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Brief of the Fred T. Korematsu Center for Law and Equality, Civil Rights Organizations, and National Bar Associations of Color, as Amici Curiae in Support of Plaintiffs

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BADR DHAIFALLAH AHMED MOHAMMED, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Case No. 2:17-cv-00786-SJO-GJS

[Hon. S. James Otero]

BRIEF OF THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, CIVIL RIGHTS ORGANIZATIONS, AND NATIONAL BAR ASSOCIATIONS OF COLOR, AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS

Hearing Date: February 10, 2017
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 7.1, 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.

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.

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

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INTEREST OF *AMICI CURIAE*

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.[1]

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.

Amicus Curiae the South Asian Bar Association of North America ("SABA") is the umbrella organization for 26 regional bar associations in North America representing the interests of over 6,000 attorneys of South Asian descent. SABA provides a vital link for the South Asian community to the law and the legal system.

[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici* made a monetary contribution to its preparation or submission. Counsel for Defendants has consented to the filing of this brief. As of this writing, counsel for Plaintiffs has not yet responded to *Amici*'s request for consent. *See* Motion for Leave to File Amici Brief, filed concurrently.

Within the United States, SABA takes an active interest in the legal rights of South Asian and other minority communities. Members of SABA include immigration lawyers and others who represent persons that have been and will be affected by the Executive Order.

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.

SUMMARY OF ARGUMENT

In 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.*, 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 such as *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 with similar precedent 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 – public education in *Brown*, immigration policy here – "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 flowing from 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; Saito at 15; *see also, e.g.*, *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 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,

[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. *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).

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 – their reliance on 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 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); 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

[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.

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 have applied contemporary constitutional principles in reviewing immigration actions by the political branches. 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). 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. *See* 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 "expressed serious concern that aliens would be denied access to judicial review in such harsh and unremitting terms," dissenting in influential McCarthy-era plenary power cases. *See* 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]

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 the 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:

[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*, 517 U.S. 620, 632 (1996), the Court stated: "'[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" *Id.* at 633 (*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. *Romer*, 517 U.S. at 632.

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.*

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); *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 our 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.'").

Like 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 we dismiss those cases as wrongly decided, we 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. Relying on the plenary power doctrine, a doctrine rooted in racism and xenophobia, to permit the Executive Order to stand will be seen for what it is – the judiciary's abdication of its duty to stand as a bulwark against those who would undermine our core constitutional principles.

CONCLUSION

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

Dated: February 8, 2017

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