No. 14-1688

in the United States Court of Appeals for the Third Circuit

SYED FARHAJ HASSAN, ET AL.,

Appellants,

v.

THE CITY OF NEW YORK

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF *AMICI CURIAE* OF KAREN KOREMATSU, JAY HIRABAYASHI, AND HOLLY YASUI IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI CURIAE

Amici are the children of Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui, three American citizens of Japanese ancestry. As young men during World War II, these three challenged the constitutionality of the military orders subjecting Japanese-Americans to curfew, forced removal from the West Coast, and ultimately incarceration for the duration of the war in government internment camps scattered across desolate areas of the nation's interior. 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 American history. *See 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 through petitions for writs of error *coram nobis*, and had their wartime convictions vacated. *See Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United*

States, 828 F.2d 591 (9th Cir. 1987), *aff'g in part and rev'g in part*, 627 F. Supp. 1445 (W.D. Wash. 1986); Order at 2, *Yasui v. United States*, Crim. No. C 16056 (D. Or. Jan. 26, 1984) (granting government's motion to vacate conviction), *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.

Korematsu, Hirabayashi, and Yasui, and their children, *amici* here, have experienced firsthand the stigmatizing and injurious consequences when the judicial system, under the pressure of an alleged national emergency, accepts an ostensibly proper government interest—alleged "good intentions"—as sufficient to justify an express racial classification without subjecting those justifications to the strictest scrutiny. Although Congress eventually issued a formal apology, *amici* understand that such an apology comes far too late and can never fully undo the harm suffered due to express racial categorization.

In honor of their fathers' legacies, *amici* therefore have committed themselves to ensuring that other marginalized and socially disfavored groups never again have to suffer the unjustified stigma of officially-

endorsed governmental stereotyping, and to ensuring that courts strictly apply strict scrutiny of such invidious categorizations.

Amici are concerned both with the parallels between the challenged conduct in this case and the wrongful action previously taken against Japanese-Americans, and with the district court's failure to apply strict scrutiny to the challenged program's express religious classification. The New York City Police Department ("the Department") infiltrated and surveilled Muslim communities *solely* because they were Muslim communities. The district court held on a motion to dismiss that the plaintiffs lacked standing and that, based on the Department's proffered interest in "security," that plaintiffs had not stated an Equal Protection claim.

Amici urge this Court to reverse.[1]

[1] All parties consent to the filing of this Brief *Amicus Curiae*. *See* Fed. R. App. P. 29(a). Counsel for *amici* authored this brief in whole. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than *amici* and counsel for *amici* contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(c)(5).

SUMMARY OF ARGUMENT

In 1942, in the aftermath of the attack on Pearl Harbor, this country launched what is now regarded as one of its most shameful violations of civil rights and liberties—the forced removal and mass internment of all persons of Japanese ancestry from the nation's mainland west coast. Propelled by fear and long-standing racial prejudice, as well as economic greed and political opportunism, the internment went against all available evidence of the loyalty of Japanese-Americans. Compounding the wrong, the Supreme Court rejected *amici*'s fathers' constitutional challenges to the internment, thereby placing the Judiciary's stamp of approval on these widespread violations of the Constitution. *See Korematsu v. United States*, 323 U.S. 214 (1944); *Yasui v. United States*, 320 U.S. 115 (1943); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

Subsequently, the courts, the Congress, and the President have all acknowledged and acted to ameliorate the lasting effects of the government's unconstitutional actions against Japanese-Americans in World War II.

In the 1980s, the courts vacated the convictions of Minoru Yasui, Fred Korematsu, and Gordon Hirabayashi based on newly discovered evidence that the government had knowingly suppressed, destroyed, altered, and misrepresented evidence conclusively refuting the allegations of Japanese-American disloyalty used to support its claim that military concerns compelled the forced removal and incarceration of Japanese-Americans. *See Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987), *aff'g in part and rev'g in part*, 627 F. Supp. 1445 (W.D. Wash. 1986); Order at 2, *Yasui v. United States*, Crim. No. C 16056 (D. Or. Jan. 26, 1984) (granting government's motion to vacate conviction), *rev'd and remanded on other grounds*, 772 F.2d 1496 (9th Cir. 1985). The courts recognized that this would at least begin to repair the manifest injustice, and lasting injury, done to *amici*'s fathers, and by extension to all Japanese-Americans, due entirely to their race.

