No. 06-7427

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Ali Saleh Kahlah Al-Marri, and
Mark A. Berman, as next friend,
Petitioners,

v.

Commander S. L. Wright, USN Commander,
Consolidated Naval Brig,
Respondent.

On Appeal From The United States District Court
For The District Of South Carolina

BRIEF FOR CENTER FOR NATIONAL SECURITY STUDIES, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ASIAN AMERICAN JUSTICE CENTER, HATE FREE ZONE, MUSLIM ADVOCATES, AND NATIONAL IMMIGRANT JUSTICE CENTER AS *AMICI CURIAE* SUPPORTING PETITIONER AND OPPOSING THE GOVERNMENT'S MOTION TO DISMISS

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No. 04-7427 Caption: Ali Saleh Kahlah Al-Marri, et al. v Commander S.L. Wright

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If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

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No. 06-7427 Caption: Ali Saleh Kahlah Al Marri, et al. v. Commander S.L. Wright

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No. 06-7427 Caption: Ali Saleh Kahlah Al Marri, et al. v. Commander S.L. Wright

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Asian American Justice Center who is Amicus,
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No. 06-7427 Caption: Ali Saleh Kahlah Al Marri, et al. v. Commander S.L. Wright

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makes the following disclosure:

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Paul Smith
(signature)

December 11, 2006
(date)

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No. 06-7427 Caption: Ali Saleh Kahlah Al Marri, et al. v. Commander S.L. Wright

Pursuant to FRAP 26.1 and Local Rule 26.1,

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(date)

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INTEREST OF AMICI CURIAE[1]

The Center for National Security Studies is a nonprofit, nongovernmental civil liberties organization in Washington, D.C., that was founded in 1974 to ensure that civil liberties are not eroded in the name of national security. The Center has worked for more than 30 years to find solutions to national security problems that protect both the civil liberties of individuals and the legitimate national security interests of the government.

The American-Arab Anti-Discrimination Committee ("ADC") is a civil rights organization committed to defending the rights of people of Arab descent and promoting their rich cultural heritage. ADC, which is non-sectarian and non-partisan, is the largest Arab-American grassroots civil rights organization in the United States. It was founded in 1980 by former United States Senator James Abourezk and has 38 chapters nationwide and members in all 50 States. Since September 11, 2001, the Arab-American community has often been subjected to harsh treatment, and ADC has been at the forefront in addressing discrimination and bias against Arab-Americans wherever it is practiced.

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[1] The parties to this appeal have either consented to or do not oppose the filing of this brief.

The Asian American Justice Center ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, the Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and public education on issues of importance to the Asian American community. AAJC and its Affiliates have a long-standing interest in protecting the civil liberties of, and civil rights that have an impact on, the Asian American community, and this interest has resulted in AAJC's participation in a number of *amicus* briefs before the courts.

Hate Free Zone is a Seattle-based nonprofit organization whose mission is to advance the fundamental principles of democracy and justice at the local, state and national levels by building power within immigrant communities, in collaboration with key allies. Hate Free Zone has an interest in protecting the civil rights and civil liberties of immigrant communities, including the right of every immigrant to due process and equal protection.

Muslim Advocates is a nonprofit, educational, charitable entity dedicated to promoting and protecting freedom, justice, and equality for all,

regardless of faith, by using the tools of legal advocacy, policy engagement, and education and by serving as a legal resource to promote the full participation of Muslims in American civic life. Founded in 2005, Muslim Advocates is a sister entity to the National Association of Muslim Lawyers, a network of over 500 Muslim American legal professionals. Muslim Advocates seeks to protect the founding values of our nation and believes our nation can be safe and secure without sacrificing constitutional rights and protections.

The National Immigrant Justice Center is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers. The Center provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education. Since its founding three decades ago, the Center has consistently advocated for the due process rights of non-citizens, including litigating dozens of habeas cases on behalf of detained immigrants.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600, should not be read to withdraw federal court jurisdiction over habeas petitions filed by Al-Marri and other non-citizens arrested in the

United States. Such a statutory construction would create an unprecedented and unconstitutional distinction between the rights of citizens and non-citizens and would permit the government to effectively "disappear" non-citizens into legal black holes.

