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ANTI-DEFAMATION LEAGUE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

STATE OF HAWAI'I and ISMAIL
ELSHIKH,

Plaintiffs,

v.

DONALD TRUMP, in his official
capacity as President of the United
States, *et al.*,

Defendants.

CV 17-00050 DKW-KJM

**BRIEF OF *AMICUS CURIAE*
ANTI-DEFAMATION LEAGUE
IN SUPPORT OF PLAINTIFFS'
MOTION FOR TEMPORARY
RESTRAINING ORDER;
APPENDIX; CERTIFICATE OF
SERVICE**

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STATEMENT OF INTEREST

The Anti-Defamation League (“ADL”) respectfully submits this brief as *Amicus Curiae* in support of the relief sought by Plaintiffs declaring invalid Sections 2 and 6 of the Executive Order dated March 6, 2017, entitled “Protecting the Nation from Foreign Terrorist Entry into the United States” (the “new Executive Order”).¹ Accordingly, *Amicus* asks this Court to grant Plaintiffs’ motion for temporary restraining order enjoining enforcement of Sections 2 and 6 of the new Executive Order.²

Founded in 1913, ADL is a civil rights and human relations organization that seeks to stop the defamation of the Jewish people, and to secure justice and fair treatment for all people. Through its 26 regional offices throughout the United States, ADL provides materials, programs and services to combat anti-Semitism and all forms of bigotry. Because of its history fighting discrimination, including prejudice toward immigrants and religious minorities, ADL can provide unique and important insights for the Court in addressing the new Executive Order and in

¹ The new Executive Order is a slightly revised version of an earlier order (the “original Executive Order”) of the same title, which was issued on January 27, 2017.

² *Amicus Curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *Amicus* and their counsel, made any monetary contribution toward the preparation or submission of this brief.

considering the historical context of the new Executive Order's provisions limiting or barring entry into the United States of refugees.

BACKGROUND

The United States is a nation dedicated to the ideals of equality, liberty and justice. (*See infra* Section I.) Adhering to these principles under changing domestic and international circumstances often is a work in progress. Throughout the history of the United States, and frequently with respect to immigration, our ideals have been tested. Sometimes the nation rises to meet the challenge, upholding the values that make America exceptional. (*See infra* Section II.) At other times, when prejudice and fear predominate over reason and compassion, we falter, often with devastating consequences. (*See infra* Section III.) We turned our backs on the *St. Louis*, a ship with nearly 1,000 Jews fleeing from Nazi Germany, condemning hundreds of them to their deaths; we passed laws that overtly excluded and discriminated against the Chinese; and we rounded up more than 100,000 Japanese Americans and interned them in prison camps in the 1940s. In each instance, when we later realized that we had strayed from our principles, we were left to apologize to the people who suffered, or to their descendants, or to the memory of those who perished without descendants, in each case promising to learn from our mistakes and not to repeat them.

ADL was created at a time when fear and prejudice against Jews were so great that a Jewish man, Leo Frank, was convicted of murder after a trial marked by overt anti-Semitism and then dragged from his prison cell and lynched in 1915.³ ADL regularly confronts discrimination against perceived outsiders, foreigners and strangers. As an organization founded by immigrants, as an organization sworn to protect the interests of religious and ethnic minorities, ADL believes that when our nation's values are threatened, we are duty-bound to look back at the founding principles that propelled this nation of immigrants – in the hope that future generations can celebrate our resolve.

ARGUMENT

A plaintiff seeking a temporary restraining order must demonstrate that “he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat’l Res. Def. Council, Inc.*, 555

³ See Wendell Rawls, Jr., *After 69 Years of Silence, Lynching Victim is Cleared*, N.Y. TIMES, Mar. 8, 1982. After the lynching, armed mobs ran through the streets of Atlanta, forcing Jewish businesses to shutter their doors and about half of Georgia’s Jewish population to flee. Sixty years later, the State of Georgia posthumously pardoned Frank on the grounds that the State failed to protect him while he was in its custody. See STATE BOARD OF PARDONS AND PAROLES, Pardon of Leo Frank (Mar. 11, 1986), <http://www.gpb.org/files/georgiastories/nsouthfrank176.jpg>. See also Leonard Dinnerstein, *Leo Frank Case*, NEW GEORGIA ENCYCLOPEDIA, <http://www.georgiaencyclopedia.org/articles/history-archaeology/leo-frank-case> (last visited Feb. 7, 2017).

U.S. 7, 20 (2008).⁴ With this brief, ADL seeks to provide important insight regarding how Sections 2 and 6 of the new Executive Order, absent injunctive relief, will almost certainly cause irreparable harm, similar to other harms for which the United States has later apologized when it failed to live up to values and the promise embodied in the Constitution. ADL also seeks to demonstrate that the public interest lies squarely in support of injunctive relief, as America has always been at its best when it opens its doors to refugees and immigrants.

