Testimony of

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"Discrimination and the Civil Rights of
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Chairman Cohen, Vice Chairwoman Ross, and distinguished Members of the Committee. Thank you for inviting me to appear before you today. It is an honor.

I currently serve as Associate Dean for Diversity, Equity and Inclusion; Samuel Weiss Faculty Scholar; and the Founding Director of the Center for Immigrants' Rights Clinic at Penn State Law in University Park. My practice, teaching, and scholarship focus on immigration, a field I have worked in for more than twenty years. My testimony was prepared in my individual capacity and does not reflect the views of Pennsylvania State University. My testimony is drawn largely from my published research and my lived experiences as a South Asian American, immigration attorney, and advocate.

The history of Asian exclusion traces back to the nineteenth century.[1] The Page Act of 1875 banned the immigration of Chinese prostitutes and was motivated by stereotypes that they were a moral threat to American society. Seven years later, Congress passed the Chinese Exclusion Act of 1882, which blocked the entry of Chinese laborers into the United States and prohibited Chinese nationals from becoming naturalized citizens. The Act spared those already in the United States who obtained a certificate before leaving the United States, but eventually, even those with certificates were denied entry. These rules became the subject of a legal challenge by Chae Chan Ping, a Chinese laborer who lived in the United States for over a decade, but who was expelled after visiting family in China, despite having a certificate and having followed the rules.[2] The Supreme Court upheld the U.S. government's power to exclude Chinese and in doing so,

[1] *See, e.g.*, Shoba Sivaprasad Wadhia & Margaret Hu, *Decitizenizing Asian Pacific American Women*, 93 U. COLO. L. REV. 325, 339–48 (2022); Shoba Sivaprasad Wadhia, *Discretion and Disobedience in the Chinese Exclusion Era* (September 14, 2021). Asian Am. L.J. forthcoming (2022).
[2] *See* Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 581–82 (1889).

adopted a principle known as "plenary power," which gives the "political branches"—Congress and the executive branch—the power to regulate immigration, to choose who to include and exclude, in this case based on race.[3]

Congress extended and expanded Chinese exclusion with the Geary Act, by directing all Chinese laborers inside the United States to register with the government for a certificate, or else tell a judge why not, by "reason of accident, sickness or other unavoidable cause," and prove their residence in the United States *by at least one credible white witness*.[4] Applying the plenary power doctrine once again, the Supreme Court in *Fong Yue Ting* upheld the federal government's power to deport Chinese laborers already living in the United States.[5] The Chinese Exclusion cases have never been overturned and are crucial to understanding modern day exclusion.

Exclusion based on nationality and race continued in the 20th century. One of the most significant immigration exclusions occurred in 1924, with the passage of the Johnson-Reed Act. The 1924 Act significantly lowered the number of people who could enter the United States. It also created a national origin-based quota system by excluding any person who by virtue of race or nationality was ineligible for citizenship.[6] Because existing laws prohibited people of Asian lineage from naturalizing, the 1924 Act effectively banned Asian immigration.[7]

Only in 1965, on the heels of the landmark Civil Rights Act and Voting Rights Act, President Lyndon B. Johnson signed a bill into law to amend the immigration statute, or Immigration and Nationality Act, to end national origin discrimination in immigration law.[8]

[3] *See id.* at 609 ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.").
[4] Act of May 5, 1892, ch. 60, § 6, 27 Stat. 25 (1892) ("Geary Act").
[5] Fong Yue Ting v. United States, 149 U.S. 698, 706–07 (1893).
[6] *See* Immigration Act of 1924, ch. 190, § 11, 13, 43 Stat. 153 (1924) ("Johnson-Reed Act").
[7] *See* U.S. Department of State Archive, The Immigration Act of 1924 (The Johnson-Reed Act).
[8] *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (1965).

Sharing a well-known passage from President Kennedy's Inaugural Address, Johnson observed that "a nation that was built by the immigrants of all lands can ask those who now seek admission: 'What can you do for our country?' But we should not be asking: 'In what country were you born?'"[9] The 1965 Immigration and Nationality Act created a nondiscrimination clause that appears in the immigration statute today: "[N]o 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 of birth, or place of residence."[10]

The 1965 Act altered the racial landscape of the United States, and produced significant increases in Asian immigration, opening the doors for families like mine. My parents were raised in India and after their marriage moved to the United States. My father worked at the Dayton, Ohio VA hospital as a physician from the beginning of the AIDS crisis. My mother entered the United States as the spouse of a green card holder.

