No. 17-965

In The
Supreme Court of the United States

DONALD J. TRUMP,
President of the United States, et al.,

Petitioners,

v.

STATE OF HAWAII, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF 36 APPELLATE LAWYERS SUPPORTING RESPONDENTS

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AMICUS CURIAE BRIEF OF 36 APPELLATE LAWYERS SUPPORTING RESPONDENTS

The 36 citizens listed *post*, pages 35-41, submit this brief as amici curiae supporting respondents.[1]

INTEREST OF THE AMICI CURIAE

Amici are 36 appellate lawyers admitted to the bar of this Court. We write as citizens on our own behalf and not for employers, legal-practice organizations in which we have an interest, or clients. Please attribute the words and positions stated in this brief solely to the named amici.

The interest of amici is to preserve the rule of law. As officers of the Court, many of whom have briefed and argued cases in the Court for clients, we owe our highest duty to the rule of law. We perceive the rule of law to be threatened by actions that gave rise to this

[1] Pursuant to Supreme Court Rule 37.3(a), amici certify that Petitioners have filed a blanket consent with the Clerk, and counsel of record for Respondents has consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

Pursuant to Supreme Court Rule 37.6, amici state that this brief was written by members of the amici group, who exclusively produced and funded the brief. No party or counsel for a party was involved in preparing this brief or contributing financially to fund the preparation or submission.

case. Our duty to the rule of law calls us to write this brief to expose and resist the threat.

SUMMARY OF ARGUMENT

Appellate review of executive orders that legislate should embrace all verifiable evidence of a President's motive or intent when motive or intent is relevant. In the Nation's intentionally divided government, Congress legislates and the President faithfully executes.[2] When Congress broadly delegates legislative power, the President becomes an authorized autocrat. Then the judicial branch must assure the President does not "trench upon fundamental rights."[3] When a President as a sole state actor would abridge civil rights or the rights of a minority in the name of enhancing security or prosperity, the Court uniquely owes the people a duty to scrutinize the abridgment with full attention to whether its true motive is repression. As a matter of judicial process that means considering all verifiable evidence of the President's motives.

This brief explains how lessons of recent history favor considering everything verifiable that a President says about the purposes for issuing an executive order. Amici show what perils attend a judiciary's failing to take a leader at his or her word. Disregarding

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[2] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583, 588 (1952).

[3] *Kent v. Dulles*, 357 U.S. 116, 129 (1958); *see Greene v. McElroy*, 360 U.S. 474, 507 (1959).

expressions of repressive motive or will to act outside the rule of law contributes to social breakdowns greater than those embodied in a particular case.

Part I documents how the judiciary in another rule-of-law nation – Germany in 1933 – failed to see clearly and question deeply when facing a would-be totalitarian. Seduced by popular nationalism and cowed by factions angry over unemployment and underemployment, the German judiciary – like many other thoughtful German leaders and later world leaders – appeased when it should have stood its ground under its nation's constitution and rule-of-law tradition. The courts facilitated the plurality government's descent into totalitarianism. The result was not security or prosperity. It was tens of millions of deaths and Germany's destruction.

Part II shows that Germany's catastrophic experience is pertinent to the United States today. American courts – even this Court 70 years ago – have sometimes blinded themselves to real and knowable reasons for oppressive measures. They have accepted palpably meritless excuses invoking national security or tranquility. But the words of this Court and individual justices have often advocated the constitutional duty to prevent presidential trenching on fundamental rights, and the Court has invalidated executive acts – including in times of crisis.

Part III applies the lessons of parts I and II to show why the Court should take a President at his or her word – wherever or however uttered verifiably –

for the meaning and purpose of an executive order being challenged or interpreted under the Constitution or laws of the United States. The conditions in which this case arrives at the Court have salient analogies to the histories in parts I and II. As the Nation's chief guardian of the Constitution and the rule of law, this Court must examine thoroughly and deeply, and then thoughtfully stand on the ground of the rule of law.

ARGUMENT

I. How a Society Based on the Rule of Law Descended Into the Abyss.

From 1871 until 1919, the Constitution of the German Reich provided the German Empire's organic law. That constitution provided for a civil society under the rule of law, much like a republic.[4]

A. The Weimar Constitution provided for civil rights and for the rule of law administered by an independent judiciary.

After the First World War, Germany adopted a new constitution, the Reich Constitution of August 11, 1919, often called the Weimar Constitution.[5] The

[4] Carlton J. H. Hayes, A Political and Social History of Modern Europe 397 (Macmillin 1916).

[5] Amici rely on the translation available at Weimar Constitution (Alexander Ganse, trans. 2001), http://www.zum.de/psm/weimar/weimar_vve.php, last visited September 4, 2017, a copy of which is maintained in the records of counsel of record.

Weimar Constitution began similarly to the opening phrases of the United States Constitution: "The German people, united in its tribes and inspirited with the will to renew and strengthen its Reich in liberty and justice, to serve peace inward and outward and to promote social progress, has adopted this constitution." Article 1 declared: "The German Reich is a republic. State authority derives from the people."

