No. 05-533

IN THE

Supreme Court of the United States

JOSE PADILLA,

Petitioner,

v.

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

Respondent.

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

BRIEF OF HUMAN RIGHTS FIRST AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Since 1978, Human Rights First, formerly the Lawyers Committee for Human Rights, has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity, and respect for the rule of law. Human Rights First works to support human rights activists who fight for basic freedoms at the local level; ensure that domestic legal systems incorporate international human rights protections; help build a strong international system of justice for the worst human rights crimes; and promote effective responses to security threats in keeping with the rule of law. Human Rights First believes Jose Padilla's detention presents pivotal questions about the rule of law in the United States, and the organization has been deeply engaged in Mr. Padilla's case since his arrest in 2002, filing its first *amicus* brief in support of Petitioner in the Second Circuit in July 2003. Human Rights First has prepared briefs at every level of the federal court system for retired federal judges, senior law enforcement, intelligence officials, and others on Mr. Padilla's behalf. Human Rights First believes that Mr. Padilla's detention today presents as urgent a threat as it did in 2002 to the human rights of all Americans.

STATEMENT OF THE CASE

Mr. Padilla's military detention. In May 2002, Jose Padilla, a United States citizen, was arrested by agents of the Federal Bureau of Investigation ("FBI") pursuant to a material witness warrant issued by the United States District Court for the Southern District of New York in connection with a grand jury investigation into the September 11, 2001 attacks. *See Padilla v. Rumsfeld*, 352 F.3d 695, 699 (2d Cir. 2003). Just weeks later, President Bush declared Mr. Padilla an "enemy combatant" and directed the Secretary of Defense

[1]The parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amicus curiae* discloses that the law firm of Jones Day authored the brief in part and made a contribution in kind to its printing, preparation, and submission.

to take him into military custody. *Id.* at 700. The Department of Defense transported Mr. Padilla to a high-security military brig in South Carolina. *Id.*

On June 11, 2002, Mr. Padilla's appointed counsel filed a *habeas corpus* petition on his behalf in the Southern District of New York, claiming that his detention violated the Constitution. The district court held that the Executive Branch had authority to detain U.S. citizens arrested in the United States as enemy combatants. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (2002). The Second Circuit reversed, holding that the President lacked the inherent authority to order Mr. Padilla's military detention. *Padilla v. Rumsfeld*, 352 F.3d at 698 ("Padilla's detention was not authorized by Congress, and absent such authorization, the President does not have the power under Article II of the Constitution to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat"). In light of the absence of express congressional authorization to detain Mr. Padilla, the Second Circuit determined that Mr. Padilla's detention was barred by the Non-Detention Act, 18 U.S.C. § 4001(a) (2005), which prohibits the detention of a U.S. citizen unless authorized by an act of Congress. 352 F.3d at 699.

This Court granted certiorari, 540 U.S. 1173 (2004), recognizing that the case presented "important questions of federal law." *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) ("*Padilla I*"); *see also id.* at 455 (Stevens, J., dissenting) (agreeing that Mr. Padilla's *habeas* petition "raises questions of profound importance to the Nation").[2] A majority of the

[2]Mr. Padilla's lawyers had opposed the Government's petition for certiorari but argued that, if certiorari were granted, the Court should extend its review to address "whether Padilla would be entitled to meet with counsel." (Br. in Opp. 19-23). On the same day that its reply brief was filed, the Government announced that it would allow Petitioner highly limited access to counsel. Reply Br. at 7 n.6; *see also* Press Release No. 097-04, U.S. Dep't of Def., Padilla Allowed Access to Lawyer (Feb. 11, 2004), *available at* http://www.defenselink.mil/releases/ 2004/nr20040211-0341.html.

Court nevertheless declined to reach the merits of Mr. Padilla's constitutional challenge to his detention, instead concluding that the New York District Court lacked jurisdiction over Mr. Padilla's *habeas* petition. *Id.* at 442-47. The Court ordered the *habeas* petition dismissed without prejudice. *Id.* at 451.

Hamdi v. Rumsfeld. In the interim, this Court issued its decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). There, a plurality of the Court agreed that the Authorization for Use of Military Force Joint Resolution ("AUMF")[3] allowed the Executive Branch to detain American citizens captured on the field of battle as enemy combatants. 542 U.S. at 519 ("Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here"). Central to the plurality's decision was that Hamdi's designation as an "enemy combatant" was based on the Government's allegations that he had (i) been "'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan," and (ii) "'engaged in an armed conflict against the United States' there." *Id.* at 516 (quoting Brief for Respondents Rumsfeld, *et al.* at 3). The Court was careful to "answer only the narrow question" squarely presented in that case: whether the military detention of citizens falling within the Government's proposed definition of "enemy combatant" is authorized. *Id.*

Mr. Padilla's second habeas petition. On July 2, 2004, following the *Padilla I* decision, Mr. Padilla filed a second *habeas corpus* petition in the U.S. District Court in South

[3]The AUMF provides that "the President is authorized 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 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons." Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (Sept. 18, 2001) (codified at 50 U.S.C. § 1541).