Similarly, the Civil Liberties Act of 1988 "acknowledge[d] the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II." 50 App. U.S.C. § 1989(1). Congress

belatedly acknowledged that the internment's "broad historical causes … were racial prejudice, wartime hysteria, and a failure of political leadership." *Id.* § 1989a(a); *see* Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians* 459 (1997) [hereinafter *Personal Justice Denied*].

The history of the Japanese internment, and the ensuing apologies and atonement of each branch of the United States government, provide twin lessons. *First*, infringement of rights on the basis of class membership—race in the World War II era, and religion in this case—is not only inherently injurious but can and does produce injury. *Second*, a proffered military or police exigency, no matter how great, must be subjected to the strictest of scrutiny on the merits rather than accepted at the threshold as the basis for dismissal of an equal protection claim.

The district court's decision goes against these lessons. In concluding that the plaintiffs, surreptitiously surveilled and infiltrated by the Department solely because they are Muslim, lacked standing, the district court misapprehended the very nature of the injury—the

unjustified stigma of being subjected to a discriminatory policy on the basis of religion.

Equally as wrong, in concluding that plaintiffs failed to state a claim, the district court took the Department at its unsupported word that "the motive for the Program was not solely to discriminate against Muslims, but rather to find Muslim terrorists hiding among ordinary, law-abiding Muslims." (JA-22.) In doing so, the district court misconstrued the requirements of the strict scrutiny analysis that grew out of *Korematsu* itself.

The complaint clearly alleged that the challenged Department initiative was not facially neutral but instead categorized potential targets exclusively on the basis of religion. (JA-38 ¶ 37.) And, as the Court's modern equal protection cases make clear, in such situations "'good intentions' alone are not enough," *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 228 (1995). "[A]ll governmental action based on race … must be analyzed by a reviewing court under strict scrutiny [and] are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Id.* at 227.

Amici respectfully urge this Court to reverse.

ARGUMENT

The Court should consider the historical—and, for *amici*, personal—precedent regarding classifications based on race or religion, justified at the time in the guise of security. The treatment of the Muslim community by the Department has parallels to the treatment of Japanese-Americans by the federal government during World War II. That historical context provides the foundations for modern Equal Protection jurisprudence and strict scrutiny analysis. The district court's decision is inconsistent with those foundations.

I. The Court Should Consider the Historical Precedent Regarding Classifications Based on Race or Religion Justified at the Time in the Guise of Security.

A. The classification of Japanese-Americans during World War II.

On December 7, 1941, Japan attacked Pearl Harbor. Afterward, "nativist" organizations, farming interests, and elected officials fomented concerns that Japanese-Americans living within the United States, particularly on the West Coast, were spies, or at a minimum not loyal to the United States. *See, e.g.*, *Personal Justice Denied*, *supra*, at 67–82; Roger Daniels, *Concentration Camps USA: Japanese Americans and World War II* 32–34 (1972).

This concern came not from any demonstrated disloyalty; to the contrary, the actual evidence showed the loyalty of the persecuted community. Earlier in 1941, the President had hired an investigator, Curtis B. Munson, to report on the loyalty of Japanese-Americans living on the West Coast. His conclusions were clear: "a remarkable, even extraordinary degree of loyalty among this generally suspect ethnic group." Michi Weglyn, *Years of Infamy: The Untold Story of America's Concentration Camps* 34 (1976).

