No. 17-965

In The Supreme Court of the United States

DONALD J. TRUMP, *et al.*,

Petitioners,

v.

STATE OF HAWAII, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* IMMIGRATION LAW SCHOLARS ON THE TEXT AND STRUCTURE OF THE IMMIGRATION AND NATIONALITY ACT IN SUPPORT OF RESPONDENTS

DEBORAH ANKER*
Clinical Professor of Law
SABRINEH ARDALAN*
Assistant Clinical Professor of Law
PHILIP L. TORREY*
Lecturer on Law and Managing Attorney
HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM
HARVARD LAW SCHOOL
6 Everett Street
Cambridge, MA 02138
(617) 384-8165
danker@law.harvard.edu
sardalan@law.harvard.edu
ptorrey@law.harvard.edu

FATMA MAROUF*
Counsel of Record
Professor of Law
TEXAS A&M UNIVERSITY SCHOOL OF LAW
1515 Commerce Street
Fort Worth, TX 76102
(817) 212-4123
fatma.marouf@law.tamu.edu

*Filed in an individual capacity. University affiliation is for identification only.

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

GEOFFREY HOFFMAN*
Director, Immigration Clinic
Clinical Associate Professor of Law
UNIVERSITY OF HOUSTON LAW CENTER
4604 Calhoun Road, Room 56, TU-II
Houston, TX 77204
(713) 743-2094
ghoffman@central.uh.edu

ALAN HYDE*
Distinguished Professor of Law
and Sidney Reitman Scholar
RUTGERS LAW SCHOOL
123 Washington Street
Newark, NJ 07102
(973) 353-3163
hyde@law.rutgers.edu

KARLA MCKANDERS*
Clinical Professor of Law
VANDERBILT LAW SCHOOL
131 21st Avenue South
Nashville, TN 37203
(615) 322-3092
karla.mckanders@vanderbilt.edu

*Filed in an individual capacity. University affiliation is for identification only.

Of Counsel
NATHAN MACKENZIE
225 Walden Street, #4N
Cambridge, MA 02140
(978) 852-8626
nmackenzie@jd17.law.harvard.edu

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INTEREST OF *AMICI CURIAE*

Amici are immigration law scholars. They teach immigration law, have written numerous scholarly articles on immigration law, and understand the practical aspects of immigration law through client representation. They submit this brief to demonstrate that the text and structure of the Immigration and Nationality Act ("INA") constrain the authority delegated to the executive branch under 8 U.S.C. §§ 1182(f) and 1185(a)(1), rendering Proclamation 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017) ("EO-3"), *ultra vires*.[1]

SUMMARY OF THE ARGUMENT

While Congress has delegated broad powers to the executive branch concerning the enforcement of immigration laws, the INA's text, structure, and usage limit those powers. The scope of authority delegated under 1182(f) can only be reconciled with the INA as a whole if that provision is construed to apply in exigent

[1] Pursuant to Sup. Ct. R. 37.6, *amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person – other than *counsel for amici* – contributed money that was intended to fund preparing or submitting the brief. A Motion for Leave to File is not required pursuant to Sup. Ct. R. 37.2(a) because counsel for Respondents has consented in writing to the filing of this *amici curiae* brief, and Petitioners lodged their blanket consent to *amici curiae* briefs with the Clerk. A complete list of *amici* is set forth in the appendix to this brief.

circumstances involving diplomacy or military affairs, where the President's power is at its peak. Further, the grant of authority under 1185(a)(1) must similarly be construed in its appropriate context as pertaining to procedural requirements for entering and departing the United States – not the power to implement a wholesale ban on issuing visas based on nationality. 8 U.S.C. § 1185(a)(1). The Government's assertion that the INA authorizes the actions outlined in EO-3 is thus unfounded.

Part I explains that Congress has primary authority over immigration policy and argues that the President may not unilaterally alter the categories of aliens who may be admitted to the United States as immigrants (permanent residents) and nonimmigrants (temporary visitors). *See Fong Yue Ting v. United States*, 149 U.S. 698, 713-14 (1893) ("The power to exclude or to expel aliens . . . is to be regulated by treaty or by act of congress, and to be executed by the executive authority according to the regulations so established . . . ."). Nor is the President authorized to override the grounds for exclusion legislated by Congress, including the provisions barring admission based on national security and foreign policy concerns. While Congress has delegated broad power to exclude noncitizens under these grounds, it has also legislated restrictions on that power.

Part II discusses the authority that Congress has delegated to the executive branch over immigration enforcement, adjudication, and visa processing, and shows why 1182(f) and 1185(a) do not provide the

President the unchecked power that the Government claims. This section discusses the plain language of 1182(f) and how specific words in the statute constrain the President's authority, prohibiting an indefinite, nationality-based ban. We argue that the text of 1182(f), together with its prior usage, limit its application. This interpretation gives the President the authority and flexibility needed to respond to exigent situations without subverting the INA as a whole.

Here, there is no exigent circumstance or appropriate detrimental finding that would warrant the type of sweeping ban that EO-3 dictates. Furthermore, the purported purposes of EO-3, which pertain to the designated countries' information-sharing and identity-management practices, are not related to the restrictions actually imposed. Congress has already determined what to do if a foreign country's documentation is inadequate: its nationals must apply individually for visas, at which point applicants are vetted on a case-by-case basis. EO-3 rewrites that rule by indiscriminately prohibiting the issuance of visas to nationals of such countries.

The INA's nondiscrimination provision further constrains the President's delegated authority under 1182(f) and 1185(a)(1). *See* 8 U.S.C. § 1152(a)(1)(A). When 1182(f) was enacted in 1952, exclusion of entire nations was a central feature of U.S. immigration law. In 1965, Congress amended the INA to end the discriminatory barred zones and national origin quotas. The abolition of national origin quotas was an important change in U.S. immigration policy – not one

that the President is free to ignore. Congress definitively abandoned a system rooted in national origin discrimination in favor of a more equitable admission system based primarily on family unification. This change would be meaningless if the President had unchecked power under 1182(f) and 1185(a)(1) to override the principle of nondiscrimination embedded in the INA. Thus, the text and structure of the INA as a whole unambiguously doom EO-3.

