Nos. 16-1436 and 16-1540

In The
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, ET AL,

Petitioners,

v.

INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, ET AL.,

Respondents.

DONALD J. TRUMP, PRESIDENT
OF THE UNITED STATES, ET AL.,

Petitioners,

v.

STATE OF HAWAII, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Fourth And Ninth Circuits

BRIEF OF *AMICUS CURIAE* THE JAPANESE AMERICAN CITIZENS LEAGUE IN SUPPORT OF RESPONDENTS

GEORGE T. FRAMPTON, JR.
1133 19th St., NW
Third Floor
Washington, DC 20036

THOMAS FRAMPTON
HARVARD LAW SCHOOL
1563 Massachusetts Avenue
Cambridge, MA 02138

JOSEPH N. ROTH
OSBORN MALEDON, PA
2929 N. Central Avenue
Floor 21
Phoenix, AZ 85012

Counsel for Amicus Curiae

WALTER DELLINGER
Counsel of Record
DOUGLAS B. MAGGS
PROFESSOR EMERITUS
OF LAW
DUKE LAW SCHOOL
210 Science Drive
Box 90360
Durham, NC 27707
(202) 383-5319
wdellinger@omm.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

Page

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF AMICUS CURIAE

The Japanese American Citizens League ("JACL") is a nonprofit organization whose mission is to secure and safeguard the civil and human rights of Asian and Pacific Islander Americans and all communities affected by injustice and bigotry.[1]

In 1943 and 1944, JACL urged this Court to declare unconstitutional the incarceration of nearly 120,000 Japanese Americans pursuant to Executive Order No. 9066. Emphasizing the overwhelming loyalty of the Japanese American community and its "confidence in American justice," JACL's filings in *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944), asked this Court to look behind the government's specious invocation of "military necessity" and instead stand as a bulwark "[a]gainst this dangerous drift and tide, this loss of manpower, this senseless gift to enemy propagandists, this prodigal waste of goodwill and unity at home, this opportunistic drive of groups long organized for hate to inflate their fanatic grudge into a national and international issue[.]" Brief for JACL as *Amicus Curiae* in *Hirabayashi* ("JACL *Hirabayashi* Br."). JACL "look[ed] to this Court, as the guardians of the liberties of all the people of the United States – of which Japanese Americans are a living and integral

[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. Petitioners have filed a blanket letter of consent. Counsel for Respondents have consented to the filing of this brief.

part – with confidence to protect them from such discrimination as this, which is so alien to the American way of life, not for their sake alone, but also for the sake of every minority racial group in American life." *Id.*

JACL's confidence was misplaced. The Court accepted the government's national security claims, clearing the way for tragedy and a lasting scar on American virtue. Immediately, scholars argued that "the basic issues should be presented to the Supreme Court again, in an effort to obtain a reversal" of these judicial "disasters," *see* Eugene V. Rostow, *The Japanese American Cases – A Disaster*, 54 Yale L.J. 489 (1945), but as a Congressional Commission noted in 1982, the country has "not been so unfortunate that a repetition of the facts has occurred to give the Court that opportunity," U.S. Comm'n on the Wartime Relocation and Internment of Civilians, 96th Cong., *Report: Personal Justice Denied* ("CWRIC Report"), at 239 (1982).

Until now. Executive Order No. 13780 (the "Travel Ban Order") – and the flimsy, illogical, and trumped-up national security rationale upon which it rests – is such a repetition. Once again, the Government insists that this Court must accept its talismanic incantation of "national security" and shirk its core responsibility to take a hard look at arbitrary, discriminatory, and harmful treatment of a disfavored group.

In its 1943 "Statement of Interest" in *Hirabayashi*, JACL explained that its concern was:

> not alone for its members, [but] for all the minority racial groups in this country who may be the next victims of similar discrimination resulting from war or other prejudices and hysterias, and for the preservation of civil rights for all[.]

JACL *Hirabayashi* Br. 9.

These same concerns compel JACL to write today.

SUMMARY OF ARGUMENT

History teaches the virtues of caution and skepticism when weighing the validity of vast, unprecedented exclusionary measures that target disfavored classes in the name of national security. Though *Hirabayashi* and *Korematsu* have been largely repudiated, *see, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) ("I am optimistic enough to believe that, one day, [this opinion] will be assigned its rightful place in the history of this Court's jurisprudence beside *Korematsu* and *Dred Scott*."), the deferential approach demonstrated by the Court during World War II left behind "a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need," *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting). The striking parallels between the Japanese Wartime Cases and the present case should inform the Court's analysis.

