No. 16-1307

IN THE

Supreme Court of the United States

ALI HAMZA AHMAD SULIMAN AL BAHLUL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DC CIRCUIT

BRIEF OF THE UNITED STATES COUNCIL OF MUSLIM ORGANIZATIONS, THE INTERFAITH ALLIANCE FOUNDATION AND THE MUSLIM JUSTICE LEAGUE, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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I. INTEREST OF THE *AMICI CURIAE*

The United States Council of Muslim Organizations was founded in March of 2014 as a coalition of several leading national and local Muslim organizations and institutions to unify the approach, agenda and vision of the Muslim community.

Interfaith Alliance Foundation is a 510(c)(3) nonpartisan organization created in 1994 to celebrate religious freedom and to challenge the bigotry and hatred arising from religious and political extremism infiltrating American politics. Today, Interfaith Alliance has members across all fifty states who are part of 75 faith traditions as well as those of no faith tradition. Interfaith Alliance believes that the first freedoms in the United States Constitution guarantee equal treatment regardless of professed faith for all people subject to Constitutionally sanctioned proceedings.

The Muslim Justice League is a Boston-based 501(c)(3) organization advocating for human and civil rights and civil liberties that are threatened under national security pretexts. Through intersectional community education and organizing, and legal and policy advocacy, the Muslim Justice League works to empower and protect suspect communities whose rights are violated in the "war on terror."[1]

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1. Pursuant to Supreme Court Rule 37.6, counsel for amici certify that no counsel for any party authored this brief in whole or in part, and that no person other than amici curiae, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of amici's

II. SUMMARY OF THE ARGUMENT

By establishing a criminal justice system only for non-citizens, the Military Commissions Act implicitly raises a profound question of Constitutional law: may the government discriminate against a person because of his or her religion?

To be sure, the Military Commissions Act does not expressly discriminate on the basis of religion. Instead, it focuses on alienage. Our history makes clear, however, that alienage frequently is used as a proxy for religious discrimination. To cite but one example, the rampant anti-Irish bigotry of the 1800's had its roots in the historic anti-Catholicism of the Protestant majority at the time.

By guaranteeing that all people are entitled to equal justice under the law, the Equal Protection Clause has long stood as a bulwark against such tyranny by a majority over a discrete minority. The statute at issue in this case, however, concerns the creation of a separate, and decidedly unequal, system of justice reserved only for non-citizens. If such a system passes muster under the Equal Protection Clause, the implications will extend well beyond the confines of Guantanamo Bay and, ultimately, could be used to justify discrimination against any religious minority. Given the importance of this issue, Amici ask this Court to grant the Petition for a Writ of Certiorari and assess, under a heightened level of scrutiny, the constitutionality of the Military Commissions Act.

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intention to file this brief. The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk.

III. ARGUMENT

A. Equal Justice Under Law: The Bedrock of American Civil Rights.

Equal justice under law has occupied an exalted place in the American legal system for 150 years; not simply as a high-minded aspiration inscribed on this Court's façade, but as a concrete safeguard against government action targeting the powerless. The principle of equal protection was first codified in the Civil Rights Act of 1866, which provided that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory, . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." This provision was later reenacted (in nearly identical form) in Section 16 of the 1870 Enforcement Act. *See* Enforcement Act of 1870, ch. 114, § 16, 16 Stat. 140, 144 (codified as amended at 42 U.S.C.A. § 1981 (2007)). Considering Section 16's origin and its reference to "white citizens," one might conclude that Congress intended for the 1870 Act to address only issues of post-civil war race discrimination. Section 17 of the Enforcement Act makes clear, however, that Congress' intended reach was broader, encompassing anti-alien discrimination:

> [A]ny person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by [Section 16] of this act, or to different punishment, pains, or penalties <u>on account of such person being an</u>

> alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor. . . .

Id. at § 17 (emphasis supplied).

