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 THE NATIONAL IMMIGRANT JUSTICE CENTER AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AS AMICI CURIAE SUPPORTING RESPONDENTS

CHARLES ROTH
NATIONAL IMMIGRANT JUSTICE CENTER
208 S. LaSalle Street
Suite 1300
Chicago, IL 60604
(312) 660-1364

ROBERT N. HOCHMAN*
NATHANIEL C. LOVE
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000
rhochman@sidley.com

Counsel for Amici

*Counsel of Record

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QUESTION PRESENTED

Amici address the following question:

Whether respondents' challenge to the President's suspension of entry of aliens abroad is justiciable.

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Amicus National Immigrant Justice Center (NIJC) is a non-profit agency that represents immigrants and asylum-seekers. Together with over 1000 attorneys who co-counsel with NIJC on a pro bono basis, NIJC represents thousands of immigrants and asylum-seekers annually. NIJC has represented clients banned from entering the country under President Donald J. Trump's proclamation entitled *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, Proclamation No. 9,645 (Sept. 27, 2017) ("the Proclamation"). NIJC has also represented United States citizens who want to be rejoined with family members who are banned by the Proclamation.

Amicus the American Immigration Lawyers Association (AILA) is a national association with more than 15,000 members who practice and teach in the field of immigration and nationality law. As the preeminent bar association for immigration attorneys, AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization, to cultivate immigration jurisprudence, and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members possess expertise in the complexities of immigration statutes and on-the-ground experience in consular officers' adjudication of visa

applications filed by beneficiaries of approved family- and employment-based petitions.[1]

INTRODUCTION

The government offers a breathtakingly expansive view of the executive branch's power to disregard the legal standards imposed by Congress in the Immigration and Nationality Act ("INA"). Its position would transform the narrow, antiquated doctrine of consular nonreviewability into unfettered executive power over the fundamental relationships of millions of Americans.

The government's position that respondents' statutory claims are nonjusticiable rests in large part on the so-called consular nonreviewability doctrine.[2] Under that doctrine, courts generally will not review an individual executive officer's denial of a visa based on the officer's discretionary determination of particular facts. Courts developed the doctrine when there was no mechanism, practically or legally, for courts to review the decisions of consular officers abroad. *See, e.g.*, *U.S. ex rel. London v. Phelps*, 22 F.2d 288, 290 (2d Cir. 1927). It rests on shaky legal

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[1] Pursuant to Rule 37.6 of the rules of this Court, amici affirm that no counsel for a party authorized this brief in whole or in part and that no person other than amici and their counsel made a monetary contribution to its preparation or submission. Amici certify that all parties have consented to the filing of this brief, and were timely notified.

[2] The government concedes that judicial review of *constitutional* claims by U.S. citizens based on exclusion of non-citizens are justiciable. Pet. Br. at 14–15. This brief does not address respondents' constitutional claim but assumes, as does the government, that review of such a claim is not precluded by the doctrine of consular nonreviewability. *Id.* at 14–15, 26.

footing, and certainly does not prevent judicial review here.

Since the origins of the consular nonreviewability doctrine emerged in the lower courts, Congress has passed the Administrative Procedure Act ("APA") providing for judicial review of executive branch decisions, and this Court has recognized a "strong presumption in favor of judicial review of administrative action," under both that statute and courts' equitable powers. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 498 (1991). Further, unlike in prior consular nonreviewability cases, review of the executive's authority to implement the challenged Proclamation is not impractical: respondents do not challenge consular officers' consideration of individualized facts in far-flung locations. Instead, they challenge the executive branch's adoption of an illegal policy. This Court has never held that the executive alone may decide what the INA means. Instead, it is the quintessential role of this Court to decide whether the President's decree is consistent with the only possible source of his authority—the law Congress enacted.

Here, the President is not acting in a narrow zone of discretion created by statute. Instead, he "attempts to enact, by decree, the type of immigration policy traditionally reserved for Congress." *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 289 (4th Cir. 2018) (en banc) (Gregory, C.J., concurring), *petitions for cert. filed*, No. 17-1194 (Feb. 23, 2018), No. 17-1270 (Mar. 9, 2018). And, unlike in prior consular nonreviewability cases before this Court, the executive branch alone—not the "political branches"—is demanding unfettered deference, to the point of arguing that courts may not even consider whether the President's policy is *contrary* to

Congress's will expressed in a duly enacted statute. Such deference would be unprecedented, and inconsistent with the text and structure of the Constitution.

"The formulation of [policies pertaining to the entry of aliens] is entrusted exclusively to Congress." *Galvan v. Press*, 347 U.S. 522, 531 (1954); *Boutilier v. INS*, 387 U.S. 118, 123 (1967) ("*Congress* has plenary power to make rules for the admission of aliens . . . .") (emphasis added). To the extent the government seeks (as here) to insulate executive actions which *violate* laws passed by Congress, the executive is in a very weak position. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring) ("Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.").

Indeed, this Court's prior decisions involving consular nonreviewability reached the merits of claims that the executive branch had misapplied statutes. *See U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542–47 (1950) (considering a claim that exclusion was barred by War Brides Act, interpreting and explaining that statute); *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S 206, 214–15 (1953) (finding exclusion proper under Passport Act, concluding that "respondent's continued exclusion [does not] deprive[ ] him of any statutory or constitutional right"); *see also Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring) (relying heavily on the understanding that the agency's exclusion of Din's husband was required by, or at least permitted by, Congress); *cf. Abourezk v. Reagan*, 785 F.2d 1043, 1062 (D.C. Cir. 1986) (Bork, J., dissenting) ("I agree that we have jurisdiction to reach the statutory

issues presented"), *aff'd by an equally divided court*, 484 U.S. 1 (1987).

