

No. 17-35105

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

DONALD TRUMP, President of the United States, et
al., Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON

**MOTION FOR EXTENSION OF TIME TO FILE
AMICUS CURIAE BRIEF OF THE ANTI-
DEFAMATION LEAGUE IN SUPPORT OF THE
PLAINTIFFS-APPELLEES**

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MOTION TO EXTEND TIME & DEEM BRIEF TIMELY-FILED

The undersigned respectfully moves this Court for a request an extension of time to file the amicus curiae brief concurrently filed and for an order deeming the brief timely filed. This motion is filed pursuant to FRAP, Rule 26 and the declaration of Shelley A. Carder

Dated: February 6, 2017

Respectfully submitted,

/s/ Shelley A. Carder

/s/ John B. Harris

/s/ Steven M. Freeman

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DECLARATION OF SHELLEY A. CARDER

I, Shelley A. Carder, declare and state, as follows:

1. I am a resident of the County of San Diego, State of California and am a member of the law firm of Procopio, Cory, Hargreaves & Savitch, LLP in the position of Senior Counsel. I make this declaration based on matters within my personal knowledge, save and except for those matters based on information and belief, which I

believe to be true, and if called would and could testify thereto under penalty of perjury under the laws of the United States.

2. I am an attorney admitted to practice in the State of California and before the Ninth Circuit Court of Appeals. My bar no. is 13755. I last appeared before this Court in the matter of Dennis Wilcox v. Hi-Desert Memorial Healthcare, et al., Case No. 0:13-cv-55299.

3. Yesterday, I had the privilege of being asked to participate in the filing of an *amici curiae* brief by the e Anti-Defamation League (“ADL”) opposing the motion to stay the Temporary Restraining Order (TRO) issued by the U.S. District Court for the Western District of Washington.

4. Unfortunately, I was unable to log in to my ECF/Pacer account to accomplish the filing. I began trying to gain access early in the evening yesterday, Sunday February 5, 2017, waited through the system maintenance downtime and tried again after midnight, attempting to get the brief filed by the 1:00 AM deadline. Despite my best efforts, I received an error message that my PACER user account is currently inactive. One of the error windows I received said: :”For information on how to make your account status active, contact the PACER Service Center at (800) 676-6856 Monday through Friday between 8 AM and 6 PM CT. . .” Another error message I received said: “You logged in to the CM/ECF Document Filing System with a PACER account that does not have e-filing privileges. Please choose one of the following

options to continue.” Although I attempted to link my PACER account from my old firm, Di Caro, Coppo & Popcke, and did just about everything else I could think of, I could not gain access. In fact, I also attempted to set up an new account and my boss, Richard D. Barton attempted to do so, as well. Despite our best efforts, we could not gain access to the e-filing system.

5. This morning, I called PACER at or about 8 AM and went through several steps and was told that the Court was not recognizing my account. I next called the Court and received the recorded message that I am required to send an e-mail to 'cmecf_ca9help@ca9.uscourts.gov'. This was accomplished by 9:03 a.m. I next spoke with a motions clerk regarding how to seek relief and file this request for extension of time and an order deeming the brief of the Anti-Defamation League timely filed.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 6th day of February 2017 at San Diego, California.

Respectfully submitted,

/s/ Shelley A. Carder

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STATEMENT OF INTEREST

The Anti-Defamation League (“ADL”) respectfully submits this brief as *Amicus Curiae* in support of the relief sought by Plaintiffs-Appellees declaring invalid portions of the Executive Order dated January 27, 2017, entitled “Protecting the Nation from Foreign Terrorist Entry into the United States.” (the “Executive Order”). Accordingly, *Amicus* asks this Court to affirm the February 3, 2017 Order of the United States District Court for the Western District of Washington (Robart, J.) insofar as it temporarily enjoined the Defendants-Appellants from enforcing portions of the Executive Order.¹

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

¹ Pursuant to FRAP 29(a)(4)(E), *Amicus Curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *Amicus* and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to this Court’s Rule 29(a)(2), we are advised that both plaintiffs and defendants have consented to the filing of *amicus* briefs from interested parties.

barring entry into the United States of persons coming from seven majority-Muslim nations.² The ADL submits this brief under Fed. R. App. P. 29, Circuit Rule 29(a)(2). All parties have consented to the submission of amici briefs in this case.

