No. 16-1307

In the Supreme Court of the United States

ALI HAMZA AHMAD SULIMAN AL BAHLUL,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

BRIEF OF *AMICI CURIAE* KAREN KOREMATSU, JAY HIRABAYASHI, HOLLY YASUI, TERRY DERIVERA, THE JAPANESE AMERICAN CITIZENS LEAGUE, AND THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Karen Korematsu, Jay Hirabayashi, and Holly Yasui are the children of Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui, who challenged the constitutionality of the military orders implementing the internment of Japanese Americans during World War II based on the fundamental constitutional guarantee of equal protection of the laws. *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944). Additionally, Masuo Yasui, Holly Yasui's grandfather and Minoru Yasui's father, was arrested by the FBI immediately after Pearl Harbor because he was a community leader, and was "tried" without elementary guarantees of due process by a Department of Justice commission created exclusively for "enemy aliens" suspected of subversive activities. In the 1980s, contemporaneous with Congress's finding that the internment orders resulted from "racial prejudice, wartime hysteria, and a failure of political leadership," 50 U.S.C. § 4202(a), the courts vacated the wartime convictions of *amici*'s fathers based on showings that the government had destroyed, altered, suppressed, and misrepresented material evidence refuting the claim of military necessity asserted to justify the internment.[2] Honoring and carrying

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

[2] See *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987), *aff'g in part and rev'g in part*, 627 F. Supp. 1445 (W.D.

forward their fathers' legacies, these *amici* have committed themselves to ensuring that the courts subject any governmental actions denying constitutional rights and liberties to the strictest scrutiny.

Terry DeRivera is the daughter of Mitsuye Tsutsumi (née Endo), who brought litigation challenging the government's internment policies and refused the government's offer to release her if she would not return to the West Coast. The Supreme Court agreed that there was no lawful basis for her internment. *Ex parte Endo*, 323 U.S. 283 (1944).

The Japanese American Citizens League (JACL), founded in 1929, is the oldest Asian American civil rights organization in the United States. The JACL's mission is to secure and maintain the civil rights of Japanese Americans and all others who are victimized by injustice and bigotry. The JACL opposed discriminatory federal laws that prevented aliens of Japanese ancestry from obtaining citizenship and state laws that prevented them from owning real estate or obtaining commercial fishing licenses. The JACL also fought for monetary compensation for persons of Japanese ancestry who were unjustly incarcerated during World War II.

The Asian American Legal Defense and Education Fund (AALDEF), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the coun-

Wash. 1986); Order at 2, *Yasui v. United States*, Crim. No. C 16056 (D. Or. Jan. 26, 1984) (granting government's motion to vacate conviction), *rev'd and remanded on other grounds*, 772 F.2d 1496 (9th Cir. 1985).

try to secure human rights for all. In 1982, AALDEF testified before the U.S. Commission on Wartime Relocation and Internment of Civilians, in support of reparations for Japanese Americans forcibly relocated and imprisoned in camps during World War II.

Accordingly, the issues presented in this case, particularly the discriminatory treatment of noncitizens, are of great importance to the *amici*.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the Military Commissions Act of 2006 (the "MCA" or "Act"), Congress "establishe[d] procedures governing the use of military commissions to try" only "alien unlawful enemy combatants." Pub. L. No. 109-366, 120 Stat. 2600, sec. 3(a)(1), § 948b(a).[3] The military commissions have expansive jurisdiction to try criminal charges against any "alien" "enemy combatants" who engaged in "hostilities against the United States or its co-belligerents." §§ 948a, 948c, 948d(a). The Act defines "alien" to mean "a person who is not a citizen of the United States." § 948a(3).

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[3] Standalone section citations refer to Title 10 of the U.S. Code as amended by the 2006 MCA, under which the Petitioner was tried and convicted. Congress again amended Title 10 in the Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190, tit. XVIII. However, the 2009 MCA—the current version of the law, which this brief cites as "2009 MCA § __"—retains the same distinction based on citizenship. See 2009 MCA § 948a(1) ("The term 'alien' means an individual who is not a citizen of the United States"); *id.* § 948b(a) ("This chapter establishes procedures governing the use of military commissions to try alien unprivileged enemy belligerents"); *id.* § 948c ("Any alien unprivileged enemy belligerent is subject to trial by military commission").