A finding that improper animus motivated Executive Order No. 13780, however, is not necessary to declare the President's action unlawful. Congress delegated authority to the President to exclude entire classes upon a "find[ing]" that the aliens' entry "would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). Meaningful scrutiny of the executive's finding of harm to United States interests can have a powerful preventative effect and will often be sufficient to guard against the use of racial, national or religious animus in the case of sweeping exclusions. Identifying the lack of any reasonable national security basis obviates the need for making an affirmative determination that the executive acted upon any improper motive. By making it clear that the Court will search for a meaningful basis for the challenged action, the Court can ensure that there is not yet another "repetition [that] imbeds that principle [of invidious discrimination] more deeply in our law and thinking and expands it to new purposes." *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting). The Travel Ban Order cannot withstand such scrutiny.

ARGUMENT

I. HISTORICAL PARALLELS BETWEEN EXECUTIVE ORDER NO. 9066 AND THE TRAVEL BAN ORDER SHOULD INFORM THE COURT'S ANALYSIS

It is often so that "a page of history is worth a volume of logic." *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349

(1921) (Holmes, J.). In this spirit, JACL respectfully urges that this Court's analysis should be informed by the striking parallels between the arguments and circumstances involved in this matter and those at issue in the Japanese Wartime Cases.

A. Then, as now, the Government pursued a mass exclusionary measure of sweeping and senseless scope.

Executive Order No. 9066, signed ten weeks after the attack on Pearl Harbor, empowered the Secretary of War and his military commanders to exclude from designated areas "any and all persons" if "necessary or desirable." The Order itself contained no direct reference to race, ethnicity, or nationality, but military authorities soon ordered the "evacuation" of nearly 120,000 persons of Japanese descent from the Pacific Coast. CWRIC Report, at 157. These men, women, and children – mostly American citizens – were torn from their homes, farms, businesses, and schools and sent to far-flung facilities, "to be held in camps behind barbed wire and released only with government approval." *Id*. at 10.

The scope of the effort was unprecedented and cruel. Those incarcerated included thousands of members of the JACL, who had signed special oaths of allegiance to the United States; Japanese Americans who served the United States with distinction in World War I; and thousands more who would later fight for the

United States in the Pacific Theater. *See* JACL *Hirabayashi* Br. 1, 91-92; CWRIC Report, at 253-60. It included persons "with as little as one-sixteenth Japanese blood [and] others who, prior to evacuation, were unaware of their Japanese ancestry." Lt. Gen. J. DeWitt, Final Report: Japanese Evacuation from the West Coast, 1942 ("DeWitt Report"), at 145 (1943). Over one hundred Japanese American children were plucked from orphanages and incarcerated at the Manzanar War Relocation Center. Robert L. Brown and Ralph P. Merritt, Final Report, Manzanar Relocation Center (1946); *see also* Renee Tawa, *Childhood Lost: the Orphans of Manzanar*, L.A. Times, March 11, 1999. Foster children in the custody of Caucasian foster parents were removed and incarcerated. Paul R. Spickard, *Injustice Compounded: Amerasians and Non-Japanese Americans in World War II Concentration Camps*, 5 J. of Am. Ethnic History 5, 12-14 (1986). The camps also held over 2,000 Latin Americans of Japanese descent, many of whom were not Japanese citizens and had never stepped foot in Japan. CWRIC Report, at 303-14; Edward N. Barnhart, *Japanese Internees from Peru*, 31 Pac. Historical Rev. 169 (1962).

Government lawyers defending the program repeatedly told the Court that it was simply impossible to distinguish loyal Japanese Americans – concededly the vast majority of those evacuated and incarcerated – from those who might commit terrorist acts. An individualized approach to "prevent[ing] acts of espionage" was "fraught with extreme difficulty, if not wholly impossible," and only a blanket exclusion could "remove

the danger [of a possible terrorist attack] during all hours." Brief for the United States, *Korematsu* ("Gov't Br. in *Korematsu*") 22-23. Reliable information was difficult to ascertain because the Japanese constituted an "unassimilated, tightly knit racial group." DeWitt Report, at vii. Even with extreme vetting, it would be difficult for government officials "to look deep into the mind of a particular Japanese and determine whether his allegiance to the United States was so dominant within him as to overcome the ties of kinship or other intangible forces which might bind him to the members of an invading Japanese army." Gov't Br. in *Korematsu* 62-63. This Court accepted these arguments, credulously reasoning that "[a]t a time of threatened Japanese attack upon this country, the nature of our inhabitants' attachments to the Japanese enemy was consequently a matter of grave concern . . . [w]hatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry [as a whole]." *Korematsu*, 320 U.S. at 96, 99.