Carolina. Upon Mr. Padilla's motion for summary judgment, the district court arrived at the same conclusion the Second Circuit had reached – that the President lacked the legal authority to detain, indefinitely and without criminal charge, a United States citizen arrested on American soil. *Padilla v. Hanft*, 389 F. Supp. 2d 678, 690-91 (D.S.C. 2005) (Pet. App. 51a). The district court distinguished *Hamdi* on the ground that Mr. Padilla was arrested at a United States airport and not captured on a foreign battlefield; the "exigencies of military action on the battlefield" thus did not compel his military detention. *Id.* at 39a. The district court also held that the Non-Detention Act forbids detention of a U.S. citizen except where specifically authorized by Congress, and that the AUMF did not provide such specific authorization. *Id*. at 48a.

The Fourth Circuit's decision in *Padilla II*. The Fourth Circuit reversed, finding no "difference in principle between Hamdi and Padilla" and concluding that the AUMF authorizes Mr. Padilla's detention just as it authorized Hamdi's. *Padilla v. Hanft*, 423 F.3d 386, 391, 397 (4th Cir. 2005) ("*Padilla II*") (Pet. App. 11a, 12a, 23a) (concluding that AUMF authorizes the President "to detain identified and committed enemies such as Padilla, who associated with al Qaeda and the Taliban regime, who took up arms against this Nation in its war against these enemies, and who entered the United States for the avowed purpose of further prosecuting that war by attacking American citizens and targets on our own soil") (emphasis omitted). The Fourth Circuit viewed as decisive the fact that both Padilla and Hamdi were alleged to have held a weapon on a foreign battlefield; it reasoned that detention was equally compelling in both cases "as a fundamental incident to the conduct of war" "in order to prevent" both Hamdi and Padilla from "return[ing] to the battlefield." *Id.* at 12a. The court of appeals believed its conclusion to be bolstered by this Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942), which it read to establish that Mr. Padilla, like Haupt (the citizen petitioner in *Quirin*), was an "enemy belligerent" subject to military detention "as

a fundamental incident to the President's prosecution of the war against al Qaeda in Afghanistan." Pet. App. 14a (footnote omitted).

The Government's Eleventh-Hour Indictment of Mr. Padilla. On November 22, 2005, just three business days before the Government's opposition to certiorari in this case was due, Mr. Padilla was indicted on charges of alleged conspiracy to engage in terrorist activities in unnamed places "outside the United States," alleged conspiracy to provide and provision of material support to terrorists – a new theory in support of Mr. Padilla's detention. Notably, the indictment does *not* contain any charges related to the Government's multiple prior justifications for detaining Mr. Padilla – his alleged plans to detonate either a "dirty bomb" or a nuclear device, his alleged plans to explode a bomb in gas-heated apartment buildings, or his alleged actions as a battlefield combatant in Afghanistan.[4] The Government has refused to rule out the possibility that Mr. Padilla could again be subjected to military detention as an "enemy combatant."[5]

SUMMARY OF ARGUMENT

The question presented by the Petition – whether the Executive has inherent and unreviewable authority to detain indefinitely a U.S. citizen captured on U.S. soil and designated an "enemy combatant" – is one that both this Court and two United States Courts of Appeals have recognized is profoundly important. Indeed, this Court once

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[4] *See, e.g.*, Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy at 3-4 (August 27, 2002) ("Mobbs Declaration"), 2d Cir. J.A. 46-47; 4th Cir. J.A. 20-22; *cf.* Superseding Indictment at 4-30, United States v. Hassoun, et al., No. 04-60001 (S.D. Fla. Nov. 17, 2005) ("Indictment").

[5] Andrew Zajac, *U.S. Indicts Padilla*, CHI. TRIB., Nov. 23, 2005, at A1: "Gonzales said that Padilla 'is no longer being detained . . . as an enemy combatant' but he declined to say whether this meant that the government no longer classified him as one"; *see also* Adam Liptak, *In Terror Cases, Administration Sets Own Rules*, N.Y. TIMES, Nov. 27, 2005, § 1, at 1: "[Counsel for Mr. Padilla] was told that the government reserved the right to detain Mr. Padilla again should he be acquitted."

before granted certiorari in this case to address it. Two courts of appeals have now reached directly contrary conclusions on the question. Because the Fourth Circuit extension of *Hamdi* to support Mr. Padilla's military detention could have grave consequences for citizens captured in the U.S. and labeled as "enemy combatants," this Court's review is needed.

