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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

Fred T. Korematsu Center for Law and Equality

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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  
Time: 10:00 a.m.  
Courtroom: 10C, Tenth Floor

Date Action Filed: January 31, 2017

1 **CORPORATE DISCLOSURE STATEMENT**

2 Pursuant to Federal Rule of Civil Procedure 7.1, undersigned counsel for  
3 *Amici Curiae* make the following disclosure:

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

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

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

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1 **INTEREST OF AMICI CURIAE**

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

9 The Korematsu Center has a special interest in addressing government action  
10 toward persons based on race or nationality. Drawing from its experience and expertise,  
11 the Korematsu Center has a strong interest in ensuring that courts understand the  
12 historical – often racist – underpinnings of doctrines asserted to support the exercise of  
13 such legislative and executive power.<sup>1</sup>

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

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

25  
26 <sup>1</sup> No counsel for any party authored this brief in whole or in part, and no person or entity other  
27 than *Amici* made a monetary contribution to its preparation or submission. Counsel for Defendants has  
28 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.

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

5 This Brief is also submitted by all members of *Amicus Curiae* Asian Americans  
6 Advancing Justice (“Advancing Justice”), the national affiliation of five nonprofit,  
7 nonpartisan civil rights organizations: Asian Americans Advancing Justice – AAJC,  
8 Asian Americans Advancing Justice – Asian Law Caucus, Asian Americans Advancing  
9 Justice – Atlanta, Asian Americans Advancing Justice – Chicago, and Asian Americans  
10 Advancing Justice – Los Angeles. Members of Advancing Justice routinely file *amicus*  
11 *curiae* briefs in cases in this Court and other courts. Through direct services, impact  
12 litigation, policy advocacy, leadership development, and capacity building, the  
13 Advancing Justice affiliates advocate for marginalized members of the Asian American,  
14 Native Hawaiian, Pacific Islander and other underserved communities, including  
15 immigrant members of those communities.

### 16 SUMMARY OF ARGUMENT

17 In multiple, similar actions, the government has maintained that this Court may  
18 not review Executive Order 13769, entitled “Protecting the Nation from Foreign  
19 Terrorist Entry into the United States,” 82 Fed. Reg. 8977 (Jan. 27, 2017) (the  
20 “Executive Order”), because the President has “unreviewable authority” to suspend  
21 admission of aliens to this country. *See, e.g.*, Emergency Motion Under Circuit Rule  
22 27-3 for Administrative Stay and Motion for Stay Pending Appeal at 2, *State of Wash. v.*  
23 *Trump*, No. 17-35105 (9th Cir. Feb. 4, 2017). That argument advances the plenary  
24 power doctrine, which, like the “separate but equal” doctrine, is a relic of an odious past  
25 that has no role in modern American jurisprudence. Just as *Plessy v. Ferguson*, 163 U.S.  
26 537 (1896), was influenced by nineteenth century views considered anathema today, the  
27 plenary power doctrine derives from decisions such as *Chae Chan Ping v. United States*,

1 130 U.S. 581 (1889) (the “*Chinese Exclusion Case*”), that were premised on outdated  
2 racist and nativist precepts that we now reject.

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

## 16 17 ARGUMENT

### 18 **I. The Plenary Power Doctrine Was Born Out Of Racist Notions And Outdated** 19 **Understandings Of Sovereignty That Courts Now Reject.**

20 The birthplace of the plenary power doctrine, the *Chinese Exclusion Case*, relies  
21 on racist descriptions of Chinese immigrants that stoked xenophobia. The Court  
22 stereotyped Chinese laborers as “industrious,” “frugal,” and “content with the simplest  
23 fare, such as would not suffice for our laborers and artisans.” 130 U.S. at 595 (emphasis  
24 added). These stereotypes informed the xenophobia of the opinion, driven by fear of  
25 “strangers in the land, residing apart by themselves, and adhering to the customs and  
26 usages of their own country” – whose presence amounted to “an Oriental invasion.” *Id.*;  
27 *see also id.* at 606 (“the government of the United States, through its legislative  
28

1 department,” could lawfully “consider[] the presence of foreigners *of a different*  
2 *race...who will not assimilate with us, to be dangerous to its peace and security*” despite  
3 the absence of “actual hostilities”) (emphasis added).

