20-1119, 20-1311

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

ANAS ELHADY, et al.,

Plaintiffs-Appellees,

—v.—

CHARLES H. KABLE, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION
(1:16-CV-00375-AJT-JFA)

BRIEF OF *AMICUS CURIAE* THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF PLAINTIFFS-APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 20-1119 Caption: Elhady et al v. Kable et al

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(name of party/amicus)

who is amicus curiae, makes the following disclosure:
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If yes, identify all parent corporations, including all generations of parent corporations:

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If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
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Signature: /s/ Muhammad Faridi Date: 06/02/2020

Counsel for: Fred T. Korematsu Center

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INTEREST OF *AMICUS CURIAE*[1]

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 T. Korematsu, who defied military orders during World War II that led to the unlawful incarceration of over 110,000 Japanese Americans, the Korematsu Center works to advance social justice for all. The Korematsu Center does not represent the official views of Seattle University.

Drawing on its experience and expertise, the Korematsu Center seeks to ensure that courts understand the history of discriminatory restrictions on civil liberties and the burdens those restrictions impose on racial, ethnic, or religious minorities. In this brief, the Korematsu Center seeks to do so by highlighting the experience of Mitsuye Endo, a loyal American citizen of Japanese ancestry whose fundamental liberties were curtailed by government conduct under the guise of national security during World War II.

[1] All parties have consented to the filing of this brief. No party or counsel for a party authored this brief in whole or in part, nor has any party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief.

Mitsuye Endo, seated at her desk in the administrative office at the Central Utah "Relocation Center" in Topaz, Utah, one of the ten government concentration camps that detained people of Japanese ancestry during World War II.[2]

[2] Dep't of Interior, War Relocation Authority, Topaz Relocation Center, 1943-1945, available at https://catalog.archives.gov/id/148727990.

SUMMARY OF ARGUMENT

As the Supreme Court declared a century ago, "a page of history is worth a volume of logic."[3] If the page that records the history of disfavored minorities in our country teaches anything, it is that the government's justifications for why it needs to curtail the rights of minority groups should be viewed with caution. Our nation's sordid treatment of Japanese Americans during World War II illustrates why the Court should view the government's arguments in this case with a skeptical eye.

In this case, the government contends that the redress process for individuals listed in the Terrorist Screening Database ("TSDB") requires deference because the matter involves "sensitive and weighty interests of national security." It argues that its redress system need not be "foolproof" or "eliminate all possibility of error."[4] In reality, the government claims the power to subject individuals who pose no threat to national security—a large number of whom are Muslim and/or Arab American—to burdensome restrictions on their core constitutional rights. Despite having exercised that power in the shadows for years, it cannot point to a single act of terrorism that the TSDB has helped to prevent—nor a single individual who attempted to carry out an act of terror while on the watchlist.

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[3] *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

[4] Opening Brief for Appellants, *Elhady v. Kable*, 20-1119 (4th Cir. April 27, 2020) ("Gov't Br.") at 51.

The arguments that the government makes to justify the procedures governing the TSDB are not new. During World War II, the government similarly contended that it could curtail the rights of another disfavored minority group, Japanese Americans, in order to maintain national security. It asserted carte blanche to limit the freedoms of the entire Japanese American population on the West Coast—over 110,000 individuals—on the ground that it was otherwise impossible to distinguish loyal citizens from those who might commit espionage. In the years since, our government has acknowledged that its actions were based on racism and hysteria rather than valid national security concerns.[5] And the Supreme Court has referred to its decision in *Korematsu v. United States*, 323 U.S. 214 (1944), in which it accepted the government's justifications, as a "grave wrong" now "overruled in the court of history."[6]

The experience of one Japanese American citizen, Mitsuye Endo, whose legacy is sometimes overlooked in the annals of that era, is particularly relevant to the issues in this case. Detained in a concentration camp, Endo challenged her imprisonment, arguing that it was unconstitutional. She also challenged the government's "indefinite leave" procedure that offered "conditional release" from

[5] *See generally* U.S. Comm'n on Wartime Relocation and Internment of Civilians, 96th Cong., Report: Personal Justice Denied (1982) ("CWRIC Rep."), available at https://www.archives.gov/research/japanese-americans/justice-denied.