The question whether a U.S. citizen *seized in the United States* and accused of being an enemy combatant can be subject to indefinite military detention without charge is squarely presented in this case and was expressly left open in *Hamdi*, which addressed only the President's authority to detain a citizen *captured on the Afghan battlefield*. Thus, contrary to the Fourth Circuit's reasoning, this case is not governed by *Hamdi*.

Nor has the case been mooted by the Government's decision to indict Mr. Padilla and to transfer him to civilian detention. The Government's voluntary cessation of the behavior challenged in the Petition cannot foreclose this Court's review. The Government bears the burden to demonstrate that the violation of Mr. Padilla's rights alleged in the Petition will not recur; but its own public statements, about both military "enemy combatant" detainees in general and Mr. Padilla in particular, make plain its intention to leave open the possibility that Mr. Padilla may again be subject to military detention in the future. Far from being moot, this controversy is now more in need of this Court's engagement than ever.

ARGUMENT

I. THIS CASE PRESENTS AN IMPORTANT AND RECURRING LEGAL ISSUE REGARDING MILITARY DETENTION OF U.S. CITIZENS SEIZED WITHIN THE UNITED STATES

A. This Case Involves an Exceedingly Important Legal Issue.

As four justices of this Court made clear in *Padilla I*, this case "raises questions of profound importance to the

Nation," and "nothing less than the essence of a free society" is at stake. 542 U.S. at 455, 465 (J. Stevens, dissenting). The Fourth Circuit agreed, noting that the case presents an "exceedingly important question." (Pet. App. 7a). This Court chose to hear Mr. Padilla's case on the same day as Yaser Hamdi's; while it reached the merits of whether the President could detain an American citizen "seized abroad" in *Hamdi*, 542 U.S. 507, it reserved the question Mr. Padilla presented of whether the President could "seize and detain a United States citizen in the United States," determining that Supreme Court jurisdiction over his case was not yet established. *See* order list granting certiorari in *Rumsfeld v. Padilla*, No. 03-1027, Feb. 20, 2004, at http://www.supremecourtus.gov/docket/03-1027.htm. *See also Padilla I*, 542 U.S. at 430 ("we do not decide the merits").

The Court's jurisdiction over Mr. Padilla's *habeas* petition is proper, and its exercise of that jurisdiction is urgent. The President has asserted the power to detain a U.S. civilian who acknowledges no membership in a hostile nation's armed forces, and who was apprehended not in a foreign combat zone, but in a civilian setting on U.S. soil. Only a handful of other times in our history has the Executive sought to detain civilians under its sole review authority.[6] But the Civil War and Second World War detentions contrast starkly with the detention imposed here. While civilians detained in the Civil War faced charges or were released within a few months,[7] and Japanese-American civilians were

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[6]President Lincoln suspended the writ of *habeas corpus* in August of 1862, with Congress's subsequent endorsement in the Act of Mar. 3, 1863, ch. 81, 1, 12 Stat. 755, 755; between 1942 and 1946, the War Relocation Authority incarcerated approximately 80,000 Japanese-American citizens pursuant to clear congressional authority. *See, e.g.*, *Hirabayashi v. United States*, 320 U.S. 81, 87-90 (1943) (discussing, *inter alia*, Act of March 21, 1942, 56 Stat. 173, 18 U.S.C. § 97a). More than three years since Mr. Padilla's initial detention, Congress has taken no steps to ratify the detention at issue here.

[7]*See* William H. Rehnquist, *Civil Liberty and the Civil War: The Indianapolis Treason Trials*, 72 IND. L. J. 927, 931 (1997).

interned in company with others, Mr. Padilla has now faced detention without clear legal status for more than three years, and he has suffered severely damaging solitary confinement throughout this time.[8] The conditions of isolation and sensory deprivation he has endured might well be deemed cruel and unusual.[9] They undoubtedly violate substantive due process, given that he has never been apprised of specific charges or afforded an opportunity to challenge them.[10] Under the circumstances, the fundamental liberty interests at stake in this case may well outweigh those in any executive detention previously considered by this Court. The Petition presents an issue of surpassing importance to every U.S. citizen.