Kenneth Ringle, the assistant district intelligence officer for the Eleventh Naval District in Los Angeles, and who did significant work for the Office of Naval Intelligence ("ONI") regarding the Japanese-American community, shared these views. In his 1942 report, Ringle rejected the race-based fears being directed at the Japanese-American community, and unequivocally concluded that this community was overwhelmingly loyal to the United States and posed no security risk—specifically noting that any individual spies or saboteurs could be individually identified: "[T]he entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people … it should be handled on the basis of the individual, re-

gardless of citizenship, and not on a racial basis." Report from K. Ringle to Chief of Naval Operations, Jan. 26, 1942, § I(h).[2]

Unfortunately, the lack of any actual evidence of disloyalty did not matter. Two months after Pearl Harbor, President Roosevelt signed Executive Order 9066, which authorized the Army to designate "military areas" from which "any or all persons may be excluded." 7 Fed. Reg. 1407 (Feb. 19, 1942). That Order resulted in a series of progressively oppressive acts curtailing the freedom of Japanese-Americans:

- March 2, 1942: General John L. DeWitt issued Public Proclamation No. 1, designating Military Area No. 1 (encompassing most of the West Coast), and requiring anyone who had "enemy" ancestry within to file a Change of Residence Notice if they planned to move. 7 Fed. Reg. 2320 (Mar. 26, 1942).

[2] Commander Ringle's report, representing the ONI's official view, was knowingly withheld from the Supreme Court during the briefing of *amici*'s fathers' cases over internal Department of Justice objection. In April 1943, Department of Justice lawyer Edward Ennis advocated that Solicitor General Charles Fahy advise the Supreme Court 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 this 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." *Hirabayashi*, 828 F.2d at 601–02 & n.11.

- March 24, 1942: Public Proclamation No. 3 declared an 8:00 p.m. to 6:00 a.m. curfew for "all enemy aliens and all persons of Japanese ancestry" and prohibited those persons from possessing, among other things, firearms, cameras, or radios. 7 Fed. Reg. 2543 (Apr. 2, 1942).

- March 24, 1942: DeWitt issued the first of a series of Civilian Exclusion Orders, ordering people of Japanese ancestry in Military Area No. 1 to report to "Civil Control Stations." 7 Fed. Reg. 2581 (Apr. 3, 1942).

- March 27, 1942: Public Proclamation No. 4 prohibited, "as a matter of military necessity," all those of Japanese ancestry from leaving Military Area No. 1 for "any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct." 7 Fed. Reg. 2601 (Apr. 4, 1942).

- March 31, 1942: People of Japanese ancestry were evacuated to "assembly centers," the first stop on the way to the internment camps. *Personal Justice Denied*, *supra*, at 135.

In the end, the "policy of exclusion, removal and detention was executed against 120,000 people without individual review." *Id.* at 2–3.[3]

[3] Before exclusion and internment, both the ONI and Curtis Munson surveilled the Japanese-American community as a class, and certain individuals were named in reports. *See* Jacobus tenBroek et al., *Prejudice, War, and the Constitution* 296 (1958). While that surveillance largely indicated the loyalty of the Japanese-American population, it was of no moment to the trampling of constitutional rights; the surveillance was first ignored, then misused to justify internment. *See* Greg Robinson, *By Order of the President: FDR and the Internment of Japanese Americans* 68–69 (2001) (noting that Munson's conclusions were "minimized and distorted" in a summary provided to the President).

B. The "security" justification for the treatment of Japanese-Americans.

If there was no evidence of the disloyalty of the Japanese-American community, what prompted these mass violations of constitutional rights? In 1980, to answer this, Congress established the Commission on Wartime Relocation and Internment of Civilians to review the implementation of Executive Order 9066. Commission on Wartime Relocation and Internment of Civilians Act, Pub. L. No. 96–317, § 2, 94 Stat. 964 (1980). The Commission unanimously concluded that the factors that shaped the internment decision "were race prejudice, war hysteria and a failure of political leadership," rather than military necessity. *Personal Justice Denied*, *supra*, at 459.

In fact, members of the military thought at the time that racial prejudice could create military necessity; General John L. DeWitt, head of the Western Defense Command and one of the chief architects of the Japanese internment offered the following rationale:

> I don't want any of them (persons of Japanese ancestry) here. They are a dangerous element. There is no way to determine their loyalty. ... It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty. ... But we must worry about the Japanese all the time until he is wiped off the map.

