Nos. 17-2231 (L), 17-2232, 17-2233, 17-2240 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself and its clients; HIAS, INC., on behalf of itself and its clients; JOHN DOES #1 & 3; JANE DOE #2; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; ARAB AMERICAN ASSOCIATION OF NEW YORK, on behalf of itself and its clients; YEMENI-AMERICAN MERCHANTS ASSOCIATION; MOHAMAD MASHTA; GRANNAZ AMIRJAMSHIDI; FAKHRI ZIAOLHAGH; SHAPOUR SHIRANI; AFSANEH KHAZAELI; JOHN DOE #4; JOHN DOE #5,

Plaintiffs-Appellees,

and ALLAN HAKKY; SAMANEH TAKALOO; PAUL HARRISON; IBRAHIM AHMED MOHOMED;,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; ELAINE C. DUKE, in her official capacity as Acting Secretary of Homeland Security; REX TILLERSON, in his official capacity as Secretary of State; DANIEL R. COATS, in his official capacity as Director of National Intelligence.

Defendants-Appellants.

No. 17-2231 (L)
On Cross- Appeal from the United States District Court for the District of Maryland, Southern Division (8:17-cv-00361-TDC)

[Caption continued on inside cover]

AMICI BRIEF OF KAREN KOREMATSU, JAY HIRABAYASHI, HOLLY YASUI, THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, CIVIL RIGHTS ORGANIZATIONS, AND NATIONAL BAR ASSOCIATIONS OF COLOR IN SUPPORT OF APPELLEES

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NO. 17-2232
(8:17-CV-02921-TDC)

IRANIAN ALLIANCES ACROSS BORDERS; JANE DOE #1; JANE DOE #2; JANE DOE #3; JANE DOE #4; JANE DOE #5; JANE DOE #6; IRANIAN STUDENTS' FOUNDATION, Iranian Alliances Across Borders Affiliate at the University of Maryland College Park,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; ELAINE C. DUKE, in her official capacity as Acting Secretary of Homeland Security; KEVIN K. MCALEENAN, in his official capacity as Acting Commissioner of U.S. Customs and Border Protection; JAMES MCCAMENT, in his official capacity as Acting Director of U.S. Citizenship and Immigration Services; REX TILLERSON; JEFFERSON B. SESSIONS III, in his official capacity as Attorney General of the United States.

Defendants-Appellants.

No. 17-2233
(1:17-cv-02969-TDC)

EBLAL ZAKZOK; SUMAYA HAMADMAD; FAHED MUQBIL; JOHN DOE #1; JOHN DOE #2; JOHN DOE #3,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF STATE; ELAINE C. DUKE, in her official capacity as Acting Secretary of Homeland Security; REX TILLERSON, in his official capacity as Secretary of State.

Defendants-Appellants.

No. 17-2240
(8:17-cv-00361-TDC)

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself and its clients; HIAS, INC., on behalf of itself and its clients; JOHN DOES #1 & 3; JANE DOE #2; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; ARAB AMERICAN ASSOCIATION OF NEW YORK, on behalf of itself and its clients; YEMENI-AMERICAN MERCHANTS ASSOCIATION; MOHAMAD MASHTA; GRANNAZ AMIRJAMSHIDI; FAKHRI ZIAOLHAGH; SHAPOUR SHIRANI; AFSANEH KHAZAELI; JOHN DOE #4; JOHN DOE #5,

Plaintiffs-Appellants,

and PAUL HARRISON; IBRAHIM AHMED MOHOMED; ALLAN HAKKY; SAMANEH TAKALOO,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; ELAINE C. DUKE, in her official capacity as Acting Secretary of Homeland Security; REX TILLERSON, in his official capacity as Secretary of State; DANIEL R. COATS, in his official capacity as Director of National Intelligence.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), undersigned counsel for *amici* make the following disclosures:

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center") is a research and advocacy organization based at Seattle University, a non-profit educational institution under Section 501(c)(3) of the Internal Revenue Code. The Korematsu Center does not have any parent corporation or issue stock and consequently there exists no publicly held corporation which owns 10 percent or more of its stock.

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INTEREST OF *AMICI CURIAE*[1]

Karen Korematsu, Jay Hirabayashi, and Holly Yasui, the children of Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui, come forward as *amici curiae* because they see the disturbing relevance of the Supreme Court's decisions in their fathers' infamous cases challenging the mass removal and incarceration of Japanese Americans during World War II to the serious questions raised by Presidential Proclamation No. 9645, 82 Fed. Reg. 45161.