² ADL is aware that the parties dispute whether the Executive Order constitutes a ban of Muslims as opposed a ban of persons from certain countries that the United States believes pose a terrorist threat. Inasmuch as the vast majority of the persons affected by the Executive Order are of the Muslim faith and inasmuch as the President has indicated that the ban does not apply in the same manner to Syrians of the Christian faith, ADL considers the Executive Order to implicate religion in a significant manner.

Background

ADL recognizes that the United States is a nation dedicated to the ideals of equality, liberty and justice. Adhering to these principles under changing domestic and international circumstances is often a work in progress. Throughout the history of the United States, and often with respect to immigration, our ideals have been tested. Sometimes the nation rises to meet the challenge, upholding the values that make America exceptional. (Point II below). At other times, when prejudice and fear predominate over reason and compassion, we falter, often with devastating consequences, as set forth below in connection with the *St. Louis* tragedy, the Japanese internment and the Chinese exclusion. When we later realize that we have strayed from our principles, we are left to apologize to people who have suffered (and, too often, to their descendants) and to promise to learn from our mistakes and not to repeat them. (Point III below).

As the Ninth Circuit has held: “The proper legal standard for preliminary injunctive relief requires a party to demonstrate (1) ‘that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest.’” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir., 2009) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). This brief seeks to provide important insight regarding how the Executive

Order, absent injunctive relief, will almost certainly cause irreparable harm, similar to other harms for which the United States has later apologized when it failed to live up to values and the promise embodied in the Constitution. It also seeks to demonstrate that the public interest lies squarely in support of injunctive relief, as America has always been at its best when it opens its doors to refugees and immigrants.

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

³ After the lynching, armed mobs ran through the streets of Atlanta, forcing Jewish businesses to shutter their doors and about half of Georgia's Jewish population to flee. Sixty years later, the State of Georgia, faced with evidence of Frank's innocence, posthumously pardoned Frank and apologized for failing to protect him.

ARGUMENT

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

The promise of America has been manifest since before the American Revolution. John Winthrop, while still on his transatlantic voyage to the New World, admonished the future colonists of Massachusetts to always remember that their new community would be “as a city upon a hill,” with the entire world watching.⁴ In fulfilling this vision, the country welcomed in its early years those disfavored and persecuted in their homelands based on their religious beliefs, including the Pilgrims, the Puritans and the Huguenots. Since then, our nation’s wisest leaders have been guided by Winthrop’s inspiring vision and have strived toward a more inclusive democracy.⁵

The birth of the United States came in part because the Founders sought to cast off the shackles of Europe’s endless religious wars and sectarian conflict in order to form a more perfect union. In beseeching the country to separate from

⁴ John Winthrop, *A Model of Christian Charity* (1630).

⁵ “History will not judge our endeavors,” said President-elect John F. Kennedy in a speech invoking Winthrop, “merely on the basis of color or creed or even party affiliation.” Speech to the General Court of Massachusetts, January 9, 1961. Ronald Reagan also referred to Winthrop’s vision of America on the eve of his election as President in 1980:

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

Ronald Reagan, *Election Eve Address*, November 3, 1980.

England, Thomas Paine recognized that Europe was “too thickly planted with kingdoms to be long at peace” and believed the discovery of America had a divine purpose: “to open a sanctuary to the persecuted in future years, when home should afford neither friendship nor safety.”⁶ Seven months later, the Declaration of Independence enunciated the “self-evident truths” that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” Less quoted from the Declaration is the Founders’ burning grievance that the English King had restricted free immigration, having “endeavoured to prevent the population of these States; for that reason obstructing the Laws for the Naturalization of Foreigners [and] refusing to pass others to encourage their migrations hither.”

