No. 17-965

In The
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, ET AL.,

Petitioners,

v.

STATE OF HAWAII, ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF *AMICUS CURIAE* THE JAPANESE AMERICAN CITIZENS LEAGUE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The Japanese American Citizens League ("JACL") is a nonprofit organization whose mission is to secure and safeguard the civil and human rights of Asian and Pacific Islander Americans and all communities affected by injustice and bigotry.[1]

In 1943 and 1944, JACL urged this Court to declare unconstitutional the incarceration of nearly 120,000 Japanese Americans pursuant to Executive Order No. 9066. Emphasizing the overwhelming loyalty of the Japanese American community and its "confidence in American justice," JACL's filings in *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944) (the "Japanese Wartime Cases"), asked this Court to look behind the government's specious invocation of "military necessity" and instead stand as a bulwark "[a]gainst this dangerous drift and tide, this loss of manpower, this senseless gift to enemy propagandists, this prodigal waste of goodwill and unity at home, this opportunistic drive of groups long organized for hate to inflate their fanatic grudge into a national and international issue[.]" Brief for JACL as *Amicus Curiae* in *Hirabayashi* ("JACL *Hirabayashi* Br."). JACL "look[ed] to this Court, as the guardians of the liberties of all the people of the United States – of which Japanese

[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. Petitioners have filed a blanket letter of consent. Counsel for Respondents has consented to the filing of this brief.

Americans are a living and integral part – with confidence to protect them from such discrimination as this, which is so alien to the American way of life, not for their sake alone, but also for the sake of every minority racial group in American life." *Id*.

JACL's confidence was misplaced. The Court accepted the government's national security claims, clearing the way for tragedy and a lasting scar on American virtue. Immediately, scholars argued that "the basic issues should be presented to the Supreme Court again, in an effort to obtain a reversal," *see* Eugene V. Rostow, *The Japanese American Cases – A Disaster*, 54 Yale L.J. 489, 533 (1945), but as a Congressional Commission noted in 1982, the country has "not been so unfortunate that a repetition of the facts has occurred to give the Court that opportunity," U.S. Comm'n on the Wartime Relocation and Internment of Civilians, 96th Cong., *Report: Personal Justice Denied* ("CWRIC Report") 239 (1982).

Until now. The President's travel ban order – now in its third iteration – is such a repetition. The Court need not look far for evidence: the President and then-candidate Trump told us that his "total and complete shutdown of Muslims entering the United States" would do "the same thing" to Muslims that was done to Japanese Americans in the past. Joint App. 120 ("J.A. __"). And once in office he wasted little time, putting out the first travel ban (Executive Order No. 13,769, "EO-1" or "First Travel Ban") a few days after inauguration. After lower courts swiftly blocked it, the President issued Executive Order No. 13,780 ("EO-2" or

"Second Travel Ban") so that he could "keep [his] campaign promises," J.A. 127, with a "watered down version of the first one" that he "tailor[ed] at the behest of [his] lawyers," J.A. 131. The lower courts halted EO-2 in substantial part as well.

The third version, Proclamation No. 9645 ("EO-3" or "Third Travel Ban") now comes before this Court. The Government's brief is clear: the President expects the Court to give EO-3 – and its flimsy, contrived national security and foreign policy justifications – the same hands-off treatment it gave decades ago to Executive Order No. 9066. Once again, the Government expects the Court to accept the President's invocation of the "national security" and shirk its core responsibility to take a hard look at arbitrary, discriminatory, and harmful treatment of a disfavored group.

In its 1943 "Statement of Interest" in *Hirabayashi*, JACL explained that its concern was:

> not alone for its members, [but] for all the minority racial groups in this country who may be the next victims of similar discrimination resulting from war or other prejudices and hysterias, and for the preservation of civil rights for all[.]

JACL *Hirabayashi* Br. 9.

These same concerns compel JACL to write today.

SUMMARY OF ARGUMENT

History teaches caution and skepticism when vague notions of national security are used to justify vast, unprecedented exclusionary measures that target disfavored classes. Though *Hirabayashi* and *Korematsu* have been largely repudiated, *see, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) ("I am optimistic enough to believe that, one day, [this opinion] will be assigned its rightful place in the history of this Court's jurisprudence beside *Korematsu* and *Dred Scott*."), the Court's deferential approach left behind "a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need," *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting). The striking parallels between the Japanese Wartime Cases and the present case should inform the Court's analysis.

There is much debate in the briefing about whether evidence of the President's animus causes EO-3 to fall under the Establishment Clause. Pet. Br. 58-70; Resp. Br. 61-76. But a finding that improper animus motivated EO-3 is not necessary to declare the President's action unlawful. Congress delegated authority to the President to exclude entire classes upon a "find[ing]" that the aliens' entry "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). That specific grant of authority is not a handover of Congress's Article I enumerated power over immigration; it must, among other things, co-exist with the later-enacted prohibition on nationality-based discrimination,

8 U.S.C. § 1152(a)(1)(A), and other provisions of the Immigration and Nationality Act ("INA") reflecting congressional intent with respect to how visa applicants are vetted and considered for admission to the United States. Contrary to the Government's urging that this Court play no role here, meaningful scrutiny of the executive's finding of harm to United States interests can have a powerful preventative effect and will often be sufficient to guard against the use of racial, national or religious animus in the case of sweeping exclusions.