As Congress debated the 1870 Enforcement Act, the United States took its most significant step toward ensuring equal protection of law when it passed the Fourteenth Amendment, which, through its Equal Protection Clause, prohibits government from "deny[ing] to any person within its jurisdiction the equal protection of the laws."[2] U.S. CONST. amend. XIV, § 1 (emphasis supplied). Evidence suggests that, like the 1870 Act, Congress intended for the Equal Protection Clause's safeguards to be expansive and unlimited by citizenship:

> [U]nlike the Privileges and Immunities Clause, which only applies to "citizens," the drafters [of the Equal Protection Clause] intentionally extended equal protection to "persons." Foremost in their minds was the language of *Dred Scott v. Sandford*, [60 U.S. 393 (1857),] which had limited due process guarantees by framing them as nothing more than the "privileges of the citizen." This language was repeatedly mentioned in the Senate debates on the Fourteenth Amendment, with the very

2. This equal protection obligation extends to the federal government via the Fifth Amendment's Due Process Clause. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) ("the equal protection obligations imposed by the Fifth and Fourteenth Amendments [are] indistinguishable"); *see also Bolling v. Sharpe*, 347 U.S. 497 (1954).

> first draft of the Amendment distinguishing between persons and citizens: "Congress shall have power to . . . secure to all citizens . . . the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty, and property." The Amendment's principal author, Representative John Bingham, asked . . . "Is it not essential . . . that all persons, whether citizens or strangers, within this land, shall have equal protection . . . ?

Neal K. Kaytal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1371-72 (2007) (emphasis supplied).

Since its passage, this Court has repeatedly confirmed that the Equal Protection Clause has a unique and broad role to play in preventing government conduct that discriminates on the basis of impermissible considerations. In *Strauder v. West Virginia*, 100 U.S. 303 (1879), for example, the Court invalidated, on equal protection grounds, a West Virginia statute that permitted only white men to serve as jurors, finding the statute served as "practically a brand upon [black West Virginians], affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Id.* at 308. Setting the stage for the expansive protections that would later flow from the Equal Protection Clause, the Court continued: "The Fourteenth Amendment makes no attempt to enumerate the rights it is designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies

the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property." *Id.* at 310 (emphasis supplied).

Shortly after *Strauder*, the Supreme Court reiterated the Fourteenth Amendment's wide reach in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). At issue in *Yick Wo* was the legality of an ordinance that disparately interfered with the right of Chinese citizens to operate laundromats in San Francisco. *Id.* at 362. In striking down the ordinance, the Supreme Court explained that "[t]he rights of the petitioners . . . are not less because they are aliens . . . The fourteenth amendment to the constitution is not confined to the protection of citizens. . . . [The] provisions [of the Fourteenth Amendment] are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality. . . . The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court." *Id.* at 368-69 (emphasis supplied). *See also Wong Wing v. United States*, 163 U.S. 228, 243 (1896) (The term 'person,' used it the fifth amendment is broad enough to include any and every human being within the jurisdiction of the republic. . . . This has been decided so often that the point does not require argument.") (Fields, J., concurring in part, dissenting in part).

The justices of this Court have consistently emphasized the important role of the Equal Protection Clause in guarding against inequitable government action,

irrespective of their judicial philosophy. For example, in *Ry. Express Agency v. New York*, Justice Robert Jackson described the Clause as the most "practical guaranty against arbitrary and unreasonable government," asserting that "nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." 336 U.S. 106, 112-13 (1949). Justice Scalia echoed this sentiment when he extolled the "constitutional guarantee that is the source of most of our protection – what protects us, for example, from being assessed a tax of 100% of our income above the subsistence level" and other "horribles" which do not, by themselves, violate the Due Process Clause: "Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).

