No. 17-965

In the Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

v.

HAWAII, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION AND OTHERS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The National Asian Pacific American Bar Association ("NAPABA") is a national association of Asian Pacific American ("APA") attorneys, judges, law professors, and law students, representing the interests of over seventy-five national, state, and local APA bar associations and nearly 50,000 attorneys who work in solo practices, large firms, corporations, legal services organizations, nonprofit organizations, law schools, and government agencies. Since its inception in 1988, NAPABA has served as a national voice for APAs, including Muslim Americans of Asian descent, in the legal profession and has promoted justice, equity, and opportunity for APAs. In furtherance of its mission, NAPABA opposes discrimination, including on the basis of race, religion, and national origin, and promotes the equitable treatment of all under the law. NAPABA and its members have experience with and a unique perspective on attempts by the U.S. Government to improperly restrict admission and immigration based on nationality or religion, of which the Executive Orders at issue are simply the latest versions.[2]

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[1] All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part; no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than NAPABA, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Statements of Interest for additional Amici Curiae are contained in Appendix A.

SUMMARY OF THE ARGUMENT

Much has been made about Korematsu in this case. And to be sure, the historical parallels are striking—including implausible national security justifications. What must not go unnoticed, however, is another line of cases that are foundational to current immigration law, a line of cases that stained the legacy of the Court—the Chinese Exclusion Act cases. These cases stand as a reminder of how the political branches can err and how it the responsibility of the Court to correct them to prevent a return to exclusionary immigration and invidious discrimination that this nation sought to foreclose more than fifty years ago.

ARGUMENT

I. Executive Order History.

On January 27, 2017, President Donald J. Trump issued Executive Order No. 13,769[3] titled, "Protecting the Nation from Foreign Terrorist Entry into the United States" ("Original Order"). The Original Order was temporarily enjoined by multiple courts, including by the U.S. District Court for the Western District of Washington, which the Ninth Circuit declined to stay.[4]

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[3] 82 Fed. Reg. 8977 (Feb. 1, 2017).

[4] *Washington v. Trump*, 847 F.3d 1151, 1161–62 (9th Cir. 2017) (per curiam).

On March 6, 2017, the President signed Executive Order No. 13,780[5] with the same title ("Revised Order"), replacing the Original Order.[6] The Revised Order had many of the same restrictions, including one on issuing visas to citizens of six Muslim-majority countries.[7] The Revised Order was also enjoined by multiple courts; subsequently, this Court narrowed the scope of the injunctions, providing that the Revised Order "may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States."[8] The challenges to the Revised Order expired prior to this Court's review, resulting in dismissal of the challenges to the Revised Order as moot.[9]

The Revised Order, Executive Order No. 13,780, was similarly enjoined.[10] When the government sought

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[5] 82 Fed. Reg. 13,209 (Mar. 9, 2017).

[6] 82 Fed. Reg. 13,209 (Mar. 9, 2017) (Pet. App. 148a), *amended*, Memorandum on the Effective Date in Executive Order 13780, 2017 Daily Comp. Pres. Doc. 401 (June 14, 2017).

[7] 82 Fed. Reg. 13,209 §§ 1, 2, 3, 9, 12.

[8] *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017).

[9] *Trump v. Hawaii*, 138 S. Ct. 377, 377 (2017); *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 353, 353 (2017).

[10] *State of Hawaii, et al. v Trump*, 245 F. Supp. 3d 1227, 1234–39 (D. Haw.), *aff'd in part and vacated in part*, 859 F.3d 741 (9th Cir. 2017); *Int'l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 549–66 (D. Md.), *aff'd in part and vacated in part en banc*, 857 F.3d 554 (4th Cir. 2017).

leave to implement the executive order pending certiorari review, this Court limited the scope of those injunctions, ruling that the suspension-of-entry provisions "may not be enforced against foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States."[11] The challenged provisions of Executive Order No. 13,780 expired before this Court completed its review, and the Court dismissed the challenges as moot.[12]

On September 24, 2017, the President issued Proclamation 9645 ("Proclamation"), which represents the third recent attempt to attach nationality-based restrictions in the immigration context as a proxy for discrimination on the basis of race and religion.[13] The Proclamation bans all immigration from five of the countries covered by the Revised Order and Original Order (Iran, Libya, Syria, Yemen, and Somalia) and two additional countries (Chad and North Korea).[14] The Proclamation also restricts availability of visas for nationals of many of the covered nations.[15] Although

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[11] *Trump*, 137 S. Ct. at 2088.

[12] *Trump*, 138 S. Ct. at 377; *Trump*, 138 S. Ct. at 353.

[13] The history of the Executive Orders is set forth in more detail in Respondent's Brief. Res.'s Br. at 5-10, *Trump v. Hawaii*, No. 17-965 (U.S. Jan. 12, 2018).

[14] Proclamation No. 9645 § 2(a)–(e), (g)–(h), 82 Fed. Reg. at 45,165–67 (Pet. App. 131a–137a).

[15] *Id.* § 2(a)–(e), (g), 82 Fed. Reg. at 45,165–67 (Pet. App. 131a–137a).

the Proclamation initially recognized the Court's protection of foreign nationals with a bona fide relationship with the United States, this provision was removed on October 18, 2017.[16]

Challenges to the Proclamation are informed by both evidence of the order's history and purpose, and by the country's historical experience using nationality-based restrictions in the immigration context as a proxy for discrimination on the basis of race and religion.[17]

II. The United States Has Renounced Nationality-Based Discrimination in Immigration Due to Past Abuse and Injustice that Should Inform Any Assessment of the Proclamation.

During the heart of the Civil Rights Era, Congress enacted, and President Lyndon Johnson signed, the Immigration and Nationality Act of 1965[18] to prohibit preference, priority, or discrimination in the issuance of immigrant visas due to "race, sex, nationality, place of birth, or place of residence."[19] This provision marked a firm break from the invidious discrimination in historical immigration laws. It sought to prevent the country from repeating those errors.

