No. 23-334

IN THE
Supreme Court of the United States

UNITED STATES DEPARTMENT OF STATE, ET AL.,
Petitioners,

v.

SANDRA MUÑOZ, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF IMMIGRATION LAW AND HISTORY SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF IMMIGRATION LAW AND HISTORY SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

This brief is submitted on behalf of a group of immigration law and history scholars in support of respondents.[1]

INTEREST OF *AMICI CURIAE*

Amici curiae are scholars of immigration law and history who teach, research, and publish at universities across the United States. They have authored scholarship on various topics including women's citizenship and immigration, race and immigration, Asian American legal history, immigration law, political science, and political sociology. *Amici* submit this brief to provide the Court with relevant context about the history of U.S. immigration law, including the law's consistent emphasis on family reunification and privileging spousal relationships.

A full list of *amici* is attached as an appendix to this brief.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns provisions of the Immigration and Nationality Act (INA) that provide a path for U.S. citizens to petition for their spouses to acquire lawful permanent residency in the United States. *See* 8 U.S.C. § 1101 *et seq.* These provisions reflect the elevated status of marriage and the nuclear family in U.S. immigration law, and the special privileges associated with these relationships—principles that have deep roots in this Nation's history. Federal immigration regulation in the United States has a complex history with some dark chapters; yet, it has regularly treated marriage as a special category, providing married couples with benefits and privileges not extended to others seeking to immigrate.

When the Court considered in *Kerry v. Din*, 576 U.S. 86 (2015), what process a U.S. citizen is due when their spouse is denied a visa, the three-Justice plurality looked to two historical data points—the Expatriation Act of 1907 and Emergency Immigration Act of 1921—as indications that U.S. citizens have no deeply rooted liberty interest in living with their spouse in the United States. *See id.* at 96–97 (plurality opinion). *Amici* submit this brief to provide a broader survey of the historical record, which supports a different conclusion. The history shows that although spouses at times faced legal barriers to entry, the law repeatedly made special accommodations to allow for family reunification, even in contexts where immigration was otherwise closely restricted.

To understand the present significance of a statute like the Emergency Immigration Act of 1921, it is

important to consider the broader historical context surrounding that law. The first federal immigration restrictions targeted specific ethnic groups: first, Chinese immigrants in the 1870s and 1880s and then, a few decades later, Japanese, Southern European, and Eastern European immigrants. Despite the discriminatory nature of these measures, they bent in important ways to facilitate married couples' ability to live together in the United States. The broader restrictions implemented in the early twentieth century—including the national-origins quota system of the 1920s—similarly made exceptions for immediate family members, which served to facilitate reunification of spouses in the United States.

Even in the most restrictive periods of U.S. immigration policy, Congress repeatedly displayed "reverence for the preservation of family . . . by passing family unity provisions." Catherine Lee, *Fictive Kinship: Family Reunification and the Meaning of Race and Nation in American Immigration* 73 (Russell Sage Found. 2013) (hereinafter Lee, *Fictive Kinship*). That lawmakers recognized an interest in family reunification and implemented measures to accommodate it, despite the fact that immigration law in this era was often driven in significant part by racial animus and sexism, illustrates just how deeply rooted the interest in family reunification was.

The Expatriation Act of 1907 also must be understood in a broader historical context. Many early immigration policies addressed marriage in gendered terms—they tended to benefit men who, often already residing legally in the United States, sought entry for their wives and immediate families. Rather than

reflecting an affirmative policy decision to privilege the rights of men over women *with respect to immigration*, the early focus on the rights of husbands to reunite with their wives was largely a product of the more general subordinate legal status of women in the nineteenth and early twentieth centuries. Indeed, until 1922, three years after the ratification of the Nineteenth Amendment, the law treated married women's citizenship as "derivative," meaning their legal rights and status flowed from their husbands'. The Expatriation Act of 1907 followed from that principle. But as U.S. immigration law evolved in the twentieth century, Congress gradually extended equal spousal-immigration benefits to U.S. citizen women with foreign husbands, eliminating gender-based disparities while retaining a core focus on spousal unity.

Marriage and immediate family relationships have continued to play a central role in U.S. immigration policy since World War II, and family reunification was a key feature of the Hart-Cellar Act of 1965, which provided much of the framework for modern immigration law. Properly understood, this history shows that although spousal immigration has been subject to some restrictions for some groups in some periods, our Nation's immigration laws have long recognized the importance of family reunification and made significant accommodations to further that principle.

ARGUMENT

I. EVEN THE MOST RESTRICTIVE HISTORICAL IMMIGRATION POLICIES RECOGNIZED THE IMPORTANCE OF FAMILY REUNIFICATION AND MADE ALLOWANCES TO PERMIT MARRIED COUPLES TO LIVE TOGETHER IN THE UNITED STATES

A full analysis of the history of federal immigration law, reaching back before the early twentieth century, reveals a long tradition of respect for family reunification.