The Travel Ban Order – which excludes 180 million men, women, and children from the United States from six countries, and all refugees – is likewise striking in its breadth and cruelty. Because the Order excludes on the basis of nationality, it targets many with only tenuous, if any, connection to the Designated Countries. The policy bars those who have not visited their birth-country in decades, and even those – like the *Nisei* (second generation) and *Sansei* (third generation) Japanese Americans incarcerated during World War II – who have never stepped foot in their "home"

countries. Thousands of European-born children (*e.g.*, a toddler born in Sweden to Iranian parents or an infant born in Spain to Libyan parents) are subject to the ban,[2] but a British citizen who makes repeated trips to conflict areas in Syria or a Belgian citizen who becomes a terrorist in Yemen remain eligible for entry.

Just as Executive Order No. 9066's blanket approach led to the incarceration of many of the Japanese Empire's most zealous opponents,[3] the Travel Ban Order's abandonment of individualized assessments results in the exclusion of even the avowed and proven opponents of the terrorist groups against which the action purportedly shields. Yet because the President states he has studied the situation and "determined that the Refugee Program is a means of entry would-be terrorists *may* seek to exploit," Gov't Br. 26 (emphasis added), those who are most vulnerable to such violence must suffer.

---

[2] *See* Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws* 17-35 in CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES (2001) (discussing citizenship laws of European nations); Brownwen Manby, *Citizenship Law in Africa: A Comparative Study* (3d ed. 2016) (discussing citizenship laws of African nations) 55; Civil Code of Iran, art. 976(2) (providing automatic Iranian citizenship at birth to those born to Iranian fathers).

[3] Indeed, JACL leadership faced criticism from some within the community for the zeal with which the organization collaborated with American law enforcement and intelligence officials during World War II. *See* Cherstin M. Lyon, *Prisons and Patriots: Japanese American Wartime Citizenship, Civil Disobedience, and Historical Memory* (2011).

The predictable result of this dragnet approach, as in World War II, is a propaganda coup for America's enemies. *Compare Saboteur Ruling Assailed by Rome*, N.Y. Times, Aug. 4, 1942, at 8 (noting Axis propaganda exploiting incarceration of 100,000 Japanese Americans) *with* Amarnath Amarasingam, *What ISIS Fighters Think of Trump*, POLITICO.com, Mar. 1, 2017, goo.gl/bSsBZH (last visited Sept. 13, 2017) (noting "[t]he President has given terrorist groups a propaganda victory beyond their wildest dreams").

B. Then, as now, the exclusion's underinclusivity casts additional doubts on the proffered justification.

The Government defended Executive Order No. 9066 on the ground that it was necessary to guard against "fifth column" activity by Axis Powers, yet comparable mass exclusion and incarceration efforts were never undertaken against German Americans and Italian Americans. As Justice Jackson pointed out, "[h]ad [Fred] Korematsu been one of four – the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole – only Korematsu's presence [in California] would have violated the order." 323 U.S. at 243 (Jackson, J., dissenting). The Government dismissed these concerns as "without substance," urging the Court not to second-guess military determinations that the Pacific Coast presence of the Japanese was "[t]he principal danger to be apprehended." Brief

for the United States, *Hirabayashi* ("Gov't Br. in *Hirabayashi*") 65; *but see* CWRIC Report, at 283-93 (identifying a host of ulterior reasons for lack of similar action against German Americans).

The underinclusivity of the Travel Ban Order, in light of its stated rationale, raises similar concerns. According to a thorough study published in 2016, out of 154 foreign-born terrorists who committed or were convicted of attempting to commit a terrorist attack in the United States between 1975-2016, only 15 were from the six countries named in the Travel Ban Order; by comparison, 64 were from the five leading countries (Saudi Arabia (19), Pakistan (14), Egypt (11), Cuba (11), Croatia (11)), none of which are subject to the Travel Ban Order. Alex Nowrasteh, *Guide to Trump's Executive Order to Limit Migration for "National Security" Reasons*, CATO AT LIBERTY, Jan. 26, 2017, goo.gl/rQ916v (last visited Sept. 13, 2017). Attacks attributable to foreign-born terrorists resulted in some 3,024 deaths, but none of these attackers (who were born in 13 different countries) were from the six countries listed in the Travel Ban Order. *Id.* Even assuming that nationals of the six Designated Countries did pose a heightened danger, the Travel Ban Order has no effect on many nationals of those countries, "when the individual is traveling on a passport by a non-designated country." Travel Ban Order, Sec. 3(b)(4).

