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Brief of Norman Y. Mineta, the Sakamoto Sisters, the Council on American-Islamic Relations (National and New York, Inc.), and the Fred T. Korematsu Center for Law and Equality as Amici Curiae in Support of Respondents

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No. 18-966

In The
Supreme Court of the United States

DEPARTMENT OF COMMERCE, ET AL.,
Petitioners,
v.
STATE OF NEW YORK, ET AL.,
Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

BRIEF OF NORMAN Y. MINETA, THE SAKAMOTO SISTERS, THE COUNCIL ON AMERICAN-ISLAMIC RELATIONS (NATIONAL AND NEW YORK, INC.), AND THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Norman Y. Mineta, Sharon Sakamoto, Eileen Yoshiko Sakamoto Okada, and Joy Sakamoto Barker come forward as *amici curiae* because they know first-hand about the dangers—particularly for immigrant and minority communities—from government exploitation of census data. The government weaponized confidential census data during World War II to facilitate the mass removal and incarceration of their families and communities. The unlawful and pretextual manner in which the federal government has endeavored to add a citizenship question to the 2020 decennial census compels *amici* to offer that profoundly troubling historical context to inform the Court's consideration of the questions presented.

Norman Y. Mineta served as Secretary of Transportation under President George W. Bush, as Secretary of Commerce under President Clinton, as a member of the U.S. House of Representatives from 1975 to 1995, and as mayor of San Jose, California, from 1971 to 1975. Norm's parents had to respond as non-citizens to the 1920, 1930, and 1940 decennial censuses because this Court made clear in *Ozawa v. United States*, 260 U.S. 178 (1922), that his parents—who emigrated from Japan—were not eligible for naturalized citizenship due to their Japanese

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[1] This brief is filed with the written 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.

ethnicity. In 1942, when Norm was 10 years old, the federal government removed him and his family from their home, and incarcerated them with thousands of other Japanese Americans—first at the Santa Anita racetrack in southern California and then at the Heart Mountain camp in Wyoming. Even though he was a young boy at the time, Norm clearly recalls being surprised that the federal government was able to so quickly round up many Japanese Americans from his community on the day of the Pearl Harbor bombing and in the months that followed. Years later, he learned that the U.S. Census Bureau had provided critical information that facilitated the surveillance of Japanese American communities, as well as their eventual exclusion and incarceration.

Sharon Sakamoto, Eileen Yoshiko Sakamoto Okada, and Joy Sakamoto Barker are three sisters who spent World War II incarcerated at the Minidoka concentration camp in Idaho. Their parents were American citizens born and raised in Washington State. Eileen was five years old and Joy was six months old when the federal government removed them, their parents, and two brothers from their Seattle home and sent them all to live in a converted horse stall at the Puyallup Fairgrounds south of Seattle. The federal government then moved them to Minidoka, where Sharon was born. Like Norm and his family, the Sakamoto family was unaware that the Census Bureau cooperated with military authorities by identifying where Japanese Americans lived. Sharon, Eileen, and Joy join as *amici* because they are deeply concerned that the proposed citizenship question on the 2020 decennial census will cause immigrants and other persons of color to avoid

responding for fear that the information will be used to harm them, just as the federal government harmed Japanese Americans during World War II.

The Council on American-Islamic Relations (CAIR) is the Nation's largest Muslim American civil rights and advocacy organization, and the Council on American-Islamic Relations, New York, Inc. (CAIR-NY) is an independent New York affiliate. Following the tragic attacks of 9/11, CAIR and CAIR-NY aided Muslim New Yorkers impacted by the perceived misuse of census data. Shortly after 9/11, at the request of what is now U.S. Customs and Border Protection, the Census Bureau provided a list of U.S. cities that had more than 1,000 Arab American residents. Over a year later, it provided a zip-code-level breakdown of Arab American populations by country of origin. Government officials subsequently insisted that the Bureau disclosed this data to help notify travelers about currency reporting requirements and to improve airport signage. Muslim Americans, however, viewed these post-9/11 disclosures as pretextual and infected with animus, thereby reducing their trust and participation in the 2010 decennial census. CAIR and CAIR-NY join as *amici* out of concern that the inclusion of a citizenship question in the 2020 decennial census will further erode Muslim Americans' trust and participation.

