ALSTON HUNT FLOYD & ING

PAMELA W. BUNN 6460
JOHN RHEE 9681
1001 Bishop Street, Suite 1800
Honolulu, Hawai‘i 96813
Telephone: (808) 524-1800
Facsimile: (808) 524-4591
Email: pbunn@ahfi.com
jrhee@ahfi.com

McDERMOTT WILL & EMERY LLP

JAMES W. KIM (*pro hac vice pending*)
The McDermott Building
500 North Capitol Street, N.W.
Washington, DC 20001
Telephone: (202) 756-8386
Facsimile: (202) 591-2865
Email: JaKim@mwe.com

Attorneys for Amicus Curiae

(See Next Page For Additional Counsel)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

STATE OF HAWAI‘I and ISMAIL ELSHIKH,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX TILLERSON, in his official capacity as Secretary of State; and the UNITED STATES OF AMERICA,

Defendants.

Case No. 1:17-CV-00050 DKW-KSC

BRIEF OF THE NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS; CERTIFICATE OF SERVICE

Hearing Date: March 15, 2017
Hearing Time: 9:30 a.m.
Hearing Judge:
The Honorable Derrick K. Watson

EXHIBIT "A"

ADDITIONAL COUNSEL

NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION

TINA MATSUOKA (*pro hac vice pending*)
MEREDITH S.H. HIGASHI (*pro hac vice pending*)
NAVDEEP SINGH (*pro hac vice pending*)
RACHANA PATHAK (*pro hac vice pending*)
1612 K Street NW, Suite 510
Washington D.C. 20006
Telephone: (202) 775-9555
Facsimile: (202) 775-9333
E-mail: tmatsuoka@napaba.org
mhigashi@napaba.org
nsingh@napaba.org
radha.pathak@strismaher.com

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INTEREST OF *AMICUS CURIAE*

The National Asian Pacific American Bar Association ("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.

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 Western District of Washington, whose order the U.S. Court of Appeals for the Ninth Circuit declined to stay. *Washington v. Trump*, No. 17-35105, slip op. at 13–

14 (9th Cir. Feb. 9, 2017) (finding “no precedent to support” Defendants’ claim of unreviewable presidential discretion in the area of immigration policy, and observing that Defendants’ argument “runs contrary to the fundamental structure of our constitutional democracy”) (citing *Boumediene v. Bush*, 553 U.S. 723, 765 (2008)).[1]

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. In doing so, the Revised Order violated fundamental statutory limitations on the Executive’s exercise of immigration and admissions determinations that reflect and promote constitutional guarantees of due process and equal protection.

II. Congress Prohibited Nationality-Based Discrimination to Reverse a Long History of 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

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[1] *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”).

issuance of immigrant visas due to "race, sex, nationality, place of birth, or place of 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 also sought to prevent the country from repeating the errors of its past. The terms of the Revised Order depart from Section 1152(a)(1)(A)'s unambiguous rule as applied by courts to admission decisions and, accordingly, must be set aside as contrary to law.

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

Asian Pacific Americans are acutely familiar with the impact of exclusionary laws, having historically been the subjects of systematic and increasingly expansive immigration restrictions by Congress that reflected and validated offensive stereotypes. The state of Hawaii's pronounced and pervasive experience with restrictions on Asian and Pacific Islander migration reflects the complex history and legacy shaped by these policies. In Hawai‘i, the expanding sugarcane industry during the mid-1800s spurred the recruitment of laborers from Asia and other regions. Bill Ong Hing, *Making and Remaking Asian America Through Immigration Policy, 1850–1990*, at 36 (1993). Chinese migrants comprised the first of these laborers and eventually, Japanese laborers became the largest group, while Filipinos, Koreans, Portuguese, and Puerto Rican workers, along with others,

joined them to form the backbone of the plantation and industry workforce, establishing significant populations of several diverse groups in Hawaiʻi before annexation. *See* Erika Lee, *The Making of Asian America: A History* 74 (2015); Hing, *supra*, at 27; Helen Zia, *Asian American Dreams: The Emergence of An American People* 36–37 (2000). After Hawaiʻi became a U.S. territory in 1900, the closing and opening of waves of immigrant labor from different Asian countries reflected the restrictions of U.S. immigration laws.