B. The Government's Position Would Permit Unlimited Detention of U.S. Citizens in a Wide Variety of Circumstances

The Fourth Circuit held that the AUMF authorizes the President "to detain identified and committed enemies such as Padilla, who associated with al Qaeda and the Taliban regime, who took up arms against this Nation in its war against these enemies, and who entered the United States for the avowed purpose of further prosecuting that war by attacking American citizens and targets on our own soil." *Padilla II* (Pet. App. 23a) (emphasis omitted). This broadly worded extension of *Hamdi* (based on an at-best-unproven factual premise) allows the military to seize and detain civilians on U.S. soil on allegations that they "associated" with terrorists and "took up arms" to support them at some

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[8] *See* Craig Haney, *Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement*, 49 (1) CRIME & DELINQ. 124-56 (2003).

[9] *See Chambers v. Florida*, 309 U.S. 227, 237 (1940) (likening solitary confinement to the "rack, the thumbscrew, [and] the wheel").

[10] *Bell v. Wolfish*, 441 U.S. 520, 531 (1979) (conditions of pretrial detention violate due process when they amount to punishment); *see also Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989) ("if ever there were a strong case for 'substantive due process,' it would be a case in which a person who had been arrested but not charged or convicted was brutalized while in custody").

unspecified time or place, unrelated to the place or time of their detention. Indeed, other U.S. citizens are now similarly accused, although they were (for reasons unclear in light of the Government's position here) arrested and afforded full criminal process on similar allegations of having once entered, or tried to enter, Afghanistan at some time past:

- In September 2002, a U.S. citizen was arrested on U.S. soil on allegations that he received al Qaeda military training in Afghanistan, but left before U.S. military operations began in 2001.[11]
- In October 2002 and March 2003, five U.S. citizens were arrested on U.S. soil on allegations that late in 2001 they traveled to western China and attempted to enter Afghanistan to supply arms and personnel to al Qaeda and the Taliban.[12]

These citizens arrested and charged by federal authorities could now instead be removed to prolonged military detention without charges because, as the Government would have it, there are no temporal limits on alleged association with terrorists sufficient to permit such detention.[13]

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[11]Sahim Alwan of Lackawanna, New York, pled guilty to material support of terrorism and is serving a 10-year prison sentence. *See* Matthew Purdy & Lowell Bergman, *Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. TIMES, Oct. 12, 2003, § 1, at 1; *see also* http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/inside/ (last visited Dec. 15, 2005).

[12]Patrice Ford, Jeffey Battle, Muhammed Bilal, Ahmed Bilal, and Mayer Hawash of Portland, Oregon, plea bargained and are serving reduced sentences. *See* Mark Larabee, *Hawash Gets Deal, Pleads Guilty*, OREGONIAN, Aug. 7, 2003, at A01.

[13]The rule as set forth by the Fourth Circuit below does not establish any governing principle to determine when ordinary criminal processes, rather than military detention, ought to be applied. The arbitrariness of selective removal of only *some* citizens from ordinary criminal processes is constitutionally problematic. Similar allegations can lead in one case to immediate charges and in another case to an enemy combatant designation, without reason. The Executive already appears to be making such decisions ad hoc. *Cf. United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) (U.S. citizen and alleged Taliban combatant detained on ten-count indictment in federal court) *with Hamdi v.*

Similarly, the Government would set no geographic limit on where a citizen allegedly "took up arms" in order to detain him militarily. For the *Hamdi* plurality, the battlefield location of Hamdi's capture was critical to the presumptions about conduct and intent it afforded. *See Hamdi*, 542 U.S. at 534 (presumption in favor of Executive's evidence as to status of battlefield detainees is permissible, so long as the "errant tourist, embedded journalist, or local aid worker" has a chance to "prove military error"). But the Government would extend *Hamdi* to all armed activity, anywhere in the world, that the Government alleges is al-Qaeda-associated and directed against U.S. targets on U.S. soil. Under that rule, the Government could impose prolonged military detention rather than criminal process on numerous individuals whose cases are currently pending before U.S. courts, *e.g.*:

- A U.S. citizen arrested in the United States allegedly received al Qaeda training in Pakistan in 2003 and 2004 where he volunteered to target supermarkets and hospitals in the U.S.[14]
- Two U.S. citizens arrested in the United States allegedly agreed to provide, respectively, martial arts training to al Qaeda associates and medical assistance to wounded

(continued…)

Rumsfeld, 243 F. Supp. 2d 527 (E.D. Va. 2002), *rev'd*, 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004) (U.S. citizen and alleged Taliban combatant detained militarily without charges). *Cf. United States v. Moussaoui*, No. Crim. 01-455-A, 2002 U.S. Dist. LEXIS 17737 (E.D. Va. Sept. 4, 2002) (non-U.S. citizen and alleged member of al Qaeda World Trade Center conspiracy detained on six-count indictment in federal court) *with Al-Marri v. Hanft*, 378 F. Supp. 2d 673 (D.S.C. 2005) (non-U.S. citizen and alleged member of al Qaeda World Trade Center conspiracy detained militarily without charges).