[6] *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

concentration camps to loyal citizens like her. She argued that this procedure simply substituted one harm for another because the terms of conditional release unduly infringed on her freedom of movement. In fact, Endo found those conditions so objectionable that she rejected the government's offer of conditional release, opting instead to remain imprisoned so that she could fully vindicate her rights in the court system.

Endo ultimately prevailed on the Supreme Court to order the government to release her "unconditionally." As the Court observed, she was "concededly loyal" and posed no risk of espionage. Yet—as Justice Frank Murphy pointed out in his concurring opinion—the Court refused to declare the government orders that restricted her right to move freely outside of the concentration camp as unconstitutional. As a result, Endo's rights and liberties were still fundamentally restricted.[7] The Court's regretful decision in Endo's case—very much like its decision in *Korematsu*—is a lesson for this and other courts. It underscores the need for a careful evaluation of how restrictions in the name of national security affect protected liberty interests of minority groups in practice. That assessment, informed by our history, compels the conclusion in this case that, in the absence of robust safeguards, the TSDB effectively denies plaintiffs the right to travel—a right that has been held to be firmly protected by the Constitution.

[7] *Ex Parte Endo*, 323 U.S. 283 (1944) ("*Endo*").

As Justice Robert H. Jackson observed in his dissenting opinion in *Korematsu*, a "judicial construction of the due process clause" that allows the executive to infringe the liberties of Americans in the name of national security "is like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[8] As history has shown, that warning should have been heeded then, and it most certainly should be heeded now.

The Korematsu Center respectfully urges the Court to reject the government's arguments and affirm the district court.

ARGUMENT

I. HISTORY TEACHES THAT LIMITATIONS ON CONSTITUTIONAL RIGHTS BASED ON NATIONAL SECURITY SHOULD BE VIEWED SKEPTICALLY.

Centuries ago, our Founding Fathers aphoristically warned: "Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety."[9] Yet our history contains many episodes where the government restricted the rights of disfavored minority groups on the ground that such curtailments were necessary to preserve national security or public order.[10]

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[8] *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

[9] *The Papers of Benjamin Franklin*, Vol. 6 (Leonard W. Labaree, ed., New Haven, Conn: Yale Univ. Press 1963).

[10] This history includes the broad patchwork of laws that restricted the movement of African Americans following the Civil War based on pretextual public order

Time and again, our country has looked back, and it has concluded that those restrictions were legally unjustifiable and morally repugnant. Its treatment of Japanese Americans during World War II provides a compelling example.

Ten weeks after the attacks on Pearl Harbor, in February 1942, President Franklin D. Roosevelt signed Executive Order ("EO") 9066, authorizing the Secretary of War and his military commanders to issue orders that could exclude from designated areas "any and all persons" to provide security against sabotage

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concerns. *See, e.g.*, Steven A. Reich, *The Great Black Migration: A Historical Encyclopedia of the American Mosaic* 152 (2014). It also includes the Chinese Exclusion Act, which was motivated by racist conceptions of Chinese immigrants as a foreign threat and thus restricted the movement of Chinese immigrants and Chinese Americans alike. *See, e.g.*, Geary Act, Ch. 60, § 6, 27 Stat. 25, 25–26 (1892) (repealed 1943) (requiring Chinese immigrants and Chinese American citizens to carry proof of legal status at all times, present it upon request, and, if unable to do so, provide "at least one credible white witness" to testify to their lawful presence in the country). The Supreme Court upheld the Exclusion Act in a case involving a Chinese American even though a federal district court judge found him to be a native-born U.S. citizen, relying instead on what the Court deemed to be the conclusive (and not judicially reviewable) determination by executive branch officers that he was not a citizen. *United States v. Ju Toy*, 198 U.S. 253, 262-63 (1906); *see also id.* at 269 (Brewer, J., dissenting) (comparing "appalling" outcome to banishment). Ju Toy, in his brief to the Court, noted that "[i]f the government's contention were sustained . . . American citizens of Chinese ancestry would in the future travel abroad at their peril." Charles McClain, *California Carpetbagger: The Career of Henry Dibble*, 28 QUINNIPIAC L. REV. 885, 962 (2010). Many of these restrictions were not absolute bans on travel. Yet, in effect, they so limited freedom of movement that the Court later saw fit to protect the right to travel in applying the Civil Rights Act of 1964 and 18 U.S.C. § 241. *United States v. Guest*, 383 U.S. 745, 758-59 (1966) (upholding indictment for criminal conspiracy to deprive the right to travel).

