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Brief of the Fred T. Korematsu Center for Law and Equality, Jay Hirabayashi, Holly Yasui, Karen Korematsu, Civil Rights Organizations, and National and New York Bar Associations of Color, as Amici Curiae in Support of the Relief Sought by Petitioners and Intervenor-Plaintiff

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

HAMEED KHALID DARWEESH, et al., Petitioners, and PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK, Intervenor-Plaintiff, v. DONALD TRUMP, President of the United States, et al., Respondents.	Civil Action No. 1:17-cv-00480 (Amon, J.)

BRIEF OF THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, JAY HIRABAYASHI, HOLLY YASUI, KAREN KOREMATSU, CIVIL RIGHTS ORGANIZATIONS, AND NATIONAL AND NEW YORK BAR ASSOCIATIONS OF COLOR, AS *AMICI CURIAE* IN SUPPORT OF THE RELIEF SOUGHT BY PETITIONERS AND INTERVENOR-PLAINTIFF

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INTEREST OF *AMICI CURIAE*

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center") is a non-profit organization based at the Seattle University School of Law. The Korematsu Center works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu, who defied military orders during World War II that ultimately led to the unlawful incarceration of 110,000 Japanese Americans, the Korematsu Center works to advance social justice for all. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

The Korematsu Center has a special interest in addressing government action targeted at classes of persons based on race, nationality, or religion. Drawing on its experience and expertise, the Korematsu Center seeks to ensure that courts understand the historical—and, at times, profoundly unjust—underpinnings of arguments asserted to support the exercise of such unchecked executive power.[1]

Jay Hirabayashi, Holly Yasui, and Karen Korematsu are children of three Japanese Americans who challenged the government's racial curfew and detention programs in the United States Supreme Court during World War II: Gordon Hirabayashi (*see Hirabayashi v. United States*, 320 U.S. 81 (1943)); Minoru Yasui (*see Yasui v. United States*, 320 U.S. 115 (1943)); and Fred Korematsu (*see Korematsu v. United States*, 323 U.S. 214 (1944)). Their interest is in reminding this Court of the legacy those judicial decisions had on their generation and will have on future generations, and the impact of judicial decisions that fail to protect men, women, and children belonging to disfavored groups in the name of national security. Guilt, loyalty, and threat are individual attributes. When these attributes are imputed to racial, religious, or national

[1] *Amici curiae* file this brief pursuant to the Court's February 13, 2017 docket order granting their motion for leave to file.

origin groups, courts play a crucial role in ensuring that there is a legitimate basis. Disaster has occurred when courts have refused to play this role.

During World War II, Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu stood largely alone. Here, their children are gratified to have such a broad coalition standing with them, and together, standing with those communities and individuals most directly harmed by the Executive Order:

Asian Americans Advancing Justice ("Advancing Justice") is the national affiliation of five nonprofit, nonpartisan civil rights organizations: Asian Americans Advancing Justice – AAJC, Asian Americans Advancing Justice – Asian Law Caucus, Asian Americans Advancing Justice – Atlanta, Asian Americans Advancing Justice – Chicago, and Asian Americans Advancing Justice – Los Angeles. Members of Advancing Justice routinely file *amicus curiae* briefs in cases in this Court and other courts. Through direct services, impact litigation, policy advocacy, leadership development, and capacity building, the Advancing Justice affiliates advocate for marginalized members of the Asian American, Native Hawaiian, Pacific Islander and other underserved communities, including immigrant members of those communities.

The Asian American Bar Association of New York ("AABANY") was formed in 1989 as a not-for-profit corporation to represent the interests of New York Asian-American attorneys, judges, law professors, legal professionals, legal assistants, paralegals, and law students. The mission of AABANY is to improve the study and practice of law, and the fair administration of justice for all by ensuring the meaningful participation of Asian Americans in the legal profession.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By

combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. The President's Executive Order No. 13,769, which would curtail the rights of immigrants to be free from discrimination because of their race, national origin, or religion, raises issues central to AALDEF's mission. In 1982, AALDEF testified before the U.S. Commission on Wartime Relocation and Internment of Civilians, in support of reparations for Japanese Americans forcibly relocated and imprisoned in camps during World War II. After 9/11, we represented more than 800 individuals from Muslim-majority countries who were called in to report to immigration authorities under the Special Registration ("NSEERS") program. AALDEF is currently providing community education and legal counseling to Asian Americans affected by the challenged Executive Order.