The Fred T. Korematsu Center for Law and Equality is a non-profit organization based at the Seattle University School of Law. It 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 resulted in

the unlawful incarceration of 120,000 Japanese Americans—the Korematsu Center works to advance social justice for all. It has a special interest in addressing government action that harms classes of persons based on race or nationality.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

The decennial census depends on self-reporting and can achieve its mandate under the Enumeration Clause only when the public trusts that the federal government will not misuse collected information. In recognition of that fact, every U.S. President since 1910 has issued a proclamation reassuring individuals and their communities that no harm could result from participating in the decennial census. Toward that end, the modern Census Act requires the Secretary of Commerce to treat census data as confidential.

Despite those assurances, the government has breached the public's trust on several occasions throughout the Nation's history—particularly during World Wars I and II. The most notable breach is the Census Bureau's 1942 disclosure of data on the whereabouts of Japanese Americans. The evidence is clear—and, indeed, the Bureau now admits—that it provided the data that powered the machinery of mass removal and incarceration of Japanese Americans during World War II.

The Census Bureau disclosed confidential data to wartime authorities out of supposed "military urgency," but the *coram nobis* cases 40 years later

[2] The Korematsu Center does not represent the official views of Seattle University.

demonstrated any such urgency was a lie. The real reason for the government's deplorable treatment of Japanese Americans was a baseless perception of disloyalty grounded in racial stereotypes.

As that history demonstrates, the fear that census data could be used to harm individuals and communities is anything but abstract. Immigrant communities and other communities of color, in particular, thus have good reason to be suspicious of the government's decision to include a citizenship question on the 2020 decennial census. The district court's exhaustive post-trial findings confirm that suspicion here: the citizenship question was added through a process that the court found to be arbitrary, and it was based on a justification that the court found to be pretextual.

The federal judiciary plays a vital role in ensuring that improper motives do not infect government decisionmaking. Heeding the lessons of the government's historical exploitation of census data, including its misuse of such data to facilitate the mass incarceration of Japanese Americans on the pretext of national security, this Court should firmly reject the government's attempt once again to escape meaningful judicial scrutiny.

ARGUMENT

I. PUBLIC TRUST IN THE CENSUS DERIVES FROM THE FEDERAL GOVERNMENT'S ASSURANCE THAT IT WILL NOT MISUSE DATA.

The promise of data confidentiality is integral to the modern Census Bureau's ability to achieve the

"actual Enumeration" required by the U.S. Constitution. U.S. CONST. art. I, § 2, cl. 3; *see*, *e.g.*, Vincent P. Barabba & D.L. Kaplan, *U.S. Census Bureau Statistical Techniques To Prevent Disclosure—The Right of Privacy vs. the Need To Know* (1975) ("Should the public's confidence in the Bureau's pledge of confidentiality for their census returns erode, goodwill and cooperation will erode."), *quoted in* U.S. DEP'T OF COMMERCE, REPORT ON STATISTICAL DISCLOSURE AND DISCLOSURE-AVOIDANCE TECHNIQUES 32 (1978). In recognition of the need for public trust, the modern Census Act restricts the Secretary's ability to (i) "use the information furnished" by census respondents "for any purpose other than the statistical purposes for which it is supplied"; (ii) "make any publication whereby the data furnished by any particular establishment or individual *** can be identified"; or (iii) "permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports." 13 U.S.C. § 9(a)(1)-(3).

The federal government, however, did not always seek to protect census data. For example, to facilitate an accurate enumeration in the 1790 decennial census, the government posted draft census data in public places to shame noncompliant persons and levy community pressure on them. *See* JASON G. GAUTHIER, MEASURING AMERICA: THE DECENNIAL CENSUS FROM 1790 TO 2000, at 129 (2002).

It was not until the early twentieth century that the Census Bureau (created in 1902) adopted a more sensible approach of incentivizing participation in the decennial census through "guarantees *** designed to

assure the public that they can respond candidly to government statistical inquiries." Margo Anderson & William Seltzer, *Challenges to the Confidentiality of U.S. Federal Statistics, 1910-1965*, 23 J. OFFICIAL STATS. 1, 1 (2007) (hereinafter "*Challenges*"). President William Howard Taft sought to remove politics from the census process by ordering the Secretary of Commerce and Labor to promulgate regulations to ensure that "the census shall not be made to serve the political purposes of any one." *The Census and Politics*, N.Y. TIMES, at 8 (Aug. 18, 1909) (quoting President Taft's letter).

