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Motion for Leave to File Brief of Amici Curiae the Fred T. Korematsu Center for Law and Equality, Civil Rights Organizations, and National Bar Associations of Color, in Support of the Petitioners

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

TAREQ AQEL MOHAMMED AZIZ, et al.,

Petitioners,

v. Case No. 17-cv-116-LMB-TCB

DONALD TRUMP, President of the United States, et al.,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, CIVIL RIGHTS ORGANIZATIONS, AND NATIONAL BAR ASSOCIATIONS OF COLOR, IN SUPPORT OF THE PETITIONERS

The Fred T. Korematsu Center for Law and Equality, Civil Rights Organizations, and National Bar Associations of Color hereby submit this Motion for Leave to File a Brief as *Amici Curiae* in Support of Petitioners and Affirmance.

INTEREST OF *AMICI CURIAE* AND REASONS WHY THE MOTION SHOULD BE GRANTED

Amicus Curiae The Fred T. Korematsu Center for Law and Equality ("Korematsu Center") is a non-profit organization based at the Seattle University School of Law. The Korematsu Center works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu, who defied military orders during World War II that ultimately led to the unlawful incarceration of 110,000 Japanese Americans, the Korematsu Center works to advance social justice for all. The Korematsu Center does not, in this Brief or otherwise, represent the official views of Seattle University.

The Korematsu Center has a special interest in addressing government action toward persons based on race or nationality. Drawing from its experience and expertise, the Korematsu Center has a strong interest in ensuring that courts understand the historical – often racist –

underpinnings of doctrines asserted to support the exercise of such legislative and executive power.

Amicus Curiae the National Native American Bar Association's ("NNABA") core mission is advancing justice for Native Americans, Native Hawaiians and Alaska Natives, communities which have survived injustice in the American legal system for hundreds of years, as power has gone unchecked and institutionalized discrimination persisted, often with few rising to question it. NNABA believes justice for all Americans is advanced when, as here, citizens stand together to examine the fairness of the actions of our institutions.

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This Brief is also submitted by all members of *Amicus Curiae* Asian Americans Advancing Justice ("Advancing Justice"), the national affiliation of five nonprofit, nonpartisan civil rights organizations: Asian Americans Advancing Justice – AAJC, Asian Americans Advancing Justice – Asian Law Caucus, Asian Americans Advancing Justice – Atlanta, Asian Americans Advancing Justice – Chicago, and Asian Americans Advancing Justice – Los Angeles. Members of Advancing Justice routinely file *amicus curiae* briefs in cases in this Court and other courts. Through direct services, impact litigation, policy advocacy, leadership development, and capacity building, the Advancing Justice affiliates advocate for marginalized

members of the Asian American, Native Hawaiian, Pacific Islander and other underserved communities, including immigrant members of those communities.

The Court should use its discretion to grant this Motion, and permit the *Amici* to file their concurrently submitted Brief of *Amici Curiae* because the information therein is "timely, useful, or otherwise necessary to the administration of justice." *Tafas v. Dudas,* 511 F. Supp. 2d 652, 659 (E.D. Va. 2007) ("The Court has broad discretion in deciding whether to allow a non-party to participate as an amicus curiae.").

Plaintiffs' Complaint addresses green card holders who were denied entry to the United States or forced to withdraw their applications for admission to the United States and/or abandon their status as lawful permanent residents as a result of the Executive Order that Defendant President Donald Trump signed on January 27, 2017. Compl. at 11. Plaintiffs seek permanent relief from the Executive Order, including a determination that the Executive Order creates an impermissible religious test for travel to the United States. Compl. at 18. *Amici* write to address the plenary power doctrine, which Defendants have relied on in this action and other similar challenges to support limiting the judicial branch's authority to question any exercise of the President's executive power. The proposed Brief seeks to demonstrate that the plenary power doctrine derived from decisions such as *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (the "*Chinese Exclusion Case*") and its progeny, is premised on outdated racist and nativist precepts that we now reject and outdated understandings of sovereignty. *Amici* urge this Court to consider the historical conditions under which the plenary power doctrine developed and justified prior historical developments, which modern courts now recognize as anathema.