ARGUMENT

I. CONGRESS HAS ESTABLISHED A SPECIFIC IMMIGRATION ADMISSION SYSTEM, WHICH THE PRESIDENT CANNOT UNILATERALLY REWRITE.

Congress has legislated specific categories of aliens who may and may not be admitted to the country based on certain criteria. The President cannot effectively repeal that system by rewriting the rules of admission via executive fiat. Where, as here, Congress has repeatedly legislated to limit the President's statutory authority related to the admissions system, he is not free to ignore those constraints. The provisions delegating authority to the President must be construed in light of the INA as a whole. As this Court recognized in *Lopez v. Gonzales*, reading provisions of the INA in isolation could lead to "so much trickery, violating the cardinal rule that statutory language must be read in context." 549 U.S. 47, 56 (2006) (citations and internal quotation marks omitted).

A. Congress Has Primary, If Not Exclusive, Power to Regulate Immigration.

Pursuant to the U.S. Constitution, primary responsibility over immigration policy-making lies with Congress, which has the power to "establish an uniform Rule of Naturalization," "regulate Commerce with foreign Nations," "declare War," and prohibit "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit." U.S. Const. art. I, § 8, cl. 3, 4, 11 & § 9, cl. 1. The Court has recognized that these enumerated powers, combined with the Necessary and Proper Clause, give Congress primary – if not exclusive – authority to regulate the admission of aliens. *See Hawaii v. Trump*, 878 F.3d 662, 685 (9th Cir. 2017), *cert. granted*, No. 17-965, 2018 WL 324357 (U.S. Jan. 19, 2018) (describing Congress's power, as compared to the executive's, as "the primary, if not exclusive," power over immigration) (citing *Arizona v. United States*, 567 U.S. 387, 409 (2012)); *see also Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." (internal quotation marks omitted)); *Fong Yue Ting*, 149 U.S. at 713-14.

The President cannot use his delegated authority under 1182(f) and 1185(a)(1) of the INA to undermine the admissions system Congress created.[2] *See*

[2] Although the Government invokes *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 539 (1950) to argue that the President has inherent authority over admission, *Knauff* is inapposite. In that case, the President denied entry to a single German

Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). The language of 1182(f) and 1185(a)(1) must be interpreted in a manner consistent with other specific provisions of the INA and the statute as a whole to give them proper meaning without allowing them to be used as a backdoor to override the INA's admission system. *See, e.g.*, *Dada v. Mukasey*, 554 U.S. 1, 16 (2008) ("In reading a statute we must not look merely to a particular clause, but consider in connection with it the whole statute." (internal quotation marks omitted)); *Lopez*, 549 U.S. at 56 ("[O]ur interpretive regime reads whole sections of a statute together to fix on the meaning of any one of them.").

Interpreting 1182(f) and 1185(a)(1) in the context of the entire INA demonstrates that these provisions do not authorize the blanket ban on immigrant visas and the improper and contradictory restrictions on nonimmigrant visas set forth in EO-3. In the sixty-five years since the enactment of 1182(f), Congress has repeatedly enacted restrictions on executive discretion that would make no sense if the President were free to

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national pursuant to a 1941 Act that authorized the President to impose additional restrictions on entry and departure "during the national emergency proclaimed May 27, 1941." *See Knauff*, 338 U.S. at 539. The case thus stands for the uncontroversial proposition that the President, authorized by a clear congressional mandate, may deny entry to an individual during a proclaimed national emergency, following an individualized finding of possible harm to the public interest. *Id.* at 544. EO-3, in contrast, bans approximately 150 million foreign nationals in the absence of a national emergency, in direct contravention of a specific statutory scheme, and without any individualized findings.

ignore them. *See Hawaii*, 878 F.3d at 685 (concluding that "the Proclamation conflicts with the statutory framework of the INA by indefinitely nullifying Congress's considered judgments on matters of immigration"); *International Refugee Assistance Project v. Trump*, 883 F.3d 233, 295 (4th Cir. 2018) (Gregory, J., concurring) (comparing "the Government's interpretation of § 1182(f) and § 1185(a)(1) [as] authoriz[ing] the President to prevent significant portions of the INA from having any effect, indefinitely" to "the unconstitutional line item veto").

B. The President's Delegated Authority Does Not Allow Him to Circumvent Congress's Deliberately Crafted Admission System.

The INA provides detailed and delimited categories of aliens who may be admitted to the United States, which the President cannot unilaterally alter. For individuals seeking permanent residence, Congress has established three primary pathways to obtaining an immigrant visa: family relationships, employment, and the diversity lottery. 8 U.S.C. § 1153(a)-(c). These visas are issued pursuant to statutorily established methods for calculating the number of visas available, *see* 8 U.S.C. §§ 1153(a)-(b), 1151(b)(2)(A)(i), and for determining in what order individuals will be admitted. *See, e.g.*, 8 U.S.C. § 1153(c) (providing a formula to determine admission in a random order, from certain underrepresented geographical regions). For nonimmigrants, who comprise the

vast majority of individuals admitted to the United States, Congress has created an equally specific system – an alphabet soup of visas for individuals coming to the United States for tourism, business, investment, study, training, temporary work, artistic performances, athletic events, and exchange programs, among others. 8 U.S.C. § 1101(a)(15).

Just as Congress has specified categories for admission, so too has it specified categories of aliens who may *not* be admitted. 8 U.S.C. § 1182. Those inadmissibility grounds render certain aliens "ineligible to receive visas and ineligible to be admitted to the United States," subject to specified exceptions and discretionary waivers. 8 U.S.C. § 1182(a). The inadmissibility grounds include, but are not limited to, categories based on: criminal convictions; crime-related conduct; immigration violations; fraudulent misrepresentation; national security; and foreign policy. *See* 8 U.S.C. § 1182(a). Of those, the national security and foreign policy inadmissibility grounds are the most critical for interpreting the President's authority under 1182(f) and 1185(a)(1).

The Government justifies EO-3 as necessary to protect national security, but Congress has already addressed that concern. The national security inadmissibility ground at 8 U.S.C. § 1182(a)(3)(B) provides broad definitions of "terrorist activity" and "engag[ing] in terrorist activity," according consular and immigration officials wide discretion in applying those labels to render individuals inadmissible. *See* Gerald L. Neuman, *Terrorism, Selective Deportation and the First*

Amendment After Reno v. AADC, 14 Geo. Immigr. L.J. 313, 321-22 (2000). For instance, any organization may qualify as a Tier III terrorist organization if it is "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in [terrorist activity]." 8 U.S.C. § 1182(a)(3)(B)(vi)(III). The definition of "terrorist activity," in turn, includes unlawful use of a "weapon or dangerous device," and the phrase "[e]ngag[ing] in terrorist activity" includes providing "material support" to any "terrorist activity" or "terrorist organization." 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b), (B)(iv); 8 U.S.C. § 1182(d)(3)(B).