Accordingly, the Court should reject the President's non-justiciability arguments and his push for wholesale deference to his decisions under section 1182(f). *See* Pet. Br. 18-26; Pet. Br. 35-40. As explained in Respondents' Brief (at 21-22, 32-37, 51-53), the Government's position would insulate from review executive actions that are inconsistent with the statutory framework and with congressional intent, and would empower the executive to effectively rewrite our immigration laws. In light of the sorry history of *Korematsu*, the consonance between the President's asserted national security justifications for EO-3 and the explanations that the War Department offered to support Executive Order No. 9066 in 1942 should put this Court on alert. To accept the President's rationale here on the Government's say-so when there is ample public evidence to the contrary invites executive overreach that compromises our deeply held national values. By contrast, by making it clear that the Court will require a legitimate basis for the challenged action, the Court

can ensure that there is not yet another "repetition [that] imbeds that principle [of invidious discrimination] more deeply in our law and thinking and expands it to new purposes." *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting). EO-3 cannot withstand such scrutiny.

ARGUMENT

I. Historical parallels between Executive Order No. 9066 and EO-3 should inform the Court's analysis so that history is learned from, not repeated.

It is often so that "a page of history is worth a volume of logic." *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.). In this spirit, JACL respectfully urges that this Court's analysis should be informed by the striking parallels between the arguments and circumstances involved in this matter and those at issue in the Japanese Wartime Cases.

A. Then, as now, the Government pursued a mass exclusionary measure of sweeping and senseless scope.

Executive Order No. 9066, signed ten weeks after the attack on Pearl Harbor, empowered the Secretary of War and his military commanders to exclude from designated areas "any and all persons" if "necessary or desirable." The Order itself contained no direct reference to race, ethnicity, or nationality, but military

authorities soon ordered the "evacuation" of nearly 120,000 persons of Japanese descent from the Pacific Coast. CWRIC Report at 157. These men, women, and children – mostly American citizens – were torn from their homes, farms, businesses, and schools and sent to far-flung facilities, "to be held in camps behind barbed wire and released only with government approval." *Id*. at 10.

The scope of the effort was unprecedented and cruel. Those incarcerated included thousands of members of the JACL, who had signed special oaths of allegiance to the United States; Japanese Americans who served the United States with distinction in World War I; and thousands more who would later fight for the United States in the Pacific Theater. *See* JACL *Hirabayashi* Br. 1, 91-92; CWRIC Report at 253-60. It included persons "with as little as one-sixteenth Japanese blood [and] others who, prior to evacuation, were unaware of their Japanese ancestry." Lt. Gen. J. DeWitt, Final Report: Japanese Evacuation from the West Coast, 1942 ("DeWitt Report"), at 145 (1943). Over one hundred Japanese American children were plucked from orphanages and incarcerated at the Manzanar War Relocation Center. Robert L. Brown and Ralph P. Merritt, Final Report, Manzanar Relocation Center (1946); *see also* Renee Tawa, *Childhood Lost: the Orphans of Manzanar*, L.A. Times, March 11, 1999. Foster children in the custody of Caucasian foster parents were removed and incarcerated. Paul R. Spickard, *Injustice Compounded: Amerasians and Non-Japanese Americans in World War II Concentration Camps*, 5 J.

of Am. Ethnic History 5, 12-14 (1986). The camps also held over 2,000 Latin Americans of Japanese descent, many of whom were not Japanese citizens and had never stepped foot in Japan. CWRIC Report at 303-14; Edward N. Barnhart, *Japanese Internees from Peru*, 31 Pac. Historical Rev. 169 (1962).

Government lawyers defending the program repeatedly told the Court that it was simply impossible to distinguish loyal Japanese Americans – concededly the vast majority of those evacuated and incarcerated – from those who might commit terrorist acts. An individualized approach to "prevent[ing] acts of espionage" was "fraught with extreme difficulty, if not wholly impossible," and only a blanket exclusion could "remove the danger [of a possible terrorist attack] during all hours." Brief for the United States, *Korematsu* ("Gov't Br. in *Korematsu*") 22-23. Reliable information was difficult to ascertain because the Japanese constituted an "unassimilated, tightly knit racial group." DeWitt Report at vii. Even with extreme vetting, it would be difficult for government officials "to look deep into the mind of a particular Japanese and determine whether his allegiance to the United States was so dominant within him as to overcome the ties of kinship or other intangible forces which might bind him to the members of an invading Japanese army." Gov't Br. in *Korematsu* 62-63. This Court accepted these arguments, credulously reasoning that "[a]t a time of threatened Japanese attack upon this country, the nature of our inhabitants' attachments to the Japanese enemy was consequently a matter of grave concern . . . [w]hatever

views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry [as a whole]." *Hirabayashi*, 320 U.S. at 96, 99.

