UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

International Refugee Assistance Project; **HIAS, Inc.**; **Middle East Studies Association of North America, Inc.**; **Muhammed Meteab**; **Paul Harrison**; **Ibrahim Ahmed Mohomed**; **John Does Nos. 1** and **3**; and **Jane Doe No. 2**, Plaintiffs/Appellees, v. **Donald J. Trump**, **Department of Homeland Security**, **Department of State**, **Office of the Director of National Intelligence**, **John F. Kelly**, **Rex W. Tillerson**, and **Daniel R. Coats**, Defendants/Appellants.	Case 17-1351

NAPABA'S MOTION FOR LEAVE TO FILE AMICUS-CURIAE BRIEF IN SUPPORT OF PLAINTIFFS

The National Asian Pacific American Bar Association hereby moves the Court for leave to file an amicus-curiae brief in support of Plaintiffs. Fed. R. App. P. 29(a)(2). NAPABA's proposed brief is attached as Exhibit 1. *Id.* R. 29(a)(3). As explained below, NAPABA has a strong interest in this matter and its brief presents relevant context for the dispute over whether the United States can legally exclude aliens on the basis of national origin.

NAPABA is the national association of Asian Pacific American attorneys, judges, law professors, and law students, representing the interests of over seventy-five state and local Asian Pacific American bar associations and nearly 50,000 attorneys who work in solo practices, large firms, corporations, legal services organizations, nonprofit organizations, law schools, and government agencies. Since its inception in 1988, NAPABA has served as the national voice for Asian Pacific Americans in the legal profession and has promoted justice, equity, and opportunity for Asian Pacific Americans. In furtherance of its mission, NAPABA opposes discrimination, including on the basis of race, religion, and national origin, and promotes the equitable treatment of all under the law.

NAPABA fulfills "the classic role of amicus curiae by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982); *see also Missouri v. Harris*, No. 2:14-CV-00341-KJM, 2014 WL 2987284, at *2 (E.D. Cal. July 1, 2014) (citing *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995), and discussing courts' "broad discretion regarding the appointment of *amici*")).

This case concerns the government's use of national origin to exclude individuals from the United States. *See generally* Exec. Order No. 13780, 82 Fed.

Reg. 13,209 (Mar. 6, 2017). NAPABA's brief highlights the history of nationality-based immigration discrimination as it has affected the Asian Pacific Islander community and addresses statutory limitations on executive discretion imposed by the Immigration and Nationality Act, which Congress intended to serve as a bar against nationality-based discrimination, as well as the Constitution of the United States.

Accordingly, NAPABA urges the Court to grant it leave to file its amicus-curiae brief and deem the attached brief as filed in this matter.

Dated: April 19, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE–VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type–volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A), because it contains 386 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5) and the type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word (version 14.0.7172.5000 (32-bit)) with 14-point Times New Roman.

Dated: April 19, 2017

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PROOF OF SERVICE

I hereby certify that the foregoing **NAPABA's Motion for Leave To File Amicus-Curiae Brief in Support of Plaintiffs** was filed on April 19, 2017, using the Court's Electronic Case Filing system, which automatically generates and sends by email a Notice of Docket Activity to all registered attorneys participating in this case.

s/Joshua David Rogaczewski
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Case 17-1351

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Plaintiffs/Appellees,

v.

Donald J. Trump, **Department of Homeland Security**, **Department of State**, **Office of the Director of National Intelligence**, **John F. Kelly**, **Rex W. Tillerson**, and **Daniel R. Coats**,

Defendants/Appellants.

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

AMICUS-CURIAE BRIEF OF THE NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION IN SUPPORT OF PLAINTIFFS AND AFFIRMANCE

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fourth Circuit Rule of Appellate Procedure 26.1, the National Asian Pacific American Bar Association, who is an amicus curiae, makes the following disclosure:

1. NAPABA is *not* a publicly held corporation or other publicly held entity.

2. NAPABA does *not* have any parent corporations.

3. Ten percent or more of NAPABA's stock is *not* owned by a publicly held corporation or other publicly held entity.

4. There is *not* any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation.

5. This case does *not* arise out of bankruptcy proceeding.

Dated: April 19, 2017

s/Joshua David Rogaczewski
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INTEREST OF AMICUS CURIAE

The National Asian Pacific American Bar Association ("NAPABA") is the national association of Asian Pacific American ("APA") attorneys, judges, law professors, and law students, representing the interests of over seventy-five national, state and local APA bar associations and nearly 50,000 attorneys who work in solo practices, large firms, corporations, legal services organizations, nonprofit organizations, law schools, and government agencies.[1] Since its