At the same time that Congress delegated this extensive power of exclusion on national security grounds, it legislated specific restrictions on that executive power. For example, an alien may *not* be excluded for membership in a Tier III terrorist organization if he or she "can demonstrate by clear and convincing evidence that the alien did not know, and should not reasonably have known, that the organization was a terrorist organization." 8 U.S.C. § 1182(a)(3)(B)(i)(VI); *see also* 8 U.S.C. § 1182(a)(3)(B)(iv)(IV)(cc). Furthermore, the definition of terrorist activity excludes the use of weapons "for mere personal monetary gain." 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b). The Government's reading of the INA would render these restrictions meaningless because the President would retain power to bar any noncitizen from the country. Congress's restrictions on executive discretion show that it did not

intend 1182(f) to be construed as broadly as the Government claims in this case.

It would be pointless for Congress to legislate specific criteria for terrorism-related inadmissibility, as well as inadmissibility-related exceptions and exemptions, while also authorizing the President to nullify those provisions by summarily excluding entire nations based on alleged terrorism concerns. *See Abourezk v. Reagan*, 785 F.2d 1043, 1057-58 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987) (prohibiting the executive branch from using the general exclusionary authority conferred by Congress in one provision of the INA to circumvent a more specific provision excluding aliens on the basis of organizational affiliation); *Hawaii*, 878 F.3d at 690 ("[B]y suspending entry of a class of 150 million potentially admissible aliens, the Proclamation sweeps broader than any past entry suspension . . . in the name of addressing," *inter alia* "general public-safety and terrorism threats," which "Congress has already addressed.").

Similarly, Congress made the foreign policy inadmissibility ground extensive but imposed specified constraints. That ground applies to any alien "whose entry or proposed activities in the United States the Secretary of State has *reasonable grounds to believe* would have potentially serious adverse foreign policy consequences for the United States." 8 U.S.C. § 1182(a)(3)(C) (emphasis added). Yet, Congress carved out specific exceptions to the foreign policy inadmissibility ground, including an exception that a person generally should not be inadmissible based on "past,

current, or expected beliefs, statements, or associations that would be lawful within the United States." 8 U.S.C. § 1182(a)(3)(C)(ii)-(iii).

Congress created this inadmissibility ground to "establish a single clear standard for policy exclusions" to be applied on a case-by-case basis. H.R. Rep. No. 101-955, at 128-29 (1990) (emphasizing that individuals cannot be excluded "merely because of the potential signal that might be sent"). By requiring the executive branch to have "reasonable grounds to believe" that an individual was excludable based on the foreign policy inadmissibility ground before denying admission, Congress limited the President's authority to exclude. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (interpreting a statute to avoid "the superfluity of a specific provision that is swallowed by the general one").

EO-3 effectively renders entire groups defined by their nationality inadmissible, thereby overriding Congress's deliberately crafted, individualized admission system. *See Hawaii*, 878 F.3d at 691-92 (rejecting the President's efforts to "effectively rewrit[e] the immigration laws as they pertain to the affected countries"). EO-3's attempt to override Congress's statutory admission scheme is clearly "incompatible with the express or implied will of Congress." *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084 (2015) (quoting *Youngstown Sheet and Tube*, 343 U.S. at 637 (Jackson, J., concurring)); *Abourezk*, 785 F.2d at 1061 ("[Although] the Executive has broad discretion over the admission and exclusion of aliens, [that discretion] . . .

extends only as far as the statutory authority conferred by Congress . . . .").

II. CONGRESS HAS DELEGATED POWERS OVER IMMIGRATION TO THE PRESIDENT THAT ARE SIGNIFICANT, BUT NOT UNLIMITED.

Although EO-3 belatedly attempts to correct the deficiencies in the President's prior efforts to ban foreign nationals from certain countries, it exceeds the President's delegated authority. As set forth in Part A below, the powers Congress delegated to the executive branch are limited and primarily concern the INA's enforcement, as well as matters related to the adjudication of immigration relief and benefits and the processing of visas – not carte blanche authority to rewrite the INA. As Parts B and C demonstrate, respectively, the President's authority under 1182(f) and 1185(a)(1) is broad, but not unlimited.

A. Congress Has Delegated Certain Powers Over Immigration Enforcement, Adjudication, and Visa Processing to the President.

The broadest delegations of authority from Congress to the executive branch pertain to enforcement and removal, rather than admission. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 464-65 (2009). Congress has charged the Secretary of Homeland Security with

"[e]stablishing national immigration enforcement policies and priorities," and, even more generally, with "the administration and enforcement" of immigration laws. 6 U.S.C. § 202(5); 8 U.S.C. § 1103(a). Those powers allow the President, through the Secretary of Homeland Security, to prioritize certain classes of noncitizens for removal and provide guidance regarding the use of prosecutorial discretion. Although Congress has set forth detailed grounds of deportability, *see* 8 U.S.C. § 1227, the executive branch has prosecutorial discretion to determine who is actually placed in removal proceedings and who is ultimately deported under those statutory grounds.

In addition, Congress has authorized the Executive Office for Immigration Review of the Department of Justice, as well as the Department of Homeland Security ("DHS"), to make determinations about whether to grant certain forms of relief and protection from removal if an individual satisfies the INA's eligibility criteria. Many of those determinations, including whether to grant different types of cancellation of removal, voluntary departure, and adjustment of status, require executive branch officials to exercise some degree of discretion. *See* 8 U.S.C. §§ 1229b, 1229c, 1255(c).