Asians first began migrating to the U.S. mainland in significant numbers in the mid-1800s, with Chinese nationals being the earliest sizeable group. *See* Hing, *supra*, at 19–20. 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 also instilled 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).

Rather than countering such xenophobia and racism, Congress facilitated it 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 who it excluded.[2] The first such law came toward the tail 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: 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

[2] 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.

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 1902, Act of Apr. 29, 1902, Pub. L. No. 57-90, 32 Stat. 176.

Immigration restrictions were also expanded to other Asian groups. 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 sentiments and enabled violent backlash from nativist Americans. For example, the Asiatic Exclusion League was established in the early 20th century to prevent the immigration by people of Asian origin to the United States and Canada,

which had a similar nationality-based system of immigration at the time.[3] On September 4, 1907, the Asiatic Exclusion League and labor unions led the "Bellingham Riots" in Bellingham, Washington, to expel South Asian immigrants working in 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* Lee at 163-4 (the riots were the latest in series of anti-Asian violence targeting Chinese, Japanese, and South Asian laborers since the late-1800s).

Congress responded in the same way that it had to the perceived threat of Chinese immigrants to these growing populations. 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,

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[3] *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)).

and parts of Central Asia.[4] 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 persons from Asian countries from immigrating altogether.

Because of then-U.S. jurisdiction over the Philippines, Filipinos were still able to migrate to Hawaiʻi and the mainland. 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).[5]

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[4] 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.

[5] The idea, still prevalent today, that race keeps one from being an American particularly resonated with Filipinos affected by the new restrictions: "We have

Although Congress stopped passing new laws to restrict immigration from Asia in 1934, as admissions had effectively been halted, tight quotas and anti-Asian sentiment persisted. Most notably, 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.[6]

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).

[6] *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. The majority of those incarcerated were living on the West Coast mainland. In Hawai'i, where more than one-third of the population was of Japanese ancestry, the logistics of confining such a large number of people and the need for their labor resulted in the more selective incarceration of 2,000 individuals. Some were removed to the mainland, while others were incarcerated at the Honouliuli camp in Hawai'i alongside foreign prisoners of war. *See* National Park Service, *Honouliuli National Monument: Historical Overview*, *available at* https://www.nps.gov/hono/learn/historical-overview.htm (last visited Mar. 11, 2017).

B. In 1965, Congress and President Johnson Dismantled Immigration Quotas Based upon Nationality and Generally 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 United States' interests on the world stage. In 1965, Congress broadly prohibited discrimination based on race and national origin in the context of immigration, imposing statutory constraints that the Revised Order simply cannot overcome.

At the urging of President Franklin D. Roosevelt, who emphasized America's alliance with China and called the exclusion of its 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, and replaced them with a tight quota of 105 visas per year. In 1946, the Luce–Celler Act, Pub. L. No. 79-483, 60 Stat. 416, similarly allowed 100 Filipinos and Indians, each, to immigrate per year and permitted their naturalization.[7] In 1952, the Immigration and Nationality Act (or McCarran–Walter Act), Pub. L. No. 82-414, 66 Stat. 163, repealed the Asiatic Barred Zone

[7] 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 373-5, 392.

and eliminated the racial bar on citizenship, yet retained national origin quotas that heavily favored immigration from northern and western Europe.

After decades of moderately more permissive but 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 the system "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 finally agreed, abolishing the national origins quotas in an act signed by President Johnson and providing that "[e]xcept as specifically provided" in certain subsections,[8] "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). Consistent with the contemporaneous and monumental Civil Rights Act of 1964, which outlawed

[8] 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.

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 firm departure from the United States' past reliance upon such characteristics. *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).

