No. 08-368

IN THE
Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI
Petitioner,

v.

COMMANDER DANIEL SPAGONE,
U.S.N., CONSOLIDATED NAVAL BRIG
Respondent.

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

BRIEF OF WILLIAM N. ESKRIDGE, JR., DANIEL A. FARBER, AND ERIC LANE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici are law professors and scholars at Yale Law School, Boalt Hall Law School, and Hofstra Law School, respectively. They teach and write in the areas of legislation and statutory interpretation. Based on their application of accepted canons of statutory interpretation, *amici* respectfully submit that neither the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), nor the USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified at 8 U.S.C. § 1226a), authorizes the indefinite detention of Petitioner and similarly situated persons seized in the United States as enemy combatants.

SUMMARY OF ARGUMENT

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), a plurality of this Court held that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (the "AUMF"), authorized the President to detain as enemy combatants persons who were "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 (quotation marks omitted). In seeking to hold al-Marri in a naval brig indefinitely without charge, the

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[1] The parties have consented to the filing of this brief. No counsel for a party 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 curiae* or their counsel made a monetary contribution to its preparation or submission.

government now asks this Court to extend the plurality's decision in *Hamdi* and read into the AUMF the implicit authorization for the President to seize and detain U.S. citizens and resident aliens on American soil, even if they never affiliated with a foreign military or set foot on a foreign battlefield. Under settled principles of statutory interpretation, the government's breathtakingly expansive reading of the AUMF should be rejected.

Congress has specifically denied the President the indefinite detention powers that the government now seeks to gain through judicial interpretation. Just thirty-eight days after passing the AUMF, Congress passed the USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified at 8 U.S.C. § 1226a), which gave the President carefully defined powers to detain resident aliens on suspicion of terrorism. The administration initially sought much broader and unlimited detention power but was forced to withdraw that proposal in the face of bipartisan congressional disapproval. Congress's unambiguous rejection of the administration's request for authority to indefinitely detain persons seized within the United States fatally undermines the government's assertion that such detention was somehow authorized *sub silentio* by the AUMF only thirty-eight days earlier.

Having failed to convince Congress to grant the power to hold resident aliens in indefinite detention, the government now seeks to lobby the judiciary to read that authority into the more general provisions of the AUMF. The government's efforts to override the clear will of Congress in the guise of judicial

interpretation cannot be reconciled with *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), or our Constitution's separation of powers. "If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court." *Hamdi*, 542 U.S. at 578 (Scalia, J., dissenting).

Even if Congress had not specifically limited the President's powers to detain resident aliens, traditional canons of construction would counsel against the government's broad reading of the general terms of the AUMF. Under the canon of constitutional avoidance, this Court should avoid interpreting the AUMF in a manner that would raise difficult constitutional questions, both as applied to resident aliens such as al-Marri and as applied in future cases to U.S. citizens. And, under the clear-statement rule announced in *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944), this Court should not interpret the general provisions of a wartime measure to restrict the domestic liberty of citizens unless such an intent is clearly and unmistakably expressed in the text of the statute. While the detention of persons fighting in a foreign theater of war may be implied from the general terms of the AUMF, *Endo* requires a clear and explicit statement to authorize the domestic seizure and detention of persons who never set foot on a foreign battlefield. Because the AUMF does not clearly and unmistakably authorize such detentions of citizens and resident aliens, the decision of the Fourth Circuit should be reversed.

ARGUMENT

The government asks this Court to extend the plurality's decision in *Hamdi* and read into the AUMF the implicit authorization for the President to seize U.S. citizens and resident aliens on American soil, and to hold those detainees indefinitely in military custody without charge. Under settled principles of statutory interpretation, the administration's expansive interpretation of the AUMF should be rejected.

I. The AUMF Did Not Authorize—and the Patriot Act Prohibits—the Indefinite Domestic Detention of al-Marri and Other Resident Aliens Seized Within the United States.