Korematsu, 323 U.S. at 236 n.2 (Murphy, J., dissenting) (quoting *House Naval Affairs Subcommittee to Investigate Congested Areas, Part 3*, 78th Cong. 739–40 (1943)). General DeWitt turned the lack of evidence of disloyalty on its head, advocating for the adoption of Executive Order 9066 on the ground that the very lack of any evidence of disloyalty was "a disturbing and confirming indication that such action will be taken." *Personal Justice Denied*, *supra*, at 6.

As General DeWitt's statements sadly demonstrate, a vital lesson from this history is that claims of "military exigency" cannot be accepted at face value. Rather, the internment demonstrates, in the words of former Attorney General Francis Biddle, "the power of suggestion which a mystic cliché like 'military necessity' can exercise on human beings." Francis Biddle, *In Brief Authority* 226 (1962). As former Chief Justice Earl Warren, then California Attorney General, 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) (emphasis added).

The later revelation that the United States actually suppressed evidence that contradicted its claims of military necessity further bolsters this conclusion. *See Korematsu*, 584 F. Supp. at 1418. In the original version of General DeWitt's report, the orders "did not purport to rest on any military exigency, but instead declared that because of traits peculiar to citizens of Japanese ancestry it would be impossible to separate the loyal from the disloyal." *Hirabayashi*, 828 F.2d at 598. When officials of the War Department received the original version, they convinced an unwilling DeWitt to remove or tone down the racist implications. Copies of the original version were burned. Peter Irons, *Justice at War* 210–11 (1983).

In sum, the repeated assertions of military exigency should not have prevailed. As Attorney General Biddle later lamented, the internment "subjected Americans to the shame of being classed as enemies of their native country without any evidence indicating disloyalty." Biddle, *supra*, at 212. We now recognize from this sad history that courts must be highly wary when military or police exigency is the proffered basis for infringement of rights, let alone the rights of an entire community.

C. The Judiciary permitted the violation of constitutional rights.

Our history also reveals that courts, unfortunately, have not always timely exercised judicial review to ensure protection of fundamental liberty. In *Yasui* and *Hirabayashi*, the Supreme Court upheld the constitutionality of the curfew order directed at all persons of Japanese ancestry. Then, in *Korematsu*, the Supreme Court, in a six-to-three decision, relying on its earlier affirmance of the curfew, upheld the exclusion and internment of the same class of persons.

In *Hirabayashi*, the government argued directly that the mere presence of Japanese-Americans *as a class* was enough: "The rationale of the action here in controversy is not the loyalty or disloyalty of individuals but the danger from the residence of the class as such within a vital military area." Br. for the United States at 64, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (No. 870). The Court not only credited this statement, but wilfully disregarded its duty to question it: "[I]t is not for any court to sit in review of the wisdom of their action [of the war-making branches of government] or substitute its judgment for theirs. … [I]t is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national de-

fense afforded a rational basis for the decision which they made. *Whether we would have made it is irrelevant*." *Hirabayashi*, 320 U.S. at 93, 102 (emphasis added).

Consistent with this hands-off approach, the Court failed to require bona fide proof of the government's asserted justification for the orders. The "facts" the government asserted and the Court adopted—that the proximity of some 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 or directly refuted. Improperly taking judicial notice of these "facts," the Court accepted, without scrutiny, the government's claim of military necessity, announcing that "we cannot reject as unfounded the judgment" of the military commander and political branches. *Id.* at 99.

Then, in *Korematsu*, the majority acknowledged that Korematsu was excluded not because of anything he had done, but "because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures." *Korematsu*, 323 U.S. at

223. Over the prescient dissent,[4] the majority accepted that "military imperative … answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin." *Id.* at 219.

