

No. 05-533

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IN THE  
*Supreme Court of the United States*

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JOSE PADILLA,  
*Petitioner,*

v.

COMMANDER C.T. HANFT, U.S.N.,  
COMMANDER, CONSOLIDATED NAVAL BRIG,  
*Respondent.*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Fourth Circuit**

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**BRIEF OF WASHINGTON LEGAL FOUNDATION  
AND ALLIED EDUCATIONAL FOUNDATION  
AS *AMICI CURIAE* IN OPPOSITION TO PETITION**

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Date: December 16, 2005

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## QUESTIONS PRESENTED

1. Does the military have the power to detain as an “enemy combatant,” for the duration of hostilities, an American citizen who has taken up arms in support of armies fighting overseas against the military forces of the United States and its allies in on-going hostilities, where the citizen was not taken into custody until after his return to the United States?
2. Did Congress authorize the continued detention of alleged U.S.-citizen enemy combatants such as Petitioner when it adopted the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)?
3. Would the Court’s exercise of jurisdiction over this case be inappropriate in light of the President’s November 20, 2005 order directing Petitioner’s release from military custody and his transfer to the control of the Justice Department to face criminal charges (set forth in a November 17, 2005 grand jury indictment) that he, *inter alia*, conspired to murder, maim, and kidnap individuals outside the United States?

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**BRIEF OF WASHINGTON LEGAL FOUNDATION  
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**INTERESTS OF *AMICI CURIAE***

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with supporters in all 50 states.<sup>1</sup> WLF devotes a substantial portion of its resources to promoting America's security. To that end, WLF has appeared before this Court and other federal courts to ensure that the federal government possesses the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir.), *cert. granted*, \_\_\_ U.S. \_\_\_, 74 U.S.L.W. 3287 (Nov. 7, 2005); *Al Odah v. United States*, No. 05-5064 (D.C. Cir., dec. pending). WLF also filed *amicus curiae* briefs in the U.S. Court of Appeals for the Second Circuit and in the court below when Petitioner's habeas corpus petitions were before those courts. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004); *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), Pet. App. 1a-25a.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on national security-related issues on a number of occasions.

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

*Amici* fully concur with the Court's numerous pronouncements that the judiciary should show significant deference to the judgments of the political branches with respect to foreign policy and national security issues. *Amici* are concerned that the federal courts not unnecessarily involve themselves in such issues – particularly when, as here, the Executive Branch no longer is pursuing the policy being challenged.

*Amici* are filing this brief with the consent of all parties. Letters of consent have been lodged with the Clerk.

### **STATEMENT OF THE CASE**

Petitioner Jose Padilla was taken into custody by the federal government in Chicago in May 2002 while he was attempting to re-enter the country on a commercial flight. On June 9, 2002, President George W. Bush issued an order designating Padilla an "enemy combatant" and directing that he be transferred to the control of the military. The President's order determined that Mr. Padilla "is closely associated with al Qaeda, an international terrorist organization with which the United States is at war," that he had "engaged in conduct that constituted hostile and war-like acts," and that he "represents a continuing, present and grave danger to the national security of the United States, and detention of Mr. Padilla is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States." Padilla, a U.S. citizen, has been detained since June 2002 at a military facility in South Carolina.

On November 17, 2005, Padilla was indicted by a federal grand jury in Florida; the criminal charges lodged against him include conspiring to murder, main, and kidnap individuals outside the United States, and providing material support to terrorists. On November 20, 2005, President Bush issued a memorandum that superseded the June 9, 2002 order. The new

memorandum directed that Padilla be released from military custody and turned over to the control of the Attorney General to face the new criminal charges; it provided that once the transfer takes place, the military's authority to detain Padilla "shall cease." That transfer is likely to take place in the very near future, as soon as the U.S. Court of Appeals for the Fourth Circuit approves it.