Congress has provided the executive branch with the authority to make individualized determinations about matters related to admissions, parole, and visa processing. For example, Congress has authorized the executive branch to deny entry based on an existing inadmissibility ground. *See, e.g.*, *Kerry v. Din*, 135 S. Ct. 2128, 2131-32 (2015) (upholding consular official's

denial of a visa, where the official acted pursuant to a statutory provision prohibiting the issuance of visas to persons who engage in terrorist activities). Congress has also delegated authority to grant discretionary waivers of certain inadmissibility grounds in individual cases. *See, e.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972) (involving denial of a waiver of inadmissibility by the executive branch pursuant to a delegation of authority in former 8 U.S.C. § 1182(a)(28)). While some waivers are quite broad, *see, e.g.*, 8 U.S.C. § 1182(d)(3) (waiver of inadmissibility grounds for nonimmigrant visa holders), others may be granted only if the applicant satisfies specific statutory requirements. *See, e.g.*, 8 U.S.C. § 1182(a)(9)(B)(v) (waiver of three and ten-year bars to admission for unlawful presence). Congress has also authorized executive branch officials to grant "parole," which allows entry "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A).

In addition, Congress has delegated authority to executive branch officials to determine the form and manner of processing immigrant and nonimmigrant visa applications. *See* 8 U.S.C. § 1202(a)-(d); 8 U.S.C. § 1202(h)(1)(C) (authorizing the Secretary of State to waive the in-person interview requirement for a nonimmigrant visa if it is "in the national interest of the United States" or "necessary as a result of unusual or emergent circumstances"); 8 U.S.C. § 1202(g)(2)(B) (authorizing the Secretary of State to grant an exception to the rule that overstaying a nonimmigrant visa

makes an individual ineligible to be readmitted as a nonimmigrant).

Viewed in its entirety, the admissions system Congress created affords the President broad – but not unlimited – powers over immigration. The President's attempt to override the admission system and impose a blanket ban on immigrants from seven countries and certain nonimmigrants from eight countries is outside the scope of his delegated authority. *See IRAP*, 883 F.3d at 290 ("Congress has not clearly delegated the expansive authority that the President seeks, and the powers Congress did delegate contain restraints that have been exceeded in this case.") (Gregory, J., concurring).

B. The Delegation of Authority Under 1182(f) Does Not Provide the President Unlimited Power.

EO-3 relies primarily on the President's authority under 1182(f) in this third attempt to impose a nationality-based ban. Section 1182(f) provides:

> Whenever the President *finds* that the entry of any aliens or 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) (emphasis added). As discussed below, 1182(f) does not grant the President unfettered discretion. First, the plain language of this section demonstrates that Congress's grant of authority to the President to restrict or suspend entry of aliens is limited. Second, past practice confirms that the authority in 1182(f) is limited to exigent situations involving military or foreign affairs, which are not at issue in this case. Third, EO-3 unlawfully circumvents Congress's complex vetting scheme, which already takes into consideration countries' information-sharing and identity-management practices.

1. The Plain Language of 1182(f) Constrains the President's Power.

Interpreting 1182(f) requires giving each term of this provision some effect without rendering the INA's admission scheme superfluous and its restraints on the executive branch's discretion meaningless. *See Marx v. General Revenue Corp.*, 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."); *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect.").

First, the words "suspend" and "period" used in 1182(f) indicate that the provision cannot be invoked as authority for the type of indefinite ban set forth in EO-3. *See Hawaii*, 878 F.3d at 684 (interpreting

"suspend" and "period" as limiting the President's "exclusion power"). As this Court and others have noted, the terms "suspend" and "period" connote temporary, finite intervals of time. *See, e.g.*, *United States v. Updike*, 281 U.S. 489, 495 (1930) (interpreting "period" as a "stated interval of time commonly thought of in terms of years, months, and days"); *Martinez v. Plumbers & Pipefitters Nat'l Pension Plan*, 795 F.3d 1211, 1221-23 (10th Cir. 2015) (interpreting "suspend" in conjunction with "resume" as referring to a temporary withholding of benefits); *United Air Lines, Inc. v. Civil Aeronautics Bd.*, 198 F.3d 100, 108 (7th Cir. 1952) (describing "the power of the Board to 'suspend' as not including the power to 'revoke' ").

By imposing indefinite, and potentially permanent, nationality-based bans, EO-3 exceeds 1182(f)'s temporal limitations. Although EO-3 pays lip service to periodic reviews of the affected countries' information and identity sharing practices, it would allow the nationality-based bans to remain in effect indefinitely. *See Hawaii*, 878 F.3d at 684-85 (describing the scheme as creating a situation where "the restrictions may persist ad infinitum" – especially given the lack of evidence that the restrictions will actually incentivize countries to improve their information-sharing and identity-management practices – a result that § 1182(f) "heavily disfavors").

Even if 1182(f) were construed to allow for an indefinite ban, its plain language requires the President to "find" that the entry of noncitizens "*would be detrimental* to the interests of the United States." 8 U.S.C.

§ 1182(f) (emphasis added). This requirement, which limits the President's discretion, stands in stark contrast to other provisions of the INA, which delegate much broader grants of discretion. For example, other INA provisions instruct the executive branch to "consider" whether admission is in the "national interest" and delegate authority at "the discretion of" the Attorney General. *See, e.g.*, 8 U.S.C. § 1182(d)(14) (giving the Secretary of DHS discretion to waive inadmissibility grounds for victims of crimes applying for U visas "if [he] considers it to be in the public or national interest to do so"); 8 U.S.C. § 1182(d)(3)(A) (leaving it to "the discretion of the Attorney General" to grant nonimmigrant visa applicants waivers of specified grounds of inadmissibility); 8 U.S.C. § 1182(d)(1) (giving the Attorney General discretion to waive inadmissibility grounds for nonimmigrants if he "considers it to be in the national interest to do so").

The language of 1182(f) requiring the President to "find" that entry is "detrimental to the interests of the United States" indicates that this provision applies only to situations where a proper finding was made that admission would be damaging to national security. This interpretation of 1182(f) gives the President the authority and flexibility needed to respond to exigent situations without subverting the INA as a whole. Here, there is no exigent circumstance or appropriate detrimental finding that would warrant the type of sweeping ban that EO-3 dictates.

