No. 08-368

IN THE

Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

—v.—

COMMANDER JOHN PUCCIARELLI,
U.S.N., CONSOLIDATED NAVAL BRIG.,

Respondent.

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

BRIEF FOR *AMICI CURIAE* PROFESSORS OF CONSTITUTIONAL LAW AND OF THE FEDERAL COURTS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

DANIEL F. KOLB
Counsel of Record
REBECCA WINTERS
JOSHUA D. LISTON
MOLLY SHIMA
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

Attorneys for Amici Curiae

Of Counsel:

STEPHEN I. VLADECK
4801 Massachusetts Avenue, NW
Washington, D.C. 20016

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in Appendix A are professors of constitutional law and of the federal courts who hold divergent views on many issues, including different views as to the best and most appropriate ways to resolve the important questions presented by this case. Although they do hold to different views, *amici* nevertheless come together here to urge the Court to grant the Petition for a Writ of Certiorari so that the Court may address and decide as soon as practicable the significant and unsettled questions presented. *Amici* uniformly share the belief that it is in the nation's interest that the Court do so.

The Court has to date had only a few occasions to consider the application of constitutional principles to the exigencies of the war on terrorism presently being waged by the United States. And in the few cases this Court has decided, it has not fully addressed the basic national security issues and questions as to individual rights presented here. Until the Court does address those issues, the significant disagreements among judges in the lower federal courts on those important questions will continue. That will leave the Government and individuals alike without guidance as to the limits of

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[1] The parties have received timely notice of *amici*'s intent to file and have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

the authority of the Executive to detain United States citizens and lawful aliens as enemy combatants within the territorial United States. They will be left without such guidance while the war on terrorism and the detention of citizens and lawful aliens as enemy combatants continue.

SUMMARY OF ARGUMENT

The decisions of the courts below raise significant issues as to the proper scope of the Executive's domestic military detention authority under both the Authorization for Use of Military Force (the "AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001) and the United States Constitution. They also implicate the individual liberties of anyone potentially falling within the Government's claimed detention authority. In its few prior decisions related to the war on terrorism, the Court has not yet addressed these crucial questions of Executive authority and individual liberty, and its guidance on those issues is needed. Such guidance is necessary both to afford the Government guideposts as to the appropriate scope of its detention authority and to provide it with the option to seek additional legislation if needed. A decision of the Court is likewise essential for Petitioner to determine whether his indefinite detention without trial is warranted and to avoid prejudice should there ultimately be further proceedings on remand to the district court. The guidance is also necessary for those persons, citizens and non-citizens alike, who the Government might target for detention, to assure that their rights to individual liberty are protected, consistent with the need to address the threat posed by international terrorism. Such guidance is needed

all the more because the decision below of the Fourth Circuit is inconsistent with an earlier holding of the Second Circuit that enemy combatant status is not appropriate on similar facts.

ARGUMENT

I. This Case Implicates Both Important National Security and Individual Liberty Interests

Much of this Court's precedent defining the reach of Executive power in times of war emerged during the course, or in the wake, of traditionally fought conflicts, such as the Civil War and World War II. As evidenced here, the attacks of September 11, 2001 and the Government's response have raised substantial new questions concerning the relationship between the Executive's ability to conduct a non-traditional war against a terrorist organization not under the control of another sovereign, such as al Qaeda, and this nation's historical commitment to basic individual rights.

A. National Security

The September 11, 2001 attacks made it overwhelmingly clear that "we live in an age where thousands of human beings can be slaughtered by a single action and where large swaths of urban landscape can be leveled in an instant. If the past was a time of danger for this country, it remains no more than prologue for the threats the future holds." *Al-Marri v. Pucciarelli*, 534 F.3d 213, 293 (4th Cir. 2008) (Wilkinson, J., concurring in part and dissenting in part); *see Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229, 2294 (2008) (Scalia, J.,

dissenting) ("[O]ne need only walk about buttressed and barricaded Washington, or board a plane anywhere in the country, to know that the threat is a serious one."). In response to these "acts of treacherous violence," Congress enacted the AUMF, which authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks" or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." AUMF § 2(a), 115 Stat. at 224. The purpose of the legislation was, and remains, twofold—to punish those involved in the September 11 attacks and to prevent similar catastrophic attacks in the future. *See id.*