Germans enjoyed freedoms declared in terms similar to those of the Bill of Rights. Article 109 of the Weimar Constitution expressed the substance of the Equal Protection Clause. Articles 114, 115, and 117 declared key principles of the Fourth, Fifth, and Sixth Amendments, adding an explicit right of privacy. Article 116 could not be distinguished from the Ex Post Facto Clause. In articles 118, 123, 124, and 135, the Weimar Constitution laid out the principles of First Amendment freedoms of expression, assembly, and religion. Articles 136 and 137 further implemented freedom of religion by prohibiting religious tests for public office, prohibiting any state church, and guaranteeing the right to form religious communities. Article 153 required just compensation for taking of property.

German civil rights were protected by the rule of law under an independent judiciary with life tenure. Judges swore an oath of "loyalty to the Constitution, obedience to the law, and conscientious fulfillment of

the duties of my office. . . ."[6] Express constitutional provisions included:

Article 102 – "Judges are independent and subject only to the law."

Article 104 – "Judges serving ordinary jurisdiction are appointed for lifetime. Against their will they can only be suspended temporarily or forced into early retirement or transferred to another location if a judge decided so, based on reasons and according to procedures determined by law. Legislation may establish an age limit, at which judges retire." Also, under Article 105, the government could not create extraordinary courts or subject civilians to military jurisdiction.

Sadly for the German people and the world, the Weimar Constitution embedded its own potential nullification by providing in Article 48(2) that the Reich President could suspend many individual rights "[i]n case public safety is seriously threatened or disturbed . . . to reestablish law and order. . . ."

B. The German judiciary betrayed the rule of law.

Before 1933, virtually no judges were members of the National Socialist German Workers' Party ("Nazi

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[6] William F. Meinecke, Jr. & Alexandra Zapruder, Law, Justice and the Holocaust 24 (U.S. Holocaust Memorial Museum, 2d ed. 2014). *Compare* Judiciary Act of 1789 (1 Stat. 73, ch. 20, § 8); 28 U.S.C. § 453.

Party").[7] But some had eroded the rule of law by allowing criminal convictions for truthful journalism and acquittals for major crimes when the defendant's conduct supported Germany's illegal rearming.[8]

On January 30, 1933, Reich President Hindenburg appointed the leader of the Nazi Party, Adolf Hitler, to be chancellor.[9] The Nazi Party held barely more than one-third of the seats in Germany's parliament, the Reichstag. But that was the largest party bloc.[10]

On February 27, 1933, someone – according to the Nazi Party a terrorist – set fire to the Reichstag building.[11] The next day, Hindenburg issued a decree suspending most of the civil rights and liberties of the German people until further notice under Article 48(2) of the Weimar Constitution.[12] A German who "provokes, or appeals for, or incites the disobedience of the orders" implementing the decree was guilty of a crime and subject to unlimited imprisonment.[13]

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[7] H. W. Koch, In the Name of the Volk: Political Justice in Hitler's Germany 7 (1989).

[8] Ingo Müller, Hitler's Justice 22-24 (Deborah Lucas Schneider, trans., Harvard Univ. Press 1991) (Kindler Verlag GmbH 1987).

[9] Michael Bazyler, Holocaust, Genocide, and the Law 5 (Paperback ed. Oxford Univ. Press 2017).

[10] *Id.*

[11] Meinecke, *supra* note 6, at 10.

[12] *Id.* at 11-12 (Decree of the Reich President for the Protection of the People and the State).

[13] *Id.* at 11.

Less than three weeks later, the German Federation of Judges capitulated to Hindenburg by issuing a declaration approving "'the will of the new government to put an end to the immense suffering of the German people'" and expressing full confidence in the government. The Federation declared "'German judges have always been loyal to the nation and aware of their responsibility.'"[14]

On March 24, Hindenburg declared that the Reichstag had, the day before, validly amended the constitution with a Law to Remedy the Distress of the People and the Reich.[15] Commonly called the Enabling Act, this law permitted the Reich Government to enact laws without engaging the Reichstag: "Laws enacted by the Reich Government may deviate from the Constitution as long as they do not affect the institutions of the Reichstag and the Reichsrat."[16]

A week later, on April 1, the government suspended all Jewish judges and prosecutors. A week after that, the government enacted a law removing all Jewish officials from civil service. This put 643 judges out of office in Prussia alone. The chairman of the German Federation of Judges expressed complete confidence in the chancellor, claiming the independence of judges

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[14] Müller, *supra* note 8, at 37.

[15] Meinecke, *supra* note 6, at 18.