In arguing that the power to seize and detain persons in the United States should be viewed as "necessary and appropriate force" authorized by the AUMF, the government ignores the explicit and unambiguous restraints on executive detention that Congress enacted as part of the Patriot Act. The AUMF should not be interpreted to implicitly confer the same broad detention powers that Congress specifically refused to authorize.

A. The Plain Text of the Patriot Act Clearly and Explicitly Limits the Executive's Power To Detain Indefinitely a Resident Alien on Suspicion of Terrorism.

When it passed the Patriot Act (thirty-eight days after passing the AUMF) Congress gave the President explicit, narrowly defined authority to detain aliens within the United States on suspicion of terrorism. A subheading of the statute is

expressly identified as a "[l]imitation on indefinite detention." 8 U.S.C. § 1226a(a)(6).

The Patriot Act provides that within seven days of seizing an alien within the United States, the Attorney General "shall place the alien . . . in removal proceedings," or "shall charge the alien with a criminal offense." *Id.* § 1226a(a)(5). If no charges or removal proceedings are brought within that seven-day period, the Attorney General "shall release the alien." *Id.* The Patriot Act allows the Attorney General to detain suspected terrorists during the pendency of their removal proceedings and when it is impossible in the "reasonably foreseeable future" to transfer them to another country—but that additional detention power is subject to strict procedural safeguards. *Id.* § 1226a(a)(6). In such cases, the Attorney General or Deputy Attorney General must personally certify that release of the alien would pose national security concerns, and the responsibility for making that certification may not be delegated to any other official. *Id.* § 1226a(a)(4). Following the initial certification, "[t]he alien may request each 6 months in writing that the Attorney General reconsider the certification and may submit documents or other evidence in support of that request." *Id.* § 1226a(a)(7). Every six months, the Attorney General must submit detailed reports to the House and Senate Judiciary committees disclosing the number of aliens certified, the grounds for those certifications, the nationalities of the aliens, the length of the detention for each certified alien, the number of certified aliens who were removed, the number of certified aliens granted relief from

removal, the number of certified aliens the Attorney General has determined may no longer be certified, and the number of certified aliens released from detention. *Id.* § 1226a note.

Even if the text of the Patriot Act were not plain and unambiguous, the legislative history confirms Congress's clear intent to place strict limits on the President's power to detain aliens in the United States. In drafting the Patriot Act, Congress considered and rejected the President's request for authorization to detain suspected terrorists indefinitely without charge. The initial legislation proposed by the administration, named the Anti-Terrorism Act of 2001, would have allowed indefinite detention with no limitations or restrictions. During committee hearings in Congress, this proposal drew bipartisan criticism,[2] which caused the administration to agree to a more restricted provision. *See* Neil A. Lewis & Robert Pear, *A*

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[2] *See Administration's Draft Anti-Terrorism Act of 2001: Hearings Before the H. Comm. on the Judiciary*, 107th Cong. 14 (2001) (statement of Rep. Conyers) (identifying proposal for indefinite detention as one of a "number of provisions in your measure that give us constitutional trouble"); *id.* at 20 (statement of Rep. Berman) (criticizing provision for giving Attorney General "an ability to detain in perpetuity people in detention without limit, without requirement of deportation, without requirement of prosecution"); *id.* at 30 (statement of Rep. Lofgren) ("[T]he indefinite detention is a real issue, because there is no time line during which the deportation proceedings must be undertaken."); *Homeland Defense: Hearings before the S. Comm. on the Judiciary*, 107th Cong. 26 (2001) (statement of Sen. Specter) (criticizing proposal for giving "the authority to detain on that very generalized standard without any evidentiary base or probable cause").

Nation Challenged: Congress; Negotiators Back Scaled-Down Bill to Battle Terror, N.Y. Times, Oct. 2, 2001, at A1 ("The proposal for indefinite detention of immigrant suspects engendered the greatest opposition from civil libertarians both inside and outside Congress.")

