

**Nos. 20-5039**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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SAIFULLAH PARACHA,

*Petitioner – Appellant,*

v.

JOSEPH R. BIDEN, *et al.*,

*Respondents - Appellees*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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**BRIEF OF *AMICUS CURIAE* MUSLIM ADVOCATES  
IN SUPPORT OF PETITIONER-APPELLANT AND FOR REVERSAL OF  
THE DISTRICT COURT**

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

### **A. Parties and Amici**

Except for *amicus curiae* Muslim Advocates, all parties, intervenors, and *amici* appearing before this Court are listed in the Brief for Petitioner-Appellant.

### **B. Rulings Under Review**

References to the rulings at issue appear in the Brief for Petitioner-Appellant.

### **C. Related Cases**

Related cases and cases involving similar issues have been identified in the Brief for Petitioner-Appellant.

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**CORPORATE DISCLOSURE STATEMENT**

*Amicus* Muslim Advocates is a 501(c)(3) non-profit organization with no parent company.

**CERTIFICATE OF COUNSEL REGARDING THE FILING OF  
SEPARATE *AMICUS CURIAE* BRIEFS**

Pursuant to Circuit Rule 29(d), the undersigned counsel declares that *amicus curiae* Muslim Advocates finds it necessary to file a brief separate from the brief of *amicus curiae* Professor Stephen I. Vladeck.

Prof. Vladeck's brief concerns the interpretation of military law, while Muslim Advocates' brief details the record of anti-Muslim animus established by former President Trump. Because these arguments depend on separate factual and legal bases and non-overlapping areas of expertise, these arguments were not appropriate for *amici* to combine into a single brief.

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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The issue in this appeal is the denial of Mr. Saifullah Paracha’s amended petition for a writ of habeas corpus by the U.S. District Court for the District of Columbia on January 23, 2020. *Amicus curiae* Muslim Advocates—a civil rights organization fighting for religious freedom—writes to highlight how President Donald Trump’s statements and actions reflect a deep-seated antipathy towards Islam and Muslims. This ideology is inextricably intertwined with his policy determination to continue to detain the remaining Guantánamo Muslim detainees regardless of their individualized circumstances; it should be taken into consideration when considering the individualized circumstances of Mr. Paracha. Mr. Paracha’s individual circumstances warrant a grant of his habeas petition. Accordingly, *amicus* supports Appellant’s claims that his detention is driven by an impermissible purpose and that his writ of habeas corpus should be granted.

Muslim Advocates is a national legal advocacy and educational organization that works on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. The issues at stake in this case directly relate to Muslim Advocates’ work fighting institutional discrimination against the American Muslim

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<sup>1</sup> *Amicus* files this brief with the consent of all parties. No party’s counsel authored this brief in whole or in part. No party or party’s counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the *amicus curiae*, its members, and its counsel—contributed money that was intended to fund preparing or submitting the brief.

community and its extensive work assisting individuals who are impacted by discriminatory policies and acts.

## SUMMARY OF ARGUMENT

“[A]s critical as the Government’s interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004) (plurality). When the Supreme Court wrote those words affirming the right of a Guantánamo detainee to challenge his detention in 2004, Mr. Paracha had been in the custody of the United States for a little over a year. Fifteen years later, the United States continues to hold him—without charging him or providing a meaningful opportunity to challenge his detention. In the absence of judicial review to hold U.S. authorities accountable, the U.S. detention of Mr. Paracha has become just the sort of “oppression and abuse” that the Supreme Court feared in *Hamdi*.

The clearest evidence of this oppression and abuse is the treatment of the Guantánamo detainees during the Trump administration. Mr. Trump referred to Muslims suspected of terrorism, like those detained at Guantánamo, as “animals”<sup>2</sup> not entitled to rights. In fact, on the campaign trail and in office, President Trump

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<sup>2</sup> Philip Bump, *The Trump toughness doctrine and Guantanamo Bay*, THE WASHINGTON POST, Nov. 1, 2017, [https://www.washingtonpost.com/news/politics/wp/2017/11/01/the-trump-toughness-doctrine-and-Guantánamo-bay/?utm\\_term=.8ff410d222c6](https://www.washingtonpost.com/news/politics/wp/2017/11/01/the-trump-toughness-doctrine-and-Guantánamo-bay/?utm_term=.8ff410d222c6).

openly and repeatedly announced his hostility to Muslims. In public discourse, he reflexively equated the practice of Islam with being a terrorist and has derided the efforts of past presidents, both Republican and Democrat, to release Guantánamo detainees. Instead, he has insisted that more Muslim men need to be imprisoned there, while never suggesting that non-Muslim terror suspects be sent to Guantánamo. This disparity reveals the President's perception of Guantánamo as a prison exclusively for Muslims. It highlights that his refusal even to consider the release of Guantánamo's detainees is specifically a rejection of the rights of *Muslim* prisoners. As such, the President's actions on Guantánamo detainees is simply another in a line of policies that target and denigrate Islam and Muslims, revealing his extraordinary anti-Muslim animus.

