No. 23-334

IN THE
SUPREME COURT OF THE UNITED STATES

DEPARTMENT OF STATE, ET AL.,

Petitioners,

v.

SANDRA MUÑOZ, ET AL.,

Respondents.

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

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BRIEF OF FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, ASIAN AMERICANS ADVANCING JUSTICE | AAJC, ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS SANDRA MUÑOZ, ET AL.

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INTERESTS OF AMICI CURIAE[1]

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center") is based at the Seattle University School of Law. Inspired by the legacy of Fred Korematsu, the Korematsu Center works to advance justice for all through research, advocacy, and education. The Korematsu Center has a special interest in addressing government action targeting classes of persons based on race, nationality, or religion and in seeking to ensure that courts understand the historical—and, at times, unjust—underpinnings of arguments asserted to support the exercise of such executive power. The Korematsu Center does not, here or otherwise, represent the official views of Seattle University.

Asian Americans Advancing Justice | AAJC ("Advancing Justice-AAJC") is a nonprofit, nonpartisan organization that seeks to create an equitable society for all. Advancing Justice-AAJC works to further civil and human rights and empower Asian American communities through organization, education, advocacy, and litigation. Advancing Justice-AAJC is a leading expert on issues of importance to the Asian American community, including immigrant rights, anti-racial profiling, and national security policies.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part and no person other than *amici curiae* or their counsel made any monetary contribution to its preparation or submission.

Both the Korematsu Center and Advancing Justice-AAJC have a vested interest in ensuring that decisions of this Court do not rely on doctrines grounded in a history of racial animus against Asian immigrants. Listed in the Appendix, the additional amici are community organizations that share this interest.

SUMMARY OF THE ARGUMENT

The doctrine of consular nonreviewability was born broken. A manifestation of prejudice, it emerged from a line of nineteenth century decisions permitting the exclusion of Asian, and particularly Chinese, immigrants based on the political branches' plenary power to regulate immigration. These decisions not only upheld the discriminatory laws at issue but also relied on pernicious racist stereotypes to do so. Contrary to Petitioners' urging,[2] this Court should not reach beyond the questions presented to decide this case on the grounds of consular nonreviewability. Indeed, a ruling for Petitioners on these grounds risks reversing course on more than a century of doctrinal development distancing this Court, and this Nation, from an ugly historical epoch.

In *Ping v. United States*, 130 U.S. 581 (1889), also known as *The Chinese Exclusion Case*, the Court accepted legislators' fears of "vast hordes" of non-white immigrants "who will not assimilate with us" and upheld a statute barring the return of Chinese laborers who had left the United States prior to the statute's passage. *Ping*, 130 U.S. at 606. The line of cases that followed further entrenched this anti-Asian

[2] Pet'rs' Br. at 16.

discrimination in both rhetoric and doctrine. *See Ekiu v. United States*, 142 U.S. 651, 661 (1892) (upholding the exclusion of a Japanese woman baselessly deemed "unable to take care of [her]self" under the Immigration Act of 1891); *Ting v. United States*, 149 U.S. 698, 729–730 (1893) (upholding requirement that Chinese resident aliens offer "at least one credible white witness" in order to remain in the country); *United States v. Toy*, 198 U.S. 253 (1905) (upholding deportation and denying judicial review to a natural-born citizen with Chinese parentage). The distorting influence of prejudice produced a moment of constitutional aberration where the judiciary's role in applying the Constitution's protection of individual rights and limits on government power was set aside in favor of expansive federal authority seen as necessary to enable racial exclusion.

Increasingly, immigration law has moved away from the conception of unchecked plenary power articulated in *The Chinese Exclusion Case*. *See Washington v. Trump*, 847 F.3d 1151, 1162–63 (9th Cir. 2017) (collecting cases demonstrating reviewability of federal government action in immigration and national security matters). Constitutional limits to plenary authority over immigration recognize necessary constraints on a power that was abused to achieve racist ends. In keeping with this return to the values of equality and individual liberty that represent the best of America's political and legal history, this Court should acknowledge that plenary power is not without bounds. Anything less would amount to constitutional backsliding, threatening a return to a history best left in the past.