B. Government Practices That Jeopardize the Fundamental Rights of Aliens Must be Subjected to Heightened Scrutiny.

Government action that disfavors non-citizens is an affront to the constitutional promise of equal justice under law unless it is justified by a significant and articulable government interest. To be sure, courts tend to defer to the federal government in making decisions based on alienage even where states would not enjoy the same level of trust from the judiciary. *Compare, e.g.*, *Mathews v. Diaz*, 426 U.S. 67 (1976) (explaining that Congress has "broad power over immigration and naturalization," which

enables it, unlike states, to make rules applicable to aliens that "would be unacceptable if applied to citizens") *with Plyler v. Doe*, 457 U.S. 202, 221, 230 (1982) (striking down state statute denying free public education to children who were not legally admitted into the United States because law lacked a "substantial state interest"). Yet any framework for reviewing action by the federal government must account for the nature of the right at stake, as there is a vast difference between the level of scrutiny appropriate when the government provides a benefit of citizenship, rather than limits a fundamental human right. *See* Katyal at 1375 (explaining that some rights "have long been deemed too fundamental to be dispensed with using merely rational basis review"). Thus, where the powerful majority bestows second-class status upon an unpopular minority group which has no realistic hope of exercising influence over political outcomes, the courts have applied, and should continue to apply, "a correspondingly more searching judicial inquiry" to ensure equal justice under the law. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). *See also Int'l Refugee Assistance Project, et al. v. Trump*, No. 17-1351, 2017 U.S. App. LEXIS 9109, *63 (4th Cir. May 25, 2017) ("[P]ower over immigration is not tantamount to a constitutional blank check . . . vigorous judicial review is required when an immigration action's constitutionality is in question.").

Nowhere is heightened scrutiny more appropriate than when the government creates different levels of treatment in the criminal justice system, which implicates the most jealously guarded of constitutional rights: life and liberty. *See* Katyal, 59 Stan. L. Rev. at 1370 ("The force of [equal protection] principles is at [its] height when life and death decisions are on the line."). Courts

have recognized that an individual's liberty interests are most acute in the context of criminal proceedings, not only because the Sixth Amendment of the Constitution spells out a special set of fundamental rights for those accused of crimes, but because concerns of fairness and equal justice have greater urgency when a person's life is at stake. *See, e.g.*, *Wong Wing*, 163 U.S. at 238 (United States Congress' wide discretion in matters of immigration did not permit imprisonment of aliens without a trial, as "all persons within the territory of the United States are entitled to the protection guarantied by [the Fifth, Sixth and Fourteenth] amendments, and [] even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law.") (emphasis supplied); *Boumediene v. Bush,* 553 U.S. 723, 727 (2008) (holding that the habeas corpus rights afforded by the Constitution extended to Guantanamo detainees, stating: "The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. To hold that the political branches may switch the Constitution on or off at will would lead to a regime in which they, not this Court, say 'what the law is'."); *Douglas v. People of State of Cal.*, 372 U.S. 353, 356 (1963) (recognizing right to appellate counsel on a first appeal granted as a matter of right from a criminal conviction).

As the Court wrote in *Gideon v. Wainwright*, "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant

stands equal before the law." 372 U.S. 335, 344 (1963). Indeed, long before *Gideon* and *Douglas*, the framers expressed something of an obsession with the rights of those accused of crimes. Alexander Hamilton, for example, warned in The Federalist No. 84 that "the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny." Citing Hamilton's warning approvingly, the Court in *Boumediene* traced the historical background of the constitutional right to habeas corpus and praised it as a "vital instrument for the protection of individual liberty." 553 U.S. at 725. These principles speak to a time-honored tradition of requiring the government to tread lightly when it trifles with human liberty, and to insist that its actions are both well-founded and not based on mere animosity or prejudice. Pursuant to this tradition, "basic fairness in hearing procedures does not vary with the status of the accused. If the procedures used to judge this alien are fair and just, no good reason can be given why they should not be extended to simplify the condemnation of citizens. If they would be unfair to citizens, we cannot defend the fairness of them when applied to the more helpless and handicapped alien." *Shaughnessy v. United States*, 345 U.S. 206, 225 (1953) (Jackson, J., dissenting).

In sum, extending a single standard of casual deference to all federally imposed alienage distinctions, regardless of the personal interest at stake, risks creating a constitutional loophole through which, not only aliens, but other protected classes may lose the constitutional protection of equal justice under law.