The fact that Mr. Paracha and his fellow detainees could be kept imprisoned through the Trump administration for no reason other than the whims of a bigoted politician makes clear how important it is for courts to engage in a searching review when the government acts to imprison people. Even though a new presidential administration is now in charge of the Guantánamo facility, this Court must ensure that legal safeguards are in place to guard against the arbitrary deprivation of liberty that was so clearly demonstrated under President Trump. Without such oversight by courts, the executive branch will be free to continue to discriminate against Mr. Paracha and future detainees. This country's laws demand more; they demand that

prisoners and detainees receive the due process necessary to preserve their liberty. For those reasons, this Court must reverse the ruling of the district court and order that Mr. Paracha's amended habeas petition be granted.

## ARGUMENT

### **I. AS PRESIDENT, MR. TRUMP ADOPTED AND PROMOTED AN IDEOLOGY THAT UNIFORMLY EQUATES THE PRACTICE OF ISLAM WITH TERRORISM.**

For many years before and during his presidency, President Donald Trump referred to Muslims in the United States as a “problem.” As early as April 2011, Mr. Trump affirmed that there “absolutely” was “a Muslim problem” in the United States.<sup>3</sup> He cited the Qur’an as the source of the problem, claiming that it “teaches some very negative vibe” and “tremendous hatred.”<sup>4</sup> He subsequently maintained that a “massive Muslim problem” existed in the U.S. and abroad.<sup>5</sup> At a 2015 rally, Mr. Trump agreed with an audience member that “[w]e have a problem in this

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<sup>3</sup> David Brody, *Brody File Exclusive: Donald Trump Says Something in Koran Teaches a ‘Very Negative Vibe,’* CBN NEWS (Apr. 12, 2011), <http://www1.cbn.com/thebrodyfile/archive/2011/04/12/brody-file-exclusive-donald-trump-says-something-in-koran-teaches> (last visited Jan. 18, 2018).

<sup>4</sup> *Id.*

<sup>5</sup> Donald J. Trump, Twitter (Dec. 10, 2015), <https://twitter.com/realDonaldTrump/status/674934005725331456> (last visited Jan. 18, 2018); Donald J. Trump, Twitter (Dec. 10, 2015), <https://twitter.com/realDonaldTrump/status/674936832010887168> (last visited Jan. 18, 2018); Donald J. Trump, Twitter (Dec. 10, 2015), <https://twitter.com/realDonaldTrump/status/675123192864899072> (last visited Jan. 18, 2018).

country. It's called Muslims.”<sup>6</sup> During a Republican candidate debate, Mr. Trump declared that “Islam hates us” and that Muslims possess “tremendous hatred” and “unbelievable hatred.”<sup>7</sup>

During one of the presidential debates, when provided the opportunity to clarify whether his statement that “Islam hates us” referred to all of the world’s 1.6 billion Muslims, he responded: “I mean a lot of them. I mean a lot of them...[T]here’s tremendous hatred. And I will stick with exactly what I said.”<sup>8</sup> When asked in a December 2015 interview if people had been “too politically correct with Muslims in America,” he affirmed, “I think certainly so.”<sup>9</sup> Queried about his plan to bar entry into the United States of all Muslims in December 2015, he

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<sup>6</sup> Jonathan Merritt, *Trump’s Proposals Could Backfire on Christians*, THE ATLANTIC (Nov. 24, 2015), <https://www.theatlantic.com/politics/archive/2015/11/donald-trump-muslims-christians/417255/> (last visited Jan. 18, 2018); Theodore Schleifer, *Trump doesn’t challenge anti-Muslim questioner at event*, CNN (Sept. 18, 2015), <http://www.cnn.com/2015/09/17/politics/donald-trump-obama-muslim-new-hampshire/> (last visited Jan. 18, 2018).

<sup>7</sup> Theodore Schleifer, *Donald Trump: ‘I think Islam hates us’*, CNN (Mar. 10, 2016), <http://www.cnn.com/2016/03/09/politics/donald-trump-islam-hates-us/> (last visited Jan. 18, 2018).

<sup>8</sup> *Transcript of Republican Debate in Miami*, CNN (Mar. 15, 2016), <http://www.cnn.com/2016/03/10/politics/republican-debate-transcript-full-text/> (last visited Jan. 18, 2018).