As the proposed Brief of *Amici Curiae* details, the influence of the plenary power doctrine has been steadily eroded in the immigration context. Separately, but equally significant,

the proposed Brief reviews the historical threads of cases that abdicated judicial review of executive and legislative actions against entire races or nationalities and provided judicial sanction of discriminatory action taken against disfavored minorities.

Counsel for the parties have consented to the filing of this brief.

CONCLUSION

For these reasons, the Court should grant this Motion, and permit the Korematsu Center, Civil Rights Organizations, and National Bar Associations of Color to file their concurrently submitted Brief of *Amici Curiae*. *Amici Curiae* hereby waive a hearing on this motion.

Respectfully submitted,

Dated: February 9, 2017

THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

Robert S. Chang
901 12th Avenue, Sullivan Hall
Seattle, WA 98122-1090
Telephone: (206) 398-4025
Facsimile: (206) 398-4261
Changro@seattleu.edu

AKIN GUMP STRAUSS HAUER & FELD LLP

/s/ *James E. Tysse*
James E. Tysse (VSB 73490)
1333 New Hampshire Ave, NW
Washington, DC 20036
Telephone: (202) 887-4571
Facsimile: (202) 887-4288
jtysse@akingump.com

Robert A. Johnson (*pro hac pending*)
One Bryant Park
New York, NY 10036
Telephone: (212) 872-1000
Facsimile: (212) 872-1002
Rajohnson@akingump.com

Jessica M. Weisel (*pro hac pending*)
1999 Avenue of the Stars, Suite 600
Los Angeles, CA 90067
Telephone: (310) 229-1000
Facsimile: (310) 229-1001
Jweisel@akingump.com

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that, on this 9th day of February 2017, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all parties of record.

Dated: February 9, 2017

/s/ *James E. Tysse*
James E. Tysse (VSB 73490)
1333 New Hampshire Ave, NW
Washington, DC 20036
Telephone: (202) 887-4571
Facsimile: (202) 887-4288
jtysse@akingump.com

Attorney for Amici Curiae

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Robert S. Chang
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Seattle, WA 98122-1090
Telephone: (206) 398-4025
Facsimile: (206) 398-4261
Changro@seattleu.edu

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1333 New Hampshire Ave, NW
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Facsimile: (202) 887-4288
jtysse@akingump.com

Robert A. Johnson (*pro hac pending*)
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Telephone: (212) 872-1000
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1999 Avenue of the Stars, Suite 600
Los Angeles, CA 90067
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Jweisel@akingump.com

Attorneys for Amici Curiae

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[1] No counsel for any party authored this Brief in whole or in part, and no person or entity other than amicus made a monetary contribution to its preparation or submission. Counsel for the parties have consented to the filing of this brief. *See* Motion for Leave to File Amicus Brief, filed concurrently.

members of the Asian American, Native Hawaiian, Pacific Islander and other underserved communities, including immigrant members of those communities.

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SUMMARY OF ARGUMENT

In this and multiple, similar actions, the government has maintained that this Court may not review Executive Order 13769, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 8977 (Jan. 27, 2017) (the "Executive Order"), because the President has "unreviewable authority" to suspend admission of aliens to this country. *See, e.g.*, Respondent's Memorandum of Law in Opposition to Intervenor-Petitioner Commonwealth of Virginia's Motion for Preliminary Injunction (ECF 80 at 2, 14); Emergency Motion Under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal at 2, *State of Wash. v. Trump*, No. 17-35105 (9th Cir. Feb. 4, 2017). That argument advances the "plenary

power" doctrine, which, like the "separate but equal" doctrine, is a relic of an odious past that has no role in modern American jurisprudence. Just as *Plessy v. Ferguson*, 163 U.S. 537 (1896) was influenced by nineteenth century views considered anathema today, the plenary power doctrine derives from decisions like *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (the "*Chinese Exclusion Case*") that were premised on outdated racist and nativist precepts that we now reject.

When confronted similarly outdated in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the Supreme Court recognized that it "cannot turn the clock back" and decide its former cases differently. Instead, it would have to consider the subject of the law "in the light of its full development and its present place in American life throughout the Nation." *Id*. at 492-93. Consistent with that principle, courts have not given total deference to executive and legislative decisions on exclusion, but have engaged in appropriate judicial review. As a District Court in the Western District of Washington recently concluded: "Fundamental to the work of this court is a vigilant recognition that it is but one of three equal branches of our federal government" and that it must review the Executive Order "to fulfill its constitutional role in our tripart government." Temporary Restraining Order at 6-7, *State of Wash. v. Trump*, No. 17-cv-00141 (W.D. Wash. Feb. 3, 2017). This Court should do the same.