I. America's Aspirations as a Refuge for the Oppressed

The promise of America has been manifest since before the American Revolution. John Winthrop, while still on his transatlantic voyage to the New World, admonished the future colonists of Massachusetts to always remember that their new community would be “as a city upon a hill,” with the entire world watching.⁵ In fulfilling this vision, the country welcomed in its early years those disfavored and persecuted in their homelands based on their religious beliefs, including the Pilgrims, the Puritans, and the Huguenots. Since then, our nation’s wisest leaders have been guided by Winthrop’s inspiring vision and have strived toward a more inclusive democracy.

⁴ *Winter* “concerned a motion for a preliminary injunction, but the legal standards applicable to TROs and preliminary injunctions are ‘substantially identical.’” *Washington v. Trump*, 847 F.3d 1151, 1159 n.3 (9th Cir. 2017).

⁵ John Winthrop, *A Model of Christian Charity* (1630).

The birth of the United States came in part because the Founders sought to cast off the shackles of Europe's endless religious wars and sectarian conflict in order to form a more perfect union. In beseeching the country to separate from England, Thomas Paine recognized that Europe was "too thickly planted with kingdoms to be long at peace" and believed the discovery of America had a divine purpose: "to open a sanctuary to the persecuted in future years, when home should afford neither friendship nor safety."⁶ Seven months later, the Declaration of Independence enunciated the "self-evident truths" that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."⁷ Less quoted from the Declaration is the Founders' burning grievance that the English King had restricted free immigration, having "endeavoured to prevent the population of these States; for that reason obstructing the Laws for the Naturalization of Foreigners [and] refusing to pass others to encourage their migrations hither."⁸

After the United States won its independence, it faced the challenge of designing laws that embodied the enlightened vision of the new nation. In 1785, James Madison published "Memorial and Remonstrance Against Religious

⁶ Thomas Paine, *Common Sense* (Jan. 10, 1776).

⁷ Declaration of Independence (July 4, 1776).

⁸ *Id.*

Assessments” in opposition to a bill proposed to Virginia’s General Assembly that would have levied a modest tax to support Christian education.⁹ Madison warned that any measure, no matter how slight, that gave a preference to one religion over another would constitute “a dangerous abuse of power” and would betray the vision of America as a shining city upon a hill:

Because the proposed establishment is a departure from that generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? *Instead of holding forth an Asylum to the persecuted, it is itself a signal of persecution. . . .* Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthropy [sic] in their due extent, may offer a more certain repose from his Troubles.¹⁰

Virginia recognized Madison’s wisdom. It rejected the establishment bill and instead adopted Thomas Jefferson’s “Statute for Religious Freedom,” which firmly separated church from state and enshrined the principles of religious liberty for all.¹¹ When Madison went to the Constitutional Convention in 1787, he fought

⁹ James Madison, *Memorial and Remonstrance against Religious Assessments* ¶ 9 (Jun. 20, 1785).

¹⁰ *Id.* (emphasis added).

¹¹ Virginia’s Statute for Religious Freedom (Jan. 16, 1786).

for Jefferson's view to become the law of the land, and it became a bedrock of the rights confirmed by the First Amendment.

Although the makeup of the United States was overwhelmingly Christian at its birth, our Founders were clear that the nation's new laws prohibiting religious discrimination extended to people of all faiths and backgrounds. When Jefferson later reflected on his Statute for Religious Freedom, he extolled the broad application of the law, which was evidence that the legislators "meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and the Mahometan [Muslim], the Hindoo [Hindu], and every Infidel of every denomination."¹²

The American values of accepting people into this country regardless of their faith, race or nationality have been celebrated by our leaders. In 1855, Abraham Lincoln confronted the burgeoning anti-immigrant "Know Nothing" movement, soundly rejecting the Know Nothings' vision of an America in which "all men are created equal, except negroes, and foreigners, and Catholics."¹³ He said of the movement: "When it comes to this I should prefer emigrating to some

¹² Thomas Jefferson, *Autobiography*, Works 1:71 (1821).

¹³ Abraham Lincoln, *Letter to Joshua F. Speed* (Aug. 24, 1855).

country where they make no pretence of loving liberty — to Russia, for instance, where despotism can be taken pure. . . .”¹⁴

The vision of the “shining city on the hill” has also inspired poets. In 1856, Walt Whitman wrote: “These States are the amplest poem, here is not merely a nation but a teeming Nation of nations.”¹⁵ Emma Lazarus’ immortal sonnet, enshrined on the pedestal of the Statue of Liberty, urges “ancient hands” to give America “your tired, your poor, your huddled masses yearning to breathe free. . . . Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!”¹⁶

These values have endured to the modern day. In his 1959 book, *A Nation of Immigrants*, future President John F. Kennedy studied the history of immigration in this country, both in terms of those subject to religious persecution and those facing other overpowering hardship. He wrote: “America has always been a refuge from tyranny. As a nation conceived in liberty, it has held out to the world the promise of respect for the rights of man.”¹⁷

¹⁴ *Id.*

¹⁵ Walt Whitman, *Preface to Leaves of Grass* (1855).