Until the late nineteenth century, immigration was largely unrestricted at the federal level. *See Din*, 576 U.S. at 96 (plurality opinion); Erika Lee, *At America's Gates: Chinese Immigration During the Exclusion Era, 1882–1943*, at 23–25 (Univ. of N.C. Press 2003) (hereinafter Lee, *At America's Gates*); *see generally* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 Colum. L. Rev. 1833 (1993). Rather than seeking to keep prospective immigrants out, for much of early U.S. history, immigration was generally encouraged. *See* Bill Ong Hing, *Defining America Through Immigration Policy*, at 11–25 (Temple Univ. Press 2004) (hereinafter Hing, *Defining America*). [2] Under this largely hands-off

[2] Federal statutes in the Founding Era regulated some aspects of *how* immigration occurred, such as the number of years of residency required to obtain U.S. citizenship or the grounds on which immigrants could be deported. *See* Hing, *Defining America*, at 18–19; *see also generally* Neuman, *supra*. However, Congress did not place any restrictions on who could enter the United States or in what numbers until the Chinese exclusion

regime, men could immigrate freely to the United States with their wives, whose legal status would then flow from their husbands'. *See id.*

Federal regulation of immigration expanded significantly from the 1870s through the 1920s, when unprecedented numbers of prospective immigrants sought to enter the United States. *See generally* Hing, *Defining America*, at 28–72. While the United States generally welcomed immigrants from some countries without numerical limitation until the 1920s, federal regulation in the late nineteenth and early twentieth centuries was overwhelmingly occupied with restricting immigration from Asia. *See id.* at 28–50. More broadly restrictive laws began to take hold in the aftermath of World War I, culminating in the imposition of a national-origins quota system that privileged immigration from Western Europe. *See* Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 18–19 (Princeton Univ. Press 2014). Yet even under the most draconian and discriminatory immigration laws, close family relationships, including marriage, were afforded special privileges, underscoring the strength of the family-reunification principle in the history of U.S. immigration law. *See* Lee, *Fictive Kinship*, *supra*, at 50, 73.

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laws of the late nineteenth century. *See infra* Part I–A; *see also generally* Anna O. Law, *Lunatics, Idiots, Paupers, and Negro Seamen—Immigration Federalism and the Early American State*, 28 Stud. Am. Pol. Dev. 107 (2014).

A. Under The Earliest Federal Immigration Statutes, Which Severely Restricted Chinese Immigration, Wives Of Admissible Men Were Permitted To Immigrate To The United States With Their Husbands

The earliest restrictive federal immigration laws, passed in response to lobbying by California and other western states where Chinese immigrants had been settling in large numbers since the 1848 Gold Rush, aimed to constrain further immigration from China. Broadly speaking, these laws were motivated by racial hostility and concerns that the growing influx of Chinese laborers threatened American ways of life. *See* Lee, *At America's Gates*, *supra*, at 23–30.

The federal government initially viewed Chinese immigration favorably, and it was that sentiment that prompted Congress to ratify the Burlingame Treaty in 1868. Treaty of Peace, Amity, and Commerce, China-U.S., July 28, 1868, 16 Stat. 739 (hereinafter Burlingame Treaty); *see* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 Colum. L. Rev. 641, 650 (2005) (hereinafter Abrams, *Federalization of Immigration Law*). Under the treaty, China and the United States recognized "the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for purposes of curiosity, of trade, or as permanent residents." Burlingame Treaty, *supra*, art. V, 16 Stat. at 740. The treaty provided for a reciprocal grant of "the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the

citizens or subjects of the most favored nation." *Id.* art. VI, 16 Stat. at 740; *see also* George Anthony Peffer, *If They Don't Bring Their Women Here* 32 (Univ. of Ill. Press 1999).

In 1875, in response to growing anti-Chinese sentiment in the American West, Congress passed the Page Act, Pub. L. No. 43-141, 18 Stat. 477 (1875)—the first federal immigrant exclusion policy. Lee, *Fictive Kinship*, *supra*, at 50; Abrams, *Federalization of Immigration Law*, *supra*, at 651. The law was crafted to exclude Chinese immigrants without violating the Burlingame Treaty—an objective it achieved by formally prohibiting only importation of contract laborers (*i.e.*, laborers kidnapped or coerced into service) and prostitutes. Abrams, *Federalization of Immigration Law*, *supra*, at 651 n.41, 695.

Although the Page Act on its face applied to prospective immigrants from "China, Japan, or any Oriental country," Page Act § 1, the primary target was Chinese women. *See* Lee, *Fictive Kinship*, *supra*, at 50 n.3. In practice, the Page Act led to "the virtually complete exclusion of Chinese women from the United States," as "officials who enforced anti-Chinese legislation 'demonstrated a consistent unwillingness, or inability, to recognize women who were not prostitutes among all but wealthy applicants for immigration.'" Abrams, *Federalization of Immigration Law*, *supra*, at 698 (quoting Peffer, *supra*, at 9).

In 1880, the United States and China signed the Angell Treaty, which paved the way for further restrictions on Chinese immigration. *See* Treaty Regulating Immigration from China, China-U.S., Nov. 17, 1880, 22 Stat. 826 (hereinafter Angell Treaty),

modifying Burlingame Treaty, *supra*. The Angell Treaty allowed the United States to "regulate, limit, or suspend" (but not "absolutely prohibit") immigration of Chinese laborers

> [w]henever in the opinion of the Government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof.

Id. art. 1. The treaty specified that such limitations or suspensions "shall apply only to Chinese who may go to the United States as laborers" and that

> Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.

Id.

