State of Washington, et al v. Donald J. Trump, et al Doc. 166 Att. 1

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Hameed Khalid Darweesh and Haider Sameer Abdulkhaleq Alshawi, et al.

Petitioners,

v.

Donald Trump, President of the United States, et al.,

Respondents.

17 Civ. 480 (CBA)

BRIEF OF LAW PROFESSORS OF CONSTITUTIONAL LAW, FEDERAL COURT JURISDICTION, IMMIGRATION, NATIONAL SECURITY, AND CITIZENSHIP, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici curiae are scholars of federal constitutional law, federal court jurisdiction, and the law of immigration, national security and citizenship.[1] In light of the claims advanced in this case about separation of powers, Executive authority, immigration, and national security, *Amici* believe this overview of the history and governing legal principles will be helpful.

ARGUMENT

Amici write to address the contention that the political branches' control over immigration is "plenary" and that the Executive has unreviewable authority to suspend the admission of "any class of aliens"—even if the selection of a particular class reflects invidious discrimination based on religion, race, or sex, or an arbitrary exercise of authority lacking a rational basis. While decisions by the Executive on matters related to immigration and national security are entitled to deference, the President has no authority to ignore the Constitution, and the courts retain their critical responsibility to "say what the law is."

Our constitutional history demonstrates the harms of excessive deference to Executive claims that national security requires it to target individuals of particular

[1] *Amici* certify that (a) no party's counsel authored any part of this brief, (b) no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief, and (c) no person other than *Amici* or their counsel contributed money that was intended to fund the preparation or submission of this brief.

nationalities, races, and religions. The powerful exemplar is the evacuation and detention of more than 100,000 Japanese-American citizens and lawful residents during World War II, to which the courts acceded and for which both the Executive and Congress later apologized.

The Executive Order of January 27, 2017 raises a host of constitutional questions, implicating the rights of visa holders, and the relationships of visa holders to U.S. citizens, businesses, and educational institutions, as well as the rights and obligations of states. Moreover, the Order stands in sharp contrast to congressional enactments that during the second half of the twentieth century abolished overt race discrimination in immigration law.

The assertion of unfettered Executive authority to take such action is breathtaking in multiple ways: its disregard for the host of legally-cognizable interests it affects; the haste with which the Order appears to have been drafted and implemented; its indifference to constitutional obligations of even-handedness among religions and of due process; and its circumvention of procedures designed to ensure that Executive action will reflect the expertise of the relevant agencies. Most fundamentally, the claim of blanket and unquestionable power that the Executive has asserted is inconsistent with established law.

I. U.S. Law No Longer Reflects Doctrines of Unconstrained Authority And A Tolerance of Invidious Discrimination That Once Had Currency In Immigration Law.

There was a time when American immigration statutes incorporated, and the

courts declined to invalidate, openly discriminatory immigration provisions. The notion that the authority of the political branches over immigration is unconstrained—"plenary"—derives from cases dating back to such periods. But the lesson to be drawn from this unhappy history is precisely the opposite of the government's position. The Supreme Court has made clear that immigration rules and statutes *are* subject to constitutional constraints. Moreover, the shift in the Supreme Court's approach is paralleled by shifts in Congress, which since the 1950s has moved away from policies nested in invidious discriminations.

A list of those once excluded – based on national stereotypes, gender, and race - makes the point. Congress's exclusion of Chinese immigrants began in the late nineteenth century, first with the Page Law of 1875, ch. 141, 18 Stat. 477 (1875), and then with the Chinese Exclusion Act of 1882, which suspended immigration of Chinese laborers for a period of ten years and also declared that "no State Court or Court of the United States shall admit Chinese to Citizenship," Chinese Exclusion Act, ch. 126, §§ 1 & 14, 22 Stat. 58, 59-61 (1882). Exclusionary laws expanded over several decades, culminating in the Immigration Act of 1924, which both re-codified the race-based exclusionary laws and created a national-origins quota system that would remain in place for decades thereafter. Immigration Act of 1924, 43 Stat. 153, 168 (1924). *See* Staff Report, Select Commission on Immigration and Refugee Policy 194-197 (Apr. 20, 1981). Moreover, American women who married noncitizen men from certain countries (including those marrying men from India and China) lost their

United States citizenship. *See* Nancy F. Cott, *Marriage and Women's Citizenship in the United States*, 1830-1934, 103 Am. Hist. Rev. 1140 (Dec. 1998).