Like its predecessors, EO-3 – which excludes 150 million men, women, and children from the United States from seven countries – is likewise striking in its overbreadth and cruelty. Because the Order excludes on the basis of nationality, it targets many with only tenuous, if any, connection to the designated countries. The policy bars those who have not visited their birth-country in decades, and even those – like the *Nisei* (second generation) and *Sansei* (third generation) Japanese Americans incarcerated during World War II – who have never stepped foot in their "home" countries. Thousands of European-born children (*e.g.*, a toddler born in Sweden to Iranian parents or an infant born in Spain to Libyan parents) are subject to the ban, but a British citizen who makes repeated trips to conflict areas in Syria or a Belgian citizen who becomes a terrorist in Yemen remain eligible for entry.[2]

Just as Executive Order No. 9066's blanket approach led to the incarceration of many of the Japanese

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[2] *See* Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, *in* CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES 17-35 (2001) (discussing citizenship laws of European nations); Brownwen Manby, *Citizenship Law in Africa: A Comparative Study* 55 (3d ed. 2016) (discussing citizenship laws of African nations); Civil Code of Iran, art. 976(2) (providing automatic Iranian citizenship at birth to those born to Iranian fathers).

Empire's most zealous opponents,[3] EO-3's abandonment of individualized assessments results in the exclusion of even the avowed and proven opponents of the terrorist groups against which the action purportedly shields. Yet those who are most vulnerable to such violence must suffer.

The predictable result of this dragnet approach, as in World War II, is a propaganda coup for America's enemies. *Compare Saboteur Ruling Assailed by Rome*, N.Y. Times, Aug. 4, 1942, at 8 (noting Axis propaganda exploiting incarceration of 100,000 Japanese Americans) *with* Amarnath Amarasingam, *What ISIS Fighters Think of Trump*, POLITICO.com, Mar. 1, 2017, goo.gl/bSsBZH (last visited Mar. 26, 2018) (noting "[t]he President has given terrorist groups a propaganda victory beyond their wildest dreams").

B. Then, as now, the exclusion's underinclusivity cast additional doubts on the proffered justification.

The Government defended Executive Order No. 9066 on the ground that it was necessary to guard against "fifth column" activity by Axis Powers, yet comparable mass exclusion and incarceration efforts were never undertaken against German Americans or

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[3] Indeed, JACL leadership faced criticism from some within the community for the zeal with which the organization collaborated with American law enforcement and intelligence officials during World War II. *See* Cherstin M. Lyon, *Prisons and Patriots: Japanese American Wartime Citizenship, Civil Disobedience, and Historical Memory* (2011).

Italian Americans. As Justice Jackson pointed out, "[h]ad [Fred] Korematsu been one of four – the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole – only Korematsu's presence [in California] would have violated the order." 323 U.S. at 243 (Jackson, J., dissenting). The Government dismissed these concerns as "without substance," urging the Court not to second-guess military determinations that the Pacific Coast presence of the Japanese was "[t]he principal danger to be apprehended." Brief for the United States, *Hirabayashi* ("Gov't Br. in *Hirabayashi*") 65; *but see* CWRIC Report at 283-93 (identifying a host of ulterior reasons for lack of similar action against German Americans).

The under-inclusivity of EO-3, in light of its stated rationale, raises similar concerns. According to a thorough study published in 2016, out of 154 foreign-born terrorists who committed or were convicted of attempting to commit a terrorist attack in the United States between 1975-2016, only 15 were from the six countries named in the First Travel Ban Order; by comparison, 64 were from five leading countries (Saudi Arabia (19), Pakistan (14), Egypt (11), Cuba (11), Croatia (9)), none of which have been the subject of any of the travel ban orders. Alex Nowrasteh, *Guide to Trump's Executive Order to Limit Migration for "National Security" Reasons*, CATO AT LIBERTY, Jan. 26, 2017, goo.gl/rQ916v (last visited Mar. 26, 2018). Attacks attributable to foreign-born terrorists resulted in some 3,024 deaths, but none of these attackers (who were born in

13 different countries) were from the six countries listed in the First Travel Ban Order. *Id.*

Despite a year of study and experience from the earlier travel bans, no effort appears to have been made to evaluate the original scheme or to tailor it to any data or experience with terrorist infiltration into the United States. Instead, the Government's efforts have been devoted to propping up the original rationale for EO-1 and EO-2. Furthermore, even assuming that nationals of the countries now targeted in EO-3 do pose a heightened danger, EO-3 has no effect on many nationals of those countries, "when the individual is traveling on a passport issued by a non-designated country." Pet. App. 138a (EO-3 § 3(b)(iv)).

Echoing its position during World War II, the Government here (at 34-36) continues to wave off the poor fit between asserted danger and executive action as irrelevant to the Court's inquiry. But the point is not that this under-inclusivity itself renders the Order unlawful. Rather, the gross mismatch between the Order's scope and its stated rationale counsels care in examining the Order's purported purpose, rationality, and justification.

C. Then, as now, the Government invoked the specter of an ill-defined threat to national security to justify the exclusion.

Executive Order No. 9066 invoked the necessity of "protection against espionage and against sabotage [for] national-defense" as its purpose and justification.