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

11 Similar racist and xenophobic justifications pervade plenary power doctrine cases  
12 flowing from the *Chinese Exclusion Case*. The “right of self-preservation” advanced as  
13 justification for the plenary power doctrine’s broad immunity in these exclusion cases  
14 was plainly ethnic and racial self-preservation, not the preservation of borders or  
15 national security. *See, e.g., Chinese Exclusion Case*, 130 U.S. at 608; Saito at 15; *see*  
16 *also, e.g., Fong Yue Ting v. United States*, 149 U.S. 698, 729-30 (1893) (discussing the  
17 requirement that Chinese resident aliens prove the fact of their U.S. residence “by at  
18 least one credible white witness” in order to remain in the country); *Nishimura Ekiu v.*  
19 *United States*, 142 U.S. 651, 664 & n.1 (1892) (exclusion of Japanese immigrant who  
20 was “likely to become a public charge”).<sup>2</sup> These racial underpinnings have led courts to  
21 apply the plenary power doctrine, relying on an “aberrational form of the typical  
22 relationship between statutory interpretation and constitutional law” in the area of  
23 immigration law. Hiroshi Motomura, *Immigration Law After a Century of Plenary*  
24 *Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545,

25  
26 <sup>2</sup> Later cases do not explicitly discuss or express support for race-based distinctions, but do so  
27 implicitly through their reliance on the reasoning of the *Chinese Exclusion Case* and its progeny. *See*  
28 *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).

1 549 (1990); *see also* T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the*  
2 *Constitution*, 7 Constitutional Commentary 9, 33 (1990) (Chinese Exclusion laws  
3 “should serve as cautionary examples to those who would urge that the immigration  
4 power be left unconstrained by the Constitution in order to promote the maintenance of  
5 ‘communities of character’”).

6 The overt racism of these cases contributes to an additional flaw in the doctrine –  
7 their reliance on an outdated and race-based meaning of sovereignty. The *Chinese*  
8 *Exclusion Case* states that “[t]he power of exclusion of foreigners” is “an incident of  
9 sovereignty belonging to the government of the United States . . . delegated by the  
10 constitution.”<sup>3</sup> 130 U.S. at 609. Since then, the concept of sovereignty has evolved to  
11 incorporate principles of fundamental human rights and anti-discrimination, shifting the  
12 system “from the protection of sovereigns to the protection of people.” *See* W. Michael  
13 Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 Am. J.  
14 Int’l L. 866, 872 (1990). This change is reflected in congressional action incorporating  
15 these principles in federal law. *See, e.g.*, Foreign Affairs Reform and Restructuring Act  
16 of 1998, 22 U.S.C. § 6501 et. seq. (1998) (adopting United Nations Convention Against  
17 Torture and authorizing issuance of related regulations, which prevent the U.S.  
18 government from removing or extraditing aliens to countries where they may be subject  
19 to torture); International Convention on the Elimination of All Forms of Racial  
20 Discrimination, G.A. Res. 2106 (XX) (Dec. 21, 1965), *ratified by* 140 Cong. Rec.  
21 S7634 (daily ed. June 24, 1994); Motomura at 566 (“By the 1950s, aliens’ rights  
22 decisions beyond the scope of immigration law already conflicted with assumptions  
23 implicit in the plenary power doctrine.”). These changes also require reinterpretation, or  
24

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25  
26 <sup>3</sup> This same race-based concept of sovereignty is discussed at length in *Dred Scott v. Sandford*,  
27 which explained that, historically, “negroes of African race” were not “constituent members of this  
28 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.

1 modernization, of other norms to avoid “the absurdity of mechanically applying an old  
2 norm without reference to fundamental constitutive changes.” Reisman at 873.

