Case 17-2231

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

International Refugee Assistance Project; **HIAS, Inc.**; **John Does Nos. 1** & **3**; **Jane Doe No. 2; Middle East Studies Association of North America, Inc.**; **Muhammed Meteab**; **Paul Harrison**; **Ibrahim Ahmed Mohomed**; and **Arab American Association of New York**,

Plaintiffs/Appellees,

and **Allan Hakky** and **Samaneh Takaloo**

Plaintiffs,

v.

Donald J. Trump; **Department of Homeland Security**; **Department of State**; **Office of the Director of National Intelligence**; **Elaine C. Duke; Rex Tillerson**; and **Daniel R. Coats**,

Defendants/Appellants.

On Appeal from the United States District Court for the District of Maryland

AMICUS-CURIAE BRIEF OF THE NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION IN SUPPORT OF PLAINTIFFS AND AFFIRMANCE

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4. There is *not* any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation.

5. This case does *not* arise out of bankruptcy proceeding.

Dated: November 17, 2017

s/Joshua David Rogaczewski
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INTEREST OF AMICUS CURIAE

The National Asian Pacific American Bar Association ("NAPABA") is a national association of Asian Pacific American ("APA") attorneys, judges, law professors, and law students, representing the interests of over seventy-five national, state, and local APA bar associations and nearly 50,000 attorneys who work in solo practices, large firms, corporations, legal services organizations, nonprofit organizations, law schools, and government agencies. Since its inception in 1988, NAPABA has served as a national voice for APAs, including Muslim Americans of Asian descent, in the legal profession and has promoted justice, equity, and opportunity for APAs. In furtherance of its mission, NAPABA opposes discrimination, including on the basis of race, religion, and national origin, and promotes the equitable treatment of all under the law. NAPABA and its members have experience with, and a unique perspective on, attempts by the U.S. government to improperly restrict admission and immigration based on nationality or religion, of which the Executive Orders at issue are simply the latest examples.[1]

[1] All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part; no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than NAPABA, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

I. The Current Travel Ban Is the Latest in a Series of Executive Actions Targeting Immigrants from Muslim-Majority Countries.

Proclamation 9645, entitled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats," 82 Fed. Reg. 45,161 (Sept. 27, 2017) ("EO-3"), is the third in a succession of executive actions by Donald J. Trump to prevent nationals of certain Muslim-majority countries from traveling to the United States. Specifically, EO-3 bans all immigration by nationals of five Muslim-majority nations also covered by the prior orders—Iran, Libya, Somalia, Syria, and Yemen—and drops Sudan, but now includes Chad, another Muslim-majority country. All but Somalia also face restrictions on the issuance of non-immigrant visas. EO-3 also bars travel to the United States by certain Venezuelan government officials and their immediate family members and all travel to the United States by North Koreans.[2]

EO-3 continues the nationality-based restrictions first imposed on January 27, 2017, in Executive Order No. 13,769, entitled "Protecting the Nation

[2] The total number of people from Venezuela and North Korea affected by EO-3 is negligible in relation to the broader impact of the ban. The Venezuelans affected by the ban represent a tiny fraction of Venezuelans who receive visas to enter the United States each year, and in 2016, EO-3 would have barred only 61 North Koreans from entry into the United States. Darla Cameron, *Why Trump's Travel Ban Included These Eight Countries*, Wash. Post (Oct. 18, 2017), https://www.washingtonpost.com/world/almost-no-north-koreans-travel-to-the-us-so-why-ban-them/2017/09/25/822ac340-a19c-11e7-8c37-e1d99ad6aa22_story.html.

from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 8977 (Feb. 1, 2017) ("EO-1"), and its replacement, Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) ("EO-2"). As explained below, EO-3 must be read in light of what came before it, including both the antecedent orders and our government's lamentable history of using nationality-based restrictions in immigration as crude proxies for discrimination on the basis of race and religion.[3]

II. The Executive Orders Must Be Assessed Against the Historical Backdrop of Nationality-Based Discrimination in U.S. Immigration, Which Was Plagued by Abuse and Which Has Been Properly Renounced.