Echoing its position during World War II, the Government here dispenses with these concerns in a footnote. *See* Gov't Br. 49 n.16. But the point is not that

this underinclusivity itself renders the Order unlawful. Rather, the gross mismatch between the Order's scope and its stated rationale counsels care in examining the Order's purported purpose, rationality, and justification.

C. Then, as now, the Government invoked the specter of an ill-defined threat to national security to justify the exclusion.

Executive Order No. 9066 invoked the necessity of "protection against espionage and against sabotage [for] national-defense" as its purpose and justification. In the wake of the attack on Pearl Harbor – which "crippled a major portion of the Pacific Fleet and exposed the West Coast to an attack which could not have been defensively impeded" – extraordinary precautions were required, according to the Government. DeWitt Report, at vii. As argued in the authoritative military account of the project, Lt. Gen. John L. DeWitt's "Final Report: Japanese Evacuation from the West Coast, 1942," the mass race-based incarceration "was impelled by military necessity." *Id*.

Government lawyers hammered this point in *Hirabayashi* and *Korematsu*. "[T]he military situation was so grave, the danger of an enemy attack was so far within the realm of probability, and the peril to be apprehended from treacherous assistance to the enemy . . . was so substantial," the Solicitor General urged, that "it was a matter of high military necessity to take

prompt and adequate precautionary steps." Gov't Br. in *Hirabayashi* 60-61. The Court's interference with such measures "might spell the difference between the success or failure of any attempted invasion." *Id*. at 61.

Despite the absence of a comparable existential danger to the United States today, the Government again invokes the specter of an ill-defined threat to national security to justify the President's Travel Ban Order. The chance of erroneously admitting "terrorist operatives or sympathizers" of Iranian, Libyan, Somali, Sudanese, Syrian, and Yemeni extraction, the Order asserts, is now "unacceptably high." Travel Ban Order, Sec. 1(f). Echoing the Government's justifications from 1943 and 1944, the Government again points to a (possible) dearth of reliable information about the broad class of individuals the Government excludes: Because there are "serious concerns" that these countries "*may* be unable or unwilling to provide needed information," the blanket exclusionary policy is warranted. Gov't Br. 45 (emphasis added).

D. Then, as now, the purported threat to national security was illusory.

In 1980, in response to a growing redress movement, Congress established the Commission on Wartime Relocation and Internment of Civilians. Peter Irons, *Justice at War: The Story of the Japanese Internment Cases* 348 (1993). Tasked with "review[ing] the facts and circumstances surrounding Executive Order

[No.] 9066," the Commission carefully studied government records and received testimony from more than 750 evacuees, former government officials, public figures, and historians. CWRIC Report, at 1. When completed in December 1982, the Commission's unanimous 467-page Final Report concluded: "Executive Order 9066 was not justified by military necessity, and the decisions which followed from it – detention, ending detention and ending exclusion – were not driven by analysis of military conditions." *Id*. at 18. While military commanders bore much of the responsibility, the Commission also faulted President Roosevelt, who signed the Order "without raising the question to the level of Cabinet discussion or requiring any careful thorough review of the situation." *Id*. at 9. Congress largely adopted these findings when it passed the Civil Liberties Act of 1988, Pub. L. No. 100-383, acknowledging that the "internment of civilians [was] carried out without adequate security reasons . . . and [was] motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership." 50 U.S.C. § 4202.

This conclusion vindicated the position JACL had urged this Court to adopt in 1943 and 1944. The Court did not "need to speculate concerning the nature of the alleged 'military necessity,'" JACL wrote, because documents that were already publicly available (including military memoranda and official reports) belied the Government's claims. JACL *Hirabayashi* Br. 40. At length, JACL demonstrated how each of the government's "considerations" were "[if] not preposterous

and false . . . at the very least exaggerated and distorted." JACL *Korematsu* Br. 14-15. JACL beseeched the Court to take a hard (or even cursory) look at military officials' logic, such as the paradoxical claim: "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that action will be taken." *Id*. at 12. Presciently, JACL warned that the Government's misleading arguments "in creating an impression of 'military necessity' are particularly reprehensible and dangerous, for, if they are allowed to go unchallenged they may become the means by which any group can be similarly victimized." *Id*. at 22.