After the Angell Treaty was ratified, it did not take long for Congress to further restrict immigration of Chinese laborers. In 1882, Congress passed the Chinese Exclusion Act,[3] Pub. L. No. 47-126, 22 Stat. 58,

[3] While the Act was not formally titled the "Chinese Exclusion Act," it eventually became known as such. *See* Charles J. McClain, *In Search of Equality: The Chinese Struggle Against*

declaring the belief that "the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof." *Id.* § 1. The Chinese Exclusion Act, which was framed as a protection for the rights of American workers, suspended immigration of Chinese laborers for ten years. *Id.*; *see* Todd Stevens, *Tender Ties: Husbands' Rights and Racial Exclusion in Chinese Marriage Cases, 1882–1924*, 27 Law & Soc. Inquiry 271, 271 (2002); Lee, *Fictive Kinship*, *supra*, at 50, 53; *see also* McClain, *In Search of Equality*, *supra*, at 147–50. The law tracked the contours of the 1880 treaty by permitting Chinese laborers who already resided in the United States to make return trips to China and specifying that "every Chinese person other than a laborer who may be entitled" under the treaty and the Act to immigrate to the United States would be allowed to do so if they secured a certificate from the Chinese government attesting to their eligibility. Chinese Exclusion Act § 6; *see id.* §§ 3–6; *see also Chew Heong v. United States*, 112 U.S. 536, 543 (1884) (addressing right of return).[4]

Discrimination in Nineteenth-Century America 149 (U.C. Press 1994) (hereinafter McClain, *In Search of Equality*).

[4] In 1884, Congress amended the Exclusion Act to heighten certification requirements "for both new immigrants claiming to enter as non-laborers and . . . those claiming to reenter as returning immigrants." Sherally Munshi, *Race, Geography, and Mobility*, 30 Geo. Immigr. L.J. 245, 256 (2016). The right of return was eliminated entirely a few years later, in 1888, under the Scott Act, Pub. L. No. 50-1064, 25 Stat. 504 (1888). *See* McClain, *In Search of Equality*, *supra*, at 191–92. The Scott Act incorporated provisions from an 1888 treaty that made an exception from the prohibitions on immigration and return for Chinese laborers who had wives, children, or parents who resided legally in the United States. *See id.*

Crucially, although neither the 1880 treaty nor the Exclusion Act expressly mentioned spouses, this Court construed them to allow Chinese men of the educated or merchant classes—that is, non-laborer men who were permitted to immigrate to the United States under this regime—to bring their wives with them. *United States v. Gue Lim*, 176 U.S. 459, 464 (1900); *see* Kerry Abrams, *Family Reunification and the Security State*, 32 Const. Comment. 247, 256–58 (2017); *see also* Kerry Abrams, *What Makes the Family Special?*, 80 U. Chi. L. Rev. 7, 10 (2013) (hereinafter Abrams, *What Makes the Family Special?*).[5]

In one early case concerning Chung Toy Ho and Wong Choy Sin, the wife and child of a Chinese merchant residing in Portland, the Circuit Court for the District of Oregon construed the treaty and statutory scheme to allow their entry, permitting

[5] While non-laborers who were permitted to immigrate to the United States under the 1882 Act were able to bring their families with them, the Exclusion Act did effectively bar Chinese laborers already living in the United States from reuniting with their families while remaining in the country. *See* Abrams, *Federalization of Immigration Law*, *supra*, at 712; *In re Ah Moy*, 21 F. 785, 787 (C.C.D. Cal. 1884) (wife of Chinese laborer with certificate granting him entry deported because she did not have a certificate of her own and was treated as a "laborer" otherwise ineligible for immigration). It is worth noting, however, that Chinese laborer immigrants themselves were not eligible to become U.S. citizens at the time. *See infra* at 13–14 n.7. The Ninth Circuit emphasized the stronger rights of citizens in this context when holding that the wives of American citizens of Chinese ancestry (for example, American-born children of Chinese immigrants) were exempt from the Exclusion Act's certificate requirement. *See Tsoi Sim v. United States*, 116 F. 920, 925 (9th Cir. 1902); *see also* Abrams, *Federalization of Immigration Law*, *supra*, at 712.

reunification. *See In re Chung Toy Ho*, 42 F. 398 (C.C.D. Or. 1890). The court reasoned:

> [A] Chinese merchant who is entitled to come into and dwell in the United States is thereby entitled to bring with him, and have with him, his wife and children. The company of the one, and the care and custody of the other, are his by natural right; and he ought not to be deprived of either.

Id. at 400; *see also United States v. Gue Lim*, 83 F. 136 (D. Wash. 1897) (agreeing with *Chung Toy Ho*); *In re Lee Yee Sing*, 85 F. 635 (D. Wash. 1898) (same). Some courts reached the opposite result, disallowing reunification on the ground that the law, read literally, permitted entry of wives only if they, too, obtained the required certificates. *See In re Ah Quan*, 21 F. 182, 186 (C.C.D. Cal. 1884); *In re Wo Tai Li*, 48 F. 668 (N.D. Cal. 1888); *In re Li Foon*, 80 F. 881 (C.C.S.D.N.Y. 1897).

In 1900, this Court resolved the issue by explicitly adopting the reasoning of *Chung Toy Ho* and holding that the wives and children of Chinese merchants were allowed to enter and reside legally in the United States with their families without obtaining admissibility certificates of their own. *See Gue Lim*, 176 U.S. at 464, 468–69. The Court recognized that the plain text of the treaty did not provide for the admission of spouses, yet the Court concluded it was "not possible to presume that the treaty, in omitting to name the

wives of those who . . . were entitled to admission, meant that they should be excluded." *Id.* at 466.[6]

The complex racial, gender, and class dynamics that shaped immigration policy in this period produced a regime in which family reunification sometimes prevailed and sometimes did not. Yet the law recognized family reunification as a legitimate, weighty interest—even for Chinese immigrants whom the law generally treated with hostility.[7] That

