

No. 19-36020

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

John Doe #1, et al.,

Plaintiffs-Appellees,

v.

Donald Trump, *et al.*,

Defendants-Appellants

On Appeal from the United States District Court
for the District of Oregon

**BRIEF IN SUPPORT OF APPELLEES SUBMITTED BY
AMICI CURIAE IMMIGRATION LAW PROFESSORS**

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STATEMENT OF AMICI'S INTEREST¹

Amici curiae are law professors who teach and publish scholarship about United States immigration law. Amici have collectively studied the implementation and history of the Immigration and Nationality Act (INA) for decades and have written extensively on the topic. They accordingly have an abiding interest in the proper interpretation and administration of the Nation's immigration laws, particularly the INA. Amici respectfully submit that their proposed brief could aid this Court's consideration by placing the current dispute in the broader context and history of relevant immigration statutes. Amici are²:

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¹ Amici submit this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) and state that all parties have consented to its timely filing. Amici further state, pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), that no counsel for a party authored this brief in whole or in part, and no person other than the amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

While the language of 8 U.S.C. § 1182(f) is indeed broad, it is not unbounded. Both Supreme Court precedent and past practice suggest that deference to the President's power under § 1182(f) is limited to situations when presidential action has a specific nexus with the conduct of foreign governments. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2413 (2018) (observing that past exercises of power under § 1182(f) have often sought to resolve "ongoing diplomatic disputes" with other states). The present Proclamation is unprecedented because that nexus is wholly absent. Hence, the Proclamation should not trigger the same level of deference prompted by past Proclamations, such as the one at issue in *Trump v. Hawaii*. Instead, the Proclamation should be judged by ordinary tools of statutory interpretation. Assessed in this fashion, the Proclamation exceeds the power that Congress delegated to the President under § 1182(f), as the district court concluded.

Never before has a President exercised his § 1182(f) power in the pursuit of exclusively domestic interests. In fact, the nexus with a foreign government characteristic of all past exercises of power under § 1182(f) falls under one of two contexts: retaliation or cooperation. In

the first context, the President seeks to retaliate for or induce particular conduct by governments abroad. *See id.* at 2413 (noting that proclamations issued under § 1182(f) have often involved U.S. efforts to “retaliate for conduct by . . . governments that conflicted with U.S. foreign policy interests”); *id.* at 2408-09 (describing President Trump’s ban on entry of nationals of certain countries as designed to “induce improvement” in foreign governments’ vetting of prospective immigrants who might otherwise jeopardize U.S. “national security and public safety”); Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986) (President Ronald Reagan) (curbing immigration from Cuba in order to prod that government to comply with agreement with United States).

In the second context, the President seeks to demonstrate cooperation with other nations on matters affecting mutual interests and obligations. *See Hawaii*, 138 S. Ct. at 2409 (citing President’s ability to adopt a “preventive measure . . . in the context of international affairs and national security”) (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010)); *Humanitarian Law Project*, 561 U.S. at 32-33 (noting importance of U.S. policies that elicit

cooperation from “our . . . allies”); Proclamation No. 7452, 66 Fed. Reg. 34,775 (June 26, 2001) (President George W. Bush) (citing importance of international efforts to promote peace in the Balkans in suspending entry of persons who sought to “undermine” those efforts).

The Supreme Court’s decision in *Hawaii* signaled that the President enjoys substantial latitude when addressing foreign affairs under § 1182(f), but the Supreme Court – like all other courts in the history of the statute – did not have occasion to consider whether the power that Congress delegated under § 1182(f) applies to purely domestic interests. *See Hawaii*, 138 S. Ct. at 2412-13 (rejecting argument that authority under § 1182(f) was limited to “exigencies” and times of “national emergency”). Every example the Supreme Court considered occurred in the retaliation or cooperation arenas; the present Proclamation contains no hint of a nexus to either context.

Nothing in the Proclamation even refers, expressly or implicitly, to the conduct of foreign governments. Instead, the Proclamation bases its curb on entry of persons without “approved” health insurance on purely domestic concerns, including “higher costs on hospitals” and “delays in emergency services.” In this exclusively domestic realm lacking a

specific nexus with the conduct of foreign governments, there is no justification for the latitude that the President retains in the retaliation and cooperation realms.

ARGUMENT

I. Past Practice Under § 1182(f) Has Entailed a Specific Nexus With the Conduct of Foreign Governments

In every case out of the over forty proclamations and executive orders issued under § 1182(f) or related statutory authority, presidential action has shown a specific nexus with the conduct of foreign governments. *See* Kate Manuel, CONG. RESEARCH SERV., R44743, EXECUTIVE AUTHORITY TO EXCLUDE ALIENS: IN BRIEF 6-10 (2017) (listing prior § 1182(f) proclamations and orders); Part C of Brief for *Amici Curiae*, *infra* (providing detailed description of each prior proclamation and executive order). This connection between invocations of § 1182(f) and foreign powers has been uniform for the almost seventy years since Congress enacted that provision in 1952. Notably, while the Supreme Court cautioned against “ad hoc” distinctions in historical practice in *Hawaii*, every single example the Court cited concerned foreign policy – because no counterexamples exist. *See* 138 S. Ct. at 2413. Far from being an ad hoc distinction, the

foreign-facing nature of the proclamation is a fundamental part of § 1182(f)'s backdrop that no court has had occasion to question or examine.