Although the political branches have authorized the trial of aliens by military commissions in the past, prior to the MCA, military commission jurisdiction had never been expressly limited to foreign nationals. The first military commissions, established during the Mexican War, ensured that "all offenders, Americans and Mexicans, were alike punished." Winfield Scott, *Memoirs of Lieut.-General Scott, L.L.D.* 392-95 (1864). Similarly, President Roosevelt's Order authorizing the military trial of the German saboteurs during the Second World War applied equally to citizens and noncitizens alike. *Ex Parte Quirin*, 317 U.S. 1 (1942) (upholding trial by military commission of German saboteurs, including one U.S. citizen). "The commissions set up by the MCA," by contrast, "appear to be the first ones in American history designed to apply only to foreigners." Neal K. Katyal, *Equality in the War on Terror*, 59 Stan. L. Rev. 1365, 1370 (2007).

Under the MCA, American citizens and foreigners charged with the exact same crime are subject to prosecution in two totally different criminal justice systems. This differential treatment, based solely on the accused's citizenship, implicates core constitutional concerns. Discrimination based on alienage has long been held to trigger strict scrutiny. But the distinctions between citizen and noncitizen embedded in the MCA do not serve any rational relationship to a state interest—let alone one that is narrowly tailored to a compelling state interest.

The Constitution does not permit the political branches to single out noncitizens—and only noncitizens—for trial in military courts. The Court should

grant the petition for certiorari to address this important issue.

ARGUMENT

I. BECAUSE THE MCA TREATS ALIENS AND U.S. CITIZENS DIFFERENTLY, IT MUST SATISFY EQUAL PROTECTION SCRUTINY.

One of the Constitution's most basic promises is the equal protection of the laws. This guarantee "emphasizes disparity in treatment * * * between classes of individuals whose situations are arguably indistinguishable," in contrast to due process, which "emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated." *Ross v. Moffit*, 417 U.S. 600, 609 (1974). Equal protection demands at least a rational basis, and sometimes more, before the government can treat otherwise similarly situated individuals differently on account of a particular characteristic.

The MCA, which creates a separate court system to prosecute noncitizens for certain terrorism-related offenses, presents such a disparity in treatment. It draws a straightforward distinction between "alien unlawful enemy combatants" and unlawful enemy combatants who are *U.S. citizens*—the former are "subject to trial by military commission," while the latter must be tried in Article III courts. § 948c. Such a distinction, solely on the basis of alienage, must be subjected to equal protection scrutiny.

This Court long ago recognized that "the Fourteenth Amendment to the Constitution is not confined to the protection of citizens" and that its "provi-

sions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Because the "equal protection guarantee" of the Fifth and Fourteenth Amendments was "fashioned * * * to reach every exercise of state authority," that guarantee "extends to anyone, citizen or stranger, who is subject to the laws of a State." *Plyler v. Doe*, 457 U.S. 202, 211-12, 215 (1982) (emphasis omitted). "[A]ll persons within the territory of the United States"—"even aliens"—"are entitled to the protection guarant[eed] by" the Fifth Amendment. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).[4]

These principles apply with equal force to Petitioner, who has been detained for the past fifteen years, and was tried and convicted, at Guantanamo Bay. "Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'" *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)). The Court has recognized that Guantanamo is "a territory that * * * is under the complete and total control of our Government" and for all practical purposes is not "abroad," but rather is "within the constant jurisdiction of the United States." *Id.* at 769, 771. *Accord Rasul v. Bush*, 542

[4] The Fifth and Fourteenth Amendments impose "indistinguishable" "equal protection obligations" on the exercise of governmental power. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995). "[E]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

U.S. 466, 487 (2004) (Kennedy, J., concurring) ("Guantanamo Bay is in every practical respect a United States territory, * * * a place that belongs to the United States, extending the 'implied protection' of the United States to it."). Thus, in *Boumediene*, the Court held that the Constitution's Suspension Clause "has full effect at Guantanamo Bay." 553 U.S. at 771. There is nothing "impracticable [or] anomalous" (*id.* at 759-60) about likewise requiring the government to abide by the Constitution's equal protection guarantees when it pursues *criminal prosecutions* of Guantanamo detainees.