A principal basis for Padilla's military detention was his active participation in armed resistance to U.S. and allied forces in Afghanistan, a resistance that continues to this day. According to Respondent C.T. Hanft (Padilla's immediate custodian for so long as he remains in military custody), Padilla's hostile actions spanned a period of two years. In the summer of 2000, Padilla traveled to Afghanistan where, in July, he applied to al Qaeda for jihad-related military training. *See* Declaration of Jeffrey N. Rapp ("Rapp Decl."), ¶ 8.<sup>2</sup> In September and October of 2000, he received military training at an al Qaeda-affiliated training camp in Afghanistan. *Id.* For three months in late 2000, he served military duty, guarding a Taliban outpost north of Kabul; while doing so, he was armed with a Kalashnikov assault rifle. *Id.*

While in Afghanistan and Pakistan, Padilla plotted and trained for two separate missions designed to kill American civilians. In early 2002, Padilla plotted with a senior Osama bin Laden lieutenant regarding terrorist operations involving the detonation of explosive devices in the United States. *Id.*, ¶ 10. In furtherance of those plans, Padilla conducted research

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<sup>2</sup> For purposes of these summary judgment proceedings, the Court should construe the facts – as did the court below – in the light most favorable to the federal government. *Bishop v. Wood*, 426 U.S. 341, 347 (1976). Excerpts of the Rapp Declaration are included in the Petition Appendix ("Pet. App.") at 61a-62a.

on construction of an atomic bomb at an al Qaeda safe house in Pakistan. *Id.*

Padilla also plotted to blow up apartment buildings in the United States, a task he accepted in the summer of 2001. *Id.*, ¶ 11. In furtherance of those plans, that summer Padilla underwent explosives training in Kandahar. *Id.* The apartment building plot was revived in March 2002 while Padilla was in Pakistan. *Id.*, ¶ 12. Pursuant to the plot, Padilla underwent further training, then accepted \$15,000 to assist in carrying out his mission and departed for the United States. *Id.* At the time of his capture in Chicago in May 2002, “Padilla was an operative of the al Qaeda terrorist organization with which the United States is at war.” *Id.*, ¶ 13.

Padilla was staying at an al Qaeda safehouse in the Kandahar vicinity at and following the time of al Qaeda’s September 11, 2001 attacks on the United States. *Id.*, ¶ 9. After the U.S. launched combat operations against al Qaeda and the Taliban in Afghanistan, Padilla and other al Qaeda operatives “began moving from safehouse to safehouse in an effort to avoid being bombed or captured by U.S. or coalition forces.” *Id.* As al Qaeda’s military situation deteriorated, Padilla – armed with a rifle and accompanied by other al Qaeda operatives – began moving toward the Pakistan border. *Id.*, ¶ 10. As the Rapp Declaration pointedly notes, “Padilla was thus armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States and its coalition partners.” *Id.* Padilla and other al Qaeda operatives, with the assistance Taliban escorts, eventually made their way into Pakistan where, as noted above, Padilla met with other al Qaeda operatives to resume their plotting against American targets. *Id.*

Following dismissal of his initial habeas corpus petition on jurisdictional grounds,<sup>3</sup> Padilla filed this petition in U.S. District Court for the District of South Carolina in July 2004. The petition alleged that Padilla's detention without criminal charges violated his rights under the U.S. Constitution and 18 U.S.C. § 4001(a). The petition also alleged that, under the Fifth Amendment's Due Process Clause, he was entitled to a hearing at which he could contest the factual bases for the government's determination that he was an enemy combatant. Padilla subsequently moved for summary judgment on the issue of the President's authority to detain him without criminal charges.