The reopening of America's doors in 1965 transformed the Asian Pacific American community. Today nearly two-thirds of the country's Asian Pacific American population is 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 Asian Pacific American families in the United States began with the opportunity to immigrate that was denied to their ancestors. But even the relaxation of the immigration laws did not erase the harmful legacies of those earlier laws, which tore apart families, denied lawful immigrants the right to naturalize and the rights that accompany citizenship, and dignified with the force of law the xenophobia, racism, and invidious stereotypes that many Americans held of Asians. Indeed, for many of these reasons, 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, Asian Pacific Americans 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 admitted based not on their applications, but upon ugly stereotypes about the citizens of their countries of origin. For the reasons set forth in this brief, as well as the briefs submitted by the State of Hawaiʻi and various other *amici curiae*, the Court should enjoin its enforcement.

III. The Executive Order Violates 8 U.S.C. § 1152(a)(1)(A)'s Bar on Nationality-Based Discrimination.

As set forth in Part II, Congress in the Civil Rights Era rejected the discriminatory immigration policies of the past. The Immigration and Nationality Act amendments in 1965, and in particular Section 1152(a)(1)(A), disavowed discrimination on the basis of race and national origin in the issuance of immigrant visas.

A. The 1965 Immigration and Nationality Act Amendments Prohibit 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 because of a person's nationality or place of residence. *See 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"), *vacated on other grounds*, 519 U.S. 1 (1996). 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 (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 (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").

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). For citizens with relatives abroad, Attorney General Robert F. Kennedy lamented that the national origins system "separate[d] 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 who 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 in certain countries were more desirable or worthy of

admission than those from others. As explained above, nationals of Asian countries were subject to nationality-based immigration restrictions justified 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. And, as Attorney General Robert F. Kennedy explained in a 1963 letter to Congress, the national origins system "separate[d] families coldly and arbitrarily." 10-A Trelles & Bailey, *supra*, at 411. It would be perverse if the remedy for this animating concern for the 1965 Act was to ensure equality for family members seeking to immigrate to the country, but not for those foreign nationals who merely wanted to visit family in the United States. Later, during 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."

IV. Statutory Limits Constrain the Executive's Discretion Related to Immigration and Refugee Admission.

Presidential discretion in the general area of immigration and refugee admission may be broad, but it is not boundless. The President must either operate within the confines of the authority and discretion afforded by Congress (in legislation signed by the current or a preceding president) or the President must take the position that the power to act was inherent and Congress lacked the constitutional authority to impose the relevant constraint found in the Immigration and Nationality Act of 1965 in the first place. In either case, no matter how broad the claim of executive discretion, the President cannot ignore the Bill of Rights, the Fourteenth Amendment, or other provisions of the Constitution—a proposition for which this Court need look no further than the Ninth Circuit's decision last month denying these Defendants' motion to stay Judge Robart's order from the Western

District of Washington temporarily enjoining enforcement of the Original Order, which discriminated against immigrants on the basis of national origin. *See Washington*, slip op. at 13–14 (finding "no precedent to support" Defendants' claim of unreviewable presidential discretion in the area of immigration policy, and observing that Defendants' argument "runs contrary to the fundamental structure of our constitutional democracy") (citing *Boumediene*, 553 U.S. at 765).[9] Here, the only specific bases for authority cited in the Revised Order are statutory: "the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., and section 301 of title 3, United States Code." Revised Order at 1.[10]

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)

[9] *See also Zadvydas*, 533 U.S. at 695 (even in the context of immigration law, congressional and executive power "is subject to important constitutional limitations").