Congress's repudiation of the administration's earlier proposal was recounted throughout the debate by supporters of the final bill. In the House, Representative Conyers submitted a "point-by-point" analysis of the legislation, stating that the final bill "completely revises the Administration's proposal to better balance the law enforcement needs of the Attorney General with the protection of aliens' civil liberties." 147 Cong. Rec. 20,441 (2001) (statement of Rep. Conyers); *see also id.* at 20,439 (statement of Rep. Sensenbrenner) (noting that the "compromise legislation" requires the Attorney General "to revisit every 6 months the detention of an alien who has been certified as an alien terrorist").

In the Senate, the bill's supporters emphasized that negotiators had "made painstaking efforts to achieve this workable compromise" in order to address "questions about earlier provisions, particularly the detention provision for suspected alien terrorists." 147 Cong. Rec. 19,507 (2001) (statement of Sen. Hatch).

> In response to the concern that the INS might detain a suspected terrorist indefinitely, the [sic] Senator Kennedy, Senator Kyl, and I worked out a compromise that limits the provision. It provides that the alien must be

> charged with an immigration or criminal violation within seven days after the commencement of detention or be released. In addition, contrary to what has been alleged, the certification itself is subject to judicial review. The Attorney General's power to detain a suspected terrorist under this bill is, then, not unfettered.

Id. Senator Kyl similarly stated that the provision for "temporary detention" was a "compromise" that "represents a bipartisan understanding." *Id.* at 19,538 (statement of Sen. Kyl).

> Under the compromise that Members have reached, the Attorney General must charge an alien with a deportable violation or he must release the alien. The underlying certification, and all collateral matters, can be reviewed by the U.S. District Court of the District of Columbia, and the Attorney General is required to report to Congress every six months on the use of this detention provision.

Id.

The legislative history of the Patriot Act underscores what is clear from the statute's plain text: The Executive may not detain a resident alien for more than seven days without bringing criminal charges or initiating deportation proceedings. Even after doing so, the Executive may further detain the alien only by following the Patriot Act's carefully outlined procedures. The government has not—and does not claim to have—followed any of these

procedures in detaining al-Marri in a naval brig for over five years.

B. The Patriot Act Precludes the Government's Expansive and Strained Reading of the AUMF.

Under settled principles of statutory interpretation, the Patriot Act's specific limitations on the detention of resident aliens preclude the government's interpretation of the AUMF as granting the President unlimited detention powers. A specific statute usually takes precedence over a general one. *See, e.g.*, *Hinck v. United States*, 127 S. Ct. 2011, 2015 (2007) (explaining that "a precisely drawn, detailed statute" usually "pre-empts more general remedies" and should be "regarded as exclusive") (quotation marks omitted). And later statutes usually trump earlier enactments. *See, e.g.*, *United States v. Estate of Romani*, 523 U.S. 517, 530 (1998) (applying principle that "a specific policy embodied in a later federal statute should control our construction" of an earlier statute). Accordingly, in the event of a conflict between the two statutes, the Patriot Act's specific and more recent limitations on executive detention would take precedence over any detention power that could be inferred from the broad provisions of the AUMF.

But in this case, the Court does not need to resort to such rules of construction to harmonize disparate pieces of legislation passed by different Congresses. The Patriot Act's specific limitations on the detention of resident aliens provide compelling evidence of what that same Congress did—and did not—intend

to authorize when it passed the AUMF thirty-eight days earlier. This Court has repeatedly refused to interpret broad legislative provisions in a manner that would conflict with other acts passed by the same Congress. *See, e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) ("It is quite unlikely that the same Congress that rejected proposals to limit the President's authority to conclude executive agreements [when enacting IEEPA] sought to accomplish that very purpose *sub silentio* through the FSIA.").[3]

It is similarly "quite unlikely" that the administration would request—and that Congress would explicitly withhold—the power to detain indefinitely resident aliens seized within the United States if the same Congress already had given those same detention powers to the President as part of the AUMF thirty-eight days earlier. Under settled