In February 2005, the district court granted Padilla's summary judgment motion and directed Commander Hanft to release Padilla within 45 days. Pet. App. 26a-54a. The court ruled that under the U.S. Constitution, "the detention of a United States citizen by the military is disallowed without explicit Congressional authorization." *Id.* 45a. The court ruled that the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), did not provide the

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<sup>3</sup> Padilla filed his initial petition in the U.S. District Court for the Southern District of New York. In June 2004, this Court dismissed the petition on jurisdictional grounds, ruling that New York federal courts lacked jurisdiction because Padilla was being detained in South Carolina, not New York. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). That ruling had the effect of vacating all decisions that had been rendered in the case. During the course of those vacated New York proceedings, four federal judges split evenly on the question of the President's authority to detain American citizens such as Padilla as enemy combatants. Two of those judges stated that the President lacks such authority, *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) (Pooler and Parker, JJ.); and the other two judges stated that the President possesses the requisite authority, *id.* at 726 (Wesley, J., concurring in part, dissenting in part); *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (Mukasey, J.).

required authorization, at least with respect to those taken into custody in the United States. The court added, “Of course, if appropriate, the Government can bring criminal charges against Petitioner or it can hold him as a material witness.” *Id.* 54a n.14.

On appeal, the U.S. Court of Appeals for the Fourth Circuit reversed the grant of summary judgment and remanded for further proceedings. *Id.* 1a-23a. The appeals court unanimously concluded, based on the evidence put forward by Hanft in opposition to the summary judgment motion, that the AUMF provided the President with the requisite authority to detain Padilla as an enemy combatant. *Id.* 7a-8a & n.1. The court held that its conclusion was mandated by *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), a decision the court deemed factually indistinguishable in all material respects. The court explained:

As the AUMF authorized Hamdi’s detention by the President, so also does it authorize Padilla’s detention. Under the facts as presented here, Padilla unquestionably qualifies as an “enemy combatant” as that term was defined for purposes of the controlling opinion in *Hamdi*. Indeed, under the definition of “enemy combatant” employed in *Hamdi*, we can discern no difference in principle between Hamdi and Padilla.

*Id.* 11a-12a.

The court rejected Padilla’s claim that, although both he and Hamdi “stood alongside Taliban forces in Afghanistan,” his case was distinguishable because Hamdi was captured on a foreign battlefield, while he managed to escape that battlefield and return to the United States before being captured. *Id.* 14a. The court noted that nowhere in its framing

of the “narrow question” presented did the *Hamdi* plurality “even mention the locus of capture.” *Id.* 15a. The court held that the federal government’s allegations:

[U]nquestionably establish that Padilla poses the requisite threat of return to battle in the ongoing conflict between the United States and al Qaeda in Afghanistan, and that his detention is authorized as a “fundamental incident of waging war,” [*Hamdi*, 542 U.S. at 519], in order “to prevent a combatant’s return to the battlefield.” *Id.*

*Id.* 21a.

Padilla filed this Petition on October 25, 2005. Following the President’s November 20, 2005 memorandum directing the release of Padilla from military custody, the appeals court issued an order on November 30 directing the parties to file briefs regarding whether it should vacate its decision on mootness grounds. In its December 9, 2005 brief, the United States said that it had no objection to an order vacating the decision. Padilla’s Fourth Circuit brief is due today, December 16.

### **REASONS FOR DENYING THE PETITION**

Whether it is ever appropriate for the military to detain without trial American citizens who have taken up arms against the United States is an issue of exceeding importance. That question has been decided in the affirmative by the elected leader of this Nation in two separate instances, one involving Yassir Hamdi and one involving Jose Padilla. Padilla is asking the Court to second-guess the President’s determination with respect to him, despite the Court’s repeated admonition that, as even the district court recognized, “great

deference is afforded the President's exercise of his authority as Commander-in-Chief." *Id.* 49a (citation omitted).

The Court should deny Padilla's request to take up his case. First, there is little reason for the Court to set up a confrontation between itself and the elected branches of government, in light of the President's directive that Padilla be released from military custody. Even if that release does not render the case moot (because there is at least some possibility that Padilla could be taken into military custody once again following completion of criminal proceedings), and even if the Fourth Circuit does not take up the federal government's invitation that it vacate its decision, the Court would needlessly squander its capital by wading into this dispute at a time when Padilla faces no immediate prospect of being harmed. In the absence of any credible evidence that the United States has taken steps designed to evade judicial review, granting review in a case involving a discontinued policy would be wholly unwarranted.