C. Throughout American History, Alienage Has Been Used as a Pretext for Religious Discrimination.

It is well established that evidence of a facially neutral law's purpose may be considered when evaluating whether the law violates the Constitution. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."). Thus, this Court recognizes that the text of a statute may obscure (intentionally or unintentionally) the statute's underlying purpose. *See, e.g., Larson v. Valente*, 456 U.S. 228, 254-55 (1982) (examining legislative history to evaluate whether a facially neutral law was intended to be applied only to minority religions); *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977) (explaining that the historical background of a decision and statements made by decision makers may be considered in evaluating whether a government action was made for a discriminatory purpose).

Our nation's history is rife with examples of such duality. For example, even a cursory review of our nation's various nativist movements demonstrates that alienage frequently is used as a pretext for religious discrimination.

i. Antebellum Discrimination Against Irish Immigrants Flowed From A Historic Prejudice Against Catholicism.

Prior to the Revolutionary War, many colonial Americans harbored the same anti-Catholic prejudices that were common in Great Britain. For example, it was

"a regular colonial custom at the time of the Revolution that the Pope and the Devil were religiously burned on Guy Fawkes Day." C.H. Van Tyne, *The Influence of the Clergy, and of Religious and Sectarian Forces on the American Revolution*, 19 Am. Hist. Rev. 44, 60 (1913). *See generally* Peter Gottschalk, American Heretics 29-33 (Palgrave Macmillan) (2013); John Higham, Strangers in the Land 5-6 (Rutgers Univ. Press) (1955).

This prejudice also manifested itself in the laws of the colonial era. Each of the thirteen colonies enacted laws that discriminated against Catholics in some fashion. *See* Ralph E. Pyle & James D. Davidson, *The Origins of Religious Stratification in Colonial America*, 42 J. for Sci. Study Religion 57, 66-68 (2003) (collecting examples). For example, some colonies prevented Catholics from voting or holding official office or required that office holders take anti-Catholic oaths. *See* Pyle & Davidson, at pp. 66-68; Daniel F. Piar, *Majority Rights, Minority Freedoms: Protestant Culture, Personal Autonomy, and Civil Liberties In Nineteenth Century America*, 14 William & Mary Bill of Rights Journal 987, 992-93 (2006). Even Maryland, which was established to provide a refuge for Catholics, enacted such laws once a Protestant majority took hold of power there. *See* Jay P. Dolan, The American Catholic Experience: A History From Colonial Times To The Present 84-85 (Doubleday & Company, Inc.) (1985) (discussing Maryland laws that prohibited Catholics from practicing law and educating children and enacted special taxes on Catholics).

Although many leaders of the Revolution shared these prejudices, explicit demonstrations of anti-Catholic sentiment waned after large numbers of Catholics took up

arms in support of America and France aligned herself with the new nation. *See* Dolan, at p. 97; Gottschalk, at p. 33. As one historian described the situation: "The contagion of liberty had broken down the barriers of religious bigotry, and an increasing number of Catholics stepped into the political arena during the Revolutionary period." Dolan, at p. 97. *See* Higham, at p. 6 ("the American revolution, accompanied by a growing religious toleration and secular democracy, largely suspended the wars of the godly").

As Irish immigration began to increase in the early to mid-1800's, however, the nation's historic anti-Catholicism transformed into anti-Irish bigotry. *See* Noah Feldman, Divided By God: America's Church-State Problem--and What We Should Do About It 63-70 (Farrar, Strauss and Giroux) (2005); Dolan at pp. 128-29 (describing the pattern of antebellum immigration and observing that Catholics made up the majority of Irish immigrants beginning in the 1830's). "As the pillars of an alien faith, the Irish attracted a good measure of any anti-Catholic sentiment that might be in the air; an Irishman's loyalty to his priest was too firm for anxious Protestants to rest easily." Higham at p. 26.