During the heart of the Civil Rights Era, Congress enacted, and Lyndon Johnson signed, the Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911, to prohibit preference, priority, or discrimination in the issuance of immigrant visas due to "race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). Marking a firm break from the invidious discrimination in historical immigration laws, this provision sought to prevent the country from repeating those errors. From the statute itself, the district court concluded that "Plaintiffs are likely to succeed on the merits of their claim that the Proclamation violates the non-discrimination provision of § 1152(a) to the extent that it bars

[3] EO-1, EO-2, and EO-3, are referred to collectively as the "Executive Orders." Their history is well known to this Court, and is set forth in detail by the district court in its findings of fact. JA 997–1013

entry by immigrants on the basis of nationality." JA 1040. Likewise the Hawaii district court concluded: "EO-3 plainly discriminates based on nationality in [a] manner . . . antithetical to both Section 1152(a) and the founding principles of this Nation." *Hawaii v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 4639560, at *1 (D. Haw. Oct. 17, 2017).

A. EO-3 Echoes Historical Discrimination in the Application of Immigration Laws Based upon National Origin.

APAs are acutely familiar with the impact of exclusionary immigration laws, having long been the subjects of systematic and expansive restrictions driven by racial, ethnic, and religious animus. These historical laws not only excluded people from Asian countries, but hurt those already in the United States by legitimizing and validating ugly stereotypes and inequalities. As described below, the laws' negative impacts have been clear even when the laws were facially neutral.

Asians first began migrating to the United States mainland in significant numbers in the mid-1800s, led by Chinese nationals. *See* Bill Ong Hing, *Making and Remaking Asian America Through Immigration Policy, 1850–1990*, at 19–20 (1993). As conditions weakened in their homelands, economic opportunity beckoned Asian laborers to the United States. The discovery of gold and westward expansion fueled demand for low-wage labor. Industrial employers actively recruited Chinese nationals to fill some of the most demanding jobs, particularly in domestic service, mining, and railroad construction. *Id.* at 20.

However, the resulting growth in the immigrant labor population provoked anger and resentment among native-born workers eager for work and better wages. *Id.* at 21. Chinese immigrants, in particular, became targets of fierce hostility and violence. The so-called "Yellow Peril" refers to the widespread characterization of Chinese immigrants as "unassimilable aliens" with peculiar and threatening qualities. *See* Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 Asian Am. L.J. 71, 86–89 (1997).

Congress catered to this xenophobia and racism by passing a series of laws that discouraged and ultimately barred immigration from China and other Asian countries. These laws marked the first time the federal government broadly enacted and enforced an immigration admissions policy that defined itself based on whom it excluded.[4] The first such law came toward the end of Reconstruction, when Congress enacted the Page Act. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974). Barring the entry of Asian immigrants considered "undesirable," the Page Act was largely enforced against Asian women, who were *presumed to be prostitutes* simply by virtue of their ethnicity. *See* George Anthony Peffer,

[4] Naturalization and citizenship laws have always limited the scope of who could be a citizen, but the same was not so for rules on entry to the United States. The Naturalization Act of 1870, ch. 254, 16 Stat. 254, which barred Asians from naturalization, prefaced the era of Asian exclusion.

Forbidden Families: Emigration Experiences of Chinese Women Under the Page Law, 1875–1882, 6 J. Am. Ethnic Hist. 28, 28–46 (1986).

A few years later, Congress responded to persistent anti-Chinese fervor with the Chinese Exclusion Act on May 6, 1882, ch. 126, 22 Stat. 58, the first federal law to exclude people on the basis of their nationality. On the premise that the "coming of Chinese laborers . . . endanger[ed] the good order" of areas in the United States, the Act provided that "[i]t shall not be lawful for any Chinese laborer to come, or, having so come after the expiration of said ninety days, to remain within the United States." *Id.* § 1. The Chinese Exclusion Act halted immigration of Chinese laborers for ten years, prohibited Chinese nationals from becoming U.S. citizens, and uniquely burdened Chinese laborers who were already legally present and wished to leave and re-enter the United States. Congress first extended the exclusionary period by ten years in 1892 with the Geary Act, ch. 60, 27 Stat. 25, and then indefinitely in the Act of April 29, 1902, Pub. L. No. 57-90, 32 Stat. 176.