Second, the Court only last year, in *Hamdi*, upheld the military's authority to detain U.S. citizen enemy combatants under circumstances largely indistinguishable from this case. The only significant factual difference between this case and *Hamdi* is that Hamdi was taken into custody in Afghanistan, while Padilla escaped from the Afghanistan battlefield and returned to the United States before being taken into custody. The Fourth Circuit thoroughly analyzed *Hamdi* in determining that Padilla could be held without trial. There are no conflicting federal court decisions. Under those circumstances, there is little reason to review an issue that has already received the Fourth Circuit's careful consideration.

Finally, review is unwarranted because the decision below is clearly correct. The appeals court correctly

determined that the locus of Hamdi's capture did not play a significant role in the Court's determination that the President had the authority to detain Hamdi without trial. Accordingly, the fact that Padilla escaped from Afghanistan before being captured is not relevant to the President's authority to detain him as an enemy combatant. Given *Hamdi's* determination that the AUMF authorized military detention of American citizens under "narrow circumstances" present both in that case and this one, the Fourth Circuit's determination that Congress authorized Padilla's detention – through its adoption of the AUMF – is unexceptionable.

**I. THE COURT SHOULD AVOID A CONFRONTATION WITH THE ELECTED BRANCHES OF GOVERNMENT ON AN IMPORTANT NATIONAL SECURITY ISSUE NOW THAT PADILLA IS TO BE RELEASED FROM MILITARY CUSTODY**

On November 20, 2005, the President issued a memorandum directing the military to release Padilla from custody and turn him over to the control of the Attorney General to face criminal charges. The memorandum provided that once the transfer takes place, the military's authority to detain Padilla "shall cease." Given Padilla's imminent release from military custody, numerous prudential considerations counsel strongly against granting the Petition in order to determine whether that military detention violated Padilla's rights.

First, Padilla's imminent release from military custody may well render the case moot. Padilla has gotten precisely what he asked for: he has repeatedly asked that the

government either release him or charge him with a crime.<sup>4</sup> Now that he is to be transferred to the criminal justice system to face criminal charges, he will have a full opportunity to contest those charges.

*Amici* recognize that the Court may still possess the *power* to decide this case. As the Court has explained:

It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. . . . If it did, the courts would be compelled to leave the defendant free to return to his old ways. . . . In accordance with this principle, the standard we have announced for determining whether a case has been mooted by a defendant's voluntary conduct is stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.

*Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citations omitted).

But even if the possibility that Padilla could be taken into military custody once again following completion of criminal proceedings prevents Padilla's release from rendering the case moot, that release nonetheless counsels strongly against granting the petition for certiorari. Now that his military detention has come to an end, Padilla is no longer suffering any injury due to the allegedly improper detention policy. Given that Padilla's legal challenge can be renewed if

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<sup>4</sup> See, e.g., Pet. 26 ("The essence of Petitioner's claim is that he . . . is entitled to be *immediately* released from military custody.") (emphasis in original).

and when he is once again taken into military custody, there is little reason for the Court to expend its limited resources to grant discretionary review to a petitioner who has already been granted all the relief he sought.

More importantly, there are strong reasons counseling against a grant of review. The President determined in June 2002 that Padilla “represents a continuing, present, and grave danger to the national security of the United States,” and that his military detention “is necessary” to prevent an attack on the United States. In asking the Court to second-guess the President’s order that he be detained, Padilla of necessity is asking this Court to substitute its views of national security imperatives for those of the President. Moreover, Padilla is asking the Court to confront Congress as well: he insists that his military detention is constitutionally impermissible even if, as the appeals court held, Congress authorized his military detention when it adopted the AUMF. Pet. 19-21. Such confrontations may on rare occasions be warranted when the elected branches of government are engaged in conduct that seriously threatens well-established constitutional rights. But where (as here) the elected branches have ceased the complained-of activity and there is no prospect for its resumption in the foreseeable future, it would be imprudent for the Court to exercise its discretionary authority to review a challenge brought by someone seeking only prospective relief against the ceased activity.