In the wake of the attack on Pearl Harbor – which "crippled a major portion of the Pacific Fleet and exposed the West Coast to an attack which could not have been defensively impeded" – extraordinary precautions were required, according to the Government. DeWitt Report at vii. As argued in the DeWitt Report, the authoritative military account of the project, the mass race-based incarceration "was impelled by military necessity." *Id.*

Government lawyers hammered this point in *Hirabayashi* and *Korematsu*. "[T]he military situation was so grave, the danger of an enemy attack was so far within the realm of probability, and the peril to be apprehended from treacherous assistance to the enemy . . . was so substantial," the Solicitor General urged, that "it was a matter of high military necessity to take prompt and adequate precautionary steps." Gov't Br. in *Hirabayashi* 60-61. The Court's interference with such measures "might spell the difference between the success or failure of any attempted invasion." *Id*. at 61.

Despite the absence of anything like a comparable existential danger to the United States today, the Government has again invoked the specter of an ill-defined threat to national security to justify each of the President's travel ban orders. In the earlier orders, the President claimed that widespread nationwide bans on entry were necessary because the chance of erroneously admitting "terrorist operatives or sympathizers" was "unacceptably high." Pet. App. 155a (EO-2 § 1(f)). In the Third Travel Ban Order, the President has

determined – purportedly based on a "worldwide review" – that nearly identical restrictions are "necessary" because the Government "lacks sufficient information to assess the risks they pose to the United States," and to cajole foreign governments into changing their "identity-management and information-sharing" policies. Pet. Br. 9; Pet. App. 128a-129a. Setting aside the question whether the "worldwide review" is merely a pretext for the President's long-promised Muslim ban (*see* § I.E, *infra*), the Government's argument has hardly changed: wholesale exclusion of nationals from certain countries is necessary because an absence of information creates too much risk. Once again, these justifications echo those from 1943 and 1944, with the Government's assertion that its dearth of information means that whole classes of people should be subjected to a blanket exclusionary policy.

D. Then, as now, the purported threat to national security was illusory.

In 1980, in response to a growing redress movement, Congress established the Commission on Wartime Relocation and Internment of Civilians. Peter Irons, *Justice at War: The Story of the Japanese Internment Cases* 348 (1993). Tasked with "review[ing] the facts and circumstances surrounding Executive Order [No.] 9066," the Commission carefully studied government records and received testimony from more than 750 evacuees, former government officials, public figures, and historians. CWRIC Report at 1. When completed in December 1982, the Commission's unanimous 467-page

Final Report concluded: "Executive Order 9066 was not justified by military necessity, and the decisions which followed from it – detention, ending detention and ending exclusion – were not driven by analysis of military conditions." *Id*. at 18. While military commanders bore much of the responsibility, the Commission also faulted President Roosevelt, who signed the Order "without raising the question to the level of Cabinet discussion or requiring any careful thorough review of the situation." *Id*. at 9. Congress largely adopted these findings when it passed the Civil Liberties Act of 1988, Pub. L. No. 100-383, acknowledging that the "internment of civilians [was] carried out without adequate security reasons . . . and [was] motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership." 50 U.S.C. § 4202.

This conclusion vindicated the position JACL had urged this Court to adopt in 1943 and 1944. The Court did not "need to speculate concerning the nature of the alleged 'military necessity,' " JACL wrote, because documents that were already publicly available (including military memoranda and official reports) belied the Government's claims. JACL *Hirabayashi* Br. 40. At length, JACL demonstrated how each of the government's "considerations" were "[if] not preposterous and false . . . at the very least exaggerated and distorted." JACL *Korematsu* Br. 14-15. JACL beseeched the Court to take a hard (or even cursory) look at military officials' logic, such as this paradoxical claim: "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that action

will be taken." *Id*. at 12. Presciently, JACL warned that the Government's misleading arguments "in creating an impression of 'military necessity' are particularly reprehensible and dangerous, for, if they are allowed to go unchallenged they may become the means by which any group can be similarly victimized." *Id*. at 22.

The Government offers up an equally illogical justification for the indefinite suspension enacted here. Mirroring the logic of military officials in 1942, EO-3 rests on the conclusion that the sweeping restrictions on entry are "necessary to prevent entry" of those who may pose a risk to the United States. Pet. Br. 9. Of course, there is nothing "unrestricted" about the current visa issuance process or Congress's individualized vetting system that exists to take account of and mitigate the very risk the President contends animates EO-3. *See* Resp. Br. 48-49 (discussing the rigorous individualized vetting system already in place "to ensure that the United States can safely admit aliens regardless of whether their governments cooperate with the United States"). And, as noted previously, since 1975, not a single person has been killed in a terrorist attack on U.S. soil by a national from any of the six countries listed in EO-1 or EO-2. Nowrasteh, *Guide to Trump's Executive Order*, *supra*.

This data is, once again, evocative of the objective information the Court confronted in 1942. There, as Justice Murphy noted in dissent in *Korematsu*, there was no dispute that, despite lengthy Government recitations of the danger posed by Japanese Americans, "not one person of Japanese ancestry was accused or

convicted of espionage or sabotage after Pearl Harbor while they were still free, a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combatting these evils." *Korematsu*, 323 U.S. at 241 (Murphy, J., dissenting). As in the 1940s, JACL urges the Court to carefully weigh the Government's "solemn recitation of facts and figures about one group" that misleadingly imply the dangerousness of such persons, and respectfully urges that "[i]f there is any doubt of the artificiality of the [sabotage/terrorism] argument, [the Government's] attempt to inflate the seriousness of the [danger posed by immigrants from the designated countries and refugees] should remove it." JACL *Korematsu* Br. 57.