2. Prior Practice Confirms the Constraints on the President's Power Under 1182(f).

Past practice confirms the limitations on the scope of 1182(f) reflected in its text. *See Zivotofsky*, 135 S. Ct. at 2090-91 (placing "significant weight on historical practice" in interpreting what foreign affairs power is legitimate (quoting *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014))); *Kent v. Dulles*, 357 U.S. 116, 122, 129-30 (1958) (declining to expand the authority granted under the INA beyond the scope of its historical usage, despite a declared national emergency). Prior Presidents have relied on 1182(f) in exigent situations invoking military powers or foreign affairs, which match the President's constitutional authority. *See* U.S. Const. art. II, § 2, cl. 1-2; *IRAP*, 883 F.3d at 296 (Gregory, J., concurring) (finding that 1182(f) empowers the President to exclude "(1) foreign nationals whose individual conduct or affiliation makes their entry harmful to national interests for reasons unanticipated by Congress and (2) foreign nationals in response to a foreign-affairs or national-security exigency"). In contrast, when the President attempts to restrict entry of classes of aliens in situations that do not implicate specific diplomatic emergencies or military crises, he is encroaching on Congress's power to establish the classes of persons who may and may not be admitted to the United States, and consequently his power is at "its lowest ebb." *See Youngstown Sheet and Tube*, 343 U.S. at 637 (Jackson, J., concurring).

The President may invoke 1182(f) to pressure a foreign government to conform with U.S. policy (often as part of broader sanctions), to enforce a treaty, or to respond to a foreign coup, act of aggression, or emergency. *See* Kate M. Manuel, Cong. Research Serv., R44743, *Executive Authority to Exclude Aliens* 6-10 (2017) (listing all previous presidential suspensions). In those exigent circumstances, the President's power is at its zenith. For example, President Carter used his delegated authority under 1182(f) in response to the 1980 Iranian hostage crisis, directing the Secretary of State to invalidate and suspend the issuance of visas to Iranians "except for compelling and proven humanitarian reasons or where the national interest of our own country requires." President's Announcement of Sanctions Against Iran, 16 Weekly Comp. of Pres. Doc. 611 (Apr. 7, 1980). Restricting the entry of Iranians was just one of several measures, including ending diplomatic relations, that President Carter used to increase pressure on Iran to release hostages taken during the attack on the U.S. embassy. *Id.*

Perhaps the broadest use of 1182(f) was President Reagan's decision to "suspend entry into the United States as immigrants by all Cuban nationals." Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986). But even that Proclamation included specified exceptions for immediate family of U.S. citizens. Moreover, President Reagan issued Proclamation No. 5517 in response to the Cuban government's refusal to honor an immigration agreement between the two countries,

which disrupted normal migration procedures.[3] *Id. See also Regan v. Wald*, 468 U.S. 222, 241-42 (1984) (upholding President Reagan's ability to restrict U.S. citizens' travel to Cuba, specifically citing "weighty concerns of foreign policy" as the justification for the restriction).

In contrast to EO-3, those prior executive actions were taken in response to specific diplomatic exigencies and therefore fell squarely within the scope of the President's authority under 1182(f). *See Hawaii*, 878 F.3d at 689 ("[U]nlike the Proclamation, the Cuba and Iran orders were intended to address specific foreign policy concerns distinct from general immigration concerns already addressed by Congress."). The broad, unprompted reach of EO-3 is unprecedented. *See IRAP*, 883 F.3d at 289 (Gregory, J., concurring) ("The Proclamation has no historical precedent."). EO-3's suspension of the entry of foreign nationals from certain countries is not related to exigent diplomatic or military affairs. There is no evidence, for example, that the President suspended entry from these countries to

[3] President Reagan's High Seas Interdiction Proclamation and its implementing executive orders were also limited in scope and driven by exigent circumstances related to U.S.-Haiti foreign affairs. That Proclamation suspended "entry of undocumented aliens from the high seas" and thus only applied to individuals who were already inadmissible. *See* 8 U.S.C. § 1182(a)(7)(A)(i)(I). It was also based on a diplomatic agreement between Haiti and the United States, reached after months of negotiations, and contained a military component. *See Reagan Orders Aliens Stopped on the High Sea*, NY Times, Sept. 30, 1981, available at http://www.nytimes.com/1981/09/30/us/reagan-orders-aliens-stopped-on-the-high-sea.html.

apply pressure in foreign negotiations, to enforce a treaty, or to respond to an act of aggression or a coup or recent revolution. *Id.* at 300 ("The Proclamation cannot be responding to an exigency because it does not identify any new event or factual circumstance that Congress has not already considered via legislation."). The Government's interpretation of 1182(f) thus "requires a breathtaking delegation to the President of virtually unconstrained power not only to depart from Congress's priorities but to dramatically reorganize the domestic affairs of broad swathes of Americans." *Id.* at 291.

3. The Purported Purposes of EO-3 Are Inconsistent with the Constraints on the President's Power Under 1182(f).

EO-3 summarily asserts that information-sharing and identity-management deficiencies in the designated countries compromise national security and that EO-3 serves a diplomatic purpose by encouraging the designated countries to improve their practices in those areas. But the Government's purported reasons are not related to the restrictions actually imposed. EO-3 "makes no finding that nationality alone renders entry of this broad class of individuals a heightened security risk" or that "the nationality of the covered individuals alone renders their entry into the United States on certain forms of visas detrimental to the interests of the United States." *See Hawaii*, 878 F.3d at 693-94 (noting that EO-3 "attempt[s] to rectify EO-2's lack of a meaningful connection between listed

countries and terrorist organizations" by "cit[ing] to the fact that 'several terrorist groups are active' in Chad," but it "does not tie the nationals of the designated countries to terrorist organizations" and "makes no finding that nationality alone renders entry of this broad class of individuals a heightened security risk or that current screening processes are inadequate"); *see also IRAP*, 883 F.3d at 317 (Keenan, J., concurring) (concluding that "the Proclamation suffers from the same deficiency as its predecessor: the Proclamation fails to find that the entry of these particular nationals would be detrimental to the interests of the United States").

Furthermore, Congress has already accounted for the variations in countries' information-sharing and identity-management practices when deciding which countries can participate in the Visa Waiver Program. *See* 8 U.S.C. §§ 1187(a)(3)(B), (a)(12)(D)(iii), (c)(2)(D)-(F) (requiring foreign governments to issue electronic passports, report lost or stolen passports, share security-related information about its nationals, and not be a safe haven for terrorists to participate in the Visa Waiver Program). Nationals of countries that do not meet those information-sharing criteria cannot enter without a visa and must go through the regular visa application process, during which the individual applicant has the burden to prove visa eligibility, including admissibility into the United States, through both documentation and an interview. *See* 8 U.S.C. §§ 1202(a)-(d), (g)-(h) (placing the burden on applicants in the visa application process); 1182(a)(2), (a)(3)(A)-(C)

(inadmissibility bars based on threats to national security and public safety). Individuals who fail to provide sufficient information and documentation cannot obtain visas. 8 U.S.C. § 1361; 22 CFR § 40.6.