[16] *Id.* The Reichsrat was the upper house of the German legislature with limited power to object to legislation adopted by the Reichstag. Weimar Constitution, arts. 63, 68, 74.

would be maintained.[17] In parallel, the government, with help from the remaining judges, began to purge Jewish lawyers from the bar.[18]

The Law to Secure the Unity of the Party and the State declared on December 10, 1933: "After the victory of the National Socialist revolution, the National Socialist German Workers' Party has become the upholder of German state thinking and is indissolubly linked to the state."[19]

As 1934 arrived, state and Reich courts enhanced government decrees by finding implicit subversion, Communism, and disobedience in acts not literally prohibited, if police or government officials denounced them as adverse to state interests. Civil courts participated by disbanding organizations, refusing to enforce laws and regulations in favor of citizens, permitting expropriation of private property without process or compensation, and refusing to enforce contracts between Aryans and Jews. The courts eagerly joined the government's quest to crush all political dissent and opposition.[20] Even before decrees required them to do so, German judges adopted Nazi Party race theory as the

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[17] Müller, *supra* note 8, at 37 (Law for Restoration of the Professional Civil Service).

[18] *Id.* at 61-64.

[19] Diemut Majer, "Non-Germans" under the Third Reich 24 (Peter Thomas Hill, et al., trans., Johns Hopkins Univ. Press 2003) (Oldenbourg Verlag, München, 2d ed. 1993).

[20] Müller, *supra* note 8, at 47-49, 116-117.

basis of civil decisions, including denying and annulling marriages.[21]

Traditional legal standards became barren sacks to be filled with Nazi Party ideology. "[T]his *required no changes* in the established legal system but only the setting forth of new definitions of meaning and revised guidelines. . . ."[22] "There were essentially three principles that were held to be axiomatic for the entire field of administration as well as the judiciary: the principle of absolute rule by a leader (the Führer principle), the principle of the authority of the Party over the state, and the influence of race as the fundamental principle guiding affairs of state ('racial inequality')."[23]

When Hindenburg died on August 2, 1934, the chancellor joined the presidency with the chancellorship and proclaimed himself Führer. The armed forces swore allegiance to the Führer by office and name.[24] On August 24, 1934, the judicial oath's loyalty to the constitution was replaced with a promise "to be true and obedient to the Führer of the German Reich and people, Adolf Hitler. . . ."[25]

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[21] *Id.* at 91-95.

[22] Majer, *supra* note 19, at 6 (original italics); Richard J. Evans, The Third Reich in Power 73 (2005).

[23] Majer, *supra* note 19, at 10.

[24] Evans, *supra* note 22, at 42-43.

[25] Meinecke, *supra* note 6, at 23-24. Evans, *supra* note 22, at 43 (the Reich Commissioner for Justice in 1936 declares the role of a judge is to apply Nazi Party ideology).

All the acts of the German state leading to and culminating in the crimes prosecuted at Nuremberg were authorized by decrees under the Enabling Act or adopted by the Reichstag. The government adopted and carried out, from 1934 through the end of the war, racial discrimination laws that inflicted humiliations, theft, ghettoization, imprisonment, and death. On the process and precedent built in the first year of Nazi Party rule, the courts enforced those laws. Almost without exception, the laws had benign titles; without reading the content, one would have thought they were neutral, not mandates to oppress Jews and other minorities.[26] Emblematic of filling traditional process with Nazi Party ideology, a 1935 decree created ex post facto crime-by-analogy: conviction for acts contrary to the "sound sentiment of the people" even though the elements of a crime were absent.[27] A survivor of both a Soviet gulag and a German concentration camp said the Soviets possessed a "'blundering, often stupid brutality,'" but the Germans proceeded with a "'refined, law-abiding sadism.'"[28]

The German judiciary assimilated itself into the Third Reich, presided over the destruction of its own independence, and subordinated itself to authoritarian

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[26] Bazyler, *supra* note 9, at 7-32; Evans, *supra* note 22, at 547-554.

[27] III Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10: "The Justice Case" 176-178 (U.S. Gov't Printing Off. 1951) (quoting Law of June 28, 1935, arts. 2, 170a).

[28] Bazyler, *supra* note 9, at 4.

leadership. While a few judges resisted the Nazi Party regime extrajudicially, only one can be documented to have refused to accept a Nazi Party decree as German law; he was given early retirement.[29] German judges acquiesced in a view of life that all things are political and all politics is dichotomous: us/them, win/lose, good/evil. Their loyalty ran more to the material state than to the rule of law.[30]

C. Conquest and contrast.

To the collapse of the rule of law in the Third Reich, no greater contrast could be found than the Allies' trials at Nuremberg of German officials accused of war crimes. Against withering pressure for vengeance and summary executions from the Soviet Union and the United Kingdom, the United States prevailed on the principle that the Germans would be tried under the rule of law, both substantive and procedural.[31] The chief prosecutor for the United States, who stood against others' pressure, was Justice Robert Jackson of this Court.[32]

No author has eclipsed the first 95 words of Justice Jackson's opening statement to declare the magnitude of the Nuremberg trials: "The privilege of opening

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[29] Müller, *supra* note 8, at 194-196.