[1] Forty-three of NAPABA's member associations have affirmatively endorsed this brief, including: Arizona Asian American Bar Association, Asian American Bar Association of the Greater Bay Area, Asian American Bar Association of Greater Chicago, Asian American Bar Association of New York, Asian American Bar Association of Ohio, Asian American Criminal Trial Lawyers Association, Asian American Lawyers Association of Massachusetts, Asian Bar Association of Washington, Asian Pacific American Bar Association of Central Ohio, Asian Pacific American Bar Association of Los Angeles County, Asian Pacific American Bar Association of Pennsylvania, Asian Pacific American Bar Association of Silicon Valley, Asian Pacific American Bar Association of South Florida, Asian Pacific American Bar Association of Tampa Bay, Asian Pacific American Bar Association of Virginia, Asian Pacific American Lawyers Association of New Jersey, Asian Pacific American Women Lawyers Alliance. Asian/Pacific Bar Association of Sacramento, Austin Asian American Bar Association, Chinese American Bar Association of Greater Chicago, Connecticut Asian Pacific American Bar Association, Filipino American Lawyers Association of Chicago, Filipino American Lawyers of San Diego, Filipino Bar Association of Northern California, Japanese American Bar Association, Korean American Bar Association of Chicago, Korean American Bar Association of Northern California, Korean American Bar Association of Southern California, Korean-American Bar Association for the Washington, DC Area, Korean American Lawyers Association of Greater New York, Michigan Asian Pacific American Bar Association, Minnesota Asian Pacific American Bar Association, Missouri Asian American Bar Association, National Asian Pacific American Bar Association—Hawaii Chapter, National Filipino American Lawyers Association, Orange County Asian American

inception in 1988, NAPABA has served as the national voice for APAs, including Muslim Americans from Asian countries, in the legal profession and has promoted justice, equity, and opportunity for APAs. In furtherance of its mission, NAPABA opposes discrimination, including on the basis of race, religion, and national origin, and promotes the equitable treatment of all under the law. NAPABA and its members have experience with and a unique perspective on attempts by the U.S. Government to improperly restrict admission and immigration based on nationality or religion, of which the Executive Orders at issue are simply the latest version.[2]

ARGUMENT

I. Executive Order History.

On January 27, 2017, President Donald J. Trump issued Executive Order No. 13769, 82 Fed. Reg. 8977, titled, "Protecting the Nation from Foreign Terrorist Entry into the United States" ("Original Order"). The Original Order was temporarily enjoined by multiple courts, including the U.S. District Court for the

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Bar Association, South Asian Bar Association of Chicago, South Asian Bar Association of Northern California, South Asian Bar Association of Southern California, South Asian Bar Association of Washington, Southern California Chinese Lawyers Association, Tennessee Asian Pacific American Bar Association, and the Thai American Bar Association

[2] NAPABA has moved for leave to file its amicus-curiae brief. *See* Fed. R. App. P. 29(a)(4)(D). No counsel for a party authored this brief in whole or in part; no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than NAPABA, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. *See id.* R. 29(a)(4)(E).

Western District of Washington, whose order the U.S. Court of Appeals for the Ninth Circuit declined to stay. *Washington v. Trump*, 847 F.3d 1151, 1161–62 (9th Cir. Feb. 9, 2017) (citing *Boumediene v. Bush*, 553 U.S. 723, 765 (2008)).[3]

On March 6, 2017, the President signed Executive Order No. 13780, 82 Fed. Reg. 13209, with the same title ("Revised Order"), replacing the Original Order and maintaining many of the same restrictions, including restricting granting of visas to individuals from six of the original seven nations based upon their country of origin. The U.S. District Court for the District of Maryland preliminary enjoined the executive from enforcing or implementing section 2(c) of the Revised Order, concluding that "the history of public statements continues to provide a convincing case that the purpose of the Second Executive Order remains the realization of the long-envisioned Muslim ban." *Int'l Refugee Assistance Project v. Trump*, No: TDC-17-0361, slip op. at 30; *see also Hawai'i v. Trump*, No. 1:17-cv-00050 (temporarily and then later preliminarily enjoining enforcement or implementation of sections 2 and 6 of the Revised Order because ample evidence demonstrated that

[3] *See also, e.g., Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (even in the context of immigration law, congressional and executive power "is subject to important constitutional limitations").

its primary purpose was the impermissible religious objective "of temporarily suspending the entry of Muslims," in violation of the Establishment Clause).[4]

A threshold question presented by this appeal is whether courts should ignore evidence of impermissible intent outside of the context of the language of the Revised Order. This Court's answer to that question must be informed by our country's history of discrimination in immigration in which nationality often served as a proxy for race and religion.

II. In 1965, the United States Government Renounced Nationality-Based Discrimination in Immigration Due to Past Injustice.