As Justice Breyer has warned, “this Court should resist the temptation unnecessarily to resolve” legal disputes where the legal context “make[s] clear that restraint is appropriate.” *Bush v. Gore*, 531 U.S. 98, 153 (2000) (Breyer, J., dissenting). Padilla is no longer litigating in pursuit of his liberty, but rather in pursuit of an abstract legal principle. The Court would be well advised not to “run[] the risk of undermining the public’s

confidence in the Court itself” by setting up a direct confrontation with the elected branches when no one’s liberty is actually at stake. *Id.* at 157. Unless the Court “adequately attend[s] to that necessary check upon our own exercise of power, our own sense of self-restraint,” *id.* at 158 (citations omitted), it “risk[s] a self-inflicted wound – a wound that may harm not just the Court, but the Nation.” *Id.* See also, *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (“It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case”); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980); Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962); James Bradley Thayer, “The Origin and Scope of the American Doctrine of Constitutional Law,” 7 HARV. L. REV. 129 (1893).

Such restraint is particularly appropriate when, as here, the case involves vital national security and foreign affairs issues. The President’s pre-eminent role in military and foreign policy matters was recognized by the Founding Generation and has continued to be recognized by this Court. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (“The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”) (quoting U.S. Representative John Marshall (10 *Annals of Cong.* 613 (1800))). See also *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (“heightened deference to the judgments of the political branches with respect to foreign policy” is particularly warranted with respect to terrorism-related issues); *Rostker v. Goldberg*, 453 U.S. 57, 66 (1981); *Ex Parte Quirin*, 317 U.S. 1, 25 (1942); *The Three Friends*, 166 U.S. 1 (1897); *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862). As Alexander Hamilton reasoned in the *Federalist Papers*:

[T]he direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms [a vital] and essential . . . definition of the executive authority.

*The Federalist No. 74* at 447 (Clinton Rossiter, ed., 1961).

In his first *Pacificus* essay, his 1793 defense of President Washington’s proclamation of neutrality, Hamilton outlined his vision of the President’s broad authority over military and foreign policy matters. He observed:

It deserves to be remarked, that as the participation of the senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general “Executive Power” vested in the President, they are to be construed strictly – and ought to be extended no further than is essential to their execution.

15 *The Papers of Alexander Hamilton* 42 (Harold C. Syrett, ed., 1969). *See generally*, H. Jefferson Powell, “The Founders and the President’s Authority Over Foreign Affairs,” 40 *WM. & MARY L. REV.* 1471 (1999).

The President determined in June 2003 that the national security required that Padilla be detained by the military. Evaluating such determinations will always be problematic for the Court, given the Court’s limited training in and resources for dealing with national security issues. By declining to review a challenge to government practices that are not currently in place and that are unlikely to be resumed in the foreseeable future, the Court can avoid entangling itself in an

area in which significant deference to the Executive Branch's decisions is warranted.

Review might nonetheless be warranted if there were some indication that the President had taken extraordinary steps to evade judicial review. But there is no such evidence. Padilla was detained as an enemy combatant for a period of 3 ½ years. During that period, the federal government defended on the merits its detention decision before numerous courts, including this Court in 2004. When the case came before the Fourth Circuit, the court unanimously upheld Padilla's detention without trial. While the President's decision to remove Padilla from military custody means that *this* Court is less likely to have an opportunity to pass on the propriety his detention, it is wholly inaccurate to suggest that Padilla has been denied an adequate opportunity to litigate that issue in other courts.

In sum, numerous prudential considerations counsel against granting the petition for review.

**II. REVIEW IS UNWARRANTED GIVEN THAT THE COURT SO RECENTLY ADDRESSED ENEMY COMBATANT ISSUES AND GIVEN THE ABSENCE OF ANY SPLIT OF AUTHORITY REGARDING HOW THAT DECISION SHOULD BE APPLIED**

The Court only last year, in *Hamdi*, upheld the military's authority to detain U.S. citizen enemy combatants under circumstances largely indistinguishable from this case. Review should be denied because Padilla has failed to articulate any compelling reason why the Court should plow that same ground once again.