[30] *Id.* at 296-298.

[31] Norbert Ehrenfreund, The Nuremburg Legacy 8-13 (St. Martin's Press 2007).

[32] *Id.*; *see* Eugene C. Gerhart, America's Advocate: Robert H. Jackson 310 (1958) (Jackson's appointment on May 2, 1945).

the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."[33]

II. American Analogies and Contrasts.

At times, this Court has succumbed to pulls from the executive branch and emotional factions to compromise the rule of law, and history has judged it harshly for doing so. But dissenters and recent majority decisions have spoken with a wiser voice that should guide the Court here.

A. This Court's nadirs came when it yielded to executive or popular racial sentiment and compromised the rule of law.

In *Korematsu v. United States*, 323 U.S. 214 (1944) ("*Korematsu*"), the Court upheld the part of Executive Order 9066 that excluded American citizens of Japanese descent from so-called military areas, as declared

[33] II Trial of the Major War Criminals before the International Military Tribunal Nuremberg 14 November 1945-1 October 1946, 98-99 (Nuremberg, Germany 1947).

by military authority.[34] The executive order stated as its justification: " 'the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. . . .' "[35] The order justified exclusion primarily by citing the "Final Report, Japanese Evacuation from the West Coast, 1942" ("Final Report").[36]

The Final Report "deliberately omitted relevant information and provided misleading information in" forming the *Korematsu* record.[37] The civilian government knew the Final Report's mendacity at the time, and the Justice Department's brief in *Korematsu* disavowed the report.[38]

Under Executive Order 9066 and the Army's implementing orders, military areas consisted of the Western United States, and American citizens of Japanese ancestry could leave military areas only by submitting to transportation to concentration camps.[39] Thus, although facially less oppressive, the orders imprisoned

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[34] *Korematsu*, 323 U.S. at 216-217.

[35] *Id.* at 217.

[36] *Id.* at 219 n.2.

[37] *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) ("*Korematsu-II*").

[38] Brief of the United States at 12 n.2, *Korematsu v. United States*, 323 U.S. 214 (1944) (No. 22) (disavowing reliance on the "Final Report, Japanese Evacuation from the West Coast, 1942, by Lt. Gen. J. L. DeWitt").

[39] *Korematsu*, 323 U.S. at 221-224, *see id.* at 227 (Roberts, J., dissenting) (documenting extent of military areas).

all Americans of Japanese ancestry without proof of a crime or even a propensity to commit one. Despite notice of the Final Report's flaws, the Court refused to adjudicate the constitutional consequences of the imprisonment worked by Executive Order 9066's combined impositions. The Court affirmed Korematsu's conviction despite recognizing that race-based restrictions on civil rights must be subjected "to the most rigid scrutiny."[40]

The Court has never disapproved *Korematsu*, although the United States has apologized to the victims of the internment.[41] Congress declared the internment was "carried out without adequate security reasons and without any acts of espionage or sabotage documented by [appropriate authorities], and [was] motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership."[42]

Korematsu must be recognized as one of America's most profound judicial failures, but it is not the only decision in which the Court lent a willing hand to undermining the rule of law. In *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (*Dred Scott*), Chief Justice Taney led a majority of the Court to declare that descendants of African slaves could not become citizens of the United States, and a slave taken by a master into a

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[40] *Id*. at 216.

[41] Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988). This was four years after a district court granted Mr. Korematsu's petition for writ of error coram nobis. *Korematsu-II*, 584 F. Supp. at 1420.

[42] *Id.* at § 2(a).

free state remained the master's property, notwithstanding statutes to the contrary.[43] Forsaking the rule of law, including the Missouri Compromise, the Court aimed to preserve the Union by appeasing the pro-slavery faction and bolstering Southern dignity.[44] President James Buchanan by ex parte communications convinced Justice Robert Grier to side with Chief Justice Taney.[45] Far from preserving the Union, corrupting the rule of law did the opposite: it immediately inflamed the North and contributed to the evolving political revolution becoming violent.[46]

In a third case, *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court compromised the rule of law to accommodate popular racism, codified in a local Jim Crow law rather than an executive order. *Plessy* was no naïve or ignorant mistake; Justice Harlan confronted the majority with what it was doing and why.[47]

A final example of constitutional justice delayed and denied connects American law with Nazi law. Preparing what became the Nuremberg Laws, Nazi

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[43] *Dred Scott*, 60 U.S. at 427, 452.

[44] Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics 557-558 (1978).

[45] John Mack Faragher, et al., Out of Many: A History of the American People, Revised Printing, 388 (4th ed. 2005).

[46] Fehrenbacher, *supra* note 44, at 417-418, 425-426, 432-433 (state legislative responses), 566-567.