D. Each branch of government belatedly acknowledged the constitutional violations that occurred.

We now recognize that the government's actions of that era, and the trilogy of judicial decisions, are stains on our history and the rule of law. Upon retiring from the Supreme Court, Justice Clark (who had served as an Assistant Attorney General responsible for criminal prosecutions arising out of violation of the internment orders) stated, "I have made a lot of mistakes in my life. … One is my part in the evacuation of the Japanese from California. … [A]s I look back on it—although at the time I argued the case—I am amazed that the Supreme Court ever approved it." John D. Weaver, *Warren: The Man, The Court, The Era* 113 (1967). *See also, e.g.*, *Fraise v. Terhune*, 283 F.3d 506, 530 (3d Cir. 2002) (Rendell, J., dissenting) ("We have, at times, overreacted in response to

[4] *See Korematsu*, 323 U.S. at 233–42 (Murphy, J., dissenting) (concluding that the internment program "goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism").

perceived characteristics of groups thought to be dangerous to our security or way of life and condemned individuals based on group membership. … Only later, when we have viewed these reactions with some perspective, have we acknowledged that the wholesale treatment of certain groups was not consistent with the basic tenets of our democracy." (citing *Korematsu*, 323 U.S. 214)).

Each branch of the government has attempted to atone for the government's wrongs in imposing the curfew, forced removal, and internment of Japanese-Americans during World War II, and each has strongly condemned the actions then taken. In doing so, each branch—and the Judiciary in particular—has recognized the lasting stigma attached to the wholesale violation of rights due to no more than membership in a particular community.

1. The Judiciary has vacated the internment-era convictions through coram nobis *actions.*

As discussed above, in the 1980s Korematsu, Yasui, and Hirabayashi successfully vacated their convictions through writs of error *coram nobis* based on newly discovered wartime government records. These records proved the internment was not just a "mistake," but that the government knew at the time that its claim of military necessity to

justify the internment was false, and deliberately suppressed, altered, destroyed, and misrepresented material evidence to secure favorable judicial rulings in the internment cases. *See generally* Irons, *supra*, at 347–67.

These decisions underscore the danger of uncritical judicial deference to government national security claims. These decisions also underscore the availability of judicial relief for constitutional injury. *Coram nobis* relief is appropriate in criminal cases when "the errors [are] of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid." *United States v. Mayer*, 235 U.S. 55, 69 (1914); *see also United States v. Morgan*, 346 U.S. 502, 512–13 (1954). As *coram nobis* relief is appropriate only when the applicant has finished serving his or her sentence, "adverse consequences" stemming from the conviction must exist "sufficient to satisfy the case or controversy requirement of Article III." *Hirabayashi*, 828 F.2d at 604.

In considering Korematsu's *coram nobis* petition, the court noted that because of the grave injustice done, "denial of the motion would result in manifest injustice and that the public interest is served by granting the relief sought." *Korematsu*, 584 F. Supp. at 1417. In grant-

ing *coram nobis* relief to Hirabayashi, the court recognized the lasting injury done to an individual whose rights are infringed solely due to his membership in a certain community: "A United States citizen who is convicted of a crime on account of race is lastingly aggrieved." *Hirabayashi*, 828 F.2d at 607.

In addition to pointing out the ongoing harm of this manifest injustice stemming from the express race-based classification defining the internment and Korematsu's, Hirabayashi's and Yasui's related convictions, the court in the *Korematsu coram nobis* case explicitly pointed out the need for timely and exacting scrutiny of claims of military need:

> *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.

Korematsu, 584 F. Supp. at 1420.

2. The executive and legislative branches have acted to issue formal apologies and reparations.

The legislative and executive branches of government have also recognized the need to acknowledge and atone for the wrongful actions taken during World War II. In 1976, President Ford formally rescinded Executive Order 9066, asking the nation to learn from its past wrongs. Proclamation No. 4417, 41 Fed. Reg. 774 (Feb. 19, 1976). Later, in the Civil Liberties Act, Congress made reparations and formally apologized for "these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry." 50 App. U.S.C. § 1989a(a). As President Reagan stated in signing the bill into law: "Here we admit a wrong." Remarks on Signing the Bill Providing Restitution for the Wartime Internment of Japanese-American Civilians, Aug. 10, 1988, 2 *Public Papers of the Presidents* 1054–55 (1991).