E. Then, as now, the Government was unwilling to reveal its own intelligence agencies' views of the purported threat.

Since 1943-44, additional evidence has come to light – concealed by the Solicitor General over the written objection of Department of Justice lawyers – that would have further undercut the United States' claim of "military necessity." As the Acting Solicitor General formally acknowledged in a "Confession of Error" in 2011:

> By the time the cases of Gordon Hirabayashi and Fred Korematsu reached the Supreme Court, the Solicitor General had learned of a key intelligence report that undermined the rationale behind the internment. The Ringle

> Report, from the Office of Naval Intelligence, found that only a small percentage of Japanese Americans posed a potential security threat, and that the most dangerous were already known or in custody. But the Solicitor General did not inform the Court of the report, despite warnings from Department of Justice attorneys that failing to alert the Court "might approximate the suppression of evidence." Instead, he argued that it was impossible to segregate loyal Japanese Americans from disloyal ones. Nor did he inform the Court that a key set of allegations used to justify the internment, that Japanese Americans were using radio transmitters to communicate with enemy submarines off the West Coast, had been discredited by the FBI and FCC.

Neal Katyal, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases* (May 20, 2011), goo.gl/YJKarv (last visited Mar. 26, 2018); *see also* CWRIC Report at 51 (noting FBI and Naval Intelligence "saw only a very limited security risk from the ethnic Japanese; none recommended a mass exclusion or detention of all people of Japanese ancestry"); Irons, *supra*, at 198-218, 278-302, 311-13 (identifying additional concealment and misrepresentations by Government officials).

This lack of candor served as the basis for successful *coram nobis* petitions that Korematsu and Hirabayashi brought to overturn their decades-old wrongful convictions, in part based on claims that Government lawyers had concealed evidence and misled the Court.

See Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 627 F. Supp. 1445 (W.D. Wash. 1986), *affirmed in part, reversed in part*, 828 F.2d 591 (9th Cir. 1987).

Troubling echoes of this deception have already surfaced in relation to the travel bans. For example, in February 2017, newspapers reported the existence of a leaked Department of Homeland Security assessment that concluded citizenship is an "unreliable" threat indicator and that "citizens of countries affected by [EO-1] are rarely implicated in US-Based Terrorism." *See* Ron Nixon, *Homeland Security Report Undercuts Travel-Ban Logic*, N.Y. Times, Feb. 26, 2017, at A20. In earlier proceedings before this Court, the Solicitor General referred to the study as a "*purported* leaked 'draft DHS report,'" Pet. Br. 47 in Case Nos. 16-1436 and 16-1540 (emphasis added), apparently to cast doubt on its authenticity. Later, the White House and the Department of Homeland Security publicly confirmed the report's authenticity. *See* Nixon, *Homeland Security Report*, *supra*.

Questions also exist about whether the "worldwide review" used to justify EO-3 actually supports the policy enacted. *See* Pet. Br. 6-9 (describing worldwide review process). The "worldwide review" purportedly involved a review by the Acting Secretary of Homeland Security and the State Department of the adequacy of every country's "information-sharing and identity-management protocols and practices" and a diplomatic effort to encourage improvements in those areas. *Id*. at 6-7. The end result, however, was a recommendation that virtually the same group of countries whose

nationals were already denied immigrant visas under EO-1 and EO-2 would remain restricted under EO-3. *See* Pet. App. 129a-130a (EO-3 § 1(h)(ii)-(iii)).

Whether the "worldwide review" supports EO-3 or is mere pretextual legal scaffolding remains unknown because the Government has resisted all efforts to make the information public or even available to the parties in the cases challenging EO-3. *See* Notice of *In Camera Ex Parte* Lodging of Report Containing Classified Information and Objection to Review or Consideration of Report at 2-4, *Hawaii v. Trump*, No. 1:17-cv-00050-DKW-KSC (D. Haw. Oct. 13, 2017), ECF No. 376 (Government motion requesting that the court **not** consider the worldwide review report and objecting to its disclosure to both the district court and the parties because of its classification as "Secret" and the Government's assertions of presidential-communications and deliberative-process privileges). Indeed, the text of EO-3 is circumspect about how much the DHS's worldwide review supports EO-3. *Compare* Pet. App. 129a (EO-3 § 1(h)(ii)) (explaining rationale for restrictions for immigrant visas without stating the position of DHS's report) *with* Pet. App. 130a (EO-3 § 1(h)(iii)) (explaining that restrictions for non-immigrants visas are "in accordance with the recommendations of the" DHS Secretary).

The limited information available raises suspicions about the worldwide review and its purpose. In response to FOIA litigation seeking disclosure of the worldwide review report documents, the Government has withheld them and instead provided an index listing the withheld documents. The index states that the "attachment A" to the Acting Secretary's Memorandum

purportedly containing the DHS "assessment of countries' information-sharing capabilities and vetting procedures" is only **one** page. *See Vaughn* Index at 3, *Brennan Center for Justice at New York University School of Law v. U.S. Dep't of State*, No. 17 Civ. 7520 (S.D.N.Y. Feb. 23, 2018), ECF No. 31-1 (index filed in FOIA dispute). These facts raise doubts about whether the "worldwide review" informed the President's policy, or whether the review exists to give the President's acts legal cover.