Minoru Yasui was a 25-year-old attorney in Portland, Oregon, when, on March 28, 1942, he intentionally defied the government's first actionable order imposing a curfew on persons of Japanese ancestry in order to bring a test case challenging its constitutionality. Gordon Hirabayashi was a 24-year-old college senior in Seattle, Washington, when he similarly chose to defy the government's curfew and removal orders on May 16, 1942. Fred Korematsu was a 22-year-old welder in Oakland, California, when, on May 30, 1942, he was arrested for refusing to report for removal.

All three men brought their constitutional challenges to the courts. Deferring to the government's claim that the orders were justified by military necessity, the Supreme Court affirmed their convictions. Our Nation has since

[1] This brief is filed with the consent of all parties. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution intended to fund the brief's preparation or submission.

recognized that the mass removal and incarceration of Japanese Americans was wrong; the three cases have been widely condemned; and all three men have been recognized with the Presidential Medal of Freedom for their wartime courage and lifetime work advancing civil and human rights.

Their children have sought to carry forward their fathers' legacy, educating the public and reminding the courts of the harm wrought by governmental actions, carried out in the name of national security, that impact men, women, and children belonging to disfavored minority groups—both the human toll and the danger of sacrificing our country's fundamental values. Guilt, loyalty, and threat are individual attributes. Courts must be vigilant when these attributes are imputed to entire racial, religious, and/or ethnic groups. The *Hirabayashi*, *Yasui*, and *Korematsu* cases stand as important symbols of the need for courts to fulfill their essential role in our democracy by checking unfounded exercises of executive power.

The Korematsu, Hirabayashi, and Yasui families are proud to stand with the following civil rights and national bar associations of color:

Fred T. Korematsu Center for Law and Equality at Seattle University School of Law;

Asian Americans Advancing Justice;

The Asian American Legal Defense and Education Fund;

The Hispanic National Bar Association ("HNBA");

The Japanese American Citizens League of Hawaii, Honolulu Chapter;

LatinoJustice PRLDEF, Inc.;

The National Bar Association; and

The South Asian Bar Association of North America.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Often the question has been raised whether this country could wage a new war without the loss of its fundamental liberties at home. Here is one occasion for this Court to give an unequivocal answer to that question and show the world that we can fight for democracy and preserve it too."

Gordon Hirabayashi made that plea to the Supreme Court in 1943, as he appealed his conviction for violating military orders issued three months after the Japanese attack on Pearl Harbor. Authorized by Executive Order No. 9066, those orders led to the forced removal and incarceration of over 120,000 men, women, and children of Japanese descent.

Mr. Hirabayashi did not stand alone before the Court. Minoru Yasui likewise invoked our Nation's ideals in casting his separate but related appeal as "the case of all whose parents came to our shores for a haven of refuge" and insisting that the country should respond to war and strife "in the American way and not by *** acts of injustice." Appellant Br. 55-56, *Yasui v. United States*, No. 871 (U.S. Apr. 30, 1943). The Court denied the appeals of both men. *See Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943).

The following year, the Supreme Court revisited the mass removal and incarceration of Japanese Americans in *Korematsu v. United States*, 323 U.S. 214 (1944). In *Korematsu*, the Court again failed to stand as a bulwark against governmental action that undermines core constitutional principles. By refusing to scrutinize the government's claim that its abhorrent treatment of Japanese Americans was justified by military necessity, the Court enabled the government to cover its racially discriminatory policies in the cloak of national security.

In this case, the courts are once again asked to abdicate their critical role in safeguarding fundamental freedoms. Invoking national security, the government seeks near complete deference to the President's decision to deny visas to nationals of six Muslim-majority nations. Indeed, the government will not even permit courts to review the classified report purporting to justify the President's decision on national security grounds. *See* J.A. 951-955.

Although the government claims it is merely asking for the application of established legal principles, the extreme deference it seeks is not rooted in sound constitutional tradition. Rather, it rests on doctrinal tenets infected with long-repudiated racial and nativist precepts. In support of the sweeping proposition that the President's authority to exclude aliens is unbounded, the government previously invoked the so-called "plenary power" doctrine—a doctrine that derives from decisions such as *Chae Chan Ping v. United States*, 130 U.S. 581 (1889),

which relied on pejorative racial stereotypes to eschew judicial scrutiny in upholding a law that prohibited Chinese laborers from returning to the United States after travel abroad. *Id*. at 595.

Although the government's arguments have evolved, it has not changed its message or its impact. While no longer invoking the term "plenary power," the government continues to assert that the "deeply rooted principle of nonreviewability" precludes courts from scrutinizing political decisions to deny visas, including, as here, denials to entire classes of aliens. Gov't Br. 20. As the Ninth Circuit observed, the numbing judicial passivity the government demands "runs contrary to the fundamental structure of our constitutional democracy" in which "it is the role of the judiciary to interpret the law, a duty that will sometimes require the '[r]esolution of litigation challenging the constitutional authority of one of the three branches.'" *Washington v. Trump*, 847 F.3d 1151, 1161 (9th Cir. 2017) (alteration in original) (quoting *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)).