The similarities between this case and *Hamdi* are striking.<sup>5</sup> Hamdi and Padilla, the two Americans who President Bush designated as enemy combatants, are both alleged to have borne arms in Afghanistan in 2000-2001 against the United States and/or its allies. Hamdi is alleged to have done so on behalf of the Taliban, while Padilla is alleged to have done so on behalf of both the Taliban and al Qaeda. Both carried a Kalashnikov assault rifle while fighting on behalf of the Taliban. The only significant factual distinction is that Hamdi was captured in Afghanistan and brought by the U.S. military to the United States, while Padilla escaped the Afghanistan battlefield and came to the United States on his own before being captured.

The Fourth Circuit carefully considered Padilla's claims in light of *Hamdi*. It concluded that Padilla's case could not meaningfully be distinguished from *Hamdi*. In particular, because it determined that this Court's finding that the President was authorized to detain Hamdi as an enemy combatant was not dependent on "the locus of capture," the Fourth Circuit concluded that Padilla's case could not be distinguished based on Padilla capture within the United States – and thus that *Hamdi* required that the President's detention of Padilla be upheld. Pet. App. 11a-15a.

Padilla challenges the Fourth Circuit's analysis; but notably, he is unable to point to any federal court decisions that have disagreed with the appeals court's understanding of *Hamdi*. In the absence of any disagreement among federal

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<sup>5</sup> *Amici* note that the similarities were far less striking when this case first came before the Court in 2004. At that time, the government had not yet fully documented Padilla's combat activities in 2000-2001 in Afghanistan on behalf of the Taliban and al Qaeda. *See* Declaration of Jeffrey N. Rapp.

courts regarding the meaning of *Hamdi*, there is little reason for this Court to grant review and thereby duplicate the careful review conducted by the Fourth Circuit.

Padilla's suggestion that the Fourth Circuit's decision conflicts with a Second Circuit decision is without merit. This Court determined in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), that the Second Circuit had lacked jurisdiction to entertain Padilla's habeas corpus petition, and thus it reversed the Second Circuit's decision. Once a federal court is determined to lack jurisdictional authority over a case, it has no power to take any further action, and any action it does take is a nullity. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). See *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential value.") Thus, the Second Circuit's vacated decision lacks all precedential value and cannot be deemed to create a conflict among federal court precedents. It is true, of course, that two New York federal judges (Judges Pooler and Parker) have expressed views on Padilla's detention that are at odds with the Fourth Circuit's view, while two other New York federal judges (Judges Wesley and Mukasey) agreed with the Fourth Circuit. But because those views were expressed in connection with rulings that were vacated based on lack of jurisdiction, they are not entitled to any more weight than the numerous other legal scholars who have expressed their views on Padilla's military detention.

The issues raised in this case have already received the Fourth Circuit's careful attention. Padilla does not contend that the appeals court failed to consider any relevant precedents; he simply disagrees with the court's ultimate conclusion. In the absence of evidence that other federal

courts have disagreed with the Fourth Circuit's analysis, further review by this Court is unwarranted.

### **III. REVIEW IS UNWARRANTED BECAUSE THE DECISION BELOW IS CLEARLY CORRECT**

Review is also unwarranted because the decision below is clearly correct. The Fourth Circuit correctly determined that *Hamdi* dictates a finding that the President is authorized to detain Padilla without trial in military custody, for the duration of hostilities in Afghanistan.

The Fourth Circuit's interpretation of the AUMF is fully consistent with *Hamdi*. For purposes of its decision, *Hamdi* defined an "enemy combatant" as an individual who "was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." *Hamdi*, 542 U.S. at 516 (plurality) (internal quotations omitted). The Court then held that Congress, when it adopted the AUMF, had authorized the detention of U.S. citizens falling within that category:

We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they are captured, is so fundamental and accepted an incident of war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.