During the heart of the Civil Rights Era, Congress enacted and President Lyndon Johnson signed the Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911, to prohibit preference, priority, or discrimination in the issuance of immigrant visas due to "race, sex, nationality, place of birth, or place of

[4] Indeed, the very reference in both the Original Order and the Revised Order to "a temporary pause" on the entry of nationals from the designated countries is misleading. The Executive Order indicates that, based on reports to the President, the President will issue a proclamation that will prohibit "entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means." This clearly indicates that, notwithstanding the purportedly fixed 90 day suspension, the ban will not be lifted until the administration is satisfied that foreign nationals from these countries (and possibly others to be named) are being properly vetted. Based on these points, the ban is better described as an "indefinite" ban, rather than one that is merely "temporary." The somewhat artful drafting of "a temporary pause" masks the truly pernicious scope of the Executive Orders.

residence." 8 U.S.C. § 1152(a)(1)(A). This provision marked a firm break from the country's long history of invidious discrimination in immigration. It sought to prevent the country from repeating the errors of its past. The Revised Order departs from the spirit—and arguably the letter—of Section 1152(a)(1)(A) restrictions, and warrants this Court's close scrutiny.

A. The Revised Order Echoes Historical Discrimination in the Application of Immigration Laws Based upon National Origin.

APAs are acutely familiar with the impact of exclusionary laws, having long been the subjects of systematic and expansive immigration restrictions driven by racial, ethnic, and religious animus. These historical laws not only excluded people from Asian countries, but hurt those already in the United States by legitimizing and validating ugly stereotypes and inequalities. This was true even when the laws themselves were facially neutral.

Asians first began migrating to the U.S. mainland in significant numbers in the mid-1800s, led by Chinese nationals. *See* Bill Ong Hing, *Making and Remaking Asian America Through Immigration Policy, 1850–1990*, at 19–20 (1993). As conditions weakened in their homelands, economic opportunity beckoned Asian laborers to the United States. The discovery of gold and westward expansion fueled demand for low-wage labor. Industrial employers actively recruited Chinese nationals to fill some of the most demanding jobs, particularly in domestic service, mining, and railroad construction. *Id.* at 20.

However, the resulting growth in the immigrant labor population provoked anger and resentment among native-born workers eager for work and better wages. *Id*. at 21. Chinese immigrants, in particular, became targets of fierce hostility and violence. The so-called "Yellow Peril" refers to the widespread characterization of Chinese immigrants as "unassimilable aliens" with peculiar and threatening qualities. *See* Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 Asian Am. L.J. 71, 86–89 (1997).

Congress catered to this xenophobia and racism by passing a series of laws that discouraged and ultimately barred immigration from China and other Asian countries. These laws marked the first time the federal government broadly enacted and enforced an immigration admissions policy that defined itself based on whom it excluded.[5] The first such law came toward the end of Reconstruction, when Congress enacted the Page Act. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477. Barring the entry of Asian immigrants considered "undesirable," the Page Act was largely enforced against Asian women, who were *presumed to be prostitutes* simply by virtue of their ethnicity. *See* George Anthony Peffer, *Forbidden Families:*

[5] Naturalization and citizenship laws have always limited the scope of who could be a citizen, but the same was not so for rules on entry to the United States. The Naturalization Act of 1870, ch. 254, 16 Stat. 254, which barred Asians from naturalization, prefaced the era of Asian exclusion.

Emigration Experiences of Chinese Women Under the Page Law, 1875–1882, 6 J. Am. Ethnic Hist. 28, 28–46 (1986).

A few years later, Congress responded to persistent anti-Chinese fervor with the Chinese Exclusion Act on May 6, 1882, ch. 126, 22 Stat. 58, the first federal law to exclude people on the basis of their nationality. On the premise that the "coming of Chinese laborers . . . endanger[ed] the good order" of areas in the United States, the Act provided that "[i]t shall not be lawful for any Chinese laborer to come, or, having so come after the expiration of said ninety days, to remain within the United States." *Id.* § 1, 22 Stat. at 59. The Chinese Exclusion Act halted immigration of Chinese laborers for ten years, prohibited Chinese nationals from becoming U.S. citizens, and uniquely burdened Chinese laborers who were already legally present and wished to leave and re-enter the United States. Congress first extended the exclusion period by ten years in 1892 with the Geary Act, ch. 60, 27 Stat. 25, and then indefinitely in the Act of Apr. 29, 1902, Pub. L. No. 57-90, 32 Stat. 176.

After the Chinese exclusion laws foreclosed employers from importing Chinese laborers, immigrants began coming in larger numbers from Japan, Korea, India, and the Philippines. *See* Hing, *supra*, at 27–31. As with the Chinese nationals before them, these immigrants and others, including southern and eastern Europeans, encountered strong nativist opposition as their numbers rose. *Id.* at 32.