Even with the dismantling of the national origin quotas in 1965, however, exclusionary policies persisted. One sharp example is September 11, 2001. My memory of this tragic day and its lasting effects on immigration are vivid. September 11 was a day that normalized a narrative conflating immigration with terrorism, and unleashed a litany of immigration policy changes developed in the name of "national security," but with consequences for Muslim, Arab, and South Asian communities.[11] I was working as an immigration attorney in downtown Washington, D.C., and on a walk home shortly after, I saw spray painted on a wall: "Deport Arabs." These words became a symbol for 9/11's lasting impact on immigration and a defining moment in my career,

[9] President Lyndon B. Johnson, Annual Message to Congress on the State of the Union (Jan. 8, 1964), http://www.lbjlibrary.net/collections/selected-speeches/november-1963-1964/01-08-1964.html; *see also* President Lyndon B. Johnson, Remarks on Signing the Immigration Act of 1965 (Oct. 3, 1965), https://www.learningforjustice.org/classroom-resources/texts/remarks-on-signing-the-immigration-act-of-1965.
[10] 8 U.S.C. § 1152(a)(1)(A).
[11] *See e.g.*, Shoba Sivaprasad Wadhia, Business as Usual: Immigration and the National Security Exception. Penn State Law Review, Vol. 114, No. 4, p. 1485, (2010)

propelling me into immigration policy, which began with being thrown into the legislative debate around the creation of a new cabinet level agency called the Department of Homeland Security. There were impassioned debates about where to place immigration but eventually the functions mostly landed in DHS. Twenty years later, I am struck by the message sent to newcomers who arrive or interact with a department called "Homeland Security."

In October 2001, former Attorney General John Ashcroft spoke at a conference to the U.S. Mayors, analogizing former Attorney General Robert F. Kennedy's belief that arresting mobsters for "spitting on the sidewalk" would help thwart organized crime, to the zealousness with which potential "terrorists" in the wake of September 11, 2001, should be punished.[12] Ashcroft remarked:

> Let the terrorists among us be warned: If you overstay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. We will use all our weapons within the law and under the Constitution to protect life and enhance security for America.[13]

One significant 9/11 policy was known as the "National Security Entry-Exit Registration System," or NSEERS. In September 2002, former Attorney General Ashcroft rolled out a tracking program known as "special registration." The program was rolled out in multiple phases, beginning first with visiting nonimmigrants from Iran, Iraq, Libya, Sudan, and Syria.[14] Such individuals were

[12] OFFICE OF THE INSPECTOR GENERAL, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS, at ch. 2 § I(B) (2003), https://oig.justice.gov/sites/default/files/legacy/special/0306/full.pdf.
[13] *Id.* at ch. 2 § I(B).
[14] Press Release, DOJ, Attorney General Ashcroft Announces Implementation of the First Phase of the National Security Entry-Exit Registration System (Aug. 12, 2002), http://www.justice.gov/opa/pr/2002/August/02_ag_466.htm.

required to register at the port of entry (POE) at which they entered, follow up with an in-person interview after entering the United States, and register again upon exiting the United States.[15]

The NSEERS program was expanded to include a "call-in" component to reach certain males who had already entered the United States. The announcement of, and instructions for, call-in registration was made through four publications in the Federal Register.[16] In sum, the call-in portion of NSEERS applied to certain males from 25 countries.[17] Information collected and interview questions included bank account information, credit card information, and affiliations with political, religious, or social groups on university campuses.[18] The men targeted for call-in registration came from the following countries: Iran, Iraq, Libya, Sudan, Syria, Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, Yemen, Pakistan, Saudi Arabia, Bangladesh, Egypt, Indonesia, Jordan, and Kuwait.[19]

I recall vividly standing in front of the local immigration office to protest NSEERS and conducting know your rights sessions about the program inside of mosques. I learned a few things at the time. First, that most people do not read the Federal Register. Second, that protest can serve as a form of solidarity. Third, that one must educate a community about their rights and