Even more than the early "plenary power" decisions, the shades of *Korematsu*, *Hirabayashi*, and *Yasui* lurking in the government's argument should give this Court pause. In those cases, as here, the government's policies were justified in a controversial report. And like in this case, the government denied that its policies were grounded in "invidious *** discrimination" and asked the

courts to take it at its word that "the security of the nation" justified blanket action against an "entire group *** at once." Gov't Br. 35, *Hirabayashi v. United States*, No. 870 (U.S. May 8, 1943).

The Supreme Court agreed. First, in *Hirabayashi*, the Court employed a double negative to conclude that, even though racial distinctions are "odious to a free people," it "[could] []not reject as unfounded the judgment" of the government. *Hirabayashi*, 320 U.S. at 99-100. Going further in *Korematsu*, the Court denied that race played any role in the government's decisions: "cast[ing] this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue." 323 U.S. at 223. Accepting the government's assurance, the Court went on to find that "Korematsu was not excluded from the [West Coast] because of hostility to him or his race. He was excluded because *** the properly constituted military authorities *** decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated *** temporarily." *Id.*

Not all members of the Court were convinced, however. Three Justices dissented, including Justice Murphy, who declared that the exclusion of Japanese Americans from the West Coast "falls into the ugly abyss of racism," *Korematsu*, 323 U.S. at 233, and Justice Jackson, who pointed out that the Court "had no real evidence" to support the government's assertions of military necessity. Moreover,

Justice Jackson warned, the Court had created "a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Id.* at 246.

As history has made us acutely aware, the dissenters' doubts as to the veracity of the government's assertion of military necessity were well-founded, and their recognition of the gravity of the Court's decision was prophetic. Four decades later, Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu successfully sought vacatur of their convictions in unprecedented *coram nobis* proceedings. Evidence presented in those cases showed that the "military urgency" on which the Supreme Court predicated its decision was nothing more than a smokescreen: the real reason for the government's deplorable treatment of Japanese Americans was not acts of espionage (as the government maintained) but rather a baseless perception of disloyalty grounded in racial stereotypes.

Korematsu, *Hirabayashi*, and *Yasui* are as wrong today as they were on the day they were decided. If it were to accept the government's invitation here to abdicate its judicial responsibility, this Court would repeat the failures in those widely condemned cases. The Court should instead take this opportunity to acknowledge the historic wrong in *Korematsu*, *Hirabayashi*, and *Yasui*, and to repudiate the refusal in those cases to scrutinize the government's claim of necessity and its consequent failure to recognize the military orders' racist

underpinnings. Heeding the lessons of history, this Court should subject Proclamation No. 9645 to meaningful judicial scrutiny and affirm the Founders' visionary principle that an independent and vigilant judiciary is a foundational element of a healthy democracy.

ARGUMENT

I. THE GOVERNMENT'S CONCEPTION OF PLENARY POWER DERIVES FROM CASES INFECTED WITH RACIST AND XENOPHOBIC PREJUDICES

When the Trump Administration first attempted to deny visas and suspend the entry of aliens from Muslim-majority nations, the government argued that the "political branches[] [have] plenary constitutional authority over foreign affairs, national security, and immigration." Gov't Emergency Mot. 15-16, *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 4, 2017). In light of that "plenary authority," the government asserted, "[j]udicial second-guessing of the President's determination that a temporary suspension of entry of certain classes of aliens was necessary *** to protect national security *** constitute[s] an impermissible intrusion." *Id.* at 15.

Despite shedding the "plenary power" label in its defense of the Proclamation, the government's central argument remains unchanged: The political branches' "power to *** exclude aliens" is "largely immune from judicial control." Gov't Br. 19 (ellipsis in original) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)). The

Supreme Court, however, has never recognized an unbridled "plenary" power in the immigration realm that would preclude judicial review. And to the extent that it has shown excessive deference to the political branches in some cases, those precedents are linked to racist attitudes from a past era that have long since fallen out of favor.