[47] *Plessy*, 163 U.S. at 557, 562 (Harlan, J., dissenting).

lawyers studied United States race law.[48] They analyzed (i) federal race-based immigration law,[49] and the de jure second-class citizenship afforded to residents of Puerto Rico and the Philippines;[50] (ii) state de facto second-class citizenship, e.g., the myriad poll taxes, literacy tests, and other barriers thrown up to block African American voting rights;[51] and (iii) American state law of interracial sex.[52] While United States immigration and citizenship law proved not to match German conditions,[53] miscegenation law did.[54] Nazi scholars and lawyers concluded that in protecting white supremacy and purity of the blood of the Nordic races, the Unites State led the world.[55] They modeled their own Blood Law – prohibiting, nullifying, and criminalizing marriage of a member of any Nordic race with a Jew – on an amalgam of American state miscegenation laws.[56] And although the Nazis thought of Jewishness

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[48] James Q. Whitman, Hitler's American Model: The United States and the Making of Nazi Race Law (2017) 59-69, 113-127, 135.

[49] *Id.* at 34-37, 43-48, 50-55.

[50] *Id.* at 37-48, 50-55.

[51] *Id.* at 38-40, 69-72.

[52] *Id.* at 73-123.

[53] *Id.* at 50-55.

[54] *Id.* at 106-117, 135.

[55] *Id.* at 12, 73-80.

[56] *Id.* at 124-127; the Law for the Protection of German Blood and German Honor of September 15, 1935, is partially quoted *id.* at 125. For full text of the law, *see* Holocaust Encyclopedia, Nuremberg Race Laws: Translation, U.S. Holocaust Memorial Museum.

as a race, Judaism, like Islam, is a religion; the Nazis' target was analogous to that of the executive orders.

Not until 1967 did the Court recognize that state laws prohibiting interracial marriage violated the Fourteenth Amendment.[57] The California Supreme Court understood this 20 years earlier.[58]

Could the Court again undermine the rule of law by complicity with official lawlessness, trading the Constitution for a claim of better security? This is what the President seeks – unconditional deference to his mere recital of national security and foreign policy grounds for an executive order.[59] In the EO-2 case, three Fourth Circuit judges would have granted that. Circuit Judge Shedd and two colleagues explicitly endorsed subordinating the rule of law to extra-legal public interests: "Undoubtedly, protection of constitutional rights is important, but there are often times in the federal system when constitutional rights must yield for the public interest."[60] Justice Thomas warned against such wagers: "Can we really be sure that the racial theories that motivated *Dred Scott* and *Plessy* are a relic of the past or that future theories will be nothing but beneficent and progressive? That is a

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[57] *Loving v. Virginia*, 388 U.S. 1 (1967).

[58] *Perez v. Sharp*, 32 Cal. 2d 711, 198 P.2d 17 (Cal. 1948).

[59] Brief for the Petitioners, pp. 36, 39, 54-55, 58-60, 63, 66-68.

[60] *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 659 (4th Cir. 2017) (Shedd, J., dissenting); *see Int'l Refugee Assistance Project v. Trump*, Nos. 17-2231, 17-2232, 17-2233, 17-2240, 2018 U.S. App. LEXIS 3515 (4th Cir. Feb. 15, 2018) *262-*265, *298, *320-*325.

gamble I am unwilling to take, and it is one the Constitution does not allow."[61]

B. The Court and its members have also affirmed the wisdom of an independent judiciary as a check on executive power.

The United States was founded on the rule of law by citizens of a rule-of-law nation.[62] The nation to which the Founders formerly owed their loyalty treated them as mere colonists.[63] Chief among their grievances was that the English government denied them an independent judiciary to enforce their civil rights and commercial law.[64]

In better voices than the majority opinions in *Korematsu*, *Dred Scott*, and *Plessy*, the Court and individual justices have declared the wisdom of enforcing the rule of law cherished by the Founders. Opinions have called for opposing an executive branch that would trample the rule of law, and the Court has invalidated executive acts. Justice Roberts dissented in *Korematsu* on the ground that the government could not convict a citizen of being in a prohibited place when the citizen could leave only by subjecting himself to unconstitutional imprisonment in a concentration camp.[65] Justice

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[61] *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 781-782 (2007) (Thomas, J., concurring).

[62] The Declaration of Independence; U.S. Const. preamble.

[63] The Declaration of Independence.

[64] The Declaration of Independence, paras. 9, 10, 13, 19, 20.

[65] *Korematsu*, 323 U.S. at 225-233 (Roberts, J., dissenting).

Murphy dissented on the ground that the "exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."[66] The Court must declare, he said, that "[i]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support."[67] He used the record to show that the Final Report was a racist sham[68] and concluded: "A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations."[69] And Justice Jackson dissented, arguing that even if the courts should not interfere with unconstitutional military orders, they must not enforce them.[70] "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."[71]

In 1974, the Court faced a President whose philosophy was that "[w]hen the president does it, that

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[66] *Id.* at 233 (Murphy, J., dissenting).

[67] *Id.* at 234.