In a similar vein, President Taft issued a proclamation in 1910 to assure the public that participation in the census would not lead to harm:

> The sole purpose of the census is to secure general statistical information *** , and replies are required from individuals only in order to permit the compilation of such general statistics. The census has nothing to do with *** army *** service *** , with the regulation of immigration, or with the enforcement of any national, state, or local law or ordinance, nor can any person be harmed in any way by furnishing the information required. There need be no fear that any disclosure will be made regarding any individual person or his affairs.

1910 Census Proclamation, U.S. CENSUS BUREAU. The sitting U.S. President has delivered a virtually identical proclamation for every decennial census since then. *Challenges*, *supra*, at 5.

Yet the Census Bureau almost immediately failed to live up to its promise of confidentiality. In 1917, the Bureau disclosed "to courts, draft boards, and the Justice Department" the names of thousands of draft-age men who failed to register for the Selective Service during World War I. *Challenges*, *supra*, at 7. In doing so, the Bureau's Director concluded that "statistical confidentiality should be conditioned and compromised by more apparently pressing government needs." *Id*.

Unsurprisingly, the floodgates opened: "[O]nce census officials supported the initial release of information to draft boards in 1917, officials in other agencies, for example in the Justice Department, asked for further releases." *Challenges*, *supra*, at 10. "[I]n early 1920, while the enumerators were in the field, the Justice Department, on behalf of the Department of Labor, asked if the local enumerators in Toledo, Ohio, could provide information about individuals' citizenship from the 1920 Census of Population *** for use in deportation cases." *Id*. at 8 (ellipsis in original) (citation and internal quotation marks omitted).

After World War I, Census Bureau Directors William Mott Steuart (1921-1933) and William Lane Austin (1933-1941) viewed regaining public trust through data confidentiality as paramount. *See Challenges*, *supra*, at 9-10, 16. But by 1941, as the United States faced the prospect of World War II, President Franklin Roosevelt "sought a mechanism to permit the administrative and intelligence agencies access to individual level information collected by the U.S. Census Bureau." *Id*. at 16. President Roosevelt

"involuntarily retired" Director Austin and nominated a more compliant director, who immediately "authorized the Commerce Secretary to provide officials in other government agencies access to confidential census data for the 'national defense program.'" *Id*. at 17. Within a year, Congress passed the Second War Powers Act of 1942, which stated "[t]hat notwithstanding any other provision of law, *** data *** in the possession of the Department of Commerce or any bureau or division thereof, may be made available *** to any branch or agency of the Government *** for use in connection with the conduct of the war." Pub. L. No. 77-507, § 1402, 56 Stat. 176, 186-187. That Act temporarily suspended the existing statutory confidentiality protection for census data. 13 U.S.C. §§ 8-9 (1940).

Requests for the Census Bureau to share census data continued during the postwar period. For instance, a few years after the end of World War II, "the Attorney General's Office sought information from census records about certain individuals for use by the FBI in the context of rising concern about possible Communist infiltration and sabotage." *Challenges*, *supra*, at 25 (citation and internal quotation marks omitted). To be sure, for a period beginning in 1962, the "Bureau effectively resisted any federal agency requests for access to individual reports for the purpose of taxation, investigation or regulation." *Id.* at 28. But in 2001, the Bureau facilitated the U.S. Department of Homeland Security's post-9/11 access to data from the 2000 decennial census concerning the 5-digit postal codes of Arab Americans. *Id.* And "[a]s during the world wars, there is much discussion today in the United States

about coordination of government information and efficiency." *Id.* at 30.

The upshot of these examples is that many Americans—particularly those from immigrant and minority communities—have reason to distrust how the government might use responses to a citizenship question, which could suppress response rates and degrade the quality of the data gathered. Past experience has also eroded confidence in the effectiveness of "ethical safeguards *** to deter the most likely and persistent 'intruders,' that is, other agencies of government with investigative, intelligence, or prosecutorial agendas." *Challenges*, *supra*, at 29. In today's age, where national security and other exigencies have brought the issue of census data confidentiality back to the fore, it is imperative that the decennial census be administered in a manner that eliminates any concern that data will be wielded against those who provide responses.