1. In *Chae Chan Ping v. United States*, known as *The Chinese Exclusion Case*, the Court upheld a statute preventing the return of Chinese laborers who had departed the United States prior to its passage. 130 U.S. at 581-582. Describing the reasons underlying the law's enactment, the Court characterized Chinese laborers as "content with the simplest fare, such as would not suffice for our laborers and artisans," and observed that they remained "strangers in the land, residing apart by themselves, *** adhering to the customs and usages of their own country," and unable "to assimilate with our people." *Id.* at 595. "The differences of race added greatly to the difficulties of the situation." *Id.* Residents of the West Coast, the Court explained, warned of an "Oriental invasion" and "saw or believed they saw *** great danger that at no distant day *** [the West] would be overrun by them, unless prompt action was taken to restrict their immigration." *Id.*

Far from applying a skeptical eye to the law in light of the clear animus motivating its passage, the Court found that "[i]f *** the government of the United States, through its legislative department, considers the presence of foreigners of a

different race in this country, who will not assimilate with us, to be dangerous to its peace and security *** its determination is conclusive upon the judiciary." *The Chinese Exclusion Case*, 130 U.S. at 606. In reality, the "right of self-preservation" that the Court validated as justification for the government's unbounded power to exclude immigrants was ethnic and racial self-preservation, not the preservation of borders or national security. 130 U.S. at 608; *see id.* at 606 ("It matters not in what form *** aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us.").

Similar racist and xenophobic attitudes are evident in decisions following *The Chinese Exclusion Case*. *See, e.g.*, *Fong Yue 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); *id.* 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 *The Chinese Exclusion Case*, 130 U.S. at 598)).

2. Even in its early plenary power decisions, however, the Court recognized that the government's sovereign authority is subject to constitutional limitations. *See The Chinese Exclusion Case*, 130 U.S. at 604 ("[S]overeign powers *** [are] restricted in their exercise only by the constitution itself and

considerations of public policy and justice which control, more or less, the conduct of all civilized nations."). Indeed, from the doctrine's inception, the Court divided over the reach of the government's power in light of those limitations.

Fong Yue Ting, which upheld a law requiring Chinese laborers residing in the United States to obtain a special certificate of residence to avoid deportation, generated three dissenting opinions. *See* 149 U.S. at 738 (Brewer, J., dissenting); *id.* at 744 (Field, J., dissenting); *id.* at 761 (Fuller, J., dissenting). Even Justice Field, who authored the Court's opinion in *The Chinese Exclusion Case*, sought to limit the plenary power doctrine's application with regard to alien residents:

> As men having our common humanity, they are protected by all the guaranties of the constitution. To hold that they are subject to any different law, or are less protected in any particular, than other persons, is *** to ignore the teachings of our history *** and the language of our constitution.

Id. at 754.

Nearly 60 years later, judicial skepticism regarding an unrestrained plenary power persisted—and proliferated. In *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), the Court, relying on *Korematsu*, upheld a provision permitting the deportation of resident aliens who were members of the Communist Party. In dissent, Justice Douglas quoted Justice Brewer's words in *Fong Yue Ting*, observing that they "grow[] in power with the passing years":

> This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. *** The governments of other nations have elastic powers. Ours are fixed and bounded by a written constitution. The expulsion of a race may be within the inherent powers of a despotism. History, before the adoption of this constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely, as it seems to me, they gave to this government no general power to banish.

Id. at 599-600.

In another McCarthy-era precedent, four Justices advocated for limitations on the plenary power doctrine. Dissenting in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), in which the Court rejected any constitutional challenge to the exclusion of an alien who had previously resided in the United States, Justice Black reasoned that "[n]o society is free where government makes one person's liberty depend upon the arbitrary will of another." *Id.* at 217 (Douglas, J., joining). "Dictatorships," he observed, "have done this since time immemorial. They do now." *Id.* Justice Jackson, joined by Justice Frankfurter, added that aliens returning to the United States must be "accorded procedural due process of law." *Id.* at 224.

3. Perhaps reflecting the shift away from the xenophobic and race-based characterizations prevalent in its early plenary power precedents, the Court in recent years has been more willing to enforce constitutional limitations on the government's authority over immigration matters.

In *Reno v. Flores*, 507 U.S. 292 (1993), for example, the Court held that INS regulations must at least "rationally advanc[e] some legitimate governmental purpose." *Id.* at 306. In *Landon v. Plasencia*, 459 U.S. 21 (1982), the Court affirmed that a resident alien returning from a brief trip abroad must be afforded due process in an exclusion proceeding. *Id.* at 33. And in *Zadvydas v. Davis*, 533 U.S. 678 (2001), in response to the government's contention that "Congress has 'plenary power' to create immigration law, and *** the Judicial Branch must defer to Executive and Legislative Branch decisionmaking in that area," the Court observed that such "power is subject to important constitutional limitations." *Id.* at 695 (citations omitted). "[F]ocus[ing] upon those limitations," *id.*, the Court determined that the indefinite detention of aliens deemed removable would raise "serious constitutional concerns" and accordingly construed the statute at issue to avoid those problems, *id.* at 682.