After the United States won its independence, it faced the challenge of designing laws that embodied the enlightened vision of the new nation. In 1785, James Madison published “Memorial and Remonstrance Against Religious Assessments” in opposition to a bill proposed to Virginia’s General Assembly that would have levied a modest tax to support Christian education. Madison warned that any measure, no matter how slight, that gave a preference to one religion over

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

another would constitute “a dangerous abuse of power” and would betray the vision of “a city upon a hill:”

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

Virginia recognized Madison’s wisdom. It rejected the establishment bill and instead adopted Thomas Jefferson’s “Statute for Religious Freedom,” which firmly separated church from state and enshrined the principles of religious liberty for all. When Madison went to the Constitutional Convention in 1787, he fought for Jefferson’s view to become the law of the land, and it became a bedrock of the rights confirmed by the First Amendment.

Although the makeup of the United States was overwhelmingly Christian at its birth, our Founders were clear that the nation’s new laws prohibiting religious discrimination extended to people of all faiths and backgrounds. When Jefferson later reflected on his Statute for Religious Freedom, he extolled the broad application of the law, which was evidence that the legislators “meant to

comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and the Mahometan [Muslim], the Hindoo [Hindu], and every Infidel of every denomination.”⁷

The American values of accepting people into this country regardless of their faith, race or nationality have been celebrated by our leaders. In 1855, Abraham Lincoln confronted the burgeoning anti-immigrant “Know Nothing” movement, soundly rejecting the Know Nothings vision of an America in which “all men are created equal, except negroes, and foreigners, and Catholics.” He said of the movement: “When it comes to this I should prefer emigrating to some country where they make no pretence of loving liberty -- to Russia, for instance, where despotism can be taken pure ...”

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

In his 1959 book, “A Nation of Immigrants,” future President John F. Kennedy studied the history of immigration in this country, both in terms of those

⁷ Thomas Jefferson, Autobiography, Works 1:71 (1821).

subject to religious persecution and those facing other overpowering hardship. He wrote: “America has always been a refuge from tyranny. As a nation conceived in liberty, it has held out to the world the promise of respect for the rights of man.”⁸

II. America Has Been at its Best When it Honors Its Commitment to Its Core Values

There are numerous examples where the United States has met its aspirations as Winthrop’s “shining city on the hill,” opening itself to “anyone with the will and the heart to get here.”⁹ At its best, the United States has been a beacon of hope for refugees from war-torn countries, victims of religious persecution, natural disasters or other emergencies – fulfilling what President Kennedy described in *Nation of Immigrants* as the “natural humanitarian impulses of the American people which is in keeping with our traditions of shelter to the homeless and refuge for the oppressed.”¹⁰ Indeed, many of these refugees have contributed immeasurably to the fabric of America.

With the Truman Directive in 1945, and the Displaced Persons Act of 1948, the United States – for the first time since its founding – began explicitly to focus on its identity as a sanctuary for those fleeing persecution, as the first Americans

⁸ John F. Kennedy, *A Nation of Immigrants* (Harper Perennial, January 2008), at p. 7.

⁹ Ronald Reagan, “Farewell Address to the Nation,” January 11, 1989, The American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=29650> (last visited February. 3, 2017).

¹⁰ Kennedy, *Nation of Immigrants*, at p. 46.

had done hundreds of years earlier.¹¹ President Truman led the assistance and reconstruction effort to resettle hundreds of thousands of European Jews and other Europeans displaced from their home countries who could not return in the aftermath of WWII.¹²

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

With the onset of the Cold War, Congress began assisting groups of refugees from Communist regimes including those from the Soviet Union, Cuba, Hungary, Poland, and Yugoslavia, as well as those fleeing Southeast Asia after the Vietnam

¹¹ David W. Haines, "Learning From our Past: The Refugee Experience in the United States," reported at <http://www.americanimmigrationcouncil.org/research/refugee-experience-united-states>.

¹² *Id.*

War. The openness to asylum seekers reflected in these efforts also demonstrated a growing recognition that many refugees have significant education, skills, strong family structures and commitment to hard work and success that make them ideal new citizens.¹³

In the wake of the publication of *A Nation of Immigrants*, Congress enacted the Immigration and Nationality Act of 1965, which allowed increased numbers of people to migrate to the United States from Asia, Africa, the Middle East, and Southern and Eastern Europe. Examples of notable refugees that came to the United States from this period are: Sergey Brin, Joseph Brodsky, Gloria Estefan, Milos Forman, Miriam Makeba, Thomas Petterffly, Regina Spektor, Roberto Suarez, and David Tran.