[15] Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg 52,584 (Aug. 12, 2002); *see also* Registration and Fingerprinting, 8 C.F.R. § 264.1(f) (2008).
[16] *See* Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 2363 (Jan. 16, 2003); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77,642 (Dec. 18, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 70,526 (Nov. 22, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 67,766 (Nov. 6, 2002).
[17] *See id.*
[18] Jane Black, *At Justice NSEERS Spells Data Chaos*, BUSINESSWEEK (May 2, 2003).
[19] *See* Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 2363 (Jan. 16, 2003); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77,642 (Dec. 18, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 70,526 (Nov. 22, 2002); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 67,766 (Nov. 6, 2002); *see also* AM.-ARAB ANTI-DISCRIMINATION COMM. & CTR. FOR IMMIGRANTS' RIGHTS, PA. STATE UNIV., NSEERS: THE CONSEQUENCES OF AMERICA'S EFFORTS TO SECURE ITS BORDERS 15-16 (2007), http://www.adc.org/wp-content/uploads/2016/12/NSEERS-ADC-Report.pdf.

responsibilities in places where they feel safe and welcome. NSEERS was a full of challenges—the lack of notice to individuals, the limited resources at local offices, the wide range of questions asked to those interrogated.[20] Numbers reported by DHS in 2003 show that 13,799 people who complied with special registration were issued Notices to Appear and placed in removal proceedings.[21]

The NSEERS program also failed as a national security program as it relied on the premise that singling out Muslim males residing in the United States would somehow improve national security. Said counterterrorism expert Juliette Kayyem: "The pure accumulation of just massive amounts of data is not necessarily helpful . . .. Basically, what this has become is an immigration sweep."[22] The *New York Times* also reported on similar comments made by the former INS Commissioner James Ziglar stating that "he and members of his staff had raised doubts about the benefits of the special registration program when Justice Department officials first proposed it. He said he had questioned devoting significant resources to the initiative because he believed it unlikely that terrorists would voluntarily submit to intensive scrutiny."[23] Mr. Ziglar continued, "To my knowledge, not one actual terrorist was identified. But what we did get was a lot of bad publicity, litigation and disruption in our relationships with immigrant communities and countries that we needed help from in the war on terror."[24]

[20] *See generally* AM.-ARAB ANTI-DISCRIMINATION COMM. & CTR. FOR IMMIGRANTS' RIGHTS, PA. STATE UNIV., NSEERS: THE CONSEQUENCES OF AMERICA'S EFFORTS TO SECURE ITS BORDERS (2007), http://www.adc.org/wp-content/uploads/2016/12/NSEERS-ADC-Report.pdf.
[21] ICE, *Fact Sheet: Changes to National Security Entry/Exit Registration System (NSEERS)*, U.S. DEP'T OF HOMELAND SEC. 4 (Dec. 1, 2003), http://www2.gtlaw.com/practices/immigration/news/2003/12/01a.pdf.
[22] Dan Eggen & Nurith C. Aizenman, *Registration Stirs Panic, Worry*, WASH. POST (Jan. 10, 2003), https://www.washingtonpost.com/archive/politics/2003/01/10/registration-stirs-panic-worry/ad5bedb3-b5ad-47ed-819c-7ba42307fa9d/?utm_term=.883260d415cf.
[23] Rachel L. Swarns, *Program's Value in Dispute as a Tool to Fight Terrorism*, N.Y. TIMES (Dec. 21, 2004), https://www.nytimes.com/2004/12/21/us/programs-value-in-dispute-as-a-tool-to-fight-terrorism.html.
[24] *Id.* (internal quotations omitted).

Even after portions of NSEERS were suspended and the program no longer operational, the lingering effects were pronounced. Reports by the Center for Immigrants' Rights Clinic at Penn State Law on behalf of the American-Arab Anti-Discrimination Committee and the Rights Working Group highlight these effects.[25] Only in December 2016, on the heels of an urgency expressed by community leaders and lawyers inside the White House and on the streets, did the Department issue a final rule ending the regulation giving rise to NSEERS.[26]

Efforts to roll back post 9/11 policies were also made legislatively, with the introduction of the Civil Liberties Restoration Act (CLRA). The CLRA was never enacted into law, but contained a measured set of remedies to post 9/11 immigration policies. The CLRA would have terminated a memo permitting closed immigration hearings; terminated the NSEERS program and provided limited relief to individuals with immediate eligibility for an immigration benefit or relief from removal; and required noncitizens held by DHS beyond 48 hours without charges or notice of charges to see a judge to determine whether prolonged detention is appropriate, among other provisions.[27]