F. Then, as now, intolerance and bigotry, not a genuine concern for national security, animated the sweeping exclusion.

Rather than "military necessity," the Congressional Commission concluded in 1982, "race prejudice, war hysteria and a failure of political leadership" produced "a policy conceived in haste and executed in an atmosphere of fear and anger." CWRIC Report at 18; *accord* 50 U.S.C. § 4202.

This, too, was plain at the time the Court heard the Japanese Wartime Cases. In a critical February 14, 1942 memorandum recommending evacuation, for example, Gen. DeWitt explained, "In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many [are second- and third-generation U.S. born citizens] the racial strains are undiluted." JACL *Korematsu* Br. 11 (quoting DeWitt Report at 34). A year later, Gen. DeWitt testified before Congress: "The danger of the Japanese was . . . espionage and sabotage. It makes no difference whether he is an American citizen,

he is still a Japanese." Testimony before House Naval Affairs Subcommittee, Apr. 13, 1943 (quoted in CWRIC Report at 66). He repeated the remarks to journalists, in more concise form, the following day: "[A] Jap is a Jap." CWRIC Report at 66; JACL *Korematsu* Br. 154 ("We know [Gen. DeWitt's] opinion of Americans of Japanese descent."). In upholding the evacuation and incarceration of Japanese Americans, the *Korematsu* majority assiduously avoided the broader context of anti-Japanese prejudice that helped produce Executive Order No. 9066. *See* 323 U.S. at 223 ("To cast this case into outlines of racial prejudice . . . merely confuses the issue."); *but see* 323 U.S. at 233 (Murphy, J., dissenting) ("Such exclusion . . . falls into the ugly abyss of racism.").

The toxic combination that allowed the mass incarceration of Japanese Americans during World War II – a collective mistrust among large segments of the general population, and individual animus on the part of officials – resurfaces with the promulgation of the travel ban orders. As with the abundant record of Lt. Gen. DeWitt's racist declarations, the record in this case contains substantial evidence of President Trump's overt anti-Muslim prejudice and bigotry. As Judge Watson found in his decision enjoining the earlier bans:

> The Government appropriately cautions that, in determining purpose, courts should not look into the "veiled psyche" and "secret motives" of government decisionmakers and may not undertake a "judicial psychoanalysis of a drafter's heart of hearts." Govt. Opp'n at 40 (citing *McCreary*, 545 U.S. at 862, 125 S.Ct.

> 2722). The Government need not fear. The remarkable facts at issue here require no such impermissible inquiry. For instance, there is nothing "veiled" about this press release . . . Nor is there anything "secret" about the Executive's motive specific to the issuance of the Executive Order. . . .

Hawaii v. Trump, 241 F. Supp. 3d 1119, 1136-37 (D. Haw. 2017). After reciting several incendiary and bigoted statements, Judge Watson continued: "There are many more." *Id*. at 1137 n.14. As Respondents' Brief makes clear (at 69-75), Judge Watson's assertion is an understatement.

G. Then, as now, the perceived threat was cast in religious terms.

Although the Establishment Clause played no role in the legal arguments before this Court in the World War II cases, religious bias was an undercurrent motivating the Government's actions. Both before and after Executive Order No. 9066, the Government reasoned that Japanese Americans posed a pervasive threat because within the community there were "a substantial number of Buddhists" and others "exposed to Shinto indoctrination." Gov't Br. in *Hirabayashi* 27. In the immediate aftermath of the attack on Pearl Harbor, Shinto and Buddhist priests were among the first Japanese Americans (along with other individuals previously identified as bona fide security targets) detained in government raids. Irons, *supra*, at 22-23. When the Government defended the subsequent blanket exclusions of Japanese Americans before

this Court, the community's religious beliefs were "[a]nother factor to be taken into account in considering the viewpoints and loyalties of the West Coast Japanese." Gov't Br. in *Hirabayashi* 25-26.

The mistaken assumption that "all persons of Japanese ancestry in this country are Shintoists or Buddhists and therefore inimical to a Christian civilization," the JACL argued then, was the latest incarnation of a religious intolerance that has resurfaced throughout our country's history. JACL *Hirabayashi* Br. 49-53. Although most American-born persons of Japanese ancestry were actually Christian, and Shintoism was misunderstood by the "amateur theologians" crafting U.S. policy, the JACL nevertheless urged the Court to reject the Government's arguments on their own terms: they were "nothing more than a revival of Know-Nothingism, with a new slogan for a new victim." *Id*. at 49. "This time it is the Japanese instead of the Catholic who cannot be a good American citizen," the JACL argued, "and it is the Mikado [Emperor] instead of the Pope at Rome who lures the erring from the path of loyalty." *Id. Accord* JACL *Korematsu* Br. 45-48 (arguing "The Religious Views of Resident Japanese and Americans of Japanese Ancestry Constituted No Danger to Internal Security"); Brief for Petitioner at 77-86, *Korematsu v. United States*, 323 U.S. 214 (1944) (No. 22) (responding to Gen. DeWitt's attribution of "a part of his distrust of these deportees to the religions they profess").