and espionage.[11] Although EO 9066 did not reference Japanese Americans expressly, it "was used, as the President, his responsible Cabinet officers and the West Coast Congressional delegation knew it would be, to exclude persons of Japanese ancestry, both American citizens and resident aliens, from the West Coast."[12] Initially, that exclusion was purportedly voluntary, but soon thereafter it was implemented by compulsion. As a result, more than 110,000 Japanese Americans were imprisoned in "relocation centers"—a euphemism for concentration camps—in desolate interior regions of the west.[13]

EO 9066 and the resulting military proclamations were justified in the name of national security.[14] Yet the Commission on Wartime Relocation and Internment of Civilians, a Congressional Commission established to review the facts and circumstances of EO 9066, noted in its 1982 report that "the government has conceded at every point that there was no evidence of actual sabotage, espionage or fifth column activity among people of Japanese descent on the West Coast[.]"[15] Furthermore, the two government officials "who were most involved in the evacuation decision" testified before the Commission "that the decision was not

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[11] CWRIC Rep., *supra* n.5, Part 2 at 2.

[12] *Id.* Part 1 at 49.

[13] *Id.*

[14] *Id.* at 51.

[15] *Id.* at 50.

taken on the basis of actual incidents of espionage, sabotage or fifth column activity."[16]

Nor is there any evidence that EO 9066 was justified by well-grounded suspicion that Japanese Americans *might* engage in illegal activity. As the Commission observed, "The government has never fundamentally reviewed whether this massive eviction of an entire ethnic group was justified."[17] The intelligence agencies that monitored Japanese Americans following the attacks on Pearl Harbor "saw only a very limited security risk from the ethnic Japanese; none recommended a mass exclusion or detention of all people of Japanese ancestry."[18] An intelligence report reviewed by the President and the War Department on the risk of espionage by Japanese Americans concluded that "there will be no armed uprising of Japanese."[19]

Ultimately, the Congressional Commission concluded that EO 9066 was based on "race prejudice, war hysteria and a failure of political leadership," not valid concerns of national security.[20] Indeed, not a single Japanese American was

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[16] *Id.*

[17] *Id.* at 49.

[18] *Id.* at 51. In fact, FBI Director J. Edgar Hoover "did not believe that demands for mass evacuation were based on factual analysis," and "he pointed out that the cry for evacuation came from political pressure." *Id.* at 55.

[19] *Id.* at 52.

[20] *Id.* at 18.

ever prosecuted for espionage or sabotage during World War II—a fact that only underscores the needless suffering inflicted by our government in the name of military necessity.[21]

Nonetheless, the Supreme Court found that EO 9066 and its implementing proclamations constituted a valid exercise of executive authority. In *Korematsu*, the Court affirmed the criminal conviction of Fred T. Korematsu for violating a military order requiring him to leave his home for a "Relocation Center."[22] The Court held that the government's policy had "a definite and close relationship to the prevention of espionage and sabotage."[23] However, as the Congressional Commission later observed, the *Korematsu* Court "did not undertake any careful review of the facts of the situation on the West Coast in early 1942 . . . , choosing to give great deference to the military judgment on which the decision was based."[24] According to the Commission, if the Court had carefully considered the facts, "it would have found that there was nothing there—no facts particularly within military competence which could be rationally related to the extraordinary

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[21] *Id.* at 3.

[22] *Korematsu*, 323 U.S. at 230.

[23] *Id.* at 218. In doing so, the Court approvingly cited its decision from the prior year, *Hirabayashi v. United States*, 320 U.S. 81 (1943), in which it upheld a military order that imposed a dusk-to-dawn curfew on all people of Japanese ancestry along the West Coast. *Id.*

[24] CWRIC Rep., *supra* n.5, Part 1 at 236.

action taken."[25]

Today, our government's treatment of Japanese Americans during the Second World War based on the pretext of national security is universally regarded as one of the most shameful episodes in our country's history. The Commission referred to it as "a grave injustice."[26] In 1988, Congress passed the Civil Liberties Act to expressly acknowledge "the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II."[27] In the signing ceremony of the Act, President Ronald Reagan observed that this incarceration of an entire group of innocent citizens "was based solely on race" and that our country had committed "a grave wrong."[28]

The Court, too, recognized recently that it had committed a fundamental error in accepting without a careful assessment the government's justifications underlying EO 9066. In *Trump v. Hawaii*, the Court acknowledged that "the forcible relocation of U.S. citizens to concentration camps solely and explicitly on the basis of race," through a "morally repugnant" executive act, was "objectively

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[25] *Id.* at 237.

