



August 28, 2023

The Honorable Jack Reed
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

The Honorable Mike Rogers
Chairman
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Roger Wicker
Ranking Member
Committee on Armed Services
United States Senate
Washington, DC 20510

The Honorable Adam Smith
Ranking Member
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

Dear Chairmen Reed and Rogers, and Ranking Members Wicker and Smith:

As both chambers consider and seek to reconcile competing versions of the National Defense Authorization Act for Fiscal Year 2024, the National Asian Pacific American Bar Association (NAPABA) urges this conference to carefully examine the discriminatory harms presented by Senate Amendment 813 to the Senate version of the NDAA, S.2226, which passed on July 25, 2023 (“Amendment”).

To be clear, NAPABA understands the legitimate national security concerns that underlie the desire to safeguard this country’s agricultural land and food supplies. NAPABA also recognizes the important role that the Committee on Foreign Investment in the United States (CFIUS) plays in protecting critical industries, preserving the technological leadership of the United States, protecting the sensitive data of Americans, and enhancing supply chain resilience.

The Amendment, however, serves none of those goals. Instead, it is overly broad and vague. The prohibitions against nearly all foreign citizens from certain countries have the pernicious effect of equating ordinary, lawfully present foreign persons in the United States with no discernable ties to adversarial governments as hostile agents of those regimes. Such needless discrimination risks creating fodder

for bias and xenophobia, harming the broader Asian American, Native Hawaiian, and Pacific Islander community. Instead, the language should be narrowly tailored to focus on specific and identifiable national security threats.

I. The Amendment must be reworked to avoid discrimination against lawfully present foreign persons seeking to establish a livelihood.

The Amendment would prohibit the sale or leasing of certain agricultural lands to individuals and entities from adversarial countries that are designated by 15 C.F.R 7.4. While the Amendment provides exclusions for those who are citizens of the United States or lawful permanent residents, there are no such protections for a wide range of other lawfully present persons. They include those in the United States on work or student visas, or refugees and asylees, many of whom have been persecuted by the very regimes that this Amendment targets.

In a sign of its overbreadth, the Amendment imposes the same treatment and prohibitions against a state-owned Chinese company as it does for an ordinary Chinese citizen lawfully residing in the United States on a work visa with no discernable ties to the Chinese government, Chinese Communist Party, or any state or military entity. Without evidence, the Amendment equates ordinary citizens of certain adversarial countries as agents of those regimes. Merely because an individual hails from an authoritarian country does not mean that such an individual acts at the command or behest of that country. That is why a panoply of federal civil rights laws bans national origin discrimination: because a person's heritage is such a poor and inappropriate proxy for perceived conduct. In reality, those fortunate enough to arrive in the United States often seek the economic and political freedoms, liberties, and fundamental rights, including property ownership, so often denied in their country of origin.

In contrast, the federal regulation, 15 C.F.R. 7.4, singles out "foreign governments or foreign non-government persons...engaged in a long-term pattern or serious instances of conduct significantly adverse to the national security of the United States or security and safety of United States." This standard is based on evidence of "serious instances of conduct" and cannot be applied in a blanket fashion to all citizens from those countries. Unless evidence somehow exists that *ordinary* citizens of the adversarial countries in question have been shown to purchase property in the United States in a widespread manner specifically in order to undermine our national security, surveil our military bases, or seize control of our food supply, the Amendment must be updated to protect lawfully present foreign persons in the

United States who are simply seeking to pursue a livelihood.

II. The Amendment should be narrowly tailored and focus on specific national security threats.

In broad fashion, the Amendment defines “covered persons” to include any natural person or entity “subject to the jurisdiction” of a country of concern. This could potentially mean a person or entity with assets in or operating in Russia or China. While American companies and persons are exempted, a person or entity from a non-adversarial country (including United States allies) operating in Hong Kong, for example, could be subject to this bar.

The Amendment should instead be revised to focus on specific national security threats. For example, those could include a focus on state-owned entities, or those companies with known links to the People’s Liberation Army in China, or to the Kremlin. For example, Section 1260H of the 2021 NDAA has required the Secretary of Defense to identify military companies known to be operating in the United States that are owned or controlled by the PLA, are Chinese defense contractors, or are tech companies that receive funding through the Chinese military apparatus and are [listed](#) by the Pentagon. This is an example of a helpful and relevant, evidence-based starting point for an appropriately narrowly tailored bill.