To assess how this exclusive foreign focus has cabined executive authority under § 1182(f), it is helpful to review the specific purposes for which Presidents – past and current – have invoked this authority. All such presidential action has entailed either retaliation or cooperation: 1) efforts to deter foreign states from engaging in conduct inimical to U.S. interests; or 2) attempts to foster international cooperation on matters of mutual interest. While the language of § 1182(f) is broad, the Proclamation before this court is such an outlier compared to historical practice that it defies the basic understanding held by all past Presidents: exercises of authority under § 1182(f) must connect to the United States' relations with foreign powers. The Proclamation's sharp break from a longstanding limiting principle under § 1182(f) should extinguish the deference that this Court accords the present Proclamation, which lacks the foreign government nexus displayed by previous proclamations.

a. Retaliatory Proclamations

Many proclamations attempt to retaliate for prior conduct by foreign governments that is inimical to U.S. interests and to induce more amenable conduct in the future. The Supreme Court in *Hawaii* expressly acknowledged this category of proclamation and cited several examples, including President Reagan’s Proclamation No. 5517 (1986), which sought to “apply pressure on the Cuban government” to live up to an agreement on immigration from Cuba to the United States that Cuba had violated. *Hawaii*, 138 S. Ct. at 2413. As part of that agreement, Cuba had agreed to accept the return of almost three thousand members of the Mariel Boatlift to the United States who had committed crimes after admission. *Amici* have studied the Mariel episode and the agreement that the United States and Cuba reached in 1984. See Maryellen Fullerton, *Cuban Exceptionalism: Migration and Asylum in Spain and the United States*, 35 U. Miami Inter-Am. L. Rev. 527, 561-62 (2004); see also Bernard Weinraub, *U.S. and Cuba Gain an Accord on Repatriation*, N.Y. Times, Dec. 15, 1984, at § 1, p. 1 (reporting on accord between Cuban and the United States).

After the United States began radio broadcasts criticizing the regime of then-president Fidel Castro, Cuba suspended this agreement. *See* Gerald M. Boyd, *Reagan Acts to Tighten Trade Embargo of Cuba*, N.Y. Times, Aug. 23, 1986, at § 1, p. 3. In addition, Cuban officials had aided and abetted human smuggling, extorting cash from Cuban nationals in exchange for exit permits that allowed those nationals to travel to third countries in order to obtain visas to enter the United States. *Id.* By issuing the Proclamation and taking related steps to limit Cuban emigration, President Reagan hoped to persuade the Castro regime to comply with its accord. Ultimately, the United States and Cuba resumed a more orderly approach to immigration. *See* Fullerton, *supra*, at 562 n. 235.

The same specific nexus with foreign governments characterized the facts in *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986). In *Abourezk*, the government sought to bar the entry of nationals of Cuba, Nicaragua, and Italy. The government believed the first two groups were agents of the communist regimes in their respective countries and the Italian was an agent of the Soviet Union. *Id.* at 1047-49; *see also id.* at 1062, 1070 (Bork, J., dissenting) (discussing the State Department's

concerns about links of the foreign nationals in question to communist regimes, and noting that “[r]elationships between our government and the governments of Nicaragua, the Soviet Union, and Cuba have been marked with tension”).

Writing for the *Abourezk* court, then-Judge Ruth Bader Ginsburg noted that in a related act, President Reagan had issued Proclamation No. 5377, 50 Fed. Reg. 41,329 (Oct. 4, 1985), which invoked § 1182(f) to suspend the entry of “officers or employees of the Cuban government or the Cuban Communist Party.” *Abourezk*, 785 F.2d at 1049 n. 2. The court expressed doubt that any *specific* inadmissibility ground in § 1182 supported the suspension of entry of the foreign nationals from Nicaragua, Italy, and Cuba who had challenged the bar to their entry in *Abourezk*. However, even if those specific inadmissibility grounds were unavailing, the court suggested that the President might have in the proclamation power granted by § 1182(f) another “safeguard against the danger” allegedly posed by these individuals. *Id.* (noting President’s “sweeping” § 1182(f) authority); *see also Hawaii*, 138 S. Ct. at 2408 (citing *Abourezk*). In acknowledging the breadth of § 1182(f)’s grant of

authority, the court thus situated this authority squarely in the United States' fraught relationship with hostile foreign powers.

Moving forward almost thirty years, a specific nexus with foreign governmental conduct is also evident in Executive Order 13694, 80 Fed. Reg. 18,077 (April 1, 2015), which relies on § 1182(f) in suspending entry of foreign nationals who have engaged in “malicious cyber-enabled activities” directed against critical infrastructure, the financial sector, computer networks, or intellectual property. The Executive Order took these and other measures, such as blocking the assets of covered foreign nationals, in the course of declaring a national emergency to address what it termed an “unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.” While Executive Order 13694 did not specifically address the persons or entities that it covered, that information emerged from a follow-up order, Executive Order 13757, 82 Fed. Reg. 1 (Dec. 28, 2016). The 2016 Executive Order included an annex that, *inter alia*, listed Russian state entities, such as the Russian Main Intelligence Directorate and Federal Security Service. The 2016 follow-up confirmed the foreign government nexus of each of these measures.