[26] *Id*. at 18.

[27] Civil Liberties Act of 1988, Pub. L. 100-383, 102 Stat. 903, § 1.

[28] President Ronald Reagan, Remarks on Signing the Bill Providing Restitution for the Wartime Internment of Japanese-American Civilians (Aug. 10, 1988), available at https://www.reaganlibrary.gov/research/speeches/081088d.

unlawful and outside the scope of Presidential authority."[29] It concluded, "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'"[30]

This long-overdue recognition resulted from decades of ceaseless efforts by the Japanese American community to educate the country about its experience during World War II and the dangers of executive overreach in the name of national security. Just as the damage of the World War II era has lingered in our national memory for years, the discriminatory treatment of an entire group of people based on their heritage will never fully disappear. Yet, rather than learning from our past, "[t]ime and again, further violations have been made, usually against a different group under different circumstances."[31] A key shared question in court cases challenging these violations is whether the wholesale lumping together of people based on their ancestry for discriminatory treatment can be

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[29] *Hawaii*, 138 S. Ct. at 2423. By using the phrase "concentration camps" in *Hawaii*, the Court also implicitly recognized its error in rejecting that term in *Korematsu*. *See Korematsu*, 323 U.S. at 223 (noting "we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies").

[30] *Hawaii*, 138 S. Ct. at 2423 (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)).

[31] Roger Daniels, *The Japanese American Cases, 1942-2004: A Social History*, 68 Law & Contemp. Probs. 159, 172 (Spring 2005).

justified in the name of national security.[32] Unfortunately, our courts have continued to do so even when recognizing in the same cases that they had committed a grave harm in cases challenging the incarceration of Japanese Americans during World War II.[33]

The Korematsu Center seeks to prevent another unjust outcome today by recounting our nation's prior missteps that are relevant to the case at hand.

II. MITSUYE ENDO'S LEGACY UNDERSCORES THE NEED FOR A CAREFUL ANALYSIS OF LIMITATIONS ON FREEDOM OF MOVEMENT.

Endo's experience demonstrates the significant effects that government encroachment on the right to move freely can have on an individual. Her legacy underscores why this Court should not accept at face value the government's argument that inclusion in the TSDB imposes only a "minimal" burden on the plaintiffs. Rather, the Court should conduct a careful evaluation of the actual consequences of inclusion in the TSDB and the safeguards necessary to prevent the erroneous deprivation of plaintiffs' rights. That assessment, performed with an appreciation of the Japanese American experience and Endo's legacy, should

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[32] *See* Robert S. Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases*, 68 CASE WESTERN RESERVE L. REV. 1183 (2018).

[33] *See, e.g. Hawaii*, 138 S. Ct. 2392 (holding that exclusions of Muslims from certain countries designated by presidential executive orders do not violate the Constitution).

compel the conclusion that the implementation of the TSDB impermissibly burdens plaintiffs' right to travel.

Endo was born and raised in California, the child of Japanese immigrants. She has been described as an "ideal" American.[34] She grew up to become a state civil servant, which was "one of the few jobs open to Japanese Americans" until the state fired Japanese American employees en masse following the attack on Pearl Harbor.[35] Endo's commitment to public service was shared by her brother, who went on to fight in the "much decorated all-Japanese American 442nd Regiment" of the U.S. Army.[36] President Roosevelt himself commended that unit, writing, "No loyal citizen of the United States should be denied the democratic right to exercise the rights of citizenship. . . . Americanism is not, and never was, a matter of race or ancestry."[37]

Nevertheless, in June 1942, Endo's family was forced to leave their home in Sacramento as a result of military proclamations issued under EO 9066. The

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[34] Stephanie Buck, *Overlooked No More: Mitsuye Endo, a Name Linked to Justice for Japanese-Americans*, N.Y. Times (Oct. 9, 2019), https://www.nytimes.com/2019/10/09/obituaries/mitsuye-endo-overlooked.html.