After the Chinese exclusion laws foreclosed employers from importing *Chinese* laborers, immigrants from Japan, Korea, India, and the Philippines began coming in larger numbers. *See* Hing, *supra*, at 27–31. As with Chinese nationals before them, these immigrants encountered strong nativist opposition as their numbers rose. *Id.* at 32.

The exclusionary policies of the U.S. government enforced and validated xenophobic and racist sentiments and enabled violent backlash. Nativist Americans established the Asiatic Exclusion League in the early 20th century to prevent immigration by people of Asian origin to the United States and Canada, which had a similar nationality-based system of immigration at the time.[5] On September 4, 1907, the Asiatic Exclusion League and labor unions led the "Bellingham Riots" in Bellingham, Washington, to expel South Asian immigrants from local lumber mills. *See 1907 Bellingham Riots*, Seattle Civil Rights & Labor History Project, http://depts.washington.edu/civilr/bham_intro.htm; *see also* Erika Lee, *The Making of Asian America: A History* 163–64 (2015). Herman Scheffauer's *The Tide of the Turbans* noted that: "Again on the far outposts of the western world rises the spectre of the Yellow Peril and confronts the affrighted pale-faces," and lamented

[5] *See* Victor M. Hwang, *Brief of* Amici Curiae *Asian Pacific Islander Legal Outreach and 28 Asian Pacific American Organizations, in support of all respondents in the Six Consolidated Marriage Cases, Lancy Woo and Cristy Chung, et al., Respondents, v. Bill Lockyer, et al., Appellants on Appeal to the Court of Appeal of the State of California, First Appellate District, Division Three*, 13 Asian Am. L.J. 119, 132 (2006) (the Asiatic Exclusion League was formed for the stated purpose of preserving "the Caucasian race upon American soil . . . [by] adoption of all possible measures to prevent or minimize the immigration of Asiatics to America" (internal quotation marks omitted)).

"a threatening inundation of Hindoos over the Pacific Coast," which it proposed to address by legislation. 43 Forum 616 (1910).[6]

Congress responded to nativist concerns about these growing populations in the same way that it had to the perceived threat of Chinese immigrants. The Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874, created the "Asiatic Barred Zone," which extended the Chinese exclusion laws to include nationals of other countries in South Asia, Southeast Asia, the Polynesian Islands, and parts of Central Asia.[7] The racial undertones of this act were such that, in addressing whether a "high-caste Hindu, of full Indian blood" was a "white person," eligible to naturalize under the laws at the time, the Supreme Court inferred from it that Congress would have "a similar [negative] attitude toward Asiatic naturalization." *United States v. Thind*, 261 U.S. 204, 206, 215 (1923).[8]

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[6] The term "Hindoo" or "Hindu" was applied to all South Asian persons, regardless of faith. The "Tide of Turbans" referenced the distinctive turban worn by members of the Sikh faith.

[7] An executive agreement, the Gentlemen's Agreement, reached in 1907 and 1908, restricted the immigration of Japanese laborers, as well as Koreans, whose nation was under Japanese forced occupation between 1910 and 1945. *See* Hing, *supra*, at 29.

[8] Bhagat Singh Thind was a member of the Sikh faith, though described as "Hindu" as explained in note 6. The question posed was whether a South Asian of Caucasian ancestry was distinct from "Asiatic" or other racial groups under the prevailing racial theories and qualified as "white" under U.S. law. *See Thind*, 261 at 209–14 (Justice Sutherland's discussion of theories of racial classification).

A few years later, the Immigration Act of 1924 (the "Asian Exclusion Act"), Pub. L. No. 68-139, 43 Stat. 153, imposed immigration caps based upon national origin and prohibited immigration of persons ineligible to become citizens, which effectively barred people from Asian countries from immigrating altogether. As explained by an opponent of the law, its nationality restrictions were driven by animus against religious and ethnic groups—such as Jews—by restricting immigration from countries where they lived in larger numbers, just as the law treated other "inferior peoples":

> Of course the Jews too are aimed at, not directly, because they have no country in Europe they can call their own, but they are set down among the inferior peoples. Much of the animus against Poland and Russia, old and new, with the countries that have arisen from the ruins of the dead Czar's European dominions, is directed against the Jew.