The Court's most recent decision in this area provides further support for the conclusion that, after more than a century of erosion, the notion of plenary power over immigration is little more than a relic.

In *Kerry v. Din*, 135 S. Ct. 2128 (2015), the Supreme Court considered a due process claim arising from the denial without adequate explanation of a spouse's visa application. Although it described the power of the political branches over immigration as "plenary," Justice Kennedy's concurring opinion in *Din* made clear

that courts may review an exercise of that power. *Id.* at 2139-2140. Justice Kennedy acknowledged that the Court in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), had declined to balance the constitutional rights of American citizens injured by a visa denial against "Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" *Din*, 135 S. Ct. at 2139 (quoting *Mandel*, 408 U.S. at 766). But he explained that the Court did inquire "whether the Government had provided a 'facially legitimate and bona fide' reason for its action." *Id.* at 2140 (quoting *Mandel*, 408 U.S. at 770). And while as a general matter courts are not to "look behind" the government's asserted reason, courts should do so if the challenger has made "an affirmative showing of bad faith." *Id.* at 2141.

To be sure, Justice Kennedy's opinion in *Din* acknowledged that the political branches are entitled to wide latitude and deference in immigration matters. For that reason, the government relies heavily on *Din* and *Mandel* to argue that its assertion of a national security rationale is sufficient to justify Proclamation No. 9645 and to preclude further judicial scrutiny. But, as the courts of appeals recognized, *Din* (and *Mandel* before it) concerned an *individual* visa denial on the facts of that case. By contrast, the Proclamation sets a nationwide immigration policy, suspending entry and foreclosing visa adjudications for aliens of certain nationalities. While it may be sensible for courts ordinarily to defer to the

judgment of the political branches when considering the application of immigration law to a particular alien, the President's decision to issue a broadly-applicable immigration *policy*—especially one aimed at nationals of particular countries likely to share a common religion—is properly the subject of more searching judicial review.

All told, modern judicial precedent supports the notion that courts have both the power and the responsibility to review Proclamation No. 9645. Where, as here, the Court is asked to review a far-reaching program—promulgated at the highest level of the Executive Branch and targeting aliens based on nationality and religion—precedent and common sense demand more than an assessment of whether the government has offered a "facially legitimate and bona fide" rationale for its policy. Rather, the Proclamation, both on its face and in light of the glaring clues as to its motivations, cries out for careful judicial scrutiny.

II. *KOREMATSU*, *HIRABAYASHI*, AND *YASUI* STAND AS STARK REMINDERS OF THE NEED FOR SEARCHING JUDICIAL REVIEW OF GOVERNMENTAL ACTION TARGETING DISFAVORED MINORITIES IN THE NAME OF NATIONAL SECURITY

This Court need not look far for a reminder of the constitutional costs and human suffering that flow from the Judiciary's failure to rein in sweeping governmental action against disfavored minorities. And it need not look far for a reminder of the Executive Branch's use of national security as a pretext to

discriminate against such groups. The Court need look only to the all but universally condemned wartime decisions in *Korematsu*, *Hirabayashi*, and *Yasui*.

1. On February 19, 1942, President Roosevelt issued Executive Order No. 9066, authorizing the Secretary of War to designate "military areas" from which "any or all persons" could be excluded and "with respect to which, the right of any person to enter, remain in, or leave" would be subject to "whatever restrictions the Secretary of War or the appropriate Military Commander may impose." Exec. Order No. 9066, "Authorizing the Secretary of War to Prescribe Military Areas," 7 Fed. Reg. 1407, 1407 (Feb. 19, 1942). Adding its imprimatur to the Executive Order, Congress made violation of any restrictions issued thereunder a federal offense. An Act of March 21, 1942, Pub. L. No. 77-503, 56 Stat. 173.

Lieutenant General John L. DeWitt, head of the Western Defense Command, used that authority to issue a series of proclamations that led to the removal and incarceration of all individuals of Japanese ancestry living in "Military Area No. 1"—an exclusion area covering the entire Pacific Coast. *Hirabayashi*, 320 U.S. at 89. A curfew order came first. Soon after, Japanese Americans were ordered to abandon their homes and communities on the West Coast for tarpaper barracks (euphemistically called "relocation centers") surrounded by barbed wire and machine gun towers in desolate areas inland. *Id.* at 90.