The Government offers up a similarly puzzling justification for the Travel Ban Order here. Mirroring the logic of military officials in 1942, the Travel Ban Order rests on the conclusion that the "*unrestricted* entry" of nationals of the six Designated Countries poses a significant danger, Travel Ban Order, Sec. 2(c) (emphasis added); of course, there is nothing "unrestricted" about the current visa issuance process, because Congress and the prior Administration already withdrew the participation of these countries in the Visa Waiver Program in favor of restricted entry through individual vetting. The Order implies that terrorists may seek to "infiltrate" the United States as refugees, *id.*, Sec. 1(b)(iii), but given the arduous and multiple vettings that refugees receive, the inevitable delays in entry, and the fact that UNHCR-approved refugees cannot pick their destination country, this

suggestion strains credulity.[4] And, as noted previously, not a single person has been killed in a terrorist attack on U.S. soil by a national from any of the six Designated Countries since 1975. Nowrasteh, *Guide to Trump's Executive Order*.

This data is, once again, evocative of the objective information the Court confronted in 1942. There, as Justice Murphy noted in dissent in *Korematsu*, there was no dispute that, despite lengthy Government recitations of the danger posed by Japanese Americans, "not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free, a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combatting these evils." *Korematsu*, 323 U.S. at 241 (Murphy, J., dissenting). As in the 1940s, JACL urges the Court to carefully weigh the Government's "solemn recitation of facts and figures about one group" that misleadingly imply the dangerousness of such persons,

---

[4] Indeed, based on historical data the likelihood that terrorist attacks will be committed by admitted refugees is absolutely infinitesimal. From 1975 to the end of 2015, approximately 3.3 million refugees have been admitted to the United States. Alex Nowrasteh, Terrorism and Immigration: A Risk Analysis, 798 CATO INSTITUTE POLICY ANALYSIS 1, 23 (Sept. 13, 2016), goo.gl/p6ERih (last visited Sept. 13, 2017). During this period, only three have killed people in terrorist attacks on U.S. soil by refugees, all by Cuban nationals in the 1970s (before Cuba was designated a State Sponsor of Terrorism). *Id.* Thus, "[t]he chance of an American being murdered in a terrorist attack caused by a refugee is 1 in 3.64 *billion* per year[.]" *Id.* at 1 (emphasis in original).

and respectfully urges that "[i]f there is any doubt of the artificiality of the [sabotage/terrorism] argument, [the Government's] attempt to inflate the seriousness of the [danger posed by immigrants from the Designated Countries and refugees] should remove it." JACL *Korematsu* Br. 57.

E. Then, as now, the Government was unwilling to reveal its own intelligence agencies' views of the purported threat.

Since 1943-44, additional evidence has come to light – concealed by the Solicitor General over the written objection of Department of Justice lawyers – that would have further undercut the United States' claim of "military necessity." As the Acting Solicitor General formally acknowledged in a "Confession of Error" in 2011:

> By the time the cases of Gordon Hirabayashi and Fred Korematsu reached the Supreme Court, the Solicitor General had learned of a key intelligence report that undermined the rationale behind the internment. The Ringle Report, from the Office of Naval Intelligence, found that only a small percentage of Japanese Americans posed a potential security threat, and that the most dangerous were already known or in custody. But the Solicitor General did not inform the Court of the report, despite warnings from Department of Justice attorneys that failing to alert the Court "might approximate the suppression of

> evidence." Instead, he argued that it was impossible to segregate loyal Japanese Americans from disloyal ones. Nor did he inform the Court that a key set of allegations used to justify the internment, that Japanese Americans were using radio transmitters to communicate with enemy submarines off the West Coast, had been discredited by the FBI and FCC.

Neal Katyal, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases* (May 20, 2011), goo.gl/YJKarv (last visited Sept. 13, 2017); *see also* CWRIC Report, at 51 (noting FBI and Naval Intelligence "saw only a very limited security risk from the ethnic Japanese; none recommended a mass exclusion or detention of all people of Japanese ancestry"); Peter Irons, *Justice at War* (1983) (identifying additional concealment and misrepresentations by Government officials). This lack of candor served as the basis for successful *coram nobis* petitions brought by Korematsu and Hirabayashi nearly half a century after their wrongful convictions. *See Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 627 F. Supp. 1445 (W.D. Wash. 1986), *affirmed in part, reversed in part*, 828 F.2d 591 (9th Cir. 1987).