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[3] *See also Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002) (concluding that, in light of subsequent legislation requiring the Department of Education to centralize enforcement of FERPA, "[i]t is implausible to presume that the same Congress nonetheless intended private suits to be brought before thousands of federal- and state-court judges, which could only result in the sort of 'multiple interpretations' the Act explicitly sought to avoid"); *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 667 (1995) ("To interpret ERISA's pre-emption provision as broadly as respondents suggest, would have rendered the entire NHPRDA utterly nugatory, since it would have left States without the authority to do just what Congress was expressly trying to induce them to do by enacting the NHPRDA. Given that the NHPRDA was enacted after ERISA and by the same Congress, it just makes good sense to reject such an interpretation.").

principles of interpretation, the government's expansive reading of the AUMF should be rejected.

C. Judicial Interpretation of the AUMF Should Not Be Used To Override the Clearly Expressed Will of Congress.

Like a majority of the judges on the Fourth Circuit, the government asserts that the Patriot Act can simply be ignored because it does not directly speak to the conflict with al Qaeda. In its Brief in Opposition to Certiorari, the government echoes Judge Wilkinson's assertion that the two acts have "separate spheres" because "the AUMF represents a specific response to the 9/11 attacks, authorizing military force against those responsible for the attacks," while the Patriot Act's standards for executive detention are "designed to prevent terrorism generally, regardless of whether the suspect was associated with 9/11." Pet. App. 201a (Wilkinson, J.).[4]

The government's assertion that the detention provisions of the Patriot Act were not directed at the persons who planned the 9/11 attacks is demonstrably false. The administration presented the Patriot Act to Congress as "America's response to the criminal act of war perpetrated on the United States of America on September 11."

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[4] The government's Brief in Opposition does not discuss or defend Chief Judge Williams' assertion that the Patriot Act regulates the President's authority to detain under the Take Care Clause of the Constitution and the AUMF provides separate authority to detain pursuant to the Commander-in-Chief Clause. Pet. App. 169a.

Administration's Draft Anti-Terrorism Act of 2001: Hearings Before the H. Comm. on the Judiciary, 107th Cong. 3 (2001) (statement of John Ashcroft, Att'y Gen. of the United States). Indeed, then-Attorney General Ashcroft argued that the detention proposal was an important part of the administration's efforts to detect and apprehend persons responsible for the attacks: "[T]he investigation into the act of September 11 is ongoing, moving aggressively forward. To date, the FBI and INS have arrested or detained 352 individuals who remain—there are other individuals, 392 who remain at large, because we think they have—and we think they have information that could be helpful to the investigation." *Id.* at 7.[5]

In attempting to relegate the Patriot Act to a "separate sphere[]," the government asks the Court to infer grants of authority from the AUMF that could potentially supplant any and all domestic laws

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[5] Supporters of the administration's proposal similarly anticipated that the Patriot Act would be applied to apprehend and punish the perpetrators of the 9/11 attacks. *See id.* at 3 (statement of Rep. Sensenbrenner) ("Let me tell you on September 11, our common defense was penetrated, and America's tranquility, welfare and liberty were ruthlessly attacked. I urge the Members of this Committee to stand united together in recognition of the important purpose we must serve in preventing future terrorist attacks and prosecuting those who have already attacked us."); *id.* at 28-29 (statement of Rep. Chabot) ("[T]he vicious terrorist attacks of September 11 represented nothing less than a declaration of war against our country. To win this war, we must use every investigative law enforcement and military resource at our disposal to find and punish the individuals or governments responsible for these terrible crimes.").

unless, perhaps, the text of those laws specifically referenced the 9/11 attacks. That approach has no foundation in our Constitution's separation of powers or in this Court's precedents. Indeed, just a few terms ago, this Court affirmed that the general language of the AUMF does not supplant long-standing provisions of the Uniform Code of Military Justice governing military commissions. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring) (finding no authority in the AUMF to employ military commissions when "Congress has denied the President the legislative authority to create military commissions of the kind at issue here"); *see also* Daniel J. Freeman, Note, *The Canons of War*, 117 Yale L.J. 280, 304 (2007) (surveying cases and concluding that "in nine of twelve cases the courts found that a specific framework statute trumps a more recent AUMF").