The exclusionary policies of the U.S. government enforced and validated xenophobic and racist sentiments and enabled violent backlash. Nativist Americans established the Asiatic Exclusion League in the early 20th century to prevent immigration by people of Asian origin to the United States and Canada, which had a similar nationality-based system of immigration at the time.[6] On September 4, 1907, the Asiatic Exclusion League and labor unions led the "Bellingham Riots" in Bellingham, Washington, to expel South Asian immigrants from local lumber mills. *See 1907 Bellingham Riots, Seattle Civil Rights & Labor History Project*, *available at* http://depts.washington.edu/civilr/bham_intro.htm; *see also* Erika Lee, *The Making of Asian America: A History* 163–64 (2015). Herman Scheffauer's *The Tide of the Turbans* noted that: "Again on the far outposts of the western world rises the spectre of the Yellow Peril and confronts the affrighted pale-faces," and

[6] *See* Victor M. Hwang, *Brief of Amici Curiae Asian Pacific Islander Legal Outreach and 28 Asian Pacific American Organizations, in support of all respondents in the Six Consolidated Marriage Cases, Lancy Woo and Cristy Chung, et al., Respondents, v. Bill Lockyer, et al., Appellants on Appeal to the Court of Appeal of the State of California, First Appellate District, Division Three*, 13 Asian Am. L.J. 119, 132 (2006) (the Asiatic Exclusion League was formed for the stated purpose of preserving "the Caucasian race upon American soil . . . [by] adoption of all possible measures to prevent or minimize the immigration of Asiatics to America" (internal quotation marks omitted)).

lamented "a threatening inundation of Hindoos over the Pacific Coast," which it proposed to address by legislation. 43 Forum 616 (1910).[7]

Congress responded to these growing populations in the same way that it had to the perceived threat of Chinese immigrants. The Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 847, catered to nativist preferences by creating the "Asiatic Barred Zone," which extended the Chinese exclusion laws to include nationals of other countries in South Asia, Southeast Asia, the Polynesian Islands, and parts of Central Asia.[8] The racial undertones of this facially neutral act were such that, in addressing whether a "high-caste Hindu, of full Indian blood"[9] was a "white person," eligible to naturalize under the laws at the time, the Supreme Court

[7] The term "Hindoo" or "Hindu" was applied to all South Asian persons, regardless of faith. The "Tide of Turbans" referenced the distinctive turban worn by members of the Sikh faith, who comprised a majority of the early South Asian migrants. Historical references of the era did not recognize these distinctions.

[8] An executive agreement, the Gentlemen's Agreement, reached in 1907 and 1908 restricted the immigration of Japanese laborers, as well as Koreans, whose nation was under Japanese forced occupation between the years of 1910 and 1945. *See* Hing, *supra*, at 29.

[9] Again, "Hindu" did not refer to a South Asian individual's specific religious practice. Thind was a member of the Sikh faith. The question posed was if a South Asian of Caucasian ancestry, as asserted to be distinct from "Asiatic" or other racial groups under the prevailing racial theories, qualified as "white" under law. *See United States v. Thind*, 261 U.S. 204, 209–14 (1923) (Justice Sutherland's discussion of theories of racial classification).

inferred that Congress would have "a similar [negative] attitude toward Asiatic naturalization." *Thind*, 261 U.S. at 215.

A few years later, the odious Immigration Act of 1924, or Asian Exclusion Act, Pub. L. No. 68-139, 43 Stat. 153, set immigration caps based upon national origin and prohibited the immigration of persons ineligible to become citizens, which prevented people from Asian countries from immigrating altogether. As explained by an opponent of the law, its nationality restrictions were driven by animus against religious and ethnic groups—such as Jews—by restricting immigration from countries where they lived in larger numbers:

> Of course the Jews too are aimed at, not directly, because they have no country in Europe they can call their own, but they are set down among the inferior peoples. Much of the animus against Poland and Russia, old and new, with the countries that have arisen from the ruins of the dead Czar's European dominions, is directed against the Jew.

65 Cong. Rec. 5929–32 (1924) (Statement by Rep. Clancy).

Because of then-U.S. jurisdiction over the Philippines, Filipinos were still able to migrate to the United States. Lee, *supra*, at 157. However, U.S. citizenship remained out of reach and Filipinos could not escape racial animus, as they were seen to present an economic threat and to "upset the existing racial hierarchy between whites and nonwhites." *Id.* at 157, 185. Anti-Filipino agitation culminated in passage of the Tydings–McDuffie Act in 1934, Pub. L. No. 73-127, 48 Stat. 456, which granted independence to the Philippines and changed the status of Filipinos

from U.S. nationals to "aliens" now subject to the same restrictions as other Asian groups. The next year, Filipino nationals already in the United States became subject to deportation and repatriation. Filipino Repatriation Act, Pub. L. No. 74-202, 49 Stat. 478 (1935).[10]

The exclusionary racism and xenophobia underpinning these laws crystallized and escalated during World War II, when the U.S. government forcibly incarcerated over 110,000 permanent residents and U.S. citizens in internment camps on the basis of their Japanese ancestry.[11]

B. In 1965, Congress and President Johnson Dismantled Quotas Based upon Nationality and Barred Distinctions Based upon "Race, Sex, Nationality, Place of Birth, or Place of Residence."

Starting during World War II and continuing over the next twenty years, Congress gradually loosened restrictions on Asian immigration to further the interests of the United States on the world stage.