Troubling echoes of this deception have already surfaced in relation to the Travel Ban Order. For example, in February 2017, newspapers reported the existence of a leaked Department of Homeland Security

assessment that concluded citizenship is an "unreliable" threat indicator and that "citizens of countries affected by [an earlier iteration of the Travel Ban Order are] rarely implicated in US-Based Terrorism." *See* Ron Nixon, *Homeland Security Report Undercuts Travel-Ban Logic*, N.Y. Times, Feb. 26, 2017, at A20. Before this Court, the Solicitor General now refers to the study as a "*purported* leaked 'draft DHS report,' " Gov't Br. 48 (emphasis added), apparently seeking to cast doubt on its authenticity. Such obfuscation is worrisome given that the White House and the Department of Homeland Security have publicly confirmed the report's authenticity. *See* Nixon, *Homeland Security Report*.

F. Then, as now, the vast weight of evidence strongly suggests that intolerance and bigotry, not a genuine concern for national security, animated the sweeping exclusion.

Rather than "military necessity," the Congressional Commission concluded in 1982, "race prejudice, war hysteria and a failure of political leadership" produced "a policy conceived in haste and executed in an atmosphere of fear and anger." CWRIC Report, at 18; *accord* 50 U.S.C. § 4202.

This, too, was plain at the time the Court heard the Japanese Wartime Cases. In a critical February 14, 1942 memorandum recommending evacuation, for example, Gen. DeWitt explained, "In the war in which we

are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many [are second- and third-generation U.S.-born citizens] the racial strains are undiluted." JACL *Korematsu* Br. 11 (quoting DeWitt Report, at 34). A year later, Gen. DeWitt testified before Congress: "The danger of the Japanese was . . . espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese." Testimony before House Naval Affairs Subcommittee, Apr. 13, 1943 (quoted in CWRIC Report, at 66). He repeated the remarks to journalists, in more concise form, the following day: "[A] Jap is a Jap." CWRIC Report, at 66; JACL *Korematsu* Br. 154 ("We know [Gen. DeWitt's] opinion of Americans of Japanese descent."). In upholding the evacuation and incarceration of Japanese Americans, the *Korematsu* majority assiduously avoided the broader context of anti-Japanese prejudice that helped produce Executive Order No. 9066. *See* 323 U.S. at 223 ("To cast this case into outlines of racial prejudice . . . merely confuses the issue."); *but see* 323 U.S. at 233 (Murphy, J., dissenting) ("Such exclusion . . . falls into the ugly abyss of racism.").

The toxic combination that allowed the mass incarceration of Japanese Americans during World War II – a collective mistrust among large segments of the general population, and individual animus on the part of officials – resurfaces with the promulgation of the Travel Ban Order. As with the abundant record of Lt. Gen. DeWitt's racist declarations, the record in this case contains unavoidable evidence of President

Trump's anti-Muslim prejudice and bigotry. As Judge Watson found below:

> The Government appropriately cautions that, in determining purpose, courts should not look into the "veiled psyche" and "secret motives" of government decisionmakers and may not undertake a "judicial psychoanalysis of a drafter's heart of hearts." Govt. Opp'n at 40 (citing McCreary, 545 U.S. at 862, 125 S.Ct. 2722). The Government need not fear. The remarkable facts at issue here require no such impermissible inquiry. For instance, there is nothing "veiled" about this press release . . . Nor is there anything "secret" about the Executive's motive specific to the issuance of the Executive Order. . . .

Hawai'i v. Trump, No. 17-050, 2017 WL 1011673, at *13 (D. Haw., Mar. 15, 2017). After reciting several incendiary and bigoted statements, Judge Watson continued: "There are many more." *Id.*

G. Then, as now, the Government insisted that the Court abdicate its core responsibilities and do no more than accept at face value the Government's naked, pro forma invocation of national security.

The core of the Government's message some seventy years ago was straightforward: in times of great danger, the Court should not cripple the Executive Branch's "power to wage war successfully" by second-guessing the judgment of "those whose duty it was to

protect the Pacific Coast against attack." Gov't Br. in *Hirabayashi* 47, 60. National security judgments often turn on "tendencies and probabilities as evidenced by attitudes, opinions, and slight experience, rather than . . . objectively ascertainable facts." Gov't Br. in *Korematsu* 57. Rather than wade into such fraught terrain, the Court should defer to the military commanders "defending our shores." *Id*.

