

No. 17-35105

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF WASHINGTON, et al.,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, et al.,
Defendants-Appellants.

On Appeal from an Order of the United States
District Court for the Western District of Washington

United States District Judge James L. Robart
Case No. 2:17-CV-00141-JLR

**MOTION FOR LEAVE TO FILE BRIEF OF
THE JEWISH FEDERATION OF GREATER SEATTLE
AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES**

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**MOTION FOR LEAVE TO FILE BRIEF OF
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AS *AMICI CURIAE* IN SUPPORT OF APPELLEES**

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure and Circuit Rule 29-3, The Jewish Federation of Greater Seattle respectfully moves for leave to file a 10-page *amicus curiae* brief in support of Appellees’ Opposition to Appellants’ Emergency Motion for Stay Pending Appeal. *Amicus* states as follows:

1. The Jewish Federation of Greater Seattle was founded in 1928 to serve the Jewish community, locally and around the world. Over its nearly nine decades of service, helping immigrants and refugees fleeing overseas persecution has been a central component of the Federation’s mission. In the 1940s, the Federation worked to rescue and resettle Holocaust survivors; in the 1970s and 1980s, the community welcomed Russian emigres fleeing Soviet persecution and in the 1990s and 2000s supported Ethiopian immigrants escaping starvation and civil war on the Horn of Africa.

2. The Federation’s work is affected by the Executive Order issued on January 27, 2017, entitled “Protecting the Nation from Foreign Terrorist Entry into the United States” (the “Order”).

3. The Order represents a significant departure from the principles of compassion, fairness, equity and religious neutrality that have governed the United States immigration policy for more than fifty years and inflicts significant harm on

the Seattle Jewish Community as a result. The Order makes it more difficult for innocent victims of overseas oppression to seek refuge in the United States, discriminates against asylum seekers who do not subscribe to the Christian faith, and is not rationally related to the governmental objective of protecting Americans from terror.

4. The proposed *amicus* brief, attached to this motion as Exhibit A, explains how the Order will undermine the mission and goals of the Seattle Jewish Federation and is contrary to law.

5. Counsel for the State of Washington has consented to the filing of an *amicus* brief.

6. Out of an abundance of caution, *amici* file this motion to request the Court's leave to file a 10-page brief.

7. Neither the Federal Rules of Appellate Procedure nor this Court's Rules clearly authorize the filing of an *amicus curiae* brief in connection with a motion for a stay, even when the parties have consented to its filing.

8. In addition, Fed. R. App. P. 29(a)(5) states that, except with the Court's permission, an *amicus* brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. Circuit Rule 27-1(1)(d) does not speak in terms of "briefs," instead stating that, except with the Court's permission, a motion or response to a motion may not exceed 20 pages.

Because it is unclear whether Circuit Rule 27-1 limits *amici* to 10 pages, and because *amici* believe that a 10-page brief is warranted in light of the importance and novelty of the issues presented, *amici* request the Court's leave to file a 10-page brief.

CONCLUSION

The Jewish Federation of Greater Seattle respectfully requests that the Court grant its motion for leave to file a 10-page *amicus curiae* brief and accept for filing the *amicus curiae* brief attached as Exhibit A.

Dated: February 6, 2017

Respectfully submitted,

/s/ Matthew P. Bergman

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel certifies that this motion:

(i) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Times New Roman font in a size equivalent to 14 points or larger and,

(ii) complies with the length requirement of Rule 27(d)(2) because it is 506 words.

Dated: February 6, 2017

Respectfully submitted,

/s/ Matthew P. Bergman
Matthew P. Bergman, WSBA #20894
BERGMAN DRAPER LADENBURG

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the 6th day of February 2017, I electronically filed Motion for Leave to File Brief of The Jewish Federation of Greater Seattle as *Amicus Curiae* In Support of Appellees with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: February 6, 2017

Respectfully submitted,

/s/ Matthew P. Bergman
Matthew P. Bergman, WSBA #20894
BERGMAN DRAPER LADENBURG

Exhibit A

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CORPORATE DISCLOSURE STATEMENT

The Jewish Federation of Greater Seattle is a nonprofit corporation. It has no parent corporations, and no publicly held corporation owns any portion of it.