One incident of the war on terrorism has been the potentially indefinite detention of those considered by the Executive to be enemy combatants in that war. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality) ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942))). "The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again." *Hamdi*, 542 U.S. at 518 (citing Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 Int'l Rev. Red Cross 571, 572 (2002)). In *Hamdi*, this Court found that such domestic military detention is authorized for citizens captured on a battlefield outside the territorial United States whom the Government alleges were

"part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and "who engaged in armed conflict." *Hamdi*, 542 U.S. at 516 (internal quotation marks omitted). However, this Court has not, to date, considered the circumstances, if any, under which domestic detention is proper for other categories of individuals who are purported enemy combatants, including those lawfully within the United States at the time of their arrest. Granting certiorari here as to that question would permit the Court to provide necessary guidance that could have a significant impact on vital questions of national security.

Specifically, this case presents the Court with the opportunity to provide guidance on the scope of detention authority provided to the President by the AUMF and the Constitution to incarcerate and detain United States citizens and lawful resident aliens as enemy combatants, and on how the substantive law of war should be applied domestically in view of the "realities" of modern warfare against global terrorist organizations. This case raises questions about enemy combatant classification, including whether it is essential that an individual have taken up arms before he can be classified as an enemy combatant and whether the historical practice of designating as enemy combatants only those captured while fighting for the military arm of a nation with which the United States is at war should or should not be extended to encompass citizens or lawfully resident aliens alleged to be members of or associated with international terrorist organizations.

B. Individual Liberty

At the same time that it presents such significant national security issues, the Petition implicates the most basic of civil liberties: the right to be free from confinement and the right to basic procedural protections guaranteed by the Constitution. *See Hamdi*, 542 U.S. at 554–55 (Scalia, J., dissenting) ("The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."); *Boumediene*, 128 S. Ct. at 2246–47 ("[E]very person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful . . . ." (quoting 3 Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 328 (2d ed. 1876))); *see also Al-Marri*, 534 F.3d at 217 (Motz, J., concurring in the judgment) ("For over two centuries of growth and struggle, peace and war, the Constitution has secured our freedom through the guarantee that, in the United States, no one will be deprived of liberty without due process of law."); *id.* at 295 (Wilkinson, J., concurring in part and dissenting in part) ("The military detention of American citizens or aliens lawfully within this country is a huge step.").[2] It presents

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[2] That this Petition may concern the detention of one, uniquely situated individual has no bearing on its importance. The Fourth Circuit opinions concerning the scope of Executive detention pertain not just to Petitioner, but to every resident alien and citizen in this country. As Blackstone wrote:

> Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest,

(...continued)

squarely the question of whether and, if so, under what circumstances, United States citizens and lawful resident aliens may properly be taken into custody on United States soil and may be deprived of liberty without criminal charge or trial based upon the Executive's assertion that they are enemy combatants. The resolution of those questions implicates the right of individuals to be free from indefinite military detention where there are functional courts that are fully competent to adjudicate any criminal case that might be brought against them. Just as there is a vital interest in protection against terrorist attacks, there is a vital national interest in preserving basic constitutional rights.

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> magistrate to imprison arbitrarily whomever he or his officers thought proper . . . there would soon be an end of all other rights and immunities. . . . To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.

1 William Blackstone, *Commentaries on the Laws of England* 131–33 (1765), *quoted in Hamdi*, 542 U.S. at 555 (Scalia, J., dissenting).

Amici submit that such questions as to national security and individual liberties should not be left undecided by this Court during the ongoing war on terrorism.

II. The Supreme Court's Decisions in Post-9/11 Detention Cases—and the Decisions of the Lower Courts—Have Left These Questions Unresolved

Rather than resolving these issues, this Court's prior pronouncements on related questions have sparked further disagreements among the lower courts.