Indeed, almost a century ago, this Court stated that "[t]he Constitution of the United States is in force * * * wherever and whenever the sovereign power of that government is exerted." *Balzac v. Porto Rico*, 258 U.S. 298, 312 (1922). And while not every provision of the Constitution necessarily applies with full force outside the borders of the United States, the Court has said that, at a minimum, the rights "to free access to courts of justice, to due process of law, and to an equal protection of the laws" apply in United States territories and those areas where the United States exercises effective control. *Downes v. Bidwell*, 182 U.S. 244, 282 (1901).

The United States seeks to hold Petitioner to account in a United States tribunal located in a territory under complete, exclusive, and permanent U.S. control for an offense defined by United States law. See § 950v(b)(28). It seeks, in other words, to exercise "the [sovereign] power * * * to determine what shall be an offense against its authority and to punish such offenses"—a role in which "the Federal Government" undoubtedly is "subject to the overriding

requirements of the Federal Constitution." *United States v. Wheeler*, 435 U.S. 313, 320 (1978).

"All would agree * * * that the dictates of the Due Process Clause of the Fifth Amendment"—and by extension, that Amendment's guarantee of equal protection—apply where "[t]he United States is prosecuting a foreign national in a court established under Article III." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring). The political branches surely lack the power to circumvent the Constitution's equal protection guarantee merely by creating a *non*-Article III tribunal at Guantanamo, applicable only to noncitizens, and prosecuting Petitioner there instead. After all, the "political branches" do not "have the power to switch the Constitution on or off at will." *Boumedien*e, 553 U.S. at 765.

In short, in prosecuting Petitioner, the government must afford him the equal protection of the laws. But, as we explain below, the creation of a separate court system only for "aliens" violates the Constitution's guarantee of equal protection.[5]

II. THE CREATION OF A SEPARATE COURT SYSTEM TO PROSECUTE ONLY NONCITIZENS VIOLATES EQUAL PROTECTION.

A. The MCA Established A Separate, Inferior Court System.

[5] To be sure, *amici* believe that the MCA's constitutional flaws go well beyond the Act's failure to satisfy equal protection. But the fact that the MCA subjects only noncitizens to trial by military commission is an independent reason to strike down Petitioner's conviction.

The criminal process afforded the Petitioner in the military commissions under the MCA was plainly and substantially inferior to the process that he would have received in an Article III court.

For example, the MCA provided that allegedly coerced statements were admissible in military commissions if the military judge found that the statements were "reliable and possess[ed] sufficient probative value" and that "the interests of justice would best be served" by their admission. §§ 948r(c)-(d); 949a(b)(2)(C). In addition, the MCA barred statements obtained through "cruel, inhuman, or degrading" interrogation techniques only if the statements were obtained *after* December 30, 2005. § 948r(c)-(d).[6] Admission of such statements against an accused is clearly prohibited in Article III courts, and "convictions following the admission into evidence of confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological, cannot stand." *Rogers v. Richmond*, 365 U.S. 534, 540 (1961).[7]

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[6] The 2009 amendments altered this provision. See 2009 MCA § 948r (excluding all statements obtained by torture).

[7] See also, e.g., *Chavez v. Martinez*, 538 U.S. 760, 796 (2003) (Kennedy, J., concurring in part and dissenting in part) ("[U]se of torture or its equivalent in an attempt to induce a statement violates an individual's fundamental right to liberty of the person."); *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944) (recognizing that totalitarian regimes employ "unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture," but "[s]o long as the Constitution remains the basic law of our Republic, America will not have that kind of government"); *Brown v. Mississippi*, 297 U.S. 278, 287 (1936) ("'Coercing the supposed state's criminals into confessions and

The MCA also relaxed hearsay rules. Under the MCA, hearsay evidence was presumptively admissible: "[h]earsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted," unless the opposing party "demonstrates that the evidence is unreliable or lacking in probative value." § 949a(b)(2)(E)(ii); see also Military Comm'n R. Evid. 802 (2007 ed.) ("Hearsay may be admitted on the same terms as any other form of evidence"). In contrast, hearsay is presumptively *in*admissible in both courts martial and Article III courts. See Military R. Evid. 802 ("[h]earsay is not admissible unless" otherwise provided); Fed. R. Evid. 802 (same). That difference is no small thing. As this Court has recognized, where "there are in effect no limits on the admission of hearsay evidence * * * the detainee's opportunity to question witnesses is likely to be more theoretical than real." *Boumediene*, 553 U.S. at 784; see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 575 (2004) (Scalia & Stevens, JJ., dissenting) (decrying plurality's failure to repudiate "unheard-of system" in which "testimony is by hearsay rather than live witnesses").

