No. 06-7427

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ALI SALEH KAHLAH AL-MARRI, AND
MARK A. BERMAN, AS NEXT FRIEND,
Petitioners,

v.

COMMANDER S. L. WRIGHT, USN COMMANDER,
CONSOLIDATED NAVAL BRIG,
Respondent.

On Appeal From The United States District Court
For The District Of South Carolina

BRIEF FOR CENTER FOR NATIONAL SECURITY STUDIES, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ASIAN AMERICAN JUSTICE CENTER, AND NATIONAL IMMIGRANT JUSTICE CENTER AS *AMICI CURIAE* SUPPORTING PETITIONER AND REVERSAL

KATE MARTIN
JOSEPH ONEK
CENTER FOR NATIONAL
SECURITY STUDIES
1120 19th Street NW
Washington, DC 20036

PAUL SMITH*
JOSHUA A. BLOCK
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600
Counsel for Center for National Security Studies

*Counsel of Record

(Additional Counsel Inside Cover)

LEMA BASHIR
AMERICAN-ARAB
ANTI-DISCRIMINATION COMMITTEE
1732 Wisconsin Avenue, NW
Washington, DC 20007
Counsel for American-Arab
Anti-Discrimination Committee

AIMEE J. BALDILLO
ASIAN AMERICAN JUSTICE CENTER
1140 Connecticut Avenue, NW
Suite 1200
Washington, DC 20036
Counsel for Asian American Justice Center

MARY MEG MCCARTHY
NATIONAL IMMIGRANT JUSTICE CENTER
208 S. LaSalle Street
Suite 1818
Chicago, Illinois 60604
Counsel for National Immigrant Justice Center

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No. 06-7427 Caption: Al-Marri v. Wright

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No. **06-7427** Caption: **Al-Marri v. Wright**

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No. 06-7427 Caption: Al-Marri v. Wright

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Immigrant Justice Center (name of party/amicus) who is amicus (appellant/appellee/amicus),

makes the following disclosure:

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2. Does party/amicus have any parent corporations?
   ☐ YES ☒ NO
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QUESTION PRESENTED

Whether a person residing in the United States and arrested at his home in Peoria, Illinois may be held indefinitely without charge or trial as an "enemy combatant" even though the government does not allege that he is a member of the armed forces of an enemy state.

INTEREST OF *AMICI CURIAE*[1]

The Center for National Security Studies is a nonprofit, nongovernmental civil liberties organization in Washington, D.C., that was founded in 1974 to ensure that civil liberties are not eroded in the name of national security. The Center has worked for more than 30 years to find solutions to national security problems that protect both the civil liberties of individuals and the legitimate national security interests of the government.

The American-Arab Anti-Discrimination Committee ("ADC") is a civil rights organization committed to defending the rights of people of Arab descent and promoting their rich cultural heritage. ADC, which is non-sectarian and non-partisan, is the largest Arab-American grassroots civil rights organization in the United States. It was founded in 1980 by former United States Senator James Abourezk and has 38 chapters nationwide and members in all 50 States. Since September 11, 2001, the Arab-American community has often been

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[1] The parties to this appeal have consented to the filing of this brief.

subjected to harsh treatment, and ADC has been at the forefront in addressing discrimination and bias against Arab-Americans wherever it is practiced.

The Asian American Justice Center ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, the Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and public education on issues of importance to the Asian American community. AAJC and its Affiliates have a long-standing interest in protecting the civil liberties of, and civil rights that have an impact on, the Asian American community, and this interest has resulted in AAJC's participation in a number of *amicus* briefs before the courts.

The National Immigrant Justice Center is dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers. The Center provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education. Since its founding three decades ago, the Center has been unique in blending individual client advocacy with broad-based systemic change.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises fundamental questions about the power of the government to arrest individuals in this country, label them enemy combatants based on allegations about their intentions to engage or assist in terrorism, and detain them indefinitely outside the criminal justice system in military custody without charge or trial. The existence of such a power would be frightening because it would expose all persons in this country, citizens and non-citizens, to the prospect that they would lose their liberty indefinitely or permanently on the mere say-so of the Executive.[2] The Bill of Rights and the Suspension Clause of the Constitution protect all persons within the United States against this type of arbitrary action.