II. THE MASS INCARCERATION OF JAPANESE AMERICANS, FACILITATED BY CENSUS DATA AND PRETEXT, SERVES AS A CAUTIONARY TALE.

A. The Government Used Census Data To Incarcerate Japanese Americans During World War II.

One of the most glaring and heinous examples of the Census Bureau's violation of the public trust occurred during World War II: the Bureau played a central role in the mass removal and incarceration of over 120,000 Japanese Americans during the spring of 1942. "The historical record is clear that senior

Census Bureau staff proactively cooperated with the internment, and that census tabulations were directly implicated[.]" U.S. CENSUS BUREAU POLICY OFFICE, A MONOGRAPH OF CONFIDENTIALITY AND PRIVACY IN THE U.S. CENSUS 16 (July 2001) (hereinafter "CENSUS BUREAU MONOGRAPH").

Most directly, the Census Bureau now admits to "providing 1940 census data on Japanese Americans" to the War Department, specifically the Western Defense Command, "for small geographic areas down to the census tract and block levels." CENSUS BUREAU MONOGRAPH, *supra*, at 15. In February 1942, the Bureau deployed the head of its statistical research division, Calvert Dedrick, "to the Western Defense Command to assist in the implementation of the evacuations." Margo Anderson, *Public Management of Big Data: Historical Lessons from the 1940s*, FED. HIST. 17, 22 (2015) (hereinafter "*Public Management*"). Dedrick later testified that the Western Defense Command asked him for "a detailed cross-tabulation for even the most minute areas," such as "cities by blocks." William Seltzer & Margo Anderson, *After Pearl Harbor: The Proper Role of Population Data Systems in Time of War* 7 (Mar. 28, 2000) (unpublished draft). Dedrick agreed and provided unpublished data that allowed the Western Defense Command "to find where the citizens of Japanese descent lived" and to identify "exactly the city blocks where the people of Japanese descent lived." *Public Management*, *supra*, at 29-30 (citation and quotation marks omitted).

Contemporaneous evidence confirms the Census Bureau's admission. In 1943, U.S. General John L.

DeWitt, Commander of the Western Defense, authored what the government offered as the military's official account of the wartime removal and incarceration. J.L. DeWitt, *Final Report: Japanese Evacuation from the West Coast, 1942* (June 5, 1943) (hereinafter "*Final Report*"). General DeWitt detailed how the Bureau performed a "special tabulation" of 1940 decennial census data for the Western Defense Command, which "plotted on maps" the "total number of Japanese individuals and families *** for each census tract." *Id.* at 86. Specifically, the Bureau provided "tables" showing "various city blocks where the Japanese lived and *** how many were living in each block." REPORT OF THE CWRIC, PERSONAL JUSTICE DENIED 105 n.* (The Civil Liberties Public Education Fund & University of Washington Press, 1997).

That information allowed the Western Defense Command to round up Japanese Americans—what General DeWitt referred to as the "logistics of evacuation"—with swift and surgical precision. *Final Report*, *supra*, at 356. Indeed, General DeWitt concluded that "[t]he most important single source of information prior to the evacuation was the 1940 Census of Population," which "became the basis for the general evacuation and relocation plan." *Id.* at 352; *see also id.* at 79 (census data was "[o]f prime importance in shaping the evacuation procedure").

Beyond sharing data with the Western Defense Command, the Census Bureau disclosed information about individual Japanese Americans to federal agencies. William Seltzer & Margo Anderson, *Census Confidentiality Under the Second War Powers Act*

(1942-1947), at 5 (Mar. 12, 2007) (unpublished draft). In 1943, pursuant to the Second War Powers Act, the U.S. Treasury Department requested from the Commerce Department "a list of the Japanese residing in the Metropolitan Area of Washington, D.C., as reported in the 1940 Census, including information as to addresses." *Id*. at 16 & fig. 1. The Commerce Department complied within seven days, creating a spreadsheet that listed the "name, address, sex, age, marital status, citizenship status, status in employment, and occupation and industry" of 79 Japanese Americans. *Id*. at 21-22 & figs. 5a-b. The rapidity of the disclosure demonstrates that "the Bureau not only provided identifiable micro-data on Japanese Americans to other federal agencies but also had well-developed procedures to do so expeditiously." *Id*. at 24. Thus, at the very least, the 1943 Washington, D.C. disclosure is strong evidence that "lists of Japanese Americans from the 1940 Census were provided to assist in the mopping up stages of the round-up of Japanese Americans on the West Coast." *Id*. at 40.