[10] The Revised Order also refers generally to authority vested "by the Constitution and the laws of America" but cites no specific Constitutional provision or authority. Any claims to inherent constitutional authority over admission of aliens, notwithstanding a contrary statute, would fly in the face of well-established doctrine explained in section A.1. of Hawai'i's brief in support of its Motion for Temporary Restraining Order. *See* Br. at 24 (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012), and *Galvan v. Press*, 347 U.S. 522, 531 (1954), for the proposition that the Framers " 'entrust[ed] ***exclusively to Congress***' . . . the power to set '[p]olicies pertaining to the entry of aliens and their right to remain here.' " (emphasis added)); *see also INS v. Chadha*, 462 U.S. 919, 940–41 (1983) ("The plenary authority of Congress over aliens under Art. I, § 8, cl. 4, is not open to question . . . .").

(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 United States Court of Appeals for the District of Columbia 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. This is consistent with the legislative history of the 1965 Act. *See supra* Part III.B.

Defendants' expected reliance upon 8 U.S.C. § 1182(f), which permits exclusion based upon "association with terrorist organizations," to presumptively exclude all citizens of six nations as potential terrorists, is unavailing. Because Congress has already provided "specific criteria for determining terrorism related inadmissibility," *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring), the President's exclusionary authority under Section 1182(f), is implicitly constrained. 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.* Rather than obliterating the carefully considered criteria provided by Congress in this area, other courts have held that this 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).

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. Thus, the President lacked statutory authority or discretion to issue the Orders. *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"). Because the President lacked the authority to discriminate in immigration matters on the basis of race or national origin, the Court should enjoin enforcement of any such provisions of the Revised Order.

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, is unavailing. Such an argument would run counter to the lessons of, and the government's apologies for, the Japanese American incarceration during World War II.[11] The proffered evidence of danger in the Revised Order itself is perfunctory, and was almost entirely absent from the Original Order, which is inexplicable and unacceptable given the gravity of departing from the expressed will of Congress to not discriminate against certain applicants for entry or immigration based upon their national origin. Congress relegated this kind of discrimination into the past by the Immigration and Nationality Act of 1965, which aligned the country's immigration laws with notions of equality etched into the nation's conscience in the Civil Rights

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[11] *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.

Era that remain with us today. Crucially, the President retains the ability to act within the authority delegated by Congress to develop specific time-bound restrictions based on specific relevant facts and non-prohibited categories as permitted under law. *See supra* Part III (addressing limitations on executive authority).

Because the statutory provisions at issue facially prohibit enforcement of the Revised Order's discrimination against individuals in immigration and entry proceedings on the basis of nationality, place of birth, or place of residence, the Court can avoid reaching any such Constitutional question. *See, e.g.*, *Zadvydas*, 533 U.S. at 689 (courts should "ascertain whether a construction of the statute is fairly possible by which [a constitutional] question may be avoided.").

B. The Executive's Discretion over Admission of Aliens Is Subject to Review if Based on Bad Faith.

Even absent a directly contrary statute, courts have restricted Executive discretion related to alien admission in circumstances where there was a "bad faith" basis for a discriminatory admission policy. *See, e.g.*, *Din*, 135 S. Ct. at 2128 (suggesting that a showing of "bad faith" permits a "look behind" the proffered basis for the exclusion determination); *American Academy of Religion v. Napolitano*, 573 F.3d 115 (2d Cir. 2009) (holding that a well-supported allegation of bad faith could render an immigration decision not bona fide). As described by

the Ninth Circuit, the Supreme Court recognized the limitations on executive discretion: "the federal power over aliens was found not to be 'so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens.'" *Mow Sun Wong v. Campbell*, 626 F.2d 739, 744 (9th Cir. 1980) (quoting *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 (1976)).

A *prima facie* showing of "bad faith" is clear from the unambiguous discriminatory language of the Revised Order. The Revised Order identifies and restricts admission on the basis of national identity in violation of statutory requirements. The demonstration of a discriminatory purpose permits the Court to "look behind" the basis for exclusion, including the statements of then-candidate Trump's calling for a "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on," Donald J. Trump, *Statement on Preventing Muslim Immigration* (Dec. 7, 2015), *available at* https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration, statements by his campaign staff and advisors, and the actions and statements of President Trump and other members of the Administration, *see Aziz v. Trump*, No. 117CV116LMBTCB, 2017 WL 580855, at *7–9 (E.D. Va. Feb. 13, 2017) (detailing public statements by then-candidate Trump as well as his advisors describing the Original Order as a

"Muslim ban"). These statements provide crucial context for identifying the animus and discriminatory purpose behind the Revised Order, and afford ample basis for this Court to conclude that its exercise of Executive discretion is contrary to the requirements of law and/or the Constitution.