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[16] *Id.* § 7(a), (b), 82 Fed. Reg. at 45,171 (Pet. App. 146a–147a).

[17] The history of the Executive Orders is set forth in more detail in Respondent's Brief. Res.'s Br. at 5-10, *Trump v. Hawaii*, No. 17-965 (U.S. Jan. 12, 2018).

[18] Pub. L. No. 89-236, 79 Stat. 911.

[19] 8 U.S.C. § 1152(a)(1)(A).

A. The Proclamation Echoes Historical Discrimination in the Application of Immigration Laws Based upon National Origin.

APAs are acutely familiar with the impact of exclusionary immigration laws, having long been the subjects of systematic and expansive restrictions driven by racial, ethnic, and religious animus. These historical laws not only excluded people from Asian countries, but hurt those already in the United States by legitimizing and validating ugly stereotypes and inequalities. As described below, the laws' negative impacts are clear even when the laws were facially neutral.

Asians first began migrating to the United States mainland in significant numbers in the mid-1800s, led by Chinese nationals.[20] As conditions weakened in their homelands, economic opportunity beckoned Asian laborers to the United States. The discovery of gold and westward expansion fueled demand for low-wage labor. Industrial employers actively recruited Chinese nationals to fill some of the most demanding jobs, particularly in domestic service, mining, and railroad construction.[21]

However, the resulting growth in the immigrant labor population provoked anger and resentment among native-born workers eager for work and better

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[20] *See* Bill Ong Hing, *Making and Remaking Asian America Through Immigration Policy, 1850–1990* 19–20 (1993).

[21] *Id.* at 20.

wages.[22] Chinese immigrants, in particular, became targets of fierce hostility and violence. The so-called "Yellow Peril" refers to the widespread characterization of Chinese immigrants as "unassimilable aliens" with peculiar and threatening qualities.[23]

Congress catered to this xenophobia and racism by passing a series of laws that discouraged and ultimately barred immigration from China and other Asian countries. These laws marked the first time the federal government broadly enacted and enforced an immigration admissions policy that defined itself based on whom it excluded.[24] The first such law came toward the end of Reconstruction, when Congress enacted the Page Act of 1875.[25] Barring the entry of Asian immigrants considered "undesirable," the Page Act was largely enforced against Asian women, who were *presumed to be prostitutes* simply by virtue of their ethnicity.[26]

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[22] *Id.* at 21.

[23] *See* Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 Asian Am. L.J. 71, 86–89 (1997).

[24] Naturalization and citizenship laws have always limited the scope of who could be a citizen, but the same was not so for rules on entry to the United States. The Naturalization Act of 1870, 16 Stat. 254, which barred Asians from naturalization, prefaced the era of Asian exclusion.

[25] Ch. 141, 18 Stat. 477 (1875) (repealed 1974).

[26] *See* George Anthony Peffer, *Forbidden Families: Emigration Experiences of Chinese Women Under the Page Law, 1875–1882*, 6 J. Am. Ethnic Hist. 28, 28–46 (1986).

A few years later, Congress responded to persistent anti-Chinese fervor with the Chinese Exclusion Act on May 6, 1882,[27] the first federal law to exclude people on the basis of their nationality. On the premise that the "coming of Chinese laborers . . . endanger[ed] the good order" of areas in the United States, the Act provided that "[i]t shall not be lawful for any Chinese laborer to come, or, having so come after the expiration of said ninety days, to remain within the United States."[28] The Chinese Exclusion Act halted immigration of Chinese laborers for ten years, prohibited Chinese nationals from becoming United States citizens, and uniquely burdened Chinese laborers who were already legally present and wished to leave and re-enter the United States. Congress first extended the exclusionary period by ten years in 1892 with the Geary Act,[29] and then indefinitely in the Act of Apr. 29, 1902.[30]

After the Chinese exclusion laws foreclosed employers from importing *Chinese* laborers, immigrants from Japan, Korea, India, and the Philippines began coming in larger numbers.[31] As with Chinese nationals before them, these immigrants

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[27] 22 Stat. 58 (1882).

[28] *Id.* at § 1.

[29] 27 Stat. 25 (1892).

[30] Pub. L. No. 57-90, 32 Stat. 176.

[31] Hing, *supra*, at 27–31.

encountered strong nativist opposition as their numbers rose.[32]

The exclusionary policies of the U.S. Government enforced and validated xenophobic and racist sentiments and enabled violent backlash. Nativist Americans established the Asiatic Exclusion League in the early 20th century to prevent immigration by people of Asian origin to the United States and Canada, which had a similar nationality-based system of immigration at the time.[33] On September 4, 1907, the Asiatic Exclusion League and labor unions led the "Bellingham Riots" in Bellingham, Washington, to expel South Asian immigrants from local lumber mills.[34] Herman Scheffauer's *The Tide of the Turbans* noted that: "Again on the far outposts of the western world rises the spectre of the Yellow Peril and confronts the affrighted pale-faces," and lamented "a

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[32] *Id.* at 32.

[33] Victor M. Hwang, *Brief of* Amici Curiae *Asian Pacific Islander Legal Outreach and 28 Asian Pacific American Organizations, in support of all respondents in the Six Consolidated Marriage Cases, Lancy Woo and Cristy Chung, et al., Respondents, v. Bill Lockyer, et al., Appellants on Appeal to the Court of Appeal of the State of California, First Appellate District, Division Three*, 13 Asian Am. L.J. 119, 132 (2006) (the Asiatic Exclusion League was formed for the stated purpose of preserving "the Caucasian race upon American soil . . . [by] adoption of all possible measures to prevent or minimize the immigration of Asiatics to America" (internal quotation marks omitted)).