For different individual reasons, but sharing a deep sense of justice, Minoru Yasui, Gordon Hirabayashi, and Fred Korematsu refused to comply with General DeWitt's orders. Yasui, a young lawyer, regarded the curfew as an affront to American constitutional values. "To make it a crime for me to do the same thing as any non-Japanese person *** solely on the basis of ancestry," he explained, "was, in my opinion, an absolutely abominable concept and wholly unacceptable." Testimony of Minoru Yasui, Nat'l Comm. for Redress, Japanese Am. Citizens League 9, *Comm'n on Wartime Relocation and Internment of Civilians* (1981). "Our law and our basic concept of justice had always been founded upon the fundamental principle that no person should be punished but for that individual's act, and not because of one's ancestry." *Id.* at 10. Convinced of the curfew's illegality, Yasui immediately defied it in order to initiate a constitutional challenge.

Hirabayashi, a student at the University of Washington, also defied the orders so that he could challenge their constitutionality, saying that he "considered it [his] duty to maintain the democratic standards for which this nation lives." PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES 88 (1984). Korematsu, a welder living in Oakland, California, refused to obey the removal orders so that he could remain with his fiancée who was not subject to removal because she was not Japanese American. The last of the three to face arrest and prosecution, Korematsu "shared with Yasui and Hirabayashi an

equal devotion to constitutional principle" and believed that the statute under which he was convicted was wrong. *Id.* at 98.

2. The constitutional challenges Yasui, Hirabayashi, and Korematsu made to the military orders soon made their way to the Supreme Court. But far from fulfilling its essential role in the constitutional structure that entrusts the Judiciary with the protection of fundamental rights, the Court set upon a path of judicial abdication that today serves as a cautionary tale.

In Hirabayashi's case, the Court elected to consider only his conviction for violating the curfew order, leaving unanswered his challenge to his conviction for failing to report to a Civil Control Station—a precursor to removal from his home in Seattle. *Hirabayashi*, 320 U.S. at 85. Harkening back to *The Chinese Exclusion Case*, the Court repeated the government's claim that "social, economic and political conditions" "intensified the[] solidarity" of Japanese Americans and "prevented their assimilation as an integral part of the white population." *Id.* at 96. Betraying no skepticism of these premises, the Court found that, in view of these and other attributes of the "isolation" of Japanese Americans and their "relatively little social intercourse *** [with] the white population," "Congress and the Executive could reasonably have concluded that these conditions *** encouraged the continued attachment of members of this group to Japan and Japanese institutions." *Id.* at 98. "Whatever views we may entertain regarding the loyalty to

this country of the citizens of Japanese ancestry," the Court continued, "we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained." *Id.* at 99.

Having upheld the curfew in *Hirabayashi*, the Court issued only a short opinion remanding Yasui's case to the Ninth Circuit. *Yasui*, 320 U.S. at 115. Because the district court had imposed a sentence based on its determination that Yasui had renounced his American citizenship, and the government did not defend that finding, the Court remanded the matter for resentencing. *Id.* at 117. The Court thereby avoided addressing the lower court's conclusion, supported by extensive analysis, that the military orders were unconstitutional as applied to citizens. *See United States v. Yasui*, 48 F. Supp. 40, 44-54 (D. Or. 1942).

The Court's third opportunity to confront the mass removal and incarceration program came a year-and-a-half later, in Korematsu's case. The Court again narrowed the issues before it, rejecting Korematsu's argument that the removal order could not be extricated from the incarceration he would inevitably face if he complied with that order. 323 U.S. at 216. Then, despite affirming that racial distinctions are "immediately suspect" and "must [be] subject *** to the most rigid scrutiny," *id.*, the Court denied, without probing examination, that the military orders were driven by racial hostility. The Court reiterated its conclusion from

Hirabayashi that it would not substitute its judgment for that of the military authorities. "There was evidence of disloyalty on the part of some," the Court reasoned, and "the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified." *Id.* at 223-224.

When the Court decided *Korematsu*, however, three members rejected the government's arguments. Although acknowledging that the discretion of those entrusted with national security matters "must, as a matter of *** common sense, be wide," Justice Murphy declared that "it is essential that there be definite limits to military discretion" and that individuals not be "left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support." 323 U.S. at 234. In his view, the exclusion order "clearly d[id] not meet th[is] test" as it relied "for its reasonableness upon the *assumption* that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage." *Id.* at 234-235 (emphasis added). In fact, as Justice Murphy noted, intelligence investigations found no evidence of Japanese American sabotage or espionage. *Id.* at 241. And even if "there were some disloyal persons of Japanese descent on the Pacific Coast," Justice Murphy reasoned, "to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action

against the entire group" is nothing more than "th[e] legalization of racism." *Id.* at 240-241, 242.