CONCLUSION

The United States restricted entry, immigration, and naturalization by innumerable people from many Asian nations for decades prior to 1965—an aspect of American history looked back on with shame. The statutes imposing these restrictions based upon national origin grew out of and gave credence to ugly stereotypes about nationals from the affected countries. Many Asian Pacific Americans are here today because Congress prohibited such discrimination in 1965. It did so in the Civil Rights Era, when the harm and injustice of government-sanctioned discrimination on the basis of "race, sex, nationality, place of birth, [and] place of residence" received wider recognition and could no longer be countenanced.

The Revised Order seeks to side-step these statutory prohibitions on nationality based discrimination as well as fundamental constitutional due process and equal protection concerns, to discriminate against nationals of six Muslim-majority countries, consistent with then-candidate Trump's proposal to provisionally bar admission of all Muslims into the United States. Defendants ask

this Court to uphold the Revised Order based upon thinly sourced, broad, and ugly stereotypes of nationals from the affected countries. This Court should prevent the President from exercising such unilateral authority in contravention of a core civil rights statute, lest it presage a return to the era of invidious discrimination that Congress sought to put behind us over fifty years ago.

DATED: Honolulu, Hawaiʻi, March 12, 2017.

Respectfully submitted,

PAMELA W. BUNN
JOHN RHEE
JAMES W. KIM*
TINA R. MATSUOKA*
MEREDITH S.H. HIGASHI*
NAVDEEP SINGH*
RACHANA PATHAK*

Attorneys for *Amicus Curiae*

**Pro hac vice application pending*

CERTIFICATE OF SERVICE

I hereby certify that, on the dates and by the methods of service noted below, a true and correct copy of the foregoing was served on the following at their last known addresses:

Served Electronically through CM/ECF on __________________________:

Florence T. Nakakuni — florence.nakakuni@usdoj.gov
Edric Ming-Kai Ching — edric.ching@usdoj.gov

Michelle R. Bennett — michelle.bennett@usdoj.gov
Brad P. Rosenberg — brad.rosenberg@usdoj.gov
Daniel Schwei — daniel.s.schwei@usdoj.gov

Neal Katyal — neal.katyal@hoganlovells.com
Colleen Roh Sinzdak — colleen.rohsinzdak@hoganlovells.com
Mitchell Reich — mitchell.reich@hoganlovells.com
Elizabeth Hagerty — elizabeth.hagerty@hoganlovells.com
Sara Solow — sara.solow@hoganlovells.com
Alexander Bowerman — alexander.bowerman@hoganlovells.com
Thomas Schmidt — thomas.schmidt@hoganlovells.com

Douglas S.G. Chin — hawaiiag@hawaii.gov
Clyde J. Wadsworth — clyde.j.wadsworth@hawaii.gov
Deirdre Marie-Iha — deirdre.marie-iha@hawaii.gov
Donna H. Kalama — Donna.H.Kalama@hawaii.gov
Kimberly T. Guidry — kimberly.t.guidry@hawaii.gov
Robert T. Nakatsuji — robert.t.nakatsuji@hawaii.gov

And all other counsel of record

DATED: Honolulu, Hawai‘i, ______________________________.

Respectfully submitted,

/s/ Pamela W. Bunn
PAMELA W. BUNN
JOHN RHEE
JAMES W. KIM*
TINA R. MATSUOKA*
MEREDITH S.H. HIGASHI*
NAVDEEP SINGH*
RACHANA PATHAK*
Attorneys for *amicus curiae*

* *Pro hac vice application pending*