¹⁶ Emma Lazarus, *The New Colossus* (1883).

¹⁷ John F. Kennedy, *A Nation of Immigrants* 7 (Harper Perennial, January 2008).

On the eve of his election as President in 1980, Ronald Reagan also took inspiration from Winthrop’s vision of America:

These visitors to that city on the Potomac do not come as white or black, red or yellow; they are not Jews or Christians; conservatives or liberals; or Democrats or Republicans. They are Americans awed by what has gone before, proud of what for them is still . . . a shining city on a hill.¹⁸

II. America is at Its Best When It Honors Its Commitment to Its Core Values

There are numerous examples where the United States has met its aspirations as Winthrop’s “shining city on the hill,” opening itself to “anyone with the will and the heart to get here.”¹⁹ At its best, the United States has been a beacon of hope for refugees from war-torn countries, victims of religious persecution, natural disasters or other emergencies, fulfilling what President Kennedy described in *A Nation of Immigrants* as the “natural humanitarian impulses of the American people which is in keeping with our traditions of shelter to the homeless and refuge for the oppressed.”²⁰ Indeed, many of these refugees have contributed immeasurably to the fabric of America.

With the Truman Directive in 1945, and the Displaced Persons Act of 1948, the United States — for the first time since its founding — began explicitly to

¹⁸ Ronald Reagan, *Election Eve Address* (Nov. 3, 1980).

¹⁹ Ronald Reagan, *Farewell Address to the Nation* (Jan. 11, 1989).

²⁰ Kennedy, *supra* note 17, at 46.

focus on its identity as a sanctuary for those fleeing persecution, as the first Americans had done hundreds of years earlier.²¹ President Truman led the assistance and reconstruction effort to resettle hundreds of thousands of European Jews and other Europeans displaced from their home countries who could not return in the aftermath of World War II.²²

These new laws gave truth to Thomas Paine’s prophecy that the United States would “open a sanctuary to the persecuted in future years, when home should afford neither friendship nor safety.” The refugees welcomed to the United States during or after World War II have made immeasurable contributions to politics, science, literature, music, art, and social and scientific studies. Refugees from that period include Madeleine Albright, Hannah Arendt, Bela Bartok, Marc Chagall, Marlene Dietrich, Albert Einstein, Enrico Fermi, Henry Kissinger, Raphael Lemkin, Thomas Mann, Vladimir Nabokov, Claude Levi-Strauss, Dr. Ruth Westheimer, and Billy Wilder. American culture and science stand on the shoulders of many of these contributions.

²¹ David W. Haines, *Learning From our Past: The Refugee Experience in the United States*, AMERICAN IMMIGRATION COUNCIL, <http://www.americanimmigrationcouncil.org/research/refugee-experience-united-states> (last visited Feb. 7, 2017).

²² *Id.* In so doing, as set forth below, the United States began the process of making amends for the tragic consequences of its turning away Jewish refugees during World War II, dooming many of them to death or excruciating years in concentration camps.

With the onset of the Cold War, Congress began assisting groups of refugees from Communist regimes including those seeking freedom from the Soviet Union, Cuba, Hungary, Poland, and Yugoslavia, as well as those fleeing Southeast Asia after the Vietnam War. The openness to asylum seekers reflected in these efforts also demonstrated a growing recognition that many refugees have significant education, skills, strong family structures, and commitment to hard work and success that make them ideal new citizens.²³ Examples of notable refugees that came to the United States from this period include: Sergey Brin, Joseph Brodsky, Gloria Estefan, Milos Forman, Wyclef Jean, Miriam Makeba, Thomas Peterffy, Regina Spektor and David Tran.

In the wake of the publication of *A Nation of Immigrants*, Congress enacted the Immigration and Nationality Act of 1965, which allowed increased numbers of people to migrate to the United States from South America, Asia, Africa, the Middle East, and Southern and Eastern Europe, abolishing the previous quotas that had been set based on national origin. In 1968, the United States was one of the first countries to sign the United Nations Protocol Relating to the Status of Refugees, a key treaty in international refugee law. The 1974 Jackson-Vanik Amendment ultimately permitted approximately 500,000 Jews, evangelical

²³ Haines, *supra* note 21.