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[10] The idea, still prevalent today, that race keeps one from being an American particularly resonated with Filipinos affected by the new restrictions: "We have come to the land of the Free and where the people are treated equal only to find ourselves without constitutional rights . . . . We . . . did not realize that our oriental origin barred us as human being in the eyes of the law." Lee, *supra*, at 185 (citing June 6, 1935 letter from Pedro B. Duncan of New York City to the Secretary of Labor and other letters).

[11] *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). For a further discussion of the improper justification for the Japanese American incarceration, see the amicus brief for the Fred T. Korematsu Center for Law and Equality.

First, at the urging of President Franklin D. Roosevelt, who called the exclusion of Chinese citizens by the United States "a historic mistake," Lee, *supra*, at 256, Congress repealed the Chinese exclusion laws with the Magnuson Act of 1943 (or Chinese Exclusion Repeal Act), Pub. L. No. 78-199, 57 Stat. 600. In 1946, the Luce–Celler Act, Pub. L. No. 79-483, 60 Stat. 416, allowed 100 Filipinos and Indians, each, to immigrate per year and permitted their naturalization.[12]

Then, in 1952, the Immigration and Nationality Act (or McCarran–Walter Act), Pub. L. No. 82-414, 66 Stat. 163, repealed the Asiatic Barred Zone and eliminated the racial bar on citizenship. Nevertheless, it left in place national origin quotas intended to heavily favor immigration from northern and western Europe, with unmistakable racial, religious and ethnic consequences.

After decades of highly regimented immigration quotas tied to prospective immigrants' countries of origin, the Immigration and Nationality Act of 1965 marked a dramatic turning point. Like Presidents Harry S. Truman and Dwight D. Eisenhower before him, President John F. Kennedy opposed the national origins quota system, calling it "nearly intolerable" and inequitable. Remarks to Delegates of the American Committee on Italian Migration (June 11, 1963), *available at* http://www.presidency.ucsb.edu/ws/?pid=9269. In 1965, Congress agreed,

[12] This bill allowed Dalip Singh Saund to become a naturalized citizen. He would become the first Asian Pacific American Member of Congress. *See* Lee, *supra*, at 373–75, 392.

abolishing the national origins quotas in an act signed by President Johnson and providing that "[e]xcept as specifically provided" in certain subsections, "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." 8 U.S.C. § 1152(a)(1)(A).[13]

As the district court in this case recognized, this "was adopted expressly to abolish the 'national origins system' imposed by the Immigration Act of 1924," that aimed to "'maintain to some degree the ethnic composition of the American people.' " *International Refugee Assistance Project v. Trump*, No. TDC–17–0361, slip op. at 20 (quoting H.R. Rep. No. 89-745, at 9 (1965)). This accords with the D.C. Circuit's holding that "Congress could hardly have chosen more explicit language" in barring discrimination against the issuance of a visa because of a person's nationality or place of residence. *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State* ("*LAVAS*"), 45 F.3d 469, 472–73 (D.C. Cir. 1995) (finding "Congress has unambiguously directed that no nationality-based discrimination shall occur").

[13] The excepted subsections address "Per country levels for family-sponsored and employment-based immigrants," 8 U.S.C. § 1152(a)(2), statutory creation of "special immigrant" categories for preferred treatment (*e.g.*, certain Panamanian nationals who worked in the Canal Zone, etc.), 8 U.S.C. § 1101(a)(27), admission of immediate relatives of U.S. citizens, 8 U.S.C. § 1151(b)(2)(A)(i), and the statutorily created system of allocation of immigrant visas, 8 U.S.C. § 1153.

Consistent with the contemporaneous and monumental Civil Rights Act of 1964, which outlawed discrimination on the basis of "race color, religion, sex, or national origin," and the Voting Rights Act of 1965, the Immigration and Nationality Act of 1965 marked a departure from the nation's past reliance upon such characteristics to restrict entry into the country. *See* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. Rev. 273 (1996).

Today nearly two-thirds of APAs are foreign-born. Karthick Ramakrishnan & Farah Z. Ahmad, *State of Asian Americans and Pacific Islanders Series: A Multifaceted Portrait of a Growing Population* 23 (Sept. 2014), *available at* http://aapidata.com/wp-content/uploads/2015/10/AAPIData-CAP-report.pdf. The experience of many APA families in the United States began with the opportunity to immigrate that was denied to their ancestors. Nevertheless, the harmful legacies of those earlier laws persist, including torn apart families, denial of the right to naturalize and the rights that accompany citizenship to lawful immigrants, and allowing the force of law to validate xenophobia, racism, and invidious stereotypes.

Indeed, Congress recently reaffirmed its condemnation of the Chinese exclusion laws with the passage of resolutions expressing regret for those laws. S. Res. 201, 112th Cong. (2011); H.R. Res. 683, 112th Cong. (2012). The Senate

resolution explicitly recognized that "[the] framework of anti-Chinese legislation, including the Chinese Exclusion Act, is incompatible with the basic founding principles recognized in the Declaration of Independence that all persons are created equal." S. Res. 201, *supra*.

