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Brief of Amici Curiae Karen and Ken Korematsu; Holly, Iris, and Laurel Dee Yasui; Jay Hirabayashi; Sharon Mitsu Yuen; and Marion Setsu Oldenburg in Support of Plaintiffs-Appellees and Affirmance

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12-3176, 12-3644

United States Court of Appeals
For the Second Circuit

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CHRISTOPHER HEDGES, Daniel Ellsberg, Jennifer Bolen, Noam Chomsky, Alexa O'Brien, US Day of Rage, Kai Wargalla, Hon. Birgitta Jonsdottir M.P.,

Plaintiffs-Appellees,

v.

BARACK OBAMA, individually and as representative of the United States of America, Leon Panetta, individually and in his capacity as the executive and representative of the Department of Defense,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICI CURIAE KAREN AND KEN KOREMATSU HOLLY, IRIS, AND LAUREL DEE YASUI JAY HIRABAYASHI, SHARON MITSU YUEN, AND MARION SETSU OLDENBURG IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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AMICI CURIAE'S STATEMENT OF INTEREST AND OVERVIEW[1]

Amici are the children of Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui, three American citizens of Japanese ancestry who, as young men during World War II, challenged the constitutionality of the military orders subjecting Japanese Americans to curfew and forced removal from the West Coast. Deferring to the government's claim of military necessity, and failing to scrutinize the basis for the government's actions, the Supreme Court affirmed their criminal convictions for defying the military orders, placing its stamp of approval on one of the most sweeping deprivations of constitutional liberties in recent American history. *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943).

Forty years later, Korematsu, Hirabayashi, and Yasui successfully reopened their cases and had their wartime convictions vacated, based on proof that in order to secure favorable decisions from the Supreme Court, the government had suppressed, altered, and destroyed military and civilian intelligence directly refuting its claim that military necessity justified the wartime internment of Japanese Americans. *Korematsu v. United States*, 584 F.Supp. 1406 (N.D.Cal. 1984); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987), *affirming in part and reversing in part*, 627 F.Supp. 1445 (W.D.Wash. 1986); Order, *Yasui v.*

[1] All parties have consented to the filing of this brief. Only *amici*'s counsel authored, or contributed money for the preparation and submission of, this brief. FRAP 29(c)(5).

United States, Crim. No. C 16056, at 2 (D.Or. Jan. 26, 1984) (granting government's motion to vacate conviction and dismissing petition), *rev'd and remanded on other grounds*, 772 F.2d 1496 (9th Cir. 1985). These men showed that the internment was far more than an unfortunate "mistake," as many had concluded, but was the product of a fundamental and pervasive abuse of power.

The federal courts, especially the Supreme Court, failed to accord the internment of Japanese Americans the exacting scrutiny the government's wholesale deprivation of constitutional liberties demanded. Had it done so, the lack of bona fide factual justification for the internment–as well as the government's fraud on the courts, the Japanese American community, and the nation–would likely have been revealed. The NDAA's indefinite detention scheme echoes the indefinite detention that characterized the internment, and, similarly, it is factually unsubstantiated as well as ill-defined and overbroad in scope, as Judge Forrest found.

The threshold issue here is whether this Court will exactingly review the government's legal and factual defense of the NDAA's indefinite detention provision, as Judge Forrest did, or will instead uncritically defer to the government's position, as the Court did in the internment cases. Given the constitutional liberties at stake here, and in the spirit of their fathers' defenses of those same freedoms, *amici* urge this Court to draw upon the revelations of the

Japanese American internment and *coram nobis* cases and affirm Judge Forrest's application of heightened scrutiny to her review of the NDAA's indefinite detention provisions.

ARGUMENT

I. THE CONSTITUTIONAL SCHEME OF CHECKS AND BALANCES COMPELS CAREFUL JUDICIAL SCRUTINY OF GOVERNMENT NATIONAL SECURITY RESTRICTIONS OF CIVIL LIBERTIES.

In the shadow of America's expansive war on terror, disagreement persists about the judiciary's role in reviewing legal challenges to government national security actions curtailing fundamental liberties. Some, including former Chief Justice William Rehnquist, contend the judiciary should play a muted role, explaining "[t]he laws will...not be silent in time of war, but they will speak with a somewhat different voice." William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* 224-25 (2000); *Hamdi v. Rumsfeld*, 316 F.3d 450, 463 (4th Cir. 2003) (the judiciary "has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of…national security"), *vacated*, 542 U.S. 507 (2004). Because the government usually can articulate a facially plausible national security rationale for its actions, this limited approach inevitably aligns the courts with the political branches even in the face of government excesses or unsubstantiated claims of necessity.