There is a more reasonable interpretation of the MCA, one which vindicates the intent of its drafters and remains faithful to this country's core constitutional guarantees. The MCA was designed to amend 28 U.S.C. § 2241 to eliminate any statutory habeas jurisdiction for alleged enemy combatants that goes beyond what Congress believed to be the minimum required by the Constitution. Neither the text nor the legislative history of the Act purports to enact a "suspension" of the writ. It follows that Congress did not intend the MCA to withdraw jurisdiction in cases where the petitioner has a constitutional right to habeas. The legislative history also indicates that, in expanding the scope of the amendments made by the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, Div. A, Title X, 119 Stat. 2739, to restrict statutory habeas rights of enemy combatants imprisoned outside Guantanamo, Congress did not intend for the MCA to apply to persons already present in the United States and arrested there.

If the MCA were applied to deprive Al-Marri of his right to petition for habeas, it would be unconstitutional. Because Al-Marri is protected by the Suspension Clause, Congress can withdraw his right to habeas only by suspending the writ, not by simple statutory amendments to 28 U.S.C. § 2241. Absent suspension, the Fifth and Sixth Amendments protect both citizens and non-citizens from detention without the common law procedures of charge and trial. *See Wong Wing v. United States*, 163 U.S. 228 (1896). Moreover, selectively amending the habeas statute for non-citizens and not for citizens accused of being "enemy combatants" would constitute invidious discrimination in violation of the Fifth Amendment. *See Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Graham v. Richardson*, 403 U.S. 365, 372 (1971). There is no justification, under any standard of scrutiny, for distinguishing between citizens and non-citizens when the government designates them both as enemy combatants and they are accused of identical conduct.

ARGUMENT

I. The MCA Does not Deprive Al-Marri of His Right to Petition for a Writ of Habeas Corpus.

In passing the MCA, Congress intended to withdraw jurisdiction over only statutory habeas rights that Congress believed to afford broader protections than those provided by the Constitution. The text of the MCA

and the legislative history make clear that the MCA is not a "suspension" of constitutional habeas but simply an amendment to 28 U.S.C. § 2241 and that the MCA's amendments to 28 U.S.C. § 2241 were not aimed at non-citizens arrested in the United States. It follows that, although the bare text of the Act might be read to apply to this case, the MCA should not be construed to withdraw jurisdiction over claims by habeas petitioners like Al-Marri and other non-citizens within this country.

A. The MCA's Statutory Amendments to 28 U.S.C. § 2241 Do not "Suspend" the Writ of Habeas Corpus.

Section 7(e)(1) of the MCA is a statutory amendment to 28 U.S.C. § 2241. It provides:

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

That language does not, and was not intended to, "suspend" the writ. Even if Congress could suspend habeas corpus pursuant to U.S. Const. art. I, § 9, cl. 2 of the Constitution under current circumstances (which *amici* believe would be unconstitutional),[2] Congress gave no indication in the MCA that it

---

[2] *See Hamdi v. Rumsfeld*, 542 U.S. 507, 593-94 (2004) (Thomas, J., dissenting) (questioning whether the current war on terrorism constitutes a "Rebellion or Invasion" necessary to suspend the writ); William Blackstone,

actually intended to enact a "suspension." On the few occasions when Congress intended to suspend the writ, it did so explicitly. *See* Act of Mar. 3, 1863, 12 Stat. 755 (authorizing President "to suspend the writ of habeas corpus"); Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 14-15 (same). In contrast, the text of the MCA never mentions the words "suspend" or "suspension." "[T]he lack of a clear, unambiguous, and express statement of congressional intent" to suspend constitutional habeas rights "strongly counsels against adopting a construction that would raise serious constitutional questions." *INS v. St. Cyr*, 533 U.S. 289, 314 (2001).

Congress's decision not to use the word "suspend" is consistent with the legislative understanding that the MCA would repeal only what Congress thought to be statutory habeas rights. During the floor debates, when Senator Specter suggested that the MCA would unconstitutionally suspend the writ, Senator Graham, one of the bill's chief sponsors, expressly stated that the bill was drafted with the understanding that it did not affect constitutional habeas rights:

> I have been assuming something from the beginning . . . . It is a statutory right of habeas that has been granted to enemy combatants. And if there is a constitutional right of habeas

---

1 Commentaries *132 (describing habeas suspensions at common law as lasting "for a short and limited time").

> corpus given to enemy combatants, that is a totally different endeavor, and it would change in many ways what I have said.
>
> I do not know what the Court will decide, but if the Court does say in the next round of legal appeals there is a constitutional right to habeas corpus by those detained at Guantanamo Bay, then the Senator is absolutely right. We would have to make a different legal determination. We would have to make a different legal analysis. And if the Court does that, I will sit down with the Senator and we will figure out how to work through that.

