No. 17-35105

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON, et al.,

Plaintiffs and Appellees,
v.

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

Defendants and Appellants.

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

AMICUS BRIEF OF THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), undersigned counsel for amici make the following disclosures:

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

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INTEREST OF AMICUS

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]

SUMMARY OF ARGUMENT

The government maintains that this Court may not review the Executive Order of January 27, 2017, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States" (the "Executive Order"), because the President has

[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. This brief is filed with the consent of all parties. *See* Motion for Leave to File Amicus Brief, filed concurrently.

"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. That argument advances the plenary power doctrine, which, like the "separate but equal" doctrine, is a relic of an odious past that has no role in modern American jurisprudence. Just as *Plessy v. Ferguson* was influenced by nineteenth century views anathema today, the plenary power doctrine derives from decisions like *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) ("*Chinese Exclusion Case*"), that were premised on outdated racist and nativist precepts that we now reject.

When confronted with a similar precedent in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the Supreme Court recognized that it "cannot turn the clock back" and decide its former cases differently. Instead, it would have to consider the subject of the law – public education in *Brown*, immigration policy here – "in the light of its full development and its present place in American life throughout the Nation." *Id*. at 492-93. Consistent with that principle, courts have not given total deference to executive and legislative decisions on exclusion, but have engaged in appropriate judicial review. 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 must review the

Executive Order "to fulfill its constitutional role in our tripart government." TRO Order at 6-7. This Court should do the same.

ARGUMENT

I. THE PLENARY POWER DOCTRINE WAS BORN OUT OF RACIST NOTIONS AND OUTDATED UNDERSTANDINGS OF SOVEREIGNTY THAT COURTS NOW REJECT.

The birthplace of the plenary power doctrine, the *Chinese Exclusion Case*, relies on racist descriptions of Chinese immigrants that stoked xenophobia. The Court stereotyped Chinese laborers as "industrious," "frugal" and "content with the simplest fare, such as would not suffice for our laborers and artisans." 130 U.S. at 595 (emphasis added). These stereotypes informed the xenophobia of the opinion, driven by fear of "strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country"—whose presence amounted to "an Oriental invasion." *Id.*; *see also id.* at 606 ("the government of the United States, though its legislative department," could lawfully "consider[] the presence of foreigners *of a different race*…who will not assimilate with *us*, to be dangerous to its peace and security" despite the absence of "actual hostilities") (emphasis added).

Justice Field's acceptance of Congress's conclusion that Chinese immigrants are incompatible with American society due to "differences of race" drove the outcome in plenary power doctrine cases, which are "inextricably linked" to the

idea of the "'Other' in America today, whether by virtue of race, ethnicity, national origin, religion, or citizenship status." Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The Plenary Power Justification for On-Going Abuses of Human Rights*, 10 Asian Am. L.J. 13, 13 (2003).

Similar racist and xenophobic justifications pervade plenary power doctrine cases flowing from the *Chinese Exclusion Case.* In these cases, the "right of self-preservation" advanced as justification for the plenary power doctrine's broad immunity in exclusion cases was racial self-preservation, not the preservation of borders or national security. *E.g.*, *Chinese Exclusion Case*, 130 U.S. at 608; Saito at 15; *see also, e.g.*, *Fong Yue Ting v. United States*, 149 U.S. 698, 729-30 (1893) (discussing the requirement that Chinese aliens prove the fact of their U.S. residence "by at least one credible white witness" in order to remain in the country); *Nishimura Ekiu v. United States*, 142 U.S. 651, 664 & n.1 (1892) (exclusion of Japanese immigrant who was "likely to become a public charge").[2] These racial underpinnings have led courts to apply the plenary power doctrine, relying on an "aberrational form of the typical relationship between statutory

[2] Later cases do not explicitly discuss or express support for race-based distinctions, but do so implicitly through their reliance on the reasoning of the *Chinese Exclusion Case* and its progeny. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950).

interpretation and constitutional law" in the area of immigration law. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545, 549 (1990); *see also* T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 Constitutional Commentary 9, 33 (1990) (Chinese Exclusion laws "should serve as cautionary examples to those who would urge that the immigration power be left unconstrained by the Constitution in order to promote the maintenance of 'communities of character.'").