In fact, in one case, this Court rejected an argument just like the one the government makes here. Despite the government's argument that the issue was not justiciable, the Court reached the merits of a claim brought by aliens abroad challenging a presidential proclamation as inconsistent with the INA. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 165–66 (1993) (stating that the Court "must decide" whether the proclamation was "consistent with" the INA).

As this Court has recognized, the executive branch cannot usurp the power of Congress to "formulat[e]" immigration policy, *Galvan*, 347 U.S. at 531, or the judiciary's authority to "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Judicial review is necessary to preserve the separation of powers that serves as a "vital guard against governmental encroachment on the people's liberties." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

I. COURTS SHOULD RETHINK CONSULAR NONREVIEWBILITY BASED ON CHANGED LEGAL AND FACTUAL CIRCUMSTANCES.

1. When courts developed the doctrine of consular nonreviewability in the early nineteen hundreds, no statute allowed courts to consider consular officers' decisions, and the comprehensive doctrines for judicial review of executive action that evolved during the post-World War II rise of the administrative state did not yet exist. A statute and equitable doctrine now create a presumption of judicial review of all executive action, and consular nonreviewability has

become a bizarre outlier in an area in which courts otherwise comfortably operate.

During World War I, the Department of State and the Department of Labor required, for the first time, that noncitizens have a passport and visa before seeking entry into the United States. Joint Order of Department of State and Department of Labor (July 26, 1917); *see* Leon Wildes, *Review of Visa Denials: The American Consul as 20th Century Absolute Monarch*, 26 San Diego L. Rev. 887, 892 (1989). A year later, Congress confirmed the visa requirement by authorizing the President to make "reasonable rules, regulations, and orders" for the entry of noncitizens into the United States. Act of May 22, 1918, ch. 81, § 1(a), 40 Stat. 559, 559 (codified as amended at 22 U.S.C. §§ 223–226). After World War I ended, Congress enacted legislation to continue the passport and visa requirement indefinitely. Proclamation No. 1,473 (Aug. 8, 1918); Act of Mar. 2, 1921, ch. 113, 41 Stat. 1205, 1217 (codified as amended at 22 U.S.C. § 227).

Consular officers initially issued visas as a ministerial act without screening for grounds of inadmissibility. Wildes, *supra* at 892–93. Noncitizens thus faced the prospect of making the trip to the United States only to be stopped at the border. *Id*. So, in 1924, Congress enacted a provision requiring that consular officers make a determination of admissibility before issuing the visa. Act of May 26, 1924, ch. 190, § 2(f), 43 Stat. 153, 154 (codified as amended at 8 U.S.C. § 202(f)).

At that time, there was no mechanism to challenge consular decisions. If a person was denied entry at the border, the person's sole avenue for relief was to file a habeas petition challenging the exclusion. A habeas petition is filed only against the person

holding the petitioner in custody—the border officer. And, if the petitioner did not have a visa, the border officer acted lawfully in refusing to admit the petitioner. Courts considering visa denials in this posture thus lacked jurisdiction to order a consular officer to issue a visa. This practicality was a major factor in courts not reviewing visa denials in formative consular nonreviewability cases. *See, e.g.*, *London*, 22 F.2d at 290 (turning on whether the border officer legally denied entry on the basis that petitioner had no visa and stating that "[w]hether the consul has acted reasonably or unreasonably is not for us to determine"); *U.S. ex rel. Ulrich v. Kellogg*, 30 F.2d 984 (D.C. Cir. 1929); Wildes, *supra* at 896–97 (stating *Ulrich* "is unclear . . . whether there was no judicial power to review the consular officer's decision or whether it was only that no administrative authority existed to direct the consular officer to grant the visa" but that the "procedural understanding . . . seems the more reasonable one because the court expressly held that the offenses for which the alien had been convicted involved moral turpitude thereby actually reviewing and upholding the substantive merits of the consul's determination to deny the visa" (footnote omitted)).

Then, in 1946, Congress enacted the APA. Section 10 of the APA provided for the first time that any "person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." 5 U.S.C. § 702; *see Singh v. Clinton*, 618 F.3d 1085, 1088 (9th Cir. 2010) (holding the court could review a consular officer's decision under the APA for whether it was "not in accordance with law"); *Saavedra Bruno v. Albright*, 20 F. Supp. 2d 51, 52 (D.D.C. 1998)

(recognizing the "APA's presumption that agency action is reviewable may render the doctrine of consular nonreviewability anomalous"), *aff'd*, 197 F.3d 1153 (D.C. Cir. 1999); David A. Martin, *Mandel, Cheng Fan Kwok, and Other Unappealing Cases: The Next Frontier of Immigration Reform*, 27 Va. J. Int'l L. 803, 812 (1987) (criticizing consular nonreviewability cases for "erratic application of a judge-made doctrine that took root well before modern doctrines facilitating judicial review of agency action were developed"). The APA created a presumption of judicial review of executive action which did not exist when courts first refused to review consular officers' visa determinations. Congress responded to this presumption by creating some narrowly-drawn exceptions to judicial review of immigration actions in the INA. As explained below, those exceptions do not apply here.

This Court also recently emphasized its inherent, equitable power to "enjoin unlawful executive action." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015). Judicial review is thus available unless Congress affirmatively "displace[s] the equitable relief that is traditionally available to enforce federal law." *Id.* at 1385–86. Judicial review is especially important when it is necessary to preserve the balance of powers among the branches of government. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 197 (2012).

Reconsideration of the doctrine of consular nonreviewability in light of the strong presumption of judicial review of executive action created by the APA and judicial recognition of equitable power to review unlawful executive action is long overdue.