The category of "enemy combatants," who may be militarily detained without charge or trial, is properly limited to persons who are captured on a battlefield or are members of the armed forces of an enemy state. As the Supreme Court recognized in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion), such a limitation is faithful to the traditional laws of war and the constitutional holding of *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866),

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[2] Al-Marri is a non-citizen who was lawfully in the country when arrested; the government has claimed the same power to militarily detain citizens found in the United States. *See generally* Brief of Respondent-Appellee, *Padilla v. Hanft*, No. 05-6395 (4th Cir., filed May 6, 2005).

prohibiting military trial of civilians. Neither the Executive nor Congress can treat individuals outside this category as "enemy combatants."

When the government detains a civilian for conspiring to engage in criminal conduct, even when that conduct is in support of the hostile acts of an enemy state or terrorist organization, the Constitution requires the government to prove such wrong-doing consistent with the Fifth and Sixth Amendments. The detention of battlefield captives or members of an enemy armed force without charge or trial is justified by military necessity and consistent with due process. The detention of individuals seized in the United States for allegedly conspiring with Al Qaeda is not. By sidestepping the normal criminal process, the government has created an inquisitorial system that will likely produce the kind of abusive interrogation practices that have almost always accompanied detention without trial.

ARGUMENT

I. Under The Constitution, The Government May Not Detain As An "Enemy Combatant" A Person Who Is Not Captured on the Battlefield And Not A Member Of The Armed Forces Of An Enemy State.

The constitutional requirement of charge and trial is found in the guarantee of habeas corpus, the Fifth Amendment's Due Process Clause, and Sixth Amendment's requirement of trial by jury. The general constitutional rule governing detention was explained by Justice Scalia in *Hamdi*:

> The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property. When a citizen was deprived of liberty because of alleged criminal conduct, those procedures typically required committal by a magistrate followed by indictment and trial. . . . It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing.

Hamdi, 542 U.S. at 556 (Scalia, J., dissenting).[3]

The detention of enemy combatants (usually held as prisoners of war) under the law of war constitutes a very narrow exception to this general rule. Although the *Hamdi* Court was aware that in other pending cases the government had asserted the power to seize individuals far from the battlefield of Afghanistan, including Chicago and Peoria, the plurality was careful to limit its holding to individuals who were "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in armed conflict against the United States there." *Id.* at 516 (internal quotation marks omitted, quoting Respondents' brief); *see also id.* at 517 (limiting holding to

[3] Although Justice Scalia dissented in *Hamdi* from the plurality's holding that American citizens captured on the battlefield of Afghanistan could be detained without a criminal trial as "enemy combatants," the plurality did not contradict his reading of the Constitution as it applies to individuals arrested within the United States.

"the narrow category we describe"); *id.* at 518 (limiting holding to "individuals falling into the limited category we are considering").

A. The Law Of War Exception To The Fifth And Sixth Amendments Is Exceedingly Narrow.

The Supreme Court recognized in *Hamdi* that when the Congress authorized the use of military force against Al Qaeda and the Taliban in Afghanistan, it also authorized the military to detain individuals captured on the battlefield without charge or trial for the duration of active hostilities. The laws of war have historically included this limited detention of battlefield captives. *See Hamdi*, 542 U.S. at 518-19. The detention of members of an enemy armed force is justified by military necessity and consistent with respect for due process.

United States soldiers fighting in Afghanistan or anywhere else abroad must be able to capture and detain individuals who may be fighting against them in order to prevent their return to the battlefield. Such individuals are detained based on their status as enemy soldiers, not on any allegations of wrong-doing. The detention of enemy combatants "is neither a punishment nor an act of vengeance, but merely a temporary detention which is devoid of all penal character." William Winthrop, *Military Law and Precedents* 788 (rev. 2d ed. 1920) (quoted in *Hamdi*, 542 U.S at 518).