This deferential approach conflicts with the constitutionally enshrined principle of government accountability through checks-and-balances. As the Supreme Court has recognized, careful judicial scrutiny of constitutionally questionable actions of the political branches is essential to securing the nation as a democracy. *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *Ex parte Milligan*, 71 U.S. 2, 14 (1866) (rejecting government's argument that the President has wartime power to serve as "supreme legislator, supreme judge, and supreme executive"); *Boumediene v. Bush*, 553 U.S. 723, 727 (2008) ("To hold that the political branches may switch the Constitution on or off at will would lead to a regime in which they, not this Court, say 'what the law is.'"). When the judiciary fails to discharge its constitutional obligation to check the political branches, as in the WWII internment cases, democracy's rule of law is threatened. Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 Law & Contemp. Probs. 285, 327 (2005).

The judiciary's independent check on the executive and legislative branches is most important during times of national distress. It is then that the political branches have too often sacrificed constitutional liberties in the name of national security, scapegoating innocent individuals and marginalized groups, and then justifying their actions by dissembling or relying on false or misleading factual

claims. (*See* Args.II, III.) As Justice Souter explained, the courts act as a vital check on the government's penchant to "amplify" its claim of necessity to legally justify its actions:

> [f]or reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a different branch [the Judiciary].

Hamdi v. Rumsfeld, 542 U.S. 507, 545 (2004) (Souter, J., concurring).

These judicial checks, rooted in the constitutional separation of powers,[2] are essential because "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Id.* at 536. As the Supreme Court affirmed in closely reviewing executive detention powers after the Civil War, the "safeguards of liberty" should receive the "watchful care of those [e]ntrusted with the guardianship of the Constitution and laws"—the courts. *Milligan*, 71 U.S. at 124. More recently, during the Iraq War, Justice Kennedy reiterated that even in "extraordinary times…[l]iberty and security can be reconciled; and in our system…reconciled [by courts] within the framework of the law." *Boumediene*, 553 U.S. at 798; *Hamdi v. Rumsfeld*, 243 F.Supp.2d 527, 532 (E.D.Va. 2002)

[2] *Myers v. United States*, 272 U.S. 52, 293-94 (1926) (Brandeis, J., dissenting) ("separation of powers was adopted…not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was…to save the people from autocracy. …And protection of the individual…from the arbitrary or capricious exercise of power was then believed to be an essential of free government.").

(quoting *United States v. Robel*, 389 U.S. 258, 264 (1967) ("The standard of judicial inquiry must also recognize that the 'concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of [government] power designed to promote such a goal'"), *rev'd*, 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004).

The appropriate "standard of judicial inquiry" is determined by a straightforward principle that balances the government's need to advance security with the people's constitutional civil liberties guarantee:

> Except as to actions under civilly-declared martial law, the standard of judicial review of government restrictions of civil liberties of Americans is not altered or attenuated by the government's contention that "military necessity" or "national security" justifies the challenged restrictions. In operation, this means that the standard of review of governmental action is to be determined according to the existing constitutional doctrine which focuses on the right restricted.

Eric K. Yamamoto, *Korematsu Revisited - Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 Santa Clara L.Rev. 1, 41-42 (1986); Stephen Dycus et al., *National Security Law* 805 (3d ed.2002) (addressing importance of heightened scrutiny "in cases like *Hirabayashi* and *Korematsu*, 'where there is the most at stake in terms of personal freedom and the political branches are most likely to over-react'").

Under established doctrine, the character of the "rights restricted" determines the appropriate level of judicial scrutiny. *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945) ("the character of the right, not of the limitation…determines what standard governs the choice" of review); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (actions "against discrete and insular minorities may be a special condition…call[ing] for a correspondingly more searching judicial inquiry"); Aviam Soifer, *Law and the Company We Keep* 131-33 (1995).

Measures are subject to heightened judicial scrutiny—requiring the government to carefully delineate those targeted and demonstrate bona fide necessity—*only* when they appear to curtail fundamental liberties or involve suspect classifications like race. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 135-36 (1980). In those instances, keeping in mind the possible need for confidentiality, a court requires the government to forthrightly and substantially justify its actions curtailing fundamental liberties. If the government can do so, its actions are sustained; if it cannot, its actions are invalidated. Exacting judicial scrutiny thus affords the executive and legislative branches latitude in undertaking genuinely needed security measures that impinge upon basic liberties while also preventing (in the specific case) and deterring (in future instances) government overreaching or dissembling that damages foundational American

values. David Cole & James X. Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* 241 (rev. ed. 2006) ("We subject executive decisions to judicial review…because…the adversarial process can produce a fuller factual record, exposing faulty assumptions, and because deliberative review by life-tenured judges can protect against the rash decisions resulting from the pressures felt by elected officials.").[3]

Despite disagreements, courts now correctly recognize the necessity for meaningful judicial review even (or especially) in the national security context, in part because the internment cases demonstrated the grave danger of a hands-off judiciary. (*See* Arg.III.) Reflecting this trend, Judge Forrest's decision properly rejected the government's argument that judges should "step aside" in these