Understood in this full historical context, the doctrine of consular nonreviewability is not, as Petitioners wrongly suggest, "longstanding."[3] It is old, but it only stood upright for a brief, shameful period, since which time it has at least wobbled and arguably tumbled.

To stand consular nonreviewability back up again would do more than symbolic damage—it would permit the remnants of discrimination to survive in the name of a consular officer's discretion, harming thousands of vulnerable Asian and other immigrant communities by separating families. Accordingly, this Court should hold in favor of Respondents.

ARGUMENT

I. The Doctrine of Consular Nonreviewability is a Constitutional Aberration Deeply Rooted in Historical Anti-Asian Prejudice.

The notion of insulating consular officers' visa denials from judicial review rests on a foundation of anti-Asian racism and xenophobia. The government observes that "[t]he doctrine of consular nonreviewability has deep roots in the law."[4] Indeed, and those roots are rotten.

To understand the doctrine of consular nonreviewability is to understand the rise of the broad conception of plenary powers from which it grew. Placed in historical context, the plenary power doctrine can be traced

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[3] Pet'rs' Br. at 17–18, 24.

[4] *Id*. at 16.

back to the nineteenth century, when the promises of the Gold Rush and the transcontinental railroad brought thousands of Chinese immigrants to the West Coast.[5] As the number of Chinese immigrants grew, so too did the region's xenophobia and anti-Chinese racism.[6] The backlash against these immigrants was virulent and, often, state-sponsored.[7]

In the 1850s, the first significant wave of Chinese immigrants—once considered a welcome source of "cheap labor"—spurred racial violence and animus.[8] Anti-Chinese rhetoric ascribed to them "qualities of inhumanity, paradoxical mindlessness, savagery, and

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[5] Beth Lew-Williams, THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA (2018)*; see also* Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 Asian L.J. 13, 14 (2003); Kevin R. Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 Ind. L.J. 1455, 1460–62 (2022).

[6] *See* Janel Thamkul, *The Plenary Power-Shaped Hole in the Core Constitutional Law Curriculum: Exclusion, Unequal Protection, and American National Identity*, 96 Calif. L. Rev 553, 560–62 (2008).

[7] *Id*. at 561.

[8] Lew-Williams, *supra* note 5, at 17–19; *see also* Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 Wake Forest L. Rev. 575, 581–82 (2019).

brutality."[9] Press and politicians alike exploited these venomous stereotypes.[10]

Discriminatory legislation followed, codifying prejudice as federal immigration policy.[11] These laws—which included the Page Act (Immigration Act of 1875), the Chinese Exclusion Act of 1882, and the Geary Act of 1892—severely limited immigration into the United States, even by previous, lawful Chinese immigrants.[12]

In enacting these new laws, Congress made its racial animus explicit. Senators who supported the Chinese Exclusion Act of 1882 expressed, among other things, that "the Chinese people were unfit to be naturalized," "the social characteristics of the Chinese were 'revolting,'" "Chinese immigrants were 'like parasites,'" and that the United States was "a country of

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[9] Keith Aoki, *"Foreign-ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 UCLA Asian Pac. Am. L.J. 1, 32 (1996).

[10] *Id.* at 31–32.

[11] Johnson, *supra* note 5, at 1462.