The membership of *amicus curiae* the Hispanic National Bar Association ("HNBA") is comprised of thousands of Latino lawyers, law professors, law students, legal professionals, state and federal judges, legislators, and bar affiliates across the country. The HNBA supports Hispanic legal professionals and is committed to advocacy on issues of importance to the 53 million people of Hispanic heritage living in the United States. The HNBA regularly participates as *amicus curiae* in cases concerning immigration and the protection of refugees.

LatinoJustice PRLDEF, Inc. ("LatinoJustice") is a national not-for-profit civil rights legal defense fund that has defended the constitutional rights and equal protection of all Latinos under the law. LatinoJustice's continuing mission is to promote the civic participation of the greater pan-Latino community in the United States, to cultivate Latino community leaders, and to engage in and support law reform litigation across the country addressing criminal justice, education, employment, fair housing, immigrants' rights, language rights, redistricting, and

voting rights. During its 45-year history, LatinoJustice has litigated numerous cases in both state and federal courts challenging multiple forms of racial discrimination by government actors including law enforcement practices that illegally target racial groups based upon their race, natural origin and immigration status.

The National Asian Pacific American Bar Association ("NAPABA") is the national association of Asian Pacific American attorneys, judges, law professors, and law students, representing the interests of over seventy-five state and local Asian Pacific American bar associations and nearly 50,000 attorneys who work in solo practices, large firms, corporations, legal services organizations, nonprofit organizations, law schools, and government agencies. Since its inception in 1988, NAPABA has served as the national voice for Asian Pacific Americans in the legal profession and has promoted justice, equity, and opportunity for Asian Pacific Americans. In furtherance of its mission, NAPABA opposes discrimination, including on the basis of race, religion, and national origin, and promotes the equitable treatment of all under the law.

The National Bar Association ("NBA") is the largest and oldest association of predominantly African-American attorneys and judges in the United States. The NBA was founded in 1925 when there were only 1,000 African-American attorneys in the entire country and when other national bar associations, such as the American Bar Association, did not admit African-American attorneys. Throughout its history, the NBA consistently has advocated on behalf of African Americans and other minority populations regarding issues affecting the legal profession. The NBA represents approximately 66,000 lawyers, judges, law professors, and law students, and it has over eighty affiliate chapters throughout the world.

The National Native American Bar Association's ("NNABA") core mission is advancing justice for Native Americans, Native Hawaiians and Alaska Natives, communities which have survived injustice in the American legal system for hundreds of years, often as a result of unchecked power and institutionalized discrimination. NNABA believes justice for all Americans is advanced when, as here, citizens stand together to examine the fairness of the actions of our institutions.

The South Asian Bar Association of North America ("SABA") is the umbrella organization for 26 regional bar associations in North America representing the interests of over 6,000 attorneys of South Asian descent. SABA provides a vital link for the South Asian community to the law and the legal system. Within the United States, SABA takes an active interest in the legal rights of South Asian and other minority communities. Members of SABA include immigration lawyers and others who represent persons that have been and will be affected by the Executive Order.

INTRODUCTION AND SUMMARY OF ARGUMENT

History has taught us the risk of everlasting stains to this Nation's constitutional fabric when the Judiciary turns a blind eye to broad-scale governmental actions targeting particular racial, ethnic, or religious groups. Notwithstanding that history, the federal government maintains that this Court should defer to the Executive's determinations with regard to Executive Order No. 13,769, entitled "Protecting the Nation from Foreign Terrorist Entry into the United States," 82 Fed. Reg. 8977 (Jan. 27, 2017) ("Executive Order"). Respondents' Memorandum of Law In Support of Motion to Dismiss the Petition, and In Opposition to Petitioners' Motion for a Stay (D.E. #66-1), at 15-16. In other cases pertaining to the Executive Order, the federal government has even argued that the President has "unreviewable authority" to suspend the admission of "any class of aliens." Emergency Motion Under Circuit Rule 27-3 for Administrative Stay and

Motion for Stay Pending Appeal at 2, *State of Wash. v. Trump*, No. 17-35105 (9th Cir. Feb. 4, 2017). Two courts have emphatically rejected that proposition. *See State of Wash. v. Trump*, No. 17-35105, slip op. at 13-18 (9th Cir. Feb. 9, 2017); *Aziz v. Trump*, No. 17-cv-00116-LMB-TCB (E.D.Va. Feb. 13, 2017) (D.E. #111), slip op. at 10-12.