<sup>9</sup> *Face the Nation transcripts December 6, 2015: Trump, Christie, Sanders*, CBS NEWS (Dec. 6, 2015), <https://www.cbsnews.com/news/face-the-nation-transcripts-december-6-2015-trump-christie-sanders/>.



explained, “They’re sick people. There’s a sickness going on. There’s a group of people that’s very sick, and we have to figure out the answer.”<sup>10</sup>

President Trump’s attacks on Muslims also included the affirmative dissemination of group slander. On November 29, 2017, he promoted to his millions of Twitter followers three unverified videos published by a fringe British anti-Muslim group. These videos depicted violent acts by purported Muslims—at least one of whom is not Muslim—with titles intended to inflame anti-Muslim bias. The videos were titled “Muslim migrant beats up Dutch boy on crutches!”<sup>11</sup>, “Muslim Destroys a Statue of Virgin Mary!”<sup>12</sup>, and “Islamist mob pushes teenage boy off roof and beats him to death!”<sup>13</sup> Twitter later suspended the account of the far-right British

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<sup>10</sup> Dan Friedman, *Trump cites ‘sickness’ in defense of Muslim immigration ban proposal*, FOX NEWS (Dec. 13, 2015), <http://www.foxnews.com/politics/2015/12/13/trump-cites-sickness-in-defense-muslim-immigration-ban-proposal.html>.

<sup>11</sup> Jayda Fransen, Twitter (Nov. 28, 2017), <https://twitter.com/JaydaBF/status/935609305574903812> (last visited Jan. 18, 2018).

<sup>12</sup> Jayda Fransen, Twitter (Nov. 29, 2017), <https://twitter.com/JaydaBF/status/935805606447013888> (last visited Jan. 18, 2018).

<sup>13</sup> Jayda Fransen, Twitter (Nov. 29, 2017), <https://twitter.com/JaydaBF/status/935775552102981633> (last visited Jan. 18, 2018).

activist whom the President had retweeted as part of its crackdown on hateful and threatening content.<sup>14</sup>

In the President's repeated remarks about Islam, there is a persistent effort to treat an entire faith community as nothing more than a source of violence. On August 17, 2017, the President suggested that terrorism could be eradicated if suspected terrorists were executed *en masse* by bullets dipped in pigs' blood. "Study what General Pershing of the United States did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!"<sup>15</sup> The statement referred to the following apocryphal story, which Mr. Trump recounted with relish numerous times on the campaign trail:

So General Pershing....they catch 50 terrorists in the Philippines....And as you know, swine, pig....a big problem for them, big problem. He took two pigs, they chopped them open. Took the bullets that were going to go and shoot these men. Took the bullets, the 50 bullets, dropped them in the pigs, swished them around, so there was blood all over those bullets....They put the bullets into the rifles. And they shot 49 men....I'm just saying, if we're going to win, we're going to win or let's not play the game and let's not be a country any more. They put the bullets in the rifles and they shot 49 of the 50 men. Dead. Boom. So it was a pig-infested bullet in each one. ... For 28 years, there

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<sup>14</sup> Harriet Agerholm, *Jayda Fransen: Twitter suspends Britain First leader retweeted by Donald Trump*, INDEPENDENT (Dec. 18, 2017), <http://www.independent.co.uk/news/uk/home-news/jayda-fransen-britain-first-twitter-suspend-donald-trump-retweet-deputy-leader-a8116831.html>.

<sup>15</sup> Donald J. Trump, Twitter (Aug. 17, 2017), <https://twitter.com/realDonaldTrump/status/898254409511129088> (last visited Jan. 18, 2018).

was no terrorism....We have to do what we have to do. We have to clean it out.<sup>16</sup>

Since practicing Muslims consider pigs' blood to be unclean, President Trump's position that this would be an effective means of curbing terrorism clearly illustrates his belief in a synonymy between "terrorist" and "Muslim."

President Trump also spread the false story that thousands of Muslims cheered on rooftops during the September 11, 2011 attacks, claiming: "I watched when the World Trade Center came tumbling down. And I watched in Jersey City, New Jersey, where thousands and thousands of people were cheering as that building was coming down. Thousands of people were cheering."<sup>17</sup> In spite of numerous authorities debunking his claim,<sup>18</sup> the President continued to reiterate this lie on

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<sup>16</sup> *FULL Speech: Donald Trump rally in Dayton, OH 3-12-2016*, YOUTUBE (Mar. 12, 2016), <https://www.youtube.com/watch?v=-9KOAfh4GCw> (minutes 43:30 to 43:48) (last visited Jan. 18, 2018); *see also* Lydia Wheeler, *Trump resurrects story of Muslims shot with pig's blood-dipped bullets*, THE HILL (Mar. 12, 2016), <http://thehill.com/blogs/blog-briefing-room/news-campaigns/272780-trump-resurrects-story-of-muslims-shot-with-pigs> (last visited Jan. 18, 2018); David Mikkelson, *Pershing the Thought*, SNOPE (Apr. 28, 2016), <http://www.snopes.com/rumors/pershing.asp> (debunking Trump's story about General Pershing) (last visited Jan. 18, 2018).

<sup>17</sup> Glenn Kessler, *Trump's outrageous claim that 'thousands' of New Jersey Muslims celebrated the 9/11 attacks*, THE WASHINGTON POST (Nov. 22, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/11/22/donald-trumps-outrageous-claim-that-thousands-of-new-jersey-muslims-celebrated-the-911-attacks/> (last visited Jan. 18, 2018).