65 Cong. Rec. 5929–32 (1924) (statement by Rep. Clancy).

Because of then-U.S. jurisdiction over the Philippines, Filipinos were still able to migrate to the United States. E. Lee, *supra*, at 157. However, U.S. citizenship remained out of reach and Filipinos could not escape racial animus, as they were seen to present an economic threat and to "upset the existing racial hierarchy between whites and nonwhites." *Id*. at 157, 185. Anti-Filipino agitation culminated in passage of the Philippine Independence Act ("Tydings–McDuffie Act"), Pub. L. No. 73-127, 48 Stat. 456 (1934), which granted independence to the Philippines and changed the status of Filipinos from U.S. nationals to "aliens,"

making them subject to the same restrictions as other Asian groups. The next year, Filipino nationals already in the United States became subject to deportation and repatriation. Filipino Repatriation Act, Pub. L. No. 74-202, 49 Stat. 478 (1935).[9]

The exclusionary racism and xenophobia underpinning these laws crystallized and escalated during World War II, when the U.S. government forcibly incarcerated more than 110,000 permanent residents and U.S. citizens in internment camps on the basis of their Japanese ancestry.[10]

B. In 1965, Congress and President Johnson Dismantled Quotas Based upon Nationality and Barred Distinctions Based upon "Race, Sex, Nationality, Place of Birth, or Place of Residence."

Starting during World War II and continuing over the next twenty years, Congress gradually loosened restrictions on Asian immigration to further the interests of the United States on the world stage.

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[9] The idea, still prevalent today, that race keeps one from being an American, particularly resonated with Filipinos affected by the new restrictions: "We have come to the land of the Free and where the people are treated equal only to find ourselves without constitutional rights . . . . We . . . did not realize that our oriental origin barred us as human being in the eyes of the law." E. Lee, *supra*, at 185 (citing June 6, 1935 letter from Pedro B. Duncan of New York City to the Secretary of Labor and other letters).

[10] *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). For a further discussion of the improper justification for the Japanese American incarceration, *see* Brief of Karen Korematsu, Jay Hirabayashi, and Holly Yasui, *et al.*, as Amicus Curiae, *IRAP et al v. Trump, et al.*, Nos. 17-2231(L), 17-2232, 17-2233, 17-2240 (Consolidated).

First, at the urging of Franklin D. Roosevelt, who called the exclusion of Chinese citizens by the United States "a historic mistake," E. Lee, *supra*, at 256, Congress repealed the Chinese exclusion laws with the Magnuson Act of 1943 (the "Chinese Exclusion Repeal Act"), Pub. L. No. 78-199, 57 Stat. 600. Then, the Act of July 2, 1946 (the "Luce–Celler Act"), Pub. L. No. 79-483, 60 Stat. 416, allowed 100 Filipinos and Indians, each, to immigrate per year and permitted their naturalization.[11]

Then, in 1952, the Immigration and Nationality Act (the "McCarran–Walter Act"), Pub. L. 82-414, 66 Stat. 163, repealed the Asiatic Barred Zone and eliminated the racial bar on citizenship. Nevertheless, it left in place national-origin quotas intended to heavily favor immigration from Northern and Western Europe, with unmistakable racial, religious, and ethnic consequences.

After decades of highly regimented immigration quotas tied to prospective immigrants' countries of origin, the Immigration and Nationality Act of 1965 (the "Hart–Cellar Act"), Pub. L. 89-236, 79 Stat. 911, marked a dramatic turning point. Like Harry S. Truman and Dwight D. Eisenhower before him, John F. Kennedy opposed the national-origins system, calling it "nearly intolerable" and inequitable. *Remarks to Delegates of the American Committee on Italian Migration*, The

[11] This bill allowed Dalip Singh Saund to become a naturalized citizen. He would become the first APA member of Congress. *See* Lee, *supra*, at 373–75, 392.