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

17 One of the earliest plenary power cases, *Fong Yue Ting v. United States*, generated  
18 three dissenting opinions, each of which highlighted a resident alien’s ties to the United  
19 States as a basis to justify greater legal protection. *See* 149 U.S. at 738 (Brewer, J.,  
20 dissenting) (“I deny that there is any arbitrary and unrestrained power to banish  
21 residents, even resident aliens.”). Justice Field – who four years earlier announced the  
22 opinion of the court in the *Chinese Exclusion Case* – dissented in *Fong Yue Ting*. Even  
23 while praising the *Chinese Exclusion Case*, upon which the majority relied to reach its  
24 holding, Justice Field sought to limit the plenary power doctrine’s application with  
25 regard to non-citizen residents:

26 As men having our common humanity, they are protected by all the  
27 guaranties of the constitution. To hold that they are subject to any different  
28 law, or are less protected in any particular, than other persons, is, in my

1 judgment, to ignore the teachings of our history, the practice of our  
2 government, and the language of our constitution.

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

4 Nearly 60 years later, judicial skepticism regarding an unrestrained plenary power  
5 persisted. Dissenting in *Harisiades v. Shaughnessy*, Justice Douglas drew on Justice  
6 Brewer’s dissent in *Fong Yue Ting*, arguing that the implied power of deportation should  
7 not be given priority over the express guarantee of the Fifth Amendment. 342 U.S. 580,  
8 599-600 (1952) (Douglas, J., dissenting). Justice Douglas repeated Justice Brewer’s  
9 warning:

10 This doctrine of powers inherent in sovereignty is one both indefinite and  
11 dangerous . . . The governments of other nations have elastic powers. *Ours*  
12 *are fixed and bounded by a written constitution. The expulsion of a race*  
13 *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.

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

15 Along with Justices Black, Jackson, and Frankfurter, Justice Douglas supported  
16 limitations to the plenary power doctrine. These Justices “expressed serious concern  
17 that aliens would be denied access to judicial review in such harsh and unremitting  
18 terms,” dissenting in influential McCarthy-era plenary power cases. *See* *Motomura* at  
19 560; *see also Mezei*, 345 U.S. at 217 (Black, J., dissenting) (“No society is free where  
20 government makes one person’s liberty depend upon the arbitrary will of another.  
21 Dictatorships have done this since time immemorial. They do now.”); *id.* at 224  
22 (Jackson, J., dissenting) (“I conclude that detention of an alien would not be inconsistent  
23 with substantive due process, provided – and this is where my dissent begins – he is  
24 accorded procedural due process of law.”).

25 Over time, the dissents in *Mezei*, *Knauff*, and *Harisiades* gained influence,  
26 leading to “an expansion in the number and range of claims that courts, including the  
27 Supreme Court, would hear in immigration cases.” *Motomura* at 560. Lower courts  
28

1 have declined to abdicate review entirely and instead have applied “the rational basis  
2 test to substantive due process and equal protection challenges [arising from  
3 deportation]; . . . the traditional *Mathews v. Eldridge* factors to procedural due process  
4 challenges; and . . . First Amendment standards to [immigration] restrictions [arising out  
5 of] political speech and association.” Stephen H. Legomsky, *Ten More Years of Plenary  
6 Power: Immigration, Congress, and the Courts*, 22 *Hastings Const. L.Q.* 925, 934–35  
7 (1995); *see, e.g., Reno v. Flores*, 507 U.S. 292, 306 (1993) (holding that despite the  
8 broad power of the political branches over immigration, INS regulations must meet the  
9 rational basis test by “rationally advancing some legitimate governmental purpose”);  
10 *Raya-Ledesma v. I.N.S.*, 55 F.3d 418, 420 (9th Cir. 1994) (finding application of  
11 residency requirement for discretionary relief from deportation had a rational basis and  
12 therefore did not violate legal permanent resident’s right to equal protection); *Tran v.  
13 Caplinger*, 847 F. Supp. 469, 478-79 (W.D. La. 1993) (engaging in substantive due  
14 process analysis as to whether detention imposed was “merely incidental to another  
15 legitimate governmental purpose”); *Lynch v. Cannatella*, 810 F.2d 1363, 1366 (5th Cir.  
16 1987) (“We hold that even excludable aliens are entitled to the protection of the due  
17 process clause while they are physically in the United States. . .”).