Once again, the Government insists that the Court must afford the "utmost deference" to the President. Gov't Br. at 48. Repeatedly invoking the threat of terrorism, the Government cautions against any "interferences with the President's conduct of foreign affairs." *Id*. at 22. But "[n]ational security is not a 'talismanic incantation' that, once invoked, can support any and all exercise of executive power under § 1182(f)." *Hawaii v. Trump*, 859 F.3d 741, 774 (9th Cir. 2017); *accord Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting) ("My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's . . . program was a reasonable military necessity. . . . But I do not think [the courts] may be asked to execute a military expedient that has no place in law under the Constitution.").

II. ESPECIALLY IN THIS HISTORICAL CONTEXT, ANY MEASURE OF MEANINGFUL SCRUTINY SHOULD LEAD THE COURT TO CONCLUDE THAT THE PRESIDENT FAILED TO FULFILL THE STATUTORY REQUIREMENT TO "FIND" THAT ADMISSION OF A CLASS OF ALIENS "WOULD BE DETRIMENTAL TO THE INTERESTS OF THE UNITED STATES."

A. Unlike with Executive Order No. 9066, the Court must meaningfully review whether the Travel Ban Order complies with statutory constraints on the President's authority.

One significant difference between the Travel Ban Order and Executive Order No. 9066 is the authority upon which they rest. Executive Order No. 9066 was an emergency wartime measure, promulgated soon after the attack on Pearl Harbor, and Congress expressly ratified President Roosevelt's action through legislation establishing criminal penalties for those who "remain[ed] in . . . [a] military zone prescribed, under the authority of an Executive order of the President[.]" *See* Act of Congress, Mar. 21, 1942, Pub. L. No. 77-503, 56 Stat. 173. These factors were critical to the Court's legal analysis, which emphasized that the Court was not addressing "whether the President, acting alone, could lawfully have made the curfew order in question," or whether he could have done so in times of peace. *Hirabayashi*, 320 U.S. at 92. Rather, the Court simply held that it was "unable to conclude that it was beyond the

war power of Congress and the Executive [acting in concert] to exclude those of Japanese ancestry from the West Coast war area at the time they did." *Korematsu*, 323 U.S. at 218-19.

The Travel Ban Order is not an emergency wartime measure done in concert with or ratified by Congress. Instead, President Trump has acted under a delegation of Congress's authority over immigration. *See Arizona v. United States*, 567 U.S. 387, 409 (2012) (power to make immigration laws is "entrusted exclusively to Congress") (quoting *Galvan v. Press*, 347 U.S. 522, 531 (1954)); *see* U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have Power . . . To establish an uniform Rule of Naturalization"); *see also INS v. Chadha*, 462 U.S. 919, 959 (1983) (noting that the Framers "consciously" chose to place immigration policy in the hands of a "deliberate and deliberative" body); *Fiallo v. Bell*, 430 U.S. 787, 796 (1977) (noting "the particular classes of aliens that shall be denied entry altogether [and] the basis for determining such classification" are matters "solely for the responsibility of the Congress . . . to control").

Congress gives a broad but not unlimited authority to the President to suspend entry of a "class of aliens into the United States" only if the "President finds that the entry . . . would be detrimental to the interests of the United States." 8 U.S.C. § 1182(f). Accordingly, the Court must determine whether the President has actually made such a finding that the entry "would be detrimental to the interests of the United States."

Compare 8 U.S.C. § 1182(f) *with* 8 U.S.C. § 1201(i) ("After the issuance of a visa . . . the Secretary of State may at any time, in his discretion, revoke such visa. . . . There shall be no means of judicial review . . . of a revocation under this section.").

Treating seriously this requirement is one of the best ways to guard against unlawfully discriminatory use of executive power without inquiring into personal motivations.

Although the JACL does not intend to repeat Respondents' arguments regarding the effect of Section 1182(f), the Court's inquiry must involve meaningful review of the President's actions. *See* Gov. Br. 43 (arguing that Section 1182(f) does not "subject the President's assessment . . . to judicial review"). Far from "turning the statute on its head," *id*. at 41, a meaningful review of whether there has been an actual finding that entry into the United States "would" – not "could," not "might" – harm legitimate governmental interests mitigates the risk of repeating the kind of abusive and shameful treatment of classes of people that is the legacy of Executive Order 9066.