Battlefield conditions make a full-blown trial on the detainee's status impracticable. In the midst of a battle, there is neither the time nor opportunity to gather all the evidence that might be needed to determine whether someone captured is a soldier or a civilian. A rough and ready hearing must suffice. Moreover, as there is no issue of individual wrongdoing to be resolved, enemy soldiers do not require all the traditional due process rights described by Justice Scalia for adjudicating guilt or innocence. What is at issue is their status, not their conduct, and generally this can be determined fairly by a less formal proceeding than a full-blown trial. The facts that serve as the basis for such military detention of enemy combatants -- presence on the battlefield or membership in an enemy armed force -- are not usually in dispute.[4]

This traditional rationale under the laws of war makes no sense when applied to the arrest or detention of suspected Al Qaeda terrorists in the United States. As a practical matter, because the arrest occurs far from a theater of active hostilities, a normal trial would not require "a futile search for evidence buried under the rubble of war." *Hamdi*, 542 U.S. at 532. More fundamentally, suspected terrorists are detained because of their suspected crimes. Because

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4 The Geneva Conventions require a military review under Article 5 to address claims of mistaken identity. The skeletal due process rights provided by the *Hamdi* plurality similarly ensure that "the errant tourist, embedded journalist, or local aid worker [also] has a chance to prove military error." *Hamdi*, 542 U.S. at 534; *see also* U.S. Army Reg. 190-8.

what is at stake is their substantive guilt or innocence, not simply their status as a member of a hostile force, those more complicated issues require more robust procedures.

The government may claim that it is detaining certain persons on the basis of their status as "associates of known Al Qaeda operatives" rather than their wrongdoing. But, as the highly publicized wrongful detentions of Khalid El-Masri and Maher Arar demonstrate, such executive determinations are, when disputed, inevitably far less reliable than determinations of whether a person is a soldier of an enemy state or was captured on the battlefield.[5] Thus, a full trial is required before detaining someone based solely on alleged, but denied, connections with Al Qaeda.

Here, the government has failed to even allege that Al-Marri meets the requisite "enemy-combatant criteria." 542 U.S. at 534. Unlike Yaser Hamdi, Al-Marri was not captured on the battlefield in Afghanistan. Unlike even Jose Padilla, Al-Marri was not arrested at the airport, allegedly returning from the battlefield of Afghanistan, while trying to enter the United States. The Constitution prohibits extending the designation of "enemy combatant" to

[5] Self-proclaimed leaders of al Qaeda such as Osama Bin Laden and Khalid Sheikh Mohammed can be held as enemy combatants without trial because their status as persons who directed the 9/11 attacks is undisputed.

include persons who are not enemy soldiers or battlefield captives based on their alleged criminal conduct.

B. Al-Marri's Detention Is Inconsistent With The Holdings Of *Milligan* And *Quirin*.

Ex Parte Milligan held that so long as "the courts are open and their process unobstructed," no civilian in the United States may be held without a trial and conviction in accordance with the common law. *Milligan*, 71 U.S. (4 Wall.) at 121. Although the facts of *Milligan* involved a United States citizen, "'[t]his broad principle limits all our functions and applies to all subjects. It protects not only the citizens of States which are within the Union, but it shields every human being who comes or is brought under our jurisdiction.'" *Duncan v. Kahanamoku*, 327 U.S. 304, 323 n.21 (1946) (quoting Veto Message of President Andrew Johnson reproduced in Messages and Papers of the Presidents, Richardson, Vol. VI, 503).

The Supreme Court held that Milligan was entitled to a civilian trial even though he was charged with committing crimes which today would certainly be characterized as terrorism in support of an enemy. Milligan allegedly conspired to overthrow the United States government, seize munitions from the Union army, and free Confederate prisoners of war. *See Milligan*, 71 U.S. (4 Wall.) at 6-7. Indeed, the *Milligan* Court was acutely aware that Milligan's conspiring with hostile forces posed a great threat to national security:

> [R]esistance becomes an *enormous crime* when it assumes the form of a secret political organization, armed to oppose the laws, and seeks by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war, and thus overthrow the power of the United States. Conspiracies like these, at such a juncture, are extremely perilous; and those concerned in them are dangerous enemies to their country, and should receive the heaviest penalties of the law, as an example to deter others from similar criminal conduct.