152 Cong. Rec. S10267 (daily ed. Sept. 27, 2006) (Statement of Sen. Graham). Representative Sensenbrenner, Chairman of the Judiciary Committee and co-manager of the bill, made the same distinction in the House debates:

> There are two types of habeas corpus: one is the constitutional great writ. We are not talking about that here. We can't suspend that. That is in the Constitution, and we can't suspend that by law.
>
> The other is statutory habeas corpus, which has been redefined time and time again by the Congress. That is what we are talking about here, and we have the constitutional power to redefine it.

152 Cong. Rec. H7548 (daily ed. Sept. 27, 2006) (Statement of Rep. Sensenbrenner).

Given that Congress intended to restrict statutory habeas rights *without* triggering an actual "suspension" of the writ, the question in this case is how to construe language in the MCA that could be read to go further and withdraw constitutionally protected habeas jurisdiction over non-citizens who are taken into custody in this country. *See infra* Section I.C. So long

as ordinary habeas legislation remains within constitutional limitations, "judgments about the proper scope of the writ are 'normally for Congress to make.'" *Felker v. Turpin,* 518 U.S. 651, 664 (1996) (quoting *Lonchar v. Thomas,* 517 U.S. 314, 323 (1996)). But in cases such as this one, where Congress seems to have misjudged what the Constitution requires, the courts should not presume that Congress would intend for an ordinary statute to "suspend" the Great Writ or withdraw jurisdiction over constitutional habeas rights. Rather, once the courts affirm the constitutional requirements, Congress will have an opportunity to deliberate "'the critical matters involved in the judicial decision,'" fully informed of the constitutional issues at stake. *St. Cyr*, 533 U.S. at 299 n.10 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991)). Like the courts, Congress is also "'bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.'" *Id.* at 300 n.12 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

Because applying the MCA to Al-Marri would require suspending the writ, it would be more consistent with congressional intent to find the MCA inapplicable than to interpret the MCA to enact a de facto suspension of

constitutional habeas rights. Congress does not take "the grave action of suspending the writ," *Hamdi*, 542 U.S. at 575 (Scalia, J., dissenting), by accident. By affirming that constitutional rights are at stake and thus providing Congress the opportunity to make an informed choice whether to enact a "suspension," the courts can ensure that "[i]f civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion." *Id.* at 578 (Scalia, J., dissenting).

B. Congress Passed the Military Commissions Act in Order to Overrule *Rasul*'s Statutory Interpretation of 28 U.S.C. § 2241, Not to Withdraw Jurisdiction Over Constitutional Habeas Rights.

In *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court explained that 28 U.S.C. § 2241 provides broader habeas jurisdiction than what the Constitution requires. In passing the MCA, Congress reinforced its efforts in the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, Div. A, Title X, 119 Stat. 2739, to overrule *Rasul*'s statutory interpretation of 28 U.S.C. § 2241 and to return the habeas statute to the constitutional floor. In doing so Congress believed (incorrectly) that it could repeal the habeas jurisdiction for non-citizens detained indefinitely as alleged enemy combatants at Guantanamo and elsewhere overseas without raising any constitutional concerns or triggering the Suspension Clause.

The legislative history of the MCA reflects this understanding. As Senator Sessions argued in support of the changes to 28 U.S.C. § 2241: "It should also be noted that the Supreme Court's decision in *Rasul* was a statutory ruling, not a constitutional one. In other words, the Court concluded only that the federal habeas statute confers jurisdiction on federal district courts to hear claims brought by aliens detained at Guantanamo Bay." 152 Cong. Rec. S10406-07 (daily ed. Sept. 28, 2006) (Statement of Sen. Sessions). Senator Kyl echoed the same line of argument:

> Now, the *Rasul* case took great pains to emphasize that its extension of habeas to Guantanamo Bay was only statutory. Some Justices may have wanted to make *Rasul* a constitutional holding, but there was no majority for such a ruling.
>
> So both *Eisentrager* and *Verdugo* are still the governing law in this area. These precedents hold that aliens who are either held abroad or held here but have no other substantial connection to this country are not entitled to invoke the U.S. Constitution.