Indeed, courts have engaged in just such a rethinking when it comes to immigration decisions

concerning deportation and removal. *See generally* Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 Okla. L. Rev. 57 (2015). Instead of deferring entirely to the political branches, this Court now regularly applies ordinary administrative law principles in reviewing deportation and removal decisions. *See, e.g.*, *Judulang v. Holder*, 565 U.S. 42, 52–53 (2011) (noting courts' "important role" "in ensuring that agencies have engaged in reasoned decisionmaking" and reversing a deportation decision); *Kawashima v. Holder*, 565 U.S. 478, 483–90 (2012). This is true even though the INA exempts deportation and removal decisions from APA review, unlike visa policy choices like that at issue here. *See Marcello v. Bonds*, 349 U.S. 302, 306 (1955).

2. Courts should also rethink the doctrine based on the changing role of consular officers. Judicial deference to consular officers' visa denials made more sense when those determinations were the product of decentralized decision making, and involved fact-bound applications of congressional policy to often limited evidence.

Historically, courts deferred to consular officers in part because of the practical challenge of haling consular officers into U.S. courtrooms to review decisions made in consulates around the globe. Statutory changes and advances in technology have overcome such practical concerns. *See Baker v. Carr*, 369 U.S. 186, 211–12 (1962) (holding courts considering whether a question is solely reserved to the political branches should consider whether the question is "susceptib[e] to judicial handling"); *Fiallo v. Bell*, 430 U.S. 787, 796 (1977) (noting the "reasons that preclude judicial review of political questions

also dictate a narrow standard of review . . . in the area of immigration and naturalization").

During the doctrine's development, consular officers in far-off consulates were lead actors in visa adjudications. But after the Homeland Security Act of 2002, "all authorities to . . . administer, and enforce the provisions of [the INA] and of all other immigration and nationality laws, relating to the functions of consular officers of the United States in connection with the granting or refusal of visas" are "vested exclusively" with the Secretary of Homeland Security. 6 U.S.C. § 236(b)(1). In practice, under this new statutory scheme, "an applicant's visa denial often has little or nothing to do with the discretion conferred on consular officers by Congress." Brief of Former Consular Officers as Amici Curiae at 6, *Kerry v. Din*, 135 S. Ct. 2128 (2015); *see generally* Ruth Ellen Wasem, Cong. Research Serv., R43589, *Immigration: Visa Security Policies*, app. at 17–20 (2014) (explaining bureaucratic functions under current statute). Technological developments have also enabled and shaped the concentration of visa-denial power within the United States. *See id.* at 19–20. DHS authority over visas is "exercised through the Secretary of State," 6 U.S.C. § 236(b)(1), and in practice through consular officers at posts abroad, but DHS has ultimate authority. This is particularly true as to matters of broadly applicable "visa policy." *See* Memorandum of Understanding Between the Secretaries of State and Homeland Security Concerning Implementation of Section 428 of the Homeland Security Act of 2002 §§ 1(b), 2 (Sept. 28, 2003).[3]

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[3] Available at https://www.state.gov/m/ds/investigat/26137.htm.

Instead of inputs from far-off consulates leading to exclusion of visa applicants—as was the case when courts first developed the doctrine of consular nonreviewability—the flow of information is reversed. Determinations flow out to individual consulates, where consular officers exercise little to no discretion. *See generally* Brief of Former Consular Officers as Amici Curiae, *Kerry v. Din*, 135 S. Ct. 2128 (2015). The consular officer's role is no longer routinely unique. To be sure, some claims may involve a consular officer's credibility assessment, and may be thought resistant to review for practical reasons, even if such assessments are generally reviewable by courts. *Cf. Cojocari v. Sessions*, 863 F.3d 616, 618 (7th Cir. 2017). But that is not the kind of decision the government seeks to insulate from judicial review here. There is no reason courts cannot review non-discretionary rules made by non-consular officers within the United States, as they do other decisions by executive branch entities.

At a minimum, these changes indicate the Court should construe the consular nonreviewability doctrine narrowly, not expand it to give the executive branch more power to unilaterally act in the immigration context than ever before.

II. CONSULAR NONREVIEWABILITY DOES NOT APPLY TO AN EXECUTIVE POLICY TO EXCLUDE A BROAD CLASS OF INDIVIDUALS.

Assuming the continued vitality of the consular nonreviewability doctrine, it is a poor fit for this case.

This case "is not about individual visa denials, but instead concerns the President's *promulgation* of sweeping immigration policy." Pet. App. 16a. The President is attempting to exclude more than 150

million individuals, including the family members of U.S. citizens. Resp. Opp. to Cert. at 1.

Consular nonreviewability has only been applied to the executive branch's decision to "exclude *a given alien*." *Knauff*, 338 U.S. at 543 (involving consular officer's denial of visa to wife of American citizen); *see also Kleindienst v. Mandel*, 408 U.S. 753 (1972) (involving Attorney General's denial of visa to journalist); *Din*, 135 S. Ct. 2128 (plurality opinion) (involving consular officer's denial of visa to husband of wife of American citizen). This makes sense: courts have deferred to individualized determinations based on particular facts, as consular decisions traditionally have been.

Review of the kind of far-reaching policy decision in the Proclamation, in contrast, "is a familiar judicial exercise," because courts are well-able to review the legality of across-the-board rules. *Zivotofsky*, 566 U.S. at 196. And, while the Court has engaged in deferential review of "broad *congressional* policy choice[s]" regarding immigration, *Fiallo*, 430 U.S. at 795 (emphasis added), it has not hesitated to review such policies when adopted unilaterally by the executive. *See, e.g.*, *Zivotofsky*, 566 U.S. 189; *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001). There is no reason to construe the "broad grants of authority" in the INA "as assigning unreviewable 'decisions of vast economic and political significance'" to the executive branch. *Texas v. United States*, 787 F.3d 733, 760–61 (5th Cir. 2015) (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).