[3] Justice Jackson's *Youngstown* analysis of the nature of executive power under the Constitution is not contrary to *amici*'s view of the judiciary's critical role in protecting our fundamental freedoms. While Jackson posited that Presidential authority is "at its maximum" when authorized by Congress, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring), this "rough" formulation, *id*. at 635, is, and must be, tempered by countervailing principles: that the purpose of the Constitutional diffusion of power is "to secure liberty," *id*.; that the President and Congress must exercise their delegated powers within Constitutional limits, *id*. at 640; and that the nature of the "rights restricted" by governmental action, not of the power exercised, fixes the proper level of judicial scrutiny, *see Thomas*, 323 U.S. at 529-30. As the intellectual architect of the Nuremberg war crimes trials, Jackson understood the need for meaningful judicial review. Having dissented in *Korematsu*, Jackson would have understood that the Japanese American internment and *coram nobis* cases teach that the judiciary's check on the political branches through its power of searching review must not be curtailed even when, in times of national distress, they act together in denying essential freedoms.

Judge Forrest's decision recognizes these principles: "It is simply not the case that by prefacing this statute with the provision 'Congress affirms…the authority of the President…to detain covered persons…,' it is outside of the purview of judicial review. If that were the case, it would reveal an extraordinary loophole through which the legislative and executive branches could create immunity from judicial oversight[.]" *Hedges*, 2012 WL 3999839 at *31.

controversies. *Hedges v. Obama*, No. 12 Civ. 331 (KBF), 2012 WL 3999839, at *4 (S.D.N.Y. Sept. 12, 2012). Citing the historical "embarrassment" of the deferential *Korematsu* majority, *id*. at *5, Judge Forrest instead carefully reviewed the government's arguments and evidence on §1021(b)(2) and related issues of standing and injunctive relief in light of the NDAA's curtailment of core liberties of speech and due process. (*See* Arg.IV.) In doing so she faithfully discharged the judiciary's obligation of "watchful care."

II. HISTORY TEACHES THAT SEARCHING JUDICIAL SCRUTINY OF GOVERNMENT NATIONAL SECURITY RESTRICTIONS IS CRUCIAL TO PROTECTING FUNDAMENTAL LIBERTIES.

History reveals that in times of national distress the government has too often reacted excessively and, "subtly renounc[ing] their role as constitutional backstop," courts have deferred to the political branches, "taking a hands-off approach in reviewing government national security actions, even where fundamental liberties are sharply restricted." Eric K. Yamamoto & Susan K. Serrano, *The Loaded Weapon*, 27 Amerasia J. 51, 55 (2001). Justice Thurgood Marshall observed:

> History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II relocation-camp cases, and the Red scare and McCarthy-era internal subversion cases, are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.

Skinner v. Ry. Labor Execs' Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting); *Hamdi*, 542 U.S. at 530 ("history and common sense" reveal "that an unchecked system of detention carries the potential to become a means for oppression and abuse").

For Korematsu, Hirabayashi, and Yasui, who experienced first-hand the injustice resulting from a lack of searching judicial scrutiny, the courts' history of failures to check excessive government actions is particularly relevant. Indeed, in an earlier *amicus* brief, Korematsu recounted the historical "pattern whereby the executive branch curtails civil liberties much more than necessary during wartime and seeks to insulate the basis for its actions from any judicial scrutiny," including the following dark chapters in American law. Brief of Amicus Curiae Fred Korematsu, *Rasul v. Bush*, 542 U.S. 466 (2004), 2004 WL 103832, at *2.

The Alien and Sedition Acts of 1798 were early measures President Adams deployed to scapegoat political enemies under the guise of patriotism and national security. *See* Alien Friends Act, ch.58, 1 Stat. 570 (1798); Sedition Act of 1798, ch.73, 1 Stat. 596 (1798) (both expired in 1800). With the judiciary's approval, *United States v. Duane*, 25 F.Cas. 917 (C.C.Pa. 1801) (No. 14,996); *United States v. Cooper*, 25 F.Cas. 631 (C.C.Pa. 1800) (No. 14,865), these Acts enabled the executive branch to stifle political dissent by detaining political dissenters as

"dangerous." James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (1956).

During World War I, under the Espionage Act of 1917 and a "feverish atmosphere," the judiciary allowed the government to prosecute wartime dissenters for their protest speech. Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U.Chi. L.Rev. 335, 357 (2003). Deferential courts affirmed many Espionage Act convictions. *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919).

The Cold War era's McCarthyism and loyalty oaths destroyed many lives as the government prosecuted American Communist Party members and scapegoated alleged "sympathizers." Tainted often with anti-Semitism and racial prejudice, and with deferential courts lending their imprimatur, the government trampled individuals' constitutional rights of free speech and association under the mantle of national security. *See, e.g.*, *Dennis v. United States*, 341 U.S. 494 (1951) (upholding Smith Act prosecutions).