152 Cong. Rec. S10268 (daily ed. Sept. 27, 2006) (Statement of Sen. Kyl).

And Representative Sensenbrenner made the same argument in the House:

> The Supreme Court has never, never held that the Constitution's protections, including habeas corpus, extend to non-citizens held outside the United States. In fact, the Supreme Court rejected such an argument in 1950 in the case of *Johnson v. Eisentrager*. Moreover, in the 1990 *Verdugo* case, the Court reiterated that aliens detained in the United States but with no substantial connection to our country cannot avail themselves of the Constitution's protections. As a result, any argument that this bill breaks new ground or improperly denies

> detainees certain constitutional rights is both groundless and misguided.

152 Cong. Rec. H7545 (daily ed. Sept. 27, 2006) (Statement of Rep. Sensenbrenner).

Amici believe that these sponsors misread *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), in concluding that, under those cases, the Constitution provides no protections for non-citizens detained indefinitely at Guantanamo. *See Rasul*, 542 U.S. at 483 n.15; *id.* at 476 (noting that the Guantanamo detainees "differ from the *Eisentrager* detainees in important respects"); *id.* at 485-88 (Kennedy, J., concurring) (concluding that Guantanamo detainees are entitled to habeas under *Eisentrager*); *see also Verdugo-Urquidez*, 494 U.S. at 277-78 (Kennedy, J., concurring). But despite its misreading of those cases, Congress's intent to affect only statutory habeas rights could not be more clear. It would undermine the intent of the drafters to apply the MCA in cases where withdrawing habeas jurisdiction would require suspending the constitutional writ.

C. In Amending 28 U.S.C. § 2241 to Apply to Non-Citizens Imprisoned in the United States as Enemy Combatants, Congress Did Not Intend to Alter the Rights of Non-citizens Who Are Present in the United States at the Time of Their Arrest.

Congress had already responded to *Rasul* in the DTA by cutting back habeas protections for those persons detained at Guantanamo Bay. The MCA then sought to restrict statutory habeas rights further by making the DTA's provisions applicable to pending cases and by repealing statutory habeas rights for enemy combatants held overseas, in places such as Iraq and Afghanistan, and persons imprisoned (but not arrested) inside the United States.[3] Rather than evincing a deliberate choice to restrict the habeas rights of non-citizens arrested within the United States, the MCA appears to apply to Al-Marri only through Congress's inadvertent use of overly broad language.

---

[3] It should be noted that the MCA was enacted at a time of considerable discussion about the desirability of closing Guantanamo Bay, which might require the government to transfer its detainees to the United States. The removal of the references to Guantanamo from MCA § 7 can be understood, in part, as an effort to assure that the current Guantanamo detainees would not gain additional rights by virtue of such a transfer. *Amici*, however, disagree with Congress's conclusion that non-citizens arrested abroad and detained within the United States lack a constitutional right to habeas. *See Eisentrager*, 339 U.S. at 777 (noting that the petitioners were "at all times imprisoned outside the United States"). *Amici* also disagree with the government's view that non-citizens outside the United States have no constitutional protections.

Congress never intended that the MCA's amendment to 28 U.S.C. § 2241 would withdraw habeas jurisdiction for Al-Marri and other non-citizens arrested in the United States. Indeed, whatever support *Eisentrager* may provide for Congress's mistaken belief that non-citizens captured abroad and detained at Guantanamo have no constitutional rights, it provides no basis whatsoever for restricting the rights of non-citizens inside the United States. *Eisentrager* dealt with persons "captured and imprisoned abroad" who have "never been or resided in the United States." *Eisentrager*, 339 U.S. at 777. In concluding that those petitioners had no constitutional right to habeas corpus, the *Eisentrager* Court reaffirmed that the Constitution protects "'all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.'" *Id.* at 771 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

In removing the DTA's references to Guantanamo, Congress did not intend to affect non-citizens already present within the United States, but rather to codify the distinction that it interpreted *Verdugo-Urquidez* to draw between non-citizens who have voluntarily chosen to be in the United States and those who have been brought to the country by force as prisoners. *Verdugo-Urquidez* held that a non-citizen who is "brought and held here against his will" is not protected by the Fourth Amendment from a search of

his home in Mexico. *Verdugo-Urquidez*, 494 U.S. at 271. The Court explained that "[w]e do not think the applicability of the Fourth Amendment to the search of premises in Mexico should turn on the fortuitous circumstance of whether the custodian of its nonresident alien owner had or had not transported him to the United States at the time the search was made." *Id.* at 272.