These deficiencies were exacerbated by severe limitations on the government's discovery obligations. The MCA broadly protected classified information, including exculpatory evidence, from disclosure, providing that the military judge "shall" authorize trial counsel to withhold such information

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using such confessions so coerced from them against them in trials has been the curse of all countries. * * * The Constitution recognized the evils that lay behind these practices and prohibited them in this country.'").

and produce it in summary, redacted form "to the extent practicable." § 949j(c)-(d). This protection from disclosure was extended to classified "sources, methods, or activities by which the United States acquired such evidence," even where such evidence was admitted at trial. §§ 949d(f); 949j(c). By permitting the government to withhold information about how it acquired evidence used against the accused at trial, these rules seriously impeded the accused from determining whether inculpatory evidence was obtained by torture or coercion or otherwise challenging the reliability of such evidence. By contrast, under the Classified Information Procedures Act ("CIPA"), an Article III court "may"—but is not required to—authorize the withholding of classified information, and only "upon a sufficient showing." 18 U.S.C. App. III, § 4. Moreover, under CIPA, if the government refuses to release classified information to a defendant, an Article III court "shall dismiss the indictment or information" or "shall order" alternative measures to protect the interests of the accused. *Id*., § 6(e)(2). No such protection exists for defendants tried by military commission.[8]

In addition, the MCA affirmatively stated that neither the right to a speedy trial nor the right against compulsory self-incrimination applied in military commission trials. § 948b(d)(1). The MCA also curtailed the right to counsel of choice, prohibiting defendants from retaining noncitizen civilian defense

[8] See generally Federal Judicial Center, *National Security Case Studies: Special Case-Management Challenges* (6th ed. 2015) (describing the many methods available to Article III courts for addressing security concerns in terrorism cases short of allowing the government to withhold information from the accused).

counsel. § 949c(b)(3)(A). Indeed, the military commission rejected Petitioner's request to be represented by counsel of his choosing, citing the MCA's prohibition of non-U.S. citizen civilian defense counsel. *United States v. Bahlul*, No. 040003, Tr. at R.163-64 (Military Comm'n Mar. 1-2, 2006 sess.). And to state the obvious, the MCA required defendants to be tried before members of the U.S. armed forces, rather than independent Article III judges and civilian juries. §§ 948i(a), 948j(b).[9]

If there were any doubt that Congress intended the MCA's alternative criminal process to afford

[9] Although the 2009 MCA eliminated some of the deficiencies of the 2006 MCA (*e.g.* by amending the hearsay rules and expanding the Government's obligation to produce exculpatory evidence), substantial deficiencies remain. For example, under the existing law, a coerced statement still may be admitted if "the totality of the circumstances renders the statement reliable and possessing sufficient probative value" and "the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence." 2009 MCA §§ 948r(c), 949a(b)(3)(B). Moreover, the Government's obligation to disclose classified information is still more restricted than in an Article III court under CIPA. See *id.* § 949p-4. The 2009 MCA also made no relevant change to the provisions eliminating or restricting defendants' speedy-trial rights, *Miranda* rights, and rights to counsel, or those requiring judges and commission members to be members of the U.S. armed forces. See *id.* §§ 948b(d)(1), 949c(b)(3)(A); 948i(a), 948j(b). See generally Jennifer K. Elsea, Cong. Research Serv., Report R40932, *Comparison of Rights in Military Commission Trials and Trials In Federal Criminal Court* (Mar. 21, 2014). Thus, the 2009 amendments did not change the fact that the protections afforded an accused in military commissions and Article III courts are decidedly unequal.

noncitizens (and only noncitizens) fewer rights, "the legislative history confirms what the plain text strongly suggests." *Boumediene*, 553 U.S. at 778-79. As Senator Warner, then Chairman of the Senate Armed Services Committee, explained, the MCA "is *only* directed at aliens—aliens, not U.S. citizens"—and "[w]e have *no intention* to try to accord aliens engaged as unlawful combatants with all the rights and privileges of American citizens." 152 Cong. Rec. S10,250, S10,262 (Sept. 27, 2006) (emphasis added). Representative Hunter, then Chairman of the House Armed Services Committee, put it more even more plainly: "Some rights are reserved for our citizens; some rights are reserved for civilized people." *Id.* at H7,938 (Sept. 29, 2006).