Justice Jackson was equally skeptical of the factual basis for the government's claims of military necessity and specifically questioned General DeWitt's "Final Report," on which the government relied. "How does the Court know that these orders have a reasonable basis in necessity?" Justice Jackson asked. 323 U.S. at 245. Pointing out that "[n]o evidence whatever on that subject ha[d] been taken by this or any other court" and that the DeWitt Report was the subject of "sharp controversy as to [its] credibility," Justice Jackson observed that the Court had "no real evidence before it." *Id.* Accordingly, the Court "ha[d] no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable." *Id.*

Justice Jackson saw grave dangers in the Court's opinion. While an unconstitutional military order is short lived, he observed, "once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens." 323 U.S. at 246. With that, Justice Jackson issued a prophetic warning: By "validat[ing] the principle of racial discrimination in criminal procedure and of transplanting American citizens," the

Court had created "a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Id.*

3. The dissenters' fears proved to be well-founded. Decades after the Court's decisions in *Hirabayashi*, *Yasui*, and *Korematsu*, newly discovered government records revealed not only that intelligence reports and data contradicted the claim that the mass removal and incarceration program was justified by military necessity, but also that the government knew as much when it convinced the Court to affirm the defendants' convictions.[2]

In 1983, armed with those newly discovered records, Yasui, Hirabayashi, and Korematsu filed *coram nobis* petitions seeking to vacate their convictions. As the court found in the *Hirabayashi* case, government records showed that the DeWitt Report had been materially altered in order to fabricate an acceptable factual justification for the mass removal and incarceration program. *Hirabayashi v. United States*, 627 F. Supp. 1445, 1456-1457 (W.D. Wash. 1986). Although the version of the report presented to the Supreme Court stated that it was impossible to identify potentially disloyal Japanese Americans in the time available, DeWitt's original report—submitted to the War Department while the government's briefs in *Hirabayashi* and *Yasui* were being finalized—made clear that the decision to issue

[2] Those records are discussed in *Justice at War: The Story of the Japanese American Internment Cases* by Peter Irons, who, with Aiko Herzig-Yoshinaga, unearthed them.

the challenged orders had nothing to do with urgency. Rather, General Dewitt's decision turned on his view that Japanese Americans were inherently disloyal on account of their "ties of race, intense feeling of filial piety and *** strong bonds of common tradition, culture and customs." *Id.* at 1449. "It was not that there was insufficient time in which to make such a determination," the original report stated; "a positive determination could not be made [because] an exact separation of the 'sheep and the goats' was unfeasible." *Id.* (quoting General DeWitt, *Final Report: Japanese Evacuation from the West Coast* ch. 2 (1942)). That original report was ordered destroyed, and the altered version was presented to the Court.

Beyond exposing the racist underpinnings of General DeWitt's orders (as well as the pretextual nature of the claim of urgency), the *coram nobis* cases revealed that the government's own intelligence agencies rebutted assertions in the DeWitt Report that Japanese Americans were involved in sabotage and espionage. *Hirabayashi v. United States*, 828 F.2d 591, 601 (9th Cir. 1987). The Office of Naval Intelligence ("ONI"), which the President charged with monitoring West Coast Japanese American communities, had determined in its official report that Japanese Americans were overwhelmingly loyal and posed no security risk. ONI thus recommended handling any potential disloyalty on an individual, not group, basis. ONI found, contrary to the government's representation to the Court, that mass incarceration was unnecessary, as "individual determinations *could* be made

expeditiously." *Id.* at 602 n.11 (emphasis added); *see also* IRONS, *supra*, at 203. In addition, reports from the Federal Bureau of Investigation ("FBI") and Federal Communications Commission ("FCC") directly refuted claims in the DeWitt Report that Japanese Americans were engaged in shore-to-ship signaling, intimating Japanese-American espionage. *Korematsu v. United States*, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984).

Department of Justice attorney John Burling, co-author of the government's brief, sought to alert the Court of the FBI and FCC intelligence that directly refuted the DeWitt Report. Burling included in his brief a crucial footnote that read: "The recital [in General DeWitt's report] of the circumstances justifying the evacuation as a matter of military necessity *** is in several respects, particularly with reference to the use of illegal radio transmitters and to shore-to-ship signaling by persons of Japanese ancestry, in conflict with information in the possession of the Department of Justice." *Korematsu*, 584 F. Supp. at 1417 (emphasis and citation omitted). But high-level Justice Department lawyers stopped the brief's printing. Despite Burling's vociferous protest about the DeWitt Report's "intentional falsehoods," the footnote was diluted to near incoherence, even implying the opposite of Burling's intended message. As revised, the footnote stated:

> [The DeWitt Report] is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. We have specifically recited in this brief the facts

> relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and we rely upon the *Final Report* only to the extent that it relates to such facts.