In 1968 the United States was one of the first countries to sign the United Nations Protocol Relating to the Status of Refugees, a key treaty in international refugee law. The 1974 Jackson-Vanik Amendment ultimately permitted approximately 500,000 Jews, evangelical Christians and Catholics to escape religious persecution in the former Soviet Union by coming to the United States. And in 1980 Congress signed the Refugee Act which standardized the resettlement process and services for all refugees admitted to the United States.

¹³ Haines, *supra*, “Learning From our Past: The Refugee Experience in the United States.”

Since the 1980s, the United States has resettled refugees from Darfur fleeing genocide and violence; refugees from Bhutan forced out of their country; and Syrian, Iraqi and Afghan refugees displaced by war. In addition, the U.S. has facilitated the naturalization of Hmong veteran refugees who served in Laos in support of U.S. forces and during the Vietnam War;¹⁴ assisted the children of Vietnamese re-education camp survivors through the “McCain Amendment;” assisted former Soviet and Indochinese nationals with a credible fear of persecution through the “Lautenberg Amendment”; and assisted Iranian religious minorities through the “Specter Amendment.”¹⁵ Since 1975, the US has settled over 3 million refugees.¹⁶

It should come as no surprise that more than 40 percent of Fortune 500 companies were founded by recent immigrants or their children (even though such immigrants account for roughly 10.5 percent of the US population); or that the revenue generated by these companies is greater than the GDP of every country in the world outside the U.S. except China and Japan; or that successful global

¹⁴ William J. Clinton: "Statement on Signing the Hmong Veterans Naturalization Act of 2000," May 26, 2000, The American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=58559> (last visited Feb. 5, 2017)

¹⁵ Andora Bruno: “Refugee Admissions and Resettlement Policy,” November 30, 2016, Congressional Research Service, Federation of American Scientists, <https://fas.org/sgp/crs/misc/RL31269.pdf> (last visited Feb. 4, 2017).

¹⁶ Ruth Igielnick and Jens Manuel Krogstad, “Where Refugees to the U.S. Come From,” Feb. 3, 2017, PEW RESEARCH CENTER, <http://www.pewresearch.org/fact-tank/2017/02/03/where-refugees-to-the-u-s-come-from/> (last visited 2/5/2017).

companies founded by American immigrants and refugees or their children span all sectors of the economy, including some of the most valuable brands in the world (Apple, Google, eBay, AT&T, General Electric, IBM, McDonald's).¹⁷ As of 2016, roughly 2 million veterans of the U.S. Armed forces living in the U.S. – of a total 18.8 million – are refugees/immigrants or have refugee/immigrant parents.¹⁸ As President Kennedy observed, “[t]here is no part of our nation that has not been touched by our immigrant background.”¹⁹

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

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

¹⁷ Partnership For the New American Economy, “The ‘New American’ Fortune 500,” June 2011, <http://www.renewoureconomy.org/sites/all/themes/pnae/img/new-american-fortune-500-june-2011.pdf> (Last visited February 4, 2017).

¹⁸ Jie Song and Jeanne Batalova, “Immigrant Veterans in the United States,” Migration Policy Institute, <http://www.migrationpolicy.org/article/immigrant-veterans-united-states> (Last visited February 5, 2017).

¹⁹ Kennedy, *Nation of Immigrants* at p. 3.

government suspected as disloyal (the Japanese internment during World War II). In each case, the United States apologized years too late.

A. The St. Louis

The tragedy of the vessel *St. Louis* illustrates the devastating consequences that can result when the United States turns its back on refugees in need. In May 1939, on the eve of World War II and after Kristallnacht (the “Night of Broken Glass” in November 1938, in which hundreds of Jews were beaten, killed, or sent to concentration camps),²⁰ the *St. Louis* left Hamburg, Germany, carrying 937 passengers, nearly all of whom were Jews fleeing Nazi persecution. The ship was headed to Havana, Cuba with the hope of having its passengers granted sanctuary in the United States.