The foregoing lays bare how the federal government used the 1940 decennial census for the purpose of finding and incarcerating Japanese Americans, *despite* President Roosevelt's 1940 proclamation that "[t]here need be no fear that any disclosure will be made regarding any individual person or his affairs" and that "[n]o person can be harmed in any way by furnishing the information required." *Proclamation 2385: Sixteenth Decennial Census* (Feb. 9, 1940), *in* 1940 SUPPLEMENT TO THE CODE OF FEDERAL REGULATIONS 26-27 (1941). This shameful episode from our Nation's history provides

real-world context for Respondents' concern that the Census Bureau will use citizenship data for improper purposes or in ways that will harm them or their communities.

B. The Japanese American Incarceration Cases Are Powerful Reminders That This Court Must Be Vigilant In Policing Pretext.

In addition to asking the Court to remember the use of census data during World War II, *amici* ask the Court to uphold the district court's searching inquiry into the government's stated reason for adding the citizenship question to the 2020 decennial census and to ensure that the reason is not pretextual. In the Japanese American incarceration cases, the Court failed to scrutinize the government's claim that its actions were necessary, and 40 years later, it was discovered that the government's reasons were a pretext for discrimination. The Court should remember the lesson of those cases. It should scrutinize the government's proffered justification here (including by subjecting decisionmakers to discovery), and it should affirm the district court's conclusion—based on scores of post-trial factual findings—that the Secretary of Commerce concealed his true motivation for adding the citizenship question.

The district court held that "the sole rationale" the government "articulated for [its] decision—that a citizenship question is needed to enhance [the Department of Justice's (DOJ) Voting Rights Act (VRA)] enforcement efforts—was pretextual." Pet.

App. 320a.[3] In particular, the district court found several facts demonstrating that the government made its decision "well before" the DOJ's request for a citizenship question "and for reasons unrelated to the VRA." *Id.* at 313a. Worse still, "the record also includes evidence of the many ways in which Secretary Ross and his aides sought to conceal" the decision to add the citizenship question. *Id.* at 314a.

The Administrative Procedure Act (APA) exists precisely so that Article III courts can ferret out and invalidate such agency action. It confers upon courts the essential responsibility to "set aside agency action" that is "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A), (C). And it is a core tenet of APA review that an agency decisionmaker must "disclose the basis of" decision. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *see also Securities & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[T]he process of review requires that the grounds upon which the administrative agency acted be clearly disclosed[.]"). Pretextual decisionmaking is anathema to those principles.

The Solicitor General nonetheless invites this Court to insulate the Secretary's action from APA review altogether. Gov't Br. 21-28. As a fallback, the

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[3] Significantly, the only other court to consider this question also found that the Secretary's rationale was pretextual. *See State v. Ross*, No. 18-CV-01865-RS, 2019 WL 1052434, at *48 (N.D. Cal. Mar. 6, 2019) ("Together, this evidence establishes that Defendants intended to use the VRA enforcement as a pretext for adding the citizenship question when VRA enforcement was not, in fact, their true purpose.").

Solicitor General argues that the district court's pretext finding "defies fundamental principles governing APA review of agency action" because it puts the focus on an unstated justification not in the administrative record. *Id.* at 40-45. Relatedly, the Solicitor General seeks to shield decisionmakers from having to reveal their true intentions in discovery. *Id.* at 55.