Christians and Catholics to escape religious persecution in the former Soviet Union by coming to the United States. And in 1980 Congress signed the Refugee Act which standardized the resettlement process and services for all refugees admitted to the United States.

Since the 1980s, the United States has resettled refugees from Darfur fleeing genocide and violence; refugees from Bhutan forced out of their country; and Syrian, Iraqi and Afghan refugees displaced by war. In addition, the U.S. has facilitated the naturalization of Hmong veteran refugees who served in Laos in support of U.S. forces and during the Vietnam War;²⁴ assisted the children of Vietnamese re-education camp survivors through the “McCain Amendment;”²⁵ assisted former Soviet and Indochinese nationals with a credible fear of persecution through the “Lautenberg Amendment;”²⁶ and assisted Iranian religious

²⁴ William J. Clinton, Statement on Signing the Hmong Veterans Naturalization Act of 2000 (May 26, 2000).

²⁵ Andorra Bruno, CONG. RESEARCH SERV., RL31269, *Refugee Admissions and Resettlement Policy* (Nov. 30, 2016), <https://fas.org/sgp/crs/misc/RL31269.pdf>.

²⁶ *Id.*

minorities through the “Specter Amendment.”²⁷ Since 1975, the US has settled over 3 million refugees.²⁸

It should come as no surprise, then, that more than 40 percent of Fortune 500 companies were founded by recent immigrants or their children (even though such immigrants account for roughly 10.5 percent of the U.S. population); or that the revenue generated by these companies is greater than the GDP of every country in the world outside the U.S. except China and Japan; or that successful global companies founded by American immigrants and refugees or their children span all sectors of the economy, including some of the most valuable brands in the world (Apple, Google, eBay, AT&T, General Electric, IBM, McDonald’s).²⁹ At least 18 percent of all scientists living in the U.S., of which there are millions, are immigrants or refugees,³⁰ and over 25% of all physicians and surgeons in the

²⁷ *Id.*

²⁸ Ruth Igielnick and Jens Manuel Krogstad, *Where Refugees to the U.S. Come From*, PEW RESEARCH CENTER, (Feb. 3, 2017), <http://www.pewresearch.org/fact-tank/2017/02/03/where-refugees-to-the-u-s-come-from/>.

²⁹ PARTNERSHIP FOR THE NEW AMERICAN ECONOMY, *The ‘New American’ Fortune 500*, (June 2011), <http://www.renewoureconomy.org/sites/all/themes/pnae/img/new-american-fortune-500-june-2011.pdf>.

³⁰ Flora Lan, Katherine Hale, and Emilda Rivers, *Immigrants’ Growing Presence in the U.S. Science and Engineering Workforce: Education and Employment Characteristics in 2013*, NATIONAL CENTER FOR SCIENCE AND ENGINEERING STATISTICS (Sept. 2015), <https://www.nsf.gov/statistics/2015/nsf15328/nsf15328.pdf>.

United States are born abroad.³¹ And as of 2016, roughly 2 million veterans of the U.S. Armed Forces living in the U.S. — of a total 18.8 million — are refugees/immigrants or have refugee/immigrant parents.³² As President Kennedy observed, “[t]here is no part of our nation that has not been touched by our immigrant background.”³³ The new Executive Order, like the one before it, betrays that history, and would exclude the talents, ideas and work ethic of immigrants and refugees who, just as with generations past, would help to build and protect our nation and strengthen our economy.

III. When America Closed Its Doors and Allowed Its Core Values to be Compromised, The Country Later Looked Back in Shame

In sharp contrast to the times when the United States has shown its “natural humanitarian impulses,” at other times the country has closed itself to others and has succumbed to fear or bigotry, with tragic consequences. Sometimes the victims of this xenophobia and prejudice were Jews (the *St. Louis* tragedy and the denial of visas) or other religious minorities, sometimes they were from nations

³¹ Nicole Fisher, *25% of Physicians Are Born Outside the U.S. Can Immigration Reform Fix The Shortage?*, FORBES: PHARMA & HEALTHCARE, Jul. 12, 2016, <http://www.forbes.com/sites/nicolefisher/2016/07/12/25-of-docs-are-born-outside-of-the-u-s-can-immigration-reform-solve-our-doc-shortage/#446de1bc702b>.

³² Jie Song and Jeanne Batalova, *Immigrant Veterans in the United States*, MIGRATION POLICY INSTITUTE (Oct. 13, 2016), <http://www.migrationpolicy.org/article/immigrant-veterans-united-states>.

³³ Kennedy, *supra* note 17, at 3.

that were regarded as undesirable (the Chinese exclusion) and sometimes they were groups the government suspected as disloyal (the Japanese internment during World War II). In each case, the United States apologized years later, after it was too late.