[34] *1907 Bellingham Riots*, Seattle Civil Rights & Labor History Project, http://depts.washington.edu/civilr/bham_intro.htm; Erika Lee, *The Making of Asian America: A History* 163–64 (2015).

threatening inundation of Hindoos over the Pacific Coast," which it proposed to address by legislation.[35]

Congress responded to native concerns about these growing populations in the same way that it had to the perceived threat of Chinese immigrants. The Immigration Act of 1917,[36] created the "Asiatic Barred Zone," which extended the Chinese exclusion laws to include nationals of other countries in South Asia, Southeast Asia, the Polynesian Islands, and parts of Central Asia.[37] The racial undertones of this act were such that, in addressing whether a "high-caste Hindu, of full Indian blood" was a "white person," eligible to naturalize under the laws at the time, the Supreme Court inferred from it that Congress would have "a similar [negative] attitude toward Asiatic naturalization."[38]

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[35] *See* 43 Forum 616 (1910) (The term "Hindoo" or "Hindu" was applied to all South Asian persons, regardless of faith. The "Tide of Turbans" referenced the distinctive turban worn by members of the Sikh faith.).

[36] Pub. L. No. 64-301, 39 Stat. 874.

[37] *See* Hing, *supra*, at 29(An executive agreement, the Gentlemen's Agreement, reached in 1907 and 1908, restricted the immigration of Japanese laborers, as well as Koreans, whose nation was under Japanese forced occupation between 1910 and 1945).

[38] Bhagat Singh Thind was a member of the Sikh faith, though described as "Hindu" as explained in Footnote 5. The question to the Supreme Court was whether a South Asian of Caucasian ancestry was distinct from "Asiatic" or other racial groups under the prevailing racial theories and qualified as "white" under U.S. law. *United States v. Thind*, 261 U.S. 204, 206, 209–15 (1923) (Justice Sutherland's discussion of theories of racial classification).

A few years later, the Immigration Act of 1924 (the "Asian Exclusion Act"),[39] imposed immigration caps based upon national origin and prohibited immigration of persons ineligible to become citizens, which effectively barred people from Asian countries from immigrating altogether. As explained by an opponent of the law, its nationality restrictions were driven by animus against religious and ethnic groups—such as Jews—by restricting immigration from countries where they lived in larger numbers, just as the law treated other "inferior peoples":

> Of course the Jews too are aimed at, not directly, because they have no country in Europe they can call their own, but they are set down among the inferior peoples. Much of the animus against Poland and Russia, old and new, with the countries that have arisen from the ruins of the dead Czar's European dominions, is directed against the Jew.[40]

At that time, United States jurisdiction over the Philippines permitted Filipinos to migrate to the United States.[41] However, U.S. citizenship remained out of reach and Filipinos could not escape racial animus, as they were seen to present an economic threat and to "upset the existing racial hierarchy between whites and nonwhites."[42] Anti-Filipino

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[39] Pub. L. No. 68-139, 43 Stat. 153.

[40] 65 Cong. Rec. 5929–32 (1924) (Statement by Rep. Clancy).

[41] Lee, *supra*, at 157.

[42] *Id*. at 157, 185.

agitation culminated in passage of the Philippine Independence Act ("Tydings-McDuffie Act"),[43] which granted independence to the Philippines and changed the status of Filipinos from U.S. nationals to "aliens," making them subject to the same restrictions as other Asian groups. The next year, Filipino nationals already in the United States became subject to deportation and repatriation under the Filipino Repatriation Act.[44]

The exclusionary racism and xenophobia underpinning these laws crystallized and escalated during World War II, when the U.S. Government forcibly incarcerated over 110,000 permanent residents and U.S. citizens in internment camps on the basis of their Japanese ancestry.[45]

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[43] Pub. L. No. 73-127, 48 Stat. 456 (1934).

[44] Pub. L. No. 74-202, 49 Stat. 478 (1935). The idea, still prevalent today, that race keeps one from being an American particularly resonated with Filipinos affected by the new restrictions: "We have come to the land of the Free and where the people are treated equal only to find ourselves without constitutional rights . . . . We . . . did not realize that our oriental origin barred us as human being in the eyes of the law." Lee, *supra*, at 185 (citing June 6, 1935 letter from Pedro B. Duncan of New York City to the Secretary of Labor and other letters).

[45] *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). For a further discussion of the improper justification for the Japanese American incarceration, see brief of the Fred T. Korematsu Center for Law and Equality, *et al*. as *Amicus Curiae*, *State of Hawaii, et al. v. Donald J. Trump, et al.*, No. 17-15589 (9th Cir. Apr. 21, 2017).

B. In 1965, Congress and President Johnson Dismantled Quotas Based upon Nationality and Barred Distinctions Based upon "Race, Sex, Nationality, Place of Birth, or Place of Residence."

Starting during World War II and continuing over the next twenty years, Congress gradually loosened restrictions on Asian immigration to further the interests of the United States on the world stage.

First, at the urging of President Franklin D. Roosevelt, who called the exclusion of Chinese citizens by the United States "a historic mistake,"[46] Congress repealed the Chinese exclusion laws with the Magnuson Act of 1943 (the "Chinese Exclusion Repeal Act").[47] In 1946, the Act of July 2, 1946 (the "Luce-Celler Act"),[48] allowed 100 Filipinos and Indians, each, to immigrate per year and permitted their naturalization.[49]

Then, in 1952, the Immigration and Nationality Act (the "McCarran-Walter Act"),[50] repealed the Asiatic Barred Zone and eliminated the racial bar on citizenship. Nevertheless, it left in place national origin

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[46] Lee, *supra*, at 256.

[47] Pub. L. No. 78-199, 57 Stat. 600.

[48] Pub. L. No. 79-483, 60 Stat. 416.

[49] This bill allowed Dalip Singh Saund to become a naturalized citizen. He would become the first APA Member of Congress. *See* Lee, *supra*, at 373–75, 392.