<sup>18</sup> *See, e.g.*, Lauren Carroll, *Fact Checking Trump's claim that thousands in New Jersey cheered when World Trade Center tumbled*, POLITIFACT (Nov. 22, 2015), <http://www.politifact.com/truth-o-meter/statements/2015/nov/22/donaldtrump/fact-checking-trumps-claim-thousands-new-jersey-ch/> (last visited Dec. 4, 2017).

several occasions to ascribe violent and criminal behavior to all Muslims.<sup>19</sup> Each of these statements revealed President Trump's animosity towards Muslims.

Once elected, President Trump consistently appointed senior advisors who promoted anti-Muslim ideas and policies. For example, Stephen Miller, President Trump's senior advisor for policy and one of the architects of the Muslim Ban, has long believed in a war between the West and "Islamic jihad and its religion of terror."<sup>20</sup> Steve Bannon, another key proponent of the Muslim Ban, served as Mr. Trump's former chief strategist and senior counsel and was a member of his National Security Council. Like Miller, Bannon had long held a derogatory conception of Islam: "Islam is not a religion of peace. Islam is a religion of submission."<sup>21</sup> Through these and other appointments,<sup>22</sup> President Trump has enshrined anti-Muslim bigotry

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<sup>19</sup> Kessler, *supra* note 20; AP Archive, *Trump Defends 9/11 Celebrations with Article* (Nov. 24, 2015), <http://www.aparchive.com/metadata/US-OH-Trump-CR-/cadcf1e1334d2a1fea065ba383ef6f8e> (last visited Dec. 4, 2017); Donald J. Trump, Twitter (Nov. 25, 2015), <https://twitter.com/realDonaldTrump/status/669682774673137665> (last visited Dec. 4, 2017).

<sup>20</sup> Stephen Miller, TERRORISM AWARENESS PROJECT (Feb. 3, 2007), <https://web.archive.org/web/20070203001212/http://www.terrorismawareness.org/about/3/about-the-project?pg=2>.

<sup>21</sup> Andrew Kaczynski, *Steve Bannon in 2010: 'Islam is not a religion of peace. Islam is a religion of submission'*, CNN (Jan. 31, 2017), <http://www.cnn.com/2017/01/31/politics/kfile-bannon-on-islam/index.html>.

<sup>22</sup> The virulently anti-Muslim views of current and former members of the administration, those that President Trump has gathered most closely around him, are not confined to Bannon and Miller. Sebastian Gorka, a West Wing advisor to President Trump on national security and supporter of the Muslim Ban, has stated

and animus into the operation of his administration. President Trump's many statements, and those of his closest advisors, aligned Islam with hate and terrorism and revealed his animosity towards Muslims.

## **II. PRESIDENT TRUMP TARGETED THE RIGHTS OF MUSLIMS FOR CURTAILMENT, INCLUDING THROUGH THE CONTINUED USE AND PROJECTED EXPANSION OF GUÁNTANAMO.**

### **A. President Trump Demonstrated A Cavalier Disregard For The Fundamental Constitutional Rights Of Muslims.**

President Trump made clear his commitment to curtailing the rights of Muslims in various ways. From the early days of his campaign, Mr. Trump promised that, if elected, he would “be looking at” getting “rid of” Muslims.<sup>23</sup> He also advocated for a registry of all Muslims in the U.S., despite the proposal's similarity

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“The dirty little secret, Steve [Bannon], that nobody wants to tell you, (is) what the bad guys do — what al-Qaeda does or what ISIS is doing right now — is not fundamentally un-Islamic.” Steve Reilly, *Bannon, Flynn and Sessions: How Trump's top advisers view Muslims, in their own words*, USA Today (Feb. 9, 2017, 3:41 PM), <https://www.usatoday.com/story/news/2017/02/09/how-some-trump-advisors-see-islam-their-own-words/97662862/>. Attorney General Jeff Sessions equated Muslim immigrants with terrorists, saying to Bannon, “We are in an age that's very dangerous. And we are seeing more and more persons enter, and a lot of them have done terrorist acts.” *Id.* Lt. Gen. Michael Flynn, President Trump's erstwhile national security advisor, has declared, “Fear of Muslims is rational.” Thomas Gibbons-Neff, *'Fear of Muslims is rational': What Trump's new national security adviser has said online*, THE WASHINGTON POST (Nov. 18, 2016), [https://www.washingtonpost.com/news/checkpoint/wp/2016/11/18/trumps-new-national-security-adviser-has-said-some-incendiary-things-on-the-internet/?utm\\_term=.e921388f5eac](https://www.washingtonpost.com/news/checkpoint/wp/2016/11/18/trumps-new-national-security-adviser-has-said-some-incendiary-things-on-the-internet/?utm_term=.e921388f5eac).