A. The *St. Louis* and Jewish Refugees During the Holocaust

The tragedy of the vessel *St. Louis* illustrates the devastating consequences that can result when the United States turns its back on refugees in need. In May 1939, on the eve of World War II and after *Kristallnacht*,³⁴ the *St. Louis* left Hamburg, Germany, carrying 937 passengers, nearly all of whom were Jews fleeing Nazi persecution. The ship was headed to Havana, Cuba with the hope of having its passengers granted sanctuary in the United States.

Prior to the ship's departure, most of the Jewish passengers had obtained valid paperwork permitting their entry to Cuba and had also applied for U.S. visas, planning to stay in Cuba only until their entry to the U.S. was approved. By the time the *St. Louis* arrived in Cuba on May 27, 1939, however, the Cuban president

³⁴ *Kristallnacht*, or the "Night of Broken Glass," occurred in November 1938, when almost 100 Jews were murdered, countless more were attacked, and as many as 30,000 Jewish men were arrested and sent to concentration camps. See THE HOLOCAUST ENCYCLOPEDIA, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, *Kristallnacht*, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005201> (last visited Feb. 7, 2017).

had invalidated most of the passengers' travel certificates.³⁵ While United States-based Jewish organizations negotiated with Cuban officials to persuade them to admit the other passengers, the United States refused to formally intercede on the refugees' behalf or publicly pressure the Cuban government to admit them.³⁶

After negotiations with Cuba failed, the *St. Louis* headed towards Miami in June 1939, coming within sight of the Florida coastline. Despite pleas from passengers on board, President Roosevelt and the State Department refused to accept the Jewish refugees into the United States,³⁷ reflecting anti-immigrant and anti-Semitic sentiments prevailing at the time.³⁸ A State Department telegram to a passenger on the ship explained the government's position that the passengers must

³⁵ THE HOLOCAUST ENCYCLOPEDIA, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, *Voyage of the St. Louis*, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005267> (last visited Feb. 7, 2017).

³⁶ *Id.* See also Dara Lind, *How America's Rejection of Jews Fleeing Nazi Germany Haunts Our Refugee Policy Today*, VOX (Jan. 27, 2017, 8:12 AM), <http://www.vox.com/policy-and-politics/2017/1/27/14412082/refugees-history-holocaust>.

³⁷ Kristine Guerra, *What the U.S. Learned from Turning Away Refugees who Fled the Nazis*, THE WASHINGTON POST, Jan. 29, 2017, https://www.washingtonpost.com/news/post-nation/wp/2017/01/29/what-the-u-s-learned-from-turning-away-refugees-who-fled-the-nazis/?utm_term=.e91085b6c047.

³⁸ A Gallup poll taken in January 1939 asked Americans if the government should allow 10,000 refugee children, mostly Jewish, from Germany to be taken care of in American homes; 61 percent were opposed. See Ishaan Tharoor, *What Americans Thought of Jewish Refugees on the Eve of World War II*, THE WASHINGTON POST, Nov. 17, 2015, https://www.washingtonpost.com/news/worldviews/wp/2015/11/17/what-americans-thought-of-jewish-refugees-on-the-eve-of-world-war-ii/?utm_term=.a67eb4b68817.

“await their turns on the [visa] waiting list and qualify for and obtain immigration visas before they may be admissible into the United States.”³⁹

Ultimately, the United States refused entry to the passengers of the *St Louis*, forcing it to sail back to Europe.⁴⁰ Historians estimate that more than a quarter of the *St. Louis* passengers — 254 people — were killed in the Holocaust, including a number at Auschwitz, after being refused entry to the U.S.⁴¹

In April 2009, at a commemoration for Yom HaShoah (Holocaust Remembrance Day) held at the U.S. Capitol before the President and members of Congress, Fred S. Zeidman, chairman of the U.S. Holocaust Memorial Council, recalled the “infamous ship called the *St. Louis*” and reminded those gathered of the “shameful result” and the consequences of inaction.⁴² Three years later, the United States government issued a formal apology for the country’s refusal to

³⁹ See “Voyage of the St. Louis,” *supra* note 35.

⁴⁰ Recent images of refugee-seekers, having disembarked at U.S. airports after days-long journeys, being immediately sent back to the countries from which they had fled, unavoidably call to mind the passengers of the *St. Louis* who were turned away within sight of U.S. sanctuary. See Appendix.

⁴¹ See “Voyage of the St. Louis,” *supra* note 35.

