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
No. 3:19-cv-1743-SI

BRIEF IN SUPPORT OF APPELLEES' PETITION FOR REHEARING EN BANC SUBMITTED BY *AMICI CURIAE* IMMIGRATION LAW PROFESSORS

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STATEMENT OF AMICI'S INTEREST[1]

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 are[2]:

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[1] Amici submit this brief pursuant to Circuit Rule 29-2(a) 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

The panel erred by insufficiently considering the historical and statutory context relevant to the Proclamation at issue. Universal practice under § 1182(f) of the Immigration and Nationality Act ("INA") up until the current Proclamation demonstrated that a foreign-facing nexus was the critical factor cabining executive authority. This Proclamation, however, relies upon domestic health insurance costs to bar the entry of immigrants who lack qualifying health care plans. By discounting the nexus to foreign conduct, the panel removed limitations on executive discretion, jettisoned history, and disregarded Supreme Court analysis. In addition to removing the Proclamation from the context of the INA, the panel also did not consider the Proclamation's impact on the Affordable Care Act's ("ACA") statutory scheme, including the way the Proclamation relies on health insurance coverage to undermine and distort Congressional intent in health insurance legislation. The panel's lack of appropriate consideration for historical and statutory context warrants rehearing.

ARGUMENT

I. The Panel Did Not Consider the Historical Context of § 1182(f) Proclamations

In amici's brief before the panel, amici explained how, prior to the Proclamation at issue, every one of the over forty proclamations and executive orders issued under § 1182(f) or related statutory authority showed a specific nexus with the conduct of foreign government. *See* Dkt. 40, pp. 7–8; *see also* Kate Manuel, CONG. RESEARCH SERV., R44743, EXECUTIVE AUTHORITY TO EXCLUDE ALIENS: IN BRIEF 6-10 (2017) (listing prior § 1182(f) proclamations and orders). In fact, every past practice related to 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.

To illustrate this point, amici provided a comprehensive table confirming the Proclamations' foreign focus by categorizing every past Proclamation as either cooperative or retaliatory. *See* Dkt. 40, pp. 20–35. This past practice and understanding cabined executive power for seventy years. By disregarding this convention, however, the panel left § 1182 unrestrained by historical roots.

The cooperation/retaliation dichotomy is consistent with the Supreme Court's evaluation of past practice under § 1182(f). For example, when analyzing the ban on entry from nationals from seven countries primarily in the Middle East, the Court noted that presidents often used § 1182(f) to "retaliate for conduct by . . . governments that conflicted with U.S. foreign policy interests" and to address "ongoing diplomatic disputes." *Trump v. Hawaii*, 138 S. Ct. 2392, 2413 (2018). The Court also acknowledged the cooperative element when it observed that the President has latitude to "adopt[] a preventive measure in the context of international affairs and national security." *Id.* 2409 (internal punctuation omitted).

One retaliatory proclamation the Supreme Court considered was 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. 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* Maryellen Fullerton, *Cuban Exceptionalism: Migration and Asylum in Spain and the United States*, 35 U. Miami Inter-Am. L. Rev. 527, 562 n.235 (2004)

Other uses of § 1182(f) authority have included retaliating against those who supported a military coup in Haiti, Proclamation 6569, 58 Fed. Reg. 31,897 (June 3, 1993); cooperating with other nations to block war criminals from undermine stabilization efforts in the Balkans, Proclamation 7452, 66 Fed. Reg. 34,775 (June 26, 2001); and retaliating against foreign nationals who targeted the U.S. with "malicious cyber-enabled activities," Exec. Order No. 13694, 80 Fed. Reg. 18,077, § 4 (Apr. 1, 2015).

The uninsured ban departs from this uniform practice and uses the President's immigration-related authority for domestic economic reasons wholly separate from national security or foreign policy interests. Judge Tashima cited this marked departure in his dissent: "[I]n contrast to the proclamation at issue in *Trump v. Hawaii*, Proclamation 9945 does not address 'national security risks.' *Trump v. Hawaii*, 138 S. Ct. at 2403. It

instead 'deals with a purely domestic economic problem: uncompensated healthcare costs in the United States.'" Dkt. 79-1, p. 53 (citation omitted).

The unbroken, decades-long past practice should have informed the panel's analysis of the scope of the President's authority under § 1182(f). Instead, the majority dismissed the foreign/domestic distinction as "unworkable," reasoning that "all" restrictions under § 1182(f) could be viewed as domestic to a "greater or lesser degree." *Id.* at 41. This conclusion fails to distinguish between the root causes of a measure and its incidental effects.