This history and the Japanese American internment cases discussed below illuminate a key insight for the judiciary: when core constitutional liberties are at stake, courts need to subject government claims of national security necessity to heightened scrutiny to promote government accountability and foster democratic checks-and-balances.

III. THE SUPREME COURT'S INTERNMENT DECISIONS ILLUSTRATE THE DANGERS OF JUDICIAL DEFERENCE TO NATIONAL SECURITY RESTRICTIONS THAT CURTAIL FUNDAMENTAL LIBERTIES.

The Supreme Court's Japanese American internment cases—particularly *Korematsu*—have been cited by judges and scholars to illustrate the need for careful judicial review during times of national distress.[4] These cases, along with the evidence supporting their reopening in later *coram nobis* proceedings, illustrate two stark realities: 1) during time of fear or distress, both the executive and legislative branches at times bend to the will of "intemperate majorities," Edward Keynes, *Undeclared War: Twilight Zone of Constitutional Power* 63 (1991), and unfairly target unpopular and relatively powerless groups; and 2) lax judicial review not only allows or even condones such governmental excess, but invites

[4] *Hamdi v. Rumsfeld*, 337 F.3d 335, 375-76 (4th Cir. 2003) (Motz, J., dissenting from denial of rehearing en banc) ("[C]ourts must be vigilant in guarding Constitutional freedoms, perhaps never more so than in time of war. We must not forget the lesson of *Korematsu[.]*"); *Fraise v. Terhune*, 283 F.3d 506, 530 (3d Cir. 2002) (Rendell, J., dissenting) (citing *Korematsu*, "[w]e have, at times, overreacted in response to perceived characteristics of groups thought to be dangerous to our security" and requiring "close scrutiny" to determine whether group membership poses a real threat); *Doe v. Gonzales*, 500 F.Supp.2d 379, 414 (S.D.N.Y. 2007), *affirmed in part, reversed in part and remanded by John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), *modified* (Mar. 26, 2009) (citing *Korematsu*: "The pages of this nation's jurisprudence cry out with compelling instances illustrating that…when the judiciary lowers its guard on the Constitution, it opens the door to far-reaching invasions of liberty."); *Farag v. United States*, 587 F.Supp.2d 436, 467 (E.D.N.Y. 2008) (*Korematsu* is "now widely regarded as a black mark on our constitutional jurisprudence"); *see also* Eugene Rostow, *The Japanese American Cases--A Disaster*, 54 Yale L.J. 489, 502-33 (1945); Margaret Chon, *Remembering and Repairing: The Error Before Us, In Our Presence*, 8 Seattle J. Soc. Just. 643, 645 (2010); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists*," 8 Asian L.J. 1, 12 (2001).

abuses of power, including in *amici*'s fathers' cases a fraud on the courts at the highest levels.

A. The Supreme Court's failure to closely scrutinize the government's claims of military necessity for the Japanese American internment led it to validate one of the most sweeping deprivations of fundamental liberties in American history.

Americans now know that the Japanese American internment was "not justified by military necessity"; instead, its "broad historical causes…were race prejudice, war hysteria and a failure of political leadership." U.S. Comm'n on Wartime Relocation and Internment of Civilians, Congress of 1980, Report: Personal Justice Denied, at 18 (1982); *see* 50A U.S.C. §1989a(a). The Court's failure to adequately scrutinize the government actions in *amici*'s father's cases validated the notion of racial guilt, with its enduring human cost on the Japanese American community.

On February 19, 1942, bowing to political and media pressure, both exploiting and fueled by public fears, *id.* at 67-82; Roger Daniels, *Concentration Camps USA: Japanese Americans and World War II* 32-34 (1972), President Roosevelt issued Executive Order 9066, 7 Fed.Reg. 1407 (Feb. 19, 1942), which effectively gave the military sweeping authority over civilians in the name of national security. Congress made violation of military orders issued under EO 9066 a federal offense. Pub.L.No. 77-503, 56 Stat. 173 (1942). Using this authority, Lt. General John L. DeWitt, head of the Western Defense Command,

issued orders imposing a curfew on all persons of Japanese ancestry and then forcibly removing them from their homes and communities. Without any proven acts of espionage or sabotage, over 110,000 Japanese Americans, two-thirds U.S. citizens, were interned in concentration camps in harshly desolate areas of the interior for the duration of the war. Daniels, *supra*, at 33, 104.

Hirabayashi, Yasui, and Korematsu defied the military orders and challenged the constitutionality of their resulting criminal convictions, and thereby the internment as a whole, as racist deprivations of fundamental rights. Affirming, the Supreme Court failed to carefully scrutinize the basis for these orders, but instead, deferred to Lt.Gen. DeWitt's ostensible judgment that military necessity compelled the government's actions.