Just as propaganda concerning the religious beliefs of Japanese Americans "took seed in [Gen. DeWitt's mind], blossomed and produced strange fruit," Br. for

Korematsu Pet. 79, so too have distorted views of Islam grown in the President's mind into the successive Travel Ban Orders:

> As a candidate or President-elect, the President "call[ed] for a total and complete shutdown of Muslims entering the United States"; stated that "Islam hates us"; called for excluding Muslims because "we're having problems with the Muslims, and we're having problems with Muslims coming into the country"; suggested that he would attempt to circumvent scrutiny of the Muslim ban by formulating it in terms of nationality, rather than religion; and, when asked about his plans "to create a Muslim register or ban Muslim immigration to the United States," replied, "You know my plans all along, and I've proven to be right, 100 percent correct."

Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 266 n.15 (4th Cir. 2018) (internal citations omitted). The President and his advisors "have repeatedly relied on these pre-election statements to explain the President's post-election actions related to the travel ban," *id*. at 266, and the President continues to express "what any reasonable observer could view as general anti-Muslim bias," *id*. at 267 (discussing August 2017 tweet in which the President celebrated "an apocryphal story involving General Pershing and a purported massacre of Muslims with bullets dipped in a pig's blood"). The bigoted mischaracterization of Buddhism, Shintoism, or Catholicism in years past manifests itself today as hostility toward Islam.

H. Then, as now, the Government insisted that the Court abdicate its core responsibilities and do no more than accept at face value the Government's invocation of national security.

The core of the Government's message some seventy years ago was straightforward: in times of great danger, the Court should not cripple the Executive Branch's "power to wage war successfully" by second-guessing the judgment of "those whose duty it was to protect the Pacific Coast against attack." Gov't Br. in *Hirabayashi* 47, 60. National security judgments often turn on "tendencies and probabilities as evidenced by attitudes, opinions, and slight experience, rather than . . . objectively ascertainable facts." Gov't Br. in *Korematsu* 57. Rather than wade into such fraught terrain, the Court should defer to the military commanders "defending our shores." *Id*.

The same sentiments fill the Government's brief today: the Government insists (at 36) that "[d]eference is especially warranted," and cautions the Court not to interfere with the President's "foreign affairs and national-security responsibilities." But "[n]ational security is not a 'talismanic incantation' that, once invoked, can support any and all exercise of executive power under § 1182(f)." *Hawaii v. Trump*, 859 F.3d 741, 774 (9th Cir. 2017); *accord Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting) ("My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's . . . program was a reasonable military necessity. . . . But I do not think [the

courts] may be asked to execute a military expedient that has no place in law under the Constitution.").

II. Especially in this historical context, any measure of meaningful scrutiny should lead the Court to conclude that the President failed to fulfill the statutory requirement to "find" that admission of a class of aliens "would be detrimental to the interests of the United States."

A. Unlike with Executive Order No. 9066, the Court must meaningfully review whether EO-3 complies with the statutory constraints on the President's authority.

One significant difference between the iterative travel ban orders and Executive Order No. 9066 is the authority upon which they rest. Executive Order No. 9066 was an emergency wartime measure, promulgated soon after the attack on Pearl Harbor, and Congress expressly ratified President Roosevelt's action through legislation establishing criminal penalties for those who "remain[ed] in . . . [a] military zone prescribed, under the authority of an Executive order of the President[.]" *See* Act of Congress, Mar. 21, 1942, Pub. L. No. 77-503, 56 Stat. 173. These factors were critical to the Court's legal analysis, which emphasized that the Court was not addressing "whether the President, acting alone, could lawfully have made the curfew order in question," or whether he could have done so in times of peace. *Hirabayashi*, 320 U.S. at 92. Rather, the Court simply held that it was "unable to

conclude that it was beyond the war power of Congress and the Executive [acting in concert] to exclude those of Japanese ancestry from the West Coast war area at the time they did." *Korematsu*, 323 U.S. at 218-19.

EO-3 is not an emergency wartime measure done in concert with or ratified by Congress. Instead, President Trump has acted under a delegation of Congress's authority over immigration. *See Arizona v. United States*, 567 U.S. 387, 409 (2012) (power to make immigration laws is "entrusted exclusively to Congress") (quoting *Galvan v. Press*, 347 U.S. 522, 531 (1954)); *see* U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization"); *see also INS v. Chadha*, 462 U.S. 919, 959 (1983) (noting that the Framers "consciously" chose to place immigration policy in the hands of a "deliberate and deliberative" body); *Fiallo v. Bell*, 430 U.S. 787, 796 (1977) (noting "the particular classes of aliens that shall be denied entry altogether [and] the basis for determining such classification" are matters "solely for the responsibility of the Congress . . . to control").

Congress gives a broad but not unlimited authority to the President to suspend entry of a "class of aliens into the United States" only if the "President finds that the entry . . . would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). Accordingly, the Court must determine whether the President has actually made such a finding that the entry "would be detrimental to the interests of the United States."