The general rule that the AUMF does not automatically repeal pre-existing domestic laws applies with even greater force in this case because the Patriot Act was enacted one month *after* Congress passed the AUMF. This is not a case where an outdated statute failed to anticipate a new military emergency. Indeed, the same arguments that the government has used in litigation to justify the detention of al-Marri were considered and rejected by Congress during hearings on the Patriot Act. Witnesses testifying in favor of the administration's proposal argued that the detention of aliens was crucial to the country's ongoing war efforts against al Qaeda:

> Today we are right to presume the loyalty of our citizens but we still face the problem of enemy aliens in our midst. But because no foreign nation state is prosecuting the war against us, we cannot determine the identity of potentially alien enemies through the old category of the alien's nation state. Nevertheless these enemy aliens are even more dangerous because they, and not others from their home countries, are the main vectors of attacks on the United States. And unlike previous wars, they may have ready access to weapons of mass destruction targeted at civilians. In these circumstances, it is reasonable to provide the Attorney General with authority to find and detain the relatively few aliens who are our potential enemies. This new kind of alien detention authority is proportionate to the new kind of war we face.

Protecting Constitutional Freedoms in the Face of Terrorism: Hearings Before the Subcomm. on the Constitution, Federalism, and Property Rights of the S. Comm. on the Judiciary, 107th Cong. 25 (2001) (testimony of John O. McGinnis, Professor of Law, Benjamin N. Cardozo Sch. of Law). Having failed to convince Congress that indefinite detention powers were necessary for "the new kind of war we face," the administration now seeks to persuade the judiciary to authorize the same detention policies that Congress prohibited.

The government similarly argued in *Ex parte Milligan* that the danger of sleeper cells in Indiana

justified the domestic seizure and detention of Milligan, notwithstanding Congress's direction that all civilian detainees be promptly indicted or released. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 133-34 (1866) (Chase, C.J., concurring in part and dissenting in part). Indeed, the four Justices who concurred in judgment but dissented from *Milligan*'s constitutional holding were persuaded that the danger of enemy sleeper cells in Indiana might be serious enough to justify Milligan's detention as a constitutional matter. *Id.* at 140 (arguing that Milligan was a member of "a powerful secret association, composed of citizens and others . . . under military organization, conspiring against the draft, and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government"). But, while dissenting from the majority's constitutional holding, those same Justices nevertheless recognized that their own assessment of whether such detention should be authorized could not supplant Congress's refusal to do so: "We have confined ourselves to the question of power. It was for Congress to determine the question of expediency. And Congress did determine it. That body did not see fit to authorize trials by military commission in Indiana, but by the strongest implication prohibited them." *Id.* at 141. The Justices accordingly concurred in the Court's unanimous holding that Milligan must be tried or released.

Nearly a century after *Milligan* this Court again reaffirmed in *Youngstown* that the courts should not second-guess the will of Congress based on the judges' own determination that "it may have been desirable to have given the President further authority, a freer hand" to respond to national security concerns: "The need for new legislation does not enact it." *Youngstown*, 343 U.S. at 603, 604 (Frankfurter, J., concurring); *cf. Hamdi*, 542 U.S. at 577-78 (Scalia, J., dissenting). Indeed, as in *Youngstown*, it would be particularly ironic for this Court to override the will of Congress as expressed in the Patriot Act in the guise of interpreting the general provisions of the AUMF:

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.

Youngstown, 343 U.S. at 609 (Frankfurter, J., concurring).

The administration's request for expanded detention authority should be rejected in accordance with *Milligan* and *Youngstown*. Because Congress has explicitly refused to grant the administration the power to hold al-Marri and other resident aliens in indefinite detention, the AUMF may not be interpreted by judicial fiat to grant the authority that Congress refused to provide.