*Id.* at 518; *id.* at 587 (Thomas, J., dissenting).

Accepting the allegations of the Rapp Declaration, Padilla falls precisely within the category of U.S. citizens whose detention, according to *Hamdi*, is authorized by the AUMF. Padilla quite clearly is alleged to have been "part of

or supporting forces hostile to the United States or coalition partners in Afghanistan.” He is alleged to have: (1) carried out military functions for the Taliban north of Kabul in 2000; (2) plotted and trained in Afghanistan with al Qaeda in 2001 and 2002 for two separate missions to kill American civilians; (3) been present with al Qaeda forces in Kandahar in the period following the launch of U.S. combat operations against al Qaeda and the Taliban in 2001; and (4) while fighting continued, armed himself with a rifle and accompanied other al Qaeda operatives traveling into Pakistan in late 2001. Rapp Decl. ¶¶ 8-13. By arming himself and being present in the combat zone during hostilities between al Qaeda/Taliban forces and the armed forces of the United States and its coalition partners, Padilla also quite clearly “engaged in an armed conflict against the United States” in Afghanistan.

*Hamdi*’s definition of American “enemy combatants” whose detention is authorized by the AUMF says nothing about the location of capture. Thus, the AUMF authorizes the detention of Americans who act as Padilla is alleged to have acted, regardless that Padilla managed to escape from Afghanistan and reach Chicago before being captured.

Moreover, the rationale underlying *Hamdi*’s interpretation of the AUMF is fully applicable here. As the Court recognized, throughout our nation’s history, the military regularly has detained enemy combatants captured in connection with military operations – both Americans and aliens, and both within American territory and overseas. *Hamdi*, 542 U.S. at 518-19. Indeed, detention of enemy combatants without charges until the cessation of hostilities is the well-accepted norm under the laws of war. *See, e.g., Ex Parte Quirin*, 317 U.S. 1, 28, 31 (1942) (“An important incident to the conduct of war is . . . to seize” enemy combatants; both lawful and unlawful combatants “are subject

to capture and detention”); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) (“Those who have written texts upon the subject of prisoners of war agree that all persons who are active in opposing an army in war may be captured.”).

Padilla’s contention that Congress should not be deemed to have authorized detention of U.S. citizens in the absence of a “clear statement” to that effect, Pet. 7, is without merit. That contention cannot be squared with *Hamdi*, which held that the AUMF authorized the detention of an American-citizen enemy combatant captured on the Afghanistan battlefield, despite the absence in the AUMF of any language explicitly authorizing such detentions. Indeed, *Hamdi* held that “it is of no moment that the AUMF does not use specific language of detention,” because Congress must have authorized detention “in the narrow circumstances considered here” given that “detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war.” *Hamdi*, 542 U.S. at 519. As noted above, Padilla fits precisely within the “narrow circumstances” considered in *Hamdi*; accordingly, there is no reason to impose any stricter “clear statement” rule in his case than in *Hamdi*’s.

Finally, Padilla contends that limiting military detention to those individuals captured on a foreign battlefield would reduce the potential for error and government abuse of power because “most citizens simply will not be found in the foreign theater of battle.” Pet. 14. *Amici* agree that there may be sound reasons for imposing a somewhat lesser evidentiary burden on the government when an American being detained as an enemy combatant was captured on a foreign battlefield. It is somewhat more likely that an American found armed on a foreign battlefield is an enemy combatant than it would be if that same American were found unarmed at O’Hare Airport. But those evidentiary issues are not now before the Court; this

Petition asks this Court to consider the meaning of the AUMF. Nothing in the language or history of the AUMF suggests that Congress intended to authorize detentions on a foreign battlefield (as *Hamdi* held) but at the same time to prohibit detentions within the U.S. of enemy combatants who have returned to the U.S. from a foreign battlefield.

### CONCLUSION

*Amici curiae* respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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