[12] *See*, *e.g.*, Mae Ngai, THE CHINESE QUESTION: THE GOLD RUSHES AND GLOBAL POLITICS (2021); Gordon H. Chang, GHOSTS OF GOLD MOUNTAIN: THE EPIC STORY OF THE CHINESE WHO BUILT THE TRANSCONTINENTAL RAILROAD (2019); Erika Lee, AMERICA FOR AMERICANS: A HISTORY OF XENOPHOBIA IN THE UNITED STATES (2019).

white men, a country to be governed by white men."[13] Unsurprisingly then, rather than temper public hostility, the enactment of this legislation only served to further entrench discrimination and violence against Chinese immigrants.[14]

By the fall of 1888, when Chae Chan Ping boarded the steamship *Belgic* and embarked on his return trip from Hong Kong to San Francisco, anti-Asian hostility was at a fever pitch.[15] On October 1, 1888, while Mr. Ping cruised across the Pacific Ocean, President Grover Cleveland signed into law the Scott Act of 1888, which read:[16]

> [I]t shall be unlawful for any Chinese laborer who shall at any time heretofore have been . . . a resident within the United States, and who shall have departed, or shall depart, therefrom, and shall not

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[13] S. Res. 201, 112th Cong (2011); *see also* Louis Henkin, *The Constitution and United States Sovereignty: A Century of "Chinese Exclusion" and Its Progeny*, 100 Harv. L. Rev. 853, 855–56 (1987).

[14] *See generally* Bess Beaty, *The Loo Chang Case in Waynesboro: A Case Study of Sinephobia in Georgia,* 67 Ga. Hist. Q. 35 (1983).

[15] Robert S. Chang, *Whitewashing Precedent: From the* Chinese Exclusion Case *to* Korematsu *to the Muslim Travel Ban Cases*, 68 Case W. Res. Univ. L. Rev. 1183, 1186 (2018).

[16] Scott Act of 1888 (25 Stat. 504); Chang, *supra* note 15, at 1186–87.

> have returned before the passage of this act, to return to or remain the United States.

When the *Belgic* finally reached landfall, Mr. Ping, who had lived and worked in the United States for twelve years prior to his departure, was denied reentry.[17] Eventually, he learned the "certificate of return" that had guaranteed his return to the United States at the time he left Hong Kong had been nullified while he was at sea. Held aboard the *Belgic*, Mr. Ping sued for federal habeas relief.[18]

Far from rebuking the Scott Act's clear racial animus, the Court found that "[t]he differences of race added greatly to the difficulties of the situation." *Ping*, 130 U.S. at 595. The Court described Chinese laborers, like Mr. Ping, as "content with the simplest fare, such as would not suffice for our laborers and artisans," adding that these "strangers in the land, residing apart by themselves," would be unable "to assimilate with our people." *Id*.

Crediting residents' fears of an "Oriental invasion," the Court denied Mr. Ping's petition. *Id*. The Court held that determining whether "the presence of foreigners of a different race in this country, who will not assimilate with us, [is] dangerous to its peace and security" falls within the government's power of

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[17] Chang, *supra* note 15, at 1186.

[18] *Id*. at 1187.

protection and security. *Id.* at 606. The government, it added, "is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination is conclusive upon the judiciary." *Id.*

History lost track of Mr. Ping after he was sent back to China, but the plenary power doctrine flourished in his absence.[19] Nurtured by similar racist and xenophobic attitudes, the decisions that followed *The Chinese Exclusion Case* upheld the government's unbounded power to exclude immigrants, ignoring American traditions of due process and equal protection in the name of ethnic and racial self-preservation.[20] In short order, the plenary power over immigration ossified, creating "a deformity in our constitutional jurisprudence that has produced, and continues to produce, much mischief."[21] That doctrine is impossible to separate from the Court's racist assumptions about Asian immigrants.

The Court drew from this flawed line of jurisprudence when it decided *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (extending the holdings of *Ekiu,* 142 U.S. 651 and *Ting***,** 149 U.S. 698).

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[19] Garrett Epps, *The Ghost of Chae Chan Ping* (Jan. 20, 2018), https://www.theatlantic.com/politics/archive/2018/01/ghost-haunting-immigration; *see also* Chang, *supra* note 15, at 1187–88.