During many of these decades, the courts acceded to such classifications and exclusions. For example, *Chae Chan Ping v. United States,* 130 U.S. 581 (1889), upheld the unilateral exclusion of a Chinese legal permanent resident who had been given permission to reenter before he left the country. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), declined to review the expulsion of a Chinese national who had not produced a "white" witness to testify to the lawfulness of his presence. And *United States v. Ju Toy*, 198 U.S. 254 (1905), denied habeas corpus review of immigration officials' determination to exclude an individual notwithstanding his claim of United States citizenship.

The 1924 Immigration Act not only excluded Asians, but set strict national-origin quotas aimed (as one member of Congress commented in 1929) "principally at two peoples, the Italians and the Jews." 70 Cong. Rec. 3526 (1929) (statement of Rep. John J. O'Connor). By the late 1920s, the focus had shifted to other "others." Anti-Mexican sentiments permeated discussion in the House of Representatives, as proponents of criminalizing entry-after-deportation argued that migrants brought with them poverty, disease, alcohol, as well as competition in labor markets and challenges to America's identity. One Representative claimed that "hordes of undesirable aliens . . . [were] undermining [the] health, integrity, and moral fiber of the forthcoming generations." 70 Cong. Rec. 4907 (1929) (statement of Rep. Jed Johnson). Another

argued the need to stop foreigners from "poisoning the American citizen." 70 Cong. Rec. 3620 (1929) (statement of Rep. William Thomas Fitzgerald).

But during the middle of the twentieth century, both Congress and the Court moved away from these attitudes, mired in racial and religious stereotypes that echoed the licensing, before *Brown v. Board of Education*, of domestic racial discrimination. In terms of legislation, Congress gradually abolished overt race discrimination in the nationality laws, first through providing in the Immigration and Nationality Act of 1952 that the "right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex." Immigration and Nationality Act of 1952, ch. 477, § 311, 66 Stat. 163, 239 (1952).

What is known as the 1965 Hart-Celler Act (sponsored by Congressman Emanuel Celler, for whom one of Brooklyn's federal courthouses was named) provides the next landmark. Congress responded to the history of racialized national exclusivity by abandoning the national-origins quota systems. The 1965 Act replaced the prohibitions on immigration from Asia and Africa and the severe limits on migrants from certain European countries with uniform quotas of 20,000 per country in Europe, Africa, Asia, and the Pacific. Immigration and Nationality Act, Pub. L. No. 89-236, sec. 202, § 2(a), 79 Stat. 911-912 (1965). Section 202 of the Act specifically stated that with regard to immigration admissions, "[n]o person shall receive any preference or priority or be discriminated against . . . because of his race, sex, nationality, place of birth, or place of residence." *Id.* at 911. Although the 1965

Act left certain countries in the Western Hemisphere without quotas, in 1976 the Act was amended to subject each country in the Americas to a numerical cap of 20,000. Immigration and Nationality Act, Pub. L. No. 94-571, sec. 101(a)(27), § 7(a), 90 Stat. 2703, 2706 (1976).

The Supreme Court in turn moved away from its "hands off" approach. To be sure, the 1950s saw a mixture of approaches. On the one hand, *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), rejected the contention that a lawful permanent resident could be excluded from the United States without being given notice of the charges justifying his exclusion and an opportunity to be heard to object. On the other hand, *Knauff v. Shaughnessy*, 338 U.S. 537 (1950), and *Shaughnessy v. Mezei*, 345 U.S. 206 (1953), held respectively that an individual seeking permanent residency and a permanent resident seeking re-entry after a nearly two year absence could be excluded without fair process.

Subsequent to those Cold War era decisions, the Supreme Court—while continuing to recognize the need for appropriate deference—retreated from the *Knauff/Mezei* licensing of unfettered government power in the immigration sphere. *See generally* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Knauff and Ignatz Mezi*, 143 U. Pa. L. Rev. 933, 938 (1995). A wealth of scholarship has chronicled the shift in the doctrine as due process and equal protection norms came to be reflected, albeit with variations, in immigration law. *See, e.g.,* Peter Schuck, *The Transformation of Immigration Law,* 84 Colum. L. Rev. 1, 4 (1984);

Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545 (1990); T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 Geo. Immigr. L.J. 365 (2002); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration,* 46 UCLA L. Rev. 1, 54-58 (1998); Judith Resnik, *"Within its Jurisdiction": Moving Boundaries, People, and the Law of Migration*, 160 Proc. Am. Philosophical Soc'y 117 (2016); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. Rev. 255 (1984).