Amici do not believe that *Verdugo-Urquidez* can appropriately be applied outside the Fourth Amendment context. *See Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring) (noting, despite the non-citizen's involuntary presence in the United States, that "the dictates of the Due Process Clause of the Fifth Amendment protect the defendant"); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (noting that the Fifth Amendment protects "[e]ven one whose presence in this country is unlawful, involuntary, or transitory"). But the supporters of the MCA relied on their understanding of *Verdugo-Urquidez* to argue that the Constitution does not provide habeas rights to non-citizens captured abroad and brought to the United States against their will. *See* 152 Cong. Rec. S10268 (daily ed. Sept. 27, 2006) (Statement of Sen. Kyl) (citing this portion of *Verdugo-Urquidez*); 152 Cong. Rec. S10406-07 (daily ed. Sept. 28, 2006) (Statement of Sen. Sessions) (same). Following this understanding of *Verdugo-Urquidez*,

Congress removed the DTA's references to Guantanamo Bay in order to restrict the habeas rights of aliens captured abroad regardless of where the United States happens to imprison them.[4] When, for example, Senator Specter argued that it would be unconstitutional to strip habeas from persons within the United States, Senator Kyl responded that

> making the ability to hold someone as an enemy combatant turn on whether they are held in or out of the United States . . . "creates a perverse incentive. Military authorities faced with the stark choice of submitting to the full-blown criminal process or releasing a suspected enemy combatant captured on the battlefield will simply keep citizen-detainees abroad."

152 Cong. Rec. S10355 (daily ed. Sept. 28, 2006) (Statement of Sen. Kyl) (quoting *Hamdi*, 542 U.S. at 524). Senator Kyl went on to argue that

> [i]t is simply inconceivable that all of the 425,000 enemy combatants held inside the United States during [World War II] could have been allowed to sue our government in our courts to challenge their detention. And were their right to do so made to turn on whether they were held inside or outside of the United States, our Armed Forces inevitably would have been forced to find some accommodations for them in foreign territory.

Id. Senator Sessions' explanation for the change was virtually identical:

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[4] Several Senators and Congressman who opposed the amendments to 28 U.S.C. § 2241 contended that it would strip habeas from non-citizens arrested in the United States. *See, e.g.*, 152 Cong. Rec. S10356 (daily ed. Sept. 28, 2006) (statement of Sen. Leahy); 152 Cong. Rec. H7550 (daily ed. Sept. 27, 2006) (Statement of Rep. Nadler). Rather than affirming that the MCA would apply to non-citizens arrested inside the United States, the sponsors of the legislation responded by citing to *Eisentrager* and *Verdugo-Urguidez* and the situation of non-citizens arrested outside the United States.

> The biggest change that the MCA makes to section 2241(e) is that the new law applies globally, rather than just to Guantanamo detainees. We are legislating through this law for future generations, creating a system that will operate not only throughout this war, but for future wars in which our Nation fights. In the future, we may again find ourselves involved in an armed conflict in which we capture large numbers of enemy soldiers. It is not unlikely that the safest and most secure place to hold those soldiers will be inside the United States. The fact that we hold those enemy soldiers in this country should not be an invitation for each of them to sue our Government.

152 Cong. Rec. S10404 (daily ed. Sept. 28, 2006) (Statement of Sen. Sessions).

But the place of confinement is different from the place of arrest. In making the place of imprisonment irrelevant, Congress did not also intend to make the place of capture and residence irrelevant. The MCA must be read in light of its purpose: to exclude from the scope of 28 U.S.C. § 2241 aliens whom Congress believed to have no constitutional habeas rights under *Eisentrager* and *Verdugo-Urquidez*. Indeed, any other reading would be at odds with the sponsors' repeated statements that the bill was designed not to restrict constitutional habeas rights. *See* 152 Cong. Rec. S10267 (daily ed. Sept. 27, 2006) (Statement of Sen. Graham); 152 Cong. Rec. H7548 (daily ed. Sept. 27, 2006) (Statement of Rep. Sensenbrenner).