Although the JACL does not intend to repeat Respondents' arguments regarding the effect of Section 1182(f), *see* Resp. Br. at 32-50, the Court's inquiry must involve meaningful review of the President's actions. Treating seriously this requirement is one of the best ways to guard against unlawfully discriminatory use of executive power without inquiring into personal motivations. Far from "turn[ing] upside down" the grant of authority to the President, Pet. Br. at 35, a meaningful review of whether there has been an actual finding that entry into the United States "would" – not "could," not "might" – harm legitimate governmental interests mitigates the risk of repeating the kind of abusive and shameful treatment of classes of people that is the legacy of Executive Order No. 9066.

Moreover, avoiding discriminatory use of the President's authority is not a mere policy preference; it has been a feature of immigration law for more than 50 years. Since the enactment of 1182(f) in 1952, Congress has enacted a number of provisions bearing directly on the use of sweeping class discriminations in evaluating visa applications. Most important, in 1965 Congress explicitly prohibited discrimination in the issuance of immigrant visas on the basis of "nationality, place of birth, or place of residence" as part of comprehensive reform of U.S. immigration law and policy. 8 U.S.C. § 1152(a)(1)(A). This provision was not an incidental feature of the reform measure, one of the important civil rights acts of the 1960s, but a core of Congress's decision to repudiate nearly a century of immigration policy based in significant part on bigotry

and racial hostility. More recently Congress has debated and enacted provisions detailing statutory vetting criteria for individualized review of aliens who might pose a terrorism risk, *see* 8 U.S.C. § 1182(a)(3)(B), and has focused specifically on how to treat applicants who have recently visited countries with terrorist activity. *See* 8 U.S.C. § 1187.

The Government nevertheless argues that the courts should either stay out of the dispute entirely or engage in only the most cursory review of the President's actions. For the reasons stated in Respondents' Brief (at 20-30), the Government's non-justiciability arguments fail. Moreover, the comprehensive, detailed statutory structure of the INA – including the later-enacted prohibition on nationality-based discrimination in section 1152 – shows that Congress has installed important guardrails on the President's exercise of authority over visa availability. For example, Congress did not authorize the President to exclude a class of aliens upon a finding that their entry would be detrimental to the interests of his political party or reelection campaign, but not detrimental to the interests of the United States. This is hardly speculation or histrionics: It was just such capitulation to nativist fears and "failure of political leadership" (rather than a focus on what law enforcement and military intelligence deemed "detrimental to the interests of the United States") that gave rise to Executive Order No. 9066. *See* CWRIC Report at 36-46, 67-72 (discussing effect of growing "clamor for exclusion fired by race hatred and war hysteria" on government officials). In

sum, the whole of the INA cabins and restricts the authority granted to the President in 1952.

The Court's refusal to exercise oversight here would permit the President to rewrite Congress's immigration policy. Rather than accepting the President's *ipse dixit* under Section 1182(f) – that there is a "finding" of harm justifying dramatic changes to immigration policy simply because EO-3's text says so – the Court should examine whether the President's decision is based on some facts showing that an actual (not speculative or improper) "national interest" harm would occur absent suspension. Meaningful review – scrutiny that is deferential but not supine – is necessary to ensure that EO-3 is consistent with the authority Congress has delegated.

B. Under any measure of meaningful scrutiny, the President has failed to comply with the law in enacting EO-3 and excluding whole classes of aliens.

No legitimate national security purpose is served by EO-3's blanket bar on entry from any nationals of Syria, Somalia, Libya, Iran, Yemen or Chad. Every available set of facts contradicts or undermines the purported rationale for this Order.

The parallels between the naked assertions of national security made by the Government in the Japanese incarceration cases and those advanced to justify the three travel ban orders here are striking, as outlined in Part I, *supra*. The breathtaking scope of the exclusion, the vast over- and under-inclusivity of the prohibition, the absence of meaningful connection

between the purported danger and the operation of the exclusion, the illusory nature of the alleged threat, evidence that the Government's own specialists reject the value and efficacy of the measures, and the strong circumstantial evidence of ulterior (impermissible) purpose are all factors this Court has seen before. And here, as in World War II, they all point toward the unlawfulness of the Government's action, notwithstanding the Government's insistence that this Court again refrain from engaging in meaningful scrutiny of the President's Order.

CONCLUSION

In *Korematsu*, Justice Jackson described the Court's opinion as "a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting). The Court should not fulfill Justice Jackson's prophesy. In EO-3, the President has gone far beyond the authority delegated to him by Congress in the INA. While the evidence of anti-Muslim bias is clear and the national security rationale paper-thin (and still undisclosed), this Court need not determine that President Trump acted with improper racial or religious animus, nor need it override a wartime President's foreign policy judgments as commander in chief. Section 1182(f) requires the President to make a legitimate "finding" that entry of the 150 million men, women, and children targeted by EO-3 "would be detrimental to the interests of the United States." He has failed to do so. Mindful of this country's tragic failure

to vindicate the rights of Japanese Americans during World War II and the limits and guardrails Congress has established in the immigration statutes, this Court need only conduct a meaningful inquiry into whether the President's actions have exceeded the scope of authority that Congress gave him.

In light of the insubstantial record put forth by the President, the withholding of key factual information, and the substantial record of public evidence of animus, the Court should affirm the preliminary injunctions entered by the courts below and remand the case to the district court for a trial on the merits, the appropriate venue for testing the President's asserted basis for this sweeping immigration decision affecting many millions of people.

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Respectfully submitted,

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