[20] *See*, *e.g.*, *Ting*, 149 U.S. at 730 (noting Congress's belief that testimony from Chinese witnesses could not be credited because of "the loose notions entertained by the witnesses of the obligation of an oath" (quoting *Ping*, 130 U.S. at 598)).

[21] *See also* Chang, *supra* note 15, at 1187–88.

Amid the anti-immigrant sentiment accompanying the influx of Eastern Europeans post-World War II,[22] the Court upheld the exclusion of the German wife of a United States citizen because authorities had deemed her admission "prejudicial to the interests of the United States." *Knauff*, 338 U.S. at 543.

As in the Asian exclusion cases, the Court disclaimed any legal responsibility to ensure that executive decision-making is free from the same racial prejudices barred in other contexts, writing: "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Id.* at 543 (internal citations omitted). Despite acknowledging that "courts have been unable to point to any evidence ... to support an exemption from the usual rules that govern judicial review of administrative decisions," the Court grounded its decision in a lineage of anti-Asian discrimination, with the effect once again of providing cover for a prejudice of the times.[23]

The Court's decision in *Kleindienst v. Mandel*, 408 U.S. 753 (1972) built upon this expansion of government discretion, and it too is stained by the racist decisions that preceded it. *Mandel*, 408 U.S. at 769–70. Citing directly to *The Chinese Exclusion Case* and its successor, *Ting*, the Court declined to examine the "facially legitimate and bona fide" decision to deny a visa

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[22] S*ee* Saito, *supra* note 5, at 427.

[23] *See* Donald S. Dobkin, *Challenging the Doctrine of Consular Nonreviewability in Immigration Cases*, 24 Geo. Immigr. L.J. 113, 117 (2010); *see also infra* note 32.

waiver to a Belgian journalist. *Id*. at 765. The test articulated in *Mandel*, and later refined in *Kerry v. Din*, 576 U.S. 86 (2015), now governs Respondents' due process claim.

While the government avoids citing *The Chinese Exclusion Case* in its merits brief, two of the cases on which it relies are of the same ignoble vintage: *Ekiu*, 142 U.S. 651 and *Wong Wing v. United States*, 163 U.S. 228 (1896).[24] Both cases involved the application of laws, born of racial animus, targeting Asian immigrants for exclusion. Try though they might, Petitioners cannot scrub away that "tarnished pedigree." *Samirah v. Holder*, 627 F.3d 652, 662 (7th Cir. 2010).

Although Congress, in 2011, denounced these laws and the racist hostility animating them,[25] the anti-Asian exclusion laws were survived by their tainted doctrinal legacy. Inextricably linked to the expulsion of Chinese laborers when "[t]he accent at the time was on race," *Mandel*, 408 U.S. at 770 (Douglas, J., dissenting), the broad conception of plenary power upon which Petitioners seek to rely only exists because the Court and this country historically sanctioned the exclusion of Asian immigrants. This Court should decline the government's invitation to extend this notion to

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[24] Pet'rs' Br. at 17–18, 24.

[25] S. Res. 201, 112th Cong (2011); *see* Catherine E. Shoichet, *On This Day 141 Years Ago, A New Law Began Reshaping America. More Than A Century Later, Congress Apologized For It*, CNN (May 6, 2023) https://www.cnn.com/2023/05/06/us/chinese-exclusion-act-1882-cec/index.html.

include absolute nonreviewability of consular decision-making.