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[6] The existence of a legal pathway for Chinese merchants to bring their wives to the United States did not mean they were able to do so without encountering practical difficulties, as immigration officials "rarely took Chinese merchant men's familial claims at face value." Lee, *Fictive Kinship*, *supra*, at 54; *see also, e.g.*, Stevens, *supra*, at 299. For example, in the case of Chew Hoy Quong, a Chinese merchant who successfully immigrated to the United States, his wife Quok Shee was subjected to prolonged detention and questioning concerning the validity of their marriage. *See* Lee, *Fictive Kinship*, *supra*, at 49; *Chew Hoy Quong v. White*, 244 F. 749 (9th Cir. 1917); *Chew Hoy Quong v. White*, 249 F. 869 (9th Cir. 1918); *see also, e.g.*, Charles J. McClain, *Chinese Immigrants and American Law* (Garland Publ'g 1994) (discussing Quok Shee and her detention); Erika Lee & Judy Yung, *Angel Island: Immigrant Gateway to America* (Oxford Univ. Press 2010) (same). Although these barriers cannot be overlooked, it is significant that many Chinese wives nonetheless "were able to come to the United States when Congress had closed virtually all other doors of entry." Stevens, *supra*, 298.

[7] Arguments for family reunification were given meaningful weight in this period even though many of the men pressing them were Chinese immigrants who were ineligible for U.S. citizenship at the time. The first naturalization statute applied only to "free white persons." Naturalization Act of 1790, ch. 3, 1 Stat. 103. After the Civil War, the right to naturalize was extended to individuals of African descent, but the change in the law did not extend naturalization rights to other non-white

history underscores the enduring importance of family reunification as a central value in shaping U.S. immigration law and policy. "While always contingent, family unification arguments steadily widened the door for an ever-expanding universe of legal Chinese immigrants" in the late nineteenth and early twentieth centuries. Stevens, *supra*, at 299; *see* Lee, *Fictive Kinship*, *supra*, at 54.

B. Early Policies Restricting Immigration From Japan Prioritized Close Family Relationships And Reunification

The treatment of Japanese immigrants in the early twentieth century similarly reflects recognition of the importance of living with one's spouse in this country.

When Congress passed the Chinese Exclusion Act in 1882, almost all Asian immigration was from China. Between 1860 and 1882, fewer than 350 individuals immigrated to the United States from Japan. Paul Finkelman, *Coping with A New "Yellow Peril": Japanese Immigration, the Gentlemen's Agreement, and the Coming of World War II*, 117 W. Va. L. Rev. 1409, 1426 (2015). Until 1885, emigration was illegal

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immigrants. *See* 8 U.S.C. § 359 (1875). The 1882 Exclusion Act affirmatively denied citizenship to immigrants from China. Chinese Exclusion Act § 14. Only in 1943 did Congress, motivated by foreign policy concerns during World War II, amend the law to allow immigrants of Chinese descent to become naturalized citizens. *See* Lee, *Fictive Kinship*, *supra*, at 80-81; *see also* Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. Rev. 405, 415 (2005). The McCarran-Walter Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, later eliminated all other nation-specific exclusions on naturalization. *See infra* at 29.

in Japan, and Japanese immigrants began to arrive in the United States in significant numbers only after 1890. Trina Jones, *Race, Economic Class, and Employment Opportunity*, 72 Law & Contemp. Probs. 57, 69 (2009); *see* Evelyn Nakano Glenn, *Issei, Nisei, War Bride: Three Generations of Japanese American Women in Domestic Service* 22 (Temp. Univ. Press 1986).

As Japanese immigration increased, so did anti-Japanese sentiment. "[S]immering paranoia about the double-edged threat of Japan and Japanese immigrants erupted in 1905, spurred by a decision by the San Francisco School Board to segregate Japanese pupils in the school system from white pupils." Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" As A Prelude to Internment*, 40 B.C. L. Rev. 37, 48–50 (1998). When the policy was implemented in the fall of 1906, the Japanese government filed a formal protest with President Theodore Roosevelt, who initially sought to have the San Francisco School Board rescind its segregation order. *Id.* Only after extensive negotiation was President Roosevelt able to persuade state politicians to prevail upon the Board to rescind its segregation order on the condition that the President would press the Japanese government for an agreement restricting Japanese immigration. *Id.*

In 1907 and 1908, the United States and Japan negotiated the terms of an immigration policy outlined in the "Gentleman's Agreement," a series of six memoranda. Lee, *Fictive Kinship*, *supra*, at 58. The Japanese government agreed to stop issuing passports to most laborers seeking to enter the continental

United States in exchange for protections for those already residing in the United States and their immediate families. *Id.* In particular, the Agreement permitted Japan to continue issuing passports to parents, wives, and children of laborers in the United States. *Id.*; *see generally* Yuji Ichioka, *The Issei: The World of the First-Generation Japanese Immigrants, 1885–1924* (The Free Press 1988); David J. O'Brien & Stephen Fugita, *The Japanese American Experience* (Ind. Univ. Press 1991).

The family-reunification provisions under the Gentleman's Agreement extended not only to couples married in Japan before the husband departed for the United States, but also to couples who married by proxy—where the husband lived in the United States and the wife was still in Japan at the time of the marriage. Lee, *Fictive Kinship*, *supra*, at 59. These proxy marriages, which followed contemporary customs of arranged marriage, occurred when Japanese men were unable to return to Japan to wed and, instead, had their marriages arranged by a go-between using photographs. *See* Glenn, *supra*, at 42–50 (discussing the marriages and experiences of Japanese wives, including those who married by proxy and who immigrated to the United States during this period). The Gentleman's Agreement extended its family-reunification provisions to Japanese women who entered into proxy marriages despite widespread disapproval of the practice in the United States (U.S. immigration officials and politicians, for example, often referred to these women derisively as "picture brides" or "photograph brides"). *See id.* at 44; Lee, *Fictive Kinship*, *supra*, at 59.