A. *Hamdi v. Rumsfeld*

In 2004, the Court in *Hamdi* confronted the questions of whether the Executive has the authority to detain a United States citizen captured on a foreign battlefield and designated an enemy combatant by virtue of that citizen's participation in active combat against the United States on behalf of the Taliban, and, if so, what process he must be afforded in challenging his enemy combatant designation. *Hamdi*, 542 U.S. at 516, 524. A plurality of the Court concluded that, by enacting the AUMF, Congress had clearly authorized the President to designate as an enemy combatant, and to detain in the United States, individuals in the "the limited category" of persons like Hamdi—U.S. citizens affiliated with the Taliban and captured on the battlefield. *Id.* at 518. The Court concluded that such authorization was fully consistent with the law of war, which provides the framework for the Court's

analysis of Congress's grant of detention authority. *Id.* at 521.

The plurality also considered Hamdi's argument that the prospect of indefinite detention that he faced was not authorized by Congress. Although the Court was not unsympathetic, *see id.* at 520 ("We recognize that the national security underpinnings of the 'war on terror,' although crucially important, are broad and malleable" and that "[t]he prospect Hamdi raises is therefore not farfetched."), it concluded that such a prospect could provide no basis for relief, as the United States was, at that time, actively involved in combat against the Taliban. But the Court added that, if a particular conflict was so unlike those on which law of war principles are based, reliance on traditional principles of war could become impracticable. *Id.* at 521.

In holding that Hamdi's detention was justified, the *Hamdi* plurality considered the long-recognized principle that United States citizens not in the military may not be subjected to military jurisdiction in a state "where the courts are open and their process unobstructed." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866). It concluded that such a principle was limited by this Court's opinion in *Ex parte Quirin*, which held that an individual who claimed to be a United States citizen and who was captured in this country in the act of sabotage on behalf of the Nazi war effort could, consistent with the law of war, be subject to trial and punishment by a military tribunal, rather than a court. *See Quirin*, 317 U.S. at 37–38 ("Citizens who associate themselves with the military arm of the enemy

government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the . . . law of war."); *Hamdi*, 542 U.S. at 522–23.[3] According to the *Hamdi* plurality, the *Milligan* Court's requirement that the petitioner be afforded a criminal, rather than military, trial was distinguishable because "repeated explanations that Milligan was not a

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[3] In dissent, Justice Scalia criticized the plurality's reliance on *Quirin* (a case he characterized as "not this Court's finest hour," *Hamdi*, 542 U.S. at 569 (Scalia, J., dissenting)), arguing that the petitioners in *Quirin*, unlike Hamdi, essentially *conceded* that they were enemy combatants and that the Court based its holding explicitly upon that concession. *Id.* at 571 (Scalia, J., dissenting). According to Justice Scalia, *Quirin* is thus inapposite to cases like Hamdi's (and Petitioner's), where the petitioner actively contests his enemy status designation and resultant detention. Justice Scalia, joined by Justice Stevens, went on to conclude that Hamdi's detention violated the Suspension Clause because Congress did not expressly suspend the writ of habeas corpus when it passed the AUMF, and in fact whether Congress could do so constitutionally in the wake of the September 11 attacks was still an open question. *Id.* at 574 (Scalia, J., dissenting). Justice Scalia also argued that detention for purposes of trial by military commission is categorically different from detention without trial, which, he suggested the Suspension Clause precluded for U.S. citizens detained within the territorial United States. *See id.* at 574–75 (Scalia, J., dissenting) ("The Suspension Clause . . . would be a sham if it could be evaded by congressional prescription of requirements other than the common-law requirement of committal for criminal prosecution that render the writ, though available, unavailing. If the Suspension Clause does not guarantee the citizen that he will either be tried or released . . . ; if it merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed.").

prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict . . . ." *Id.* at 522.[4]