[14]Hamid Hayat was interviewed by the FBI in May, 2005 and arrested in Lodi, California on June 8, 2005 on charges of making false statements to the FBI. He admitted he trained in Pakistan after his arrest, according to an FBI affidavit. Dan Eggan & Evelyn Nieves, *Father, Son Tied to Al Qaeda Camp are Held*, WASH. POST, June 9, 2005, at A02.

terrorists in Saudi Arabia, and both inspected a warehouse on Long Island for use as a training site.[15]

And because the Government has repeatedly urged a flexible definition of the "war against terror" and of actions that allegedly support terrorists, the same principle could also conceivably extend to crimes unrelated to any literal bearing of arms or battlefield presence, such as alleged material support of terrorism[16] or terrorism-financing-related crimes.[17]

Equally alarming, the Government would be able to circumvent the rules of evidence in dealing with the large number of U.S. civilians with some degree of connection to accused or convicted terrorists, including those who acquire knowledge in the course of offering privileged or otherwise innocent aid. Under ordinary criminal law, guilt does not arise by mere association. *See, e.g., Haupt v. United States*, 330 U.S. 631, 641 (1947) (jury was correctly instructed to weigh whether treason defendant Haupt, father of *Quirin*

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[15]Rafiq Abdus Sabir, a doctor, and Tariq Shah, a martial arts expert, were charged with conspiracy to provide material support to al Qaeda on May 29, 2005. *See* Press Release, U.S. Att'y for the S. Dist. of N.Y., Two American Citizens Charged With Conspiring to Provide Material Support to al Qaeda (May 29, 2005), *available at* http://www.usdoj.gov/usao/nys/Press%20Releases/May05/Shah%20and%20Sabir%20complaint.pdf (last visited Dec. 16, 2005); *see also* Tal Abbady & Shahien Nasiripour, *Doctor Sought to Aid Wounded Terrorists, Feds Say*, S. FLA. SUN SENTINEL, May 30, 2005, at 1A.

[16]As of May 2004, the Justice Department has charged more than 50 defendants with material support offenses and detained more than 70 material witnesses. *See Aiding Terrorists – An Examination of the Material Support Statute Before the S. Comm. on the Judiciary*, 108th Cong. (2004) (statement of Christopher Wray, Assistant Attorney General), http://judiciary.senate.gov/print_testimony.cfm?id=1172&wit_id=3391 (last visited Dec. 15, 2005), and Anjana Malhotra, *Overlooking Innocence: Refashioning the Material Witness Law to Indefinitely Detain Muslims Without Charges*, in 2004 ACLU INTERNATIONAL CIVIL LIBERTIES REPORT 2 (2004), http://www.aclu.org/iclr/malhotra.pdf (last visited Dec. 15, 2005).

[17]*See* U.S. Dep't of Justice, Preserving Life and Liberty: Waging the War on Terror, http://www.lifeandliberty.gov/subs/a_terr.htm (last visited Dec. 16, 2005).

saboteur Haupt, harbored his son out of parental solicitude or in adherence to the German cause). Under the Fourth Circuit's rule, the Government would have no need to prove actual guilt. Instead, it could simply claim the existence of some evidence that a suspect "associated with" other combatants and remove him to a naval brig.

II. THIS CASE PRESENTS A CRITICAL QUESTION LEFT OPEN BY THIS COURT'S DECISION IN *HAMDI V. RUMSFELD*

The key relevant facts of this case are undisputed and have not varied since Mr. Padilla's original arrest. Mr. Padilla is a U.S. citizen, was captured in the United States, and was transferred to military detention having already been lawfully and effectively detained in U.S. civilian custody. (Pet. App. 8a-9a). Therefore, this case squarely presents the question left open in *Hamdi*, which considered only the detention of a U.S. citizen actively engaged in battlefield combat for enemy forces following capture on the battlefield. *See* 542 U.S. at 516 (accepting Government's definition of "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"). Indeed, the *Hamdi* plurality based its decision about the authority for detention of "enemy combatants" on exigencies unique to battlefield capture, reasoning that the "purpose of [military] detention is to prevent captured individuals from returning to the field of battle and taking up arms once again." *Id.* at 518; *see also id.* at 522 n.1 (noting that the basis for detention asserted in *Hamdi* was "that Hamdi was carrying a weapon against American troops on a foreign battlefield"). The Court squarely left open whether the same decision would hold with respect to citizens already in criminal custody in the United States, like Mr. Padilla. *Id.* at 516, 523-24.