[35] Lori Aratani, *Mitsuye Endo Won a Supreme Court Case to Close WWII Japanese American Internment Camps*, Washington Post (Dec. 18, 2019), https://www.washingtonpost.com/history/2019/12/18/she-fought-internment-japanese-americans-during-world-war-ii-won/.

[36] *Id.*

[37] Daniels, *supra* n.31 at 160.

Endos were sent to a series of concentration camps—first outside Sacramento, then up north to Tule Lake, and eventually to Topaz, Utah.[38] In July 1942, Endo filed a petition for writ of habeas corpus in the U.S. District Court for the Northern District of California. The court summarily denied her petition in July 1943.[39]

While her habeas petition was pending, Endo sought release from the concentration camp through the "indefinite leave" procedure for "loyal" Japanese Americans, administered by the federal War Relocation Authority ("WRA").[40] After the district court denied her habeas petition, Endo received notice that she was eligible to seek indefinite leave.[41] In addition, a high-ranking WRA attorney, understanding that she would likely file an appeal, personally offered Endo release.

The government's offers of release, however, were conditional. Among other restrictions, applicants for indefinite leave had to obtain government approval of their proposed residence and employment, and, following release, notify the

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[38] Buck, *supra* n.34.

[39] *Id.*

[40] "Indefinite leave" entailed only limited freedoms, under specific conditions; it was not a return to the full rights of citizenship. *Endo*, 323 U.S. at 291-92 (summarizing leave procedure and conditions); *see also* National Park Service, *A Brief History of Japanese American Relocation During World War II*, https://www.nps.gov/articles/historyinternment.htm.

[41] Brief for the United States, *Endo*, 1944 WL 42559 (U.S. Oct. 9, 1944) ("*Endo* Gov't Br.") at *8.

government if they sought to move or change jobs.[42] And the WRA attorney's personal offer to Endo was based on the condition that she not return to her hometown of Sacramento.[43] Although these conditions did not impose an outright ban on Endo's movement, they would, in practice, prevent her from moving freely in daily life.

Thus, viewed in context, the leave procedure would not remedy the change in legal status and resulting stigma forced upon Endo by her incarceration in the first place. Release was not acquittal; she would become a parolee, despite never having committed any crime. Given the presumption of disloyalty upon which the incarceration was justified, the leave procedure could not provide meaningful safeguards against the continuing deprivation of fundamental liberties. In essence, it served to sanitize a race-based mass detention by providing a simulacrum of due process.

Endo refused to accept such limitations. Instead, she opted to remain in the concentration camp so that she could appeal her case, which reached the Supreme Court in 1944.[44] Before the Court, Endo challenged her detention and the procedure for indefinite leave. In her view, these restraints violated her

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[42] *Endo*, 323 U.S. at 293.

[43] Buck, *supra* n.34.

[44] *Endo*, 323 U.S. at 294.

fundamental freedoms and due process rights, thereby "degrad[ing]" her very personhood.[45] She emphasized the importance of freedom of movement, invoking the "inalienable rights of the citizen to do what he will and when he will[.]"[46]

In response, the government readily conceded Endo's loyalty to her country.[47] Nonetheless, it insisted on detaining Endo as part of the "planned and orderly relocation" of "loyal" Americans, a process purportedly designed to prevent "a dangerously disorderly migration of unwanted people to unprepared communities[.]"[48] It maintained that prolonging the imprisonment of loyal individuals as part of this process was a benevolent means of "restoring . . . liberty" to Japanese Americans.[49]

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[45] Opening Brief for Appellant, *Endo*, 1944 WL 42557 (U.S. Sept. 14, 1944) ("*Endo* Appellant Br.") at *55, 59.

[46] *Id.* at *60-61 (citing *Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931)). *Amicus* ACLU of Northern California further explained that the conditions of release violated *Williams v. Fears*, in which the Supreme Court held that "the right to remove from one place to another . . . is an attribute of personal liberty," and the right to "free transit . . . [is] secured by the 14th Amendment." Brief of ACLU-NC as *Amicus Curiae* In Support of Appellant, *Endo*, 1944 WL 42558 (U.S. Sept. 16, 1944) ("*Endo* ACLU-NC Br.") at *37 (citing *Williams v. Fears*, 179 U.S. 270, 274 (1900)).

[47] *Endo*, 323 U.S. at 295.

[48] *Id.* at 297.