In other words, Congress has determined what to do if a foreign country's documentation is inadequate: its nationals must apply individually for visas. EO-3 rewrites this rule by prohibiting issuance of visas to nationals of specified countries. *See Hawaii*, 878 F.3d at 690 (concluding that EO-3 "addresses only matters of immigration already passed upon by Congress"). EO-3 therefore conflicts with Congress's considered judgment as to how countries' information-sharing and identity-management practices should impact the vetting of aliens for admission. *See Hawaii*, 878 F.3d at 686; *IRAP*, 883 F.3d at 337 (Wynn, J., concurring) (describing EO-3's reliance on the "inadequacy of the subject countries' vetting capabilities and processes" as "inconsistent" with the complex vetting scheme that Congress set forth to preclude the entry of nationals from certain countries without a visa where their countries do not meet the requisite information-sharing criteria).

EO-3's internal incoherencies further undermine any rationale related to diplomacy or national security. If the diplomatic purpose is to encourage foreign governments to improve their practices, it makes little sense to exclude from the ban a country like Iraq, which did not meet the baseline information-sharing and identity-management criteria, while a country like Somalia, which met the baseline criteria, is included in

the ban. *See* Proclamation 9645, 82 Fed. Reg. 45,161, at 1(g), (i) (Sept. 27, 2017). Similarly, EO-3 provides no explanation for why some types of visitors from a particular country are banned while others are not. If information-sharing and identity-management deficiencies generally compromise national security, it does not serve the Government's purported purpose to allow individuals from Chad, Yemen, and Libya with nearly all types of nonimmigrant visas to enter the United States. *Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1156 (D. Haw. 2017), *aff'd in part, vacated in part*, 878 F.3d 662 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 923 (2018) (describing the "internal incoherencies" of EO-3). Nor does it serve that purported purpose to allow Iranian nonimmigrants with student and exchange visas to enter while barring all other Iranian nonimmigrants. Indiscriminately excluding certain nonimmigrants, as opposed to the previous Executive Orders' wholesale exclusion of nonimmigrants, does not automatically render EO-3 a permissible exercise of presidential authority.

C. Section 1185(a)(1) Does Not Provide the President Authority to Impose a Nationality-Based Ban on Entry.

The President's authority under 1185(a)(1) also does not grant him the sweeping power necessary to enact EO-3. Section 1185(a)(1) states that "it shall be unlawful for any alien to depart from or enter . . . the United States except under such reasonable rules, regulations, and orders, and subject to such limitations

and exceptions as the President may prescribe." 8 U.S.C. § 1185(a)(1). The statute's text and legislative history demonstrate that its grant of discretionary authority allows the President to create reasonable procedural requirements for entering and departing the United States. *See IRAP*, 883 F.3d at 301-02 (Gregory, J., concurring). It does not grant unbridled authority to prevent entry based on nationality. *Id.* at 301-03.

Interpreting 1185(a)(1) in light of its text and the language of surrounding provisions demonstrates that Congress did not intend to delegate the extensive Presidential authority needed to authorize EO-3. Such an expansive delegation of authority requires a statement of legislative intent that is conspicuously absent from 1185(a)(1).[4] *Id.* at 291. The content of surrounding statutory provisions demonstrates that 1185(a)(1) is concerned with regulating the use or acquisition of travel documents. *See, e.g.*, 8 U.S.C. §§ 1182(a)(3) (prohibiting a person from making false statements in an application for permission to enter or depart the United States); 1182(a)(5) (prohibiting a person from fraudulently using a permit to enter or depart the United States); *see also IRAP*, 883 F.3d at 301 (Gregory, J., concurring) ("Read in context, § 1185(a)(1) is at best a

[4] As noted in the previous section, Congress has granted the executive branch broad discretionary authority to regulate specific aspects of immigration in other immigration-related statutory provisions. *See, e.g.*, 8 U.S.C. §§ 1182(a)(10)(C)(ii)(III) (persons designated by the Secretary of State in her "sole and unreviewable discretion" as related to an international child abductor are inadmissible); 1182(d)(3)(B)(i) (waiving an inadmissibility ground for certain nonimmigrants in the "sole unreviewable discretion" of the Secretary of State).

residual provision that enables the President to issue reasonable rules pertaining to travel documents and related administrative processes – similar to its adjacent subsections."). *Cf. Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes").

Section 1185(a)(1)'s legislative history similarly reveals Congress's intent to limit the President's authority granted under the provision. In 1952, 1185(a)(1) authorized the President to enforce departure and entry "restrictions and prohibitions in addition to those provided otherwise than by this section" during war or other "national emergency" and until "otherwise ordered by the President or Congress." Immigration & Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 190 (June 27, 1952), § 215. In 1978, Congress amended the provision to reflect its current language by repealing (1) the President's authority to impose "restrictions and prohibitions in addition to those provided . . . by this section," and (2) the requirement that the provision be exercised only during times of war or national emergency. Foreign Relations Authorization Act, Pub. L. No. 95-426, 92 Stat. 992-93 (Oct. 7, 1978), § 707. While the Government relies on the latter aspect of the amendment, the former actually reins in the President's previously granted authority to impose additional restrictions on entry and departure. *See IRAP*, 883 F.3d at 301-02 (Gregory, J., concurring).

The Government's interpretation of 1185(a)(1) does not comport with the statute's text or history, and

sweeps so broadly as to swallow the more specific 1182(f).[5] *See Hawaii*, 878 F.3d at 694 (concluding that "the Government cannot justify the Proclamation under § 1182(f) by using § 1185(a) as a backdoor," because "[g]eneral grants in a statute are limited by more specific statutory provisions, and § 1182(f) has a specific requirement that there be a finding of detriment before entry may be suspended or otherwise restricted" (citation omitted)). EO-3 therefore cannot stand as an exercise of statutory authority under 1185(a)(1).

D. The INA's Nondiscrimination Provision Further Constrains the President's Delegated Authority Under 1182(f) and 1185(a)(1).