The Government's asserted basis for Mr. Padilla's domestic arrest and detention has shifted markedly and repeatedly since his initial arrest:

- The Government first claimed, in its briefs and broadly in the U.S. media, that Mr. Padilla was planning to build and explode a "radiological dispersion device" (known as a "dirty bomb"). *See* Mobbs Declaration, 2d Cir. J.A. 46.
- Four weeks before this Court's decision in *Padilla I*, the Government changed its theory to allege that Mr. Padilla came to the United States to cause explosions in gas-heated apartment buildings.[18]
- After this Court's decision in *Hamdi*, which limited its scope to the narrow circumstances of Mr. Hamdi's engagement in armed conflict in Afghanistan, the Government alleged for the first time that Mr. Padilla had carried an assault rifle in Afghanistan prior to his arrival in the United States in 2002.[19]
- Moreover, the Rapp Declaration omits mention of a "dirty bomb" and instead alleges that Mr. Padilla researched the construction of an *atomic* bomb. *See* Rapp Declaration at 5, 4th Cir. J.A. 21.
- In recent weeks, the Government has yet again revised its position; it now contends that Mr. Padilla conspired to engage in terrorist activities in unnamed places "outside the United States" and provided material support to alleged terrorists. Indictment at 5, *supra* p.5. But the Government's recent indictment of Mr. Padilla does not contain any charges related to the Government's prior justifications for detaining Mr. Padilla for more than three years – his alleged plans to detonate either a "dirty bomb" or a nuclear device, his alleged plans to explode a bomb in gas-heated apartment buildings, or his alleged actions as a battlefield combatant in Afghanistan. *See generally, id.* at 4-30.

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[18]U.S. Deputy Att'y Gen. James Comey, Justice Department News Conference Concerning Jose Padilla (June 1, 2004) (transcript available at 2004 WL 1195419).

[19]Declaration of Jeffrey N. Rapp, Director, Joint Intelligence Task Force for Combatting Terrorism (Aug. 27, 2004) ("Rapp Declaration"), 4th Cir. J.A. 20.

Before the Fourth Circuit, the Government maintained that Mr. Padilla was factually identically situated to Mr. Hamdi, and it was on this factual premise that the Fourth Circuit based its decision that Mr. Padilla's case was settled by *Hamdi* itself. *See Padilla II*, Pet. App. 12a ("[U]nder the definition of 'enemy combatant' employed in *Hamdi*, we can discern no difference in principle between Hamdi and Padilla.").[20] But neither the undisputed facts nor the "exigencies of the battlefield" can justify Mr. Padilla's detention. At the time of his military detention, Mr. Padilla had already been detained by civilian authorities and was rendered incapable of committing acts of aggression. *Id*., Pet. App. 9a. Release from military custody would not have resulted in Mr. Padilla's return to the battlefield, but rather would have subjected him to continued civilian detention and trial on civilian charges.

Ex parte Milligan, 71 U.S. 2 (1866), which a plurality of this Court determined was inapplicable to Mr. Hamdi, thus squarely applies here. In *Milligan*, the Court held that an Indiana resident who conspired with an anti-Union secret society to commit acts of sabotage, but who was unaffiliated with the Confederate army, could not be tried under military law. 71 U.S. at 131-32. In unambiguous terms, this Court held that "the 'laws and usages of war' . . . can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed." *Id.* at 121. The *Hamdi* plurality distinguished *Milligan* on grounds that the petitioner there was "not a prisoner of war, but a resident of Indiana arrested while at home there." *Hamdi*, 542 U.S. at 522. The plurality

[20]The Fourth Circuit's statement that, "[f]or purposes of Padilla's summary judgment motion, the parties have stipulated to the facts as set forth by the government," Pet. App. 8a n.1, overstates the matter. Mr. Padilla has never stipulated to the facts set forth by the Government and vigorously contests the Government's version of the facts. However, Mr. Padilla contended below and contends here that even were the Government's version correct, it would still lack the authority to detain him without criminal charge.

expressly noted that *Milligan* might have been decided differently had Milligan, like Hamdi, been "captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield." *Id.*

Mr. Padilla's case is far more analogous to *Milligan* than to *Hamdi*. Like Milligan, Mr. Padilla was arrested in the United States. *Padilla II*, Pet. App. 9a. Like Milligan, Mr. Padilla is accused of conspiring with a secret society to commit acts of aggression against United States targets. *Id.*, Pet. App. 8a. And just as for Milligan, the civilian courts remained open and able to adjudicate criminal charges against Mr. Padilla. Unlike Hamdi, Mr. Padilla was not captured while armed on the Afghan battlefield.[21]