Having long been the subject of exclusionary immigration laws, APAs know the lasting pain and injury that result from the use of national origin as a basis for preference or discrimination in immigration laws. The Revised Order is an unwelcome return to a pre-Civil Rights Era approach to immigration when prospective immigrants were excluded based upon their national origin, which served as a pretext for discrimination on the basis of the predominant races, religions, and ethnicities in those countries.

C. *Prima Facie* Evidence of Religious Animus Permits the Court To "Look Behind" the Stated Rationale for the Revised Order To Ensure Compliance with the Establishment Clause

Because laws that discriminate on the basis of national origin have long been devised and constructed to enforce constitutionally infirm animus, courts cannot "turn a blind eye to the context in which [a] policy arose." *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005) (citation and quotation signals omitted). The Supreme Court has recognized that the "historical context and the 'specific sequence of events leading up to'" the adoption of a government policy are important considerations. *See id.* at 862.

The Constitution clearly prohibits discrimination on the basis of religion. *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). Courts apply the three-prong *Lemon* test, under which the law must: (1) have a primary secular purpose; (2) not principally advance or inhibit religion; and (3) not foster excessive entanglement with religion. 403 U.S. at 612–13; *see also Edwards v. Aguillard*, 482 U.S. 578, 583, 594 (1987) (holding all three prongs must be met in finding violation where "primary purpose" of act was "to endorse a particular religious doctrine"). The government cannot dispense with the first prong merely by identifying a secular purpose, or ask the court to ignore the historical context. *McCreary*, 545 U.S. at 865 n.13.

As *Kerry v. Din* recognized, courts "look behind" the government's express rationale where there is "an affirmative showing of bad faith," here, religious animus. 135 S. Ct. 2128, 2141 (2015); *see also American Academy of Religion v. Napolitano*, 573 F.3d 115, 137 (2d Cir. 2009) (recognizing that a well-supported allegation of bad faith could render an immigration decision not *bona fide*). Even if the government's action is facially neutral, the Establishment Clause is nonetheless violated if legislative history, context, and statements made by decision-makers demonstrate intent to apply regulations only to minority religions or to discriminate

against them. *See Larson*, 456 U.S. at 254–55; *see also Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

As the district court in Hawai‘i noted, "[a] review of the historical background here makes plain why the Government wishes to focus on the Executive Order's text, rather than its context." TRO at 33. Accordingly, the court held that:

> [P]lainly-worded statements, made in the months leading up to and contemporaneous with the signing of the Executive Order, and, in many cases, made by the Executive himself, betray the Executive Order's stated secular purpose. Any reasonable, objective observer would conclude, as does the Court for purposes of the instant Motion for TRO, that the stated secular purpose of the Executive Order is, at the very least, "secondary to a religious objective" of temporarily suspending the entry of Muslims.

TRO at 34–35 (quoting *McCreary*, 545 U.S. at 684) (footnote omitted). Similarly, in this case, the district court found that "[i]n this highly unique case . . . , the record provides strong indications that the national security purpose is not the primary purpose for the travel ban." *International Refugee Assistance Project v. Trump*, No. TDC-17-0361, slip op. at 35 (D. Md. Mar. 16, 2017). Rather, it convincingly establishes that the Revised Order "remains the realization of the long-envisioned Muslim Ban." *Id.* at 30; *see also Aziz v. Trump*, No. 117CV116LMBTCB, 2017 WL 580855, at *7–9 (E.D. Va. Feb. 13, 2017) (compiling public statements evincing discriminatory intent in entering a

temporary restraining order against the Original Order).[14] The barely concealed animus behind the Executive Orders is even more glaring when set against the long history of such discrimination that Congress has expressly tried to put behind us; ignoring such evidence would permit, and even encourage, the kinds of pretextual discrimination between religions that the Constitution's Establishment Clause seeks to prevent.

III. The Revised Order Violates the 1965 Immigration and Nationality Act Amendments' Prohibition on Discrimination Related to National Origin.

Since the Immigration and Nationality Act was amended in 1965, courts have consistently held that the government cannot discriminate on the basis of nationality in the immigration context. *See* 8 U.S.C. § 1152(a)(1)(A) ("Except as specifically provided in paragraph (2) and in sections 1101(a)(27), 1151(b)(2)(A)(i), and 1153 of this title, 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."). Courts interpreting this provision have found that "Congress could hardly have chosen more explicit language" in barring discrimination against the issuance of a visa

[14] Although the language of the Revised Order is more facially neutral than that of the Original Order, the motivating religious animus is nonetheless clear. The President in effect acknowledged as much, referring to the Revised Order as "a watered-down version" of the Original Order. Michael D. Shear, "Who Undercut President Trump's Travel Ban? Candidate Trump," N.Y. Times (March 16, 2017).

because of a person's nationality or place of residence. *See LAVAS*, 45 F.3d at 472–73 (finding "Congress has unambiguously directed that no nationality-based discrimination shall occur"). Although Congress delegated to the Executive Branch considerable authority to prescribe conditions of admission to the United States, courts have affirmed that the Executive Branch may not make such determinations on impermissible bases such as "invidious discrimination against a particular race or group." *Wong Wing Hang v. INS*, 360 F.2d 715, 719 (2d Cir. 1966) (concluding that nationality is an impermissible basis for deportation); *see also Abdullah v. INS*, 184 F.3d 158, 166–67 (2d Cir. 1999) ("[T]he Constitution does "not permit an immigration official, in the absence of [lawful quota] policies, to . . . discriminate on the basis of race and national origin.") (citing *Bertrand v. Sava*, 684 F.2d 204, 212 n.12 (2d Cir. 1982)).