[68] *Id.* at 234-239, 241-242.

[69] *Id.* at 239-240.

[70] *Id.* at 242-248 (Jackson, J., dissenting).

[71] *Id.* at 247.

means it is not illegal."[72] Rejecting a claim of executive privilege embodying that attitude, the Court held that the rule of law applied to the President and ordered him to comply with a special prosecutor's subpoena for recordings of his Oval Office conversations about the Watergate crimes.[73] The Court held that the privilege for presidential communications "must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that 'the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.' "[74]

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plur. opn.), the Court held that although Congress authorized the detention of enemy combatants, "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."[75] The plurality rejected the jurisprudential foundation of *Korematsu*: "[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts. . . . Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by

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[72] David Frost interview with Richard M. Nixon, May 19, 1977.

[73] *United States v. Nixon*, 418 U.S. 683, 713-714 (1974).

[74] *Id.* at 708-709.

[75] *Hamdi*, 542 U.S. at 509; *see also id.* at 553-554 (Souter, J., concurring and dissenting).

any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government."[76] Thus: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[77] Other justices rebuked the government's war powers position more forcefully.[78]

These voices of the Court provide foundation to uphold the rule of law against executive violations. They are the kinds of voices absent from the German jurisprudence prevalent in 1933.

III. When One Person Has Power To Make Law, the Court Should Consider All Available Evidence To Interpret and Test That Person's Acts.

A. The President has limited power to legislate under Congressional delegation.

Congress has delegated to the President power to legislate on certain immigration subjects.[79] The

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[76] *Id.* at 535-536.

[77] *Id.* at 536.

[78] *Id.* at 554 *ff*. (Scalia, J., dissenting).

[79] 8 U.S.C. § 1182(f). Whether this President's actions conflict with other provisions of the INA, including 8 U.S.C. §§ 1152(a)(1)(A) and 1157, is outside the scope of this brief.

President may act as a lawmaker only within lawful delegation.[80]

President Truman's effort to seize the steel mills exemplifies the President's limited power to legislate. By executive order, he granted himself power to seize steel mills as essential to prosecuting the Korean War, and the same order directed the Secretary of Commerce to execute the seizure.[81] The Court insisted that any such presidential power must be found in the Constitution.[82] None existed in either the war powers of the Commander in Chief of the Armed Forces or the power to execute the laws faithfully.[83] In rejecting the President's claim for the latter, the Court emphasized that the order was essentially legislative. The order created a presidential policy; it did not execute a congressional policy "in a manner prescribed by Congress."[84] Explaining the constitutional principle that Congress holds the general power to legislate and the President has no such power, the Court stated:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the

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[80] A "broad generalized" delegation does not allow the President to "trench upon fundamental rights." *Kent*, 357 U.S. at 129; *see Greene*, 360 U.S. at 507.

[81] *Youngstown*, 343 U.S. at 583, 588.

[82] *Id.* at 587.

[83] *Id.* at 587, 588.

[84] *Id.* at 588.

> recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States * * * ." After granting many powers to the Congress, Article I goes on to provide that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[85]

Amici assume that provisions of the Constitution generally limiting federal power – the Free Exercise Clause, the Establishment Clause, the equal protection component of the Fifth Amendment's Due Process Clause – apply to executive action.[86] This appeal requires the Court to decide whether specific orders violate one or more of those provisions.

Judicial loyalty to the Constitution requires upholding the rule of law not only by the substance of the Court's opinions, but also in the rules of scrutiny and review of presidential acts. The remainder of this brief explains that when a sole actor – here, the President – promulgates a challenged law, everything the actor has

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[85] *Id.* at 587-588.

[86] *See Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (holding the plenary power doctrine does not authorize detaining aliens indefinitely).

ever said or written about that law should be considered in testing its meaning and validity.

B. Objections to using Congressional legislative history do not apply to extrinsic evidence of an executive order's purpose.

If the Court agrees with the Government's statutory arguments, precedent will call for examining the President's purposes in issuing the executive orders.[87] For example, one Establishment Clause argument is that plaintiffs made "an affirmative showing of bad faith," which allows judicial scrutiny to go beyond the text of a facially neutral statute or decree.[88] Going beyond the text means consulting extrinsic evidence, raising the question what extrinsic evidence can be considered.

From the Court's earliest days, it has considered extrinsic evidence in seeking to understand lawmakers'

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[87] *United States v. Windsor*, ___ U.S. ___, 133 S.Ct. 2675, 2693 (2013) (congressional intent to interfere with state sovereignty); *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860-862 (2005) (motive relevant to Establishment Clause analysis); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 699 (1994) (same); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (same).