ARGUMENT

I. THE PLENARY POWER DOCTRINE WAS BORN OUT OF RACIST NOTIONS AND OUTDATED UNDERSTANDINGS OF SOVEREIGNTY THAT COURTS NOW REJECT.

The birthplace of the plenary power doctrine, the *Chinese Exclusion Case*, relies on racist descriptions of Chinese immigrants that stoked xenophobia. The Court stereotyped Chinese laborers as "industrious," "frugal," and "content with the simplest fare, such as would not suffice for our laborers and artisans." 130 U.S. at 595 (emphasis added). These stereotypes informed

the xenophobia of the opinion, driven by fear of "strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country" – whose presence amounted to "an Oriental invasion." *Id.*; *see also id.* at 606 ("the government of the United States, through its legislative department," could lawfully "consider[] the presence of foreigners *of a different race*…who will not assimilate with *us*, to be dangerous to its peace and security" despite the absence of "actual hostilities") (emphasis added).

Justice Field's acceptance of Congress's conclusion that Chinese immigrants were incompatible with American society due to "differences of race" drove the outcome in plenary power doctrine cases, which are "inextricably linked" to the idea of the "'Other' in America today, whether by virtue of race, ethnicity, national origin, religion, or citizenship status." Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The Plenary Power Justification for On-Going Abuses of Human Rights*, 10 Asian Am. L.J. 13, 13 (2003).

Similar racist and xenophobic justifications pervade plenary power doctrine cases that relied on the *Chinese Exclusion Case*. The "right of self-preservation" advanced as justification for the plenary power doctrine's broad immunity in these exclusion cases was plainly ethnic and racial self-preservation, not the preservation of borders or national security. *See, e.g.*, *Chinese Exclusion Case*, 130 U.S. at 608; *Fong Yue Ting v. United States*, 149 U.S. 698, 729-30 (1893) (discussing the requirement that Chinese resident aliens prove the fact of their U.S. residence "by at least one credible white witness" in order to remain in the country); *Nishimura Ekiu v. United States*, 142 U.S. 651, 664 & n.1 (1892) (exclusion of Japanese immigrant who was "likely to become a public charge").[2] These racial underpinnings have led courts to apply the plenary

[2] Later cases do not explicitly discuss or express support for race-based distinctions, but do so implicitly through their reliance on the reasoning of the *Chinese Exclusion Case* and its progeny.

power doctrine, relying on an "aberrational form of the typical relationship between statutory interpretation and constitutional law" in the area of immigration law. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545, 549 (1990); *see also* T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 Constitutional Commentary 9, 33 (1990) (Chinese exclusion laws "should serve as cautionary examples to those who would urge that the immigration power be left unconstrained by the Constitution in order to promote the maintenance of 'communities of character.'").

The overt racism of these cases contributes to an additional flaw in the doctrine – its foundation in an outdated and race-based meaning of sovereignty. The *Chinese Exclusion Case* states that "[t]he power of exclusion of foreigners" is "an incident of sovereignty belonging to the government of the United States . . . delegated by the constitution."[3] 130 U.S. at 609. Since then, the concept of sovereignty has evolved to incorporate principles of fundamental human rights and anti-discrimination, shifting the system "from the protection of sovereigns to the protection of people." *See* W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 Am. J. Int'l L. 866, 872 (1990). This change is reflected in congressional action incorporating these principles in federal law. *See, e.g.*, Foreign Affairs Reform and Restructuring Act of 1998, 22 U.S.C. § 6501 et. seq. (1998) (adopting United Nations Convention Against Torture and authorizing issuance of related regulations, which

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See Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950).