[49] *Endo* Gov't Br. at 45-46, 81. Though Justice Jackson joined Justice Douglas's opinion in *Endo* and did not write separately, an undated draft concurrence by Justice Jackson stated that "'protective custody' on an involuntary basis has no place in American law." Robert H. Jackson, Undated Typescript entitled "Endo" (n.d.) (on file with the Library of Congress, Manuscript Division, Papers of Robert

The Court rejected these arguments, holding that Endo was entitled to "unconditional release."[50] It reasoned that neither EO 9066 nor any subsequent legislation supported the detention or restrictive release because "[h]e who is loyal is by definition not a spy or a saboteur."[51] However, the release it ordered was hardly "unconditional." The Court left in place the military orders that restricted Endo's movement—from curfew orders to exclusion zones.[52] After all, the Court issued its decision in *Korematsu* the very same day.

The Court's decision thus fell far short of fully vindicating Endo's rights. Even though the Court affirmed her entitlement to "unconditional" release, it failed to take the steps necessary to actually free her of the conditions that remained in effect and to acknowledge the inadequacy of the process she was afforded to challenge the deprivation of her liberty. It is, therefore, no surprise that the Congressional Commission referred to the *Endo* decision as "crabbed and confined," and that Justice William O. Douglas, who authored the opinion of the Court, later stated that *Endo*, like *Korematsu*, "was ever on my conscience."[53]

H. Jackson, Container No. 133), *quoted in* Patrick O. Gudridge, Essay, *Remember Endo?* 116 HARV. L. REV. 1933, 1970 (2003).

[50] *Endo*, 323 U.S. at 304.

[51] *Id.* at 302.

[52] Those orders remained in effect at the time of the Court's decision. *See* Daniels, *supra* n.31, at 160.

[53] William O. Douglas, The Court Years: 1939-1975, at 279-80 (1980).

In his concurring opinion in *Endo*, Justice Frank Murphy dissected the issues avoided by the Court, repudiating "the unconstitutional resort to racism inherent in the entire evacuation program" and rejecting its underlying "racial discrimination [which] bears no reasonable relation to military necessity and is utterly foreign to the ideals and traditions of the American people."[54] He continued, "[f]or the Government to suggest . . . that the presence of Japanese blood in a loyal American citizen might be enough to warrant her exclusion from a place where she would otherwise have a right to go is a position I cannot sanction."[55] Justice Owen Roberts also denounced the continuing restrictions on Endo's movement, writing that "[u]nder the Constitution she should be free to come and go as she pleases. Instead, her liberty of motion and other innocent activities have been prohibited and conditioned."[56]

These concurring opinions underscore that this Court should not simply accept the government's arguments regarding the effects of inclusion in the TSDB. Rather, the Court should undertake a careful assessment of the actual effects—which, as plaintiffs have shown, amount to a significant burden on their freedom of movement.

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[54] *Endo*, 323 U.S. at 307-08 (Murphy, J., concurring).

[55] *Id.* at 308.

[56] *Id.* at 310 (Roberts, J., concurring).

III. LIKE THE LEAVE PROCEDURE OFFERED TO ENDO, THE "BLACK BOX" REDRESS AVAILABLE TO PLAINTIFFS IS AN EMPTY PROMISE OF DUE PROCESS.

As Justices Murphy and Roberts understood then, the rights at issue in *Endo*—and here—are more than just a limited interest in movement under certain circumstances. Freedom of movement goes to the core promise of our system of government and constitutes an inherent right of citizenship.[57] Indeed, long before *Endo*, the Supreme Court declared, "[w]e are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States."[58] It has further explained that "[f]reedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage" and enabled citizens to engage in "the core of" personal and public life.[59] By design, "the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."[60]

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[57] *See generally* Jeffrey Kahn, *International Travel and the Constitution*, 56 UCLA L. REV. 271 (2008) (distinguishing between citizens, monarchical subjects, and slaves, and linking freedom of movement to the Citizenship Clause).

[58] *Crandall v. Nevada*, 73 U.S. 35, 49 (1867).

[59] *Kent v. Dulles*, 357 U.S. 116, 126-27 (1958).

[60] *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969).