Courts have found that Executive Branch policies are discriminatory and contravene Section 1152(a)(1)(A) when "based on impermissible generalizations and stereotypes," *see Olsen v. Albright*, 990 F. Supp. 31, 38 (D.D.C. 1997), which are the very bases upon which the Revised Order singles out individuals from the six Muslim-majority countries for discriminatory treatment. Executive Branch actions that contravene Congress's mandate in 8 U.S.C. § 1152(a)(1)(A) must be set aside. *See LAVAS*, 45 F.3d at 474 ("The interpretation and application of the regulation so as to discriminate against Vietnamese on the basis of their nationality

is in violation of the Act, and therefore not in accordance with law."); *see also Chau v. Dep't of State*, 891 F. Supp. 650, 654 (D.D.C. 1995) (citing *LAVAS* and issuing preliminary injunctive relief holding that department policy discriminated against immigrants based on their nationality and therefore is not "in accordance with law").

A. The Discretion of the Executive Is Limited by Statute.

When the President's authority to act arises from statute, he must adhere to the bounds set by Congress. *Zivotofsky v. Clinton*, 566 U.S. 189, 196–97 (2012) (quoting *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991)). In 1965, through amendments to the Immigration and Nationality Act, Congress and President Johnson specifically placed *outside* those bounds of executive authority and discretion any preference, priority, or discrimination in immigration based on nationality, place of birth, or place of residence, among other characteristics. Pub. L. No. 89-236 (1965) (codified at 8 U.S.C. § 1152(a)(1)(A)). The D.C. Circuit has interpreted this provision to apply to admission of foreign nationals as well, holding that "Congress has unambiguously directed that no nationality-based discrimination shall occur." *LAVAS*, 45 F.3d at 472–73.

To the extent that the United States has sought to justify the Executive Orders by relying on the authority vested in the Executive by 8 U.S.C. § 1182(f), that reliance is misplaced. Section 1182(f) permits both denial of entry and

restrictions upon entry "[w]henever 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" to presumptively exclude all citizens of six nations as potential terrorists. However, because Congress has already provided "specific criteria for determining terrorism related inadmissibility," *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring), and the President's exclusionary authority under Section 1182(f) is not among them, the President cannot employ Section 1182(f) to undermine Section 1152(a)(1)(A)'s objectives. Thus, Justice Kennedy's controlling opinion explains that the Executive's authority to exclude an individual from admission on the basis of claimed terrorist activity "rest[s] on a determination that [he or she does] not satisfy the . . . requirements" of 8 U.S.C. § 1182(a)(3)(B). *Id.* Other courts have held that Section 1182(f) "provides a safeguard against the danger posed by any particular case or class of cases *that is not covered by one of the categories in section 1182(a)*." *Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (concluding that authority under one subsection cannot "swallow" the limitations imposed by Congress on inadmissibility under other parts of Section 1182) (emphasis added), *aff'd mem.*, 484 U.S. 1 (1987). Applying the same principle of construction, *Allende v. Shultz* held that subsections of 8 U.S.C. § 1182(a) could not be rendered superfluous by interpretation of others. 845 F.2d 1111, 1118 (1st Cir. 1988).

B. The Legislative History of 8 U.S.C. § 1152(a)(1)(A) Further Supports the Broad Prohibition on Nationality-Based Discrimination.

The legislative history surrounding the enactment of 8 U.S.C. § 1152(a)(1)(A) confirms that Congress intended to reject and repudiate the "national origins system" as an inequitable and irrelevant basis for admission decisions. For instance, a member of Congress opined that the system "embarrasse[d] us in the eyes of other nations, . . . create[d] cruel and unnecessary hardship for many of our own citizens with relatives abroad, and . . . [was] a source of loss to the economic and creative strength of our country." 9 Oscar M. Trelles II & James F. Bailey III, *Immigration Nationality Acts, Legislative Histories and Related Documents 1950–1978*, at 417 (1979). Attorney General Robert F. Kennedy lamented that the national origins system harmed citizens with relatives abroad, "separat[ing] families coldly and arbitrarily." 10-A Trelles & Bailey, *supra*, at 411. Indeed, the record confirms Congress overwhelmingly regarded the system as an outdated, arbitrary, and above all, un-American, basis upon which to decide whom to admit to the country.