[50] Pub. L. 82-414, 66 Stat. 163.

quotas intended to heavily favor immigration from Northern and Western Europe, with unmistakable racial, religious, and ethnic consequences.

After decades of highly regimented immigration quotas tied to prospective immigrants' countries of origin, the Immigration and Nationality Act of 1965 (the "Hart-Cellar Act"),[51] marked a dramatic turning point. Like Presidents Harry S. Truman and Dwight D. Eisenhower before him, President John F. Kennedy opposed the national origins quota system, calling it "nearly intolerable" and inequitable.[52] In the Fourth Circuit, Judge Wynn noted criticisms of the national origins system by Presidents Kennedy and Johnson as incompatible with "our fundamental belief that a man is to be judged—and judged exclusively—on his worth as a human being."[53]

In 1965, Congress answered these calls, abolishing the national origins quotas in an act signed by President Johnson and providing that "[e]xcept as specifically provided" in certain subsections, "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place

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[51] Pub. L. 89-236, 79 Stat. 911.

[52] John F. Kennedy, Remarks to Delegates of the American Committee on Italian Migration (June 11, 1963), http://www.presidency.ucsb.edu/ws/?pid=9269.

[53] *IRAP*, 857 F.3d at 627 (Wynn, J. concurring) (quoting Special Message to the Congress on Immigration, 1965 Pub. Papers 37, 37, 39 (Jan. 13, 1965)) (J.A. 293).

of birth, or place of residence."[54] In signing the bill, as Judge Wynn noted, President Johnson proclaimed that hereinafter "immigrants would be permitted to come to America 'because of what they are, and *not because of the land from which they sprung*.'"[55]

The legislative history of 8 U.S.C. § 1152(a)(1)(A) confirms that Congress intended to reject and repudiate the "national origins system" as an inequitable and irrelevant basis for admission decisions. For instance, a member of Congress opined that the system "embarrasse[d] us in the eyes of other nations, . . . create[d] cruel and unnecessary hardship for many of our own citizens with relatives abroad, and . . . [was] a source of loss to the economic and creative strength of our country."[56] Attorney General Robert F. Kennedy lamented that the national origins system harmed citizens with relatives abroad, "separat[ing]

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[54] 8 U.S.C. § 1152(a)(1)(A). The excepted subsections address "[p]er country levels for family-sponsored and employment-based immigrants," 8 U.S.C. § 1152(a)(2), statutory creation of "special immigrant" categories for preferred treatment (e.g., certain Panamanian nationals who worked in the Canal Zone, etc.), 8 U.S.C. § 1101(a)(27), admission of immediate relatives of U.S. citizens, 8 U.S.C. § 1151(b)(2)(A)(i), and the statutorily created system of allocation of immigrant visas, 8 U.S.C. § 1153.

[55] *IRAP*, 857 F.3d at 627 (Wynn, J. concurring) (quoting with emphasis Special Message to the Congress on Immigration, 1965 Pub. Papers 37, 37, 39 (Jan. 13, 1965)) (J.A. 294).

[56] Oscar M. Trelles II & James F. Bailey III, *Immigration Nationality Acts, Legislative Histories and Related Documents 1950–1978* 417 (1979).

families coldly and arbitrarily."[57] Indeed, it confirms Congress overwhelmingly regarded the system as an outdated, arbitrary, and above all, un-American basis upon which to decide whom to admit into the country.

Statements in the legislative history resoundingly denounced the use of nationality in immigration decisions, as it furthered the un-American belief that individuals born in certain countries were more desirable or worthy of admission than others. Prior to 1965, nationality-based immigration restrictions excluded nationals of Asian countries based upon unfounded and unjust stereotypes that conflated race, ethnicity, and religion. Several members of Congress echoed President Kennedy's sentiments, when in 1963 he wrote in a letter to Congress:

> The use of a national origins system is without basis in either logic or reason. It neither satisfies a national need nor accomplishes an international purpose. In an age of interdependence among nations, such a system is an anachronism, for it discriminates among admission into the United States on the basis of accident of birth.[58]

President Kennedy's reference to prohibiting discrimination in "*admission* into the United States," confirms the contemporaneous understanding that the 1965 Act foreclosed discrimination in *admission*, not just for immigration. Indeed, it would be perverse to

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[57] *Id.* at 411.

[58] *Id.* at 2 (quoting Kennedy, John F., 1964 Pub. Papers, 594–97 (July 23, 1963)).

provide more protection to foreign nationals seeking to immigrate to the United States than to those merely seeking to visit family. Not surprisingly, during Congressional hearings on the 1965 Act, Attorney General Kennedy contended that abolition of the national origins system sought:

> [N]ot to penalize an individual because of the country that he comes from or the country in which he was born, not to make some of our people feel as if they were second-class citizens. . . . [Abolition of the national origins system] will promote the interests of the United States and will remove legislation which is a continuous insult to countries abroad, many of whom are closely allied with us. [59]

If certain citizens' relatives cannot visit from abroad, or are prohibited from obtaining visas on equal footing with those of others, they cannot help but feel that they are themselves "second-class citizens" in the eyes of the U.S. Government.

In light of this history, the reference in 8 U.S.C. § 1152(a)(1)(A) to the prohibition against discrimination in the "issuance of immigration visas" must not be read to sanction discrimination in issuance of nonimmigrant visas. If it were, the Executive could discriminate in the very manner that the 1965 Act sought to prevent.

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[59] *Id.* at 420.

C. By Promoting Discrimination, the Executive Orders are Contrary to the Statutory Language and Purpose.

Today, nearly two-thirds of APAs are foreign-born.[60] The experience of many APA families in the United States began with the opportunity to immigrate that was denied to their ancestors. Nevertheless, the harmful legacies of those earlier laws—which tore apart families, denied the right to naturalize and the rights that accompany citizenship to lawful immigrants, and validated xenophobia, racism, and other invidious stereotypes—persist.