II. Acknowledging Constitutional Limits on Consular Decision-making Aligns with Broader Doctrinal Trends.

Over the past several decades, the plenary power over immigration has been placed on a footing more aligned with America's best history and traditions of equal protection, limited government power, and individual civil liberties. Shying away from conceptions of an unfettered plenary power, late 20th and 21st-century decisions acknowledge certain constraints on federal authority over immigration, diminishing its potential exploitation as a vehicle for racial or religious prejudice. *See, e.g., Reno v. Flores*, 507 U.S. 292, 306 (1993) (holding that INS regulations must "rationally advanc[e] some legitimate governmental purpose"); *London v. Plasencia*, 459 U.S. 21, 33 (1982) (stating that a returning resident alien must be afforded due process in an exclusion proceeding); *Zadvydas v. Davis*, 33 U.S. 678, 695 (2001) (noting that the power over immigration "is subject to important constitutional limitations"). Grounded as it is in the broader notion of plenary power over immigration, the doctrine of consular nonreviewability should follow this trend.[26]

Other courts and certain justices of this Court have already acknowledged that "the plenary-power idea"

[26] *See* Desiree Schmitt, *The Doctrine of Consular Nonreviewability in the Travel Ban Cases:* Kerry v. Din *Revisited*, 33 Geo. Immigr. L.J. 55, 58 (2018).

should be revisited because it "baked in the prejudices of the day." *Haaland v. Brackeen*, 599 U.S. 255, 327 (2023) (referring to context of American Indians, where expansive plenary power was likewise used to empower executive actors acting on the basis of racial prejudice) (Gorsuch, J., concurring); *see also Brackeen v. Haaland*, 994 F.3d 249, 290 n.10 (5th Cir. 2021) (noting that "[t]he foundational cases recognizing plenary federal authority over immigration and Indian affairs were decided just three years apart and rely on similar reasoning), overruled on other grounds *Haaland v. Brackeen*, 599 U.S. 255 (2023). Consistent with this skepticism, this Court has recognized that plenary power, like all federal power, "must derive from the Constitution, not the atmosphere." *Haaland,* 599 U.S. at 320 (Gorsuch, J., concurring) (quoting majority opinion). The doctrine of consular nonreviewability is no exception.

A rejection of consular nonreviewability would follow from, and mark a welcome addition to, this Court's admirable overall retreat from decades of shameful, anti-Asian rulings. During those earlier decades, the Court, for the most part,[27] worked hand-in-hand with the political branches in advancing anti-Asian racism. This complicity is evident not only in the Asian exclusion cases—*Ping*, *Ekiu*, *Ting*—cited *infra,* Part I, but also in subsequent cases that barred Asian immigrants from naturalization—*Ozawa v. United States*, 260 U.S. 173 (1922); *United States v. Thind*, 261 U.S.

[27] *But see Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that the 14th Amendment equal protection clause protects all persons regardless of alienation).

204 (1923)—deemed Asians ineligible to own or lease land—*Porterfield v. Webb*, 263 U.S. 225 (1923); *Terrace v. Thompson*, 263 U.S. 197 (1923)—forced Asian schoolchildren to attend segregated schools—*Gong Lum v. Rice*, 275 U.S. 78 (1927)—and upheld the internment of Japanese Americans—*Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

After World War II, and the disgraceful cases it produced, the Court began gradually chipping away at the decades of anti-Asian discrimination it had sanctioned, revealing incremental progress brick by brick. *See Oyama v. California*, 332 U.S. 633, 662 (1948) (taking a half-step by upholding right of citizen child of Japanese alien to own land, but not addressing father's right); *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948) (holding California's blanket restriction denying commercial fishing licenses to aliens ineligible for citizenship to be unconstitutional); *Mow Sun Wong v. United States*, 426 U.S. 88 (1976) (finding federal government's near-blanket exclusion of non-citizens from federal civil service positions to be unconstitutional); *Lau v. Nichols*, 414 U.S. 563 (1974) (finding school district's failure to accommodate English language learners violated Title VI).

The evolution, and even the abandonment, of certain legal doctrines is sometimes necessary to reconcile conflicting aspects of our country's history and traditions and to ensure that core values of equality and individual liberty prevail. If it were true, as argued by John W. Davis in defense of segregation, that "somewhere, sometime to every principle comes a moment of

repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance,"[28] then "separate but equal" would still divide public schools, restrooms, and train cars.