[88] *Kerry v. Din*, ___ U.S. ___, 135 S.Ct. 2128, 2140-2141 (2015) (Kennedy, J., concurring in the judgment) (determining what "bona fide" means in *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)); *see Marks v. United States*, 430 U.S. 188, 193 (1977) (determining what constitutes the holding when the Court's opinions are divided).

intent or motive. "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived. . . ."[89] Some justices have objected to this practice,[90] but even had their objections commanded a majority, none applies to analyzing executive orders like those under scrutiny here. That is because neither logically nor in the real world do the objections carry over to analyzing decrees of a sole lawmaker, which is how the President acts in promulgating many executive orders.

- Uncertainty whether a committee report or a floor speech was in the minds of all senators and representatives[91] is immaterial in the case of an executive order because only the President's reasons matter. There is no doubt whether any expression of a single mind bears on its purposes and intents.

- One cannot object that the history of an executive order is "inherently open ended";[92] at most, the material time embraces one President's campaign and term in office.

- There is no inherent difficulty determining the accuracy of sole-source extrinsic evidence. To illustrate by the plaintiffs' Establishment Clause challenge, the lawmaker's public statements are "readily discoverable fact[s]" of the

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[89] *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805).

[90] *See, e.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 520 n.2 (1993) (Scalia, J., concurring).

[91] *See id.*

[92] *Id.* at 520.

kind courts use to determine the primary purpose of a governmental action.[93]

- Supporters of the orders object to drawing inferences from the President's statements because those statements express only one person's viewpoint. Universally, these arguments cite cases that reject relying on a single legislator's floor debate statements. But those cases validly rest on the fact that one cannot infer the intent of a legislative body from individual legislators' personal perspectives.[94] The grounds for excluding individual Congressional comments do not logically carry over to executive orders.

C. The record here demonstrates the appropriateness and ease of gathering evidence of presidential intent.

Some have expressed fear that if the Court treats a presidential candidate as speaking on the legal record when campaign remarks are relevant to later constitutional analysis of executive orders, he or she will self-censor campaign speech. Amici respectfully

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[93] *McCreary*, 545 U.S. at 862.

[94] "By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body." *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921); *see McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 493-494 (1931). Authors and floor managers are different, of course. *See, e.g.*, *Edelman v. Lynchburg College*, 535 U.S. 106, 117 n.15 (2002).

disagree. Briefs have identified no principled or probative difference between statements made in a presidential campaign, statements made after an election but before inauguration, and statements made after inauguration. *This* president modified *his* campaign speech attacking all people of Muslim faith because that attack did not play well with voters.[95] His behavior shows that presidential candidates mold themselves and mind their language to attract voters, not to make or conceal evidence of the reasons for future official actions. There is no evidence that the Court would change political behavior by regarding as evidence what a presidential candidate tells the American people. That lawyer-invented fear contradicts experience with politicians' behavior. And failing to take a President at his or her word – known to all interested Americans except federal judges – would impair the integrity of the judicial process in the eyes of the people. Nor is there a slippery-slope threat to legislative branch elections: statements by individual legislators are already excluded from judicial review of Congressional legislation for reasons not affected by the scope of evidence appropriate in judicial review of executive orders.[96]

The Court confronts no inability to find evidence of purpose and intent declared by the President. The Fourth Circuit related some of that evidence in *Int'l*

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[95] Joint Appendix, *Donald J. Trump, etc. et al. v. International Refugee Assistance Project, et al.*, Docket Nos. 16-1436 and 16-1540 ("IRAP J.A.") at 798.

[96] *Duplex*, 254 U.S. at 474; *McCaughn*, 283 U.S. at 493-494.

Refugee Assistance Project v. Trump, 857 F.3d at 594. The statements remain consistent whether made before the election, before inauguration, or by the inaugurated President:

- December 7, 2015, "Statement on Preventing Muslim Immigration," calling "for a total and complete shutdown of Muslims entering the United States. . . ."[97]
- March 9, 2016, interview: "Islam hates us," and "[w]e can't allow people coming into this country who have this hatred. . . ."[98]
- March 22, 2016, interview, calling to exclude Muslims, because "we're having problems with the Muslims, and we're having problems with Muslims coming into the country."[99]
- July 17, 2016, response to criticism of his religion-based comments: "So you call it territories. OK? We're gonna do territories."[100]
- December 21, 2016, comment on terrorism in Europe: "You know my plans. All along, I've proven [sic] to be right. 100% correct."[101]
- January 27, 2017: "This is the 'Protection of the Nation from Foreign Terrorist Entry into

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[97] IRAP J.A. 346.

[98] IRAP J.A. 516-517.

[99] IRAP J.A. 522.

[100] IRAP J.A. 798; *see* IRAP J.A. 480-481 ("talking territory instead of Muslim" and referring to the territorial concept as an expansion of the ban).

[101] IRAP J.A. 506.

> the United States.' We all know what that means."[102]

Our point is not that this evidence necessarily carries the day; that is for respondents to show. Our point is that the evidence must be *considered*; otherwise a sole lawmaker can evade judicial scrutiny by sanitizing text that the Court considers probative while trampling the rule of law for all to see – and for a dangerous minority like the *Dred Scott*-era slave owners to celebrate.