⁴² AMERICAN JEWISH JOINT DISTRIBUTION COMMITTEE ARCHIVES, *Fred S. Zeidman’s Remarks, Days of Remembrance Commemoration*, Apr. 23, 2009, http://archives.jdc.org/assets/documents/stlouis_fredszeidmanremarks2009.pdf.

provide refuge for the Jewish passengers aboard the *St. Louis*.⁴³ Addressing the 14 surviving passengers, a State Department official stated: “To the survivors of the *MS St. Louis*, on behalf of the president and Secretary of State, I am honored to say what we should’ve said so long ago, welcome.”⁴⁴ (Archival photographs from the *St. Louis* are contained in the Appendix).

The passengers of the *St. Louis* were not the only victims of America’s refusal to grant visas to Jews and other minorities during the Holocaust. Before the *St. Louis* sailed, Congress rejected a bill that would have allowed 20,000 imperiled German children to settle in this country. Opponents took an “America-First” approach to reject the proposal, arguing that America should first focus on its own needy and homeless citizens. The wife of the United States immigration commissioner, Laura Delano Houghteling, refused to be swayed by the children’s vulnerability, testifying that “20,000 charming children would all too soon grow into 20,000 ugly adults.”⁴⁵ Countless Jews denied visas to enter the United States ultimately perished in Nazi concentration camps, including the Dutch teenager

⁴³ Kamrel Eppinger, *State Department apologizes to Jewish refugees*, SCRIPPS HOWARD FOUNDATION WIRE, Sep. 26, 2012, <http://www.shfwire.com/state-department-apologizes-jewish-refugees/>.

⁴⁴ *Id.*

⁴⁵ *See* Lind, *supra* note 36.

Anne Frank.⁴⁶ Historian Richard Brietman reminds us that if not for an immigration policy steeped in fear, an elderly Anne Frank could still be living in the United States today.⁴⁷ Instead she was murdered at Bergen-Belsen, made immortal by the teenage diary that survived her. The new Executive Order ignores the tragic lessons our Nation learned from turning our back on Jewish refugees during World War II, and would again close America's doors to some of the world's most vulnerable refugees and immigrants.

B. The Chinese Exclusion

In the late 1860s and early 1870s, Chinese immigrants, including both skilled and unskilled laborers, enjoyed easy passage to this country under the terms of a treaty between the United States and China.⁴⁸ Even with the treaty's relaxed

⁴⁶ In 1938, Otto Frank first applied for immigrant visas for himself, his wife Edith, and their two daughters Margot and Anne. See Richard Breitman, *Blocked by National Security Fears?: The Frank Family and Shifts in American Refugee Policy, 1938-1941*, YIVO INSTITUTE FOR JEWISH RESEARCH, Feb. 14, 2007, <https://www.yivo.org/cimages/richardbreitman-ottofrank-whitepaper.pdf?c=>. The family was placed on a waiting list, which by 1939 had grown to include 300,000 individuals. *Id.* at 2. Despite having multiple people willing to provide affidavits for the Frank family, Otto was met with additional regulations, including proof of booked transportation to the U.S., verification that no close relatives remained in German territories, and the specter of the German refugee quota. *Id.* at 5. Ultimately, the Frank family was denied refugee status and Anne, along with her mother and sister, all died in the concentration camps.

⁴⁷ Elahe Izadi, *Anne Frank and her family were also denied entry as refugees to the U.S.*, WASHINGTON POST, Nov. 24, 2015, https://www.washingtonpost.com/news/worldviews/wp/2015/11/24/anne-frank-and-her-family-were-also-denied-entry-as-refugees-to-the-u-s/?utm_term=.6e028f50e0dd.

⁴⁸ See H.R. Res. 683, 114th Cong. (as passed by House, June 18, 2012). See also Kennedy, *supra* note 17, at 40.

standards, annual Chinese immigration never exceeded 40,000 people, and in 1890 there were only 107,000 Chinese nationals living in the United States.⁴⁹

Nevertheless, hostility towards the Chinese escalated within certain portions of the American public, who blamed wage decreases and other economic difficulties on Chinese laborers.⁵⁰ Although Government leaders initially resisted constituent pressure to stop Chinese immigration,⁵¹ a “campaign of organized violence against Chinese communities took form, and the hysteria led to public pressure too violent to be resisted.”⁵²

The Chinese Exclusion Act of 1882, signed into law by President Arthur, was the “first federal law ever passed excluding a group of immigrants solely on the basis of race or nationality.”⁵³ The thrust of the Chinese Exclusion Act was that it barred Chinese laborers from entering the United States for 10 years,⁵⁴ but it also put in place other discriminatory systems, including a registry for all Chinese

⁴⁹ Kennedy, *supra* note 17, at 40.

⁵⁰ HARVARD UNIVERSITY LIBRARY OPEN COLLECTIONS PROGRAM, *Chinese Exclusion Act (1882)*, <http://ocp.hul.harvard.edu/immigration/exclusion.html> (last visited Feb. 7, 2017).