The doctrine of consular nonreviewability is one such blemish. Drawing from the lessons of history, this Court should recognize the pitfalls of this ill-gotten doctrine and continue on a corrected course by acknowledging limits on consular decision-making necessary to enable judicial review in this matter.

III. Eroding Judicial Review of Consular Decision-making Allows Racism and Prejudice to Infect the Visa Approval Process.

As the history of the doctrine of consular nonreviewability makes clear, unreviewable plenary power is a vehicle for allowing prejudice to infect government decision-making. Although the overt racism of the 19th century has retreated from official declarations of policy, empirical evidence[29] suggests that, even to this day, vesting consular officers with "extremely broad administrative discretion, as well as immunity from

[28] Derrick Bell, *Brown v. Board of Education: Forty-Five Years After the Fact*, Ohio N.U. L. Rev. 171, 172 (2000).

[29] *See* Charles Kamasaki, *US immigration policy: A classic, unappreciated example of structural racism*, Brookings Institute (Mar 26, 2021).

judicial review" allows "racial discrepancies and bias" to seep into the visa approval process.[30]

In the absence of judicial review, it is difficult to determine the extent of racial bias in the visa approval process with empirical precision; that is by design.[31] But unlawful discrimination—perpetrated not only by individual consular officers but also, on occasion, entire consulates—clearly has a continued corrosive effect.

In *Olsen v. Albright*, 990 F. Supp. 31 (D.D.C. 1997), for example, an ex-consular officer from Brazil sued the State Department for wrongful termination after being fired for refusing to comply with the consulate's racist criteria for visa approvals. Relying on stereotypes about racialized minorities, that guidance stated that certain applicants, including Korean and Chinese applicants ("[m]ajor fraud/hard to check") and Filipino and Nigerian applicants ("high fraud rates") should be subject to more rigorous inspection, than other applicants, such as British and Japanese applicants ("rarely overstay"). *Albright*, 990 F. Supp. at 34. While

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[30] Charles Ogletree, *America's Schizophrenic Immigration Policy: Race, Class, and Reason*, 41 B.C. L. Rev. 755, 762 (2000); *see also* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. Ann. Surv. Am. L. 295 (2002).

[31] *See* Mónica Lisete Hernández Santiago, *Discretion or Discrimination? Racial Profiling at Ports of Entry of the United States of America*, Univ. of Puerto Rico Law School (Mar 31, 2021), https://derecho.uprrp.edu/inrev/2021/03/31/discretion-or-discrimination-racial-profiling-at-ports-of-entry-of-the-unites-stated-of-america/.

the Court acknowledged "the difficulty of the Consulate's task," it stressed that "[t]he principle that government must not discriminate against particular individuals because of the color of their skin or the place of their birth means that the use of generalizations based on these factors is unfair and unjustified." *Id*. at 39.

At the very least, insulating consular decision-making from scrutiny leaves the door permanently cracked open for unconstitutional discrimination. This deficiency is particularly troubling because, as history demonstrates, anti-immigrant backlash tends to spike upon the invocation of national security concerns, whether pretextual or actual.[32] While this country—and its government—has made great strides since the *Chinese Exclusion Case*,[33] racial progress is neither perfect nor linear. For this reason, it is essential that basic constitutional guarantees, like due process, provide a backstop against future retrenchment.

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[32] *Cf*. *Ping*, 130 U.S. 581 (finding against Chinese petitioner amid rising hostility to Chinese immigrants); *Knauff*, 338 U.S. 537 (finding against German petitioner during the flush of Cold War anti-immigrant paranoia). In Knauff's case, the Board of Immigration Appeals later found "no substantial evidence that Knauff gave secret information to the Czechoslovakian authorities," and "[o]nce the government was required to justify its exclusion decision with substantial and reliable evidence, in an open proceeding, Knauff gained admission into the United States." Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, Penn. Law Rev. 143, 963 (1995).