As the Ninth Circuit held,

> [The doctrine of consular nonreviewability] applies to lawsuits challenging an executive

> branch official's decision to issue or deny an individual visa based on the application of a congressionally enumerated standard to the particular facts presented by that visa application. The present case, by contrast, is not about the application of a specifically enumerated congressional policy to the *particular facts presented in an individual visa application*. Rather, the States are challenging the President's *promulgation* of sweeping immigration policy. Such exercises of policymaking authority at the highest levels of the political branches are plainly not subject to the *Mandel* standard.

Washington v. Trump, 847 F.3d 1151, 1162 (9th Cir.) (per curiam) (first emphasis added), *cert. denied sub nom. Golden v. Washington*, 138 S. Ct. 448 (2017).

Indeed, no case says "the President may independently set his own immigration policy." *Int'l Refugee Assistance Project*, 883 F.3d at 291 n.12 (Gregory, C.J., concurring). And that remains true even when it comes to policies motivated by the President's national security concerns. The doctrine of consular nonreviewability is not and has never been a license to the President to make unilateral, sweeping immigration policy based on his view of national security.[4]

Judicial deference to the political branches "rests on reason, not habit." *Baker*, 369 U.S. at 213. Given the facts of this case, the reason for consular

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[4] Of course, the traditional mechanisms and rules available for dealing with confidential or classified information remain available as in other civil proceedings. *See*, *e.g.*, *Reynolds v. United States*, 345 U.S. 1 (1953).

nonreviewability does not exist here, and the Court should not abdicate its role in interpreting the law.

III. THE EXECUTIVE BRANCH'S DECISION IS JUDICIALLY REVIEWABLE FOR LEGAL ERROR.

1. Congress, not the executive branch, has "plenary" power to set rules for admissibility of immigrants. Congress can delegate powers to the President—as the President claims it did here—but the President's actions are always reviewable to ensure they are consistent with that delegated authority. Courts "can always ascertain whether the will of Congress has been obeyed, and can enforce adherence to statutory standards." *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (citation omitted) (holding executive action taken pursuant to legislatively delegated authority "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review").

Chief Justice John Marshall recognized in 1824 that Congress's power to set immigration policy derives from its "power to regulate commerce" with foreign nations. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 216–17 (1824) (applying U.S. Const. art. I, § 8, cls. 1 & 3); *see also Arizona v. United States*, 567 U.S. 387, 394–95 (2012) (citing the naturalization and implied sovereign and foreign relations powers as additional sources of congressional authority in this area, art. I, § 8, cl. 4). "[T]hat the formulation of [immigration] policies is entrusted *exclusively* to Congress has become about as firmly imbedded . . . as any aspect of our government." *Galvan*, 347 U.S. at 531 (emphasis added); *see also Fiallo*, 430 U.S. at 792 (noting the Court "has repeatedly emphasized that 'over no conceivable subject is *the legislative power of*

Congress more complete than it is over' the admission of aliens" (emphasis added)).

The executive branch's role in in this area is limited to enforcing *Congress's* policy choices. *See Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893); *Wong Wing v. United States*, 163 U.S. 228, 232–34 (1896) (describing "[t]he power of Congress to . . . prescribe the terms and conditions upon which [aliens] may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers"); *Int'l Refugee Assistance Project*, 883 F.3d at 291 (Gregory, C.J., concurring) ("The President . . . plays a distinct, complementary role in the immigration arena, and any attempt to modify Congress's immigration priorities risks intruding into the legislative domain.").

This Court has recognized that *Congress* has "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which *Congress* has forbidden." *Mandel*, 408 U.S. at 766 (emphasis added). *Congress* may "limit[ ]" and "classif[y] . . . who shall be admitted." *Fiallo*, 430 U.S. at 795 n.6; *see Harisiades v. Shaughnessy*, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring) ("[T]he underlying policies of what classes of aliens shall be allowed to enter . . . are for Congress exclusively to determine . . . ."). Thus, it was Congress that excluded Chinese immigrants from the United States through the Chinese Exclusion Act. Act of May 6, 1882, ch. 126, 22 Stat. 58, 58–61. And Congress created a quota system that imposed nationality-based restrictions on immigration from 1924 to 1965. Act of May 26, 1924, ch. 190, 43 Stat. 153.

Congress also abandoned discrimination on the basis of national origin, explicitly banning it in 1965.

Pub. L. No. 89-236, § 2, 79 Stat. 911, 911–12 (1965) (codified as amended at 8 U.S.C. § 1152(a)(1)(A)). As President Lyndon B. Johnson remarked on signing the 1965 Act, Congress "abolished" "the harsh injustice of the national origins quota system" so that "those who do come [to the United States] will come because of what they are, and not because of the land from which they sprung." Pres. Lyndon B. Johnson's Remarks at the Signing of the Immigration Bill, Oct. 3, 1965.

Because Congress has rejected this policy choice, the President's Proclamation is "incompatible with the expressed . . . will of Congress," and "his power is at its lowest ebb." *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring). A "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.* To be sure, the President asserts that Congress has authorized, by statute, in 8 U.S.C. § 1182(f), his Proclamation. But that assertion merely crystallizes the point. Only a court can determine whether the President is correctly reading section 1182(f) to empower him to undo Congress's decision to reject national origin discrimination. This case is far different from a case where the President "acts pursuant to an express or implied authorization of Congress, and "may be said (for what it may be worth), to personify the federal sovereignty." 343 U.S. at 635–36 (Jackson, J., concurring). It asks the prior question: *has* the President acted pursuant to Congressional authority at all?

2. To maintain the appropriate separation of power between Congress and the President, courts play a crucial role in ensuring the executive does not make law, but operates within its bounds. *See id.* at 587

("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."); *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring) ("[I]n the judiciary, [the framers] charged individuals insulated from political pressures with the job of interpreting the law and applying it . . . .").