Indeed, a series of organized nativist movements (such as the Native American Party, commonly referred to as the "Know Nothing Party") developed in the first half of the eighteenth century in response to this increase in immigration. Although these movements – which at times turned violent – opposed Irish immigration on the ground that the Irish were not sufficiently American, it was no coincidence that those immigrants were overwhelmingly Catholic. *See* Feldman, at p. 67 ("the fact that the

immigrants were Catholic enabled the nativists to tap into a centuries-old tradition of Catholic-Protestant polemic"); Dolan at pp. 201-202 ("Anti-Catholicism . . . surfaced again in the early-nineteenth century [because of] the large influx of Catholic foreigners, whose presence threatened the homogeneity of the Anglo-Saxon Protestant culture of the United States"); Gottschalk at pp. 37-40, 52-53.

The Know Nothings and other nativists of this period considered Protestantism to be a central component of the American identity. In their mind, being Irish was synonymous with being Catholic and, therefore, un-American. Gottschalk p. 37 ("as the Irish became an increasingly large percentage of Catholics in America, other Americans increasingly took "Irish" and "Catholic" as synonymous"). Thus, the nativists' use of anti-Irish rhetoric essentially served as a veiled pretext for anti-Catholicism. *See* Gottschalk at pp. 29-30; Feldman at pp. 68-71; Dolan at pp. 295-96. *See also* Piar, 14 William & Mary Bill of Rights Journal at 1015-18.

ii. Restrictions On Immigrants From Eastern Europe Resulted In Large Part From Anti-Jewish Bias.

As the nineteenth century wore on, the pattern of American immigration changed. From 1875 to 1925, approximately 2.8 million Jews immigrated to the United States, with 94% of them coming from Eastern Europe. Many of these immigrants were fleeing anti-Semitic programs in Russia and elsewhere.

"Unlike earlier Irish immigrants," the Jewish immigrants of this period "represented a kind of

foreignness even more exaggerated than that which had been attributed to Irish Catholics." Feldman at p. 151. *See* Higham ("Unlike the older Catholic population, the southern and eastern Europeans . . . lived in the American imagination only in the form of a few, vague ethnic stereotypes"). Although they came from many countries and socio-economic strata, the Jewish immigrants were stereotyped by nativists as being "unscrupulously greed[y]" and, therefore, a threat to "true" Americans. Higham at pp. 92-94.

As a result of these nativist concerns, there was a push for limiting the number of immigrants from central and Eastern Europe. As Senator Ellison DuRant Smith stated when supporting the Quota Act of 1921: "I think we now have sufficient population in our country for us to shut the door and to breed up a pure, unadulterated American citizenship." Ultimately, in response to those concerns, Congress enacted the National Origins Quota of 1924, which severely restricted immigration from Eastern Europe and elsewhere. Upon signing the Act, President Calvin Coolidge stated that "America must remain American."

Although proponents of the National Origins Quota of 1924 (and the Act itself) spoke in terms of limiting immigration from Eastern Europe, as opposed to restricting immigration based on religion, the two were synonymous. The immigrants from Eastern Europe during this time period were overwhelmingly Jewish. Further, the proponents of the Act spoke of Eastern Europeans in stereotypes historically attributed to Jews. Thus, there can be no doubt that although facially based on alienage, the Act was itself motivated, at least

in substantial part, by religious discrimination. *See* Gottschalk at p. 108 (referring to the Act's "implicit restriction on Jewish" immigration).

iii. Some Contemporary Alienage-Based Restrictions Are Pretext For Anti-Muslim Bias.

In today's United States, alienage is still commonly used as a proxy for religious discrimination. Indeed, we need look no further than the most recent Presidential election to see a paradigmatic example of this duality.

During the campaign, President Trump expressly stated – on more than one occasion – that, if elected he would ban Muslim immigrants from entering the United States. Indeed, in an official statement dated December 7, 2015, candidate Trump said he was "calling for a total and complete shutdown of Muslims entering the United States." Candidate Trump subsequently revised the nature of his immigration proposal. In an interview on July 24, 2016, he stated: "People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm OK with that, because I'm talking territory instead of Muslim." Meet the Press (NBC television broadcast July 24, 2016)).