The President's mere assertion of a finding cannot be "the end of the matter," Gov. Br. at 44, without disregarding the lessons learned from Executive Order 9066 or the wishes of Congress. Indeed, since the enactment of 1182(f) in 1952, Congress has enacted a number of provisions bearing directly on the use of sweeping class discriminations in evaluating visa applications. Most important, in 1965 Congress explicitly

prohibited discrimination in the issuance of immigrant visas on the basis of "nationality, place of birth, or place of residence" as part of comprehensive reform of U.S. immigration law and policy. 8 U.S.C. § 1152(a)(1)(A). This provision was not an incidental feature of the reform measure, one of the important civil rights acts of the 1960s, but a core of Congress's decision to repudiate nearly a century of immigration policy based in significant part on bigotry and racial hostility. More recently Congress has debated and enacted provisions detailing statutory vetting criteria for individualized review of aliens who might pose a terrorism risk, *see* 8 U.S.C. § 1182(a)(3)(B), and has focused specifically on how to treat applicants who have recently visited countries with terrorist activity. *See* 8 U.S.C. § 1187.

Congress has thus clearly acted to put "guardrails" on the President's exercise of authority in this area. For example, Congress did not authorize the President to exclude a class of aliens upon a finding that their entry would be detrimental to the interests of his political party or reelection campaign, but not detrimental to the interests of the United States. This is hardly speculation or histrionics: It was just such capitulation to nativist fears and "failure of political leadership" (rather than a focus on what law enforcement and military intelligence deemed "detrimental to the interests of the United States") that gave rise to Executive Order No. 9066. *See* CWRIC Report, 36-46, 67-72 (discussing effect of growing "clamor for exclusion fired by race hatred and war hysteria" on government officials).

In sum, Congress intended to cabin and restrict the authority granted to the President in 1952, and has reinforced that intention since then. It required, prior to the President barring whole classes of aliens, a legitimate factual basis to support a finding that an actual (not speculative or improper) "national interest" harm would occur absent suspension. Meaningful review – scrutiny that is deferential, but not supine – is necessary to ensure that the Travel Ban Order is consistent with the authority the Congress has delegated.

B. Under any measure of meaningful scrutiny, the President has failed to comply with the law in enacting the Travel Ban Order and excluding whole classes of aliens.

No legitimate national security purpose is served by the Travel Ban Order's blanket bar on entry from any nationals of Syria, Sudan, Somalia, Libya, Iran and Yemen. Every available set of facts contradicts or undermines the purported rationale for the Order.

The parallels between the naked assertions of national security made by the Government in the Japanese incarceration cases and those advanced to justify the Travel Ban Order here are striking, as outlined in Part I, *supra*. The breathtaking scope of the exclusion, the vast overinclusivity and underinclusivity of the prohibition, the absence of meaningful connection between the purported danger and the operation of the

exclusion, the illusory nature of the alleged threat, evidence that the Government's own specialists reject the value and efficacy of the measures, and the strong circumstantial evidence of ulterior (impermissible) purpose are all factors this Court has seen before. And here, as in World War II, they all point toward the unlawfulness of the Government's action, notwithstanding the Government's insistence that this Court again refrain from engaging in meaningful scrutiny of the President's Order.

CONCLUSION

The President failed to make an adequate "finding" that entry of the men, women, and children targeted by the Travel Ban Order "would," in fact, be "detrimental to the interests of the United States." To so hold, this Court need not determine that President Trump acted with improper racial or religious animus (or ascribe any motivation in particular to his actions); nor is this a case where the Court is called upon to "override" the judgment of the Executive Branch. Rather – mindful of this country's tragic failure to vindicate the rights of Japanese Americans during World War II and the specific guardrails Congress established when conferring authority to the Executive Branch – this Court need only conduct a meaningful inquiry into the basis for the President's actions and their propriety under the plain language of the statute.

Justice Jackson compared the Court's opinion in *Korematsu* to "a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting). Engaging in a meaningful assessment of the basis for Executive action is the most effective way to place a trigger-lock on that gun. Rather than repeat the tragic errors of World War II, this Court should affirm the decisions of the Fourth and Ninth Circuits.

Dated: September 14, 2017

Respectfully submitted,

GEORGE T. FRAMPTON, JR.
1133 19th St., NW
Third Floor
Washington, DC 20036

THOMAS FRAMPTON
HARVARD LAW SCHOOL
1563 Massachusetts Avenue
Cambridge, MA 02138

JOSEPH N. ROTH
OSBORN MALEDON, PA
2929 N. Central Avenue
Floor 21
Phoenix, AZ 85012

Counsel for Amicus Curiae

WALTER DELLINGER
Counsel of Record
DOUGLAS B. MAGGS
PROFESSOR EMERITUS
OF LAW
DUKE LAW SCHOOL
210 Science Drive
Box 90360
Durham, NC 27707
(202) 383-5319
wdellinger@omm.com