While settling those questions, the *Hamdi* Court refrained from deciding whether the AUMF authorizes the detention of anyone *outside* the "limited category" considered in *Hamdi.* Left undecided was the vital question here of whether those United States citizens or lawful resident aliens who are alleged to be members of al Qaeda sent to the United States to conduct terrorist attacks, but who have not taken up arms against United States troops, may be held without trial as enemy combatants. The Court did not determine whether the law of war would permit classification of such persons as enemy combatants in the first instance, and if not, whether Congress can statutorily expand the definition of enemy combatant beyond that previously recognized in the context of traditional warfare. Also left open was the question of whether the prospect of an endless conflict with al Qaeda—a

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[4] The *Hamdi* Court also considered what process was due a U.S. citizen who challenged his enemy-combatant designation. It instructed that the alleged enemy combatant must receive notice of and a "fair opportunity" to rebut the Government's factual assertions before a neutral decision maker, that the statutory habeas procedure provides "a skeletal outline of the procedures to be afforded a petitioner," and finally that whatever the process used, it must be carried out with "caution" and be "both prudent and incremental." *Id.* at 525, 533, 539; *see also Al-Marri*, 534 F.3d at 291 (Williams, J., concurring in part and dissenting in part).

conflict that the Government in *Hamdi* recognized "is unlikely to end with a formal cease-fire agreement," *id.* at 520—alters the traditional understanding that military detention can last for the duration of active hostilities.[5]

B. *Padilla I*

On the same day it decided *Hamdi*, the Court issued its opinion in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) ("*Padilla I*"). Like the petitioner in *Hamdi*, Jose Padilla was a United States citizen designated as an enemy combatant; however Padilla was apprehended not on a foreign battlefield, but after his legal re-entry into the United States, and was initially detained as a material witness in connection with the September 11 terrorist attacks. A majority of the Court reached only the jurisdictional question in the case, leaving for another day the critical issue of whether the AUMF provides the authorization required by the Non-Detention Act, 18 U.S.C. § 4001(a) (2000), for the detention of a United States citizen who is apprehended on United States soil. *Padilla I*, 542 U.S. at 430; *see also Padilla v. Rumsfeld*, 352 F.3d 695, 724 (2d Cir. 2003). Four dissenting Justices (Stevens, Souter, Ginsburg and Breyer, JJ.) would

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[5] Jason Straziuso, Associated Press, *Taliban, Afghan Officials Meet in Saudi Arabia*, Wash. Post, Oct. 6, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2006/10/19/AR2006101900835.html (reporting discussions between Taliban and Afghan officials and the Taliban's efforts to distinguish itself from al Qaeda, and noting that "[t]he U.S. and other Western countries will never accept a peace deal with al Qaida, the group behind 9/11").

have reached the merits and expressly declared that "the Non-Detention Act . . . prohibits—and the [AUMF] . . . does not authorize—the protracted, incommunicado detention of American citizens arrested in the United States." *Padilla I*, 542 U.S. at 464 n.8 (Stevens, J., dissenting).

Amici submit that those vital issues left undecided in *Hamdi* and *Padilla I* should now be addressed by the Court for the good of the nation and its citizens and those aliens lawfully resident here. As the multiple decisions by the en banc Fourth Circuit below suggest, these questions have divided—and will continue to divide—even the most thoughtful jurists until this Court has handed down its own decision.

C. The Decision Below

In its decision below, the Fourth Circuit considered en banc the questions left open by this Court. Its resulting opinions offer a thoughtful discussion of all issues but fall well short of the clear guidance that is needed from this Court on such important questions.

Five of the nine sitting judges held that the AUMF authorized the President to detain Petitioner if the allegations against him are true[6] and five

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[6] In so holding, the en banc panel reversed the judgment of the three-judge panel that originally heard the appeal. That panel had concluded that Petitioner's detention was improper because (1) the law of war is defined by international law, which permits detention only of those who act on behalf of an enemy nation; and (2) the USA PATRIOT Act's explicit authorization of detention pending deportation or trial of (...continued)

judges held that, assuming that Congress had authorized Petitioner's detention, he has nevertheless been afforded insufficient process.[7] *Al-Marri*, 534 F.3d at 216 (per curiam).