American Presidency Project (June 11, 1963), *available at* http://www.presidency.ucsb.edu/ws/?pid=9269. In 1965, Congress finally answered these calls, abolishing the national-origin quotas in an act signed by President Johnson and providing that "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence," subject only to certain specified exceptions. 8 U.S.C. § 1152(a)(1)(A).[12]

The legislative history of 8 U.S.C. § 1152(a)(1)(A) confirms that Congress intended to reject and repudiate the "national origins system" as an inequitable and irrelevant basis for admission decisions. For instance, a member of Congress opined that the system "embarrasse[d] us in the eyes of other nations, . . . create[d] cruel and unnecessary hardship for many of our own citizens with relatives abroad, and . . . [was] a source of loss to the economic and creative strength of our country." Oscar M. Trelles II & James F. Bailey III, *Immigration Nationality Acts, Legislative Histories and Related Documents 1950–1978*, at 417 (1979). Attorney General Robert F. Kennedy lamented that the national-origins system harmed

[12] The excepted subsections address "[p]er country levels for family-sponsored and employment-based immigrants," 8 U.S.C. § 1152(a)(2), statutory creation of "special immigrant" categories for preferred treatment (e.g., certain Panamanian nationals who worked in the Canal Zone, etc.), 8 U.S.C. § 1101(a)(27), admission of immediate relatives of U.S. citizens, 8 U.S.C. § 1151(b)(2)(A)(i), and the statutorily created system of allocation of immigrant visas, 8 U.S.C. § 1153.

citizens with relatives abroad, "separat[ing] families coldly and arbitrarily." *Id.* at 411. Indeed, it confirms Congress overwhelmingly regarded the system as an outdated, arbitrary, and, above all, un-American basis upon which to decide whom to admit into the country.

Statements in the legislative history resoundingly denounced the use of nationality in immigration decisions, as it furthered the un-American belief that individuals born in certain countries were more desirable or worthy of admission than others. Prior to 1965, nationality-based immigration restrictions excluded nationals of Asian countries based upon unfounded and unjust stereotypes that conflated race, ethnicity, and religion. Several members of Congress echoed the sentiments President Kennedy expressed in a 1963 letter to Congress:

> The use of a national origins system is without basis in either logic or reason. It neither satisfies a national need nor accomplishes an international purpose. In an age of interdependence among nations, such a system is an anachronism, for it discriminates among admission into the United States on the basis of accident of birth.

Id. at 2 (quoting Kennedy, John F., 1964 Pub. Papers, 594–97 (July 23, 1963)).

President Kennedy's reference to prohibiting discrimination in "*admission* into the United States," confirms the contemporaneous understanding that the 1965 Act foreclosed discrimination in *admission*, not just for immigration. Indeed, it would be perverse to provide more protection to foreign nationals seeking to immigrate to the United States than to those merely seeking to visit family. Not

surprisingly, during congressional hearings on the 1965 Act, Attorney General Kennedy contended that abolition of the national-origins system sought:

> [N]ot to penalize an individual because of the country that he comes from or the country in which he was born, not to make some of our people feel as if they were second-class citizens. . . . [Abolition of the national origins system] will promote the interests of the United States and will remove legislation which is a continuous insult to countries abroad, many of whom are closely allied with us.

Id. at 420. If certain citizens' relatives cannot visit from abroad, or are prohibited from obtaining visas on equal footing with those of others, they cannot help but feel that they are themselves "second-class citizens" in the eyes of the U.S. government.

In light of this history, the reference in 8 U.S.C. § 1152(a)(1)(A) to the prohibition against discrimination in the "issuance of immigration visas" must not be read to sanction discrimination in issuance of nonimmigrant visas. If it were, the Executive could discriminate in the very manner that the act sought to prevent.