Prior to the ship’s departure, most of the Jewish passengers had obtained valid paperwork permitting their entry to Cuba and had also applied for U.S. visas, planning to stay in Cuba only until their entry to the U.S. was approved. By the time the *St. Louis* arrived in Cuba on May 27, 1939, however, the Cuban president had invalidated most of the passengers’ travel certificates.²¹ While United States-

²⁰ The United States Holocaust Memorial Museum, “Kristallnacht,” Holocaust Encyclopedia, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005201>. (Last visited February 5, 2017).

²¹ The United States Holocaust Memorial Museum, “Voyage of the St. Louis,” Holocaust Encyclopedia, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005267>. (Last visited February 5, 2017).

based Jewish organizations negotiated with Cuban officials to persuade them to admit the other passengers, the United States refused to formally intercede on the refugees' behalf or publicly pressure the Cuban government to admit them.²²

After negotiations with Cuba failed, the *St. Louis* headed towards Miami in June 1939, coming within sight of the Florida coastline. Despite pleas from passengers on board, President Roosevelt and the State Department refused to accept the Jewish refugees into the United States,²³ reflecting anti-immigrant and anti-Semitic sentiments prevailing at the time. (A Gallup poll taken in January 1939 asked Americans if the government should allow 10,000 refugee children, mostly Jewish, from Germany to be taken care of in American homes; 61 percent opposed).²⁴ A State Department telegram to a passenger on the ship explained the government's position that the passengers must "await their turns on the [visa]

²² *Id.* See also Dara Lind, "How America's Rejection of Jews Fleeing Nazi Germany Haunts Our Refugee Policy Today," *Vox*, <http://www.vox.com/policy-and-politics/2017/1/27/14412082/refugees-history-holocaust> (Last visited February 5, 2017).

²³ Kristine Guerra, "What the U.S. Learned from Turning Away Refugees who Fled the Nazis," *The Washington Post*, January 29, 2017, available at https://www.washingtonpost.com/news/post-nation/wp/2017/01/29/what-the-u-s-learned-from-turning-away-refugees-who-fled-the-nazis/?utm_term=.e91085b6c047. (Last visited on February 5, 2017).

²⁴ See Ishaan Tharoor, "What Americans Thought of Jewish Refugees on the Eve of World War II," *The Washington Post*, November 17, 2015. https://www.washingtonpost.com/news/worldviews/wp/2015/11/17/what-americans-thought-of-jewish-refugees-on-the-eve-of-world-war-ii/?utm_term=.a67eb4b68817 (Last visited on February 5, 2017).

waiting list and qualify for and obtain immigration visas before they may be admissible into the United States.”²⁵

Ultimately, the United States refused entry to the passengers of the *St Louis*, forcing it to sail back to Europe. Historians estimate that more than a quarter of the *St. Louis* passengers – 254 people – died in the Holocaust, including a number at Auschwitz, after being refused entry in this country.²⁶ (Added to this number are thousands of other Jews who died in the Holocaust because of denied visas to come to the United States, including Anne Frank).

In 2012, the United States government issued a formal apology for the country’s refusal to provide refuge for the Jewish passengers aboard the *St. Louis*.²⁷ Addressing the 14 surviving passengers, a State Department official stated: “To the survivors of the *MS St. Louis*, on behalf of the president and Secretary of State, I am honored to say what we should’ve said so long ago,

²⁵ The United States Holocaust Memorial Museum, “Voyage of the St. Louis,” Holocaust Encyclopedia, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005267>. (Last visited on February 5, 2017).

²⁶ The United States Holocaust Memorial Museum, “Voyage of the St. Louis,” Holocaust Encyclopedia, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005267>. (Last visited on February 5, 2017).

²⁷ Kamrel Eppinger, “State Department apologizes to Jewish refugees,” *Scripps Howard Foundation Wire*, September. 26, 2012, <http://www.shfwire.com/state-department-apologizes-jewish-refugees/>. (Last visited on February 5, 2017).

welcome.”²⁸ (Archival photographs from the *St. Louis* are contained in the Appendix).