B. The MCA's Distinction Between Citizens and Noncitizens Cannot Withstand Equal Protection Scrutiny.

It is by now well-settled that classifications "based on alienage," like classifications "based on nationality or race," are "inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372 (1971); see also *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) ("[W]hen a statute classifies by . . . alienage" it is "subjected to strict scrutiny."); *Plyler*, 457 U.S. at 238 (Powell, J., concurring) (alienage subject to "heightened" review). Indeed, this Court long ago held that in matters of criminal justice, "the equal protection of the laws is a pledge of the protection of equal laws," *Wong Wing*, 163 U.S. at 238 (quoting *Yick Wo*, 118 U.S. at 369), for "strangers and aliens" and "citi-

zen[s] of the United States" alike. *Yick Wo*, 118 U.S. at 369.[10]

To survive strict scrutiny, the distinction the MCA draws between noncitizens and citizens must be "narrowly tailored" to "further compelling governmental interests." *Adarand*, 515 U.S. at 227. But the MCA's facial distinction between citizens and noncitizens bears *no* relationship—not a narrowly tailored one or even a merely rational one—to any legitimate state interest: "[t]here is simply no reason why the government must subject aliens who are alleged to have participated in acts of terrorism to military commissions, but need not do so for citizens

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[10] Previously in this case, the government defended the MCA against Petitioner's equal protection challenge under a line of cases applying rational basis review to uphold federal laws distinguishing between citizens and noncitizens in connection with national immigration policy. See *Al Bahlul v. United States*, 767 F.3d 1, 75 (D.C. Cir. 2014) (Kavanaugh, J., concurring). To be sure, "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Demore v. Kim*, 538 U.S. 510, 521 (2003) (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)). But in those contexts, the classifications bear an obvious, necessary connection to the object of the government's activity. Congress clearly must take noncitizen status into account when regulating immigration, for instance, or when it is regulating activities that are "intimately related to the process of democratic self-government." *Bernal v. Fainter*, 467 U.S. 216, 220 (1984). To the extent that these cases constitute an exception to the rule prohibiting discrimination based on alienage, they do not apply here: the application of criminal justice is and must be blind to the citizenship of the accused. *Wong Wing*, 163 U.S. at 238. In any event, as discussed in the text, the MCA's distinction based on citizenship does not rest on even a rational connection to a legitimate government interest.

suspected of the same crimes." Katyal, *supra*, 59 Stan. L. Rev. at 1389.[11]

The Executive has argued that the military commissions authorized by the MCA "are an appropriate venue for trying detainees for violations of the laws of war" and "allow for the protection of sensitive sources and methods of intelligence-gathering; . . . for the safety and security of participants; and for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal courts." Pres. Barack Obama, Remarks by the President on National Security (May 21, 2009). But these considerations—protecting sensitive sources or intelligence, ensuring the safety of participants, and presenting evidence gathered from the battlefield—have nothing to do with the citizenship of the accused. Under the MCA, even when charged with the same crime, noncitizens may be tried before military commissions, while U.S. citizens are entitled to the full protections of Article III courts. As Representative Buyer put it, even if a citizen and a noncitizen are charged with participation in *the very same conspiracy*, "coconspirators could be tried in a military commission if they were an alien, but if that other coconspirator is an American citizen, they will be prosecuted under title 18." 152 Cong. Rec. at

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[11] The United Kingdom's highest court reached the same conclusion in *A and Others v. Sec'y of State for the Home Dep't*, [2004] UKHL 56. The law there in question, enacted shortly after 9/11, permitted the government to detain noncitizens indefinitely without trial on suspicion of links to terrorism, but the high court invalidated the law as impermissible discrimination. *Id.* ¶¶ 73, 85, 97, 139, 159, 189, 234, 240. As Baroness Hale put it, "if it is not necessary to lock up the nationals it cannot be necessary to lock up the foreigners." *Id.* ¶ 231.

H7,940 (Sept. 29, 2006). That is so even though prosecution of the American alleged conspirator would raise the same practical and evidentiary issues as those supposedly justifying his foreign co-conspirator's trial by military commission.