Furthermore, the vision of law that supported judicial approval of such discriminatory legislation and produced pejoratives such as "the Yellow Peril," (*Oyama v. California*, 322 U.S. 633, 668–69 (1948) (Murphy, J., concurring)); and the "Latino Threat" (*see* Douglas S. Massey, *America's Immigration Policy Fiasco: Learning from Past Mistakes*, 142 Daedelus J. Am. Acad. Arts & Sci. 5, 7-8, 11 (Summer 2013)), came to be understood, as Professor Louis Henkin put it, as "an embarrassment"—"relics of a bygone, unproud era." Louis Henkin, THE AGE OF RIGHTS 137 (1990). Decisions like the *Chinese Exclusion Cases*, *Mezei*, and *Knauff* exemplify outdated attitudes toward national sovereignty premised on racial purity and religious dogma, which were swept away in the wake of *Brown* by the Supreme Court's recognition in diverse settings of the centrality of the constitutional guaranties of due process, equal protection, and religious liberty. *See generally* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81

Tex. L. Rev. 1 (2002).

II. The Supreme Court Has Recognized Numerous Limits On Executive And Legislative Power Over Immigration.

A. Section 1182(f), like any other statutory provision, must be construed to avoid raising serious constitutional questions.

Immigration statutes, like other federal statutes, must be construed to avoid serious constitutional questions. As is obvious here, such questions exist because the President has claimed that 8 U.S.C. § 1182(f) vests him with unbounded authority to exclude "any class of aliens" — even if those aliens are lawful permanent residents, and even if his selection of the "class" were to be affected by invidious racial, gender, religious, or other considerations.

It is a "cardinal principle" of statutory interpretation that when an Act of Congress raises "a serious doubt" as to its constitutionality, the Supreme Court "will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). The Supreme Court has repeatedly emphasized that it will "avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989). Moreover, statutes in tension with basic constitutional values are construed in accord with strong "clear statement" presumptions, requiring that in the absence of explicit language, a statute will not be interpreted to trench on those fundamental values. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706 (1999); *Webster v Doe*, 486 U.S. 592, 603-05 (1988).

The canon of constitutional avoidance has repeatedly been applied to limit provisions of immigration statutes that on their face appeared to confer unconstrained authority. In *INS v. St Cyr*, 533 U.S. 289, 299-300 (2001), the Court avoided interpreting a statute to have barred habeas corpus, which would have required addressing the Suspension Clause. In *Zadvydas*, where the text of the immigration statute at issue contained no apparent time limit on the detention of certain aliens, the Court read the statute to include an implicit reasonableness limitation, and emphasized that "[w]e have read significant limitations into other immigration statutes in order to avoid their constitutional invalidation." *Zadvydas*, 533 U.S. at 689.

Here, the Order represents a major shift in immigration policy, well beyond any prior use of § 1182(f), inconsistent with statutory bans on discrimination enacted *after* § 1182(f), *see* Immigration and Nationality Act, Pub. L. No. 89-236, sec. 202, § 2(a), 79 Stat. 911(1965) ("[N]o person shall . . . 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."); 8 U.S.C. § 1324B(a) (making it illegal for employers to discriminate against aliens based upon their national origin or citizenship), and in tension with the specific statutory criteria for excluding persons believed to be involved in terrorist activity, *see* 8 U.S.C. § 1182(a)(3). The Order is also tainted by disturbing evidence of an intention to disfavor a particular religious group. *See Aziz v. Trump*, 17-cv-116, 2017 WL 580855 (E.D. Va. Feb. 13, 2017). Given the seriousness of the constitutional issues raised by the Executive Order, the canon of constitutional

avoidance compels reading § 1182(f) as complying with the anti-discrimination norms enacted by Congress and embedded in the Constitution.

The Executive Order is also in tension with this Nation's leadership role in protecting religious freedom, in both domestic and international settings. In 1998, Congress mandated establishment of an Office of International Religious Freedom in the State Department, which prepares Annual Reports on International Religious Freedom. *See* 22 U.S.C. § 6411. This congressional directive is inconsistent with the notion that Congress intended to authorize the President to discriminate on the basis of religion. Thus, § 1182(f) can and should be construed to avoid the many serious constitutional questions raised by the Executive Order.