Statements in the legislative history resoundingly denounced the use of nationality to make immigration decisions, as it furthered the un-American belief that individuals born in certain countries were more desirable or worthy of admission than those from others. As explained above, nationality-based

immigration restrictions excluded nationals of Asian countries on the basis of unfounded and unjust stereotypes for nearly a century before the United States adopted the current system of race- and country of origin-neutral immigration determinations. Several members of Congress echoed President Johnson's sentiments, when in 1963 he wrote in a letter to Congress:

> The use of a national origins system is without basis in either logic or reason. It neither satisfies a national need nor accomplishes an international purpose. In an age of interdependence among nations, such a system is an anachronism, for it discriminates among admission into the United States on the basis of accident of birth.

9 Trelles & Bailey, *supra*, at 2.

President Johnson's aforementioned reference to prohibiting discrimination in "*admission* into the United States," confirms the contemporaneous understanding that the 1965 Act foreclosed discrimination in admission as well as immigration. Given this animating concern for the 1965 Act, it would be perverse to provide more protection for foreign nationals merely wanting to visit family in the United States, than for family members seeking to more permanently immigrate to the country. Not surprisingly, during later Congressional hearings on the 1965 Act, Attorney General Kennedy contended that abolition of the national origins system sought:

> not to penalize an individual because of the country that he comes from or the country in which he was born, not to make some of our people feel as if they were second-class citizens. . . . [Abolition of the national origins system] will promote the interests of the United States

> and will remove legislation which is a continuous insult to countries abroad, many of whom are closely allied with us.

9 Trelles & Bailey, *supra*, at 420. Again, if certain citizens' relatives who are foreign nationals are barred from entering the country, or are prohibited from obtaining visas on equal footing, they cannot help but feel that they are themselves "second-class citizens."

In light of this history, the reference in 8 U.S.C. § 1152(a)(1)(A) to the prohibition against discrimination in the "issuance of immigration visas" cannot be read to sanction such discrimination outside the context of such issuance. To interpret the prohibition differently would render it meaningless, enabling the Executive to deny entry on impermissible grounds and thereby render any visa application by a barred individual a fruitless exercise. Such an interpretation would have a particularly destructive impact in this case where the intention to discriminate is manifest.

Both the Original Order and the Revised Order expressly discriminate against applicants for entry based on nationality and place of residence and are premised on a construction of Section 1182(f) that would obviate limitations Congress has imposed on the executive's inadmissibility determinations under Section 1182(a)—precisely what Congress and President Johnson specified by statute the Executive Branch could *not* do. *Cf. Int'l Refugee Assistance Project v. Trump*, No: TDC-17-0361, slip op. at 24 (finding "no clear basis to conclude that

§ 1182(f) is exempt from the non-discrimination provisions of § 1152(a) or that the President is authorized to impose nationality-based distinctions on the immigrant visa issuance process through another statutory provision," but finding presumptive statutory authorization to deny entry). Thus, the President lacked statutory authority or discretion to issue the Revised Order. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring in the judgment) (observing that the President's power is at "its lowest ebb" when it is "incompatible with the expressed . . . will of Congress").

Nor is there any basis for Defendants' insistence that honoring these carefully considered statutory limits on presidential discretion and enjoining enforcement of the Revised Order would leave the country unduly vulnerable to a terrorist attack. This justification was similarly offered, and later repudiated, in connection with the Japanese American incarceration during World War II.[15] The proffered evidence of danger in the Revised Order itself is perfunctory, and was almost entirely absent from the Original Order. Congress relegated this kind of discrimination into the past in 1965, aligning the country's immigration laws with

[15] *See* Brief of the Korematsu Center, *supra*; *see also* U.S. Dep't of Justice, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases* (May 20, 2011), *available at* https://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakesduring-japanese-american-internment-cases; Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 904.

notions of equality etched into the nation's conscience in the Civil Rights Era that remain with us today.

CONCLUSION

The United States Government at times prohibited and at other times placed severe restrictions on entry, immigration, and naturalization by people from many Asian nations for nearly a century. In 1965, Congress and the President recognized that this practice reflected animus toward people of races, ethnicities and religions that prevailed in those countries and imposed restrictions on the use of nationality in immigration. Many APAs are here today because Congress prohibited such discrimination during the Civil Rights Era, when the increasingly evident harm and injustice of government-sanctioned discrimination on the basis of "race, sex, nationality, place of birth, [and] place of residence" could no longer be countenanced.

The Revised Order seeks to side-step these restrictions on nationality-based discrimination as well as the constitutional establishment clause and equal protection rights they reflect, to discriminate against nationals of six Muslim-majority countries. This Court should prevent the President from exercising such authority, lest it presage a return to the era of invidious discrimination that Congress sought to put behind us over fifty years ago.

Dated: April 19, 2017

Respectfully submitted,

s/Joshua David Rogaczewski

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Dated: April 19, 2017

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s/Joshua David Rogaczewski
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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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