Indeed, Congress recently reaffirmed its condemnation of the Chinese exclusion laws with the passage of resolutions expressing regret for those laws.[61] The Senate resolution explicitly recognized that "[the] framework of anti-Chinese legislation, including the Chinese Exclusion Act, is incompatible with the basic founding principles recognized in the Declaration of Independence that all persons are created equal."[62]

Having long been the subject of exclusionary immigration laws, APAs know the lasting pain and

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[60] Karthick Ramakrishnan & Farah Z. Ahmad, *State of Asian Americans and Pacific Islanders Series: A Multifaceted Portrait of a Growing Population* 23, AAPIDATA (Sept. 2014), http://aapidata.com/wp-content/uploads/2015/10/AAPIData-CAP-report.pdf.

[61] S. Res. 201, 112th Cong. (2011); H.R. Res. 683, 112th Cong. (2012).

[62] S. Res. 201, 112th Cong. (2011).

injury that result from the use of national origin as a basis for preference or discrimination in immigration laws. The Proclamation is an unwelcome return to a pre-Civil Rights Era approach to immigration when prospective immigrants were excluded based upon their national origin, which served as a pretext for discrimination on the basis of the predominant races, religions, and ethnicities in those countries.

As the Ninth Circuit recognized, "Congress enacted § 1152(a)(1)(A) of the INA contemporaneously with the Civil Rights Act of 1964 and the Voting Rights Act of 1965 to eliminate the 'national origins system as the basis for the selection of immigrants to the United States.' H.R. Rep. No. 89-745, at 8 (1965). In so doing, Congress manifested its intent to repudiate a history of nationality and race-based discrimination in United States immigration policy."[63] This accords with the D.C. Circuit's holding that "Congress could hardly have chosen more explicit language" in barring discrimination against the issuance of a visa because of a person's nationality or place of residence.[64] Consistent

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[63] *State of Hawaii, et al. v. Trump*, 878 F.3d 662, 695 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 923 (2018).

[64] *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State* ("*LAVAS*"), 45 F.3d 469, 472–73 (D.C. Cir. 1995) (finding "Congress has unambiguously directed that no nationality-based discrimination shall occur"); *see also Wong Wing Hang v. INS*, 360 F.2d 715, 719 (2d Cir. 1966) (concluding that nationality is an impermissible basis for deportation and "invidious discrimination against a particular race or group" is prohibited as a basis for deportation); *Abdullah v. INS*, 184 F.3d 158, 166–67 (2d Cir. 1999) ("[T]he Constitution does 'not permit an immigration official, in the absence of [lawful quota] policies, to . . . discriminate on the basis

with the contemporaneous and monumental Civil Rights Act of 1964, which outlawed discrimination on the basis of "race color, religion, sex, or national origin," and the Voting Rights Act of 1965, the Immigration and Nationality Act of 1965 marked a departure from the nation's past reliance upon such characteristics to restrict entry into the country.[65]

The Proclamation expressly discriminates against applicants for entry based on nationality and is premised on a construction of Section 1182(f) that would obviate limits Congress imposed on the Executive's inadmissibility determinations under Section 1182(a)—precisely what Congress and President Johnson specified by statute the Executive Branch could *not* do. Because Congress has already provided "specific criteria for determining terrorism-related inadmissibility,"[66] any reliance upon more general language in 8 U.S.C. § 1182(f) is misplaced.

Section 1182(f) permits both denial of entry and restrictions upon entry "[w]henever the President finds that the entry of any aliens or of any class of aliens into

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of race and national origin.'") (citing *Bertrand v. Sava*, 684 F.2d 204, 212 n.12 (2d Cir. 1982)).

[65] *See Olsen v. Albright*, 990 F. Supp. 31, 38 (D.D.C. 1997) (noting that policies that discriminate "based on impermissible generalizations and stereotypes" contravene Section 1152(a)(1)(A)); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. Rev. 273 (1996).

[66] *See Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring).

the United States would be detrimental to the interests of the United States." If this provision was interpreted in a manner to bar issuance of visas on the basis of nationality, it would defy Justice Kennedy's controlling opinion in *Kerry v. Din*, which explains that the Executive's authority to exclude an individual from admission on the basis of claimed terrorist activity "rest[s] on a determination that [he or she does] not satisfy the . . . requirements" of 8 U.S.C. § 1182(a)(3)(B).[67] Similarly, other courts have held that Section 1182(f) "provides a safeguard against the danger posed by any particular case or class of cases *that is not covered by one of the categories in section 1182(a)*."[68] Applying the same principle of construction, *Allende v. Shultz* held that subsections of 8 U.S.C. § 1182(a) could not be rendered superfluous by interpretation of others.[69]

As stated by the Ninth Circuit, "[p]ut another way, the Proclamation effectuates its restrictions by withholding immigrant visas on the basis of nationality. This directly contravenes Congress's

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[67] *Id.*

[68] *Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (concluding that authority under one subsection cannot "swallow" the limitations imposed by Congress on inadmissibility under other parts of Section 1182) (emphasis added), *aff'd mem.*, 484 U.S. 1 (1987).

[69] *Allende v. Shultz*, 845 F.2d 1111, 1118 (1st Cir. 1988).

"unambiguous[] direct[ions] that no nationality-based discrimination . . . occur."."[70]

D. The History of Discrimination Informs the Present Dispute.

The 1965 amendments to the Immigration and Nationality Act sought to constrain executive authority to afford any preference, priority, or discrimination in immigration based on nationality, place of birth, or place of residence, among other characteristics.[71] The D.C. Circuit has interpreted this provision to apply to admission as well, holding that "Congress has unambiguously directed that no nationality-based discrimination shall occur."[72]

The President lacked statutory authority or discretion to issue the Proclamation.[73] Congress relegated this kind of discrimination into the past in 1965, aligning our immigration laws with notions of equality etched into the nation's conscience during the Civil Rights Era.