[3] This same race-based concept of sovereignty is discussed at length in *Dred Scott v. Sandford*, which explained that, historically, "negroes of African race" were not "constituent members of this sovereignty[.]" 60 U.S. 393, 403-04 (1856). Therefore, they had "none of the rights and privileges" that the Constitution "provides for and secures to citizens of the United States" but only "such as those who held the power and the Government might choose to grant them." *Id*. at 404-05.

prevent the U.S. government from removing or extraditing aliens to countries where they may be subject to torture); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX) (Dec. 21, 1965), *ratified by* 140 Cong. Rec. S7634 (daily ed. June 24, 1994); *see also* Motomura at 566 ("By the 1950s, aliens' rights decisions beyond the scope of immigration law already conflicted with assumptions implicit in the plenary power doctrine."). These changes also require reinterpretation, or modernization, of other norms to avoid "the absurdity of mechanically applying an old norm without reference to fundamental constitutive changes." Reisman at 873.

Perhaps reflective of the shift away from race-based characterizations and the outdated meaning of sovereignty, modern courts have refused to abdicate their power to judicially review immigration matters. Relying on early dissents in plenary power cases, numerous lower courts now apply contemporary constitutional principles in reviewing immigration actions by the political branches. Indeed, after more than a century of erosion, the plenary power doctrine does not appear to retain the support of a majority of justices on the current Supreme Court. *See Kerry v. Din*, 135 S. Ct. 2128 (2015) (in visa denial case, plurality opinion did not rely on plenary power); *see also* Michael Kagan, *Plenary Power is Dead! Long Live Plenary Power!*, 114 Mich. L. Rev. First Impressions 21 (2015) (noting that while the Court declined to repudiate the plenary power doctrine in *Kerry v. Din*, the split between the Justices suggests the doctrine is no longer as impactful as it once was). As explained below, courts have not abdicated – and should not abdicate – their responsibility to uphold constitutional safeguards in the area of immigration.

One of the earliest plenary power cases, *Fong Yue Ting v. United States*, generated three dissenting opinions, each of which highlighted a resident alien's ties to the United States as a

basis to justify greater legal protection. 149 U.S. at 738 (Brewer, J., dissenting) ("I deny that there is any arbitrary and unrestrained power to banish residents, even resident aliens."). Justice Field – who four years earlier announced the opinion of the court in the *Chinese Exclusion Case* – dissented in *Fong Yue Ting*. Even while praising the *Chinese Exclusion Case*, upon which the majority relied to reach its holding, Justice Field sought to limit the plenary power doctrine's application with regard to non-citizen residents:

> As men having our common humanity, they are protected by all the guaranties of the constitution. To hold that they are subject to any different law, or are less protected in any particular, than other persons, is, in my judgment, *to ignore the teachings of our history, the practice of our government, and the language of our constitution.*

Id. at 754 (Fields, J., dissenting) (emphasis added).

Nearly 60 years later, judicial skepticism regarding an unrestrained plenary power persisted. Dissenting in *Harisiades v. Shaughnessy*, Justice Douglas drew on Justice Brewer's dissent in *Fong Yue Ting*, arguing that the implied power of deportation should not be given priority over the express guarantee of the Fifth Amendment. 342 U.S. 580, 599-600 (1952) (Douglas, J., dissenting). Justice Douglas repeated Justice Brewer's warning:

> This doctrine of powers inherent in sovereignty is one both indefinite and dangerous . . . The governments of other nations have elastic powers. *Ours are fixed and bounded by a written constitution. The expulsion of a race may be within the inherent powers of a despotism.* History, before the adoption of this constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely, as it seems to me, they gave to this government no general power to banish.

Id. (Douglas, J., dissenting) (emphasis added).

Along with Justices Black, Jackson, and Frankfurter, Justice Douglas supported limitations to the plenary power doctrine. These Justices, dissenting in influential McCarthy-era plenary power cases, "expressed serious concern that aliens would be denied access to judicial

review in such harsh and unremitting terms." Motomura at 560; *see also Mezei*, 345 U.S. at 217 (Black, J., dissenting) ("No society is free where government makes one person's liberty depend upon the arbitrary will of another. Dictatorships have done this since time immemorial. They do now."); *id. at* 224 (Jackson, J., dissenting) ("I conclude that detention of an alien would not be inconsistent with substantive due process, provided – and this is where my dissent begins – he is accorded procedural due process of law.").