* * * *

The throughline of these later actions is one of apology, atonement, and reparation. This ability to admit prior wrongs speaks to our desire to uphold the Constitution, even when we fail to do so at the crucial hour. This case presents an opportunity to uphold the Constitution now, against present violations, not forty years after the fact.

II. The District Court's Opinion Fails To Account for the Actual Injury Done to Plaintiffs, and Improperly Credits the Necessity Claim of the Defendant.

The New York Police Department program at issue in this case sought to infiltrate and surveill Muslim organizations, and *only* Muslim organizations. (JA-25–26 ¶ 7.) The Department produced reports naming specific individuals without proof of any illegal activity. (JA-25 ¶ 5.) Plaintiffs allege, among other things, pecuniary loss and stigma resulting from this literally unwarranted practice directed at them on account of their religion. (JA-27–36 ¶¶ 11–34.) This practice not only violates the Constitution, it is directly contrary to the history for which the President and Congress have apologized, and which the federal courts have repudiated.

In dismissing the claim at the threshold, the district court ignored the very real harm done by such policies, and repeated the same errors that led to the judicial stamp of approval on the unconstitutional treatment of Japanese-American citizens. Just as wartime exigency did not justify such behavior, contemporary "security" exigencies cannot insulate such tactics from strict judicial scrutiny.

A. Plaintiffs have suffered an actual injury in fact.

The district court erred in concluding that the plaintiffs sustained no injury in fact. In addition to suffering economic loss, plaintiffs have most certainly been injured by being persecuted on account of their religion. In the case of *amici*'s family members, courts have recognized such injury in taking the extraordinary step of granting writs of *coram nobis* and vacating the stigmatizing convictions.

The district court relied on *Laird v. Tatum*, 408 U.S. 1 (1972), in stating that unwarranted police surveillance cannot produce injury. (JA-17.) However, in citing to *Laird*, the district court misapprehended the nature of the injury in the present case. *Laird* did not involve the direct surveillance of named targets, and thus the harm was merely speculative. *See Laird*, 408 U.S. at 9.

The plaintiffs in *Laird* also did not belong to a unified class. Rather, they belonged to an array of public organizations. *Laird*, 408 U.S. at 6. In contrast, plaintiffs in the present case have suffered a specific, targeted police effort based solely on their religion.

This type of class-based surveillance is akin to the ongoing injury that provided the basis for *amici*'s family members' *coram nobis* actions.

As discussed, *coram nobis* is appropriate only when "adverse consequences" resulting from the conviction exist "sufficient to satisfy the case or controversy requirement of Article III." *Hirabayashi*, 828 F.2d at 604. In granting *coram nobis* relief, the court rejected the contention that adverse consequences did not continue to exist for Gordon Hirabayashi, as "[a]ny judgment of misconduct has consequences for which one may be legally or professionally accountable," adding: "A United States citizen who is convicted of a crime on account of race is lastingly aggrieved." *Hirabayashi* 828 F.2d at 606–07.

Similarly, United States citizens specifically named in police reports as criminal suspects, based on no more information than their religion, have suffered a stigmatizing injury to their reputation and standing in the eyes of their government and the public. A community subjected to wholesale government surveillance based on no more than its religious identity is similarly stigmatized and suffers an actual injury by virtue of the surveillance itself—"the injury of unjustified stigma." *Personal Justice Denied*, *supra*, at 460.

This injury, dismissed by the district court, was also explicitly a basis for the reparations provided by the United States in 1988. *Id.* at

460–64. This injury alone should confer standing on the present plaintiffs. *See Ams. United for Separation of Church & State v. Reagan*, 786 F.2d 194, 201 (3d Cir. 1986) (recognizing that "noneconomic injuries such as stigmatization can be a basis for demanding legal redress" where plaintiffs were personally denied equal treatment) (citing *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984)).

The Department put its imprimatur on religious discrimination, which led to pecuniary loss, loss of employment prospects, and diminished property value. The law requires strict judicial scrutiny of such activity. The district court, in failing to recognize the particular religious-based harm, failed to consider the true injury.