In support of its sweeping contention that the Executive Order is immune from judicial review, the federal government has invoked the so-called "plenary power" doctrine—a doctrine whose limited role in modern American jurisprudence cannot bear the weight the government places on it. The plenary power doctrine derives from decisions such as *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) ("*Chinese Exclusion Case*"), that were premised on racist and nativist precepts we now reject. In upholding a law that prohibited Chinese laborers from returning to the United States, the *Chinese Exclusion Case* relied on pejorative stereotypes to eschew judicial scrutiny.

Hearkening back to dissents from early cases, and informed by contemporary norms and the lessons of history, modern courts have refused to afford complete deference to executive and legislative decisions in the realm of immigration. *Amici* do not dispute that the Executive wields broad discretion with respect to national security considerations, nor do they challenge the Executive's broad discretion to determine whether and in what circumstances particular aliens may be admitted into the United States. But (it should go without saying) that discretion is not without limits: it is bounded by the Constitution, and it is the role of the courts to ensure that such discretion is lawfully exercised.

As the Ninth Circuit recognized in refusing to stay an injunction blocking the Executive Order, judicial review is acutely important where, as here, the challenged action promulgates a broadly-applicable policy—particularly one that targets groups based on characteristics such as

race, religion, or national origin. Slip op. at 15-16. Such action, in the name of national security, is all too familiar to the Korematsu Center, which owes its existence to the forced relocation and incarceration during World War II of more than 110,000 men, women, and children of Japanese descent that was challenged—to no avail—in *Korematsu v. United States*, 323 U.S. 214 (1944). Decades later, upon finally vacating Mr. Korematsu's conviction for defying the baseless military order, a federal court observed that the *Korematsu* precedent "stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees"; "national security must not be used to protect governmental actions from close scrutiny and accountability"; and courts "must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused." *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

That caution should be heeded here, and this Court should subject the Executive Order to appropriate judicial scrutiny.

ARGUMENT

I. THE "PLENARY POWER" DOCTRINE ORIGINATED FROM RACIST NOTIONS THAT COURTS NOW REJECT.

1. To the extent the Supreme Court ever recognized a truly "plenary" power that would preclude judicial review of any constitutional claims (which it has not), that conception is linked to racist attitudes from a past era and has long since fallen out of favor.

In 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." *Id.* at 606. *See also* Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The Plenary Power Justification for On-Going Abuses of Human Rights*, 10 ASIAN AM. L. J. 13, 15 (2003). 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, 729-30 (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 *Chinese Exclusion Case*, 130 U.S. at 598)).

2. While the Court's early plenary power decisions were undoubtedly influenced by such attitudes now repudiated, the Court nonetheless recognized that the government's sovereign authority is subject to constitutional limitations. *See 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."). And even in those early years, the Court divided over the reach of the government's plenary 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) ("I deny that there is any arbitrary and unrestrained power to banish residents, even resident aliens."); *id.* at 744 (Field, J., dissenting); *id.* at 762 (Fuller, J., dissenting) (similar). 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, in my judgment, to ignore the teachings of our history, the practice of our government, and the language of our constitution.

Id. at 754 (Fields, J., dissenting).

Nearly 60 years later, judicial skepticism regarding an unrestrained plenary power persisted—and grew. Dissenting in *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), which upheld a provision permitting the deportation of resident aliens who were members of the Communist Party, Justice Douglas quoted Justice Brewer's dissent in *Fong Yue Ting*, observing that it "grows 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 (Douglas, J., dissenting) (quoting *Fong Yue Ting*, 149 U.S. at 737-738 (Brewer, J., dissenting)) (emphasis added).