Gov't Br. 11 n.2, *Korematsu v. United States*, No. 22 (U.S. Oct. 5, 1944). Notwithstanding an earlier warning from Justice Department lawyer Edward Ennis that failing to alert the Court to the contrary intelligence in DOJ's possession "might approximate the suppression of evidence," *Hirabayashi*, 828 F.2d at 602 n.11 (citation omitted), the Justice Department concealed from the Court this crucial evidence on military necessity.

In light of the evidence presented, the courts hearing Fred Korematsu and Gordon Hirabayashi's *coram nobis* cases concluded that the government's misconduct had effected "a manifest injustice" and that the mass removal and incarceration program had been validated based on unfounded charges of treason. *Korematsu*, 584 F. Supp. at 1417; *Hirabayashi*, 627 F. Supp. at 1447.[3] In granting Korematsu's *coram nobis* petition, Judge Patel articulated the modern significance of the wartime cases:

> *Korematsu* *** stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to

[3] In Minoru Yasui's *coram nobis* case, the court acceded to the government's request to vacate his conviction and dismiss his petition for relief without making any determinations regarding government misconduct—and without acknowledging the injustice he suffered.

> protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.

Korematsu, 584 F. Supp. at 1420.

In vacating Korematsu, Yasui, and Hirabayashi's convictions, the *coram nobis* courts joined other institutions of government in recognizing the wrongs committed against Japanese Americans during World War II. In 1976, on behalf of the Executive Branch, President Ford officially rescinded Executive Order 9066, explaining that "[w]e now know what we should have known then—not only was *** evacuation wrong, but Japanese-Americans were and are loyal Americans." Presidential Proclamation 4417, *An American Promise*, 41 Fed. Reg. 7714 (Feb. 19, 1976). In 1983, after extensive hearings and research, the congressionally authorized Commission on Wartime Relocation and Internment of Civilians (CWRIC) issued a report concluding that it was not "military necessity" that underpinned the program of removal and incarceration, but rather "race prejudice, war hysteria and a failure of political leadership." REPORT OF CWRIC, PERSONAL JUSTICE DENIED 459 (The Civil Liberties Public Education Fund & University of Washington Press, 1997). Five years later, Congress passed (and President Reagan signed) the Civil Liberties Act of 1988, which, on the CWRIC's recommendations, acknowledged the injustice of the removal and incarceration program, issued an

official apology, and conferred symbolic reparations to the survivors of the incarceration centers.

Most recently, in 2011, the Acting Solicitor General confirmed what the *coram nobis* cases had established decades earlier: the Supreme Court's decisions in the wartime cases were predicated on lies. "By the time the cases of Gordon Hirabayashi and Fred Korematsu reached the Supreme Court, [DOJ] had learned of a key intelligence report that undermined the rationale behind the internment. *** But the Solicitor General did not inform the Court of the report despite warnings *** that failing to alert the Court 'might approximate the suppression of evidence.' Instead, he argued that it was impossible to segregate loyal Japanese Americans from disloyal ones." U.S. Dep't of Justice, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases* (May 20, 2011), https://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases.

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During World War II, the Supreme Court's refusal to probe the government's claim that military necessity justified the mass removal and incarceration of Japanese Americans made it unwittingly complicit in the government's deception. The Court's blank-check treatment of the Executive Branch's wartime policies—underscored by its repeated refusal to confront the most grievous aspects of those

policies or to acknowledge their racist underpinnings—allowed the wrongs inflicted on Japanese Americans to continue unabated for years, and allowed the government to avoid accountability for its egregious misconduct for decades.

Hirabayashi, *Yasui*, and *Korematsu* are powerful reminders not only of the need for constant vigilance in protecting our fundamental values, but also of the essential role of the courts as a check on abuses of government power, especially during times of national and international stress. Rather than repeat the failures of the past, this Court should repudiate them and affirm the greater legacy of those cases: Blind deference to the Executive Branch, even in areas in which decision-makers must wield wide discretion, is incompatible with the protection of fundamental freedoms. Meaningful judicial review is an essential element of a healthy democracy.

Consistent with those principles, this Court should reject the government's invitation to abdicate its critical role in our constitutional system, subject Proclamation No. 9645 to searching judicial scrutiny, and stand—as Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu did—as a bulwark against governmental action that undermines core constitutional values.

CONCLUSION

For the foregoing reasons, the relief sought by the government should be denied.

Respectfully submitted,

Dated: November 22, 2017

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I hereby certify that, pursuant to Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B), and 4th Circuit Rule 32(b), the attached brief is double spaced, uses a proportionately spaced typeface of 14 points or more, and contains a total of 6,496 words, based on the word count program in Microsoft Word.

Dated: November 22, 2017 /s/ Pratik A. Shah
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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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