The Court therefore assumes "Congress intends the executive to obey its statutory commands" and "expects the courts to grant relief when an executive agency violates such a command." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986). Even in areas traditionally granted to the political branches, courts "will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power" by the executive. *Baker*, 369 U.S. at 217; *cf. Zivotofsky*, 566 U.S. at 197 (courts must exercise authority "where the question is whether Congress or the Executive is 'aggrandizing its power at the expense of another branch'").

Thus, even in the context of discretionary immigration decisions, "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking." *See Judulang*, 565 U.S. at 53. "[C]ourts can take appropriate account of" matters like "the greater immigration-related expertise of the Executive Branch," "administrative needs and concerns inherent in the necessarily extensive INS efforts to enforce [the INA], and the Nation's need to 'speak with one voice' in immigration matters" "without abdicating their responsibility to review the lawfulness," of executive action. *Zadvydas*, 533 U.S. at 700.

As Chief Judge Gregory explained,

> [There is a] distinction between a challenge to the *substance* of the executive's decision and a challenge to the *authority* of the executive to issue that decision. Whereas the former invites courts to controvert the political branches' joint decisions regarding whom to exclude and therefore falls within the doctrine of consular nonreviewability, the latter presents precisely the type of question that the Constitution entrusts courts with deciding.

Int'l Refugee Assistance Project, 883 F.3d at 279 (Gregory, C.J., concurring) (citation omitted).

Indeed, while this Court has respected Congress's delegation to the executive of authority to enforce immigration law, *see Mandel*, 408 U.S. at 769, the Court has never relinquished its responsibility to determine whether the executive acted within the bounds of the discretion Congress granted. Consular nonreviewability, which deals with executive action, says only that "[t]he action of the executive officer *under such authority* is final and conclusive." *Knauff*, 338 U.S. at 543 (emphasis added); *see also Mandel*, 408 U.S. at 769 (concluding "the Attorney General validly exercised the plenary power that Congress delegated to the Executive by [statute]").[5]

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[5] The government wants to have it both ways with *Knauff* and *Mezei*. It repeatedly points to those cases as allowing unchecked executive authority over exclusion decisions. *See*, *e.g.*, Pet. Br. at 2, 18–19, 21, 26. But it insists the cases do not apply to the scope of judicial authority to review legal questions, including whether Congress has in fact authorized the executive to make challenged exclusions. *Id.* at 22 n.7. The mechanism for testing executive authority in those cases was habeas corpus, because those petitioners were detained by the executive and sought to be released. Neither case says courts may not assess executive claims of authority against the limits of alleged authorizing

The doctrine "shields from judicial review only the enforcement 'through executive officers' of Congress's 'declared [immigration] policy,' not the President's rival attempt to set policy." Pet. App. 18a (alteration in original) (quoting *Sing v. United States*, 158 U.S. 538 (1895)); *Abourezk*, 85 F.2d at 1061 ("The Executive has broad discretion over the admission and exclusion of aliens, but that discretion is not boundless. It extends only as far as the statutory authority conferred by Congress and may not transgress constitutional limitations. It is the duty of the courts, in cases properly before them, to say where those statutory and constitutional boundaries lie."); *Texas v. United States*, 809 F.3d 134, 168 (5th Cir. 2015) (holding the executive's adoption of the Deferred Action for Parents of Americans policy could "be reviewed to determine whether the agency exceeded its statutory powers." (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)), *aff'd by equally divided court*, 136 S. Ct. 2271 (2016) (per curiam) (Mem.).

Further, as "one of the Judiciary's characteristic roles is to interpret statutes," the Court "cannot shirk this responsibility merely because [a] decision may have significant political overtones." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Courts therefore regularly engage in the kind of merits analysis at issue here—involving interpretation of a statute. *See, e.g., Zivotofsky*, 566 U.S. at 196, 201 (rejecting executive's argument that a dispute was non-justiciable, because "[t]o resolve his claim, the Judiciary must decide if [petitioner's] interpretation of the statute is correct." "This is what courts do.").

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statutes, or that habeas corpus is the only mechanism for reviewing such claims.

The government protests that "virtually any challenge to the Executive's exercise of discretion conferred by statute could be recast" as an argument that the executive exceeded statutory authority. Pet. Br. at 24. Not so. The Court has demonstrated its ability to distinguish between challenges to an exercise of discretion in an area where a statute creates it, and allegations that the executive has misinterpreted a statute. For example, the Court recently held that a provision of the INA barring judicial review of a "discretionary judgment" by the Attorney General regarding an immigrant's detention or release did not preclude judicial review of a challenge to "the extent of the Government's detention authority" under that provision. *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (plurality opinion). The extent of that authority "is not a matter of 'discretionary judgment.'" *Id.*; *see also, e.g.*, *Zadvydas*, 533 U.S. at 688 (reviewing the legality of an executive policy when petitioners "challenge[d] the extent of the Attorney General's authority under the . . . statute" because "the extent of that authority is not a matter of discretion"). The government's position, on the other hand, includes no limiting principle: the executive could assert in "virtually any" case that it acted pursuant to a statute granting it discretion, and that assertion would be an impenetrable shield to judicial review, regardless of whether the statute actually granted any deference to the executive.[6]

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[6] The government's rule would also force this Court to address challenging constitutional questions unnecessarily. As the government concedes, constitutional claims challenging the exclusion of non-citizens abroad are generally justiciable when brought by U.S. citizens. Pet. Br. at 14–15. Courts analyzing such claims are faced with often difficult questions regarding

3. None of this Court's cases support the government's extreme position that the President's policy is insulated from judicial review. Instead, this Court has repeatedly considered whether executive actions violated immigration statutes, even when those actions excluded non-citizens abroad.