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INTEREST OF AMICI CURIAE

The Jewish Federation of Greater Seattle was founded in 1928 to serve the Jewish community, locally and around the world. Over nearly nine decades of service, helping refugees fleeing overseas persecution has been an important concern of the Federation. As the community representative of a historically persecuted religious minority, the Jewish Federation stands vigilantly opposed to all forms of racial, ethnic and religious discrimination. Because the Executive Order under challenge bars innocent refugees from seeking refuge in the United States and discriminates against Muslims based primarily on their faith, and because constitutional injuries will accrue immediately if the temporary restraining order is stayed, the Federation has a strong interest in ensuring that the TRO remains in place.

ARGUMENT

A. The Executive Order Barring Innocent Refugees is Not Rationally Related to the Governmental Objective of Curtailing Terrorism.

The story of the Jewish community -- like the collective story of the United States -- is one of refugees and immigrants, children and families, seeking safety, opportunity, and a better life in a country founded on the promise of opportunity for all. Over thousands of years, from Israel to Babylon to Egypt to Spain to Western and Eastern Europe, Jews have been torn from their homes through

violence. This experience has imbued the Jewish Community with a commitment to fulfill the biblical dictum: “*You shall not oppress a foreigner, since you yourselves know the feelings of a foreigner, for you also were foreigners in the land of Egypt.*” Exodus 23:9.

Washington State has always welcomed strangers and those seeking a new start. Washington’s early leaders were Jewish immigrants -- including a territorial governor and Seattle mayor. In the 20th Century survivors of regional conflict and world wars found a home in our region. They brought hopes for a safer life. They embraced with ingenuity and determination the opportunities unique to the United States.

During the Holocaust, the United States turned down thousands of Jewish refugees seeking sanctuary because they did not look like other Americans, or speak the same language, or practice the same religion. In one of the most infamous cases, in 1939 President Roosevelt turned away the transatlantic liner *St. Louis* laden with 950 German refugees fleeing Nazi persecution. The ship was sailing so close to Florida that the passengers aboard could see the Miami lights. Nevertheless, with public opinion against taking in refugees — fueled by claims that there were Nazi spies hiding among them or that they were a “menace to America,” - the president shut the doors. With the United States unwilling to let the ship dock and refusing to take in those aboard, the *St. Louis* turned back to

Europe. Almost a quarter of the passengers aboard were slaughtered in the Holocaust.

Jewish Family Service, on whose behalf, the Jewish Federation advocates, is one of five refugee resettlement agencies in Washington. Each year, Jewish Family Service resettles 300 refugees across the Puget Sound and helps almost 1,000 refugees and immigrants to make a life here - with job training, language skills, mentoring and support. These are children and families fleeing persecution and violence. Jewish Family Services has nearly 60 refugees waiting across the world, who have already passed the rigorous screening process, airplane tickets in hand and scheduled to travel within the next four weeks. This Executive Order will immediately cancel their travel. Many clients are awaiting reunification with family members who are still stuck overseas. Reinstatement of the Executive Order will prevent their families from joining them in the U.S., leaving them in vulnerable situations.

With more than 65 million people forcibly displaced from their homes, today the world faces the worst refugee crisis since World War II. The refugee screening process is the strictest, most intense of any process for persons trying to enter this country. The Administration has failed to demonstrate how restricting refugees from Syria, Iraq, Iran, Somalia, Yemen, Libya, and Sudan will make America safer. Not a single individual from one of the affected countries has been

involved in a terrorist attack on American soil since 9/11. While the Executive Branch bears primary responsibility for protecting the homeland from terrorist attack, wholesale exclusion of well-vetted refugees bears no rational relationship to that laudatory objective.

B. The Executive Order Resurrects Discredited Constitutional Arguments.

The Administration castigates the district court for “second-guessing a formal national-security judgment made by the President himself pursuant to broad grants of statutory authority.” Reply Brief at 8. Appellant thus urges this Court to withhold Constitutional and legal scrutiny because the Executive Order was promulgated under the President’s plenary authority over immigration with the ostensible goal of protecting the homeland from terrorist attack. In advancing this argument, the Administration resurrects the same legal rationale that was used in *Hirabayashi v. United States*, 320 U.S. 81, 63 S. Ct. 1375 (1943), and *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193, 204–05 (1944), to uphold the forced internment of Japanese Americans during World War II.