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

20  
21 **II. Reviewing The Executive Order Will Not Interfere With The Proper Exercise**  
22 **Of Executive Power, But Will Protect Constitutional Norms.**

23 *Amici* recognize that there are limits to judicial review and judicial overreach  
24 could interfere with sensitive political matters and foreign relations. Those concerns,  
25 however, should not preclude judicial review of the Executive Order, particularly when  
26 the Supreme Court has cautioned against classifications based on national origin. *City  
27 of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (classifications  
28



1 based on national origin are “so seldom relevant to the achievement of any legitimate  
2 state interest that laws grounded in such considerations are deemed to reflect prejudice  
3 and antipathy”).

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

12 That the political branches might use national security as a smokescreen to  
13 discriminate against disfavored populations is not an unfounded concern. The  
14 Korematsu Center owes its existence to just such an incident: the shameful, World War  
15 II-era forced relocation and incarceration of more than 100,000 men, women and  
16 children of the Japanese descent, purportedly for national security reasons, challenged in  
17 *Korematsu v. United States*, 323 U.S. 214 (1944). More than a half-century after that  
18 decision, the Solicitor General confessed error, acknowledging that the federal  
19 government knew at the time of the mass incarcerations that only “a small percentage of  
20 Japanese Americans posed a potential security threat, and that the most dangerous were  
21 already known or in custody.” Neal Katyal, *Confession of Error: The Solicitor  
22 General’s Mistakes During the Japanese-American Internment Cases*, Dep’t of Justice:

23  
24 <sup>4</sup> In a different context, the Supreme Court has cautioned that overly broad state  
25 action toward a specified group may be indicative of discriminatory intent. In *Romer v.  
26 Evans*, 517 U.S. 620, 632 (1996), the Court stated: “[D]iscriminations of an unusual  
27 character especially suggest careful consideration to determine whether they are  
28 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.

1 Justice Blogs (May 20, 2011), [https://www.justice.gov/opa/blog/confession-error-](https://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases)  
2 [solicitor-generals-mistakes-during-japanese-american-internment-cases](https://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases); *see also* Neal  
3 K. Katyal, *The Solicitor General and Confession of Error*, 81 Fordham L. Rev. 3027  
4 (2013). The federal government’s revelation occurred decades after a district court  
5 reversed Mr. Korematsu’s conviction and found “substantial support in the record that  
6 the government deliberately omitted relevant information and provided misleading  
7 information in papers before the court.” *Korematsu v. United States*, 584 F. Supp. 1406,  
8 1420 (N.D. Cal. 1984). The district court added that the Supreme Court’s decision  
9 “stands as a caution that in times of distress the shield of military necessity and national  
10 security must not be used to protect governmental actions from close scrutiny and  
11 accountability.” *Id.* Instead, courts “must be prepared to exercise their authority to  
12 protect all citizens from the petty fears and prejudices that are so easily aroused.” *Id.*

13 Engaging in judicial review, when circumstances suggest that executive or  
14 legislative action arises from such fears and prejudices, provides that protection while  
15 simultaneously extending judicial scrutiny to only a limited category of actions by the  
16 political branches. The use of such a standard for deciding when review is warranted  
17 would, in fact, have had no effect on most of the Supreme Court plenary power doctrine  
18 cases decided since World War II. For instance, *Knauff* and *Mezei* challenged exclusion  
19 decisions made on an individual basis. In each case, individuals were denied entry  
20 following determination that their admission was contrary to the public interest. *Knauff*,  
21 338 U.S. at 544-47; *Mezei*, 345 U.S. at 209-15. Although the Supreme Court invoked  
22 the plenary power doctrine in each case, and *Mezei* expressly relied on the *Chinese*  
23 *Exclusion Case*, neither decision provides any support for the argument that wholesale  
24 exclusions by race or nationality remain immune from review. The same is true of other  
25 Supreme Court decisions on which the United States has relied to support its plenary  
26 power argument. *See, e.g., INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (appeal of  
27 deportation order based on finding that individual had committed serious, non-political  
28

1 crime); *Harisiades*, 342 U.S. at 588-89 (appeals from three separate deportation orders  
2 based on aliens' past membership in the Communist Party); *Kleindienst v. Mandel*, 408  
3 U.S. 753 (1972) (denial of individual visa).