In fact, in *Sale*, this Court considered a case brought by Haitians outside the United States, challenging a presidential proclamation "suspend[ing] the entry of undocumented aliens from the high seas and order[ing] the Coast Guard to intercept vessels carrying such aliens and to return them to their point of origin," without determining their refugee status. 509 U.S. at 159–61. The Court framed the question at issue as "whether such forced repatriation . . . violates § 243(h)(1) of the Immigration and Nationality Act." *Id.* at 158. Although the Court stated that it would not consider the "wisdom of the policy choices made" by the executive, it "must decide" whether the proclamation was "consistent with" the INA. *Id.* at 165–66.

The government's answer to *Sale* is that this Court there "rejected the aliens' claims on the merits

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whether citizens' constitutional rights are implicated. That was the case in *Din*, when four justices found a citizen spouse's constitutional due process interests were implicated by exclusion of her husband, three found they were not, and two assumed they were. It is also true here: the Court is faced with determining whether respondents' First Amendment rights are implicated such that they can assert a constitutional claim. It would flip the familiar constitutional-avoidance canon on its head for the Court to ignore a statute that is susceptible to a reasonable interpretation that avoids constitutional concerns and reach constitutional questions. *See Jennings*, 138 S. Ct. 830. Under the government's rule, that would be the norm: any time the executive claims discretion, the Court must ignore statutory error and focus on constitutional claims.

without addressing, much less rejecting, the argument that their claims were unreviewable." Pet. Br. at 22. That is incorrect. The government in *Sale* argued the case was not justiciable. Brief of Petitioners at 13–18, nn.7, 9–11, *Sale v. Haitian Ctrs Council, Inc.*, 509 U.S. 155 (1993); Reply Brief of Petitioners at 1–4, *id.*; Oral Arg. Tr. at 16–22, *id.* By reaching the merits, *Sale* necessarily first decided that the Court had jurisdiction to review whether the President's proclamation was consistent with the INA. *See Sale*, 509 U.S. at 187–88; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) ("Without jurisdiction the court cannot proceed at all in any cause." (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)).[7]

Further, *Sale* is consistent with this Court's prior immigration cases. In *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892), for example, the Court stated that when

> a statute gives a discretionary power to an officer [regarding a noncitizen abroad], to be exercised

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[7] The government's other distinctions are similarly unpersuasive. First, the government says the aliens in *Sale* asserted a right not to be returned to their home country under provisions of the INA implementing a U.S. treaty, rather than, as respondents do here, asserting (among other things) a right not to have family members excluded on the basis of nationality under a provision of the INA banning such discrimination. Pet. Br. at 22. The government does not explain why this supposed distinction matters. It does not. The government also argues that here, unlike in *Sale*, respondents ask this Court to "second-guess" the "President's determination under Section 1182(f) that entry of the affected aliens would be detrimental to the interests of the United States." *Id.* Like in *Sale*, respondents seek a determination as to whether the Proclamation is consistent with the INA. The Court should reach the merits of that question, just as it did in *Sale*.

> by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, . . . no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted.

But here, the statute at issue imposes non-discretionary rules, and the dispute is not about the facts. Respondents challenge whether the executive's action is lawful, that is, whether the President was "acting within powers expressly conferred by Congress," review *Ekiu* expressly permits. *Id.*

In *Knauff*, this Court held that Congress may lawfully delegate "the decision to admit or to exclude an alien" to the President, which may preclude judicial review of the decision "to exclude a given alien." 338 U.S. at 541–43. But this Court reviewed on the merits whether Congress had actually delegated that power to the executive. *Id.* The foreign national argued that the executive had violated the War Brides Act, and the Court adjudicated this claim on the merits, interpreting the Act to determine whether "the authority upon which the Attorney General acted remain[ed] in force." *Id.* at 545–47; *see also id.* at 550 (Jackson, J., dissenting) ("I do not question the constitutional power of Congress to authorize immigration authorities to turn back from our gates any alien or class of aliens. But I do not find that Congress has authorized" the exclusion at issue.). That is, this Court reviewed the legal propriety of an administrative order applied to Knauff, a noncitizen considered to be legally outside the United States, to determine whether it was consistent with Congress's statutory command. *Id.* at 546.

Mandel did not involve any alleged legal error. There was no dispute that Mandel was inadmissible because he was a communist. 408 U.S. at 755–56. Congress had given the Attorney General the authority to waive that ground of inadmissibility, and Mandel sought that purely discretionary relief. *Id*. at 755, 757–58. The Attorney General had not misinterpreted any statutory command of Congress because Congress had not imposed any on him. No U.S. citizen in *Mandel* contended that the inadmissibility finding was contrary to statute.

Similarly, in *Din*, this Court did not consider a legal error. The citizen spouse had admitted that her husband "worked for the Taliban government," a designated terrorist organization, which the concurring opinion concluded provided "at least a facial connection to terrorist activity." 135 S. Ct. at 2141 (Kennedy, J., concurring). Din did not argue legal error; she sought only to force disclosure of sensitive information related to the government's decision. The concurrence discussed the sensitive national security concerns release of such information could trigger, *id*., and found that under these circumstances the government could lawfully decline to show its hand. Four members of this Court disagreed. That disagreement concerned whether the government should be *required* to provide a more robust factual basis for its decision, as the Ninth Circuit had required. *Id*. at 2132 (plurality opinion); *id*. at 2141–47 (Breyer, J., dissenting). *Din* does not bar review of a legally erroneous policy adopted by the executive branch.

The First, Second, Seventh, and Ninth Circuits have considered questions of law raised by consular officials' actions notwithstanding any "consular nonreviewability." *See Allende v. Shultz*, 845 F.2d

1111, 1116–20 (1st Cir. 1988); *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 126–34 (2d Cir. 2009) (holding the *Mandel* standard allows review to ensure that the consular officer has "properly construed and applied [the relevant] statutory provisions"); *Samirah v. Holder*, 627 F.3d 652, 663–64 (7th Cir. 2010) (construing consular nonreviewability, to the extent that it existed, as inapplicable to legal error in agency adjudication); *Singh*, 618 F.3d at 1088 (holding the court could address a question "of statutory interpretation, rather than an assessment of reasonableness in the instant case"); *see also Abourezk*, 785 F.2d at 1062 (Bork, J., dissenting) ("I agree that we have jurisdiction to reach the statutory issues presented"). This Court should clarify that, when the executive branch misinterprets the INA, it is subject to judicial review.