The family-oriented immigration policies of the early twentieth century had a substantial impact despite more general hostility towards immigration from this disfavored racial group: 36,064 Japanese wives immigrated to the continental United States between 1908 and 1924. *See* Bureau of Immigr., U.S. Dep't of Com. & Lab., Annual Reports of the Commissioner-General of Immigration (1908–1913); Bureau of Immigr., U.S. Dep't of Lab., Annual Reports of the Commissioner-General of Immigration (1914–1924); *see also* Lee, *Fictive Kinship*, *supra*, at 59.

C. Immigration Policies Of The 1910s And 1920s Contained Many Exceptions For Married Couples To Promote Family Unity

In the 1910s and 1920s, the United States adopted a series of immigration policies that imposed harsh new restrictions, especially (but not exclusively) on those seeking to immigrate from countries outside of Western Europe. Once again, recognition of the value of family unity played a central role in shaping the law.

In contrast to the treatment of Chinese and Japanese immigrants in the late nineteenth and early twentieth centuries, immigration from Europe to the United States remained essentially unregulated until World War I. *See* Ngai, *supra*, at 18–19. During and after World War I, Congress—spurred by a "confluence of political and economic trends" including an increase in "wartime nationalism," the rise of an "international system . . . [that] gave primacy to the territorial integrity of the nation-state," and decreasing economic reliance on immigration—began enacting

new and highly restrictive immigration policies not limited to immigrants from particular countries. *Id.*

Even so, these measures frequently included provisions exempting spouses from restrictions or otherwise making it easier for spouses to immigrate to the United States, reflecting an ongoing "reverence for family" in the immigration realm. Lee, *Fictive Kinship*, *supra*, at 65.

The first of these statutes was the 1917 Immigration Act, Pub. L. No. 64-301, 39 Stat. 874, also known as the "Asiatic Barred Zone Act" because it defined a zone that spanned the geographic area from Afghanistan to the Pacific, provided that all persons from that zone were ineligible for citizenship, and excluded them from entry to the United States. *See id.*; Ngai, *supra*, at 37.[8] For those who remained eligible and sought entry, the 1917 Act introduced a literacy test; however, close family members of immigrants already residing in the United States were exempt. *See* Lee, *Fictive Kinship*, *supra*, at 65; *see also* Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 140–43 (Harv. Univ. Press 2002) (Even the most ardent immigration restrictionists sought to welcome the "literate man who was married, who brought his wife and family with him, and who took on the responsibility to support them.").

While the literacy test was the result of exclusionist lobbying, it ultimately proved ill-suited to the task of limiting immigration, as literacy rates in Europe

[8] Immigration from China and Japan continued to be governed by the Chinese Exclusion Act and Gentleman's Agreement. *See* Lee, *Fictive Kinship*, *supra*, at 65.

had increased since the 1890s and the test itself was not particularly demanding (it "involved recognizing a few words in one's native language on flash cards"). Ngai, *supra*, at 19–20; *see* Lee, *Fictive Kinship*, *supra*, at 65.

When calls for harsher restrictions became "overwhelming" in the aftermath of World War I, Congress passed the Emergency Immigration Act of 1921, Pub. L. No. 67-5, 42 Stat. 5, with the intention of taking the next fourteen months to develop a permanent solution. *See* Ngai, *supra*, at 20. The 1921 Act capped immigration from individual countries at three percent of the number of individuals from that country residing in the United States as determined by the 1910 census. Emergency Immigration Act § 2(a); *see also* Ngai, *supra*, at 20; Lee, *Fictive Kinship*, *supra*, at 65.

The 1921 Act did not fully exempt wives of U.S. citizens from the quota system, but gave them a preference within the confines of that regime. Emergency Immigration Act § 2(d); *see also Din*, 576 U.S. at 96 (plurality opinion). As illustrated by that provision, while the right to entry was not unqualified, wives were afforded privileges not extended to other quota immigrants, reflecting the long tradition of respect for family reunification in the immigration realm.

The history of how the preference system operated in practice underscores the point. The fact that wives were subject to the quota system at all drew intense criticism. *See* Lee, *Fictive Kinship*, *supra*, at 65–67 (detailing objections from legislators to the lack of exceptions for wives and immediate family members, as well as significant opposition from ethnic and immigrant aid associations). As one senator protested, "it

seems to me, the wife ought to be admitted, regardless of all conditions and of all circumstances. The idea of passing an immigration law that will separate families and break home ties is simply heartbreaking, and no man can afford to stand for it." 65 Cong. Rec. S8587 (1924) (statement of Sen. Norris). Indeed, while wives of U.S. citizens were officially given only "preference" within the 1921 quota regime, as a practical matter, they were almost always admitted as immigration officials were influenced by strong public opposition to the exclusion of American citizens' wives. *See* Abrams, *What Makes the Family Special?*, *supra*, at 7, 11–12. Even in the hostile, anti-immigrant environment of the postwar years, allowing quotas to impede family reunification proved a step too far.

Congress soon amended the law to align with practice. Just three years after it was passed, the 1921 Act was superseded by the Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (hereinafter Johnson-Reed Act). *See generally* Ngai, *supra*, at 21–55 (analyzing the 1921 Act's provisions, application, and subsequent revisions). The 1924 Act further tightened the numerical restrictions of the 1921 Act, establishing a national-origins quota system that included temporary two-percent quotas for many European countries (while mandating that the secretaries of Labor, State, and Commerce establish permanent quotas by 1927). *See id.* at 23.