⁵¹ President Arthur initially vetoed the bill, which he viewed as incompatible with the Burlingame Treaty. *See* Chester A. Arthur, Veto of the Chinese Exclusion Act (Apr. 4, 1882).

⁵² Kennedy, *supra* note 17, at 41.

⁵³ S. J. Res. 23, Res. Ch. 134 (Ca. 2014).

⁵⁴ Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943) (hereinafter “Chinese Exclusion Act.”).

(including non-laborers) who were then legally present in the United States.⁵⁵ Additionally, Chinese laborers already in the country would have to obtain a “certificate” to return to the United States, if they ever wanted to leave the country.⁵⁶ The Act also explicitly prohibited all state and federal courts from naturalizing people of Chinese origin, regardless of whether they were legally in this country.⁵⁷ These sweeping restrictions were explained only by this statement in the law’s preamble: “in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof[.]”⁵⁸

The Chinese Exclusion Act was followed by a series of other laws designed to exclude the Chinese from the United States, both physically and politically. The Scott Act of 1888⁵⁹ precluded Chinese laborers from leaving and reentering the United States entirely and cancelled all previously issued “certificates” as referenced in the Exclusion Act.⁶⁰ This action prevented the return of

⁵⁵ *Id.*

⁵⁶ *Id.* See also S. J. Res. 23, Res. Ch. 134 (Ca. 2014)

⁵⁷ Chinese Exclusion Act, § 14. See also S. J. Res. 23, Res. Ch. 134 (Ca. 2014).

⁵⁸ Chinese Exclusion Act, preamble.

⁵⁹ The Scott Act (1888), ch. 1064, 22 Stat. 504 (1888) (repealed 1943).

⁶⁰ S. Res. 201, 112th Cong. (as passed by Senate, Oct. 6, 2011). See also H.R. Res. 683, 114th Cong.

approximately 20,000 Chinese laborers who were abroad and had lawfully-obtained certificates permitting them to re-enter.⁶¹ It also froze the migration of an additional 600 Chinese individuals who were *en route* to the United States at the time of its enactment.⁶² When the Chinese Exclusion Act was set to expire in 1892, Congress passed the Geary Act,⁶³ which extended Chinese exclusion for another ten years and introduced even more restrictions.⁶⁴ It was not until 1943 that Congress finally began repealing certain — and eventually all — of these discriminatory laws.⁶⁵

The repeal of the Chinese exclusionary laws was a first step in re-establishing the ideals of the Founders. In October 2011, the United States Senate finally issued an apology for the Chinese Exclusion Act and other laws.⁶⁶ A similar report was announced by the United States House of Representatives⁶⁷ and, later, by the California State Legislature.⁶⁸ In each instance, the government noted

⁶¹ S. Res. 201, 112th Cong.

⁶² *Id.*

⁶³ The Geary Act, ch. 60, 27 Stat. 525 (1892) (repealed 1943).

⁶⁴ S. Res. 201, 112th Cong.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ H.R. Res. 683, 114th Cong.

⁶⁸ S. J. Res. 23, Res. Ch. 134 (Ca. 2014).

that the Chinese Exclusion Act and its companion laws were and remain “incompatible with the basic founding principles recognized in the Declaration of Independence that all persons are created equal[.]”⁶⁹ The announcements expressed a commitment to “diversity in the United States that contributes to the country’s economic, cultural, technological, academic, and political growth[.]”⁷⁰

In its apology, the California legislature observed:

The Chinese Exclusion Act set the precedent for racist foreign and national policy that led to broader exclusion laws and fostered an environment of racism that quickly led to the Jim Crow laws of the 1880s, and further segregation legislation that would tear our nation apart through most of the 20th Century[.]⁷¹

Simply put, our nation’s leaders recognized that racism breeds racism, and any governmental policies that conflict with the founding ideals of this country cannot be allowed to stand. The new Executive Order, and Sections 2 and 6 in particular, is such a policy.

⁶⁹ S. Res. 201, 112th Cong. *See also* S. J. Res. 23, Res. Ch. 134 (Ca. 2014) (pointing out that, “[p]aradoxically, the very same year that the Chinese Exclusion Act was passed, financing abroad was completed for the Statute of Liberty. . . . While the Statute of Liberty was being built, legislators were contradicting those very ideals by discriminating against Chinese immigrants and lobbying Congress to do the same”).

⁷⁰ S. J. Res. 23, Res. Ch. 134 (Ca. 2014).