4. The government does not argue a statute precludes jurisdiction. Rather, it claims that in the absence of "affirmative authorization, . . . judicial review of the exclusion of aliens outside the United States is unavailable." Pet. Br. at 18–19. The government has it exactly backward. Under both the APA and the judiciary's equitable powers, there is a presumption of judicial review of unlawful executive action, which the government must overcome by demonstrating Congress intended to strip courts of jurisdiction.

By the APA's terms, judicial review is available unless statutes preclude it or agency action is committed to agency discretion. 5 U.S.C. §§ 701(a), 702; H.R. Rep. No. 94-1656, at 12 (1976) (indicating the APA does not create jurisdiction when there has been an "express or implied preclusion of judicial review"). When a party brings a claim under the APA, "[o]nly upon a showing of 'clear and convincing

evidence' of a contrary legislative intent should the courts restrict access to judicial review" of executive action. *Texas*, 787 F.3d at 755 (quoting *Block v. Cmty. Nutrition Inst.,* 467 U.S. 340, 350 (1984)); *see also Sackett v. EPA*, 566 U.S. 120, 128 (2012). Thus, "where substantial doubt about . . . congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Texas*, 787 F.3d at 755 (quoting *Block*, 467 U.S. at 351).

For example, in *Texas v. United States*, plaintiffs sought to enjoin an executive branch policy creating legal status for undocumented parents of citizens. 809 F.3d at 146–50. The Fifth Circuit held judicial review was available under the APA, a decision affirmed by an equally divided Court. The Fifth Circuit rejected the executive's claim that jurisdiction-stripping provisions in the INA prevented review under the APA. The discrete provisions did not apply according to their terms. *Id*. at 164–66. Further, the policy was not "presumptively unreviewable" as an exercise of prosecutorial discretion historically delegated to the executive and thus exempted from the APA (an analogous argument to the government's argument here regarding consular nonreviewability). *Id*. at 165–67. The executive's policy did not fit within this "narrow" carve out from APA review: while the executive traditionally has had discretion not to prosecute, it had instead affirmatively adopted a policy. *Id*. at 166–68. That action "at least c[ould] be reviewed to determine whether the agency exceeded its statutory powers." *Id*. at 168. So too here. Even if there were a narrow historical exception to the presumption of APA review for individual visa denials, it certainly would not encompass the President's unlawful policy.

Similarly, "equitable relief is traditionally available" to prevent executive overreach; to prevent judicial review Congress must affirmatively "displace" it by statute. *Armstrong*, 135 S. Ct. at 1385–86. If a statute does not "establish Congress's intent to foreclose equitable relief," relief remains available. *Id*. at 1385.

There is no statute stripping courts of jurisdiction to review the Proclamation. The government points to 6 U.S.C. § 236(f), (b)(1) and (c)(1). Pet. Br. at 19–20. But those provisions are inapplicable. Sections 236(b)(1) and (c)(1) provide only that the Secretary of State has no authority to reverse a visa denial unless "necessary or advisable in the foreign policy or security interests of the United States." Of course, respondents do not ask the Secretary of State to reverse any visa denial here.

Section 236(f) merely says "[n]othing *in this section* shall be construed to create or authorize a private right of action to challenge a decision of a consular officer or other United States official or employee to grant or deny a visa." 6 U.S.C. § 236(f) (emphasis added). That the provision does not *create* a cause of action does not mean it strips putative plaintiffs of an otherwise existing presumption of judicial review. Section 236(f) neither grants jurisdiction where none existed nor withdraws jurisdiction which already exists. In any event, respondents do not challenge a consular officer's denial of a visa. They challenge the President's authority to issue a policy that makes their family members categorically ineligible to be considered for visas. Even if section 236(f) precluded jurisdiction over consular officers' individual visa denials, it does not extend to the President's sweeping policy.

If it had wished to do so, Congress knew how to withdraw jurisdiction: it provided that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action," in other immigration contexts. *See* 8 U.S.C. § 1252(g); *see also id.* § 1252(a)(2)(B) ("[N]o court shall have jurisdiction to review" denials of discretionary relief authorized by various statutory provisions); *id.* § 1182(a)(9)(B)(v) ("No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver" of reentry restrictions).

Congress did not include any such language limiting review of visa decisions, in 236(f) or otherwise. Courts are "reluctant to draw inferences from Congress' failure to act." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988).[8] That reluctance is especially appropriate here, because of Congress's "careful and narrow approach to jurisdiction [in the INA], precluding judicial review over only discrete exercises of executive authority." *Int'l Refugee Assistance Project*, 883 F.3d at 276 (Gregory, C.J. concurring) (citing *McNary*, 498 U.S. at 492)); *see also Texas*, 787 F.3d at 755–56 ("The INA has numerous specific jurisdiction-stripping

[8] The INA did not ultimately authorize judicial review of visa denials or create "a semijudicial board . . . with jurisdiction to review consular decisions pertaining to the granting or refusal of visas," solutions which Congress considered. *See* H.R. Rep. No. 82-1365, at 36 (1952); S. Rep. No. 81-1515, at 622 (1950). But that some members of Congress attempted to explicitly add judicial review provisions suggests that the government is overreading that section; the lack of explicit jurisdiction-stripping in section 236(f) was likely a compromise. *See generally Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93–94 (2002) (discussing the role of compromise in legislation). Thus, the presumption of judicial review prevails.

provisions that would be rendered superfluous by application of an implied, overarching principle prohibiting review." (footnote omitted)). Because the INA carefully exempts certain immigration decisions from judicial review, but not the decision at issue, the Court should not infer Congress intended to restrict review here. *See Texas,* 809 F.3d at 164 (finding narrowly drawn jurisdiction-stripping provisions in the INA did not preclude review); *Jennings*, 138 S. Ct. at 839–41 (plurality opinion) (same).