Over time, the dissents in *Mezei*, *Knauff*, and *Harisiades* gained influence, leading to "an expansion in the number and range of claims that courts, including the Supreme Court, would hear in immigration cases." Motomura at 560. Lower courts have declined to abdicate review entirely and instead have applied "the rational basis test to substantive due process and equal protection challenges [arising from deportation]; . . . the traditional *Mathews v. Eldridge* factors to procedural due process challenges; and . . . First Amendment standards to [immigration] restrictions [arising out of] political speech and association." Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 Hastings Const. L.Q. 925, 934–35 (1995); *see, e.g.*, *Reno v. Flores*, 507 U.S. 292, 306 (1993) (holding that despite the broad power of the political branches over immigration, INS regulations must meet the rational basis test by "rationally advancing some legitimate governmental purpose"); *Raya-Ledesma v. I.N.S.*, 55 F.3d 418, 420 (9th Cir. 1994) (finding application of residency requirement for discretionary relief from deportation had a rational basis and therefore did not violate legal permanent resident's right to equal protection); *Tran v. Caplinger*, 847 F. Supp. 469, 478-79 (W.D. La. 1993) (engaging in substantive due process analysis as to whether detention imposed was "merely incidental to another legitimate governmental purpose"); *Lynch v. Cannatella*, 810

F.2d 1363, 1366 (5th Cir. 1987) ("We hold that even excludable aliens are entitled to the protection of the due process clause while they are physically in the United States. . . .").

Thus, as these cases have implicitly recognized, courts are not required to defer completely to the exercise of executive or legislative power over immigration matters.

II. REVIEWING THE EXECUTIVE ORDER WILL NOT INTERFERE WITH THE PROPER EXERCISE OF EXECUTIVE POWER, BUT WILL PROTECT CONSTITUTIONAL NORMS.

Amici recognize that there are limits to judicial review and judicial overreach could interfere with sensitive political matters and foreign relations. Those concerns, however, should not preclude judicial review of the Executive Order, particularly when the Supreme Court has cautioned against classifications based on national origin. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (classifications based on national origin are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy").

Neither the Plaintiffs nor *Amici* suggest that the judiciary can or should review every decision of the political branches. Review is necessary here because the Executive Order applies such a broad brush – suspending visas, prohibiting entry, and foreclosing any adjudications for all aliens of certain nationalities. Despite its purported aim of protecting national security by excluding possible terrorists, the Executive Order prohibits the entry of every person from the seven countries, ranging from infants seeking lifesaving medical attention to refugees fleeing civil war to wheelchair-bound senior citizens.[4]

[4] In a different context, the Supreme Court has cautioned that overly broad state action toward a specified group may be indicative of discriminatory intent. In *Romer v. Evans*, the Court stated: "'[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" 517 U.S. 620, 633

That the political branches might use national security as a smokescreen to discriminate against disfavored populations is not an unfounded concern. The Korematsu Center owes its existence to just such an incident: the shameful, World War II-era forced relocation and incarceration of more than 100,000 men, women and children of Japanese descent, purportedly for national security reasons, challenged in *Korematsu v. United States*, 323 U.S. 214 (1944). More than a half-century after that decision, the Solicitor General confessed error, acknowledging that the federal government knew at the time of the mass incarcerations that only "a small percentage of Japanese Americans posed a potential security threat, and that the most dangerous were already known or in custody." Neal Katyal, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Interment Cases*, Dep't of Justice: Justice Blogs (May 20, 2011), https://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases; *see also* Neal K. Katyal, *The Solicitor General and Confession of Error*, 81 Fordham L. Rev. 3027 (2013). The federal government's revelation occurred decades after a district court reversed Mr. Korematsu's conviction and found "substantial support in the record that the government deliberately omitted relevant information and provided misleading information in papers before the court." *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984). The district court added that the Supreme Court's decision "stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability." *Id.* Instead, courts "must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused." *Id.*

(1996) (*quoting Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)). If the breadth of such a law is "so discontinuous with the reasons offered for it," it leads inexorably to the conclusion that the law was motivated by prejudice and bias, not a legitimate state interest. *Id.* at 632.