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

7  
8 **III. History Repudiates Decisions That Abdicate Judicial Review Of Executive  
9 And Legislative Actions Against Entire Races Or Nationalities.**

10 Perhaps it is not surprising that less than a decade after deciding the *Chinese*  
11 *Exclusion Case*, the Supreme Court upheld racial segregation under the doctrine of  
12 "separate but equal" in *Plessy v. Ferguson*, 163 U.S. 537 (1896). *Plessy* was, of course,  
13 overturned on Equal Protection grounds in *Brown v. Board of Education of Topeka*, 347  
14 U.S. 483 (1954), and, like other cases that establish broad authority to discriminate  
15 against entire races or nationalities, are now considered the nadir of American  
16 jurisprudence. One reason, perhaps, that the Asian exclusion cases were not overturned  
17 by courts, unlike *Plessy*, is that the Asian exclusion and naturalization cases were  
18 abrogated by legislation. See Immigration and Naturalization Act of 1952, 8 U.S.C. §§  
19 1101-1537 *et seq.* (eliminating the racial bar to naturalization); Immigration and  
20 Naturalization Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8  
21 U.S.C. §§ 1101, 1151-1157, 1181-1182, 1201-1202, 1204, 1227, 1253-1255, 1259,  
22 1322, 1351) (abolishing discriminatory national origin quotas from the Immigration Act  
23 of 1924, Pub. L. No. 68-139, 43 Stat. 153, which pegged the desired racial  
24 demographics of this country based on 1890 Census).

25 *Plessy* and *Korematsu* are both considered cases that "embod[y] a set of  
26 propositions that all legitimate constitutional decisions must be prepared to refute."  
27 Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 380 (2011); see also Michael J.

1 Klarman, *The Plessy Era*, 1998 Sup. Ct. Rev. 303, 304 (1998) (“Commentators have  
2 called *Plessy* ‘ridiculous and shameful,’ ‘racist and repressive,’ and a ‘catastrophe.’”).

3 Like the government urges here, those decisions gave broad deference to the  
4 political branches of government to take action against disfavored minorities. History,  
5 however, has rejected judicial sanction of those actions. Not only do we dismiss those  
6 cases as wrongly decided, we condemn those courts for allowing racist views to go  
7 unchecked by the judiciary. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S.  
8 200, 275 (1995) (Ginsburg, J., dissenting) (describing the use of strict scrutiny in  
9 *Korematsu* to “yield[] a pass for an odious, gravely injurious racial classification . . . A  
10 *Korematsu*-type classification . . . will never again survive scrutiny: Such a  
11 classification, history and precedent instruct, properly ranks as prohibited.”); *Obadele v.*  
12 *United States*, 52 Fed. Cl. 432, 441 (2002) (“Half a century of equal protection  
13 jurisprudence has confirmed the error of [*Korematsu*’s] wartime judicial abdication.”);  
14 *see also* Michael Stokes Paulsen, *Symposium: The Changing Laws of War: Do We Need*  
15 *A New Legal Regime After September 11?: The Constitution of Necessity*, 79 Notre  
16 Dame L. Rev. 1257, 1259 (2004) (complete “judicial acquiescence or abdication” of  
17 performing checks on presidential power “has a name. That name is *Korematsu*”);  
18 Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. Pa. J. Const. L. 739, 748-  
19 51 (2014) (deferential standard of review applied in *Plessy* was “incapable of  
20 identifying and addressing contemporary prejudices”).

21 History will look similarly at this case and this Court if it allows the Executive  
22 Order to evade review. Relying on the plenary power doctrine, a doctrine rooted in  
23 racism and xenophobia, to permit the Executive Order to stand will be seen for what it is  
24 – the judiciary’s abdication of its duty to stand as a bulwark against those who would  
25 undermine our core constitutional principles.