A substantial number of proclamations and executive orders through the years have also targeted the governments of states such as Iran and North Korea. President Trump included nationals of both countries in the travel ban that the Supreme Court upheld in *Trump v. Hawaii*. See 138 S. Ct. at 2405.³ Several other past proclamations or orders have also addressed these states. See Executive Order 13608, 77 Fed. Reg. 26,409 (May 1, 2012) (barring entry of persons who engaged

³ See also *Hawaii*, 138 S. Ct. at 2413 (observing that Proclamation No. 9645 fit into patterns of measures designed to “retaliate for conduct by . . . governments that conflicted with U.S. interests”). *Amici* filed a brief in the Supreme Court on behalf of challengers to Proclamation No. 9645’s legality, asserting that the Proclamation exceeded the scope of the President’s authority. See Brief for Amici Curiae Scholars of Immigration Law in Support of Respondents on the History of the Immigration and Nationality Act, *Trump v. Hawaii*, No. 17-695 (March 2018), https://www.supremecourt.gov/DocketPDF/17/17-965/41814/20180330154515722_17-965%20bsac%20Scholars%20of%20Immigration%20Law.pdf. Scholars among the *amici* in *Hawaii* and this case have criticized the *Hawaii* decision for its broad reading of § 1182(f) and narrow reading of the Immigration and Nationality Act’s bar on national origin discrimination in visa issuance. See Shoba Sivaprasad Wadhia, *Banned: Immigration Enforcement in the Time of Trump* 20-21 (2019) (arguing that the Supreme Court read § 1182(f) “in isolation from the rest of the statute”); Peter Margulies, *The Travel Ban Decision, Administrative Law, and Judicial Method: Taking Statutory Context Seriously*, 33 Geo. Immigr. L.J. 159, 199-209 (2019) (discussing statutory backdrop). Nevertheless, it is clear that the stated role of foreign relations in Proclamation No. 9645 was central to the Supreme Court’s decision.

in certain actions entailing evasion of U.S. sanctions on Iran and Syria); Executive Order 13619, 77 Fed. Reg. 41,243 (July 11, 2012) (barring entry of individuals who have assisted in human rights abuses in Burma or engaged in arms trade in that country to or from North Korea); Executive Order 13628, 77 Fed. Reg. 62,139 (Oct. 9, 2012) (barring entry of individuals who have provided technology and other items to Iran’s government for abuses of the human rights of the Iranian people); Executive Order 13687, 80 Fed. Reg. 819 (Jan. 2, 2015) (suspending entry of persons connected to government of North Korea or communist party apparatus there). Here, again, executive actions under § 1182(f) feature a specific nexus to the conduct of a foreign government.

b. Proclamations Reflecting Cooperation With Foreign Governments

Many proclamations involve cooperation with other states on matters of mutual interest or obligation. Consider *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), in which the Supreme Court upheld U.S. action on the high seas under § 1182(f). That action flowed from a 1981 agreement between the United States and Haiti authorizing the Coast Guard to “intercept vessels engaged in the . . .

transportation” of Haitian nationals who were inadmissible under the INA because they lacked visas for entry. *Id.* at 160; *see also* Agreement on Haiti, Migrants—Interdiction, United States-Haiti, Sept. 23, 1981, 33 U.S.T. 3559, 3560, T.I.A.S. No. 10241, 1981 U.S.T. Lexis 40, at 1 (providing for the “establishment of a cooperative program of interdiction and selective return to Haiti of certain Haitian migrants and vessels involved in illegal transport of persons coming from Haiti”). Illustrating the cooperation entailed, the United States and Haiti agreed that a representative of the Haitian Navy would act as a liaison aboard each Coast Guard vessel participating in the interdiction program, which also sought to provide a means for identifying persons entitled to refugee protection. 1981 U.S.T. Lexis 40, at 3-4.

The agreement specifically referred to the “need for international cooperation regarding law enforcement measures taken with respect to vessels on the high seas and the international obligations mandated in the Protocol Relating to the Status of Refugees.” *Id.* at 1. Based on concerns that the Haitian government would target returning interdicted nationals, the agreement included diplomatic assurances that returning nationals “[would] not be subject to prosecution for

illegal departure.” *Id.* at 4. To ensure that Haiti was complying with this assurance, U.S. State Department personnel conducted over a thousand “confidential interviews” over a period of several years with returning Haitians, ultimately finding that Haiti was adhering to its diplomatic commitments. *See Dep’t of State v. Ray*, 502 U.S. 164, 167-68 (1991). The interdiction policy upheld by the Supreme Court in *Sale* stemmed from a treaty between the United States and a foreign nation and entailed extensive monitoring of implementation by U.S. diplomatic officers abroad as well as participation by Haitian officials.

Several scholars among the *amici* here have worked extensively with Haitian refugees. In this capacity, a number of these scholars had doubts then which continue to this day about the wisdom, fairness, and legality of the interdiction policy that the Supreme Court upheld in *Sale*. *See* Harold Hongju Koh & Michael J. Wishnie, *The Story of Sale v. Haitian Centers Council: Guantanamo and Refoulement*, in HUMAN RIGHTS ADVOCACY STORIES 402-10 (Deena R. Hurwitz, *et al.* eds., 2009).⁴

⁴ Koh & Wishnie, <https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/Human%20Rights%20Advocacy%20Stories%20-%20Sale%20V.%20Haitian%20Centers%20Council.pdf>.

Nevertheless, these scholars recognized the roots of the policy in the agreement reached between Haiti and the United States in 1981. *Id.* at 388 (describing the “unique bilateral agreement” between the two nations).