B. The “Chinese Exclusion”

In the late 1860s and early 1870s, Chinese immigrants, including both skilled and unskilled laborers, enjoyed easy passage to this country under the terms of a treaty between the United States and China.²⁹ Even with the treaty’s relaxed standards, annual Chinese immigration never exceeded 40,000 people, and in 1890 there were only 107,000 Chinese nationals living in the United States.³⁰ Nevertheless, hostility towards the Chinese escalated within certain portions of the American public, who blamed wage decreases and other economic difficulties on Chinese laborers.³¹ Although Government leaders initially resisted constituent

²⁸ *Id.* Before the *St. Louis* sailed, Congress also rejected a bill that would have allowed 20,000 German children to settle in this country. Opponents took an “America-First” approach to reject the proposal, arguing that America should first focus on its own needy and homeless citizens. The wife of the United States immigration commissioner, Laura Delano Houghteling, testified that “120,000 charming children would all too soon grow into 2,000 ugly adults. Dara Lind, “How America’s Rejection of Jews Fleeing Nazi German Haunts our Refugee Policy Today,” <http://www.vox.com/policy-and-politics/2015/11/19/9760060/refugees-history-holocaust> (Last visited on February 5, 2017).

²⁹ See H. Res. 683, April 14, 2016, available at <https://www.congress.gov/bill/114th-congress/house-resolution/683/text>. See also Kennedy, *Nation of Immigrants* at p. 40.

³⁰ Kennedy, *Nation of Immigrants* at p. 40.

³¹ Chinese Exclusion Act (1882), Harvard University Library Open Collections Program, available at <http://ocp.hul.harvard.edu/immigration/exclusion.html>.

pressure to stop Chinese immigration,³² as John Kennedy noted in *A Nation of Immigrants*, a “campaign of organized violence against Chinese communities took form, and the hysteria led to public pressure too violent to be resisted.”³³

The Chinese Exclusion Act of 1882, signed into law by President Arthur, was the “first federal law ever passed excluding a group of immigrants solely on the basis of race or nationality.”³⁴ The thrust of the Chinese Exclusion Act was that it barred Chinese laborers from entering the United States for 10 years,³⁵ but it also put in place other discriminatory systems, including a registry for all Chinese (including non-laborers) who were then legally present in the United States.³⁶ Additionally, Chinese laborers already in the country would have to obtain a “certificate” to return to the United States, if they ever wanted to leave the country.³⁷ The Act also explicitly prohibited all state and federal courts from naturalizing people of Chinese origin, regardless of whether they were legally in

³² President Arthur initially vetoed the bill, which he viewed as incompatible with the Burlingame Treaty. See “Veto of the Chinese Exclusion Act (April 4, 1882)” available at <http://millercenter.org/president/arthur/speeches/veto-of-the-chinese-exclusion-act>.

³³ Kennedy, *Nation of Immigrants* at p. 41.

³⁴ “Chinese Americans in California,” California State Legislature, SJR-23, August 28, 2014, available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SJR23.

³⁵ Chinese Exclusion Act, text available at http://avalon.law.yale.edu/19th_century/chinese_exclusion_act.aspSJR-23.

³⁶ *Id.*

³⁷ *Id.* See also SJR-23.

this country.³⁸ These sweeping restrictions were explained only by this statement in the law’s preamble: “in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof[.]”³⁹

The Chinese Exclusion Act was followed by a series of other laws designed to exclude Chinese individuals from the United States both physically and politically. The Scott Act of 1888 precluded Chinese laborers from leaving and reentering the United States entirely and cancelled all previously issued “certificates” as referenced in the Exclusion Act.⁴⁰ This action prevented the return of approximately 20,000 Chinese laborers who were abroad and counting on their lawfully-obtained certificates to reenter.⁴¹ It also froze the migration of an additional 600 Chinese individuals who were physically en route to the United States at the time of its enactment.⁴² When the Chinese Exclusion Act was set to expire in 1892, Congress passed the Geary Act, which extended it for another ten

³⁸ Chinese Exclusion Act, section 14. *See also* SJR-23.

³⁹ Chinese Exclusion Act, preamble.