B. The district court gave unwarranted deference to Defendant's justifications.

In also dismissing plaintiffs' suit for failure to state a claim, the district court repeatedly—and inappropriately—deferred to the alleged need for the Department to monitor *all* Muslims. This blind deference is worryingly similar to the statements and blindness of the Court in *Korematsu*:

The District Court	Supreme Court in *Korematsu*
"[T]he motive for the Program was not solely to discriminate against Muslims, but rather to find Muslim terrorists hiding among ordinary, law-abiding Muslims." (JA-22.)	"The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion." *Korematsu*, 323 U.S. at 219.
"The Plaintiffs in this case have not alleged facts from which it can be plausibly inferred that they were targeted solely because of their religion. The more likely explanation for the surveillance was a desire to locate budding terrorist conspiracies." (JA-21.)	"Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures." *Id.* at 223.
"[S]urveillance of the Muslim community began just after the attacks of September 11, 2001. The police could not have monitored New Jersey for Muslim terrorist activities without monitoring the Muslim community itself." (JA-21.)	"There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short." *Id.* at 223–24.

The district court also copied the Department's security justification "nearly verbatim," echoing the Court's now discredited acceptance of the government's claims of military necessity in its *Hirabayashi* brief.

Amici submit that the district court erred doubly in its analysis. Supposed good intentions on the part of a police organization do not obviate the need for strict scrutiny on the merits. To the contrary, "unconditional deference to a government agent's invocation of 'emergency' to justify a racial classification has a lamentable place in our history." *Patrolmen's Benevolent Ass'n. of City of N.Y. v. City of N.Y.*, 310 F.3d 43, 53–54 (2d Cir. 2002) (citing *Korematsu*, 323 U.S. at 223). The failure to subject the proffered justification to review on the merits equates to such unconditional deference.

In crediting the government's justification, the district court also applied the wrong test. Express classifications on a religious basis are subject to strict scrutiny *regardless* of discriminatory intent. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 508–09 (2005) (holding that strict scrutiny applies to all race-based governmental classifications; "the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental in-

terests'"); *Maldonado v. Houstoun*, 157 F.3d 179, 184 (3d Cir.1998) (holding that a classification that draws upon religious distinctions "is subject to strict scrutiny and will pass constitutional muster only if it is narrowly tailored to serve a compelling state interest").

Our belated acknowledgment that the outcome in *Korematsu* was wrong teaches us that the mass infringement of a community's rights is not "narrowly tailored." If it were, the subsequent apologies and reparations would have been unnecessary. The mass infringement challenged here should not have satisfied strict scrutiny on a motion to dismiss.[5]

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[5] The law requires reversal. But reversal is also good policy. Empirical research demonstrates that targeting an innocent community is not only ineffective, but counter-productive. *See, e.g.*, Stephen J. Schulhofer, Tom R. Tyler, & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. Crim. L. & Criminology 335, 364–74 (2011) (finding that the targeting of minorities and other policies perceived as unfair reduced by 61% the willingness of Muslim-American New Yorkers to report terrorist threats); Statement of Interest of the United States at 10, *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08-cv-1034) (noting, citing *inter alia*, Schulhofer, *supra*, "significant evidence that unlawfully aggressive police tactics are not only unnecessary for effective policing, but are in fact detrimental to the mission of crime reduction. Officers can only police safely and effectively if they maintain the trust and cooperation of the communities within which they work, but the public's trust and willingness to cooperate with the police are damaged when officers routinely fail to respect the rule of law.").

CONCLUSION

Amici urge the Court to reverse.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,215 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) and 3d Circuit Local Appellate Rule 29.1(b). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook 14 point font.

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July 10, 2014

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 28.3(d), I hereby certify that I am a member of the bar of this Court.

/s/Benjamin C. Block
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July 10, 2014

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2014, I caused the Amici Curiae Brief to be filed with the Clerk of the U.S. Court of Appeals for the Third Circuit using the appellate CM/ECF system. I also caused the original and six copies of the foregoing Brief of Amici Curiae to be filed with the Clerk of the Court by Federal Express.

I further certify that I caused the public version of the foregoing Brief of Amici Curiae to be served on counsel for all parties by the CM/ECF system.

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