While *Salé* addresses the first example of a cooperative arrangement setting the stage for invocation of § 1182(f), many more followed. President George W. Bush issued Proclamation No. 7452, 66 Fed. Reg. 34,775 (June 26, 2001), promoting international efforts at “assuring peace and stability” in the Balkans. That portion of Europe had recently been the site of civil strife and wartime atrocities during the breakup of the former Yugoslavia. As the Proclamation noted, the United States also wanted to enhance the effectiveness of international organizations, forces, and tribunals in the region, including the U.N. Interim Administration Mission in Kosovo, U.N. peacekeepers, and the U.N.-backed International Criminal Tribunal for the former Yugoslavia. *Id.*, §1(a)(ii). For that reason, the Proclamation barred the entry of any individuals who attempted to discourage refugees from the Balkans from returning there or in any other way tried to “undermine peace,

stability, reconciliation, or democratic development” in the Western Balkans. *Id.* at §1(a)(iv).

Cooperation through proclamations also extended to fulfillment of international duties established by the U.N. Security Council to combat the global harm of human trafficking. Proclamation No. 8693, 76 Fed. Reg. 44,751 (July 24, 2011) suspended the entry of traffickers. This Proclamation cited sanctions, travel bans, and other measures required by U.N. Security Council Resolution 2331. That resolution implemented the U.N. Convention on Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons.

Similarly, Proclamation No. 8697, 76 Fed. Reg. 49,277 (Aug. 4, 2011) illustrates the United States’ cooperation in enforcement of international human rights agreements. This Proclamation cites the United States’ “enduring commitment” to human rights and humanitarian law, noting that the “prevention of atrocities” and respect for human rights “promotes U.S. values and fundamental U.S. interests” in helping to “secure peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracies, and

prevent humanitarian crises around the globe.” *Id.* To prevent the United States from becoming a “safe haven” for individuals who would undermine these goals, the Proclamation suspends entry for persons who are “serious violators of human rights and humanitarian law.” *Id.*

c. A Comprehensive List of Proclamations and Their Respective Purposes

The following chart sets out each Proclamation issued under § 1182(f) or any related provision of the Immigration and Nationality Act. Each tracks the retaliation/cooperation typology outlined above. In sum, every past proclamation and executive order invoking § 1182(f)—up to and including President Trump’s travel ban—sounds in the key of retaliation or cooperation regarding foreign governments. None address the domestic costs or delays in service that the instant Proclamation invokes. Given this lack of a pedigree based on past practice, this Court should scale back the deference that it affords the Proclamation.

President & Citation	Description	Retaliation/ Cooperation
Harry Truman Proclamation 2850, 14 Fed. Reg. 5,173 (Aug. 17, 1949)	Amending Proclamation 2523(1) (Nov. 14, 1941), to authorize Secretary of State to issue regulations to bar entry of persons when such entry would be “prejudicial to the interests of the United States,” under predecessor of 8 U.S.C. § 1185 which empowered President to suspend entry in times of war and national emergency.	Retaliation
Harry Truman Proclamation 3004, 18 Fed. Reg. 489 ⁵ (Jan. 17, 1953)	Under predecessor of 8 U.S.C. § 1185, empowering the President to suspend entry in case of war or emergency, authorizing limits on entry of foreign nationals into the Panama Canal Zone and American Samoa, in light of concerns about spillover related to Korean War.	Retaliation
Jimmy Carter Exec. Order No. 12172, 44 Fed. Reg. 67,947 ⁶ (Nov. 26, 1979), as amended by Exec. Order No. 12206, 45 Fed. Reg. 24,101 (Apr. 7, 1980)	Under 8 U.S.C. § 1185, which empowers the President to set rules on admission and departure of foreign nationals, authorizing Secretary of State to set limits on Iranians’ entry into the United States during the Iranian hostage crisis.	Retaliation

⁵ <https://www.archives.gov/federal-register/codification/proclamations/03004.html>

⁶ <https://www.archives.gov/federal-register/codification/executive-order/12172.html>

Ronald Reagan Proclamation 4865, 46 Fed. Reg. 48,107 ⁷ (Sept. 29, 1981)	Authorizing interdiction of vessels on the high seas carrying inadmissible foreign nationals, in accordance with “cooperative arrangements” with foreign governments.	Cooperation
Ronald Reagan Proclamation 5377, 50 Fed. Reg. 41,329 ⁸ (Oct. 4, 1985)	Suspending entry by officers or employees of Cuban government and Cuban Communist Party, in light of Cuba’s suspension of immigration agreement with United States.	Retaliation
Ronald Reagan Proclamation 5517, 51 Fed. Reg. 30,470 ⁹ (Aug. 22, 1986)	Suspending entry of Cuban nationals in light of Cuba’s suspension of compliance with agreement with the United States on immigration procedures.	Retaliation
Ronald Reagan Proclamation 5829, 53 Fed. Reg. 22,289 ¹⁰ (June 10, 1988)	Suspending entry of Panamanian officials—along with their immediate families—who plan and execute policies of Panamanian strongman Manuel Noriega.	Retaliation

⁷ <https://www.archives.gov/federal-register/codification/proclamations/04865.html>

⁸ <https://www.archives.gov/federal-register/codification/proclamations/05377.html>