The irrationality of the MCA's distinction between citizens and noncitizens is further confirmed by many other actions the political branches have taken in the course of the so-called "war on terror." Congress did not differentiate between citizens and noncitizens when it passed the Authorization for the Use of Military Force ("AUMF") in the wake of the 9/11 attacks.[12] And the Executive has invoked the AUMF as the basis for detaining citizens and noncitizens alike as "enemy combatants." See *Hamdi*, 542 U.S. 507; *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005). See also, e.g., Alberto Gonzalez, U.S. Att'y Gen., *Remarks at the World Affairs Council of Pittsburgh on Stopping Terrorists Before They Strike: The Justice Department's Power of Prevention* (Aug. 16, 2006) (stating that "the threat of homegrown terrorist cells * * * may be as dangerous as groups like al Qaeda, if not more so"). Indeed, the Executive has asserted not only the right to *detain* U.S. citizens who are "enemy combatants" but, under certain circumstances, to target them for *killing*.[13]

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[12] The AUMF provided the President with the authority to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Pub. L. No. 107-40, 115 Stat. 224 (2001).

[13] *See Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 58 (D.D.C. 2014) ("Because Anwar Al-Aulaqi was a terrorist leader of al-Qa'ida in the Arabian Peninsula, the United States intentionally targeted

The government also previously contended that military necessity provides a rational basis for the MCA. See *Al Bahlul v. United States*, 767 F.3d 1, 75 (D.C. Cir. 2014) (Kavanaugh, J., concurring) (accepting government's argument that "'Congress had a vital national security interest in establishing a military forum in which to bring to justice foreign unlawful belligerents whose purpose it is to terrorize innocent U.S. citizens and to murder U.S. military personnel'"). But that is *ipse dixit*. Congress has the exact same interest in bringing American unlawful belligerents to justice as it does foreign ones. As this Court has recognized, "[a] citizen, no less than an alien, can be part of or supporting forces hostile to the United States or coalition partners and engaged in an armed conflict against the United States." *Hamdi*, 542 U.S. at 519.

The legitimate need to prosecute those who seek to terrorize innocents and murder U.S. military personnel cannot possibly justify singling out only *some*

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and killed him with a drone strike in Yemen on September 30, 2011. The missile also killed Samir Khan, who was riding in the same vehicle. Both men were U.S. citizens."); Pres. Barack Obama, Remarks by the President at the National Defense University (May 23, 2013) ("when a U.S. citizen goes abroad to wage war against America and is actively plotting to kill U.S. citizens, and when neither the United States, nor our partners are in a position to capture him before he carries out a plot, his citizenship should no more serve as a shield than a sniper shooting down on an innocent crowd should be protected from a SWAT team").

Amici stress that they are not endorsing or defending such "targeted killings" of U.S. citizens by the government. They cite these remarks solely to underscore that the classification drawn in the MCA cannot survive rational basis review, much less strict scrutiny.

of the persons accused of those crimes for trial in a different, and inferior, criminal justice system. "Equal Protection . . . is essentially a direction that all persons similarly situated should be treated alike." *Cleburne Living Ctr.*, 473 U.S. at 439. Absent a legitimate reason to believe that aliens pose a "special threat" not posed by similarly situated citizens, *id.* at 448, the MCA's classification between aliens and citizens cannot survive scrutiny.[14]

Had Congress acted to create separate tracks within the civilian court system for citizen and noncitizen criminal defendants—where, for instance, hearsay evidence and involuntary confessions were admissible against noncitizens only—that would unquestionably violate equal protection. Cf. *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring). But the MCA authorizes an identical partition between citizen and noncitizen defendants, requiring the former to be tried in Article III courts but permitting the latter to be relegated to the separate and

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[14] The argument that military commissions are necessary for national security also is belied by the government's own success rate in prosecuting noncitizens for terrorism-related offenses in the same Article III courts where citizens must be tried. See Dep't of Justice—National Security Div., *National Security Division Chart of Public/Unsealed Terrorism and Terrorism-Related Convictions* (Aug. 26, 2016), available at http://www.humanrightsfirst.org/sites/default/files/NSD-Terrorism-Related-Convictions.pdf (listing over 500 terrorism-related convictions in federal courts since 2001); Center on Law and Security, New York University School of Law, *Terrorist Trial Report Card: September 11, 2001–September 11, 2009*, at ii (Jan. 2010), http://www.lawandsecurity.org/wp-content/uploads/2011/09/02_TTRCFinalJan1422009.pdf (near-90% conviction rate for terror suspects, including both citizens and noncitizens, tried in federal court).

inferior military commissions. The distinction drawn in the MCA violates equal protection just the same.