Hirabayashi initiated the Court's troubling path of judicial abdication. After deciding to address only Hirabayashi's curfew conviction, the Court explained that, in reviewing the actions of the war-making branches of government, "it is not for any court to sit in review of the wisdom of their action or to substitute its judgment for theirs." *Hirabayashi*, 320 U.S. at 85, 93. Further, uncritically accepting the government's calculated use of judicial notice, Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 Colum. L.Rev. 175, 185-87 (1945), the Court failed to require bona fide proof of the government's claims that the orders were

justified. The "facts" the government asserted and the Court adopted—that the proximity of Japanese Americans to strategic installations, their "racial characteristics," and purported instances of espionage or sabotage created a "real" threat to national security, *Hirabayashi*, 320 U.S. at 95-98— were all controverted. Improperly taking judicial notice of these disputed "facts," the Court accepted, without scrutinizing, the government's claim of military necessity. Employing a double-negative, the Court announced that "we cannot reject as unfounded the judgment" of the military commander and political branches. *Id.* at 99.

A year-and-a-half later, the Supreme Court decided *Korematsu*, upholding the constitutionality of the forcible removal of West Coast Japanese Americans. 323 U.S. at 217-18. While the Court asserted that governmental racial classifications should be "subject...to the most rigid scrutiny," the Court again deferred to the political branches and military, inquiring only whether there was any basis for disagreeing with the orders, not whether they were based on a "pressing public necessity," and accepting carte blanche the government's untrustworthy post hoc record, untested by the protections of the adversarial process. *Id.* at 216-19. In *Korematsu*, the Court accepted DeWitt's Final Report's key factual statements, again, without scrutiny. *Id.* at 245 (Jackson, J., dissenting) (questioning credibility of DeWitt's report). Ultimately, re-inscribing its highly deferential posture, the Court explained that, "Here, as in the *Hirabayashi*

case…'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 218.

In separate dissents, three justices condemned the Court's decision. Notably, Justice Jackson warned that the Court's deferential stance posed a far-reaching and permanent danger:

> How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has 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. at 245 (Jackson, J., dissenting). In deferring to the government's claim of military necessity, he explained, the Court dangerously turned a factually untested military expedient into constitutional precedent–"a loaded weapon": "the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. *The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need*." *Id.* at 245-46 (emphasis added).

In short, in the internment cases, the Court abdicated its role as a check on the excessive exercise of government power, and, in so doing, gave the government's racially-based actions the imprimatur of constitutional authority.

B. The *coram nobis* proceedings revealed that a deferential Supreme Court decided *Korematsu, Hirabayashi,* and *Yasui* based on a fraudulent evidentiary record, underscoring the importance of exacting judicial scrutiny.

For 40 years after their Supreme Court decisions, *amici*'s fathers continued to believe that the Court's essential validation of the internment contravened the nation's constitutional principles. Many came to view the internment as an egregious "mistake." *See* Rostow, *supra* at 489 (calling the wartime internment "mistaken"); Proclamation No. 4417, 41 Fed.Reg. 7741 (Feb. 19, 1976) (President Ford rescinding EO 9066 and asking that country learn from our "mistakes").

In 1981-1982, Peter Irons and Aiko Herzig-Yoshinaga discovered WWII government records that proved the internment was not just a "mistake." Instead, the government knew its claims that military necessity justified the internment were false, and deliberately suppressed, altered, and destroyed material evidence rebutting its claim of military necessity in order to secure favorable judicial rulings in the internment cases. Peter Irons, *Justice at War* 347-67 (1983).

In 1983, based on these discoveries, Korematsu, Hirabayashi, and Yasui filed petitions for writs of error *coram nobis* to vacate their wartime convictions, successfully proving in the two petitions heard on their merits that the government's egregious misconduct not only denied them due process, but effectively validated the mass racial incarceration based on unfounded charges of treason. *Korematsu,* 584 F.Supp. 1406; *Hirabayashi,* 627 F.Supp.1445;

Hirabayashi, 828 F.2d 591.[5] The Supreme Court's refusal to probe the government's contentions, and its uncritical deference to DeWitt's ostensible military judgment, particularly as expressed in his Final Report, enabled this pervasive fraud.

First, as the government's records proved, the Final Report submitted to the Supreme Court had been materially altered to fabricate an acceptable factual justification for the forced removal and internment. *Hirabayashi*, 627 F.Supp. at 1456-57. A prior original Final Report, submitted to the War Department in April 1943 while the DOJ was finalizing its *Hirabayashi* and *Yasui* briefs, made clear that DeWitt's purported military decision had nothing to do with lack of time to identify potentially disloyal Japanese Americans—the government's official rationale adopted by the Supreme Court.[6] DeWitt's decision was based instead on his view that Japanese Americans were inherently disloyal because of their "ties of race…and the strong bonds of common tradition, culture and customs…. It was not that there was insufficient time in which to make such a determination; …a

[5] For an extensive examination of the *Hirabayashi*, *Korematsu*, and *Yasui coram nobis* litigations, *see* Peter Irons, *Justice Delayed: The Record of the Japanese American Internment Cases* 3-46 (1989); Yamamoto et al., *Race, Rights and Reparation: Law and the Japanese Internment* 277-387 (2001).