C. By Promoting Discrimination, EO-3 Is Contrary to Statutory Language and Purpose.

Today, nearly two-thirds of APAs are foreign-born. Karthick Ramakrishnan & Farah Z. Ahmad, *State of Asian Americans and Pacific Islanders Series: A Multifaceted Portrait of a Growing Population* 23, AAPIDATA (Sept. 2014), http://aapidata.com/wp-content/uploads/2015/10/AAPIData-CAP-report.pdf. The experience of many APA families in the United States began with the opportunity

to immigrate that was denied to their ancestors. Nevertheless, the harmful legacies of those earlier laws—which tore apart families; denied the right to naturalize and the rights that accompany citizenship to lawful immigrants; and validated xenophobia, racism, and other invidious stereotypes—persist.

Indeed, Congress recently reaffirmed its condemnation of the Chinese exclusion laws with the passage of resolutions expressing regret for those laws. S. Res. 201, 112th Cong. (2011); H.R. Res. 683, 112th Cong. (2012). The Senate resolution explicitly recognized that "[the] framework of anti-Chinese legislation, including the Chinese Exclusion Act, is incompatible with the basic founding principles recognized in the Declaration of Independence that all persons are created equal." S. Res. 201, 112th Cong. (2011).

Having long been the subject of exclusionary immigration laws, APAs know the lasting pain and injury that result from the use of national origin as a basis for preference or discrimination in immigration laws. EO-3 and its predecessors represent an unwelcome return to a pre-Civil Rights Era approach to immigration when prospective immigrants were excluded based upon their national origin, which served as a pretext for discrimination on the basis of the predominant races, religions, and ethnicities in those countries.

As the district court recognized, the Immigration and Nationality Act of 1965 "was adopted expressly to abolish the 'national origins system' imposed by

the Immigration Act of 1924, which keyed yearly immigration quotas for particular nations to . . . 'maintain, to some degree, the ethnic composition of the American people.'" JA 1034–35 (quoting H.R. Rep. No. 89-745, at 9 (1965)).

This accords with the D.C. Circuit's holding that "Congress could hardly have chosen more explicit language" in barring discrimination against the issuance of a visa because of a person's nationality or place of residence. *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State* ("*LAVAS*"), 45 F.3d 469, 472–73 (D.C. Cir. 1995) (finding "Congress has unambiguously directed that no nationality-based discrimination shall occur"); *see also Wong Wing Hang v. INS*, 360 F.2d 715, 719 (2d Cir. 1966) (concluding that nationality is an impermissible basis for deportation and "invidious discrimination against a particular race or group" is prohibited as a basis for deportation); *Abdullah v. INS*, 184 F.3d 158, 166–67 (2d Cir. 1999) ("[T]he Constitution does 'not permit an immigration official, in the absence of [lawful quota] policies, to . . . discriminate on the basis of race and national origin.'") (citing *Bertrand v. Sava*, 684 F.2d 204, 212 n.12 (2d Cir. 1982)).

Consistent with the contemporaneous and monumental Civil Rights Act of 1964, which outlawed discrimination on the basis of "race color, religion, sex, or national origin," and the Voting Rights Act of 1965, the Immigration and Nationality Act of 1965 marked a departure from the nation's past reliance upon

such characteristics to restrict entry into the country. *See Olsen v. Albright*, 990 F. Supp. 31, 38 (D.D.C. 1997) (noting that policies that discriminate "based on impermissible generalizations and stereotypes" contravene Section 1152(a)(1)(A)); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. Rev. 273, 273 (1996) ("Congress eased restrictions on Asian immigration into the United States in an effort to equalize immigration opportunities for groups who had been the victims of discriminatory immigration laws in the past").

EO-3, like its predecessors, seeks authorization for nationality-based discrimination in the broad language of Section 1182(f), which permits restrictions or suspension of entry "[w]henever the President finds that the entry of . . . any class of aliens into the United States would be detrimental to the interests of the United States . . . ." However, the government's construction of that provision obviates the "specific criteria for determining terrorism-related inadmissibility," in Section 1182(a)—*Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring)—as well as the prohibition on nationality restrictions in Section 1152(a)(1)(A). If Section 1182(f) were to permit the Executive to bar issuance of visas to citizens of six Muslim-majority nations as potential terrorists on the basis of their nationality, it would defy Justice Kennedy's controlling opinion in *Din*, which explains that the Executive's authority to exclude an individual from

admission on the basis of claimed terrorist activity "rest[s] on a determination that [he or she does] not satisfy the . . . requirements" of 8 U.S.C. § 1182(a)(3)(B). *Id.*