Id. at 130.

Milligan's constitutional right to a trial in criminal court was triggered by his status as a civilian. Despite the grave allegations against him, the *Milligan* Court held that so long as Indiana's courts were "open to hear criminal accusations and redress grievances . . . no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service." *Id.* at 121-22. *Milligan* thus drew a fundamental distinction between members of hostile armies and their alleged civilian accomplices:

> It is not easy to see how [Milligan] can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?

Id. at 131.

In *Ex parte Quirin*, 317 U.S. 1 (1942), the Supreme Court again reiterated this basic distinction between civilians and soldiers of a hostile state when it held that members of the German military could be tried by military commission. In doing so, the *Quirin* Court did not transform every civilian who conspires with hostile forces into an unlawful enemy combatant. The Supreme Court emphasized that the German saboteurs were conceded members of a foreign army and that they, therefore, stood on different footing than Milligan, who was a civilian and "not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents." *Id.* at 45. What separated *Milligan* from *Quirin* was not the alleged acts of sabotage but the fact that Milligan was a civilian conspirator while the *Quirin* petitioners were conceded members of the German armed forces who hid their uniforms in order to blend in with the civilian population. *Id.* at 36.

Hamdi's definition of "enemy combatant," based on the traditional law of war, was designed to reaffirm *Milligan* and *Quirin*'s fundamental distinction between civilian conspirators and actual members of a foreign military. The plurality reasoned that Milligan was "a resident of Indiana arrested while at home there." *Hamdi*, 542 U.S. at 522. *Hamdi*, in contrast, could be held as an "enemy combatant" because he was alleged to be a member of a hostile army

fighting against the United States on a foreign battlefield. The plurality stated that "[h]ad Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different." *Id.*; *cf. Hamdi v. Rumsfeld,* 337 F.3d 335, 344 (4th Cir. 2003) ("To compare this battlefield capture to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges.") (Wilkinson, J., concurring), *vacated by* 542 U.S. 507 (2004).

Al-Marri plainly does not fall under this definition of enemy combatant. According to the government's own allegations, he is not a member of a foreign military and was not captured on the battlefield of Afghanistan or Iraq. He is no less a civilian than Milligan was, and he is no less entitled to be charged and tried for his alleged crimes if detained.[6]

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[6] In employing a different definition of "enemy combatant" than the one used by the *Hamdi* plurality, the lower courts relied heavily on a footnote in the *Hamdi* plurality's opinion that states: "The legal category of enemy combatant has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them." *Hamdi*, 542 U.S. at 522 n.1. But the context of that footnote indicates that it was meant to limit the definition of enemy combatant within "permissible bounds," not to expand it. By placing that footnote at the end of its discussion of *Milligan*, the plurality indicated that the lower courts would have to make similar distinctions in defining the "permissible bounds" of the enemy combatant category. A definition of enemy combatant that would allow the government to detain without trial a "resident of Indiana arrested while at home there" would indeed exceed the "permissible bounds" contemplated by the *Hamdi* plurality.

C. The Line Between Civilian And Military Established By *Milligan* Must Be Vigorously Enforced.

The government's extraordinary assertion that it can arrest persons in the United States, citizens or non-citizens, and detain them indefinitely in military custody without trial is now rendered even more extraordinary by its assertion that, if the arrested persons are non-citizens, they can be totally denied judicial review. *See* Appellee's Motion to Dismiss (filed Nov. 13, 2006). According to the government, the Military Commission Act of 2006 bars habeas or other judicial relief to non-citizens in the United States designated as "enemy combatants" unless and until the government grants the detainees a hearing before a Combatant Status Review Tribunal (CSRT). Since there is no statutory requirement that the government hold a CSRT hearing and, of course, no deadline for holding such a hearing, the government could effectively "disappear" the detainees into a black hole.[7]

This Court will address the government's arguments as to habeas in due course. At this juncture *Amici* simply point out that the indiscriminate application of the term "enemy combatant" to persons who are not soldiers or