In all events, regardless of which version of the facts is taken as true – and the key facts of Mr. Padilla's domestic arrest and detention are undisputed – this case presents pure questions of law: whether Congress intended in the AUMF to permit indefinite detention of U.S. citizens seized in the United States, and what process is due such a citizen detained if such detention is authorized. This Court should

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[21] *Ex parte Quirin* does not dictate a contrary outcome. *First*, in *Quirin*, the Court permitted Mr. Haupt, a naturalized United States citizen, to be tried for war crimes before a military tribunal after he had entered the country as part of a hostile German Marine Infantry unit. 317 U.S. at 20. *Quirin*, like *Hamdi* but unlike *Padilla*, unambiguously involved an American citizen taking up arms against the United States in the traditional military context of a war between nations. *Id.* at 20-21. Indeed, Haupt *conceded* that he was a member of the German army undertaking a military mission against the United States and affirmatively asserted his military status in hopes of gaining advantageous treatment under the law of war. *Id.*

Second, in *Quirin* (which was decided before Congress passed the Non-Detention Act), Congress had expressly granted the President authorization to try, by military tribunal, offenses against the law of war. *Id.* at 26-27. Here, there is no *express* congressional authority to detain American citizens accused of being enemy combatants. At most, such detention authority is *implicit* in the AUMF – and *Hamdi* makes clear that that implicit authority is confined narrowly to combatants captured on the battlefield. *Hamdi*, 542 U.S. at 520-521.

now resolve these exceedingly important and unresolved questions.

III. THE GOVERNMENT'S MOST RECENT ACTIONS ONLY HEIGHTEN THE NEED FOR THIS COURT TO GRANT REVIEW

The Government may now be expected to argue that, because Mr. Padilla has now been indicted and the Government is seeking his transfer from military to civilian detention, this case is moot and should not be reviewed by this Court. Such an argument would be disingenuous and should be rejected. The Government has given every indication that it may again subject Mr. Padilla to military detention as an "enemy combatant" should the recently commenced criminal process result in an acquittal or sentence less severe than the Government believes sufficient. And it has affirmatively continued to assert the power to hold Mr. Padilla, or any other American citizen under similar circumstances, at its discretion going forward.

"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," for if it did, "the courts would be compelled to leave the defendant free to return to his old ways." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal quotation marks and ellipsis omitted). This probability of resumption keeps the controversy live. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). As the "rule traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior," *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001), it has special force where the party asserting mootness appears to be attempting to "manipulate the Court's jurisdiction to insulate a favorable decision from review." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000) (internal quotation marks and citation omitted). Furthermore, the "public interest in having the legality of the

practices settled[] militates against a mootness conclusion." *W.T. Grant Co.*, 345 U.S. at 632.

Voluntary cessation only renders an issue moot where both of two circumstances are met: "(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (internal quotation marks and citations omitted). The "heavy burden of persuading" this Court that the "challenged conduct cannot reasonably be expected to start up again *lies with the party asserting mootness*." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (internal quotation marks omitted; emphasis in original).

Thus, in *Vitek v. Jones*, 445 U.S. 480, 482-83 (1980), a prisoner challenged his involuntary transfer to a state mental hospital. While the case was pending, the prisoner was paroled but later violated his parole and was returned to prison (not the mental hospital). *Id.* at 486. Nevertheless, the Court held that the prisoner was still "in fact under threat of being transferred to the state mental hospital" due to the state's representation that he remained "a serious threat to his own safety as well as to that of others." *Id.* (internal quotation marks omitted). Because it was not "absolutely clear . . . that the allegedly wrongful behavior could not reasonably be expected to recur," the case was not moot. *Id.* at 487 (internal quotation marks omitted). *See also, e.g.*, *Rosales-Garcia v. Holland*, 322 F.3d 386, 390, 392-94, 395-96 (6th Cir. 2003) (en banc) (Cuban national subject to potentially indefinite INS detention brought habeas challenge; Sixth Circuit rejected Government's argument that its decision to parole petitioner mooted the case, because petitioner "need not do anything for the INS to revoke his parole"; under voluntary cessation doctrine, petitioner was still "threatened with an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision"), *cert. denied*, 539 U.S. 941 (2003).