Engaging in judicial review, when circumstances suggest that executive or legislative action arises from such fears and prejudices, provides that protection while simultaneously extending judicial scrutiny to only a limited category of actions by the political branches. The use of such a standard for deciding when review is warranted would, in fact, have had no effect on most of the Supreme Court plenary power doctrine cases decided since World War II. For instance, *Knauff* and *Mezei* challenged exclusion decisions made on an individual basis. In each case, individuals were denied entry following determination that their admission was contrary to the public interest. *Knauff*, 338 U.S. at 544-47; *Mezei*, 345 U.S. at 209-15. Although the Supreme Court invoked the plenary power doctrine in each case, and *Mezei* expressly relied on the *Chinese Exclusion Case*, neither decision provides any support for the argument that wholesale exclusions by race or nationality remain immune from review. The same is true of other Supreme Court decisions on which the United States has relied to support its plenary power argument. *See, e.g.*, *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (appeal of deportation order based on finding that individual had committed serious, non-political crime); *Landon v. Plasencia*, 459 U.S. 21 (1982) (appeal from exclusion order by permanent resident alien barred from returning to the United States); *Harisiades*, 342 U.S. at 588-89 (appeals from three separate deportation orders based on aliens' past membership in the Communist Party); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (denial of individual visa).

Thus, when a court engages in judicial review of policies directed at entire groups under circumstances suggestive of discriminatory intent, the court does not overstep its authority, but acts consistent with core constitutional principles.

III. HISTORY REPUDIATES DECISIONS THAT ABDICATE JUDICIAL REVIEW OF EXECUTIVE AND LEGISLATIVE ACTIONS AGAINST ENTIRE RACES OR NATIONALITIES.

Perhaps it is not surprising that less than a decade after deciding the *Chinese Exclusion Case*, the Supreme Court upheld racial segregation under the doctrine of "separate but equal" in *Plessy v. Ferguson*, 163 U.S. 537 (1896). *Plessy* was, of course, overturned on Equal Protection grounds in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), and, like other cases that establish broad authority to discriminate against entire races or nationalities, are now considered the nadir of American jurisprudence. One reason, perhaps, that the Asian exclusion cases were not overturned by courts, unlike *Plessy*, is that the Asian exclusion and naturalization cases were abrogated by legislation. *See* Immigration and Naturalization Act of 1952, 8 U.S.C. §§ 1101-1537 *et seq*. (eliminating the racial bar to naturalization); Immigration and Naturalization Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. §§ 1101, 1151-1157, 1181–1182, 1201-1202, 1204, 1227, 1253–1255, 1259, 1322, 1351) (abolishing discriminatory national origin quotas from the Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153, which pegged the desired racial demographics of this country based on 1890 Census).

Plessy and *Korematsu* are both considered cases that "embod[y] a set of propositions that all legitimate constitutional decisions must be prepared to refute." Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 380 (2011); *see also* Michael J. Klarman, *The Plessy Era*, 1998 Sup. Ct. Rev. 303, 304 (1998) ("Commentators have called *Plessy* 'ridiculous and shameful,' 'racist and repressive,' and a 'catastrophe.'").

In much the same way the government urges here, those decisions gave broad deference to the political branches of government to take action against disfavored minorities. History, however, has rejected judicial sanction of those actions. Not only do modern courts dismiss those cases as wrongly decided, they condemn those courts for allowing racist views to go

unchecked by the judiciary. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting) (describing the use of strict scrutiny in *Korematsu* to "yield[] a pass for an odious, gravely injurious racial classification . . . A *Korematsu*-type classification . . . will never again survive scrutiny: Such a classification, history and precedent instruct, properly ranks as prohibited."); *Obadele v. United States*, 52 Fed. Cl. 432, 441 (2002) ("Half a century of equal protection jurisprudence has confirmed the error of [*Korematsu*'s] wartime judicial abdication."); *see also* Michael Stokes Paulsen, *Symposium: The Changing Laws of War: Do We Need A New Legal Regime After September 11?: The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257, 1259 (2004) (complete "judicial acquiescence or abdication" of performing checks on presidential power "has a name. That name is *Korematsu*"); Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. Pa. J. Const. L. 739, 748-51 (2014) (deferential standard of review applied in *Plessy* was "incapable of identifying and addressing contemporary prejudices").

History will look similarly at this case and this Court if it allows the Executive Order to evade review. Permitting the Executive Order to stand under the plenary power doctrine—a doctrine rooted in racism and xenophobia—will be seen for what it is: the judiciary's abdication of its duty to stand as a bulwark against those who would undermine the nation's core constitutional principles.

CONCLUSION

For the foregoing reasons, this Court should adjudicate Plaintiffs' claims regarding the illegality of the Executive Order.