III. The presence of constitutional concerns and the re-emergence of discriminatory anti-Asian alien land laws.

The introduction of the Amendment occurs in the context of disturbing legislative activity occurring within several states. A variety of them have recently introduced or enacted similar legislation which also equated ordinary Chinese, Iranian, and other citizens with Chinese Communist Party members, government officials, and state-owned corporations. This includes Florida, where litigation has ensued to challenge a law on equal protection grounds. Such laws are not facially neutral and specifically single out Chinese citizens lawfully present in the United States for disparate treatment.

For example, the Florida statute contains similar prohibitions to the Amendment on the purchase of agricultural land to citizens from seven adversarial nations. It also contains a blanket prohibition on all real estate sales to Chinese citizens with certain exemptions. Most troubling, the law imposes harsher criminal penalties for violating the provisions relating to purchases by Chinese citizens (3rd

degree felonies) than it does for those related to purchases by citizens from Russian, Cuban, Venezuelan, Iranian, or North Korean (mere misdemeanors).

What remains to be seen is how such laws will be enforced. They run a substantial risk that Asian Americans of any heritage would face additional unwarranted scrutiny in real estate transactions by sellers, realtors, lenders, or others seeking to comply with the laws, based on impermissible factors such as names or appearance. At a [Louisiana house committee hearing](#), the sponsor of Louisiana HB 537, which also banned certain foreigners from purchasing agricultural and even some residential properties explained that if “reasonable suspicion” existed that a buyer could be connected to a foreign adversary, that should trigger additional scrutiny and “investigation.” But would that suspicion be precipitated merely by a purchaser being Chinese American? Or even Asian American? The potential for untoward, unjustified scrutiny based on perceived race or national origin would have devastating consequences for innocent Asian Americans seeking nothing more than to establish roots in our country.

Unfortunately, this Nation has grappled with the very same issues presented by the Amendment and anti-Asian alien land laws that were passed in the early 20th century. Such discriminatory laws also were intended to prevent Asian immigrants from acquiring farmland. California enacted its first alien land law in 1913, and then in 1920, it added further limitations on lease-holding. Similar [laws were passed](#) in Washington, Oregon, Idaho, Montana, Arizona, New Mexico, Texas, Kansas, Louisiana, Missouri, and Minnesota, Wyoming, and Florida. The rationale for these laws, in addition to suppressing economic competition, was, according to some scholars, the perceived threat of Japan’s growing industrial strength, its imperial military aspirations, and the projection onto Japanese immigrants of an image of disloyalty as a “fifth column...waiting to be activated at the emperor’s command.”

The California Supreme Court overturned California’s alien land law in 1952. It held in [Sei Fuji v. State of California](#), 242 P.2d 618 (Cal. 1952), that the alien land law violated the Fourteenth Amendment and was:

obviously designed and administered as an instrument for effectuating racial discrimination, and the most searching examination discloses no circumstances justifying classification on that basis. There is nothing to indicate that those alien residents who are racially ineligible for citizenship possess characteristics which are

dangerous to the legitimate interests of the state, or that they, as a class, might use the land for purposes injurious to public morals, safety or welfare.

Together with state laws such as the one in Florida, the Amendment evokes a painful historical and unconstitutional precedent of excluding Asian immigrants from farming in the United States.

IV. Separation of Powers.

NAPABA defers to the Administration to articulate any separation of powers concerns with Congress prescribing mandatory outcomes for a CFIUS process that constrain the Executive Branch's ability to oversee a review process involving analysis, negotiation, mitigation, and the exercise of discretion.

For these reasons, NAPABA requests that the Amendment be revised and narrowly tailored to focus on specific, identifiable national security threats without imposing harm on the broader Asian American, Native Hawaiian, and Pacific Islander community.

Respectfully,



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c: Hon. Charles E. Schumer, Majority Leader, U.S. Senate
Hon. Kevin McCarthy, Speaker, U.S. House of Representatives
Hon. Mitch McConnell, Minority Leader, U.S. Senate
Hon. Hakeem S. Jeffries, Minority Leader, U.S. House of Representatives