II. So Long as the Writ Is Not Actually "Suspended," Applying the MCA to Al-Marri and Other Non-Citizens Within the United States Would Be Unconstitutional.

The courts are obligated, when "'fairly possible,'" to construe statutes to avoid serious constitutional problems. *See St. Cyr*, 533 U.S. at 299-300 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)); *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). If the MCA were construed to apply to Al-Marri and other non-citizens within the United States -- despite Congress's intention to restrict only statutory habeas rights -- the statute would violate the Suspension Clause, the Fifth and Sixth Amendments' prohibition of detention without trial, and the equal protection guarantee of the Fifth Amendment.

A. The Suspension Clause Guarantees Both Citizens and Non-Citizens in the United States a Constitutional Right to Habeas that Cannot Be Eliminated by Ordinary Amendments to the Habeas Statute.

"[A]t the absolute minimum, the Suspension Clause protects the writ as it existed in 1789." *St. Cyr*, 533 U.S. at 301 (internal quotation marks omitted); *see also Swain v. Pressley*, 430 U.S. 372, 385-86 (1977) (Burger, C.J., concurring); *Brown v. Allen*, 344 U.S. 443, 532-33 (1953) (Jackson, J., concurring)). "In England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government, the writ of habeas corpus was available to nonenemy aliens as well as to citizens." *St. Cyr*, 533 U.S. at 301 (footnote omitted) (collecting cases). Long before the guarantee of habeas corpus was codified in the United States Constitution, "[a]t common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm." *Rasul*, 542 U.S. at 481 & n.11 (collecting cases); *see also id.* at 502 (Scalia, J., dissenting) (noting that the cases cited in *Rasul*'s footnote 11 "involve[] claims by aliens detained in what is indisputably domestic territory").

Congress may not evade the protections of the Suspension Clause by passing ordinary legislation in the guise of amendments to 28 U.S.C. § 2241. As Justice Scalia explained in the context of citizens, the Suspension Clause guarantees persons under its protection that they will be "tried or released,

unless the conditions for suspending the writ exist and the grave action of suspending the writ has been taken." *Hamdi*, 542 U.S. at 575 (Scalia, J., dissenting). In situations where the writ has not been suspended and the habeas statute fails to provide jurisdiction that the Constitution requires, the Court may justifiably adopt "a strained construction of the habeas statute" or read into the statute an "atextual exception thought to be required by the Constitution." *Rasul*, 542 U.S. at 497 (Scalia, J., dissenting); *see also id.* at 477-78 (majority opinion) (noting that *Eisentrager* discussed whether the petitioners had a constitutional right to habeas even though the habeas statute failed to provide jurisdiction). The Suspension Clause "was intended to preclude any possibility that 'the privilege itself would be lost' by either the inaction or the action of Congress." *St. Cyr*, 533 U.S. at 304 n.24 (quoting *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807)) (noting that the Constitution imposes an "obligation" to provide habeas jurisdiction).

B. Absent Suspension of the Writ, the Fifth and Sixth Amendments Protect Both Citizens and Non-Citizens in the United States from Detention as Alleged Enemy Combatants Without Trial.

The constitutional protections of non-citizens in the United States are well settled. An unbroken chain of cases has reaffirmed that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or

permanent." *Zadvydas*, 533 U.S. at 693. "There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law." *Mathews*, 426 U.S. 67, 77 (1976); *see also Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953); *Bridges v. Wixon*, 326 U.S. 135 (1945); *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