Section 1152(a)(1)(A) of the INA prohibits discrimination on the basis of nationality and place of birth in the issuance of immigrant visas. Introduced as part of the Immigration Act of 1965, the INA's nondiscrimination provision was designed to remedy the "harsh injustice of the national origins quota system." *See* President Lyndon B. Johnson, Remarks at the Signing of the Immigration Bill, Liberty Island, New York, 546 Pub. Papers 1037, 1038 (Oct. 3, 1965); *see also Olsen v.*

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[5] Previously, the Government has not argued that 1185(a)(1) grants the President more authority than 1182(f). *See, e.g.*, *Int'l Refugee Assistance Project v. Trump*, 265 F. Supp. 3d 570, 611 (D. Md. Oct. 17, 2017) ("Although the Proclamation also relies on § 1185(a)(1), the parties do not argue that this section provides broader authority than § 1182(f).").

Albright, 990 F. Supp. 31, 37-38 (D.D.C. 1997) (noting that "[t]he legislative history surrounding the 1965 Act is replete with the bold anti-discriminatory principles of the Civil Rights Era," and that visas may not be denied based on prejudicial national stereotypes).

Congress rejected a proposal to transition away from national origin quotas gradually, preferring instead to abolish them immediately and limit the executive's discretion in the visa allocation process. S.500/H.R. 2580, 89th Cong., 1st Sess. (1965) (Hart-Celler, Johnson administration bill); H.R. 8662, 89th Cong., 1st Sess. (1965) (Feighan bill). Congress surely did not imagine that a future President could unilaterally create barred zones and national exclusions that violate Congress's requirements of nondiscrimination, 8 U.S.C. § 1152(a)(1)(A), or a first-come first-served policy for visa applicants, 8 U.S.C. § 1153(e).

Considering Congress's intent to repeal the national origin quota system and its discriminatory foundation, it is unsurprising that the text of the nondiscrimination provision is succinct and unambiguous: "[N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). That text is clear and should be interpreted in accordance with its plain meaning. *See Puello v. Bureau of Citizenship & Immigr. Servs.*, 511 F.3d 324, 327 (2d Cir. 2007).

Although Congress did create some narrow statutory exceptions to the nondiscrimination provision, none are applicable to EO-3.[6] Notably, Congress did not choose to exempt the President's authority pursuant to 1182(f) or 1185(a)(1) from the nondiscrimination provision. *See Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." (citations omitted)). Additionally, none of the statutory exceptions to the nondiscrimination provision grant the President authority to create his own exceptions. There would be no point to a law that prohibits the President from discriminating except for when the President chooses to discriminate. *See IRAP*, 883 F.3d at 291.

Presidential authority pursuant to 1182(f) and 1185(a)(1) must therefore be construed in conformance with the INA's nondiscrimination provision. *See Hawaii*, 878 F.3d at 697 (finding that EO-3 "runs afoul of § 1152(a)(1)(A)'s prohibition on nationality-based discrimination."). Only then can all three statutory provisions be given effect as Congress intended. In addition, Congress enacted 1152(a)(1) in 1965 against the backdrop of 1182(f) and 1185(a)(1), meaning that those

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[6] Most significantly, Congress can assign per-country caps on the number of family and employment-based visas that are issued. 8 U.S.C. § 1152(a)(1)(A), (a)(2). Also, the Secretary of State's authority to determine "the procedures for the processing of immigrant visa applications or the locations where such applications will be processed" is not limited by the provision. 8 U.S.C. § 1152(a)(1)(B).

provisions must be read as limited by the later-enacted and more specific nondiscrimination provision. *See Hawaii*, 878 F.3d at 696 (finding that "§ 1152(a)(1)(A) provides a specific anti-discrimination bar to the President's general § 1182(f) powers"); *IRAP*, 883 F.3d at 303-04 (Gregory, J., concurring) (same); *see also Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("[A] specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

The Government contends that 1152(a)(1)(A) does not conflict with its interpretations of 1182(f) and 1185(a)(1), because the former addresses the issuance of immigrant visas to aliens "who are otherwise eligible" and therefore has no effect on aliens who are not permitted to enter based on other INA provisions, like 1182(f) and 1185(a)(1). But "the Proclamation effectuates its restrictions by withholding immigrant visas based on nationality," which "directly contravenes" Congress's prohibition of nationality-based discrimination. *Hawaii*, 878 F.3d at 695-96 (recognizing that 1152(a)(1)(A) "prohibit[s] discrimination on the basis of nationality *throughout* the immigration visa process, including visa issuance and entry") (emphasis in original); *IRAP*, 883 F.3d at 304 (Gregory, J., concurring) (finding that EO-3 "directly contravenes § 1152(a)(1) and the fundamental principles of equality that it embodies"). Construing 1152(a)(1) in the manner the Government proposes flies in the face of the statute's text and undercuts the very purpose of this historic piece of legislation.

Although the President has the authority to suspend the entry of immigrants "detrimental to the interests of the United States" via 1182(f), he cannot establish blanket prohibitions on entry based solely on nationality. *See Hawaii*, 878 F.3d at 687 ("[T]he President cannot effectively abrogate existing immigration law while purporting to merely strengthen it; the cure cannot be worse than the disease."); *Haitian Refugee Ctr. v. Civiletti*, 503 F. Supp. 442, 453 (S.D. Fla. 1980) (noting that under 1152(a), the "INS has no authority to discriminate on the basis of national origin, except perhaps by promulgating regulations in a time of national emergency"). Indeed, as described above, the only instances in which the executive branch has imposed nationality-based restrictions on entry to the United States – the bar to entry of Cuban nationals imposed by President Reagan in response to Cuba's suspension of an immigration agreement and the limitations on entry of Iranians imposed by President Carter in the wake of the Iran Hostage Crisis – were both more limited in scope and involved discrete exigencies related to foreign affairs.

EO-3, in contrast, imposes a blanket prohibition on the issuance of immigrant visas for the named countries with "no specified end date and no requirement of renewal," in direct contravention of 1152(a). *See Hawaii*, 878 F.3d at 684 n. 10 ("At the very least, Congress in adopting § 1182(f) likely did not contemplate that an executive order of the Proclamation's sweeping breadth would last for an indefinite duration."). To allow such a blanket prohibition would both undermine

the visa allocation system over which Congress retains authority and would run afoul of the INA's nondiscrimination provision.