C. The Court Should Not Defer To The Political Branches In The Name Of "National Security."

There are no doubt serious threats facing this country from terrorists and others who would do us harm. But the Court should consider with great caution the argument that the invidious discrimination embodied in the MCA can be justified as a response to such threats. The *amici* are all too aware what comes from unwarranted judicial deference to the political branches in the name of "national security."

In *Hirabayashi v. United States*, 320 U.S. 81 (1943), this Court considered whether "Congress and the Executive ha[d] constitutional authority to impose [a] curfew restriction" on those of Japanese ancestry. *Id.* at 91-92. The Court declined to "say that the war-making branches of the government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it." *Id.* at 99. And it further upheld the curfew's applicability only to those of Japanese ancestry, on the ground that "[t]he fact alone that attack on our shores was threatened by Japan rather than another enemy power set these citizens apart from others who have no particular associations with Japan." *Id.* at 101; see also *Yasui v. United States*, 320 U.S. 115 (1943) (sustaining conviction in a companion case to *Hirabayashi*).

In *Korematsu v. United States*, 323 U.S. 214 (1944), the Court considered the constitutionality of Civilian Exclusion Order No. 34, under which persons of Japanese descent were excluded from large areas of the country and interned in camps throughout the Western United States. Despite declaring that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," the Court once again demurred to the political branches. "In the light of the principles we announced in the *Hirabayashi* case," the Court held, "we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did." *Id.* at 216-18.

The Court in *Korematsu* took pains to offer assurances that it was not sanctioning bare racial hostility against the Japanese. "Korematsu was not excluded from the Military Area because of hostility to him or his race," the Court asserted. *Id.* at 223.

> He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.

Id. at 223-24. Despite these protestations, *Korematsu, Yasui*, and *Hirabayshi* have been widely condemned as shameful, and tragic, mistakes.[15] These infamous cases now stand principally "as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens"—and indeed all those to whom the Constitution's guarantees extend—"from the pet-

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[15] See, e.g., *Adarand*, 515 U.S. at 275 (Ginsburg, J., dissenting) ("[a] *Korematsu*-type classification * * * will never again survive scrutiny"); Dep't of Justice, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, May 20, 2011, https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases (recognizing that the Solicitor General who argued *Korematsu* misled the Court and relied on gross racial generalizations); Susan Kiyomi Serrano & Dale Minami, Korematsu v. United States: *A "Constant Caution" in a Time of Crisis*, 10 Asian L.J. 37, 41 (2003) (noting that *Hirabayashi*, *Yasui*, and *Korematsu* "have been intensely criticized for their blind acceptance of military declarations of proof, their embrace of racial stereotypes about Japanese Americans, and for the Supreme Court's abdication of its declared legal standard of heightened judicial responsibility"); David Cole, *Enemy Aliens*, 54 Stan. L. Rev. 953, 993 (2002) (stating that "history has vindicated dissenting Justice Frank Murphy's view in *Korematsu*"). As Professor Jamal Greene observed in 2011, "each of the last four nominees to receive a Supreme Court confirmation hearing, and five of the last six, stated either in live testimony or in their written questionnaires that *Korematsu* was either wrongly decided or * * * 'poorly reasoned.'" Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 398-99 (2011); see also Judge Neil M. Gorsuch, Responses to Questions of Senator Mazie K. Hirono, at 1 (2017), https://www.judiciary.senate.gov/imo/media/doc/Gorsuch%20Responses%20to%20Hirono.pdf (acknowledging that *Korematsu* does not have any precedential value).

ty fears and prejudices that are so easily aroused." *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

The MCA's facial distinction between citizens and noncitizens, like Civil Exclusion Order No. 34's "obvious racial discrimination" against those of Japanese descent, "deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment." *Korematsu*, 323 U.S. at 234-35 (Murphy, J., dissenting). Importantly, the MCA does not authorize the use of military commissions just for Guantanamo detainees like Petitioner or for non-U.S. citizens living and charged with wrongdoing outside of the United States. On the face of the Act, aliens lawfully within the United States could be swept into military commissions based on such charges as conspiracy and material support for terrorism that have until now been exclusively the province of Article III courts.

The Court should grant certiorari to establish that the Constitution prohibits such distinctions based on citizenship, even in times of war or in the name of national security. Otherwise, in Justice Jackson's words, the notion that the government may relegate noncitizens to an inferior judicial system will surely "lie[] about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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