[33] *See* S. Res. 201, 112th Cong (2011); Shoichet, *supra* note 25.

Without meaningful judicial review, executive policies, like directing the "extreme vetting" of Muslim visa applicants, can effectively exclude or reduce immigrants from certain groups at rates that at least call into question whether prejudice is in play as much as national security.[34] Under such a policy,[35] visa approvals from the world's 48 majority-Muslim countries plummeted 30 percent between 2016 and 2018, falling at far greater rates in majority-Muslim countries than in other countries subjected to "extreme vetting" for allegedly similar national security reasons.[36] In the absence of clear federal guidance, consular officers granted only a "miniscule percentage" of applications for discretionary waiver compared to pre-Proclamation numbers, giving the impression that the government was "not applying the Proclamation as written" but instead was acting out of anti-Muslim animus. *Trump v. Hawaii*, 585 U.S. 667, 721–25 (2018) (Breyer, J., dissenting).

As has consistently been the case with unfettered plenary power, discrimination can be cloaked beneath

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[34] *See* David Bier, *Trump Might Not Have Gotten His 'Muslim Ban.' But He Sure Got His 'Extreme Vetting*,' Washington Post (Dec. 10 2018), https://www.washingtonpost.com/opinions/2018/12/10/trump-might-not-have-gotten-his-muslim-ban-he-sure-got-his-extreme-vetting.

[35] Proclamation No. 9645, 82 F.R. 186 (Sept. 27, 2017).

[36] David J. Bier, *Trump Cut Muslim Refugees 91%, Immigrants 30%, Visitors by 18%*, Cato Institute (Dec. 7, 2018), https://www.cato.org/blog/trump-cut-muslim-refugees-91-immigrants-30-visitors-18.

blanket discretion, even in the present day.[37] While the ignoble history of—and modern retreat from—the doctrine of consular nonreviewability is sufficient for this Court to demur from its extension here, the risk of empowering bias in contemporary immigration decision-making should also inform the Court's analysis.

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[37] Saito, *supra* note 5, at 13.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Dated: New York, NY
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Respectfully submitted,

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APPENDIX

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AMICI CURIAE 1a

APPENDIX A – LIST OF ADDITIONAL *AMICI CURIAE*

AAPI New Jersey, a 501(c)3 nonprofit representing Asian Americans and Pacific Islanders and families in New Jersey.

AAPI Youth Rising, a national student-led organization advocating for civic engagement against hate, and diversity in curriculums.

Arizona Asian American Native Hawaiian Pacific Islander for Equity, a state-wide organization striving for equity and justice for the Asian American Native Hawaiian and Pacific Islander community.

Asian Americans United, a Philadelphia organization for people of Asian ancestry to build community and challenge oppression.

Asian Counseling and Referral Service, a nationally recognized nonprofit organization working for social justice and offering a broad array of behavioral health programs, human services and civic engagement activities for Asian Americans, Pacific Islanders and other communities in the Pacific Northwest.

Asian Law Alliance, a non-profit organization providing equal access to the justice system for Asian Pacific Islander and low-income populations in the Silicon Valley.

Asian and Pacific Islander American Vote Michigan, a nonpartisan nonprofit committed to justice and equity for the Asian American community.

Chinese for Affirmative Action, a San Fransisco based organization advocating for systemic change that protects immigrant rights, promotes language diversity, and remedies racial and social injustice.

Dear Asian Youth, a youth-led global organization that promotes intersectional activism, solidarity with other marginalized communities, and equality and equity—as well as working to present accurate and holistic representation of Asian communities.

Japanese American Citizens League, a national organization whose ongoing mission is to secure and maintain the civil rights of Japanese Americans and all others who are victimized by injustice and bigotry.

Minnesota 8, a community organization committed to the liberation of Southeast Asian communities in the United States.

Services, Immigrant Rights and Education Network, a registered 501(c)(3) nonprofit organization empowering low-income immigrants and refugees.