Illustrating the difficulty of the issues presented and the need for this Court's guidance, Judge Motz's concurrence in the judgment adopted two guiding principles: (1) the courts look to law-of-war principles to determine who fits within the legal category of enemy combatant; and (2) following the law of war, *Hamdi* and *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005) rest enemy combatant status on affiliation with the military arm of an enemy nation. *Al-Marri*, 534 F.3d at 231 (Motz, J., concurring in the judgment). Following these principles, Judge Motz concluded that neither the AUMF nor the Constitution permit the indefinite military detention of Petitioner.[8] At the same time, Judges Williams and Wilkinson found the opposite, that the AUMF

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individuals captured in the United States and suspected of terrorist activity suggests that congressional silence on domestic detention in the AUMF should be read as a restriction of the Executive detention authority. *Al-Marri v. Wright*, 487 F.3d 160, 184–85, 189–90 (4th Cir. 2007) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring)).

[7] Judge Traxler was the only judge in the majority on both holdings.

[8] Judge Gregory wrote separately to provide historical context and underscore that a person detained pursuant to the AUMF is entitled to a "*determinate* level of due process to justify denial of his liberty." *Al-Marri*, 534 F.3d at 277 (Gregory, J., concurring in the judgment).

fully authorizes Petitioner's detention. In doing so, Judge Williams distilled from *Hamdi* and *Quirin* a definition of "enemy combatant" as one who "attempts or engages in belligerent acts against the United States, either domestically or in a foreign combat zone . . . on behalf of an enemy force." *Id.* at 285 (Williams, J., concurring in part and dissenting in part). Because Judge Williams concluded that the AUMF authorized the use of force against organizations as well as nation-states, her definition of enemy combatant "requires neither an affiliation with an enemy nation nor capture on a battlefield." *Id.* at 243 (Motz, J., concurring in the judgment); *see also id.* at 286 (Williams, J., concurring in part and dissenting in part). As still another view, Judge Wilkinson consulted the traditional law of war, but in recognition of the changed circumstances of modern warfare, identified three criteria for making the enemy combatant determination. He defined an enemy combatant as "a person who knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering military goals of an enemy nation or organization." *Id.* at 325 (Wilkinson, J., concurring in part and dissenting in part).

Compounding the uncertainty, the Fourth Circuit's holdings in *Padilla v. Hanft* and *Al-Marri* are at odds with the Second Circuit's analysis in *Padilla v. Rumsfeld.* On the one hand, the Fourth Circuit has interpreted the AUMF as having authorized the military detention of a United States citizen after lawful re-entry into the United States who was alleged, among other things, to have taken up arms against the United States in Afghanistan, *Padilla v. Hanft*, 423 F.3d at 397, as well as the

military detention of a lawful United States resident accused of acting as an al Qaeda sleeper agent in the United States. *Al-Marri*, 534 F.3d at 216 (per curiam). On the other hand, the Second Circuit has held that the AUMF fails to provide the express authorization required by the Non-Detention Act for the military detention of a United States citizen seized in the United States and accused of engaging in "war-like acts" against the United States and associating with al Qaeda. *Padilla v. Rumsfeld*, 352 F.3d at 724.

Plainly, the uncertainty resulting from the multiple Fourth Circuit opinions and the differing approaches between Circuits should be resolved. Whether incarceration and indefinite detention of a United States citizen or lawful resident alien is sanctioned under the law of the United States should not turn on whether the detainee was held in Virginia or New York.