Due process requires that neither Congress nor the Executive can impose punishment without the common law procedures of charge and trial codified in the Fifth and Sixth Amendments. *See Hamdi*, 542 U.S. at 556 (Scalia, J., dissenting). The Supreme Court long ago held that these protections belong to all persons within the United States, both citizens and non-citizens. In *Wong Wing v. United States*, 163 U.S. 228 (1896), the Supreme Court declared that, although Congress has broad powers to regulate immigration and remove non-citizens from the country, when Congress seeks to impose punishment, "it must be concluded that all persons within the territory of the United States are entitled to the protection guarant[e]ed by [the Fifth and Sixth] amendments, and that 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." *Id.* at 238. "It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt, and adjudge the punishment by one of its own agents." *Id.* at 237; *accord Zadvydas*, 533 U.S. at 690 (emphasizing, in the context of non-citizens, the requirement of a "criminal" trial to justify detention); *Duncan v. Kahanamoku*, 327 U.S. 304, 323 n.21 (1946).[5]

C. The Fifth Amendment's Equal-Protection Guarantee Prevents Congress from Selectively Repealing Statutory Habeas Jurisdiction Only for Non-Citizens in the United States.

"[T]the Fifth Amendment protects aliens whose presence in this country is [lawful or] unlawful from invidious discrimination by the Federal Government." *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *see also Wong Wing*, 163 U.S. at 242 (Chase, J., concurring in part and dissenting in part)

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[5] Even if a CSRT hearing were provided for Al-Marri, it would not meet the Fifth and Sixth Amendments' requirements for proof of wrong-doing, and the provisions of the DTA and MCA for limited review of CSRT determinations in the D.C. Circuit would not constitute an "adequate or effective" substitute for habeas, *see Swain*, 430 U.S. at 381; *cf. Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2807 (2006) (Kennedy, J., concurring) (explaining that "provisions for review of legal issues after trial cannot correct for structural defects . . . that cast doubt on the factfinding process").

("A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws.").

The MCA, like any other statute, is subject to these equal-protection guarantees. Congress could not, for example, amend the filing deadlines in 28 U.S.C. § 2244, to provide for different deadlines based on the petitioner's race, gender, religion, or citizenship (e.g. a four-year deadline for males, a three-year deadline for females, etc.). The MCA makes precisely the same sort of invidious distinction by relegating non-citizens to the inadequate and limited review of CSRT determinations in the D.C. Circuit, while preserving the full habeas rights of citizens accused of identical conduct.

This disparate treatment cannot survive constitutional scrutiny under any standard of review.[6] In general, "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close

[6] Indeed, the Suspension Clause itself was designed to vindicate equal-protection principles by preventing Congress from targeting specific classes of disfavored persons to exclude from habeas jurisdiction. "This was a distinct abuse of majority power, and one that had manifested itself often in the Framers' experience: temporarily but entirely eliminating the 'Privilege of the Writ' for a certain geographic area or areas, or for a certain class or classes of individuals." *St. Cyr*, 533 U.S. at 337-38 (Scalia, J., dissenting) (collecting sources).

judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (footnotes omitted). "Aliens as a class are a prime example of a 'discrete and insular' minority (see *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n.4 (1938)) for whom such heightened judicial solicitude is appropriate." *Id.*; *see also Sugarman v. Dougall*, 413 U.S. 634, 642 (1973) (evaluating "the substantiality of the state's interest" and "the narrowness of the limits within which the discrimination is confined"). Even if the federal government has greater leeway in distinguishing between citizens and non-citizens, with respect to "naturalization and immigration," *see Mathews*, 426 U.S. at 79-80; *Demore v. Kim*, 538 U.S. 510, 521-22 (2003), Congress's actions are subject to greater scrutiny when it seeks to detain non-citizens for punishment or other reasons unrelated to immigration, *cf. id.* at 532-33 (Kennedy, J., concurring); *Wong Wing*, 163 U.S. at 235 (contrasting unconstitutional detention of non-citizen for purposes of punishment with constitutional "temporary confinement, as part of the means necessary to give effect to the provisions for exclusion or expulsion of aliens").[7]

[7] The Alien Enemies Act of 1798, 1 Stat. 577, 50 U.S.C. §§ 21-24 provides that aliens from nations against whom the United States has declared war may be detained and deported. Because he is not a citizen of a country at war with the United States, Al-Marri is not such an enemy alien. Moreover, such aliens have habeas rights to challenge the government's assertion that they are, indeed, nationals of a foreign enemy. *See, e.g.*, *United States ex*