⁷¹ *Id.*

C. The Japanese Internment

The internment of Japanese-Americans was authorized by Executive Order 9066,⁷² which President Roosevelt issued in early 1942, 10 weeks after the Pearl Harbor attack. Executive Order 9066 gave to the Secretary of War and the military commanders to whom he delegated authority, the power to exclude any and all persons, citizens and aliens from designated areas in order to provide security against sabotage and espionage.⁷³ The Order makes no reference to the Japanese, just as the current Executive Order does not reference Muslims. However, within a week of the issuance of the order, Lt. General John L. DeWitt issued the first of 108 relocation orders resulting in the forcible evacuation of approximately 120,000 Japanese Americans, including 70,000 citizens, to internment camps in desolate areas of the United States for the duration of World War II.⁷⁴

The justification for Executive Order 9066 was “military necessity.”⁷⁵ However, Congress has since acknowledged that “these actions were carried out without adequate security reasons and . . . were motivated largely by racial

⁷² 7 Fed. Reg. 1407 (Feb. 19, 1942).

⁷³ *Id.*

⁷⁴ See Roger Daniels, *Concentration Camps USA: Japanese Americans and World War II* 33, 104 (1972).

⁷⁵ U.S. COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, REPORT: PERSONAL JUSTICE DENIED at 6-8 (96th Cong.) (1982).

prejudice, wartime hysteria, and a failure of political leadership.”⁷⁶ This conclusion was bolstered by the fact that no effort was made to invoke Executive Order 9066 to authorize internment of German-Americans and/or Italian-Americans.⁷⁷

In 1976, President Gerald Ford issued a proclamation acknowledging that “not only was that evacuation wrong, but Japanese Americans were and are loyal Americans.” In 1982, the Commission on Wartime Relocation and Internment of Civilians issued a report entitled, “Personal Justice Denied.” The report set the stage for the historic moment in 1988 when President Ronald Reagan signed the Civil Liberties Act, which offered a formal apology and reparations for the “grave injustice” of evacuating, relocating and interning tens of thousands of Japanese Americans during the war.⁷⁸ President Reagan, in his remarks on signing the Act, made clear that the internment of Japanese Americans was a “grave wrong.”⁷⁹

⁷⁶ 50 U.S.C. § 4202. Anti-Japanese bias was palpable: polls taken in 1944 indicated that more than 60 percent of Americans thought that whites should be prioritized in hiring decisions over Japanese Americans. Stephen White, *Many Americans Support Trump’s Immigration Order; Many Americans Backed Japanese Internment Camps, Too*, THE WASHINGTON POST Feb. 2, 2017, https://www.washingtonpost.com/news/monkey-cage/wp/2017/02/02/u-s-public-opinion-supports-the-trump-immigration-order-it-backed-japanese-internment-camps-too/?utm_term=.a313ba0611d6.

⁷⁷ See U.S. COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *supra* note 72 at 3.

⁷⁸ See 50 U.S.C. § 4201 *et seq.*

⁷⁹ Ronald Reagan, *Remarks on Signing the Bill Providing Restitution for the Wartime Internment of Japanese-American Civilians* (Aug. 10, 1988).

Congress too acknowledged that this measure — carried out under the false banner of “national security” — amounted to a “fundamental violation[] of the basic civil liberties and constitutional rights of [] individuals of Japanese ancestry” and caused “enormous damages, both material and intangible, . . . which resulted in significant human suffering[.]”⁸⁰

Like Executive Order 9066, the new Executive Order here invokes national security as its justification. Leaving aside the legal standards regarding how much deference such an invocation deserves, the history of the Japanese internment counsels that we must take an especially hard look at actions that undermine core values and freedoms in the name of national security. In this regard, we note the statements by other federal courts that there is “no evidence that any alien from any of the countries named in the Order has perpetrated a terrorist attack in the United States” and that the sequence of events leading up to both the original and the new Executive Order raises questions as to whether national security concerns in this regard are “rational.” *Washington*, 847 F.3d at 1168; *see also Aziz v. Trump*, ___ F. Supp. 3d ___, No. 117CV116LMBTCB, 2017 WL 580855, at *3 (E.D. Va. Feb. 13, 2017).

⁸⁰ 50 U.S.C. § 4202.

CONCLUSION

ADL believes that enjoining Sections 2 and 6 of the new Executive Order is consistent with the principles underlying the Constitution. Absent injunctive relief, there will almost certainly be irreparable harm to countless people, just as there was when the United States shamefully turned away those on the *St. Louis* desperately seeking safety, excluded immigrants from China, and interned Japanese Americans. As with the 254 passengers aboard the *St. Louis* who died in the Holocaust, an apology years later would be woefully insufficient to address the damage done. ADL believes that enforcing Sections 2 and 6 of the new Executive Order risks once again sacrificing the nation's core values in favor of prejudice and fear – a sacrifice that history has repeatedly proven has profound consequences both to the persons who suffer as a result and to the still-vibrant vision of the shining city on the hill.

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Respectfully submitted,



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