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[70] *Hawaii*, 878 F.3d at 698 (quoting *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State*, 45 F.3d 469, 473(D.C. Cir. 1995)).

[71] Pub. L. No. 89-236 (1965) (codified at 8 U.S.C. § 1152(a)(1)(A)).

[72] *LAVAS*, 45 F.3d at 472–73.

[73] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring in the judgment) (observing that the President's power is at "its lowest ebb" when it is "incompatible with the expressed . . . will of Congress").

This Court, in *Din*, recognized that courts "look behind" the government's express rationale where there is "an affirmative showing of bad faith."[74] The long history of abusing nationality-based restrictions on immigration to target other groups should also inform the Court's consideration of whether it comports with the Establishment Clause of the United States Constitution.[75]

The thinly veiled animus behind the Proclamation is even more glaring when set against the long history of such discrimination that Congress has expressly tried to stamp out, and ignoring such evidence would abet pretextual discrimination between people of different religions and nationalities.

Rather than exhaustively recite the extensive evidence of the Proclamation's foundation in animus, which cannot escape the Court's notice, we submit that this Court should consider the evident deleterious effect the Proclamation has had on U.S. citizens from the affected nations and Muslims. These fears were borne out in a measureable uptick in hate crimes and harassment against Muslims in the first half of 2017, for which the Council on American-Islamic Relations

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[74] *Din*, 135 S. Ct. at 2141; *see also Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 137 (2d Cir. 2009) (recognizing that a well-supported allegation of bad faith could render an immigration decision not *bona fide*).

[75] U.S. Const. amend. I, cl. 1; *see Larson v. Valente*, 456 U.S. 228, 244, 254–55 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

("CAIR") found "ethnicity or national origin" to be the most common "trigger."[76] Indeed, the deputy director of CAIR in Chicago was threatened by a man charged with a felony hate crime for leaving messages that began: "Hey. Guess what? This is America calling, ... You are not welcome here. Take your [double expletive] back to Syria. We will kill you."[77]

Based on their long history of experiencing discrimination, APAs well understand the harmful effects of the President's actions and urge this Court to not allow the Proclamation to stand.

CONCLUSION

The United States Government severely restricted and at times prohibited the entry, immigration, and naturalization of people from Asian nations for nearly a century. In 1965, Congress and the President recognized that this practice reflected animus toward people of races, ethnicities, and religions that prevailed in those countries and restricted the use of nationality in immigration. Many APAs are in the United States

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[76] *CAIR Report Shows 2017 on Track to Becoming One of Worst Years Ever for Anti-Muslim Hate Crimes*, Council on American-Islamic Relations (June 17, 2017), https://www.cair.com/press-center/press-releases/14476-cair-report-shows-2017-on-track-to-becoming-one-of-worst-years-ever-for-anti-muslim-hate-crimes.html.

[77] William Lee, *Man charged with hate crime in phone threat to Muslim-American advocate: 'We will kill you'*, Chicago Tribune (June 17, 2017) (alteration in original), http://www.chicagotribune.com/news/local/breaking/ct-man-charged-with-phone-threat-to-muslim-american-advocate-we-will-kill-you-20170617-story.html.

today because Congress prohibited such discrimination during the Civil Rights Era, when the harm and injustice of government-sanctioned discrimination on the basis of "race, sex, nationality, place of birth, [and] place of residence" could no longer be countenanced.

The Proclamation seeks to side-step these restrictions on nationality-based discrimination, as well as the constitutional establishment clause and equal protection rights they reflect, to discriminate against nationals of six Muslim-majority countries. This Court should prevent the President from exercising such authority, lest it presage a return to the era of invidious discrimination that Congress sought to foreclose more than fifty years ago.

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APPENDIX

APPENDIX

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APPENDIX A

STATEMENTS OF INTEREST OF ADDITIONAL *AMICI CURIAE*

The Arizona Asian American Bar Association advocates for justice, equality, inclusion and opportunity for the Asian Pacific American community.

The Asian American Bar Association ("AABA") of Greater Chicago serves not only the interests of its members, but also the community from which its members came. AABA represents the interests of thousands of Asian American legal professionals and community members.

The Asian American Bar Association of Houston is a voluntary organization of attorneys, judges, and law students of Asian heritage or who have Asian American interests. The AABA promotes the Houston society of Asian American lawyers and addresses the needs of Houston's Asian American community.

The Asian American Bar Association of Kansas City ("AABAKC") is a non-profit organization whose mission is to promote justice, equality, and opportunity for Asian Americans, and to foster professional development, legal scholarship, advocacy and community involvement in the metropolitan Kansas City area. Our membership reflects all aspects of Kansas City's Asian American legal community.

The Asian American Bar Association of New York was formed in 1989 as a not-for-profit corporation to

represent the interests of New York Asian American attorneys, judges, law professors, legal professionals, legal assistants, paralegals, and law students. Our mission is to improve the study and practice of law, and the fair administration of justice for all by ensuring the meaningful participation of Asian Americans in the legal profession.

Established in 1992, the Asian American Bar Association of Ohio is the oldest association of APA attorneys in Ohio.

The Asian American Bar Association of the Greater Bay Area ("AABA") is one of the largest Asian American bar associations in in the State of California and the United States of America. From its inception in 1976, AABA has been actively involved in civil rights issues and community service. With over 1300 members, AABA's constituents include judges, lawyers, professors, law students, and other legal professionals.

The Asian American Criminal Trial Lawyers Association is an organization of criminal defense attorneys, judges, and law students engaged in the practice of law in the criminal justice system by advocating for the rights of the accused, and dedicated to serving the Asian American community.

