March 29, 2019

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Committee on the Judiciary
United States Senate
290 Russell Senate Office Building
Washington, D.C. 20510

Ranking Member Dianne Feinstein
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United States Senate
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Chairman Jerold Nadler
Committee on the Judiciary
United States House of Representatives
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Ranking Member Doug Collins
Committee on the Judiciary
United States House of Representatives
1504 Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Graham, Ranking Member Feinstein, Chairman Nadler, and Ranking Member Collins:

As immigration law teachers and scholars, we write in support of the National Origin-Based Antidiscrimination for Nonimmigrants Act" or the "NO BAN Act."

This letter provides a legal analysis about the NO BAN Act. In our view, this bill sets important limiting principles of provisions in the Immigration and Nationality Act (INA) necessary for future actions by current or future administrations. Our conclusions are based on years of experience in the field and a close study of the law and history of the INA.

On June 26, 2018, the Supreme Court by a decision of 5-4 ruled in *Trump v. Hawaii* that Proclamation 9645 (commonly known as the "travel ban") was lawful under both the Immigration

and Nationality Act (INA) and the Constitution. In enacting the Proclamation on September 24, 2017, President Donald J. Trump relied on § 212(f) of the INA which in turn reads in part:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

Many of the scholars and teachers who are signatories to this letter read § 212(f) in light of Congress's decisive rejection of national origin quotas in the l965 Immigration Act, which in § 202(a)(1)(A) prohibits discrimination "because of race, sex [or] nationality" "in the issuance of an immigrant visa." Congress passed this landmark provision to signal its clean break from quotas and to shut any back door executive return to the rigid quota system. Importantly, many of undersigned also interpret § 212(f) to have an inherent limiting principle based on historical past uses of this statute and in the context of the INA as a whole.

Nevertheless, the Supreme Court was unpersuaded and concluded that § 212(f) is a broad statute. Writing for the majority, Chief Justice Roberts held: that § 212(f) "exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry, whose entry to suspend, for how long, and on what conditions.…The sole prerequisite set forth in §1182(f) is that the President 'find[ ]' that the entry of the covered aliens "would be detrimental to the interests of the United States." The President has undoubtedly fulfilled that requirement here." The conclusion by the Court leaves us with a broad interpretation of § 212(f) that in our view provides the President with far too much authority to abuse.

The NO BAN Act permits the President to suspend or restrict the entry of noncitizens "to address specific acts that undermine the security or public safety of the United States; human rights; democratic processes or institutions; or international stability" *temporarily*, and requires consultation with the Departments of Homeland Security and State in advance. The bill further requires all parties to provide "specific evidence" supporting their use of 212(f) and a compliance with the 202(a)(1)(A) of the INA. If 212(f) is invoked, the NO BAN Act requires the President and Secretaries of Homeland Security and State to "narrowly tailor the suspension or restriction to meet a compelling government interest" and consider waivers to any categorical suspension. Importantly, the bill creates a rebuttable presumption for granting waivers when the facts include a family relationship or humanitarian factors. We believe these modifications provide a sound limiting principle to INA 212(f) and limit the abuse of presidential power moving forward. Furthermore, the bill's explicit language about waivers is necessary in light of the extremely low number of waivers being granted under Proclamation 9645 and the number of families separated because of an overbroad application of 212(f) and broken waiver system.

In *Trump v. Hawaii*, the Supreme Court also found no conflict with the nondiscrimination clause at § 202(a)(1)(A) of the INA. This provision currently provides:

> . . . no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

The NO BAN Act modifies this language by extending the nondiscrimination principle to those seeking admission or a visa temporarily ("nonimmigrants"), and by inserting language to prohibit discrimination on the basis of "religion." By expanding the language of 202(a)(1)(A) and implementing a limiting principle to 212(f) that requires compliance with this language, the language appropriately addresses our concerns with animus based on national origin and religion as a matter of law and history.

The 1965 amendments to the INA were codified to mark a new era of nondiscrimination in our immigration laws. The amendments made to the nondiscrimination clause with the NO BAN Act are consistent with this history and ensure that people in legally qualifying relationships under the INA are not discriminated against for impermissible reasons like religion. This language reduces the possibility that families are separated for no other reason than where they are born. Importantly, the fact that family reunification is at the hallmark of our immigration statute is illustrated not only by the 1965 amendments but also by a framework that allocates the vast majority of visas to family relationships.

The NO BAN Act also terminates the various executive actions calling for a ban on visas and entry based on nationality origin. By terminating previous and existing executive orders and Proclamation 9645, the NO BAN Act reinstates visa issuance and entry for scores of individuals and families who have been separated for no other reason than the ban.

Finally, the NO BAN Act also includes reporting requirements to congressional committees that describe the implementation of Presidential Proclamation 9645 and earlier executive orders. For example, the bill requires the Department of State to provide information about the total number of new visa applicants, outcome in visa applications and pending visa applications by country and visa category listed in Proclamation or in any subsequent amendment. This provision infuses transparency in a process that is currently cloaked largely at the consulates of the Department of State. Transparency promotes other administrative law values by keeping the public informed about what the government is doing and consistency by ensuring that similarly relevant cases are treated alike.

In conclusion, we believe the NO BAN Act provides a common sense and humanitarian solution in response to the outcome in *Trump v. Hawaii*.

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