Similarly, other courts have held that Section 1182(f) "provides a safeguard against the danger posed by any particular case or class of cases *that is not covered by one of the categories in section 1182(a)*." *Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (concluding that authority under one subsection cannot "swallow" the limitations imposed by Congress on inadmissibility under other parts of Section 1182) (emphasis added), *aff'd mem.*, 484 U.S. 1 (1987). Applying the same principle of construction, *Allende v. Shultz* held that subsections of 8 U.S.C. § 1182(a) could not be interpreted so as to render other subsections superfluous. 845 F.2d 1111, 1118 (1st Cir. 1988).

As the district court recognized, "[EO-3] is unprecedented in its combination of a broad sweep impacting millions of people based on their nationality, its imposition of additional criteria for visa issuance, and its arguable conflict with Congressional immigration policy." JA 1051. In a separate challenge to EO-3, the Hawaii district court was even more emphatic, correctly concluding that "EO-3 plainly violates Section 1152(a) by singling out immigrant visa applicants seeking entry to the United States on the basis of nationality," and, as such, is not within "the scope of the President's authority under Section 1182(f)." *Hawaii*, 2017 WL 4639560, at *13.

D. The History of Discrimination Informs the Present Dispute.

The 1965 amendments to the Immigration and Nationality Act sought to constrain the Executive's authority to afford any preference, priority, or discrimination in immigration based on nationality, place of birth, or place of residence, among other characteristics. Pub. L. No. 89-236 (1965) (codified at 8 U.S.C. § 1152(a)(1)(A)). The D.C. Circuit has interpreted this provision to apply to admission as well, holding that "Congress has unambiguously directed that no nationality-based discrimination shall occur." *LAVAS*, 45 F.3d at 472–73.

Thus, the President lacked statutory authority or discretion to issue EO-3. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring in the judgment) (observing that the President's power is at "its lowest ebb" when it is "incompatible with the expressed . . . will of Congress"). Congress relegated this kind of discrimination into the past in 1965, aligning our immigration laws with notions of equality etched into the nation's conscience during the Civil Rights Era.

The Supreme Court, in *Din*, recognized that courts "look behind" the government's express rationale where there is "an affirmative showing of bad faith." 135 S. Ct. at 2141; *see also Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 137 (2d Cir. 2009) (recognizing that a well-supported allegation of bad faith could render an immigration decision not *bona fide*). The long history of abusing

nationality-based restrictions on immigration to target other groups should also inform the Court's consideration of whether it comports with the Establishment Clause of the United States Constitution. U.S. Const. amend. I, cl. 1; *see Larson v. Valente*, 456 U.S. 228, 244, 254–55 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

The district court found unmistakable animus against Muslims when it examined the Executive's statements concerning EO-3:

> The reasonable observer using a "head with common sense" would rely on the statements of the President to discern the purpose of a Presidential Proclamation. [*McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 874 (2005)]. Here, those statements do not offer "persuasive" rejection of the President's prior calls for a Muslim ban, or his stated intention to use a ban on certain "dangerous territory" to effectuate a Muslim ban, [*Felix v. City of Bloomfield*, 841 F.3d 848, 863 (10th Cir. 2016)], nor do they show that the stated intention to impose a Muslim ban has been "repealed or otherwise repudiated," *McCreary*, 545 U.S. at 871–72. Rather, they cast the Proclamation as the inextricable re-animation of the twice-enjoined Muslim ban, and, in echoes of *McCreary*, convey the message that the third iteration of the ban—no longer temporary—will be the "enhanced expression" of the earlier ones. *Id.* at 872.

JA 1075. The barely concealed animus behind the Executive Orders is all the more glaring when set against the history of such discrimination that Congress expressly tried to stamp out, and ignoring such evidence would abet pretextual discrimination against people based upon religion or nationality.