The overt racism of these cases contributes to an additional flaw in the doctrine – their reliance on an outdated and race-based meaning of sovereignty. The *Chinese Exclusion Case* states that "[t]he power of exclusion of foreigners" is "an incident of sovereignty belonging to the government of the United States . . . delegated by the [C]onstitution."[3] 130 U.S. at 609. Since then, the concept of sovereignty has evolved to incorporate principles of fundamental human rights and anti-discrimination, shifting the system "from the protection of sovereigns to the

[3] This same race-based concept of sovereignty is discussed at length in *Dred Scott v. Sandford*, which explained that, historically, "negroes of African race" were not "constituent members of this sovereignty[.]" 60 U.S. 393, 403-04 (1856). Therefore, they had "none of the rights and privileges" that the Constitution "provides for and secures to citizens of the United States" but only "such as those who held the power and the Government might choose to grant them." *Id*. at 404-05.

protection of people." *See* W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 Am. J. Int'l L. 866, 872 (1990). This change is reflected in congressional action incorporating these principles in federal law. *See, e.g.*, Foreign Affairs Reform and Restructuring Act of 1998, 22 U.S.C. § 6501 et. seq. (1998) **(**adopting UN Convention Against Torture and issuing related regulations, which prevent the U.S. government from removing or extraditing an alien to a country where they may be subject to torture); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX) (Dec. 21, 1965), *ratified by* 140 Cong. Rec. S7634 (daily ed. June 24, 1994); Motomura at 566 ("By the 1950s, aliens' rights decisions beyond the scope of immigration law already conflicted with assumptions implicit in the plenary power doctrine."). These changes require reinterpretation, or modernization, of other norms to avoid "the absurdity of mechanically applying an old norm without reference to fundamental constitutive changes." Reisman at 873.

Perhaps reflective of the shift away from race-based characterizations and the outdated meaning of sovereignty, modern courts have refused to abdicate their power to judicially review immigration matters. Relying on early dissents in plenary power cases, numerous lower courts have applied contemporary constitutional principles in reviewing immigration actions by the political branches. After more than a century of erosion, the plenary power doctrine does

not appear to retain the support of a majority of justices on current Supreme Court. *See Kerry v. Din*, 135 S. Ct. 2128 (2015) (in visa denial case, plurality opinion did not rely on plenary power); *see also* See Michael Kagan, *Plenary Power is Dead! Long Live Plenary Power*, 114 Mich L. Rev. First Impressions 21 (2015) (noting that while the Court declined to repudiate the plenary power doctrine in *Kerry v. Din*, the split between the Justices suggests the doctrine is no longer as impactful as it once was). Courts have not - and should not - abdicate their responsibility to uphold constitutional safeguards in the area of immigration.

One of the earliest plenary power cases, *Fong Yue Ting v. United States*, 149 U.S. 698, generated three dissenting opinions, each of which highlighted a resident alien's ties to the U.S. as a basis to justify greater legal protection. *See, e.g.*, *Fong Yue Ting*, 149 U.S. at 738 (Brewer, J. dissenting) ("I deny that there is any arbitrary and unrestrained power to banish residents, even resident aliens."). Justice Field – who announced the opinion of the court in the *Chinese Exclusion Case* – dissented in *Fong Yue Ting*. Even while praising the *Chinese Exclusion Case*, upon which the majority relied to reach its holding, Justice Field sought to limit the plenary power doctrine's application with regard to non-citizen residents:

> As men having our common humanity, they are protected by all the guaranties of the constitution. To hold that they are subject to any different law, or are less protected in any particular, than other persons, is, in my judgment, *to ignore the teachings of our history, the practice of our*

> *government, and the language of our constitution*.

Fong Yue Ting, 149 U.S. at 754 (Fields, J. dissenting) (emphasis added).

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

> 'This doctrine of powers inherent in sovereignty is one both indefinite and dangerous . . . The governments of other nations have elastic powers. *Ours are fixed and bounded by a written constitution. The expulsion of a race may be within the inherent powers of a despotism.* History, before the adoption of this constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely, as it seems to me, they gave to this government no general power to banish.'

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

Along with Justices Black, Jackson, and Frankfurter, Justice Douglas supported limitations to the plenary power doctrine. These Justices "expressed serious concern that aliens would be denied access to judicial review in such harsh and unremitting terms," dissenting in influential McCarthy-era plenary power cases. *See* Motomura at 560; *see also Shaughnessy*, 345 U.S. at 217 (Black, J.

dissenting) ("No society is free where government makes one person's liberty depend upon the arbitrary will of another. Dictatorships have done this since time immemorial. They do now."); *id. at* 224 (Jackson, J. dissenting) ("I conclude that detention of an alien would not be inconsistent with substantive due process, provided – and this is where my dissent begins – he is accorded procedural due process of law.").