Congress gave no reason for the MCA's facially disparate treatment of citizens and non-citizens. Indeed, it is difficult to hypothesize what legitimate justification for disparate treatment would exist when the government, using the same definition, designates both citizens and non-citizens as enemy combatants for allegedly engaging in the same activities. "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). As Justice Jackson has observed, "basic fairness in hearing procedures does not vary with the status of the accused." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 225 (1953) (Jackson, J., dissenting) ("If the procedures used to judge this alien are fair and just, no good reason can be given why they shou[l]d 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."); *cf. A. v. Sec'y of State of the Home Dep't*, [2004] UKHL 56, [2005] A.C. 68 (appeal from Eng.) (U.K.) (striking down United

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rel. Schwarzkopf v. Uhl, 137 F.2d 898 (2d Cir. 1943); *see also* J. Gregory Sidak, *War, Liberty and Enemy Aliens*, 67 N.Y.U. L. Rev. 1402 (1992).

Kingdom's anti-terror legislation based, in part, on its disparate treatment of suspected terrorists who were not British citizens); 2 A.C. at 127 (Birkenhead) ("It is difficult to see how the extreme circumstances, which alone would justify such detention, can exist when lesser protective steps apparently suffice in the case of British citizens suspected of being international terrorists.").

In many cases, the MCA's distinction between citizens and non-citizens will produce perverse results. As this Court acknowledged in *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) *overruled on other grounds*, 542 U.S. 507 (2004), in the context of a citizen, the government cannot remove a person from "the Great Writ's purview" by simply designating him or her to be an enemy combatant. *Id.* at 465. If the government's designation of a person as an "enemy combatant" was insufficient to foreclose judicial review for Hamdi -- who, although nominally a citizen, was also a foreign national with no contemporary ties to the United States -- there is no rational reason why the same "enemy combatant" designation should strip jurisdiction over the habeas petitions of Al-Marri and other non-citizens in the United States, including even long-term legal permanent residents with longstanding connections to the country. *See Woodby v. INS*, 385 U.S. 276, 286 (1966) ("[M]any resident aliens have

lived in this country longer and established stronger family, social, and economic ties here than some who have become naturalized citizens.").[8]

The only remaining explanation for selectively withdrawing habeas from non-citizens within the United States is nativism or bare animus. But "mere negative attitudes, or fear" are not permissible bases for disparate treatment under any standard of scrutiny. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985); *see also U.S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 534 (1973). "[W]e live in a society in which '[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.'" *Hamdi*, 542 U.S. at 531 (quoting *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975)). And when fundamental rights or interests are involved, the government bears an even greater burden for justifying its disparate treatment of citizens and non-citizens. *See Plyler*, 457 U.S. at 223-24; *id.* at 230-31 (Marshall, J., concurring); *id.* at 231-34 (Blackmun, J., concurring); *id.* at 238-39 (Powell,

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[8] Non-citizens as well as citizens serve in the United States military and have demonstrated no less bravery and dedication fighting in the current wars in Afghanistan and Iraq. *See* Exec. Order No. 13,269, *Expedited Naturalization of Aliens and Noncitizen Nationals Serving in an Active-Duty Status During the War on Terrorism*, 67 Fed. Reg. 45,287 (Jan. 3, 2002); *In re Griffiths*, 413 U.S. 717, 722 (1973) ("Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society.").

J., concurring); *see also Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (adopting a heightened standard of scrutiny by evaluating "the benefit withheld by the classification" and "the basis for the classification").

When applied to constitutional habeas rights, the MCA's amendments to 28 U.S.C. § 2241 amount to no more than "a concise expression of an intention to discriminate." *Plyler*, 457 U.S. at 227. Such an irrational distinction in the context of such a fundamental right is unconstitutional.

CONCLUSION

For the foregoing reasons, the government's motion to dismiss should be denied.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-7427 **Caption:** Ali Saleh Kahlah Al-Marri, et al. v. Commander S.L. Wright

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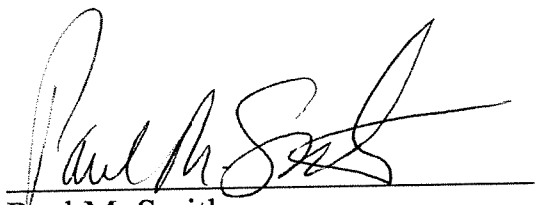

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