[6] See *Korematsu*, 323 U.S. at 223-24 (Korematsu "was excluded [from the Military Area]…because [the properly constituted military authorities] decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily.... There was evidence of disloyalty on the part of some, the military authorities considered the need for action was great, and the time was short.").

positive determination could not be made, [and] an exact separation of the 'sheep from the goats' was unfeasible." *Hirabayashi*, 627 F.Supp. at 1449 (quoting DeWitt's original Final Report). Alarmed, the War Department withheld the Final Report from the DOJ during *Hirabayashi*, forced DeWitt to change his report to recite the official "lack of time" rationale, ordered all copies of the original Final Report burned, and in *Korematsu* submitted the altered Final Report to the DOJ and Supreme Court as DeWitt's military justification for his orders. *Id*. at 1450-51. Given this calculated fraud, the Supreme Court's uncritical deference to the military commander's purported judgment could not have been more prejudicial.

Second, the *coram nobis* courts also found that the War Department and DOJ knowingly withheld from the Supreme Court critically reliable evidence rebutting DeWitt's factual statements that Japanese Americans were involved in espionage and sabotage. The government suppressed a definitive report from the Office of Naval Intelligence, the agency charged with monitoring the Japanese American communities, which had found that Japanese Americans were overwhelmingly loyal to the U.S. and posed no security risk and that a mass incarceration was unnecessary. *Hirabayashi*, 828 F.2d at 601. In April 1943, DOJ lawyer Edward Ennis strongly urged Solicitor General Charles Fahy to advise the Supreme Court in *Hirabayashi* and *Yasui* of the ONI report:

> I think we should consider very carefully whether we do not have a duty to advise the Court of the existence of the Ringle memorandum and of the fact that his represents the view of the Office of Naval Intelligence. It occurs to me that *any other course of conduct might approximate the suppression of evidence*.

Id. at 602 n.11 (emphasis added). The Solicitor General ignored Ennis's warning, enabling the Court in the later *Korematsu* appeal to take judicial notice of purportedly uncontroverted "facts" that were actually sharply refuted.

The DOJ similarly suppressed FBI and FCC records definitively discrediting the reports of Japanese American espionage and sabotage, including shore-to-ship signaling cited in DeWitt's Final Report. *Korematsu*, 584 F.Supp. at 1417; *Hirabayashi*, 828 F.2d at 603 n.12; Irons, *Justice at War* at 280-92. DOJ lawyer John Burling sought to disclaim reliance on the Final Report through a footnote in the government's brief alerting the Supreme Court of the refutory intelligence reports, but at the War Department's insistence, the disclaimer was watered down to virtual non-existence. *Korematsu*, 584 F.Supp. at 1417-18; *Hirabayashi*, 828 F.2d at 603 n.12. Ennis also unsuccessfully urged the Solicitor General to disclose the Final Report's unreliability, charging that the ONI, FBI, and FCC reports showed that the allegations of Japanese American espionage and disloyalty were not just "untrue," but were "lies, put out in an official publication" that could not be allowed to "go uncorrected." In language prophetically underscoring the need for searching judicial review, Ennis warned: "If we fail to act forthrightly…, the

whole historical records of this matter will be as the military choose to state it." *Korematsu*, 584 F.Supp. at 1423.

Lastly, although the Final Report had been thoroughly discredited, Solicitor General Fahy unequivocally warranted its reliability to the Supreme Court in oral argument, *Hirabayashi*, 828 F.2d at 600, stating: "not only the military judgment of the general, but the judgment of the Government of the United States, has always been in justification of the measures taken; *and no person in any responsible position has ever taken a contrary position*, and the Government does not do so now." Transcript of Proceedings before the Supreme Court, Oct. 12, 1944, at 7, *Korematsu v. United States Coram Nobis* Litigation Collection Number 545, Box 25, Folder 5, Dept. of Special Collections, Charles E. Young Research Library, UCLA (emphasis added). Astonishingly, in response to direct questioning, Fahy continued to unqualifiedly vouch for the Final Report's reliability: "there is not a single line, a single word, or a single syllable in that report which in any way justifies the statement that General DeWitt did not believe he had, and did not have, a sufficient basis, in honesty and good faith, to believe that the measures which he took were required as a military necessity in protection of the West Coast," and "[w]e say that the report proves the basis for the exclusion orders. There is not a line in it that can be taken in any other way. It is a complete

justification and explanation of the reasons which led to [DeWitt's] judgment." *Id*. at 6-7, 9-10.[7]

The government's fabrication of the record presented to the Supreme Court highlights the danger of uncritical judicial deference to government national security claims. As Judge Voorhees explained: "The central issue before the Supreme Court…was whether exclusion was in fact required by military necessity. Nothing would have been more important…than to know just why it was that General DeWitt made the decision that he did." *Hirabayashi*, 627 F.Supp. at 1456. More generally, and quite relevant here, Judge Marilyn Hall Patel emphasized that all public institutions, including the judiciary, must vigilantly protect "constitutional guarantees," especially during perceived crises:

> *Korematsu* remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it 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 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.