By definition, any restriction on immigration affects the number and identity of persons who are lawfully present in the country. To that extent, any conceivable restriction under § 1182(f) has some domestic component. But it is still possible to distinguish between foreign policy-driven restrictions—such as President Reagan's Cuba measure—that have incidental domestic impacts, and restrictions driven by purely domestic concerns. The former accord with past practice of § 1182 (f) and the leeway courts generally allow the President in international matters. *See, e.g.*, *Hawaii*, 138 S. Ct. at 2419–20 ("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.") (internal quotation omitted). The latter, however, run afoul of the purpose of § 1182 (f), as it had been understood for its entire history until the Proclamation at issue here.

The panel's analysis of § 1182(f) did not sufficiently consider the historical practice and judicial interpretations informing the scope of executive authority under that provision. This merits reconsideration. An additional, similar issue warrants granting the motion to reconsider: the panel did not consider the statutory context of the ACA, when doing so would have exposed the tension between the executive Proclamation and the congressional legislation.

II. The Panel Improperly Discounted the Proclamation's Clash with the ACA's Encouragement of Immigrant Enrollment

The statutory scheme of the ACA depends on a broad "health insurance risk pool." That is, healthy people with lower health care utilization costs must be part of the insurance pools, so as to offset the higher costs of care for less healthy insureds and to facilitate lower insurance premiums. *See King v. Burwell*, 576 U.S. 473, 493 (2015)

(Congress sought to "broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums").

As a general matter, immigrants are healthier than American-born persons. *See infra*, § II.b. In light of this "healthy immigrant effect," Congress deliberately crafted the ACA to encourage the enrollment of immigrants lawfully present in the United States. By barring immigrants for health insurance reasons and directing immigrants towards non-ACA plans, the Proclamation undermines Congress's statutory scheme. The panel did not give sufficient consideration to this issue, which warrants rehearing.

A. The ACA's Guiding Logic: Pooling High and Low Risks For Sustainable Health Care

In health insurance, risk pooling works by enrolling healthy individuals who pay in premiums more than they withdraw in benefits. Enrollment of these low-risk subscribers balances out less healthy individuals—such as the elderly and those with pre-existing conditions—who are be more likely to claim benefits. *Id.* at 481-82, 493. Because of the central importance of risk pooling in sustainable insurance plans, Congress enacted three reforms in the ACA to diversify the health insurance risk pool: guaranteed issue insurance to ensure that anyone

can buy insurance, the individual mandate to incentivize the purchase of insurance before one becomes sick, and tax credits to make insurance affordable. *See id.* at 493.

B. Lawfully Present Immigrants Promote Sustainable Risk-Pooling Under The ACA

Study after study has substantiated the existence of a "healthy immigrant effect," *i.e.*, that immigrants as a whole are healthier than American-born persons. *See* Ilana Redstone Akresh, *Health Service Utilization Among Immigrants to the United States*, 28 Population Research & Pol'y Rev. 795, 799 (2009) (discussing empirical findings on superior health of immigrants compared with natives); Heather Antecol & Kelly Bedard, *Unhealthy Assimilation: Why Do Immigrants Converge to American Health Status Levels?*, 43(2) Demography 337, 337, 339-43 (2006) (concluding that empirical finding of "healthy immigrant effect" is supported by, *inter alia*, consistently lower rates of obesity for immigrants, compared with natives); David L. Ortmeyer & Michael A. Quinn, *The Impact on Health of Recurring Migrations to the United States*, 49(3) Journal of Developing Areas 49, 50 (2015) (discussing empirical foundation for "healthy immigrant effect"); Maria Roura, *Unraveling migrants' health paradoxes: a transdisciplinary research*

agenda, 71 J. Epidemiology & Comm'y Health 870, 871 (2017) (migrants "often display similar or better health indicators" than native-born residents).

The healthy immigrant effect was presented to Congress in the years leading up to the ACA. Specifically, Congress heard expert testimony in 2008 that immigrants "live longer, have less chronic disease, and use less medical resources per capita than American born residents." *See Addressing Disparities in Health and Healthcare: Issues of Reform: Hearing Before the H. Subcomm. on Health of the Committee on Ways and Means*, 110th Cong. 65 (2008) (testimony of Anthony B. Iton, M.D., J.D., MPH, Director of Public Health and Health Officer, Alameda Cty. Pub. Health Dep't).