Over time, the dissents in *Mezei*, *Knauff*, and *Harisiades* gained influence, leading to "an expansion in the number and range of claims that courts, including the Supreme Court, would hear in immigration cases." Motomura at 560. Lower courts have declined to abdicate review entirely and instead have applied "the rational basis test to substantive due process and equal protection challenges [arising from deportation]; . . . the traditional *Mathews v. Eldridge* factors to procedural due process challenges; and . . . First Amendment standards to [immigration] restrictions [arising out of] political speech and association." Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 Hastings Const. L.Q. 925, 934–35 (1995); *see e.g.*, *Reno v. Flores*, 507 U.S. 292, 306 (1993) (holding that despite the broad power of the political branches over immigration, INS regulations must meet the rational basis test by "rationally advancing some legitimate governmental purpose."); *Raya-Ledesma v. I.N.S.*, 55 F.3d 418, 420 (9th Cir. 1994) (finding application of

residency requirement for discretionary relief from deportation had a rational basis and therefore did not violate legal permanent resident's right to equal protection*);* *Tran v. Caplinger*, 847 F. Supp. 469, 478-79 (W.D. La. 1993) (engaging in substantive due process analysis as to whether detention imposed was "merely incidental to another legitimate governmental purpose"); *Lynch v. Cannatella*, 810 F.2d 1363, 1366 (5th Cir. 1987) ("We hold that even excludable aliens are entitled to the protection of the due process clause while they are physically in the United States. . . .").

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

II. HISTORY REPUDIATES DECISIONS THAT ABDICATE JUDICIAL REVIEW OF EXECUTIVE AND LEGISLATIVE ACTIONS AGAINST ENTIRE RACES OR NATIONALITIES.

Perhaps it is not surprising that the Supreme Court that decided the *Chinese Exclusion Case* had largely the same composition of the Court that upheld racial segregation under the doctrine of "separate but equal" in *Plessy v. Ferguson*, 163 U.S. 537 (1896). *Plessy* was, of course, overturned on Equal Protection grounds in *Brown*, 347 U.S. 483, and, like other cases that establish broad authority to discriminate against entire races or nationalities, are now considered the nadir of American jurisprudence.

Korematsu and *Plessy* are considered cases that "embod[y] a set of propositions that all legitimate constitutional decisions must be prepared to refute." Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 380 (2011); *see also* Michael J. Klarman, *The Plessy Era*, 1998 Sup. Ct. Rev. 303, 304 (1998) ("Commentators have called *Plessy* 'ridiculous and shameful,' 'racist and repressive,' and a 'catastrophe.'").

Like the government urges here, those decisions gave broad deference to the political branches of government to take action disfavored minorities. History, however, has rejected judicial sanction of those actions. Not only do we dismiss those cases as wrongly decided, we condemn those courts for allowing racist views to go unchecked by the judiciary. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 275 (1995) (Ginsburg, J. dissenting) (describing the use of strict scrutiny in *Korematsu* to "yield[] a pass for an odious, gravely injurious racial classification . . . A *Korematsu*-type classification . . . will never again survive scrutiny: Such a classification, history and precedent instruct, properly ranks as prohibited."); *Obadele v. United States*, 52 Fed. Cl. 432, 441 (2002) ("Half a century of equal protection jurisprudence has confirmed the error of [Korematsu's] wartime judicial abdication."); *see also Symposium: The Changing Laws of War: Do We Need A New Legal Regime After September 11?: The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257, 1259 (2004) (complete "judicial

acquiescence or abdication" of performing checks on Presidential power "has a name. That name is *Korematsu*"); Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. Pa. J. Const. L. 739, 748-51 (2014) (deferential standard of review applied in *Plessy* was "incapable of identifying and addressing contemporary prejudices").

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

CONCLUSION

For the foregoing reasons, this Court should deny the emergency motion.

Respectfully submitted,

Dated: February 5, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached brief is double spaced, uses a proportionately spaced typeface of 14 points or more, and contains a total of 2,904 words, based on the word count program in Microsoft Word.

Dated: February 5, 2017

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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 parties in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: February 5, 2017 By /s/ Jessica M. Weisel
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