<sup>23</sup> See Schleifer, *supra* note 10.

to the Nazi registration of Jewish people. On November 20, 2015, Mr. Trump stated that he would “certainly implement” a database tracking Muslims in the United States.<sup>24</sup> Asked whether he would support legally obligating Muslims to register into the database, Mr. Trump responded, “They have to be—they have to be.”<sup>25</sup> Given the opportunity to clarify whether he was “ruling out a database on all Muslims,” he doubled down: “No not at all.”<sup>26</sup> When asked how registering Muslims would differ from the Nazis’ registration of Jewish people, he manifested indifference, saying four times: “You tell me.”<sup>27</sup>

In a similar vein, with flagrant disregard for basic First Amendment principles, Mr. Trump advocated for shutting down mosques in the United States during his campaign. In a November 16, 2015 television appearance, when asked about shutting down mosques, he stated, “[Y]ou’re going to have to strongly consider because some of the ideas and some of the hatred—the absolute hatred—is

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<sup>24</sup> Vaughn Hillyard, *Donald Trump’s Plan for a Muslim Database Draws Comparison to Nazi Germany*, NBC NEWS (Nov. 20, 2015), <http://www.nbcnews.com/politics/2016-election/trump-says-he-would-certainly-implement-muslim-database-n466716> (last visited Dec. 4, 2017).

<sup>25</sup> *Id.*

<sup>26</sup> Lauren Carroll, *In Context: Donald Trump’s comments on a database of American Muslims*, POLITIFACT (Nov. 24, 2015), <http://www.politifact.com/truth-o-meter/article/2015/nov/24/donald-trumps-comments-database-american-muslims/> (last visited Dec. 4, 2017).

<sup>27</sup> See Hillyard, *supra* note 27.

coming from these areas.”<sup>28</sup> Two days later, he announced on television that the United States had “absolutely no choice” but to shut down mosques.<sup>29</sup>

One of the Trump campaign’s hallmark promises was to restrict the entry of Muslims into the United States. On December 7, 2015, Mr. Trump announced on his campaign website: “Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States.”<sup>30</sup> The same day, he disseminated that statement to his millions of Twitter followers under the title, “Statement on Preventing Muslim Immigration.”<sup>31</sup> Explicitly equating Muslims with “hatred [and] danger,” he tweeted, “Just put out a very important policy statement on the extraordinary influx of hatred & danger coming into our country.”<sup>32</sup> At a rally the same day, Mr. Trump claimed that “[w]e have no choice” but to implement “a total

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<sup>28</sup> Jenna Johnson, *Donald Trump would ‘strongly consider’ closing some mosques in the United States*, THE WASHINGTON POST (Nov. 16, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/11/16/donald-trump-would-strongly-consider-closing-some-mosques-in-the-united-states/?>.

<sup>29</sup> Nick Gass, *Trump: ‘Absolutely no choice’ but to close mosques*, POLITICO (Nov. 18, 2015, 6:45 AM), <https://www.politico.com/story/2015/11/trump-close-mosques-216008>.

<sup>30</sup> Press Release, Trump-Pence, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), <https://web.archive.org/web/20170508054010/https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration> (Internet Archive record on May 8, 2017) (last visited Jan. 18, 2018).

<sup>31</sup> Donald J. Trump, Twitter (Dec. 7, 2015), <https://twitter.com/realDonaldTrump/status/673993417429524480> (last visited Jan. 18, 2018).

<sup>32</sup> Donald J. Trump, Twitter (Dec. 7, 2015), <https://twitter.com/realdonaldtrump/status/673982228163072000> (last visited Jan. 18, 2018).

and complete shutdown of Muslims.”<sup>33</sup> Asked how border officials would implement his plan, Mr. Trump equated risk of terrorism with a faith of 1.6 billion, including 3.3 millions Americans: “They would say, ‘are you Muslim?’” and that “if they said yes, they would not be allowed in the country.”<sup>34</sup>

President Trump made good on his core campaign promise of a Muslim Ban during his first week in office, enacting an Executive Order which banned the entry of nationals from seven predominantly Muslim countries.<sup>35</sup> Shortly after this policy was announced, former New York City Mayor Rudy Giuliani disclosed that President Trump had approached him about how to legally implement a “Muslim ban,” resulting in a shift in focus from “religion” to geographical “areas” that are predominantly Muslim.<sup>36</sup>

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<sup>33</sup> *Donald J. Trump is Calling for a Total and Complete Shutdown of Muslims Entering the United States Until Our Country’s Representatives Can Figure Out What the Hell is Going On!*, YouTube (Dec. 8, 2015), <https://www.youtube.com/watch?v=LRxozK6Bpvk> (minutes 0:00 to 0:36) (last visited Jan. 18, 2018).

<sup>34</sup> *Donald Trump On Muslim Travel Ban, Obama And 2016*, YouTube (Dec. 8, 2015), <https://www.youtube.com/watch?v=5I3E3-U-1jc> (minutes 14:58 to 15:14) (last visited Dec. 4, 2017); *Hardball with Chris Matthews Transcript 12/8/15*, MSNBC (Dec. 8, 2015), <http://www.msnbc.com/transcripts/hardball/2015-12-08> (last visited Dec. 4, 2017).