The government also claims 5 U.S.C. § 1182(f) and 1185(a)(1) grant deference to the President to adopt the Proclamation. Pet. Br. at 23–24. But that is the merits question before the Court; those provisions do not give the President discretion to decide what powers the INA grants him.

The inapposite statutory provisions the government cites are unpersuasive given the "strong presumption" of judicial review of executive action, and the necessity of judicial review to maintain the separation of powers here.[9]

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[9] Though not the focus of this brief, the government's argument that respondents lack prudential standing under the APA because they are not within the INA's "zone of interest[ ]," Pet. Br. at 24–25, is unpersuasive. The test for prudential standing under the APA "is not meant to be especially demanding." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (quoting *Clarke v. Sec. Indus. Ass'n,* 479 U.S. 388, 399 (1987)). There need not be "*any* indication of congressional purpose to benefit the would-be plaintiff" and "the benefit of any doubt goes to the plaintiff." *Id.* (emphasis added). Plaintiffs are at least "arguably" within the zone of interest of the INA. *Id.* The INA "implemented the underlying intention of our immigration laws regarding the preservation of the family unit" by "authoriz[ing] the immigration of family members of United States citizens and permanent resident aliens." *Legal Assistance for Vietnamese*

IV. THIS COURT SHOULD CONTINUE TO BRING REVIEW OF IMMIGRATION DECISIONS IN LINE WITH REVIEW OF OTHER EXECUTIVE ACTIONS.

1. Perhaps because the doctrine of consular nonreviewability "fits uncomfortably in modern American jurisprudence," this Court "has consistently reviewed the immigration decisions of the executive branch in a manner strikingly similar to its scrutiny of the decisions of other administrative agencies." Johnson, *supra* at 114; *id.* at 111 ("[T]he Roberts Court has consistently applied conventional methods of statutory interpretation and doctrines of administrative deference in its immigration decisions."). Immigration law is amenable to "conventional norms of judicial review," and those norms are appropriate here. *Id.* at 65.

After *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), courts defer to executive agencies on factual questions, as well as to reasonable interpretations of ambiguous statutes. They do not defer when a statute is clear. *Id.* at 842–43 ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give

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Asylum Seekers v. Dep't of State, 45 F.3d 469, 471–72 (D.C. Cir. 1995) (alteration omitted), *supplemented on other grounds*, 74 F.3d 1308 (D.C. Cir.), *vacated on other grounds*, 519 U.S. 1 (1996) (per curiam). And the rights of a citizen petitioner under the INA are ongoing until visa status is granted; for example, a citizen petitioner may, at any time, withdraw the visa petition and prevent issuance of an immigrant visa. 8 C.F.R. § 103.2(b)(6); *Cintron*, 16 I&N Dec. 9 (BIA 1976); *see also Texas*, 809 F.3d at 163 (concluding states were within the INA's zone of interest because they would suffer financial harm from the President's policy). A citizen petitioner's responsibilities are likewise ongoing. *See* 8 U.S.C. § 1183a; *Erler v. Erler*, 824 F.3d 1173, 1177 (9th Cir. 2016).

effect to the unambiguously expressed intent of Congress" and, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *cf. INS v. Cardoza-Fonseca*, 480 U.S. 421, 446–48 (1987) (courts should not defer to agency interpretations on pure questions of law).

This reasonably applies to decisions in the immigration context, regardless of the location of a visa applicant. In the face of a statutory provision and equitable doctrine providing for judicial review, and no statute stripping such jurisdiction, it is unreasonable to infer Congress intended the executive to interpret the INA with no oversight to protect against executive overreach. *Cf. Gutierrez-Brizuela*, 834 F.3d at 1153 (Gorsuch, J., concurring) ("[H]ow can anyone fairly say that Congress 'intended' for courts to abdicate their statutory duty under § 706 and instead 'intended' to delegate away its legislative power to executive agencies?").

2. Concerns have been expressed that even the amount of deference *Chevron* provides to the executive "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power" in the executive branch. *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring). The doctrine of consular nonreviewability, as the President asserts it here, does so to the nth degree; if interpreted to preclude judicial review of legal error, it removes the judiciary and Congress from the equation entirely, transforming the President into lawmaker, law-interpreter, and law-enforcer. As this case makes clear, that leads to "governmental encroachment on the people's liberties." *Id.*; *see* The Federalist No. 47

(James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.").

The Court should not endorse the stunning expansion of the doctrine the government requests. Adopting the government's position would mean that U.S. citizens could not complain of legal errors—or deliberate legal violations—by the executive, no matter how egregious, and no matter how far-ranging their effect. *See Int'l Refugee Assistance Project*, 883 F.3d at 296 (Gregory, C.J., concurring) ("[T]he President claims the authority to indefinitely set his own immigration and travel policies with respect to every foreign nation and class of immigrants, under any circumstances, exigent or not, that he sees fit.").

The Court should not sanction this extraordinary rule, which runs contrary to strong presumptions of review and has never been countenanced by the Court.

CONCLUSION

The Court should hold that the case is justiciable, and reach the merits of respondents' claims.

Respectfully submitted,

CHARLES ROTH
NATIONAL IMMIGRANT
JUSTICE CENTER
208 S. LaSalle Street
Suite 1300
Chicago, IL 60604
(312) 660-1364

ROBERT N. HOCHMAN*
NATHANIEL C. LOVE
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000
rhochman@sidley.com

Counsel for Amici

*Counsel of Record

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