B. Courts have consistently exercised constitutionally-based judicial review of the immigration process.

In addition to construing statutes to avoid constitutional difficulties, the federal courts *have* repeatedly reviewed the political branches' regulation of immigration for constitutional soundness, and the Supreme Court has expressly said that the political branches' power over immigration "is subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695. The examples run from exclusion to detention and deportation, and the individuals and institutions affected range from citizens and their families, to universities, businesses, and states. The Supreme Court has insisted on constitutional limits on the federal government's power to prevent resident non-citizens from returning to the country after traveling abroad, *see Landon v. Plasencia,* 459

U.S. 21 (1982); *Colding*, 344 U.S. 590; to detain individuals pending their removal from the country, *see Zadvydas*, 533 U.S. 678; and to deny judicial review to non-citizens held in Guantánamo Bay and held outside the United States as "enemy combatants," *see Boumediene v. Bush*, 553 U.S. 723 (2008); *Munfa v. Geren*, 553 U.S. 674 (2008).

Further, even in cases relating to the federal government's discretionary issuance of visas, courts no longer approach immigration decisions as intrinsically free from scrutiny. In *Kleindienst v. Mandel*, 408 U.S. 753 (1972), addressing the refusal of a visa to an individual invited to a conference on a college campus, the Court declined to adopt the government's argument that Congress had delegated such matters "to the Executive in its sole and unfettered discretion, and any reason or no reason may be given." *Id.* at 769. Rather, the Court upheld the Executive's decision on the ground that it was justified by a "facially legitimate and bona fide reason." *Id.* at 770. *Fiallo v. Bell*, 430 U.S. 787 (1977), rejected the argument that a policy "regulating the admission of aliens" was not "subject to judicial review," and instead recognized a "limited judicial responsibility under the Constitution *even with respect to the power of Congress to regulate the admission and exclusion of aliens*." *Id.* at 793, n.5 (emphasis added).

Since *Mandel* and *Fiallo* were decided, the Supreme Court has consistently refused to insulate immigration legislation and Executive action from constitutional scrutiny. *See Landon,* 459 U.S. at 32-35, 37; *INS v. Chadha,* 462 U.S. 919, 940-41 (1983) (invalidating legislative veto over decisions by the Executive to grant relief from deportation). *See generally* Hiroshi Motomura, *The Curious Evolution of Immigration Law:*

Procedural Surrogates for Substantive Constitutional Rights, 92 Colum. L. Rev. 1625 (1992). The core concern is to protect against "arbitrary" decisions by any single branch of government. *See Chadha*, 462 U.S. at 959. Cases in which immigration statutes were construed to avoid constitutional difficulty, such as *Zadvydas* and *St. Cyr,* 533 U.S. at 304, are also pertinent here.

More recently, in *Kerry v. Din*, the Court considered the denial of a visa to a non-citizen spouse of a U.S. citizen. 135 S. Ct. 2128, 2139 (2015). The concurring opinion from Justice Kennedy, joined by Justice Alito, which constitutes the majority holding, agreed with the denial of a visa, but based on their view that the reasons provided met the "facially legitimate and bona fide" standard of *Mandel*. *Id.* at 2140. The decision reflects a commitment to due process and judicial review in the visa issuance context. Further, Justice Kennedy's opinion noted that under the *Mandel* standard, an "affirmative showing of bad faith" would require a court to "look behind" the stated reasons for a decision. *Id.* at 2141. The Second Circuit has similarly made clear that "discretion may not be exercised to discriminate invidiously against a particular race or group or to depart without rational explanation from established policies. . . . Such exercise of the power would not be 'legitimate and bona fide' within the meaning of *Kleindienst v. Mandel*." *Betrand v. Sava*, 684 F.2d 204, 212-13 (2d Cir. 1982). These are the concerns raised here, given that other courts have already found such indications of bad faith in the multiple statements suggesting anti-Muslim motivations for the Order. *See Aziz*, 2017 WL 580855, at *3-5, 8-9;

Washington v. Trump, No. 17-35105, 2017 WL 526497, at *10 (9th Cir. Feb. 9, 2017) (per curiam) (reh'g en banc pending).

Further constraints on the political branches' plenary powers have come from the structure of "Our Federalism," illustrated by decisions addressing the applying the non-commandeering principle of *Printz v. United States*, 521 U.S. 898 (1997), in the immigration context. *E.g.*, *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014) ("[T]he federal government cannot command the government agencies of the states to imprison persons of interest to federal officials.").

In sum, notwithstanding the discretion properly recognized in the political branches with respect to many aspects of immigration law, the courts remain responsible to ensure that those powers are exercised within the bounds set by the Constitution.

C. Invocation of national security or foreign affairs does not displace the essential role of the courts in enforcing constitutional limits.