III. This Case Should Be Heard Now

Because the further proceedings envisioned by the Fourth Circuit on remand would only delay final resolution by this Court of the important issues presented here, *amici* urge that the Court take the case now.[9]

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[9] A different configuration of judges, with Judge Traxler as the only member of both majorities, narrowly determined that the process afforded Petitioner in the habeas proceeding before the district court was insufficient because *Hamdi* "place[s] the burden on the Government to make an initial showing that normal due process protections are unduly burdensome and that the Rapp declaration is 'the most reliable (...continued)

This Court has long held that where the lower court has decided a significant and clear-cut issue of law, certiorari may be granted, even where the appeal may be technically interlocutory. This is particularly true where the decision, left unreviewed, would have immediate consequences for the petitioner, *see, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 975–76 (1997), or where the Court's intercession may serve to finally resolve the litigation. *See, e.g.*, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164 (1994).

There can be no doubt as to the significance of the issues of law presented. The case raises questions that are "of profound importance to the Nation," and as to which decision should not be delayed. *Padilla I*, 542 U.S. at 455 (Stevens, J., dissenting); *see also Quirin*, 317 U.S. at 19 ("In view of the public importance of the questions raised by their petitions and of the 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, and because in our opinion the public interest required that we consider and decide those

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(continued...)

available evidence,' supporting the Government's allegations before it may order al-Marri's military detention." *Al-Marri*, 534 F.3d at 253 (Motz, J., concurring in the judgment). The majority remanded for reconsideration of the proper level of process Petitioner should receive in challenging his enemy combatant status under the particular circumstances of his case. Plainly, this question need not be reached at all if this Court holds that Petitioner's detention was unlawful in this first instance.

questions without any avoidable delay . . . ."). Among other consequences, if this Court determines that the detention of an individual in Petitioner's circumstances is inconsistent with the AUMF, the law of war, or the U.S. Constitution, the military may lack the ability to detain members of al Qaeda who lawfully enter the United States with the intention to engage in terrorist acts. In response, Congress might seek to remedy whatever defects the Court identifies—by, for example, amending the AUMF, *see Al-Marri*, 534 F.3d at 239 (Motz, J., concurring in the judgment).

The Court's decision as to the scope of the Executive's domestic detention authority also could have significant consequences for members of the United States military, including non-combatants, as well as for civilians abroad. To the extent that the law of war and its core conceptions of the battlefield and combatancy are clarified to embrace modern-day threats, it will better enable the Executive and the Armed Forces to implement policies that respect the legal limits imposed by Congress and the Constitution.[10] Moreover, in the absence of greater clarity, United States citizens abroad who have not taken up arms but are members of organizations to which foreign governments are hostile could be detained in foreign nations indefinitely. As this Court emphasized in *Hamdi*, "the risk of erroneous

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[10] *See Munaf v. Geren*, 553 U.S. ___, 128 S. Ct. 2207, 2220 (2008) ("Given that the present cases involve habeas petitions that implicate sensitive foreign policy issues in the context of ongoing military operations, reaching the merits is the wisest course.").

deprivation of a citizen's liberty in the absence of sufficient process here is very real." *See Hamdi*, 542 U.S. at 530 (citing Brief for AmeriCares et al. as *Amici Curiae* 13–22 (noting the ways in which "[t]he nature of humanitarian relief work and journalism presents significant risk of mistaken military detentions"); *see also Al-Marri*, 534 F.3d at 236 (Motz, J., concurring in the judgment) ("[A] rule permitting indefinite military detention of members of a 'terrorist' organization as enemy combatants . . . could well endanger citizens of this country or our allies. For example, a nation could employ this rule to treat American members of an environmental group, which it regards as a terrorist organization, as enemy combatants . . . .").

A prompt decision by this Court is also of great importance to Petitioner, both because he has been detained without trial for over five years, and because he has been classified as an enemy combatant and the Executive may well take the position that, absent a formal ceasefire with al Qaeda, such classification entitles it to detain him for life. *See Hamdi*, 542 U.S. at 520.[11]

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[11] This case thus is entirely unlike that of *Padilla v. Hanft*, 547 U.S. 1062 (2006) ("*Padilla II*") (mem.), where the Court denied certiorari. There, the petitioner sought this Court's review of an interlocutory decision of the Fourth Circuit reversing the district court's grant of his habeas petition, notwithstanding the fact that the Government directed that Padilla be released from military custody and transferred to the control of the Attorney General to face criminal charges, which effectively provided him the relief he sought in his habeas petition. In denying Padilla's petition on prudential grounds, this Court noted that "Padilla's current custody is part of the