⁴⁰ S.Res.201, October 6, 2011, available at <https://www.congress.gov/bill/114th-congress/senate-resolution/201>. *See also* H. Res. 683.

⁴¹ S.Res.201.

⁴² S.Res.201.

years and introduced still further additional restrictions.⁴³ It was not until 1943 that Congress finally began repealing certain – and eventually all – of these discriminatory laws.⁴⁴

In October 2011, the United States Senate issued an apology for the Chinese Exclusion Act and other laws.⁴⁵ A similar report was announced by the United States House of Representatives⁴⁶ and, later, by the California State Legislature.⁴⁷ In each instance, the government noted that the Chinese Exclusion Act and its companion laws were and remain “incompatible with the basic founding principles recognized in the Declaration of Independence that all persons are created equal[.]”⁴⁸ The announcements expressed commitment to “diversity in the United States that contributes to the country’s economic, cultural, technological, academic, an political growth[.]”⁴⁹

⁴³ S.Res.201.

⁴⁴ S.Res.201.

⁴⁵ S.Res.201.

⁴⁶ H. Res. 683

⁴⁷ SJR-23.

⁴⁸ S.Res.201. *See also* SJR-23 (Pointing out that, “[p]aradoxically, the very same year that the Chinese Exclusion Act was passed, financing abroad was completed for the Statute of Liberty. . . . While the Statute of Liberty was being built, legislators were contradicting those very ideals by discriminating against Chinese immigrants and lobbying Congress to do the same[.]”).

⁴⁹ SJR-23.

In its apology the California legislature observed that “[t]he Chinese Exclusion Act set the precedent for racist foreign and national policy that led to broader exclusion laws and fostered an environment of racism that quickly led to the Jim Crow laws of the 1880s, and further segregation legislation that would tear our nation apart through most of the 20th Century[.]”⁵⁰ Simply put, it concluded that racism breeds racism, and any governmental policies that conflict with the fabric of this country cannot be allowed to stand.

C. The Japanese Internment

The internment of Japanese-Americans was authorized by Executive Order 9066,⁵¹ which President Roosevelt issued in early 1942, ten weeks after the Pearl Harbor attack. Executive Order 9066 gave to the Secretary of War and the military commanders to whom he delegated authority, the power to exclude any and all persons, citizens and aliens from designated areas in order to provide security against sabotage and espionage.⁵² The Order makes no reference to the Japanese, just as the current Executive Order does not reference Muslims. However, within a week of the issuance of the order, Lt. General John L. DeWitt issued the first of 108 relocation orders resulting in the forcible evacuation of approximately 120,000

⁵⁰ *Id.*

⁵¹ 7 Fed.Reg. 1407 (Feb. 19, 1942)

⁵² *Id.*

Japanese-Americans, including 70,000 citizens, to concentration camps in desolate areas of the United States for the duration of World War II.⁵³

The justification for Executive Order 9066 was “military necessity.”⁵⁴ However, Congress has since acknowledged that “these actions were carried out without adequate security reasons and ... were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership.”⁵⁵ (Anti-Japanese bias was palpable: polls taken in 1944 indicated that more than 60 percent of Americans thought that whites should be prioritized in hiring decisions over Japanese Americans).⁵⁶ This conclusion was bolstered by the fact that no effort was made to invoke Executive Order 9066 to authorize internment of German-Americans and/or Italian-Americans.⁵⁷

In 1976, President Gerald Ford issued a proclamation acknowledging that “not only was that evacuation wrong, but Japanese Americans were and are loyal Americans.” In 1982, the Commission on Wartime Relocation and Internment of

⁵³ See Roger Daniels, *Concentration Camps USA: Japanese Americans and World War II* 33, 104 (1972)

⁵⁴ U.S. Comm'n on Wartime Relocation and Internment of Civilians, Congress of 1980, Report: Personal Justice Denied, at 6-8 (1982).

⁵⁵ 50 U.S.C. § 4202.

⁵⁶ Stephen White, “Many Americans Support Trump’s Immigration Order; Many Americans Backed Japanese Internment Camps, Too,” *The Washington Post*, February 2, 2017.

⁵⁷ See U.S. Comm’n on Wartime Relocation and Internment of Civilians, Congress of 1980, Report: Personal Justice Denied, at 3 (1982).