⁹ <https://www.govinfo.gov/content/pkg/STATUTE-100/pdf/STATUTE-100-Pg4480.pdf>

¹⁰ <https://www.govinfo.gov/content/pkg/STATUTE-102/pdf/STATUTE-102-Pg5027.pdf>

<p>Ronald Reagan</p> <p>Proclamation 5887, 53 Fed. Reg. 43,184¹¹ (Oct. 22, 1988)</p>	<p>Suspending entry of members of Nicaraguan government or Sandinista National Liberation Front holding diplomatic or government passports in light of Nicaragua’s expulsion of U.S. Ambassador, interference with U.S. Embassy, suppression of free expression, and “support of subversive activities throughout Central America.”</p>	<p>Retaliation</p>
<p>George H.W. Bush</p> <p>Proclamation 12807, 57 Fed. Reg. 23,133¹² (May 24, 1992)</p>	<p>Authorizing Secretary of State to enter into “cooperative arrangements with appropriate foreign governments” to deter travel to the United States on the high seas by inadmissible foreign nationals, as well as interdiction of such persons by the U.S. Coast Guard, pursuant to agreements with other states.</p>	<p>Cooperation</p>
<p>Bill Clinton</p> <p>Proclamation 6569, 58 Fed. Reg. 31,897¹³ (June 3, 1993)</p>	<p>Suspending entry of persons who planned and executed policies supporting military coup regime in Haiti and impeded efforts to “restore constitutional government to Haiti”; also suspending entry of immediate families of such persons.</p>	<p>Retaliation</p>

¹¹ <https://www.govinfo.gov/content/pkg/STATUTE-102/pdf/STATUTE-102-Pg5093.pdf>

¹² <https://www.hsdl.org/?abstract&did=463032>

¹³ <https://www.govinfo.gov/content/pkg/STATUTE-107/pdf/STATUTE-107-Pg2668.pdf>

Bill Clinton Proclamation 6574, 58 Fed. Reg. 34,209 ¹⁴ (June 21, 1993)	Suspending entry of individuals who impede the transition to democracy of Zaire (now the Democratic Republic of the Congo).	Retaliation
Bill Clinton Proclamation 6636, 58 Fed. Reg. 65,525 ¹⁵ (Dec. 10, 1993)	Suspending entry of individuals who “impede Nigeria’s transition to democracy,” as well as the immediate families of such individuals.	Retaliation
Bill Clinton Proclamation 6685, 59 Fed. Reg. 24,337 ¹⁶ (May 7, 1994)	Suspending entry of participants in regime in Haiti that had gained power through military coup and engaged in human rights abuses; this measure implemented U.N. Security Council Resolution 917 (May 6, 1994).	Cooperation
Bill Clinton Proclamation 6730, 59 Fed. Reg. 50,683 ¹⁷ (Sept. 30, 1994)	Suspending entry of persons who planned or executed policies that “impede Liberia’s transition to democracy.”	Retaliation

¹⁴ <https://www.govinfo.gov/content/pkg/STATUTE-107/pdf/STATUTE-107-Pg2674.pdf>

¹⁵ <https://www.govinfo.gov/content/pkg/STATUTE-108/pdf/STATUTE-108-Pg5127.pdf>

¹⁶ <https://www.presidency.ucsb.edu/documents/proclamation-6685-suspension-entry-aliens-whose-entry-barred-under-united-nations-security>

¹⁷ <https://www.govinfo.gov/content/pkg/STATUTE-108/pdf/STATUTE-108-Pg5637.pdf>

<p>Bill Clinton Proclamation 6749, 59 Fed. Reg. 54,117¹⁸ (Oct. 25, 1994)</p>	<p>Suspending entry of members of Bosnian Serb forces who participated in armed conflict in former Yugoslavia in violation of U.N. Security Council Resolution 942 (Sept. 23, 1994) and Resolution 820 (Apr. 17, 1993).</p>	<p>Cooperation</p>
<p>Bill Clinton Proclamation 6925, 61 Fed. Reg. 52,233¹⁹ (Oct. 3, 1996)</p>	<p>Suspending entry of members of regime in Burma who have planned or executed policies that “impeded Burma’s transition to democracy,” as well as the immediate families of such individuals.</p>	<p>Retaliation</p>
<p>Bill Clinton Proclamation 6958, 61 Fed. Reg. 60,007²⁰ (Nov. 22, 1996)</p>	<p>Suspending entry of members of Sudan government and military, in order to implement U.N. Security Council Resolution 1044 (Jan. 31, 1996) and Resolution 1054 (April 26, 1996), which called upon Sudan to extradite to Ethiopia suspects in an assassination attempt in the capital of Ethiopia against Egyptian president Hosni Mubarak.</p>	<p>Cooperation</p>

¹⁸ <https://www.govinfo.gov/content/pkg/STATUTE-108/pdf/STATUTE-108-Pg5659.pdf>

¹⁹ <https://www.govinfo.gov/content/pkg/CFR-1997-title3-vol1/pdf/CFR-1997-title3-vol1-proc6925.pdf>

²⁰ <https://www.presidency.ucsb.edu/documents/proclamation-6958-suspension-entry-immigrants-and-nonimmigrants-persons-who-are-members-or>

<p>Bill Clinton</p> <p>Proclamation 7060, 62 Fed. Reg. 65,987²¹ (Dec. 12, 1997)</p>	<p>Suspending entry of senior officials of National Union for the Total Independence of Angola (UNITA)—a party to longstanding civil strife in that country—and adult immediate relatives, because of these individuals' violation of peace accord; measure taken to implement U.N. Security Council Resolution 1127 (Aug. 28, 1997), Resolution 1130 (Sept. 29, 1997), and Resolution 1135 (Oct. 29, 1997).</p>	<p>Cooperation</p>
<p>Bill Clinton</p> <p>Proclamation 7062, 63 Fed. Reg. 2,871²² (Jan. 14, 1998)</p>	<p>Suspending entry of members of military junta in Sierra Leone and their families, to implement U.N. Security Council Resolution 1132 (Oct. 8, 1997), which called for restoration of peace in that country.</p>	<p>Cooperation</p>