In another McCarthy-era precedent, four Justices advocated for limitations on the plenary power doctrine. In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), the Court rejected any constitutional challenge to the exclusion of an alien who had previously resided in the United States, despite his resulting detention at Ellis Island. In dissent, Justice Black, joined by Justice Douglas, reasoned that "[n]o society is free where government makes one person's liberty depend upon the arbitrary will of another." *Id.* at 217. "Dictatorships," he observed, "have done this since time immemorial. They do now." *Id.* Justice Jackson, joined by Justice Frankfurter, added that, while in his view the "detention of an alien would not be inconsistent with substantive due process," such individuals must be "accorded procedural due process of law." *Id.* at 224.

3. Perhaps reflective of the shift away from race-based characterizations and other outdated notions prevalent in its early plenary power precedents, the Court in recent years has been more willing to enforce constitutional limits on the federal government's authority over immigration matters.

For example, in *Reno v. Flores*, 507 U.S. 292 (1993), the Court held that, despite the broad power of the political branches over immigration, 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, notwithstanding the government's expansive discretion to exclude. *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," the Court determined that the indefinite detention of aliens deemed removable would raise "serious constitutional concerns." *Id.*at 695, 705. *See also State of Wash. v. Trump*, No. 17-35105, slip op. at 13-18 (9th Cir. Feb. 9, 2017) (collecting cases demonstrating reviewability of federal government action in immigration and national security matters).

Even the decisions on which the federal government has relied for its "plenary" power do not support its invocation in the present context. In fact, the Court's most recent such decision supports the conclusion that, after more than a century of erosion, the "plenary power" doctrine as the federal government conceives it no longer exists. In *Kerry v. Din*, 135 S. Ct. 2128 (2015), the 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* makes clear that courts may review an exercise of that power to ensure that the reason offered for the exclusion of an alien is "legitimate and bona fide." Justice Kennedy explained that, although 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's 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden,'" *Kerry*, 135 S. Ct. at 2139 (quoting *Mandel*, 408 U.S. at 766), 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 instructed not to "look behind" the government's asserted reason for its decision provided it is "bona fide and legitimate," Justice Kennedy stated that exceptions to that rule would apply if the challenger 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. But, as the Ninth Circuit recognized, *Din* (and *Mandel* before it) concerned an individual visa denial on the facts of that case. By contrast, the Executive Order sets a nationwide immigration policy, suspending visas, prohibiting entry, and foreclosing any adjudications for all aliens of certain nationalities. That distinction strongly militates in favor of a more rigorous review of the Executive Order. While it may be sensible for courts to defer to the judgment of the political branches when considering the application of immigration law to a particular alien, "the President's *promulgation* of a sweeping immigration policy," slip op. at 16—especially one aimed at nationals of particular countries likely to share a common religion—is properly the subject of more exacting judicial scrutiny.

All told, the proposition that courts may not review the Executive Order is unsupported by modern judicial precedent. Even in cases concerning individual visa denials, the Court has inquired as to whether the government offered a "legitimate and bona fide" reason for the denial and has indicated that courts may look behind the government's asserted rationale in circumstances suggesting bad faith. Where, as here, the courts are asked to review a broadly-applicable policy—promulgated at the highest level of the Executive Branch and targeting aliens based on nationality and religion—the Court's cases demand a more searching judicial review.

Whatever the standard, this Court should reject the unsupported proposition that the President's Executive Order is immune from judicial review.

II. *KOREMATSU* STANDS AS A STARK REMINDER OF THE NEED FOR VIGILANT JUDICIAL REVIEW OF GOVERNMENTAL ACTION TARGETING DISFAVORED GROUPS IN THE NAME OF NATIONAL SECURITY.

In contending that the President's discretion to exclude "any class of aliens" is plenary and unreviewable—and, in any event, is justified by national security—the federal government has asked the courts to take its word for it. But the notion that the political branches might use national security as a smokescreen to discriminate against disfavored classes is not an unfounded concern. This Court need look no further than the tragic chapter in our Nation's history that gave rise to *Korematsu v. United States*, 323 U.S. 214 (1944).