D. Upholding the rule of law requires considering all the President's statements that relate to the executive orders.

"Our precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role. We do not defer to the Government's reading of the First Amendment, even when such interests are at stake."[103] In 2010, the Court unanimously declared that government's "authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to

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[102] IRAP J.A. 403; *see* IRAP J.A. 508 (a presidential advisor takes credit for finding a way to ban Muslims legally); *Int'l Refugee Assistance Project*, 857 F.3d at 594-595 (presenting comments on the lack of substantive or purposive difference between the first and second executive orders).

[103] *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010).

individuals."[104] But one can renounce abdication and nevertheless abdicate by deferring excessively to the government's – and especially a sole government actor's – invocation of authority and expertise. It should be "significant that Congress has been conscious of its own responsibility to consider how its actions may implicate constitutional concerns"[105] – a factor absent here.

To limit inquiry to the text of a sole lawmaker's enactment, or to the text and official statements of intent, is to abdicate judicial duty as did the Weimar judges beginning in 1933 and the majorities in *Dred Scott*, *Plessy*, and *Korematsu*. If the Court's methodology for reviewing executive orders abdicates scrutiny by refusing to consider a President's words, the Court would have no principle with which to brake itself on the slippery slope of accommodating executive lawlessness. True, the Court has said in another context that it can stop where it wants: "[t]he power to tax is not the power to destroy while this Court sits."[106] But the Weimar experience shows how quickly a judiciary can be absorbed into an authoritarian regime if it lacks the jurisprudential muscle and constitutional courage to rebuke an executive's first step in destroying a republican form of government.

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[104] *Id.*

[105] *Id.* at 35.

[106] *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

Amici advocate a rule of appellate review applicable to all decrees by sole lawmakers, at all times, and regardless of the subject. Amici clash directly with the President's position on "extrinsic material" demonstrating his own purpose, argued at pages 17, 66 through 68, and 71 of his brief. But following that rule is especially important here and now. The President, who issued the executive orders, openly disrespects the rule of law and the judiciary.[107] He boasted he could get away with murder.[108] He advocated police brutality.[109] His address to the Boy Scouts of America at their 2017 Jamboree[110] is chillingly reminiscent of Leni Riefenstahl's *Triumph of the Will*. And he advocated a

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[107] https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442; http://joshblackman.com/blog/2016/05/27/donald-trumps-dangerous-attack-on-u-s-district-judge-gonzalo-curiel-and-the-rigged-federal-judiciary/ [transcript of comments]; https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/ (the President denigrating the "so-called judge" who first enjoined enforcement of the travel ban: "The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!").

[108] "'I could stand in the middle of Fifth Avenue and shoot somebody and I wouldn't lose anyone,' the Republican presidential candidate said, complete with a gun shooting gesture. 'That's how loyal they are,' he said about his supporters." http://siouxcityjournal.com/news/state-and-regional/iowa/trump-crows-about-support-calls-out-opponents-at-dordt-rally/article_bb5afdb4-e18e-5fff-bbc8-09a0eb5a6ff7.html.

[109] https://www.washingtonpost.com/news/post-nation/wp/2017/07/29/u-s-police-chiefs-blast-trump-for-endorsing-police-brutality/.

[110] http://time.com/4872118/trump-boy-scout-jamboree-speech-transcript/.

proposal for a Muslim registry, although he later withdrew it.[111]

Events in Charlottesville on August 11 and 12 of last year, and the President's responses, cannot go unnoticed. White supremacy is not new: it is the legacy of slavery. The Ku Klux Klan has been with the Nation since Nathan Bedford Forrest's 1867 election as Grand Wizard, and American Nazism traces to the German American Bund of 1936. But never before have those forces of violence and authoritarianism coexisted with a President who took two days after race-based violence to repudiate the perpetrators by name, only later to reverse himself and attack the victims.[112]

The Court's decision must show that the judiciary listens to the real reasons for presidential acts, refuses to defer to cynical inventions of facially neutral text, and refuses to tolerate unconstitutional official acts of racial and religious hatred. History teaches that the Court cannot afford to wait. The risk of not standing against the first trenching on fundamental rights is

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[111] *See* https://www.theguardian.com/us-news/2016/nov/17/trump-camp-denies-muslim-ban-registry.

[112] More recently, the President's comments following another tragedy of violence demonstrated his lack of allegiance to the rule of law exceeds the fields of race and religion. "Take the guns first, go through due process second." Michael D. Shear, *Trump Stuns Lawmakers with Seeming Embrace of Comprehensive Gun Control* (Feb. 28, 2018) https://www.nytimes.com/2018/02/28/us/politics/trump-gun-control.html.

that there may not be another timely opportunity to make that stand.

CONCLUSION

Everything the President writes, says, or tweets that logically bears on the motives and purposes of an executive order is relevant and material, and should be admissible, to interpret and determine the validity of that order.

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