The most recent version of the travel ban attempts, belatedly, to correct the deficiencies of the prior executive orders, which failed to provide any "findings" and offered no nexus to any identifiable U.S. interests. However, it is still *ultra vires*. Unlike the prior orders, it does not invoke "the specter of 'honor killings' . . . a well-worn tactic for stigmatizing and demeaning Islam and painting the religion, and its men, as violent and barbaric." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 596 n. 17 (4th Cir. 2017) (en banc), *vacated and remanded by Trump v. Int'l Refugee Assistance Project*, No. 16-1436, 2017 WL 4518553 (U.S. Oct. 10, 2017). It also nominally adds two non-Muslim countries with little practical impact on migration and provides a new purported rationale. But its roots cannot be ignored. EO-3 fulfills its predecessors' promise of a permanent ban, using nationality as a proxy for religion, and thereby revealing animus and invidious discrimination not permitted by the INA. *See IRAP*, 883 F.3d at 322 (Wynn, J., concurring).

CONCLUSION

Based on the foregoing, *amici* respectfully submit that the Court should find EO-3 *ultra vires*. EO-3 is inconsistent with the text and structure of the INA as a whole. While 1182(f) provides the President the

authority and flexibility needed to respond to exigent situations involving diplomacy or military affairs, it does not give him unlimited authority to override the immigration system that Congress has so carefully crafted.

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Respectfully submitted,

DEBORAH ANKER*
SABRINEH ARDALAN*
PHILIP L. TORREY*
HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM
HARVARD LAW SCHOOL
6 Everett Street
Cambridge, MA 02138
danker@law.harvard.edu
sardalan@law.harvard.edu
ptorrey@law.harvard.edu

KARLA MCKANDERS*
VANDERBILT LAW SCHOOL
131 21st Avenue South
Nashville, TN 37203
karla.mckanders@vanderbilt.edu

GEOFFREY HOFFMAN*
UNIVERSITY OF HOUSTON LAW CENTER
4604 Calhoun Road, Room 56, TU-II
Houston, TX 77204
ghoffman@central.uh.edu

FATMA E. MAROUF*
Counsel of Record
TEXAS A&M UNIVERSITY SCHOOL OF LAW
1515 Commerce Street
Fort Worth, TX 76102
(817) 212-4123
fatma.marouf@law.tamu.edu

ALAN HYDE*
RUTGERS LAW SCHOOL
123 Washington Street
Newark, NJ 07102
hyde@law.rutgers.edu

Of Counsel
NATHAN MACKENZIE
225 Walden Street, #4N
Cambridge, MA 02140
(978) 852-8626
nmackenzie@jd17.law.harvard.edu

*Filed in an individual capacity. University affiliation is for identification only.

List of *Amici*

Muneer I. Ahmad*
Clinical Professor of Law
Yale Law School

Deborah Anker*
Clinical Professor of Law
Harvard Law School

Sabrineh Ardalan*
Assistant Clinical Professor of Law
Harvard Law School

David Baluarte*
Associate Clinical Professor of Law
Washington and Lee University School of Law

Jon Bauer*
Clinical Professor of Law and Richard D. Tulisano '69 Scholar in Human Rights
University of Connecticut School of Law

Lenni B. Benson*
Professor of Law
New York Law School

Holly Cooper*
Co-director UC Davis Immigration Law Clinic
U.C. Davis School of Law

Stella Burch Elias*
Professor of Law
University of Iowa College of Law

Kate Evans*
Associate Professor
University of Idaho College of Law

Jill E. Family*
Commonwealth Professor of Law and Government
Widener University Commonwealth Law School

Lauren Gilbert*
Professor of Law
St. Thomas University School of Law

Denise Gilman*
Clinical Professor
University of Texas School of Law

Geoffrey Heeren*
Associate Professor
Valparaiso University Law School

Laila L. Hlass*
Professor of Practice
Tulane University School of Law

Geoffrey Hoffman*
Clinical Associate
Professor of Law
University of Houston
Law Center

Mary Holper*
Associate Clinical
Professor
Boston College Law School

Alan Hyde*
Distinguished Professor
of Law and Sidney
Reitman Scholar
Rutgers Law School

Michael Kagan*
Professor of Law
University of Nevada,
Las Vegas, William S.
Boyd School of Law

Jennifer Lee Koh*
Professor of Law
Western State College
of Law

Annie Lai*
Assistant Clinical
Professor of Law
U.C. Irvine School of Law

Fatma E. Marouf*
Professor of Law
Texas A&M University
School of Law

Karla McKanders*
Clinical Professor of Law
Vanderbilt Law School

Nancy Morawetz*
Professor of Clinical Law
New York University
School of Law

Angela D. Morrison*
Associate Professor
Texas A&M University
School of Law

Elora Mukherjee*
Associate Clinical
Professor of Law
Columbia Law School

Gerald L. Neuman*
J. Sinclair Armstrong
Professor of
International, Foreign,
and Comparative Law
Harvard Law School

Huyen Pham*
Professor
Texas A&M University
School of Law

Jaya Ramji-Nogales*
I. Herman Stern
Research Professor
Temple Law School

Carrie Rosenbaum*
Adjunct Professor
Golden Gate University
School of Law

Rachel E. Rosenbloom*
Professor of Law
Northeastern University
School of Law

Benjamin Casper Sanchez*
Director, James H. Binger
Center for New
Americans
University of Minnesota
Law School

Leticia Saucedo*
Professor of Law
U.C. Davis School of Law

Andrew I. Schoenholtz*
Professor from Practice
Georgetown Law

Ragini Shah*
Clinical Professor of Law
Suffolk University
Law School

Sarah Sherman-Stokes*
Associate Director,
Immigrants' Rights &
Human Trafficking
Program
Boston University
School of Law

Jayashri Srikantiah*
Professor of Law and
Director, Immigrants'
Rights Clinic
Stanford Law School

Elissa Steglich*
Clinical Professor
University of Texas
School of Law

Philip L. Torrey*
Lecturer on Law
Harvard Law School

Rose Cuison Villazor*
Professor of Law
U.C. Davis School of Law

Leti Volpp*
Robert D. and Leslie Kay
Raven Professor of Law
U.C. Berkeley School
of Law

*Filed in an individual capacity. University affiliation is for identification only.