Almost exactly seventy-five years ago, on February 19, 1942, President Roosevelt issued Executive Order No. 9066, which authorized 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." Executive Order No. 9066, "Authorizing the Secretary of War to Prescribe Military Areas," 7 Fed. Reg. 1407 (Feb. 19, 1942). Although it did not explicitly refer to Japanese Americans, that order resulted in the forcible relocation and incarceration of more than 110,000 men, women, and children of Japanese descent. Fred Korematsu, one of those Japanese Americans, was convicted for defying the military's invocation of the order. The Supreme Court upheld his conviction, along with the convictions of Gordon Hirabayashi and Minoru Yasui, thus effectively sanctioning Japanese-American incarceration during World War II on the purported basis of military necessity.

Korematsu v. United States, 323 U.S. 214 (1944); *see also Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943).

The Court's decision in *Korematsu* produced vigorous dissents, including one by Justice Murphy, who questioned the validity of the military interest the government advanced. Although acknowledging that the discretion of those entrusted with national security matters "must, as a matter of . . . common sense, be wide," *Korematsu*, 323 U.S. at 234, Justice Murphy opined that "[i]t 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." *Id.* In his view, the 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 235. While conceding that "there were some disloyal persons of Japanese descent on the Pacific Coast," Justice Murphy dismissed the "infer[ence] that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group" as nothing more than "th[e] legalization of racism." *Id.* at 240-241, 242.

History has proven Justice Murphy right. More than a half-century after the Court's decision, the Solicitor General acknowledged that, contrary to its representations, the federal government knew at the time of the mass incarcerations that only "a small percentage of Japanese Americans posed a potential security threat, and that the most dangerous were already known or in custody." 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; *see also* Neal K. Katyal, *The Solicitor General and Confession of*

Error, 81 FORDHAM L. REV. 3027 (2012-2013). The federal government's revelation occurred decades after a district court reversed Mr. Korematsu's conviction and found "substantial support in the record that the government deliberately omitted relevant information and provided misleading information in papers before the court." *Korematsu*, 584 F. Supp. at 1420. The Ninth Circuit made similar findings on its way to vacating Gordon Hirabayashi's convictions. *See Hirabayashi v. United States*, 828 F.2d 591, 593 (9th Cir. 1987) (observing that, although the Supreme Court accepted the government's contention that "the curfew was justified by military assessments of emergency conditions," available materials demonstrated that "there could have been no reasonable military assessment of an emergency at the time, that the orders were based upon racial stereotypes, and that the orders caused needless suffering and shame for thousands of American citizens") (footnotes omitted).[2]

The Supreme Court's decision in *Korematsu* gave virtually a blank check to the Executive Branch to take action against disfavored minorities in the name of national security. Although the government asserted a facially valid justification for its action, that justification was later discredited. The revelation that the government's unprecedented action was not in fact necessary is but one reason that *Korematsu* is not only widely understood as wrongly decided as a matter of law, but remains a black mark on our Nation's history and serves as a stark reminder of the dire consequences that result when abuses go unchecked by the Judiciary. *See, e.g.*, Michael Stokes Paulsen, *Symposium: The Changing Laws of War: Do We Need A New Legal Regime After September 11?: The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1259 (2004)

[2] Like Korematsu and Hirabayashi, Yasui petitioned for a writ of error *coram nobis* dismissing his indictment, vacating his conviction, and declaring the military order unconstitutional. In Yasui's case, the court granted the government's motion to dismiss the indictment and vacate his conviction without finding that his constitutional rights had been violated. *See Yasui v. United States*, 772 F.2d 1496 (9th Cir. 1985). Accordingly, Yasui's conviction was invalidated, but without any findings of fact to prove the injustice he suffered.

(Complete "judicial acquiescence or abdication" of performing checks on Presidential power "has a name. That name is Korematsu.").

Korematsu, along with *Plessy v. Ferguson*, is regarded as "embod[ying] a set of propositions that all legitimate constitutional decisions must be prepared to refute." Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011). History may look similarly at this period if courts allow the Executive Order to evade robust review based on a plenary power doctrine rooted in outdated notions and xenophobia, or an unwillingness to apply healthy judicial skepticism to government action taken in the name of national security. This Court should not abdicate its duty to stand as a bulwark against governmental action that undermines our core constitutional principles.

CONCLUSION

For the foregoing reasons, this Court should grant the relief sought by Petitioners and Intervenor-Plaintiff.

Dated: February 16, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 16, 2017, I electronically filed the foregoing with the Clerk of Court for the United States District Court for the Eastern District of New York by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: February 16, 2017

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