Since its inception in 1984, the Asian American Lawyers Association of Massachusetts ("AALAM") has devoted its energy and resources to serving the Asian American legal community and improving and facilitating the administration of law and justice. AALAM serves as a professional and social network for over 250 members who include lawyers, judges, law professors, and law students.

The Asian Bar Association of Washington is a voice for the Asian Pacific American legal profession in the State of Washington, promoting justice, equity, and opportunity for Asian Pacific Americans.

The Asian Pacific American Bar Association of Central Ohio is a non-profit voluntary association for APA attorneys, judges, law professors, law students, and other members of the legal community in the central Ohio area.

The Asian Pacific American Bar Association of Colorado represents the interests of the APA community and attorneys in Colorado. Our organization fosters the exchange of ideas and information among and between the organization's members and other members of the legal profession, the judiciary, and the legal community.

The Asian Pacific American Bar Association of Los Angeles County is a pan-Asian group of Asian Pacific American attorneys in the Los Angeles area. Our mission is to provide a vehicle and forum for the unified expression of opinions and positions by the Association upon current social, political, economic, legal, or other matters or events of concern to its members.

The Asian Pacific American Bar Association of Pennsylvania is a non-profit organization founded in 1984 to advance the interests of the Asian Pacific American community and its attorneys and law students in Pennsylvania.

The Asian Pacific American Bar Association of Silicon Valley fosters professional development, advocacy, and community involvement for Silicon

Valley's APA legal community, and promotes justice and equality for all.

The Asian Pacific American Bar Association Solano County is a local organization of Asian Pacific American Attorneys. We are a non-profit organization supporting the growth of Asian American Attorneys.

The Asian Pacific American Bar Association of South Florida is a voluntary bar organization of attorneys in Miami-Dade, Broward and Palm Beach counties. Our goals include combating discrimination against all minorities, working towards civil rights reform, combating anti-immigrant agendas and hate crimes, increasing diversity in federal, state, and local government, and promoting professional development.

The Asian Pacific American Bar Association of Tampa Bay serves the Tampa Bay region to promote justice, equality, and opportunity for Asian Pacific Americans.

The Asian Pacific American Lawyers of the Inland Empire is a professional association dedicated to the professional growth and advancement of the Asian Pacific American legal community in the Counties of Riverside and San Bernardino, California. We strive to ensure justice, equal access, and opportunities in the legal profession for all persons.

The Asian/Pacific Bar Association of Sacramento was formed in 1981 to promote and protect the interests of Asian and Pacific Islander American attorneys and the API communities in the greater Sacramento area.

The California Asian Pacific American Bar Association represents the interests of Asian American and Pacific Islander bar organizations and the over 14,000 APA attorneys statewide to promote justice and equality, advance legal and policy matters that impact the APA community, and enhance the professional development of its members.

The Charlotte Asian Pacific American Bar Association fosters professional development, advocacy, and community involvement for Asian Pacific American attorneys in the Charlotte, North Carolina and surrounding metro area.

The Chinese American Bar Association of Greater Chicago is the first local bar association for attorneys of Asian descent in the Chicagoland area. We oppose all forms of discrimination and strongly believe in the equal treatment of all under the law.

The Connecticut Asian Pacific American Bar Association is the only association geared towards Asian Pacific American attorneys in Connecticut. We strive to represent and advocate the interests of Asian Pacific American lawyers, the legal profession, and Asian Pacific American communities.

The Federation of Asian Canadians – Ontario is a diverse coalition of Asian Canadian legal professionals who promote equity, justice, and opportunity for Asian Canadian legal professionals and the broader community.

Filipino American Lawyers Association of Chicago ("FALA Chicago") informs and unites the Chicago-area Filipino American legal community consisting of judges, attorneys, and law students. FALA Chicago

achieves its mission by hosting networking opportunities, advocacy, education, and mentoring events.

Filipino American Lawyers Association of New York promotes the vibrant Filipino American legal community in New York by connecting Filipino American attorneys in order to share our experiences and expertise and to explore issues, cases and laws that affect our community.

The Filipino American Lawyers of San Diego is committed to ensuring that attorneys of color, particularly Filipino American attorneys, have access to equal opportunities in the legal profession. We aim to develop multicultural solutions, to foster diversification, and to sustain multicultural coalitions in all channels of the legal system.

The Filipino Bar Association of Northern California ("FBANC") is an organization of attorneys, judges, and law students dedicated to serving the Filipino community. FBANC offers various service programs, including regular, free legal clinics, professional development programs for attorneys, and mentorship for law students and young attorneys.

The Filipino Lawyers of Washington fosters the exchange of ideas and information among and between its members, other members of the legal profession, the judiciary, and the community.

The Japanese American Bar Association ("JABA") is the only professional association of Japanese American lawyers in the United States, drawing members from across the country and abroad. For over 40 years, JABA has promoted diversity, inclusion, and

mutual respect in the broader legal community and society as a whole.

The Korean American Bar Association of Chicago ("KABA") is a nonprofit professional organization of attorneys and law school students established in 1993. KABA and its 400+ members are committed to leadership, community, and service.

The Korean American Bar Association for the Washington, D.C. Area ("KABA-DC") is an association of Korean American attorneys in the DC metro area. Since its inception in 2009, KABA-DC has served as a broad-based coalition to promote and improve the common professional and business interests of Korean-American lawyers, legislators- policymakers, judges, law professors, law students, and other law professionals.

The Korean American Bar Association of Northern California is a voice for the Korean-American and broader community on legal and other issues of interest which promote justice and equal opportunity.

The Korean American Bar Association of San Diego serves to advance Korean Americans in the legal profession, and offers legal, educational, political, and charitable services to the Korean American community in San Diego.

The Korean American Bar Association of Southern California is a non-profit organization of pro-bono attorneys and law students working together to provide legal assistance and support to the Southern California community.