Rather than exhaustively recite the extensive evidence of animus in EO-3, we submit that this Court should consider the evident deleterious effect that the Executive Orders have had on Muslims and others from the affected nations in the United States. As the Supreme Court observed in *Engel v. Vitale*, prohibiting establishment of religion forestalls "the *inevitable* result [of] hatred, disrespect and even contempt of those who held contrary beliefs." 370 U.S. 421, 431 (1962) (emphasis added).) The Federal Bureau of Investigation's recently released hate-crimes statistics for 2016 demonstrate anti-Muslim hate crimes grew 19 percent to 307 documented incidents, the fastest rate of any category, with a spike in hate crimes around the election and in the last quarter of the year.[13] Overall, the United States saw an increase in hate crimes over the previous year. The trend has continued in 2017, with a further uptick in hate crimes and harassment against Muslims in the first half of the year, as found by the Council on American-Islamic Relations ("CAIR"), which identified "ethnicity or national origin" as the most common "trigger" for persecution. *CAIR Report Shows 2017 on Track to Becoming One of Worst Years Ever for Anti-Muslim Hate Crimes*, CAIR (June 17, 2017),

[13] *See* A.J. Willingham, *Hate Crimes Rose in 2016–Especially Against Muslims and Whites*, CNN (Nov. 15, 2017), http://www.cnn.com/2017/11/14/us/hate-crimes-muslim-white-fbi-trnd/index.html; *see also* Crim. Justice Info. Servs. Div., FBI, *2016 Hate Crime Statistics*, (Nov. 13, 2017), https://ucr.fbi.gov/hate-crime/2016.

https://www.cair.com/press-center/press-releases/14476-cair-report-shows-2017-on-track-to-becoming-one-of-worst-years-ever-for-anti-muslim-hate-crimes.html.

Indeed, the deputy director of CAIR in Chicago received threats by a man ultimately charged with a felony hate crime for leaving messages that began: "Hey. Guess what? This is America calling, ... You are not welcome here. Take your [double expletive] back to Syria. We will kill you." William Lee, *Man Charged with Hate Crime in Phone Threat to Muslim-American Advocate: 'We Will Kill You'*, Chi. Trib. (June 17, 2017) (alteration in original), http://www.chicagotribune.com/news/local/breaking/ct-man-charged-with-phone-threat-to-muslim-american-advocate-we-will-kill-you-20170617-story.html. This sentiment is reflected in the plaintiffs' claim that "[EO-3] send[s] the message that Muslims . . . are not welcome in this country and that Muslim communities are bad or dangerous. . . . [I]t is another attempt to make sure that Muslims such as she are viewed as different from other Americans, and sends the message that Muslims should be singled out for worse treatment." JA 535–36.

Such discrimination contravenes the limitations Congress placed on the grant of authority to the President under the Immigration and Nationality Act and violates the First Amendment's clear prohibition on establishment of religion. Having long endured discrimination based on national origin, APAs keenly

appreciate the harmful effects that government sanction for such discrimination can have and urge this Court to not allow EO-3 to stand.

CONCLUSION

For nearly a century, the U.S. government severely restricted and at times prohibited the entry, immigration, and naturalization of people from Asian nations. In 1965, Congress and the President recognized that this practice reflected animus toward people of races, ethnicities, and religions that predominated in those countries and restricted the use of nationality in immigration going forward. Many APAs are in the United States today because Congress concluded that it could no longer ignore the harm and injustice of government-sanctioned discrimination on the basis of "race, sex, nationality, place of birth, [and] place of residence."

EO-3 seeks to side-step these restrictions on nationality-based discrimination, as well as the constitutional establishment clause and equal protection rights they reflect, to discriminate against nationals of six Muslim-majority countries. This Court should prevent the President from exercising such authority, lest it presage a return to the era of invidious discrimination that Congress sought to put behind us more than fifty years ago.

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Respectfully submitted,

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Dated: November 17, 2017

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PROOF OF SERVICE

I hereby certify that the foregoing **Amicus-Curiae Brief of NAPABA Supporting Plaintiffs and Affirmance**, was filed on November 17, 2017, using the Court's Electronic Case Filing system, which automatically generates and sends by email a Notice of Docket Activity to all registered attorneys participating in this case.

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