With respect to the treatment of wives, Congress responded to the public outcry against application of national-origins quotas to immediate family members under the 1921 Act by amending the law. The 1924

Act provided for non-quota visas for the wives and unmarried children of U.S. citizens, allowing them to immigrate to the United States outside the quota system. *See* Lee, *Fictive Kinship*, *supra*, at 65–66.[9] The family unity provisions under the 1924 Act enabled the entry of more than "32,000, or 13 percent, of the nearly 242,000 immigrants who entered between 1925 and 1930." Lee, *Fictive Kinship*, *supra*, 67.

This Court enforced the norm underlying the family-reunification provision of the 1924 Act in a related context shortly after its passage. Consistent with the 1917 Act, the 1924 Act excluded from entry all persons who were ineligible for citizenship, including those seeking to immigrate from nearly all of East and South Asia. *See* Ngai, *supra*, at 37. However, Chinese merchants were exempt from that prohibition, as the statute defined "immigrant" to exclude non-citizens entering the United States "solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation." Johnson-Reed Act § 6. That raised the question whether the wives of such merchants were also exempt from the prohibition, given that they were not themselves merchants.

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[9] Under the 1924 Act, a wife's entitlement to preferential treatment depended on the location of her husband when he filed the petition requesting her entrance into the United States. If the husband was living in the United States when he applied for a visa for his wife, the wife could be considered for non-quota status. Johnson-Reed Act § 4. If the husband was a U.S. citizen living abroad at the time he filed a request for his wife's entrance into the United States, the wife would receive preferential status under the immigration quota. *Id.* § 6.

In *Cheung Sum Shee v. Nagle*, 268 U.S. 336 (1925), the Court decided that question and ruled in favor of family reunification. As in *Gue Lim*, the Court acknowledged that the text of the provisions at issue appeared to bar entry of Chinese merchants' wives: in "a certain sense it is true that [the merchants' wives] did not come 'solely to carry on trade.'" *Id.* at 346. Nonetheless, the Court adhered to the rationale of *Gue Lim*, which held it was a "necessary implication" of admitting merchants that their "wives and minor children" should also be admitted. *Id.* Notwithstanding the 1924 Act's disparate treatment of European and Asian immigrants, *Cheung Sum Shee* allowed entry to Chinese merchants' wives on a non-quota basis—like the Act's provisions for European wives. *See id.*; *see also* Lee, *Fictive Kinship*, *supra*, at 67.

To be sure, family reunification did not always prevail. On the same day it decided *Cheung Sum Shee*, the Court rejected a similar claim regarding entry of Chinese wives of U.S. citizens, finding no possible path around the text of the 1924 Act that "plainly exclude[d]" them due to their nationality. *Chang Chan v. Nagle*, 268 U.S. 346, 352 (1925). This restriction on immigration of American citizens' wives, though more narrowly targeted than the quotas under the 1921 Act, was also met with resistance and ultimately prompted legislative action. In 1930, Congress amended the law to allow those who were married before 1924 to enter the United States. Act of June 13, 1930, Pub. L. No. 71-348, 46 Stat. 581; *see* Stevens, *supra*, at 300. And although the result in *Chang Chan* ostensibly called for deportation of the petitioners' wives and similarly situated women, none were deported in the years before the law was amended to

formally permit them to stay. *See* Stevens, *supra*, at 300. Local immigration commissioners instead allowed the women to remain with their families in the United States on a temporary basis, subject to bonds, pending legislative action. *See id.*

The law and practice of this period illustrate the ongoing importance of family-reunification principles in the immigration context, even with respect to laws that reflected a highly restrictive approach to immigration from Asian countries.

II. AS WOMEN GAINED POLITICAL POWER IN THE TWENTIETH CENTURY, IMMIGRATION LAWS EVOLVED TO AFFORD WOMEN RIGHTS TO REUNITE WITH THEIR HUSBANDS IN THE UNITED STATES

Like the Emergency Immigration Act of 1921, the Expatriation Act of 1907, Pub. L. No. 59-193, 34 Stat. 1228, is best understood when situated within the broader historical context. It is of course true that family-reunification provisions in early immigration law privileged the rights of men to have their wives (and children) join them in the United States. That pattern reflects the particular gender dynamics of the time, rather than a normative preference against spousal unity. Legal distinctions between the rights of U.S. citizen men and women eroded as women gained political power and outdated views about gender and family roles gradually changed, resulting in family-reunification provisions that more even-handedly afforded special spousal-immigration privileges for both husbands and wives.

The common law historically treated husband and wife as "one person in the law"—a doctrine known as "coverture." 1 William Blackstone, Commentaries *443. The coverture doctrine effectively merged a married woman's identity into her husband's, and thereby deprived her of the right to act independently in many respects. *See* Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 San Diego L. Rev. 593, 596 (1991).

Early federal citizenship and immigration legislation reflected this general view of the relationship between husband and wife, and the primacy of the husband in that relationship. For example, in 1855, Congress granted white women derivative citizenship through their husbands. Act of Feb. 10, 1855, 10 Stat. 604 ("Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen"); *see* Martha Gardner, *The Qualities of a Citizen: Women, Immigration, and Citizenship, 1870–1965*, at 15 (Princeton Univ. Press 2005).