As the Japanese American incarceration cases poignantly demonstrate, the costs of allowing the actual justifications for government action to go undetected—or even unchecked—are unmeasurably high. There, the government argued that the wartime orders resulting in the incarceration of 120,000 persons of Japanese ancestry—two-thirds of whom were American citizens—were justified by military necessity because those persons posed a threat of espionage and sabotage. *See Hirabayashi v. United States*, 320 U.S. 81 (1943), *conviction vacated* 828 F.2d 591 (9th Cir. 1987); *Yasui v. United States*, 320 U.S. 115 (1943), *conviction vacated* 772 F.2d 1496, 1498 (9th Cir. 1985); *Korematsu v. United States*, 323 U.S. 214 (1944), *conviction vacated* 584 F. Supp. 1406, 1413 (N.D. Cal. 1984). This Court infamously deferred, reasoning that "it is not for any court to sit in review of the wisdom of the[] action or [to] substitute its judgment for [the decisionmakers']." *Hirabayashi*, 320 U.S. at 93; *see also Korematsu*, 323 U.S. at 218 (same).

Forty years later, *coram nobis* petitions revealed that the government had engaged in "the suppression of evidence which established *** the real reason for the exclusion order," and instead had provided this Court a false and pretextual record to support the

mass exclusion of Japanese Americans. *Hirabayashi*, 828 F.2d at 604. Although the government had represented that the immediate round-up of Japanese Americans was necessary because there was insufficient time to separate the loyal from the disloyal, General DeWitt's Final Report originally said no such thing. *Id.* at 596, 598. Instead, it took the racist and revealing position that one could *never* separate the "sheep from the goats" because 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." *Hirabayashi v. United States*, 627 F. Supp. 1445, 1449 (W.D. Wash. 1986). When it was discovered that the Report contradicted the government's argument, the government ordered the Report revised and destroyed the original versions. *Hirabayashi*, 828 F.2d at 598-599.

The government also failed to apprise this Court of intelligence reports from the Federal Bureau of Investigation (FBI), the Federal Communications Commission (FCC), and the Office of Naval Intelligence (ONI) that refuted the government's claim of military necessity. Justice Department attorney John L. Burling attempted to insert a footnote into the government's brief in *Korematsu*, stating that General DeWitt's "recital" with respect to "the use of illegal radio transmitters and shore-to-ship signaling by persons of Japanese ancestry" were "in conflict with information in the possession of the Department of Justice." *Korematsu*, 584 F. Supp. at 1417 (emphasis and internal citation omitted). His memorandum to Assistant Attorney General Herbert Wechsler stated: "General DeWitt's report makes flat statements

concerning radio transmitters and ship-to-shore signaling which are categorically denied by the FBI and by the [FCC]. There is no doubt that these statements were intentional falsehoods." *Id*. at 1424. The footnote as filed, however, did the opposite of what Burling recommended in "ask[ing] the Court to take judicial notice" of "the justification for the evacuation." Br. of U.S. 11 n.2, *Korematsu v. United States*, No. 22 (U.S. Oct. 5, 1944).

Similarly, the ONI's Kenneth Ringle wrote a report concluding that there was no basis for mass incarceration. *See* Lt. Comm. Kenneth D. Ringle to Chief of Naval Operations, *Report on Japanese Question* (Jan. 26, 1942), *in* File ASW 014.311, RG 107, U.S. National Archives, Washington, D.C. Justice Department attorney Edward Ennis urged the Solicitor General to disclose the report to this Court, but "[n]otwithstanding [his] plea, the *** brief in *Hirabayashi* made no mention of Ringle's analysis." *Hirabayashi*, 828 F.2d at 602 n.11. The Solicitor General finally confessed error for this conduct in 2011. U.S. Dep't of Justice, *Confession of Error: The Solicitor General's Mistakes During the Japanese American Internment Cases* (May 20, 2011).

These well-chronicled events make all-too-concrete the concern that the government's stated rationale for pursuing a particular end may be cut from whole cloth. The APA empowers courts to evaluate the government's justification in real time, rather than discover 40 years later that it was pretextual.

* * *

Korematsu, *Hirabayashi*, and *Yasui* are painful yet powerful reminders not only of the need for constant vigilance in protecting our fundamental values, but also of the essential role of Article III courts as guardians against pretextual government action. 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's stated rationale is incompatible with the protection of fundamental freedoms. Accordingly, this Court should reject the government's invitation to abdicate its critical role to root out pretext under the APA; subject the government's reason for adding a citizenship question to the 2020 decennial census to searching judicial scrutiny; and stand as a bulwark against government action that threatens immigrant and other communities of color.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Respectfully submitted.

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