Congress leveraged this effect to bolster the sustainability of the ACA's framework in two ways. First, Congress authorized the enrollment of lawfully present noncitizens and enacted terms for their participation. *See* 42 U.S.C. § 18051(e)(1)(B) (authorizing enrollment of lawfully present noncitizens in State-contracted standard health plans offered in place of plans available through health insurance exchanges); 42 U.S.C. § 18071(e)(2) (mandating reduction in total annual insurance

expenditure insurers can require of enrollees, including noncitizens lawfully present); 42 U.S.C. § 18081(a)(1) (providing that Secretary of Health and Human Services will set procedures for determining that an individual is lawfully present and therefore may enroll); 42 U.S.C. § 18082(d) (barring ACA participation for noncitizens "not lawfully present").

Second, and most importantly, Congress actively encouraged immigrants to participate in ACA plans through tax credits and other means. *See* 26 U.S.C. § 36B(c)(1)(B)(ii) (providing that noncitizens lawfully present are eligible for tax credits that offset premiums and other costs entailed in enrolling in ACA programs).

Together, these components—permission and encouragement—worked together to advance Congress's goal of bringing healthy immigrants into the risk pool.

C. The ACA's Emphasis on Immigrant Enrollment Marked a Meaningful Departure from Congress's Past Practice

Congress's decision to emphasize and encourage immigrant enrollment in ACA plans is particularly noteworthy in light of Congress's past practice. Specifically, Congress has historically constructed barriers to immigrant participation in health insurance programs.

For example, "[t]he law governing Medicare eligibility has always contained alienage restrictions." *See* Medha D. Makhlouf, *Laboratories of Exclusion: Medicaid, Federalism, and Immigrants*, 95 N.Y.U. L. Rev. 1680, 1701 (2020); *cf. Mathews v. Diaz*, 426 U.S. 67 (1976) (upholding restrictions on immigrants' access to benefits). Congress doubled down on these restrictions in 1996, when it imposed a five-year waiting period for Medicaid eligibility on lawful permanent residents ("LPR") and most other noncitizens who entered the United States legally after August 22, 1996. *See*, *e.g.*, 8 U.S.C. § 1613(a); Janet M. Calvo, *The Consequences of Restricted Health Care Access for Immigrants: Lessons from Medicaid and SCHIP*, 17 Ann. Health L. 175, 179 (2008); Makhlouf, *Laboratories of Exclusion*, *supra*, at 1705-06; Michael J. Wishnie, *Laboratories of Bigotry?: Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. Rev. 493, 506-09 (2001).

In the ACA, however, Congress not only permitted immigrants to enroll, but incentivized them to do so.

D. The Panel Majority Unduly Discounted the Conflict Between the ACA and the Proclamation

The Proclamation clashes with Congress's objectives in the ACA by requiring "approved health insurance" to enter the United States, but

pushing immigrants away from ACA marketplace plans. Specifically, the Proclamation lists nine "approved health insurance" plans. *See* Proclamation 9945, 84 Fed. Reg. 53,991, 53,992 (Oct. 9, 2019). One such plan is an "unsubsidized health plan offered in the individual market within a State." *Id.* By specifying only "unsubsidized" plans, the Proclamations implicitly excludes ACA marketplace plans for those who would qualify for subsidies based on their income. *Cf. id.* (not listing other marketplace plans).

In doing so, the Proclamation undermines the tax credits for immigrants that Congress expressly included in the ACA, for the purposes of broadening the risk pool. *See* 26 U.S.C. § 36B(c)(1)(B)(ii) (noncitizens lawfully present are eligible for tax credits); *King*, 576 U.S. at 493 (tax credits diversify the risk pool by making insurance affordable). The Proclamation undermines Congress's goals by using health insurance as a barrier to entry, thus by its very nature obstructing immigrants' ability to lawfully enter the United States and join the risk pools.

The panel only briefly addressed the conflict between the ACA and the Proclamation. Dkt. 79-1, pp. 34–35. The panel resolved the tension

by determining there is none because the Proclamation only applies to those who have yet to enter the United States while the ACA only authorized enrollment of immigrants who "*already* are 'lawfully present in the United States.'" *Id.* at 35 (emphasis in original).

But this approach is too narrow and thereby ignores the ACA's broader statutory context. By requiring immigrants to obtain a different health insurance plan before being able to access the ACA subsidies, the Proclamation unilaterally imposes a threshold requirement on access to the ACA's immigrant tax incentive. That arbitrarily raised threshold is inconsistent with the ACA's framework.

This exercise of unilateral executive authority to impede legislative policy is particularly notable in light of the Proclamation's unprecedented nature. *See supra*, § I. The panel's decision not to address, let alone reconcile, the conflict between congressional intent and executive power warrants rehearing.

CONCLUSION

For these reasons, this Court should grant the petition for rehearing.

January 29, 2021

Respectfully submitted,

By: s/ Neil G. Nandi

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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