<sup>35</sup> Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

<sup>36</sup> Rebecca Savransky, *Giuliani: Trump asked me how to do a Muslim ban ‘legally’*, THE HILL (Jan. 29, 2017, 8:48 AM), <http://thehill.com/homenews/administration/316726-giuliani-trump-asked-me-how-to-do-a-muslim-ban-legally>.



Despite widespread condemnation of his Muslim Ban, Mr. Trump justified it by analogy to the internment of Japanese Americans during World War II, saying: “Take a look at Presidential proclamations back a long time ago....what [President Roosevelt] was doing with Germans, Italians, and Japanese because he had to do it.”<sup>37</sup> When asked whether being compared to Hitler gave him “any pause at all,” Mr. Trump blithely responded, “No”<sup>38</sup> and again justified banning Muslims based on President Roosevelt’s treatment of Japanese American<sup>39</sup>—a widely condemned government action for which President Ronald Reagan formally apologized in 1988.<sup>40</sup> Two days later, Mr. Trump defended his position by tweeting a link to an article stating that Islam is a “very evil and wicked religion,” a “false religion.”<sup>41</sup>

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<sup>37</sup> YOUTUBE, *supra* note 37 at minutes 00:46 to 01:03.

<sup>38</sup> Miriam Hernandez, *Trump Cites History to Defend Muslim Immigration Ban*, ABC 7 (Dec. 9, 2015), <http://abc7.com/politics/trump-cites-history-to-defend-muslim-immigration-ban/1116396/> (January 8, 2018).

<sup>39</sup> *Id.*

<sup>40</sup> Bilal Qureshi, *From Wrong To Right: A U.S. Apology For Japanese Internment*, NPR (Aug. 9, 2013, 4:24 PM), <https://www.npr.org/sections/codeswitch/2013/08/09/210138278/japanese-internment-redress>.

<sup>41</sup> Donald J. Trump, Twitter (Dec. 10, 2015), <https://twitter.com/realDonaldTrump/status/675034063447662592> (last visited Jan. 18, 2018). *See also* Sarah Larimer, *Why Franklin Graham says Donald Trump is right about stopping Muslim immigration*, THE WASHINGTON POST (Dec. 10, 2015), <https://www.washingtonpost.com/news/acts-of-faith/wp/2015/12/10/why-franklin-graham-says-donald-trump-is-right-about-stopping-muslim-immigration/> (last visited Jan. 18, 2017).

**B. President Trump’s Policy On Guantánamo Highlighted His Contempt For The Rights of Muslims And Ensured Continuing, Unlawful Detentions Without Regard For Individualized Circumstances.**

Upon taking office, President Trump abandoned the historically bipartisan practice of undertaking individualized assessments of Guantánamo detainees in favor of a blanket policy against release or transfer, regardless of circumstance. This position was a function of his regularly expressed antipathy toward Islam—one grounded in an ideology that falsely equates the religion with terrorism. Indeed, his perception of Guantánamo as a prison solely for Muslims, and his view that Muslims accused of terrorism lack basic rights and should be tortured, remain well-documented. On the campaign trail, Mr. Trump discussed supposed terrorists in the Middle East and proclaimed that “torture works,” “only a stupid person would say it doesn’t work,” and, “[i]f it doesn’t work, they deserve it anyway, for what they’re doing.”<sup>42</sup> The last statement especially reveals his cavalier dismissal of the United States’ human rights commitments and of the bedrock principle of “innocent until proven guilty” when the suspect is Muslim.

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<sup>42</sup> Jenna Johnson, *Trump says ‘torture works,’ backs waterboarding and ‘much worse’*, THE WASHINGTON POST (Feb. 17, 2016), [https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425\\_story.html?utm\\_term=.b00be0646e41](https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html?utm_term=.b00be0646e41) (last visited Feb. 8, 2021).

Operating since 2002, Guantánamo has served as a prison for approximately 780 men and boys, all of whom have been Muslim.<sup>43</sup> Guantánamo is inextricably linked with the “war on terror” and the mass detention of Muslim men without process. Both the Bush and Obama administrations acknowledged that because of this, Guantánamo had become a recruiting tool for groups like al-Qaeda.<sup>44</sup> The Supreme Court also found that perpetual detention at Guantánamo is unlawful, and that such “wartime” detentions are authorized only for the limited purpose of “prevent[ing] a combatant’s return to the battlefield.”<sup>45</sup>

Bush and Obama administration officials therefore began to undertake more individualized assessments of each detainee’s circumstances and security risk. Recognizing the harm to American national security posed by a Muslim prison riddled with horror stories of torture, both administrations announced their intentions to shutter or reduce the facility’s use.<sup>46</sup> To that end, President George W. Bush

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<sup>43</sup> See N.Y. TIMES, *The Guantánamo Docket, Interactive Timeline*, available at <https://www.nytimes.com/interactive/projects/Guantánamo/timeline>.