This freedom was denied to Endo despite the appearance of safeguards offered by the leave procedure. Whereas the alleged purpose of the incarceration was to separate the loyal from the disloyal, the leave procedure was supposed to provide the loyal with the opportunity to return to civilian life. However, it did not enable Endo to challenge the underlying deprivation of her rights and the resulting change in her legal status. A detainee who succeeded in obtaining indefinite leave did not regain her liberties by acquittal; she became—as Endo argued in her brief—a "*parole[e]* from a concentration camp."[61] Her conditional release could be revoked at any time in the future, leaving her in a state of uncertainty. For Endo, the leave procedure was an empty promise that substituted one harm for another by "increasing the size of her jail," as an *amicus* brief put it in support of Endo's petition to the Supreme Court.[62]

The Court's failures in Endo's case were multiple. It did not overturn—let alone acknowledge—the racially motivated presumption of guilt underlying her incarceration. It hailed her loyalty, yet did not recognize the inadequacy of the process by which she was required to prove that loyalty as a pre-requisite to exercising her inherent rights as a citizen. Finally, it pronounced her theoretically free to move as she wished, but did not effectuate that freedom by striking down

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[61] *Endo* Appellant Br. at *60 (emphasis added).

[62] *Endo* ACLU-NC Br. at *46.

the remaining barriers to it.

Bearing these failures in mind, this Court must be cautious of the harm caused by compromises to due process in the name of national security. Neither plaintiffs nor the Korematsu Center reject the proposition that national security is a legitimate governmental interest. However, that interest does not presumptively outweigh private liberty interests. Nor does it dispense with the constitutional mandate to provide meaningful process for individuals whose liberties would be impaired in its name. National security is not now, nor has it ever been, a blank check in the currency of executive power. The Framers rejected that idea, wary of the potential for government abuse wherever the assertion of vague national security concerns goes unquestioned. Time and again, history has confirmed that those fears were well-founded.

Looking back, Endo's legacy demonstrates that the right to travel must be protected from governmental restrictions that in practice infringe freedom of movement. In 1944, the government argued that its policies imposed merely temporary burdens on certain individuals, necessary for the common good. While the leave procedure was inadequate, its results were at least public. Today, the government contends that the TSDB imposes merely "minimal" burdens on certain

individuals, also necessary for the common good.[63] Its form of redress is a "black box" whose internal workings and ultimate conclusions are never disclosed—even to the affected individuals.[64] And, just as the government never identified any Japanese Americans suspected of espionage during World War II, it has never identified any individual who committed, or attempted to commit, an act of terror while listed in the TSDB.[65] Yet again, it is unwilling, or unable, to demonstrate the utility of the purported national security policy that it holds above individual rights.

The parallels between the case of Mitsuye Endo and the plaintiffs here should give this Court pause.

CONCLUSION

The Japanese American experience demonstrates that sacrifices of a disfavored minority group's fundamental rights are too often based on prejudice and hysteria masquerading as national security policy. It is incumbent on this Court to perform a careful analysis of the restrictions to movement at issue in this

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[63] Gov't Br. at 18.

[64] As the district court correctly concluded, "Nor is DHS TRIP, as it currently exists, a sufficient safeguard because, in the context of individuals challenging their placement on the TSDB rather than on the No Fly List, it is a black box – individuals are not told, even after filing, whether or not they were or remain on the TSDB watchlist and are also not told the factual basis for their inclusion." *Elhady v. Kable*, 391 F. Supp. 3d 562, 582 (E.D. Va. 2019) (summary judgment decision).

[65] Brief of Appellees, *Elhady v. Kable*, 20-1119 (4th Cir. May 26, 2020) at 22-23.

case and the redress process available to TSDB listees. That careful assessment warrants the conclusion that the implementation of the TSDB impermissibly burdens plaintiffs' right to travel. Accordingly, the Korematsu Center respectfully requests that the decision of the district court be affirmed.

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Respectfully submitted,

/s/ Muhammad Faridi

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CERTIFICATION OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(g)

I certify that, pursuant to Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(5), (a)(6), and (a)(7)(B)(i), the attached *amicus* brief is proportionately spaced, uses a typeface of 14-point Times New Roman font and contains 5,284 words, excluding the parts of the brief exempted by Rule 32(f).

Dated: June 2, 2020

/s/ Muhammad Faridi
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CERTIFICATE OF SERVICE

I certify that on June 2, 2020, I electronically filed the foregoing document with the Clerk of Court for the U.S. Court of Appeals for the Fourth Circuit by using the Court's CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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