After his inauguration, President Trump issued an executive order ("EO-1") banning entry of all non-citizens from seven overwhelmingly Muslim countries. Shortly thereafter, Rudolph Giuliani, one of his campaign advisors, stated that then-candidate Trump had asked Mr. Giuliani for help in "legally" creating a "Muslim ban" and that, in response, Mr. Giuliani and others decided to use territory

as a proxy. Amy B. Wang, *Trump asked for a "Muslim ban," Guiliani says – and ordered a commission to do it "legally,"* WASH. POST (Jan. 29, 2017)). *See also* Gottschalk at pp. 180-81 ("Overwhelmingly associated with Arabs and other people of non-European heritage, Islam and Muslims both have long represented to many Americans the intertwining of racial and religious apartness and threat.").

After EO-1 was enjoined by multiple courts, President Trump issued a second executive order ("EO-2") on March 6, 2017. EO-2, which President Trump described as a "watered down" version of EO-1, imposed a travel ban on six of the seven Muslim-majority countries included in EO-1's ban under slightly altered terms. On March 16, 2015, the United States District Court for the District of Maryland issued a nationwide injunction on EO-2's travel ban. *See Int'l Refugee Assistance Project, et. al v. Trump,* 8:17-cv-00361-TDC, 2017 U.S. Dist. LEXIS 37645 (D. Md. Mar. 16, 2017). On May 25, 2017, the United States Court of Appeals for the Fourth Circuit upheld the injunction, finding that, though the text of EO-2 "speaks with vague words of national security," "in context, [the order] drips with religious intolerance, animus, and discrimination." *Int'l Refugee Assistance Project*, 2017 U.S. App. LEXIS 9109, *20.

This most recent incident demonstrates that the historic practice of using alienage discrimination as a proxy or pretext for religious discrimination remains alive and well.

IV. CONCLUSION

The law at issue here – the Military Commissions Act – is facially applicable to any non-citizen; however, in practice the Act has subjected only Muslims to its second-rate system of justice.[3] While Muslims have been a politically expedient target for such inequitable treatment since September 11, 2001, the Amici are mindful

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3. Statements of legislators debating the Military Commissions Act hint that this result was intended. *See*, e.g. 152 Cong.Rec. S10402 (statement of Sen. McConnell) ("I support this legislation, first and foremost, because this bill recognizes that we are a Nation at war. We are a Nation at war, and we are at war with Islamic extremists. … Al-Qaida respects no law, no authority, no legitimacy but that of its own twisted strain of radical Islam."); 152 Cong.Rec. S10395 (statement of Sen. Cornyn) ("We know that this enemy, represented by Islamic extremism, justifies the use of murder against innocent civilians in order to accomplish its goals."); 152 Cong.Rec. H7549 (statement of Rep. King) ("The Global War on Terror can in no way be characterized as a mere civil war. … It is a war between Western Civilization and militant Islamic fascists from all around the Muslim world."); 152 Cong.Rec. S9771 (statement of Sen. Craig) (The September 11 attacks "launched this country into a new dimension of foreign policy that we had not been involved in or as intent on as we should have been a long while ago-a war against radical Islamic fundamentalism and the tools they use in that war known as terrorism."); 152 Cong. Rec. E1391 (statement of Rep. Simmons) ("America is not at war with a traditional enemy, but a network of civilians who swear allegiance to radical Islam."). This legislative history supports the Amici's call for a searching judicial review of the constitutionality of the Military Commissions Act. *See Int'l Refugee Assistance Project*, 2017 U.S. App. LEXIS 9109, *64-72 (Where there is sufficient evidence that government action justified by a national security interest masks an improper religious motive, courts may "look behind" the government action to ensure it was "primarily" motivated by a secular purpose.)

that the lens of discrimination shifts. As Thomas Paine prophetically warned: "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself." It is with this warning in mind that we ask the Court to grant the Petition for a Writ of Certiorari and assess, under a heightened level of scrutiny, the constitutionality of the Military Commissions Act.

Respectfully submitted,

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