

No. 17-35105

IN THE
**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STATE OF WASHINGTON, et al.,

Plaintiffs and Appellees,

v.

DONALD J. TRUMP, President of the United States, et al.,

Defendants and Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
HON. JAMES L. ROBART, JUDGE, CASE No. 2:17-cv-00141

**MOTION FOR LEAVE TO FILE BRIEF OF THE FRED T. KOREMATSU
CENTER FOR LAW AND EQUALITY AS *AMICUS CURIAE* IN
SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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*ATTORNEYS FOR AMICUS CURIAE, THE FRED T. KOREMATSU CENTER FOR LAW AND
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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY

Pursuant to Federal Rule of Appellate Procedure 29(b), The Fred T. Korematsu Center for Law and Equality hereby submits this Motion for Leave to File a Brief *Amicus Curiae* in support of Plaintiffs-Appellees and Affirmance.¹

INTEREST OF *AMICUS CURIAE* AND REASONS WHY THE MOTION SHOULD BE GRANTED

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

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

¹ Plaintiffs-Appellees and Defendant-Appellants have consented to the filing of the proposed amicus brief.

The proposed Brief *Amicus Curiae* is being filed concurrently with consent of the parties now pending in this Court. As the District Court concluded, “Fundamental to the work of this court is a vigilant recognition that it is but one of three equal branches of our federal government” and that it in determining whether to grant the Plaintiffs-Appellants Temporary Restraining Order it must review the Executive Order of January 27, 2017 entitled “Protecting the Nation from Foreign Terrorist Entry into the United States” (the “Executive Order”) “to fulfill its constitutional role in our tripart government.” TRO Order at 7. The Defendants-Appellants maintain that this Court may not review the Executive Order, because the President has “unreviewable authority” to suspend admission of aliens to this country. Emergency Motion under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal (“Mot.”) at 2. In Defendants-Appellants advancement of the plenary power doctrine in support of limiting the judicial branch’s authority to question any exercise of [his] executive power in this arena, the proposed Brief seeks to demonstrate that the plenary power doctrine derived from decisions like *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (“*Chinese Exclusion Case*”) and its progeny, that were premised on outdated racist and nativist precepts that we now reject and outdated understandings of sovereignty. We urge this Court to consider the historical conditions under which

the plenary power doctrine developed and justified prior historical developments which we now recognize as anathema.

As the proposed Brief *Amicus Curiae* details, the influence of the plenary power doctrine has been steadily eroded in the immigration context. Separately, but equally significant, the proposed Brief reviews the historical threads of cases that abdicated judicial review of executive and legislative actions against entire races or nationalities and provided judicial sanction of discriminatory action taken against disfavored minorities.

CONCLUSION

For these reasons, the Court should grant this Motion, and permit the Korematsu Center to file their concurrently submitted Brief *Amicus Curiae*.

Respectfully submitted,

Dated: February 5, 2017

**AKIN GUMP STRAUSS HAUER &
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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 Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 5, 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.

Dated: February 5, 2017

/s/ Jessica M. Weisel

Jessica M. Weisel