March 29, 2019

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

Ranking Member Dianne Feinstein  
Committee on the Judiciary  
United States Senate  
331 Hart Senate Office Building  
Washington, D.C. 20510

Chairman Jerold Nadler  
Committee on the Judiciary  
United States House of Representatives  
2132 Rayburn House Office Building  
Washington, D.C. 20515

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 1965 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*.

---

Shoba Sivaprasad Wadhia*  
Samuel Weiss Faculty Scholar & Clinical Professor of Law  
Penn State Law – University Park

*Titles and institutions for signatories are included for informational purposes only.*
Professor Em. David Abraham  
University of Miami School of Law  

David C. Baluarte  
Associate Clinical Professor of Law  
Director, Immigrant Rights Clinic  
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; Director Safe Passage Project Clinic  
New York Law School  

Kristina M. Campbell  
Jack and Lovell Olender Professor of Law  
Co-Director, Immigration and Human Rights Clinic  
University of the District of Columbia  
David A. Clarke School of Law  

Jennifer M. Chacón  
Professor of Law  
University of California, Los Angeles (UCLA)  

Ming Hsu Chen  
Professor, University of Colorado Law School  
Faculty-Director, Immigration Law and Policy Program  

Michael J Churgin  
Raybourne Thompson Centennial Professor in Law  
University of Texas at Austin  

Erin B. Corcoran  
Executive Director  
Kroc Institute for International Peace Studies  
University of Notre Dame  

Jill E. Family  
Commonwealth Professor of Law and Government  
Director, Law and Government Institute  
Widener University Commonwealth Law School
Rebecca Feldmann  
Visiting Assistant Professor & Director  
Clinic for Asylum, Refugee and Emigrant Services  
Villanova University Charles Widger School of Law

Kit Johnson  
Associate Professor  
University of Oklahoma College of Law

Lindsay M. Harris  
Assistant Professor of Law & Co-Director, Immigration & Human Rights Clinic  
University of the District of Columbia David A. Clarke School of Law

Kayleen R. Hartman  
Supervising Attorney, Removal Defense Project  
Clinical Teaching Fellow  
Loyola Immigrant Justice Clinic  
Loyola Law School

Laura A. Hernández  
Professor of Law  
Baylor Law School

Laila L. Hlass  
Professor of Practice  
Tulane University Law School

Geoffrey A. Hoffman  
Director, University of Houston Law Center Immigration Clinic

Mary Holper  
Associate Clinical Professor  
Boston College Law School

Alan Hyde  
Distinguished Professor  
Rutgers Law School

Anil Kalhan  
Professor of Law  
Drexel University Thomas R. Kline School of Law

Andrew T. Kim  
Associate Professor  
Syracuse University College of Law
Daniel M. Kowalski  
Editor-in-Chief  
Bender’s Immigration Bulletin (LexisNexis)

Christopher N. Lasch  
Professor of Law  
University of Denver Sturm College of Law

Stephen H. Legomsky  
John S. Lehmann University Professor Emeritus  
Washington University School of Law

Lynn Marcus  
Director, Immigration Law Clinic  
The University of Arizona Rogers College of Law

Peter S. Margulies  
Professor of Law  
Roger Williams University School of Law

Amelia S. McGowan  
Adjunct Professor  
Mississippi College School of Law Immigration Clinic

M. Isabel Medina  
Ferris Family Distinguished Professor of Law  
Loyola University New Orleans College of Law

Professor Vanessa Merton  
Faculty Supervisor, Immigration Justice Clinic  
Elisabeth Haub School of Law at Pace University

Andrew F. Moore  
Professor of Law  
University of Detroit Mercy School of Law

Jennifer Moore  
Professor of Law  
University of New Mexico School of Law

Hiroshi Motomura  
Susan Westerberg Prager Distinguished Professor of Law  
School of Law  
University of California, Los Angeles (UCLA)
Elora Mukherjee
Jerome L. Greene Clinical Professor of Law
Director, Immigrants' Rights Clinic
Columbia Law School

Karen Musalo
Bank of America Foundation Chair in International Law
Professor & Director
Center for Gender & Refugee Studies
U.C. Hastings College of the Law

Emily Torstveit Ngara
Maurice A. Deane School of Law
Hofstra University

Mariela Olivares
Associate Professor of Law
Howard University School of Law

Michael A. Olivas
William B. Bates Distinguished Chair in Law
University of Houston Law Center

Sarah H. Paoletti
Practice Professor of Law
Director, Transnational Legal Clinic
University of Pennsylvania School of Law

Professor Shruti Rana
Indiana University Bloomington

Maritza Reyes
Associate Professor of Law
Florida A&M University College of Law

Victor Romero
Professor of Law
Penn State Law - University Park

Carrie Rosenbaum
Lecturer/Adjunct Professor
Berkeley Law & Golden Gate University School of Law

Erica B. Schommer
Clinical Associate Professor of Law
St. Mary's University School of Law
Ragini Shah  
Clinical Professor of Law  
Suffolk University Law School

Anna Williams Shavers  
Associate Dean of Diversity and Inclusion  
Cline Williams Professor of Citizenship Law  
University of Nebraska College of Law

Margaret H. Taylor  
Professor of Law  
Wake Forest University School of Law

Philip L. Torrey  
Managing Attorney  
Harvard Immigration and Refugee Clinical Program  
Harvard Law School

Claire R. Thomas  
Director, Asylum Clinic  
New York Law School

Enid Trucios-Haynes  
Professor of Law  
Louis D. Brandeis School of Law  
University of Louisville

Yolanda Vázquez  
 Associate Professor of Law  
University of Cincinnati College of Law

Jonathan Weinberg  
 Associate Dean for Research & Faculty Development  
and Professor of Law  
Wayne State University

Deborah M. Weissman  
Reef C. Ivey II Distinguished Professor of Law  
School of Law University of North Carolina at Chapel Hill

Michael J. Wishnie  
William O. Douglas Clinical Professor of Law  
Yale Law School
Lauris Wren
Clinical Professor of Law
Maurice A. Deane School of Law at Hofstra University

Stephen Yale-Loehr
Professor of Immigration Law Practice
Cornell Law School