<sup>44</sup> Jack Goldsmith, *The Bush Administration Wanted to Close GTMO Because (in Part) of its Propaganda Value to Jihadists*, LAWFARE (Feb. 5, 2015, 8:31 PM), <https://www.lawfareblog.com/bush-administration-wanted-close-gtmo-because-part-its-propaganda-value-jihadists>.

<sup>45</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

<sup>46</sup> See e.g., Remarks by the President on National Security, National Archives, Washington, D.C., May 21, 2009, [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/).

released 539 of the 780 Guantánamo detainees<sup>47</sup> and contended that “it should be a goal of the [United States] to shut down Guantánamo.”<sup>48</sup> Likewise, President Barack Obama approved the transfer of more than half of the remaining prisoners, with 75 men permitted to depart Guantánamo in the first two years of his presidency.<sup>49</sup> In total, President Obama transferred 197 Guantánamo detainees.<sup>50</sup> Nonetheless, 41 Muslim men remain indefinitely imprisoned at Guantánamo.<sup>51</sup>

President Trump did not share his predecessors’ understanding of Guantánamo’s risks and ills. Rather, he declared that he would reverse the course charted by his predecessors and increase the number of detainees in the prison. In a campaign speech in Westfield, Indiana, Mr. Trump announced, “And Gitmo? We’re not closing Gitmo, We’re going to fill it up! We’re not closing Gitmo.”<sup>52</sup> Mr. Trump contrasted his position with that of President Obama’s and committed himself to

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<sup>47</sup> Remarks of President George W. Bush, News Conference, Aug. 9, 2007, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=75649>.

<sup>48</sup> See N.Y. TIMES, *supra* note 48.

<sup>49</sup> Michelle Shephard, *Gitmo’s Fallen Czar*, FOREIGN POLICY, May 22, 2013; Final Report of the Guantánamo Review Task Force, DEP’T of Justice, DEP’T OF DEFENSE, DEP’T OF STATE & DEP’T OF HOMELAND SECURITY 7 (Jan. 22, 2010), available at <https://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf>.

<sup>50</sup> Guantánamo by the Numbers, HUMAN RIGHTS FIRST 1 (Dec. 12, 2017), <https://www.humanrightsfirst.org/sites/default/files/gtmo-by-the-numbers.pdf>.

<sup>51</sup> *Id.*

<sup>52</sup> See *Donald Trump says Guantanamo Bay releases must end*, BBC (Jan. 3, 2017), <http://www.bbc.com/news/world-us-canada-38502539>.

packing Guantánamo with prisoners: “This morning, I watched President Obama talking about Gitmo, right, Guantánamo Bay, which by the way, which by the way, we are keeping open....and we’re gonna load it up with some bad dudes, believe me, we’re gonna load it up.”<sup>53</sup> Days before his inauguration, he tweeted, “There should be no further releases from Gitmo. These are extremely dangerous people and should not be allowed back onto the battlefield.”<sup>54</sup> A Trump administration directive drafted on the heels of the first Muslim Ban barred the transfer of current detainees and instructed the military to bring new detainees to Guantánamo.<sup>55</sup> Lawmakers including Senator John McCain, the Chairman of Senate Armed Services Committee, have suggested that a botched January 2017 raid in Yemen was rooted in an eagerness to capture Yemenis to fill the prison.<sup>56</sup> Driven by his anti-Muslim animus, President Trump refused to undertake the kind of individualized assessments of Mr. Paracha that the law requires.

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<sup>53</sup> See BBC, *supra* note 58.

<sup>54</sup> Donald J. Trump, Twitter (Jan. 3, 2017), <https://twitter.com/realdonaldtrump/status/816333480409833472?> (last visited Jan. 19, 2018).

<sup>55</sup> See Molly O’Toole, *Trump Finalizes Executive Order to Put ISIS Detainees in Guantánamo*, FOREIGN POLICY (Feb. 9, 2017), <http://foreignpolicy.com/2017/02/09/trump-finalizes-executive-order-to-put-isis-detainees-in-Guantánamo-terrorism-cuba-war-on-terror-congress/>.

<sup>56</sup> See *id.*

### **C. President Trump Displayed Antagonism Towards The Constitutional Rights Of Muslims Accused Of Terrorism.**

President Trump's position on Guantánamo fit within his broader pattern of rejecting the basic view that Muslims accused of terrorism are entitled to constitutional rights. After Muslim U.S. citizens were arrested on suspicion of committing the 2013 Boston Marathon attacks, Mr. Trump tweeted derisively, "Will Barack Obama personally read the Boston terrorist his Miranda Rights?"<sup>57</sup> He disparaged the Fifth and Sixth Amendment rights of Muslim suspects, tweeting, "Our politically correct country will read the ISIS terrorists who beheaded the reporter their Miranda Rights prior to good food & care!"<sup>58</sup> These statements highlighted President Trump's cavalier view of constitutional rights and his misguided conflation of respect for constitutional rights for political correctness.