[7] Acting Solicitor General Neal Katyal recently acknowledged the injustice of his predecessor's failure to truthfully present these cases to the Supreme Court. *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, The Justice Blog, http://blogs.justice.gov/main/ archives/1346 (May 20, 2011).

Korematsu, 584 F.Supp. at 1420 (emphasis added).

C. The lessons of the internment civil liberties "disaster" demonstrate the importance of heightened judicial scrutiny of government national security measures curtailing fundamental liberties.

Amici ask this Court, and the judiciary as a whole, to recognize the lessons of history and the critical importance of the courts in carefully scrutinizing government national security claims to assure timely protection of constitutional liberties.

First, it is precisely during times of national stress that the government has too often targeted vulnerable individuals and groups, denying their fundamental rights and liberties. These measures are commonly "part of a much larger picture" of government and public oppression of unpopular and vulnerable groups.[8] Undue judicial deference enables such injustice: "national security crises coupled with racism or nativism and *backed by the force of law* generate deep and lasting social injustice," damaging American democracy. Yamamoto & Serrano, *supra* at 57.

Second, even intelligent, educated, and well-intentioned decision-makers at times succumb to human frailties and the corrupting influences of power during times of national stress. Heated public emotion may cloud judgment, and, as the

[8] Yamamoto, *White (House) Lies*, *supra*, at 327. *See also* Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 Law & Contemp. Probs. 215, 238 (2005) (exploring "terror-profiling": "the selectively negative treatment…of individuals or groups thought to be associated with terrorist activity, based on race, ethnicity, national origin and/or religion"); Saito, *Symbolism Under Siege*, *supra*, at 12 (America has "raced" those of Arab ancestry as "'terrorists': foreign, disloyal, and imminently threatening").

coram nobis cases show, power exercised during a perceived crisis may invite its own abuse, leading some to dissemble or even fabricate justifications for actions taken. Many involved in the internment later regretted their actions. Former Chief Justice Earl Warren, who as California Attorney General vigorously advocated the removal of West Coast Japanese Americans, wrote:

> I have since deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of freedom and the rights of citizens.... It was wrong to react so impulsively, without positive evidence of disloyalty, even though we felt we had a good motive in the security of our state. It demonstrates the cruelty of war when fear, get-tough military psychology, propaganda, and racial antagonism combine with one's responsibility for public security to produce such acts.

Earl Warren, *The Memoirs of Earl Warren* 149 (1977).

Finally, searching judicial review is critical where, as under the NDAA, military authorities are granted unfettered indefinite detention discretion. During WWII, President Roosevelt essentially issued the military a "blank check." DeWitt's orders based on this limitless grant, to which the Court uncritically deferred, culminated in the internment. In reviewing the NDAA's new detention provision, the courts cannot afford to mimic the wartime Supreme Court's failure. As the Court has recently confirmed: "Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person." *Boumediene*, 553 U.S. at 797.

Here, Judge Forrest correctly rejected the government's suggestion that she uncritically defer to its claims. *Hedges*, 2012 WL 3999839 at *4, *28-33. By upholding Judge Forrest's searching review of the government's defense of the NDAA's virtually limitless detention authority, this Court can affirm the importance of the judiciary's independent check on governmental actions curtailing fundamental liberties in the name of national security.

IV. JUDGE FORREST APPROPRIATELY DISCHARGED THE JUDICIARY'S OBLIGATION OF "WATCHFUL CARE."

Judge Forrest exactingly scrutinized §1021(b)(2), the government's arguments, and the factual record, and, in so doing, properly discharged the judiciary's role as an independent check on governmental restrictions of fundamental liberties.

First, she correctly rejected the Government's argument that she should "essentially 'stay out of it,'—that is, exercise deference to the executive and legislative branches[.]" *Hedges*, 2012 WL 3999839, at *4. While acknowledging that courts "owe the political branches a great deal of deference in the area of national security[,]" she recognized that where "core constitutional rights" are implicated, "[h]eedlessly to refuse to hear constitutional challenges to the Executive's conduct in the name of deference would be to abdicate this Court's responsibility to safeguard the rights it has sworn to uphold." *Id.* Citing *Korematsu* to underscore the dangers flowing from improperly lax judicial oversight, Judge

Forrest explained: "Presented, as this Court is, with unavoidable constitutional questions, it declines to step aside." *Id.* at *5.[9] She also drew upon Justice Scalia's affirmation of the importance of checks-and-balances, even during wartime: "The proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders' general mistrust of military power permanently at the Executive's disposal." *Id.* at *20 (quoting *Hamdi*, 542 U.S. at 568 (Scalia, J., dissenting)).