²¹ <https://www.justice.gov/sites/default/files/eoir/legacy/2002/09/09/fr16de97-104.pdf>

²² <https://www.govinfo.gov/content/pkg/WCPD-1998-01-19/pdf/WCPD-1998-01-19-Pg63.pdf>

<p>Bill Clinton</p> <p>Proclamation 7249, 64 Fed. Reg. 62,561²³ (Nov. 12, 1999)</p>	<p>Suspending entry of members of government of Federal Republic of Yugoslavia (Serbia and Montenegro), including President Slobodan Milosevic, and those closely associated with these persons, in light of the targeting of civilians for attack by this group and other actions under the jurisdiction of the International Criminal Tribunal for the former Yugoslavia, as well as the efforts of the members of the Milosevic regime to “obstruct democracy” in the region and evade sanctions imposed by the United States and other countries.</p>	<p>Cooperation</p>
<p>Bill Clinton</p> <p>Proclamation 7359, 65 Fed. Reg. 60,831²⁴ (Oct. 10, 2000)</p>	<p>Suspending entry of persons who support the Revolutionary United Front—a group engaged in civil strife in Sierra Leone—or who “otherwise impede the peace process” in that country, subsequent to U.N. Security Council Resolution 1132 (Oct. 8, 1997), which called for “peace, stability, and reconciliation”; also suspending entry of “spouses, children of any age, and parents” of such individuals.</p>	<p>Cooperation</p>

²³ <https://www.govinfo.gov/content/pkg/CFR-2000-title3-vol1/pdf/CFR-2000-title3-vol1-proc7249.pdf>

²⁴ <https://www.govinfo.gov/content/pkg/CFR-2001-title3-vol1/pdf/CFR-2001-title3-vol1-proc7359.pdf>

George W. Bush Proclamation 7452, 66 Fed. Reg. 34,775 ²⁵ (June 26, 2001)	Suspending entry of persons threatening to undermine international stabilization efforts in the Western Balkans (the former Yugoslavia), or those persons accused or suspected of war crimes or crimes against humanity in connection with the armed conflict in that region.	Cooperation
George W. Bush Proclamation 7524, 67 Fed. Reg. 8,857 ²⁶ (Feb. 22, 2002)	Suspending entry of members of Zimbabwe government of Robert Mugabe, in response to the “political and humanitarian crisis [in that country] and the continued failure” of that government to support democracy and the rule of law.	Retaliation
George W. Bush Proclamation 7750, 69 Fed. Reg. 2,287 ²⁷ (Jan. 12, 2004)	Suspending entry of foreign government officials and others who have engaged in corruption including bribery, misappropriation of public funds, and election fraud; citing Third Global Forum on Fighting Corruption and Safeguarding Integrity, along with “other intergovernmental efforts.”	Cooperation

²⁵ <https://www.govinfo.gov/content/pkg/CFR-2002-title3-vol1/pdf/CFR-2002-title3-vol1-proc7452.pdf>

²⁶ <https://www.govinfo.gov/content/pkg/STATUTE-116/pdf/STATUTE-116-Pg3178.pdf>

²⁷ <https://www.govinfo.gov/content/pkg/CFR-2005-title3-vol1/pdf/CFR-2005-title3-vol1-proc7750.pdf>

George W. Bush Proclamation 8015, 71 Fed. Reg. 28,541 ²⁸ (May 12, 2006)	Suspending entry of officials of Belarus who engaged in vote fraud, corruption, human rights abuses, or other attempts to undermine “democratic institutions or impede the transition to democracy” in that country.	Retaliation
George W. Bush Proclamation 8158, 72 Fed. Reg. 36,587 ²⁹ (June 28, 2007)	Suspending entry of present and former Syrian government officials who sought to undermine Lebanon’s sovereignty or democratic government, or (through cross-reference to Executive Order 13338 (May 11, 2004)) facilitated Syria’s aid to foreign terrorist organizations, including Hamas and Hizballah.	Retaliation
George W. Bush Proclamation 8342, 74 Fed. Reg. 4,093 ³⁰ (Jan. 16, 2009)	Suspending entry of foreign government officials and their spouses who have impeded or failed to implement “international antitrafficking standards.”	Cooperation

²⁸ <https://www.govinfo.gov/content/pkg/FR-2006-05-16/pdf/06-4651.pdf>

²⁹ <https://www.govinfo.gov/content/pkg/STATUTE-121/pdf/STATUTE-121-Pg2769.pdf>

³⁰ <https://www.govinfo.gov/content/pkg/STATUTE-123/pdf/STATUTE-123-Pg3607.pdf>

Barack Obama Proclamation 8693, 76 Fed. Reg., 44,751 ³¹ (July 24, 2011)	Suspending the entry of traffickers covered by sanctions, travel bans, and other measures under U.N. Security Council Resolution 2331, which implemented the U.N. Convention on Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons.	Cooperation
Barack Obama Proclamation 8697, 76 Fed. Reg. 49,277, § 1 ³² (Aug. 4, 2011)	Suspending entry of persons who engaged in “war crimes, crimes against humanity or other serious violations of human rights.”	Cooperation
Barack Obama Exec. Order No. 13606, 77 Fed. Reg. 24,571, § 4 ³³ (Apr. 22, 2012)	Suspending entry of persons who have sold, leased, provided material support for, or operated information and communications technology used by the respective Governments of Iran or Syria to engage in “serious human rights abuses” against the people of said countries.	Retaliation