Deployment of the term "national security" likewise cannot stop appropriate judicial inquiry into the legality of, or the basis for, government actions. Indeed, in the period since the events of September 11, 2001, courts have repeatedly addressed the merits of claims of individuals and entities subjected to government orders flowing from 9/11—even when dealing with measures specifically directed at individuals believed to have engaged in terrorism. Executive claims based on national security are properly entitled to significant deference, but that deference is not a

"blank check." *Hamdi v. Rumsefeld*, 542 U.S. 507, 536 (2004).

Across a range of areas, the Government regularly argued that the judiciary had no role, as the political branches were responding to "national security" concerns and the Congress had authorized military engagements. The judiciary nonetheless has repeatedly discharged its constitutional obligation. *See id.*; *Hamdan v . Rumsfeld*, 548 U.S. 557, 576-78 (2006); *Boumediene*, 553 U.S. at 771.

III. The Executive Order, At A Minimum, Raises Grave Questions Under The First Amendment And The Due Process Clause.

As of this writing, federal district courts in Washington, Massachusetts, New York, and Virginia have examined the Executive Order. All but the decision in *Louhghalam v. Trump*, 17-cv-10154, 2017 WL 479779 (D. Mass. Feb. 3, 2017), have found the Order constitutionally suspect. Indeed, in a per curiam decision, a unanimous panel of the Ninth Circuit denied the Government's request to stay a district court's TRO enjoining enforcement of the Executive Order, because the panel concluded that (1) there was a likelihood of success on the merits for upholding a preliminary injunction on due process grounds, and (2) adequate evidence of unconstitutional religious animus existed to warrant a full judicial exploration. *Washington*, 2017 WL 526497, at *7-10. A Virginia District Judge found that evidence of unconstitutional religious animus merited issuance of a preliminary injunction against the ban's enforcement in Virginia against Virginia residents, students, or employees of Virginia's schools. *Aziz*, 2017 WL 580855, at *11.

Both the procedural due process and religious liberty issues are before this Court. This case is focused on whether aliens who had returned to the United States with valid travel documents and those who have lawful permanent residence have a cognizable liberty interest under the Due Process Clause, as well as whether those in relationship to the Petitioners - ranging from universities and employers to citizen family members - have constitutional and statutory entitlements to individualized consideration through specified procedures prior to the voiding of the visas.

Further, per the Court's grant of intervention, the New York Attorney General has asserted the rights of New York State, its businesses, universities, and hospitals, the health of its economy and citizens, and the civil rights of its residents. Through its pleadings, New York has raised claims that are not derivative of the rights of aliens but reflect independent harms in New York and in its interactions across the country.

To be sure, every President over the last thirty years has issued at least one Executive Order pursuant to 8 U.S.C. § 1182(f), many of them directed at particular nations. Each, however, was narrowly tailored to focus on a particular concern that did not involve invidious stereotyping. In the most sweeping example, President Reagan reacted to the decision of the Cuban government to suspend its then-existing immigration agreement with the United States by using § 1182(f) to temporarily exclude all Cubans, other than those eligible for family reunification visas. Proclamation 5517—Suspension of Cuban Immigration, 51 Fed. Reg. 30,470 (Aug. 22, 1986). Other legislation and orders have imposed extra vetting, most notably

determinations that travelers who had been present in Iraq, Syria, Iran, Sudan, Libya, Somalia, and Yemen on or after March 1, 2011, were, unlike some others, required to obtain visas to travel to the United States. *See* 8 U.S.C. § 1187(a)(12)(A), Visa Waiver Program Improvement and Terrorist Travel Prevention Act of 2015, Pub. L. No. 114-113, Div. O, Tit. II, 129 Stat. 2988 (2015) (extra vetting for individuals who have traveled to Iran, Iraq, Sudan, or Syria on or after March 1, 2011); Press Release, Dep't of Homeland Sec., *DHS Announces Further Travel Restrictions for the Visa Waiver Program* (Feb. 18, 2016), *available at* https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program (adding by executive order extra vetting for individuals who have traveled to Libya, Somalia, or Yemen).

Those provisions did not impose blanket exclusions but instead required that certain individuals obtain visas prior to their travel, and none of these orders was been tainted by statements proclaiming an intention to exclude members of a particular religion from the United States. *See* Congressional Research Service, *Executive Authority to Exclude Aliens: In Brief*, at 6-10 (Jan. 23, 2017) (describing all Executive Orders issued pursuant to § 1182(f) and observing that "in no case to date, though, has the Executive purported to take certain types of action, such as . . . explicitly distinguishing between categories of aliens based on their religion.").