History repeated itself fifteen years later. While a candidate on the campaign trail, former President Trump published a "Statement on Preventing Muslim Immigration" that called for a "total and complete shutdown of Muslims entering the United States."[28] Seven days after his

[25] *See generally* AM.-ARAB ANTI-DISCRIMINATION COMM. & CTR. FOR IMMIGRANTS' RIGHTS, PA. STATE UNIV., NSEERS: THE CONSEQUENCES OF AMERICA'S EFFORTS TO SECURE ITS BORDERS (2007), http://www.adc.org/wp-content/uploads/2016/12/NSEERS-ADC-Report.pdf; RTS. WORKING GRP. & CTR. FOR IMMIGRANTS' RIGHTS, PA. STATE UNIV., THE NSEERS EFFECT: A DECADE OF RACIAL PROFILING, FEAR, AND SECRECY (2012), https://pennstatelaw.psu.edu/_file/clinics/NSEERS_report.pdf.

[26] *See* Removal of Regulations Relating to Special Registration Process for Certain Nonimmigrants, 81 Fed. Reg. 94,231 (Dec. 23, 2016); Shoba Sivaprasad Wadhia, *Understanding the Final Rule Ending NSEERS*, YALE J. ON REGUL. NOTICE & COMMENT (Dec. 23, 2016), https://www.yalejreg.com/nc/understanding-the-final-rule-ending-nseers-by-shoba-sivaprasad-wadhia/.

[27] *See* Civil Liberties Restoration Act of 2005, H.R. 1502, 109th Cong. (2005).

[28] *See* Statement by Donald J. Trump, Statement on Preventing Muslim Immigration (Dec. 7, 2015) (American Presidency Project), https://www.presidency.ucsb.edu/documents/statement-donald-j-trump-statement-preventing-muslim-immigration.

inauguration, former President Trump signed an executive order dubbed as the "Muslim ban" which suspended for 90 days the entry of foreign nationals from seven countries with Muslim populations of over 90%: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.[29] The executive order relied on a section of the immigration statute—section 212(f)—which allows a President to suspend the entry of a noncitizen or group of noncitizens if such entry would be detrimental to the interests of the United States.[30] The image and chaos of lawyers, policy makers, and protests at the airports was vivid, as was the uncertainty. No guidance had been delivered to the Customs and Border Protection officials at the airports, green card holders were being turned away, and families were detained.

The chaos spread well beyond the airports. I fielded scores of phone calls from affected individuals and families from around the world. Should I leave the United States? Can my mother come for my graduation? My spouse and I have been apart, how can they get to the United States? The pedagogy for my students became "lawyering in the fire." The first executive order dropped at 4:30 p.m. on a Friday and was followed by a weekend of producing fact sheets to explain what the order means and triaging with our organizational partners and leaders.

The first executive order was blocked by a nationwide injunction, but this did not stop the delivery of a second ban, which this time was issued in March, and blocked the same countries except for Iraq.[31] The second executive order was also challenged and blocked by the courts, but eventually, the administration issued its final ban as a presidential proclamation and indefinitely blocked the entry for certain individuals from eight countries: Iran, Libya, Chad, North Korea,

[29] *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).
[30] *See* 8 U.S.C. § 1182(f); INA § 212(f).
[31] *See* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

Syria, Somalia, Venezuela, and Yemen.[32] These countries were ostensibly chosen based on the perceived threat they posed.

Working with families impacted by the Muslim ban and interviewing lawyers brought me close to the human suffering. Note it was individuals in a qualifying family relationship—like my own parents—or with a legal means to be in the United States who were being turned away because of where they were born.