For the next six decades, the judiciary grappled with an ambiguity in the 1855 law: What about the citizenship of an American woman who married a non-citizen man? The courts were split on the question, as were four attorneys general. *Comitis v. Parkerson*, 56 F. 556, 563 (C.C.E.D. La. 1893). *Compare Pequignot v. City of Detroit*, 16 F. 211, 217 (C.C.E.D. Mich. 1883) (woman loses American citizenship), *with Comitis*, 56 F. at 563 (woman retains American citizenship).

Congress enacted the Expatriation Act of 1907 in response to those years of conflict over this issue.

Congress settled the matter by adopting the dominant international approach: "[t]hat any American woman who marries a foreigner shall take the nationality of her husband." Expatriation Act of 1907, 34 Stat. at 1228; *see also* Cott, *supra*, at 143–44 ("So accustomed were advocates of the 1907 provision to giving priority to the male citizen that they did not see it as a slight or a threat to American women, whose citizenship was assumed to be relatively unimportant because they did not have political rights anyway.").

As the women's suffrage movement gained steam, prioritizing male citizens as a matter of "administrative rationality" became less tenable. *See* Cott, *supra*, at 143–44; *cf. Mackenzie v. Hare*, 239 U.S. 299, 311–12 (1915) (entertaining American woman's challenge to Expatriation Act of 1907). In the face of social and political change, Congress began to reform U.S. immigration law to reflect greater gender parity, while maintaining an emphasis on marriage and the nuclear family through family-reunification provisions. *See* Lee, *Fictive Kinship*, *supra*, at 68–69.

To that end, Congress repealed the Expatriation Act just fifteen years after it was enacted. In 1922, three years after the ratification of the Nineteenth Amendment, Congress passed the Cable Act, Pub. L. No. 67-346, 42 Stat. 1021, which granted women independent citizenship for the first time and reversed the denationalization provisions of the 1907 Act. *See generally* Candice Lewis Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* 45–112 (U.C. Press 1998) (surveying rationale behind and reactions to the Expatriation Act of 1907 and Cable Act of 1922). In addition, under the Cable

Act foreign women no longer automatically obtained U.S. citizenship upon marriage to American men. Instead, they had to go through the naturalization process themselves, although they were treated preferentially—the law applied a one-year residency requirement for these women, as opposed to the general five-year requirement that applied to other immigrants. Lee, *Fictive Kinship*, *supra*, at 69–70.

Over the following decades, Congress continued to amend the immigration laws, gradually moving closer to equal treatment of the genders. In the 1924 Act, Congress exempted only foreign wives from the national-origins quota system, meaning foreign husbands of U.S. citizen women counted towards quotas, but it also broadened the preference category to include foreign husbands. Johnson-Reed Act § 6.

In the years following the 1924 Act, Congress began to grant certain foreign husbands non-quota status. In May 1928, Congress amended the 1924 Act to extend non-quota status to foreign husbands—provided they were married to a U.S. citizen woman before June 1, 1928. Act of May 29, 1928, 45 Stat. 1009. Four years later, Congress extended this provision to foreign husbands who married prior to July 1, 1932. Act of July 11, 1932, 47 Stat. 656. In 1948, Congress enacted a similar provision as part of the post–World War II Displaced Persons Act, Pub. L. No. 80-774, 62 Stat. 1009, granting "immigrant husbands married to US citizen wives retroactive non-quota status if the marriage had been entered into before the date of the enacting legislation." Abrams, *What Makes the Family Special?*, *supra*, at 12 n.29.

In 1952, the McCarran-Walter Act, Pub. L. No. 82-414, 66 Stat. 163 (1952), finally gave women full parity under the U.S. family-reunification regime, as it replaced the word "wives" with "spouses" of U.S. citizens in the provision describing who was eligible to immigrate on a non-quota basis. *Id.* § 101 (defining a non-quota immigrant as "an immigrant who is the child or the spouse of a citizen"); *see* Lee, *Fictive Kinship*, *supra*, at 66–67.

III. IMMIGRATION REFORMS IN THE MID-TWENTIETH CENTURY AND BEYOND CONTINUED TO PLACE SPECIAL EMPHASIS ON ENABLING FAMILIES TO LIVE TOGETHER IN THE UNITED STATES

Consistent with the earlier history, close family connections, and marriage in particular, continued to be a driving force behind immigration law in the wake of World War II and beyond.

World War II was a catalyst for immigration reform. In 1943, Congress repealed the Chinese Exclusion Act in order to strengthen relations with China and to "uphold American legitimacy" against the backdrop of a war against authoritarianism. Lee, *Fictive Kinship*, *supra*, at 80; *see* Magnuson Act, Pub. L. No. 78-199, 57 Stat. 600 (1943).

Even as racial exclusions in U.S. immigration laws began to ease, frustrations with the lengthy, complicated, and fragmented family-reunification process for dependents of American servicemen abroad prompted calls for further change. Lee, *Fictive Kinship*, *supra*, at 74–75; *see generally* Jenel Virden,

Good-bye, Piccadilly: British War Brides in America 49–63 (Univ. of Ill. Press 1996) (discussing postwar reforms to the U.S. immigration system). In 1944, the U.S. military responded with a new policy providing free transportation to the United States for all American servicemen, their overseas brides, and foreign-born dependents. Virden, *supra*, at 50.