Civilians issued a report entitled, “Personal Justice Denied,” which set the stage for the moment in 1988 when President Ronald Reagan signed the Civil Liberties Act, which offered a formal apology and reparations for the “grave injustice” of evacuating, relocating and interning tens of thousands of Japanese Americans during the war.⁵⁸ President Reagan, in his remarks on signing the Act, made clear that the internment of Japanese Americans was a “grave wrong.”⁵⁹ Congress too acknowledged that this measure – carried out under the false banner of “national security” – amounted to a “fundamental violation[] of the basic civil liberties and constitutional rights of [] individuals of Japanese ancestry” and caused “enormous damages, both material and intangible, ... which resulted in significant human suffering[.]”⁶⁰

Conclusion

The ADL believes that the decision by the United States District Court for the Western District of Washington enjoining provisions of the Executive Order is consistent with the principles underlying the Constitution. Absent injunctive relief, there will almost certainly be irreparable harm to countless people, just as there was when the United States shamefully turned away those on the *St. Louis*

⁵⁸ See 50 U.S.C. § 4201 *et seq.*

⁵⁹ President Ronald Reagan, Remarks on Signing the Bill Providing Restitution for the Wartime Internment of Japanese-American Civilians (Aug. 10, 1988), <http://www.reagan.utexas.edu/archives/speeches/1988/081088d.htm>.

⁶⁰ 50 U.S.C. § 4202.

desperately seeking safety. As with the 254 passengers aboard the *St. Louis* who died in the Holocaust, an apology years later would be woefully insufficient to address the damage done. ADL believes that enforcing the Executive Order risks once again sacrificing the nation's core values in favor of prejudice and fear – a sacrifice that history has repeatedly proven has profound consequences both to the persons who suffer as a result and to the still-vibrant vision of the shining city on the hill.

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CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because it contains 4,849 words excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(ii).

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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2017, I electronically filed the foregoing with the Clerk of the court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Appendix

Passengers on the St. Louis



A woman cries as the St. Louis pulls away from Havana, 1939. | Keystone-France via Getty Images

Source: Dara Lind, “How America’s Rejection of Jews Fleeing Nazi German Haunts our Refugee Policy Today,” <http://www.vox.com/policy-and-politics/2015/11/19/9760060/refugees-history-holocaust> (Last visited on February 5, 2017).



Source: “Some of the 907 passengers on board the St. Louis arriving in Belgium after being refused entry into Cuba and the U.S.,” American Jewish Joint Distribution Committee Archives, “The Story of the S.S. St. Louis (1939);” accessible at <http://archives.jdc.org/educators/topic-guides/the-story-of-the-ss-st.html>.

In the wake of the Executive Order, and as a tribute to Holocaust Remembrance Day on January 27, 2017, a Twitter account was established in the name of the St. Louis Manifest (@StL_Manifest, accessible at https://twitter.com/stl_manifest), which has tweeted out the names and stories of the ship's passengers, examples of which appear below:

St. Louis Manifest @StL_Manifest
 My name is Regina Blumenstein. The US turned me away at the border in 1939. I was murdered in Auschwitz



St. Louis Manifest @StL_Manifest · Jan 27
 My name is Fritz Zweigenthal. The US turned me away at the border in 1939. I was murdered in France
 115 3.6K 3K

St. Louis Manifest @StL_Manifest · Jan 27
 My name is Max Wolff. The US turned me away at the border in 1939. I was murdered in Auschwitz
 44 3.4K 2.6K

St. Louis Manifest @StL_Manifest · Jan 27
 My name is Abraham Wolf. The US turned me away at the border in 1939. I was murdered in Theresienstadt
 41 2.7K 2.2K

St. Louis Manifest @StL_Manifest
 My name is Willi Dublon. The US turned me away at the border in 1939. I was murdered in Auschwitz



St. Louis Manifest @StL_Manifest
 My name is Julius Hermanns. The US turned me away at the border in 1939. I was murdered at Auschwitz



RETWEETS 2,352 LIKES 1,573
 5:55 AM - 27 Jan 2017