The Korean American Bar Association of Washington has a mission to serve the Korean, Korean American, and legal communities as a resource and a proponent of the interests, causes, and issues that are important for these communities.

The Korean American Lawyers Association of Greater New York ("KALAGNY") is a regional association of Korean American and other lawyers in the Greater New York area, including New York, New Jersey, and Connecticut. For over 30 years, KALAGNY has been committed to promoting the administration of justice, diversity, and respect for all, and advancing the interests and opportunities for the attorneys and people of the community that it serves.

The Minnesota Asian Pacific American Bar Association is committed to promoting and supporting the personal and professional development of Asian American and Pacific American lawyers, judges, and law students, serving as an advocate for the Asian Pacific American community in Minnesota, and promoting equal access to justice. Our members continue to work towards elimination of bias and violence against Asian Pacific Americans.

The Missouri-Asian American Bar Association is a St. Louis-based association of Asian-American attorneys, comprised of nearly 100 members.

NAPABA Hawaii Chapter promotes justice, equity, and opportunity for Asian Pacific Americans, and opposes discrimination, including on the basis of race, religion, and national origin.

The National Conference of Vietnamese American Attorneys promotes the education and professional

development of Vietnamese Americans in the legal community; supports research and education on legal issues of significance to the Vietnamese American community; and provides a national network for Vietnamese American attorneys to exchange ideas relating to the legal profession.

National Filipino American Lawyers Association is the national voice for the Filipino-American legal profession. It advocates for justice, civil rights, and equal opportunity for the Filipino-American community. It cultivates high standards of integrity and professionalism among its members and strives for the advancement and success of Filipino-Americans within the profession.

Since 1993, the Orange County Asian American Bar Association has fostered professional development, served as mentors to local law students, promoted diversity in the private and public sectors, volunteered for legal clinics for low income and disadvantaged communities, and supported causes which affect and advance the needs of APAs and the public at-large.

The Oregon Asian Pacific American Bar Association serves as a cohesive voice to express opinions on matters of concern that are important to Asian Pacific American attorneys and the communities we serve.

The Oregon Filipino American Lawyers Association is a professional association of Filipino American judges, lawyers, law students and legal professionals, and supporters. We work together to share and validate our experiences as Filipino American legal professionals and promote equality and

multiculturalism by increasing diversity within the Oregon State Bar and within the broader legal system.

For over 40 years the Pan Asian Lawyers of San Diego have advocated for the advancement of Asian American legal professionals and represent the interests of the Asian American community.

Founded over 30 years ago, the Philippine American Bar Association is the largest local association of Filipino-American lawyers in the United States. Comprised of attorneys, judges, and law students, it was formed to address the legal issues confronting the Filipino-American community and to meet the professional concerns of Filipino-American lawyers in Southern California.

The Sacramento Filipino American Lawyers Association is a nonprofit organization composed of attorneys, judges, law students, and individuals, dedicated to represent and advocate the interests of Filipino American attorneys and the Filipino American community in the Sacramento, California region. It provides networking and mentorship programs that promote growth in the Filipino American legal community.

South Asian Bar Association - Southern California is one of the oldest and largest South Asian bar associations in the country. SABA-SC is dedicated to the advancement and development of South Asian attorneys as well as attorneys interested in issues affecting the South Asian community.

South Asian Bar Association of Chicago is a professional organization serving South Asian professionals and the Greater Chicago community for

the past seventeen years. The organization was founded to advance the professional development and growth of a diverse member community, disseminate relevant information, and foster a culture of service within and beyond the legal community.

The South Asian Bar Association of Northern California was founded by attorneys in the Bay Area to provide an avenue to advance their professional goals, and serve as a voice for the South Asian community.

The South Asian Bar Association of San Diego ("SABA-SD") is a San Diego-based, nonprofit organization open to all South Asian attorneys and law students, as well as others interested in South Asia and law. SABA-SD strives to promote the professional and academic development of its members; support efforts to increase diversity in the legal profession; raise the South Asian-American community's awareness of relevant legal issues affecting their interests; and support public interest associations providing pro bono legal services and other grassroots community organizations serving the South Asian-American community.

South Asian Bar Association of Washington represents the interests of South Asian attorneys in Washington State. Although primarily comprised of attorneys, our organization seeks to also engage with South Asians generally within the larger community.

Southern California Chinese Lawyers Association works to advance the interests of APA lawyers and the community at large in Southern California, and supports initiatives that provide greater access to justice for all persons.

The Taiwanese American Lawyers Association ("TALA") is the national association of Taiwanese American attorneys. Since its inception, TALA has served as the national voice for Taiwanese Americans in the legal profession and has promoted justice, equity, and opportunity for Taiwanese Americans.

The Thai American Bar Association ("TABA") is the first organization to support Thai and Thai-American legal professionals in the United States. TABA was established to reflect the interests and needs of the Thai and Thai-American community in Southern California, while fostering relationships with other legal organizations.

The Asian Pacific American Bar Association of Maryland is a state affiliate of the National Asian Pacific American Bar Association.

The Asian Pacific American Lawyers Association of New Jersey focuses on ensuring greater representation of APA attorneys in various sectors of the legal profession as well as in government and the State's judiciary.

The Greater Orlando Asian American Bar Association is an organization that was founded to represent and advocate the interests of the Asian Pacific American community of the Greater Orlando, Florida area.

The Vietnamese American Bar Association of Northern California was founded to provide Vietnamese American attorneys with, among other things, a vehicle for the unified expression of opinions and positions on matters of concern to all Vietnamese American attorneys.

The Vietnamese American Bar Association of Southern California ("VABASC") is an association of attorneys, judges, law professors, and law students, representing the interests of Vietnamese American legal professionals in the Southern California area. VABASC is an association composed mainly of immigrants and the first-generation children of immigrants, who have benefitted from anti-discrimination and open immigration legislation.