Despite the military's liberalized transportation policy, soldiers and their new families continued to complain about intense bureaucratic burdens and long wait times to obtain visas to enter the United States. To alleviate these concerns, Congress passed the War Brides Act of 1945, Pub. L. No. 79-271, 59 Stat. 659, which served to "expedite the admission . . . of alien spouses and alien minor children of citizen members of the United States armed forces" by waiving visa requirements for most European war brides. 59 Stat. at 659; *see* Virden, *supra*, at 54. Over the next several years, Congress rapidly expanded this postwar family-reunification regime by continuing to ease administrative burdens and eliminate racial restrictions. *See* Alien Fiancées and Fiancés Act of 1946, Pub. L. No. 79-471, 60 Stat. 339 (easing visa requirements for foreign spouses); Luce-Celler Act, Pub. L. No. 79-483, 60 Stat. 416 (1946) (eliminating exclusions on Indian and Filipino immigrants); Chinese War Brides Act, Pub. L. No. 79-713, 60 Stat. 975 (1946) (granting non-quota status to Chinese wives of American citizens); War Brides Act of 1947, Pub. L. No. 80-213, 61 Stat. 401 (easing racial exclusions for marriages occurring within thirty days of passage); War Brides Act of 1950, Pub. L. No. 81-717, 64 Stat. 464 (renewing the War Brides Act and eliminating all racial exclusions on non-quota immigration visas for

foreign spouses and dependents of American servicemen).

Motivated in large part by a desire to actualize the United States' family-reunification goals, Congress removed all race- and nationality-based exclusions on naturalization in the McCarran-Walter Act of 1952. Lee, *Fictive Kinship*, *supra*, at 86–90; *see* 98 Cong. Rec. S2141 (1952) (statement of Sens. Humphrey, Lehman, Benton, Langer, Kilgore, Douglas, McMahon, Green, Pastore, Murray, Kefauver, Morse, and Moody) ("This bill would reunite divided families, some members of which are already in the United States as citizens [or] permanently resident aliens."). As a result of these reforms, "family reunification was the dominant mode of entry between 1953 and 1965." Lee, *Fictive Kinship*, *supra*, at 91.

By the early 1960s, the American public and politicians from both parties agreed that more changes to the immigration system were needed. A 1965 Gallup poll found that a majority of respondents considered family ties a "very important factor" in deciding which immigrants to admit. Lydia Saad, *In 1965, Americans Favored Immigration Based on Family Ties*, Gallup (Jan. 12, 2018), https://news.gallup.com/vault/225401/1965-americans-favored-immigration-family-ties.aspx; *see* David M. Reimers, *Still the Golden Door: The Third World Comes to America* 83 (Colum. Univ. Press 2d ed. 1992). Legislators similarly "identified family reunification as *the* fundamental goal of immigration reform." Lee, *Fictive Kinship*, *supra*, at 92; *see* Letter from Sen. John F. Kennedy to Rep. Alfred E. Santangelo (Oct. 8, 1960) ("I believe that the most important immediate objective of

immigration reform is the reuniting of families. There are many new citizens in America whose immediate families are in other lands, waiting patiently to join them.").[10]

Family reunification was the "centerpiece" of the Hart-Cellar Act immigration regime, enacted in 1965. Lee, *Fictive Kinship*, *supra*, at 94, 96; Daniel J. Tichenor, *Dividing Lines: The Politics of Immigration Control in America* 215 (Princeton Univ. Press 2002); *see* Hart-Cellar Act, Pub. L. No. 89-236, 79 Stat. 911 (1965); *see generally* Bill Ong Hing, *Making and Remaking Asian America Through Immigration Policy, 1850–1990* 79–120 (Stan. Univ. Press 1994) (detailing the social, economic, and demographic impact of the 1965 reforms). Under the Hart-Cellar Act, "74 percent of all visas were reserved for family members of American citizens and permanent residents." Lee, *Fictive Kinship*, *supra*, at 94; *see* Tichenor, *supra*, at 216. The Act ended the national-origins quota system, established a preference system with a focus on immigrants' skills and family ties to U.S. citizens or residents, and imposed no numerical limit on visas for immediate relatives of U.S. citizens (including spouses, children and, for the first time, parents). Lee, *Fictive Kinship*, *supra*, at 26, 33, 95. Under the Hart-Cellar Act, immigrants regardless of national

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[10] *See also, e.g.*, Dwight D. Eisenhower, Special Message to the Congress on Immigration Matters (Feb. 8, 1956) (identifying "close family relationships" as a "factor that must be taken into consideration" in formulating immigration policy); Letter from Vice President Richard Nixon, to Rep. Alfred E. Santangelo (Sept. 26, 1960) ("Humanitarianism itself calls for action to bring about a reunion of immediate family members under preferential quotas.").

origin, race, or ethnicity were eligible to bring over their spouses and minor children outside of any form of quota system. *Id.* at 33.

In the decades since the passage of the Hart-Cellar Act, family-based immigration has continued to play a central role in federal immigration policy. *See generally* Reimers, *supra* (discussing twentieth-century trends in immigration reform, including the effects of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, which featured an "expansion of the family unification preferences for immediate family members of resident aliens," *id.* at x). Between 2001 and 2011, family immigration accounted for nearly two thirds of total immigration to the United States. *See* Lee, *Fictive Kinship*, *supra*, at 4. These modern trends build on the elevated status married couples and families have enjoyed throughout U.S. immigration history.

CONCLUSION

Amici ask that the Court consider the history discussed above, including the persistent pattern of affording privileged status to marriage and family reunification across the history of U.S. immigration law and policy, when evaluating the rights asserted by respondents. While not absolute, the law's repeated recognition of the strong interest in spousal reunification shows that the interest is robust enough to warrant meaningful procedural protections.

Respectfully submitted,

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March 28, 2024

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[1] Institutional affiliations are provided for identification purposes only. The views expressed in this brief do not necessarily reflect the views of the institutions with which *amici* are affiliated.

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