One attorney I spoke to told me:

> The common thread I see among every single person that walks into my office is, I need my Mom because I'm gonna be in labor and I can't do this without her. Or, I'm the first person in my family to get a PhD; it would mean the world to my parents to be there at my graduation ceremony. Or I'm in love and I'm getting married and I'm getting engaged and this is a huge moment in my life and I would like my parents to meet my future husband. They're moments in our lives that we normally share with family. . . . Graduations, birth of a child, engagement, weddings; all of them are destroyed for people [because of the Muslim ban].[33]

In a brief I filed to the Supreme Court as co-counsel on behalf of immigration law scholars, we explained how the 1965 Immigration Act sought to eliminate the national origin quota system's

[32] *See* Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).
[33] SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP 7 (2019).

fundamental unfairness, and to prioritize family reunification.[34] We argued that by excluding people from receiving a visa and entering the United States based on race or place of birth, the country was ushering us into a pre-1965 era in defiance of the immigration statute and legislative history leading to the Immigration Act of 1965.[35]

But the Supreme Court in 2018 found the national security justification for the ban reasonable, and the power of the President to exclude broad, and in doing so, upheld the legality of the proclamation.[36] In explaining the breadth of section 212(f) of the immigration statute, the section used to create the ban, Chief Justice Roberts remarked: "By its terms, §1182(f) exudes deference to the President in every clause. It entrusts to the President the decisions whether and when to suspend entry, whose entry to suspend, for how long, and on what conditions."[37]

The proclamation included a waiver process for those impacted if they could prove that denial of entry would result in undue hardship, that entry is in the national interest, and that they pose no security threat.[38] However, many, myself included, were concerned about whether the waiver process really worked, or to echo the words of Justice Breyer during oral arguments, whether the waiver was simply "window dressing."[39]

While public attention to the Muslim ban faded, the human consequences endured. As of January 1, 2019, more than 9,000 spouses and minor children of U.S. citizens had been barred.[40] The Muslim ban is perhaps the greatest untold story of family separation. And in 2020, former

[34] *See* Brief for Scholars of Immigration Law as Amici Curiae Supporting Respondents, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965).
[35] *See id.* at 24–35; *see also* Peter Margulies & Shoba Sivaprasad Wadhia, *How the Travel Ban Resurrects National Origin Quotas Congress Sought to End*, THE HILL (Mar. 30, 2018, 12:07 PM), https://thehill.com/blogs/congress-blog/homeland-security/381002-how-the-travel-ban-resurrects-national-origin-quotas.
[36] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2420–23 (2018).
[37] *Id.* at 2408.
[38] *See* Proclamation No. 9645, 82 Fed. Reg. 45,161, § 3(c) (Sept. 24, 2017).
[39] *See* Transcript of Oral Argument at 35, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (No. 17-965).
[40] David J. Bier, *Travel Ban Separates Thousands of U.S. Citizens from Their Spouses & Minor Children*, CATO INSTITUTE: CATO AT LIBERTY (Jan. 29, 2019, 9:47 AM), https://www.cato.org/blog/travel-ban-separates-thousands-us-citizens-their-spouses-minor-children.

President Trump through a new proclamation added Nigeria, Eritrea, Kyrgyzstan, Myanmar, Sudan, and Tanzania to the existing proclamation, leading to its label as a "Muslim and African ban."[41]

Resistance to the ban was significant and revealed itself inside courts, on the streets, at consulates, and within the halls of Congress with the introduction of the National Origin-Based Antidiscrimination for Nonimmigrants Act (NO BAN Act) which, if enacted, would terminate the Muslim and African ban and set limits to the sections of the immigration statute that were used to create it.[42] As the subcommittee is aware, the NO BAN Act passed in the U.S. House of Representatives, but has yet to pass in the U.S. Senate. On January 20, 2021, President Biden repealed the Muslim and African Ban.[43] But termination of the ban does not replace the lasting human impact on individuals and families, nor does it prevent the potential for similar bans in the future.

Over and over, national security is used as a tool for immigration policies which explicitly discriminate based on race, religion or country of birth, as seen with the Chinese exclusion laws, NSEERS, and the Muslim ban. More than 50 years after the 1965 Act—and 20 years after 9/11—immigration laws continue to target Muslim, Arab, and South Asian communities, as well as broader immigrant communities of color, often because of policy choices made by the executive branch, and because of congressional inaction. History will continue to repeat itself unless we do something different. That requires a rejection of categorical exclusions, it requires changing course when immigration enforcement or discretion produces unequal outcomes, and it requires envisioning an immigration policy that is truly inclusive and one that works for everyone.

[41] *See* Proclamation No. 9983, 85 Fed. Reg. 6699 (Jan. 31, 2020).
[42] *See* NO BAN Act, H.R. 1333, 117th Cong. (2021).
[43] *See* Proclamation No. 10,141, 86 Fed. Reg. 7005 (Jan. 20, 2021).