While all lawmaking relies on categories as a "practical necessity," not all categories are equal. *Romer v. Evans*, 517 U.S. 620, 631 (1996). When the category is race, religion, gender, or national origin, alarm bells go off. The Executive Order has

echoes of the amendment invalidated in *Romer*, for it too can be described as: "imposing a broad and undifferentiated disability" – here on nationals or visitors to seven countries rather than, as in *Romer*, "a single named" group; "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." 517 U.S. at 632.

IV. Deliberation Based On A Full Factual Record Is Essential

Amici have set forth several constitutional doctrines that bear on the Executive Order and which require careful and deliberate consideration—rather than a rush to judgment. The order in *Washington v. Trump* has helped to limit the profound disruption of the administration of justice, of businesses and universities, and of families. The preliminary injunction in the Eastern District of Virginia has responded to parallel problems in that state. These orders, like the prior order in this case, permit an opportunity for careful judicial consideration of the factual and legal issues posed by the Executive Order, restoring a *status quo* that the Government has not shown to pose any imminent risk of harm, or, indeed, to have ever resulted in any of the harms said to justify the Executive Order.

In carrying out such careful judicial consideration, one final facet of constitutional history requires discussion, for this is not the first time in our history that the Government has pressed courts to defer to claims of national security and of threats identified with people from particular nationalities. The results of deference

without factual support have often been tragic, as exemplified by the hasty approval of Japanese internment.[2] *Korematsu v. United States*, 323 U.S. 214 (1944), has rightly become part of an "anticanon" – deployed as examples of what U.S. law no longer accepts as constitutional. *See* Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 380, 396, 456-60 (2011).

A few of the details of *Korematsu* bear repeating, as there – like here – national origin stood in as a proxy for risk. In the 1940s, the Court deferred to the Government's assertion that national security required the detention of 117,000 people based on their race alone because time purportedly did not permit individualized determinations. 323 U.S. at 218-219. This claim turned out to be false. A bi-partisan Congressional Commission later concluded that no evidence supported the claim of military necessity for internment, and that it was instead the result of "race prejudice, war hysteria and a failure of political leadership. *See* Report of the Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied (Washington, D.C., 1982) at 18. Moreover, the government's representation that categorical detention was needed because it had insufficient time for

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[2] Even at its lowest ebb, the Supreme Court recognized in the companion case to *Korematsu*, *Ex parte Endo*, that individualized hearings for each detainee were required. *See* 323 U.S. 283, 299-300, 303-04 (1944). Faced with the requirement of individualized hearings, the United States released the Japanese internees four months after the decision in *Ex parte Endo*. Thus, unless and until the United States provides a mechanism for such individualized consideration in connection with the cancellation of valid entry documents, this Court should enjoin the application of the blanket ban to holders of otherwise valid entry documents.

individualized review was untruthful. *See* Peter H. Irons, *Unfinished Business: The Case for Supreme Court Repudiation of the Japanese Internment Cases* 4, 7-9, 18-19 (2013).

In 1976, the order was formally terminated by President Gerald Ford, who called the order a "setback to fundamental American principles." President Ford urged American's "to resolve that this kind of action shall never again be repeated." Proclamation 4417—An American Promise, 41 Fed. Reg. 7,085 (Feb. 19, 1976).

The next chapter in *Korematsu* comes from the federal district court grant of a writ of *coram nobis* to Mr. Korematsu. As that court wrote, "[a]s historical precedent," the decision is a "constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees." Moreover, "the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability." *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

One more aspect of *Korematsu* bears elaboration. The Court has come to invoke the decision for the proposition that strict scrutiny applies to racial classifications under equal protection doctrine. "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 288, (1978) (quoting *Korematsu*, 323 U.S. at 216). *See also Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2422, (2013); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214 (1995); *Loving v.*

Virginia, 388 U.S. 1, 11, (1967).

As the Court explained in *City of Richmond v. J.A. Croson Co.,* "[t]he history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." 488 U.S. 469, 501 (1989) (citing *Korematsu*, 323 U.S. at 235-40). By linking national origin discrimination with racial discrimination, the Court has made plain how one noxious basis for classification leads to another. Indeed, as Justice Kennedy eloquently put it: the "identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

Conclusion

The Executive Order of January 27, 2017 should not be allowed to stand without a thorough review that entails fact-based analyses of its legality as a matter of statutory and constitutional law.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Eastern District of New York by using the CM/ECF system on February 16, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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