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Although not focused on the domestic detention of enemy combatants, in *Boumediene*, this Court found that the liberty interest at stake for an enemy combatant being detained weighs heavily against waiting for the results of a remand to lower courts on the issue of adequacy of process. *Boumediene*, 128 S. Ct. at 2263. A majority of the Court concluded that "the costs of further delay substantially outweigh any benefits of remanding," *id.*, though it left the issue of whether the President has authority to detain Guantanamo prisoners for the district courts to decide in the first instance. *Id.* at 2276.

If this Court were to elect to await the results of the remand, Petitioner could also be substantially prejudiced if forced to participate before the district court in a habeas proceeding that could later be found to be constitutionally insufficient. First, if subject to the hearing prescribed by Judge Traxler—a process that has been described as one that "will leave the district court with more questions than answers," *Al-Marri*, 534 F.3d at 277 (Gregory, J., concurring in the judgment)—Petitioner's chance of

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(continued...)

relief he sought, and that its lawfulness is uncontested." *Id.* *But see id.* (Ginsburg, J., dissenting) (opining that the case is not moot and that the scope of the President's domestic detention authority "is a question the Court heard, and should have decided, two years ago. Nothing the Government has yet done purports to retract the assertion of Executive power Padilla protests."). In sharp contrast with Padilla, the only "relief" Petitioner has been afforded is the possibility that on remand he will receive some additional process with which to challenge his enemy combatant determination.

being designated an enemy combatant is naturally greater than it would be if he were provided the full panoply of procedural protections associated with the truth-seeking process of a criminal trial—usually basic protections such as the right to cross examine, limitations on the use of hearsay, and trial by jury. And, indeed, even if these procedural obstacles could be surmounted, and Petitioner were to prevail in the habeas proceeding on remand, he could be prejudiced. As it did with Padilla, the Government could elect to prosecute Petitioner in a federal court, except that unlike the ordinary trial, the Government would have the benefit of a preview of Petitioner's defense, based on the evidence adduced during the course of his habeas process.

A further compelling reason for the Court to take the case now is that it could then address the central question of individual liberty posed here for all United States citizens and lawful resident aliens: will the United States Government continue to be free to detain citizens or lawful aliens as enemy combatants without trial based on its unreviewed decision that such individuals are enemy combatants? If the Executive has such authority, this Court should so decide and provide guidance as to its limits. But, if such authority is not supportable under statute or the Constitution, it should be denied to the Government as a protection of individual liberty.

CONCLUSION

The Petition should be granted because the issues presented by this case are of great importance to the Nation and to Petitioner, and they can only be resolved by this Court.

Respectfully submitted,

DANIEL F. KOLB
Counsel of Record
REBECCA WINTERS
JOSHUA D. LISTON
MOLLY SHIMA
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017
(212) 450-4000

Attorneys for Amici Curiae

Of Counsel:

STEPHEN I. VLADECK
4801 Massachusetts Avenue, NW
Washington, D.C. 20016

OCTOBER 2008

APPENDIX A LIST OF *AMICI CURIAE* PROFESSORS OF CONSTITUTIONAL LAW AND THE FEDERAL COURTS*

Bruce Ackerman
Sterling Professor of Law and Political Science
Yale University

Erwin Chemerinsky
Dean and Distinguished Professor of Law
University of California, Irvine
School of Law

Sarah H. Cleveland
Louis Henkin Professor of Human and
Constitutional Rights
Faculty Co-Director, Human Rights Institute
Columbia Law School

Caprice L. Roberts
Associate Dean of Faculty Research & Development
and Professor of Law
West Virginia University College of Law

Andrew Siegel
Associate Professor of Law
Seattle University School of Law

Stephen I. Vladeck
Associate Professor of Law
American University Washington College of Law

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* Affiliations of *amici* are listed for identification purposes only.