Respectfully submitted,

Dated: February 9, 2017

THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

Robert S. Chang
901 12th Avenue, Sullivan Hall
Seattle, WA 98122-1090
Telephone: (206) 398-4025
Facsimile: (206) 398-4261
Changro@seattleu.edu

AKIN GUMP STRAUSS HAUER & FELD LLP

/s/ *James E. Tysse*
James E. Tysse (VSB 73490)
Robert A. Johnson (*Pro hac* pending)
Jessica Michael Weisel (*Pro hac* pending)
1333 New Hampshire Ave, NW
Washington, DC 20036
Telephone: (202) 887-4571
Facsimile: (202) 887-4288
jtysse@akingump.com

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that, on this 9th day of February 2017, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all parties of record.

Dated: February 9, 2017

/s/ *James E. Tysse*
James E. Tysse (VSB 73490)
1333 New Hampshire Ave, NW
Washington, DC 20036
Telephone: (202) 887-4571
Facsimile: (202) 887-4288
jtysse@akingump.com

Attorneys for Amici Curiae

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

TAREQ AQEL MOHAMMED AZIZ, et al.,

Petitioners,

v. Case No. 17-cv-116-LMB-TCB

DONALD TRUMP, President of the United States, et al.,

Respondents.

LOCAL CIVIL RULE 7.1 FINANCIAL DISCLOSURE STATEMENT OF *AMICI CURIAE* FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, CIVIL RIGHTS ORGANIZATIONS, AND NATIONAL BAR ASSOCIATIONS OF COLOR

Pursuant to Federal Rule of Civil Procedure 7.1(A)(1)(c), undersigned counsel for *Amici Curiae* make the following disclosure:

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center") is a research and advocacy organization based at Seattle University, a non-profit educational institution under Section 501(c)(3) of the Internal Revenue Code. The Korematsu Center does not have any parent corporation or issue stock and consequently there exists no publicly held corporation which owns 10 percent or more of its stock.

Asian Americans Advancing Justice and the South Asian Bar Association of North America and are not-for-profit organizations with no parents, subsidiaries, or affiliates.

The National Native American Bar Association has an affiliate 501(c)(3) not-for-profit charitable arm, the National Native American Bar Association Foundation, but has no other parents, subsidiaries, or affiliates.

Respectfully submitted,

Dated: February 9, 2017

THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

Robert S. Chang
901 12th Avenue, Sullivan Hall
Seattle, WA 98122-1090
Telephone: (206) 398-4025
Facsimile: (206) 398-4261
Changro@seattleu.edu

AKIN GUMP STRAUSS HAUER & FELD LLP

/s/ *James E. Tysse*
James E. Tysse (VSB 73490)
1333 New Hampshire Ave, NW
Washington, DC 20036
Telephone: (202) 887-4571
Facsimile: (202) 887-4288
jtysse@akingump.com

Robert A. Johnson (*pro hac pending*)
One Bryant Park
New York, NY 10036
Telephone: (212) 872-1000
Facsimile: (212) 872-1002
Rajohnson@akingump.com

Jessica M. Weisel (*pro hac pending*)
1999 Avenue of the Stars, Suite 600
Los Angeles, CA 90067
Telephone: (310) 229-1000
Facsimile: (310) 229-1001
Jweisel@akingump.com
Attorneys for Amici Curiae

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/s/ James E. Tysse
James E. Tysse (VSB 73490)
1333 New Hampshire Ave, NW
Washington, DC 20036
Telephone: (202) 887-4571
Facsimile: (202) 887-4288
jtysse@akingump.com

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[PROPOSED] ORDER GRANTING MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, CIVIL RIGHTS ORGANIZATIONS, AND NATIONAL BAR ASSOCIATIONS OF COLOR, IN SUPPORT OF THE PETITIONERS

Having considered the Motion for Leave to File a Brief as *Amici Curiae* in Support of Petitioners filed by the Fred T. Korematsu Center for Law and Equality, Civil Rights Organizations, and National Bar Associations of Color, it is hereby ORDERED that the motion is GRANTED. The Clerk is directed to accept the proposed brief for filing.

IT IS SO ORDERED.

DATED: _____, 2017

_____

The Honorable Leonie M. Brinkema
United States District Court Judge