³¹ <https://www.govinfo.gov/content/pkg/CFR-2012-title3-vol1/pdf/CFR-2012-title3-vol1-proc8693.pdf>

³² https://travel.state.gov/content/dam/visas/Human_Rights_Proclamation_8697.pdf

³³ <https://fas.org/irp/offdocs/eo/eo-13606.htm>

Barack Obama Exec. Order No. 13608, 77 Fed. Reg. 26,409, § 4 ³⁴ (May 1, 2012)	Suspending entry of persons who evaded U.S. sanctions regarding Iran and Syria.	Retaliation
Barack Obama Exec. Order No. 13619, 77 Fed. Reg. 41,243, § 5 ³⁵ (Jul. 11, 2012)	Suspending entry of individuals who have undermined “peace, security, or stability” of Burma, led or assisted in human rights abuses in Burma, or aided arms trade between Burma and North Korea.	Retaliation
Barack Obama Exec. Order No. 13628, 77 Fed. Reg. 62,139, § 10 ³⁶ (Oct. 9, 2012)	Suspending entry of individuals who provided technology and other instrumentalities to Iran’s government for abuses of the human rights of the Iranian people.	Retaliation

³⁴ https://www.treasury.gov/resource-center/sanctions/Programs/Documents/fse_eo.pdf

³⁵ <https://www.federalregister.gov/documents/2012/07/13/2012-17264/blocking-property-of-persons-threatening-the-peace-security-or-stability-of-burma>

³⁶ https://www.treasury.gov/resource-center/sanctions/Programs/Documents/2012iranthreat_eo.pdf

<p>Barack Obama</p> <p>Exec. Order No. 13660, 79 Fed. Reg. 13,493, § 2³⁷ (Mar. 6, 2014)</p>	<p>Suspending entry of person who “asserted governmental authority [in the Crimea] without the authorization of the Government of Ukraine” and thus undermined its “peace, security, stability, sovereignty, and territorial integrity.”</p>	<p>Retaliation</p>
<p>Barack Obama</p> <p>Exec. Order No. 13667, 79 Fed. Reg. 28,387, § 4³⁸ (May 12, 2014)</p>	<p>Suspending entry of leaders of armed groups and others in Central African Republic responsible for “targeting of women, children, or any civilians through . . . acts of violence (including killing, maiming, torture, or rape or other sexual violence)” as well as “abduction, forced displacement, or attacks on schools, hospitals, religious sites, or locations where civilians are seeking refuge”; citing threats to “peace, security, [and] stability of the Central African Republic and neighboring states”, as addressed by U.N. Security Council Resolutions 2121 (Oct. 10, 2013), Resolution 2127 (Dec. 5, 2013), and Resolution 2134 (Jan. 28, 2014).</p>	<p>Cooperation</p>

³⁷ https://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine_eo.pdf

³⁸ https://www.treasury.gov/resource-center/sanctions/Programs/Documents/car_eo.pdf

Barack Obama Exec. Order No. 13685, 79 Fed. Reg. 77,357, § 3 ³⁹ (Dec. 19, 2014)	Suspending entry of persons controlling entities operating in the Crimea region of Ukraine, in response to “Russian occupation of the Crimea region.”	Retaliation
Barack Obama Exec. Order No. 13687, 80 Fed. Reg. 819, § 4 ⁴⁰ (Jan. 2, 2015)	Suspending entry of persons connected to government of North Korea or communist party in that country.	Retaliation
Barack Obama Exec. Order No. 13692, 80 Fed. Reg. 12,747, § 2 ⁴¹ (Mar. 8, 2015)	Suspending entry of present and former officials of government of Venezuela and associated individuals, in connection with efforts to deter violence, human rights abuses, corruption, and attempts to undermine democracy.	Retaliation

³⁹ https://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine_eo4.pdf

⁴⁰ <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/13687.pdf>

⁴¹ <https://www.treasury.gov/resource-center/sanctions/Programs/Documents/13692.pdf>

<p>Barack Obama</p> <p>Executive Order 13694, 80 Fed. Reg. 18,077, § 4⁴² (Apr. 1, 2015)</p>	<p>Suspending entry of foreign nationals who have engaged in “malicious cyber-enabled activities” directed against U.S. critical infrastructure, financial sector, computer networks, or intellectual property, as part of response to declared national emergency to address an “unusual and extraordinary threat to the national security, foreign policy, and economy of the United States”; a follow-up order, Executive Order 13757, 82 Fed. Reg. 1 (Dec. 28, 2016), targeted Russian state agencies, such as the Russian Main Intelligence Directorate and Federal Security Service.</p>	<p>Retaliation</p>
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⁴² https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cyber_eo.pdf

<p>Barack Obama</p> <p>Exec. Order No. 13712, 80 Fed. Reg. 73,633, § 2⁴³ (Nov. 22, 2015)</p>	<p>Suspending entry of persons who threaten the “peace, security, and stability” of Burundi through crimes such as the “targeting of women, children, or any civilians through . . . acts of violence (including killing, maiming, torture, or rape or other sexual violence)”;</p> <p>this action was a precursor to steps taken by the United Nations, which in July 2016 passed U.N. Security Council Resolution 2303, authorizing the U.N. Secretary General to assign a police component to monitor the civil conflict in Burundi and report back periodically to the Security Council on the dire situation in that country.</p>	<p>Cooperation</p>
<p>Barack Obama</p> <p>Exec. Order No. 13722, 81 Fed. Reg. 14,943, § 4⁴⁴ (Mar. 15, 2016)</p>	<p>Suspending entry of any person who has aided North Korea government’s nuclear program or other programs that provide financial support for that government’s policies.</p>	<p>Retaliation</p>