Similarly, when asked about 2014 trials in Guantánamo, Mr. Trump stated, without regard for constitutional due process, "They ought to pass a law where terrorists go quickly. You know, in China, it takes 24 hours and then the bullet—and the family pays for the bullet."<sup>59</sup> He expressed this view again as President when discussing Sayfullo Saipov, the Uzbek Muslim lawful permanent resident and

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<sup>57</sup> Donald J. Trump, Twitter (Apr. 22, 2013), <https://twitter.com/realdonaldtrump/status/326429069388423168>.

<sup>58</sup> Donald J. Trump, Twitter (Aug. 20, 2014), <https://twitter.com/realdonaldtrump/status/502054490678521858>.

<sup>59</sup> See Bump, *supra* note 1.

alleged perpetrator of the truck attack in New York City on October 31, 2017: “We also have to come up with punishment that’s far quicker and far greater than the punishment these animals are getting right now.”<sup>60</sup> President Trump appeared to view a justice system that provides constitutional guarantees as a hindrance, insufficiently punitive for those he considers wholly undeserving of such protections. By refusing to consider release procedures for the 41 Muslim men still indefinitely detained at Guantánamo, the President executed his vision that Muslims accused of violent acts were to be treated as “animals”<sup>61</sup> who, because of their faith, do not possess rights, dignity, or interests.

**D. President Trump Viewed Guantánamo As A Prison Exclusively For Muslims.**

President Trump’s statements reflected an understanding of Guantánamo as a prison only for Muslims. His outright rejection of any detainees’ release or transfer resulted from his broader anti-Muslim animus. Despite the considerable number of non-Muslim men who have committed attacks of mass violence in the United States, President Trump did not once suggest that a non-Muslim man be sent to Guantánamo. For example, when Stephen Paddock, a non-Muslim gunman, murdered 58 people and injured 546 attending a Las Vegas concert in October 2017, President Trump never once called him a terrorist. On the other hand, when Sayfullo

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<sup>60</sup> *See id.*

<sup>61</sup> *See id.*

Saipov was identified as the suspect in the New York City attack that occurred several weeks later, the President immediately pronounced, “I would certainly consider [Guantánamo], yes...Send him to Gitmo.”<sup>62</sup> This position aligned with a 2014 tweet in which he proposed that Americans who fight for ISIS have their passports revoked and be sent to “Gitmo for some R&R”<sup>63</sup> and “interrogation.”<sup>64</sup> The dichotomy was stark: Muslims charged with acts of violence belong in Guantánamo, but not non-Muslims, no matter how heinous the acts they commit.

### **III. CONTRARY TO THE DISTRICT COURT DECISION, FEDERAL LAW IS DESIGNED TO PROVIDE SAFEGUARDS AGAINST THE ARBITRARY AND ANIMUS-DRIVEN DETENTION OF PERSONS LIKE MR. PARACHA.**

In *Hamdi*, the Supreme Court reiterated the principle that “mere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty.” 542 U.S. at 531 (quoting *O’Connor v. Donaldson*, 422 U.S. 563, 575 (1975)). Yet, for the duration of the Trump administration, Mr. Paracha faced a president who explicitly invoked anti-Muslim animus as a reason to detain him. When the district court denied Mr. Paracha the protections of the Constitution and the federal statutes governing the executive branch’s actions in this matter, it

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<sup>62</sup> *See id.*

<sup>63</sup> Donald J. Trump, Twitter (Dec. 3, 2014), <https://twitter.com/realDonaldTrump/status/540235446006345728>.

<sup>64</sup> Donald J. Trump, Twitter (Oct. 8, 2014), <https://twitter.com/realdonaldtrump/status/519962504211214337>.



effectively blessed this animus and opened the door for similar mistreatment of any group that happens to become the target of a future administration.

There is a “duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty.” *Ex parte Quirin*, 317 U.S. 1, 19, *modified sub nom. U.S. ex rel. Quirin v. Cox*, 63 S. Ct. 22 (1942). The district court’s decision failed to reckon with this heavy duty or to provide justice for Mr. Paracha. This Court must take action to correct this error and restore the safeguards that protect against the arbitrary deprivation of individual liberty.

### **CONCLUSION**

For the foregoing reasons, *amicus* Muslim Advocates respectfully urges this Court to reverse the district court, determine that the ongoing detention of Mr. Paracha is unlawful, and to direct the district court to grant his amended petition for a writ of habeas corpus.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that:

(1) This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) & 32(a)(7)(B) because it contains 4,909 words, excluding the parts of the brief exempted by 32(a)(7)(B)(iii), and

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of February, 2021, the foregoing **BRIEF OF *AMICUS CURIAE* MUSLIM ADVOCATES IN SUPPORT OF PETITIONER-APPELLANT AND FOR REVERSAL OF THE DISTRICT COURT** was electronically filed in the United States Court of Appeals for the District of Columbia Circuit via CM/ECF. I certify that the parties or their counsel of record are registered as ECF Filers and that they will be notified by the CM/ECF system.

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