Second, Judge Forrest correctly rejected the government's position that "the Court's role should be limited to a post-detention habeas review." *Id.* at *5. "The Government argues that the judiciary should play no role here—or, at most, an ex post facto one in which it reviews habeas petitions challenging detention determinations." *Id.* at *28. Judge Forrest warned that innocent persons could be imprisoned for years if judicial review were limited to post-detention proceedings. *Id.* at *5, *31. That danger is real. *Ex Parte Endo*, 323 U.S. 283, 285 (1944) (three years for Supreme Court to grant Endo's habeas corpus challenge to her

[9] Justice Murphy's and Justice Jackson's dissents also provided guidance to Judge Forrest's exacting scrutiny: "In Justice Murphy's *Korematsu* dissent, he reiterated the principle that '[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.' Justice Jackson also dissented in *Korematsu*, stating, 'I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.'" *Hedges*, 2012 WL 3999839, at *33.

internment). As Judge Forrest explained, "[a]ny period of detention (let alone years) for what could be an unconstitutional exercise of authority, finds no basis in the Constitution." *Hedges*, 2012 WL 3999839, at *31.

Third, Judge Forrest appropriately subjected §1021(b)(2) to heightened scrutiny because it impinges on the plaintiffs' fundamental rights to free speech and due process. *Id.* at *35. She emphasized that the court must subject a national security measure treading on these rights to "exacting scrutiny and ask whether it is 'actually necessary' to achieve those interests." *Id.* at *38 (quoting *United States v. Alvarez*, 132 S.Ct. 2537, 2549 (2012)). Discharging the court's obligation of "watchful care," *Milligan*, 71 U.S. at 124, Judge Forrest refused to blindly accept the government's arguments and instead closely interrogated the basis for the government action. *See, e.g.*, *Hedges*, 2012 WL 399839, at *27 ("Simply by asserting that §1021 is a reaffirmation of the AUMF does not make it so.").

Thus, rather than simply accepting the government's unsupported claim that plaintiffs lacked standing, Judge Forrest searched for evidentiary support for the claim that they had no reasonable fear that their actions would subject them to detention. *Id.* at *12-13. However, "[t]he Government did not submit any evidence in support of its positions." *Id.* at *6. The government, she explained, could have offered evidence, if available, that no one had been detained for engaging in First Amendment activities, as well as evidence on how enforcement decisions were

made under §1021(b)(2), including how the phrases "substantial support," "direct support," and "associated forces" were interpreted. *Id.* at *12. The court, however, would neither assume what the "Government's evidence would have been," nor accept its "ipse dixit that plaintiffs' fears of detention were unreasonable." *Id.* at *12-13. Nor could Judge Forrest accept the government's mere promise that plaintiffs would not be subject to indefinite detention. *Id.* at *28, *36.

Similarly, Judge Forrest probed the language of §1021(b)(2), pressing for the practical meaning and application of key terms, including "associated forces," "substantially supported," and "directly supported," but the Government was unable to define these terms. *Id.* at *2, *26, *43. When pressed on whether plaintiffs could be detained under §1021(b)(2), the government first could not say whether plaintiffs were subject to detention, *id.* at *36, and later stated that they would not be if certain criteria were met, *id.* at *1, *2-3, *11, *27. These responses, Judge Forrest concluded, were insufficient; neither provided assurance that the statute would not penalize First Amendment activities. *Id.* at *1, *28.

Finally, Judge Forrest correctly concluded that plaintiffs were entitled to injunctive relief, explaining that the due deference the courts must give the political branches on national security matters did not relieve the judicial obligation to determine whether §1021(b)(2) unconstitutionally violated plaintiffs' rights. *Id.* at *5. In granting injunctive relief, she therefore declined to defer to the

government's argument that plaintiffs faced no imminent threat of detention because it said so. *Id.* at *12.

CONCLUSION

Amici respectfully urge this court to affirm Judge Forrest's exacting scrutiny and ultimate permanent injunction. Through this heightened review, Judge Forrest wisely heeded the lessons of history and correctly discharged the judiciary's constitutional duty of "watchful care."

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Respectfully submitted,

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CERTIFICATION PURSUANT TO
Fed. R. App. P. 32(a)(7)(B) and (C)

The undersigned hereby certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and (C) because the brief contains 6,991 words of text.

The brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type style requirements of Fed.R.App.P.32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2003, Times New Roman, Size 14.

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