⁴³ <https://obamawhitehouse.archives.gov/the-press-office/2015/11/23/executive-order-blocking-property-certain-persons-contributing-situation>

⁴⁴ https://www.treasury.gov/resource-center/sanctions/Programs/Documents/nk_eo_20160316.pdf

<p>Barack Obama</p> <p>Exec. Order No. 13726, 81 Fed. Reg. 23,559, §2⁴⁵ (Apr. 19, 2016)</p>	<p>Expands Exec. Order 13566 (Feb. 25, 2011), by suspending entry of those who have violated arms embargo imposed on factions within Libya by U.N. Security Council Resolution 1970 (2011), or otherwise threatened “peace, security, stability, sovereignty, democratic transition, and territorial integrity” of Libya.</p>	<p>Cooperation</p>
<p>Donald Trump</p> <p>Proclamation 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017)</p>	<p>Suspending entry of nationals from several countries, including Iran, Libya, North Korea, Syria, and Yemen (as well as members of Venezuela government and their families and associates) to address “inadequacies” in covered states’ vetting of visa applicants.</p>	<p>Retaliation</p>
<p>Donald Trump</p> <p>Proclamation 9822, 83 Fed. Reg. 57,661 (Nov. 9, 2018)</p>	<p>Authorizing Attorney General and Secretary of Homeland Security to issue rule barring grant of asylum to a person who crosses the southern border at a point not officially designated for entry; asserting that Proclamation will “facilitate ongoing negotiations with Mexico and other countries regarding appropriate cooperative arrangements” on refugee flows.⁴⁶</p>	<p>Cooperation</p>

⁴⁵ <https://obamawhitehouse.archives.gov/the-press-office/2016/04/19/executive-order-blocking-property-and-suspending-entry-united-states>

⁴⁶ In December, 2018, the Ninth Circuit declined to stay a preliminary injunction issued against the interim final rule authorized by the November, 2018 Proclamation. *See East Bay Sanctuary Covenant v. Trump*, No. 18-17274, 2018 U.S. App. LEXIS 37150 (9th Cir. Dec. 7, 2018); *see also Trump v. East Bay Sanctuary Covenant*, No. 18A615,

As this comprehensive chart demonstrates, past proclamations invoking § 1182(f) entail either retaliation against or cooperation with foreign governments. None address a purely domestic issue such as health care financing, utterly unmoored from a nexus with a foreign government. The Proclamation's lack of fit with past practice should substantially diminish the deference that it receives from this Court.

II. Case Law Does Not Support Deference to Domestic-Focused Proclamations

The Supreme Court's discussion in *Hawaii* of the constitutional bases for deference to a President's immigration orders further underscores why no deference should be accorded here. The Court identified two reasons why the judiciary generally defers to the political

2018 U.S. Lexis 7304 (Dec. 21, 2018) (denying stay). The Ninth Circuit found that the government was not likely to prevail in its appeal of the preliminary injunction against implementation of the final rule. *See East Bay*, 2018 U.S. App. Lexis 37150, at 48-57. According to the Ninth Circuit, the November, 2018 exceeded the President's power because it conflicted with 8 U.S.C. § 1158(a)(1), which allows a foreign national to apply for asylum "whether or not" she seeks to enter at a "designated port of arrival." *Id.* at 48-49. *Amici* submitted a brief to the District Court in *East Bay* supporting the challenge to the interim final rule authorized by the November 2018 Proclamation. *See* Brief of Professors of Immigration Law as Amici Curiae in Support of Plaintiffs, *East Bay Sanctuary Covenant v. Trump*, No. 3:18-cv-06810-JST (N.D. Ca. Dec. 5, 2018), ECF No. 79, https://lawguides.rwu.edu/ld.php?content_id=45891366.

branches on immigration matters, both of which emphasized foreign-facing considerations that are not present here.

First, the President’s need for flexibility in issues of national security and the judiciary’s relative lack of competence in that realm justifies deference to the Executive. The Court noted that a narrow standard of review is particularly important in “the area of national security.” *Citing Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015)

(KENNEDY, J., concurring in judgment). The Court continued:

The upshot of our cases in this context is clear: “Any rule of constitutional law that would inhibit the flexibility” of the President “to respond to changing world conditions should be adopted only with the greatest caution,” and our inquiry into matters of entry and national security is highly constrained.

138 S. Ct. at 2419-20, *citing Mathews v. Diaz*, 426 U. S. 67, 81-82 (1976).

Second, the political nature of foreign admissions decisions, particularly with regards to the United States’ relations with foreign powers, justifies deference to the political branches. The Court observed that the admission and exclusion of foreign nationals is a “fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” 138 S. Ct.

at 2418, *citing Fiallo v. Bell*, 430 U. S. 787, 792 (1977). In fact, the Supreme Court’s notion of constitutional deference on immigration matters is inherently tied to the foreign-facing nature of immigration decisions, which is “vital and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.” *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). The current Proclamation lacks any such link. Because of that gap, this Court should not defer to the President on the Proclamation at issue here.

CONCLUSION

For these reasons, this Court should affirm the district court’s decision.

February 6, 2020

Respectfully submitted,

s/Neil Nandi

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