On February 19, 1942, President Roosevelt signed Executive Order No. 9066 authorizing the Secretary of War to prescribe military areas from which any or all persons, citizens as well as aliens, might be excluded. Exec. Order No. 9066, 3 C.F.R. 1092 (1938–1943 Comp.). Based upon the authority of the Executive

Order, General DeWitt began issuing orders requiring certain persons to obey curfew restrictions and report at designated times and places for evacuation from military areas. *Hirabayashi v. United States*, 828 F.2d 591, 595 (9th Cir. 1987). Pursuant to this order, more than 110,000 Japanese Americans, who mostly lived on the West Coast, were forcibly relocated into internments camps for the duration of the war.

Gordon Hirabayashi was an American citizen of Japanese ancestry born in Seattle, Washington. *Id.* at 591-92. In 1942, he refused to honor the curfew or to report to the control station and was criminally convicted in the United States District Court for the Western District of Washington. He appealed to the United States Supreme Court on the grounds that the military orders were based upon racial prejudice and violated the protections the Constitution affords to all citizens. *Id.* As in this case, the Justice Department justified the exclusion and curfew orders upon what it said was a reasonable exercise of national security judgment by the Executive. *Id.* at 956. The Government argued that because of cultural characteristics of the Japanese Americans, including religion, it was likely that some, though not all, American citizens of Japanese ancestry were disloyal and that because of the military exigencies it could not wait to segregate the loyal from the disloyal. *Id.* Like Appellants in this case, the government's brief argued that national classifications were constitutionally permissible when deemed by the

Executive as necessary for national security.

The classification was not based upon invidious race discrimination. Rather, it was founded upon the fact that the group as a whole contained an unknown number of persons who could not readily be singled out and who were a threat to the security of the nation; and in order to impose effective restraints upon them it was necessary not only to deal with the entire group, but to deal with it at once.

Id.

As urged upon this Court by Appellants, the Supreme Court deferred to the Executive's Constitutional authority of national security and declined to overturn the curfew that Hirabayashi was convicted of violating. While recognizing that racial and ethnic classifications were constitutionally suspect, the Supreme Court held that because "the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it." *Hirabayashi*, 320 U.S. at 93.

The following year in *The Supreme Court* displayed similar deference to the Executive branch in upholding the forced relocation and internment of 110,000 Japanese Americans.

Exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military

authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground.

Korematsu, 323 U.S. at 218–19. However, in a stirring dissent that has animated jurists and scholars for 60 years, Justice Jackson upbraided the Court for abdicating its Constitutional responsibility to administrative expediency.

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution . . . the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution.

Id. at 245–46 (Jackson, J. dissenting).

This Court recognized that “[t]he *Hirabayashi* and *Korematsu* decisions have never occupied an honored place in our history.” *Hirabayashi*, 828 F.2d at 593. In the six decades since those opinions were rendered, the legal rationale that justified the Japanese internments has been relegated to the dustbin of judicial disrepute -- together with arguments invoked to support Jim Crow laws and gender

discrimination. Nevertheless, the arguments raised by Appellants to support the Executive Order struck down by the district court in this case are hauntingly familiar to the arguments advanced (and accepted) in *Hirabayashi* and *Korematsu*. This Court should reject Appellants' effort to resurrect arguments that have been long surpassed by "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590 (1958).

Over a hundred years ago, Santayana observed that "[t]hose who cannot remember the past are condemned to repeat it." G. Santayana *THE LIFE OF REASON* (1905). Seventy-five years ago, the United States turned away German refugees seeking refuge from Nazi oppression, despite their posing no threat to our country. Sixty years ago, Justice Jackson warned of the enduring consequences to Constitutional liberties where courts abdicate their authority in times of national emergency. The Executive Order before this Court offends long-enshrined Constitutional principles of equal protection and religious neutrality and undercuts America's example as a beacon of hope for persecuted refugees yearning to breathe free. This Court should heed the lessons from the past and uphold the district court at this historic juncture in our nation's history.

CONCLUSION

The Court should deny Appellants' motion.

Dated: February 6, 2017

Respectfully submitted,

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