The Government cannot shoulder its burden to establish that this case is moot. The Government has not ruled out the possibility that Mr. Padilla could again be subjected to military detention as an "enemy combatant." Indeed, the Government has *conceded* before the Fourth Circuit that "it is theoretically possible that the President could redesignate [Mr. Padilla] as an enemy combatant." Supplemental Brief for Appellant at 11, *Padilla v. Hanft*, No. 05-6396 (4th Cir. Dec. 9, 2005), http://news.findlaw.com/hdocs/docs/padilla/padhnft120905sb4th.pdf.

Critically, while the President has withdrawn the authority of the Department of Defense to continue Mr. Padilla's military detention, he has not revoked his designation as an "enemy combatant." President's Order to Secretary of Defense, Transferring Detainee to Control of Attorney General (Nov. 20, 2005). Indeed, when Mr. Padilla was indicted, Attorney General Gonzales was asked several questions about the Government's current position as to Mr. Padilla's designation as an "enemy combatant." His response was that "[t]he Fourth Circuit has held that the President of the United States was authorized to detain Mr. Padilla as an enemy combatant. And so I would just leave it at that."[22] Moreover, counsel for the Government have refused to give any assurances to counsel for Mr. Padilla or to the public that Mr. Padilla would not again be subject to military detention as an "enemy combatant" if he were acquitted in the recently-commenced criminal proceedings.[23]

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[22]U.S. Attorney General Alberto Gonzales, Justice Department News Briefing on the Indictment of Jose Padilla (Nov. 22, 2005) (transcript available at 2005 WL 3113525).

[23]"Justice Department's director of public affairs, Tasia Scolinos, would not say today whether Padilla, a U.S. citizen born in Chicago, would be freed were he to be acquitted in the criminal case announced Tuesday by Attorney General Alberto Gonzales." Michael Isikoff & Mark Hosenball, *Case Not Closed*, NEWSWEEK, Nov. 23, 2005, http://msnbc.msn.com/id/%2010184957/. A senior lawyer in the Solicitor General's office told counsel for Mr. Padilla that "'he's still an enemy combatant according to the President.'" *Id.*

The Government pursued a similar approach when the Department of Defense first contemplated military commissions or administrative hearings at the U.S. Naval Base at Guantanamo Bay to evaluate the need for continued detention of those designated as "enemy combatants" at that facility. In March 2002, Department of Defense General Counsel William J. Haynes admitted that, "[i]f we had a trial right this minute, it is conceivable that somebody [designated an "enemy combatant"] could be tried and acquitted of that charge, but may not necessarily automatically be released" and emphasized that, in the Government's view, those individuals are "dangerous people. At the moment, we're not about to release any of them unless we find out that they don't meet the criteria."[24] Secretary of Defense Rumsfeld echoed those views in February 2004, asserting that the military's administrative review process is "discretionary and in no way impacts the authority of the United States to continue to detain enemy combatants under the laws of war."[25] Similarly, in the July 15, 2002 plea agreement between the Government and John Walker Lindh, a U.S. citizen captured fighting against U.S. troops in Afghanistan, the Government reserved the right to designate Lindh as an enemy combatant (and presumably transfer him from civilian to military detention) if it "determine[s]" that Lindh engaged in terrorist activities other than those for which he was tried and convicted.[26]

The Government's track record in this case to date, a pattern of shifting factual and legal positions depending on which best suited its litigation strategy of the moment, leaves

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[24]Dep't of Def. Gen. Counsel William J. Haynes, Defense Department Regular News Briefing (March 21, 2002) (transcript available at 2002 WL 437235).

[25]Sec'y of Def. Donald Rumsfeld, Remarks to Greater Miami Chamber of Commerce, http://www.defenselink.mil/transcripts/2004/tr20040213-0445.html (last visited Dec. 15, 2005).

[26]*See* http://news.findlaw.com/hdocs/docs/lindh/uslindh71502pleaag.pdf, Plea Agreement ¶ 21, *United States v. Lindh*, No. 02-37A (E.D. Va. July 15, 2002) (last visited Dec. 15, 2005).

much cause for skepticism that it will not again shift course here. For all of these reasons, the Government has not shouldered and cannot shoulder its "heavy burden" to show that the "challenged conduct cannot reasonably be expected to start up again," rendering the case moot. *Adarand*, 528 U.S. at 222.[27]

CONCLUSION

For the foregoing reasons, *Amicus* asks that this Court grant Mr. Pedilla's Petition for Certiorari without delay.

[27] At a minimum, if this Court were to determine that the case is moot, and the Fourth Circuit does not act appropriately on its own, the Court should grant certiorari to vacate the Fourth Circuit's decision. *See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994) ("vacatur must be granted where mootness results from the unilateral action of the party who prevailed in the lower court").

Respectfully submitted,

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