II. Other Canons of Construction Counsel Against an Interpretation of the AUMF that Would Authorize al-Marri's Detention.

Even if Congress had not specifically prohibited the President from holding resident aliens such as al-Marri in indefinite detention, traditional canons of construction would counsel against the government's expansive reading of the AUMF.

A. The Government's Broad Interpretation of the AUMF Raises Constitutional Concerns Both as Applied to al-Marri and as Applied to Citizens.

The indefinite detention without trial of a resident alien such as al-Marri raises serious concern. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); *INS v. St. Cyr*, 533 U.S. 289, 304-05 (2001). This Court has long held that resident aliens are fully protected by the Fifth and Sixth Amendments. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("[E]ven aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law."). Moreover, resident aliens have a

substantive due process right to be free from bodily restraint that is "strong enough to raise a serious question as to whether, irrespective of the procedures used, the Constitution permits detention that is indefinite and potentially permanent." *Zadvydas*, 533 U.S. at 696 (citation omitted).

Those constitutional concerns are heightened in this case because the AUMF's implicit power to detain enemy combatants applies with equal force to citizens and non-citizens alike. The text of the AUMF makes no distinction between the detention of citizens and resident aliens. And this Court has twice held—first in *Quirin* and again in *Hamdi*—that, under the customary laws of war, the power to detain enemy combatants applies equally to both citizens and aliens. *See Ex parte Quirin*, 317 U.S. 1, 37-38 (1942); *Hamdi*, 542 U.S. at 519 (plurality opinion). The judges on the Fourth Circuit thus acknowledged—and the government agreed—that the court's holding would also authorize the President to seize and detain U.S. citizens on American soil. *See* Pet. App. 10a (opinion of Motz, J.); *id.* at 141a (opinion of Traxler, J.); *id.* at 146a n.2 (opinion of Gregory, J.); *id.* at 180a (opinion of Williams, C.J.); *id.* at 235a-236a (opinion of Wilkinson, J.). *But see id.* at 268a n.10 (opinion of Wilkinson, J.) (declining to "resolve the issue for the purposes of this case").

This Court should accordingly take care when interpreting the AUMF to avoid difficult constitutional questions that would arise, not only from the detention of al-Marri and other resident

aliens, but also from the detention of United States citizens in future cases.

> [W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—***whether or not those constitutional problems pertain to the particular litigant before the Court.***

Clark v. Martinez, 543 U.S. 371, 380-81 (2005) (emphasis added); *accord United States v. Santos*, 128 S. Ct. 2020, 2030 (2008) (plurality opinion); *Rita v. United States*, 127 S. Ct. 2456, 2478-79 (2007) (Scalia, J., concurring in the judgment).

The government's expansive interpretation of the AUMF would raise serious constitutional questions, in al-Marri's case and in future cases. This Court should not reach out to embrace those questions by reading into the AUMF a new detention authority that is not supported by, much less compelled by, the statute's plain text.

B. The AUMF Does Not Contain a Clear Statement Authorizing Domestic Detention, as Required By *Ex parte Endo*.

In *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944), this Court held that "when asked to find implied powers" in "a war-time measure," a reviewing court must assume that "the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." *Id.* at 300; *accord Hamdi*, 542 U.S. at 544

(Souter, J., concurring in judgment) (explaining that *Endo* created "an interpretive regime that subjected enactments limiting liberty in wartime to the requirement of a clear statement").[6]

Endo's requirement of a "clear" and "unmistakable" statement is not simply a method of divining legislative intent. Rather, it "impute[s] to Congress an attitude that [i]s more consonant with our traditions of civil liberties." *Lee v. Madigan*, 358 U.S. 228, 235 (1959); *accord Duncan v. Kahanamoku*, 327 U.S. 304, 323-24 (1946) (narrowly construing congressional authorization of "martial law" in Hawaii and refusing to attribute to Congress an intent to "authorize the supplanting of courts by military tribunals"). Requiring a clear statement by Congress before finding executive power to detain citizens, or otherwise substantially infringe on their liberties, promotes respect for the constitutional system of checks and balances by demanding that the two political branches speak in unison. And, like the doctrine of constitutional avoidance, the *Endo* canon preserves a proper, and limited, role for the courts by avoiding difficult constitutional questions unless it is truly necessary to resolve them. "If the Court invokes a clear statement rule to advise that

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[6] *Endo*'s requirement of a clear statement authorizing detention was reaffirmed by Congress in the Non-Detention Act, 18 U.S.C. § 4001(a). Although al-Marri is not a citizen and therefore not covered by *Endo* or the Non-Detention Act, the judges on the court below recognized that their holding would apply with full force to citizens and non-citizens alike. The Court should therefore interpret the AUMF in a manner that avoids unnecessary conflict with *Endo* and the Non-Detention Act in similar cases involving citizens. *See supra* at 18-19.

certain statutory interpretations are favored in order to avoid constitutional difficulties, Congress can make an informed legislative choice either to amend the statute or to retain its existing text." *Boumediene v. Bush*, 128 S. Ct. 2229, 2243 (2008); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992).

The plurality opinion in *Hamdi* does not undermine *Endo*'s requirement of a clear statement to authorize the domestic seizure of civilians who have never fought on a foreign battlefield. The *Hamdi* plurality found the broad language in the AUMF to be sufficiently "clear[] and unmistakabl[e]" to authorize Hamdi's detention because the detention of battlefield captives is a "fundamental incident of waging war." *Hamdi*, 542 U.S. at 519. But *Hamdi* took care to distinguish its holding from the unlawful seizure and detention of Milligan at his home in Indiana. *See id.* at 521-22. The plurality opinion reflects this Court's historical willingness to accommodate a "latitude of interpretation" to uphold executive action "when turned against the outside world for the security of our society" but refuse "such indulgence" when executive action "is turned inward." *Youngstown*, 343 U.S. at 645 (Jackson, J., concurring).

Because the Fourth Circuit believed that "locus of capture" is "irrelevant," the lower court mistakenly concluded that the AUMF's implicit authorization for the President to detain battlefield captives necessarily authorizes the military detention of

citizens such as Jose Padilla who are seized in the United States, *Padilla v. Hanft*, 423 F.3d 386, 393 (4th Cir. 2005), and resident aliens such as al-Marri who never set foot on a foreign battlefield, Pet. App. 165a (opinion of Williams, C.J.) (applying *Padilla*'s holding to al-Marri).

The Fourth Circuit's assumption that the "locus of capture" is "irrelevant" is incorrect. It is one thing to read the AUMF as implicitly authorizing the kinds of detentions of enemy soldiers abroad that are normally a part of warfare. It is quite another to read the AUMF as implicitly authorizing the domestic seizure and detention of a person who is not a part of any military service and never fought on any battlefield. Indeed, this Court has historically been willing to infer military jurisdiction over foreign territories while refusing to infer any corresponding military jurisdiction over domestic territory without a clear statement. *See Lee*, 358 U.S. at 233-34 (narrowly construing military jurisdiction over crimes committed by soldier in the United States); *Duncan*, 327 U.S. at 313-14 (narrowly construing Congress's authorization of "martial law" in Hawaii). Interpreting the AUMF to authorize indefinite detention of persons seized on American soil would pose a significantly greater threat to domestic liberty then the detention of persons fighting overseas on a foreign battlefield. *Endo* counsels against inferring such restrictions on domestic liberty from the general provisions of a statute without a clear statement from Congress.

Congress must speak with greater clarity when it intends to authorize domestic detentions than when

it authorizes the detention of enemy soldiers captured abroad. Because the AUMF does not contain a clear and unmistakable statement authorizing the seizure and indefinite detention of citizens and resident aliens, al-Marri's petition should be granted and the Fourth Circuit's decision should be reversed.

CONCLUSION

For the foregoing reasons, the decision of the Fourth Circuit should be reversed.

Respectfully submitted,

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