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[7] *Amici* note that even if a CSRT hearing were provided for individuals detained in the United States, it would not meet the Fifth and Sixth Amendments' requirements for proof of wrong-doing. Such hearings were, of course, conceived as a replacement for the usual Article 5 hearings provided battlefield captives under the Geneva Conventions and are not an adequate substitute for a full-blown trial.

battlefield captives inevitably creates conflicts with such fundamental constitutional principles as the right to a fair trial and the right to habeas. For this reason, the line between military and civilian established by *Milligan* must be rigorously enforced.

II. The Government's Valid Interests In Crime Prevention, Punishment, And Incapacitation Can Be Vindicated By Trial And Conviction.

Terrorist activities are, of course, punishable under the criminal law. *See, e.g.*, 18 U.S.C. § 2331 (defining terrorism); 18 U.S.C. § 2332b (defining "[a]cts of terrorism transcending national boundaries"); 18 U.S.C. § 2339A (defining the crime of "[p]roviding material support to terrorists"); 18 U.S.C. § 2339D (defining crime of "[r]eceiving military-type training from a foreign terrorist organization"). The government's evidence that Al-Marri conspired to commit terrorist activities is grounds for prosecuting him in a criminal trial, not a basis for holding him in preventive detention as an enemy soldier or battlefield captive. *Cf. Milligan*, 71 U.S. (4 Wall.) at 122 ("If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he 'conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection,' the *law* said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law.").

The government need not wait for an actual attack to occur before intervening to apprehend a suspected terrorist. That is what the law of criminal conspiracy is for. *See* 18 U.S.C. § 2331, *et seq.* There is nothing in the government's case against Al-Marri that separates him from other suspected Al Qaeda terrorists who have been prosecuted in this way. *See, e.g., United States v. Abdi*, 463 F.3d 547, 550 (6th Cir. 2006) (prosecution of suspected Al Qaeda associate who allegedly "indicated a desire to 'shoot up' a Columbus shopping mall with an AK-47"); *United States v. Khan*, 461 F.3d 477, 483 (4th Cir. 2006) (conspiracy prosecution of persons who "organized a group to engage in activities in preparation for jihad"); *United States v. Reid*, 369 F.3d 619 (1st Cir. 2004) (prosecution of "shoe-bomber"); *United States v. Ali*, No. Crim. A.1:05-53, 2006 WL 1102835, at *1 (E.D. Va. Apr. 17, 2006) (prosecution for "joining Al-Qaeda and participating in a plan to carry out terrorist activities within the United States"); *United States v. Paracha*, No. 03 Cr. 1197, 2006 WL 12768, at *1 (S.D.N.Y. Jan. 3, 2006) (prosecution for "conspir[ing] to provide support to al Qaeda by coming to the United States").

III. Detention Without Trial For The Purpose Of Interrogation Facilitates Abuse.

Hamdi made clear that "enemy combatants" may not continue to be detained solely in order to interrogate them. The rationale for detaining combatants is to prevent their return to the battlefield; the *Hamdi* plurality went

out of its way to emphasize that "[c]ertainly, we agree that indefinite detention for purpose of interrogation is not authorized." *Hamdi*, 542 U.S. at 521. But in light of the ample tools that the criminal justice system provides for detecting, incapacitating, and punishing terrorists, it has becoming increasingly clear that the detention of Al-Marri and others as enemy combatants functions primarily to prevent any judicial oversight of the interrogation methods and detention conditions being visited upon these individuals. Al-Marri has detailed his claims of abuse in the South Carolina naval brig. *See al Marri v. Rumsfeld*, Case No. 05-cv-02259 (D.S.C.). Jose Padilla has recounted similar treatment at the same facility. Def. Mot. To Dismiss For Outrageous Government Conduct, *see United States v. Padilla,* Case No. 04-60001 (S.D. Fla., filed Oct. 4, 2006).

Although the truth of these allegations has not yet been determined, it is known that departures from common law criminal procedures have historically gone hand in hand with physical abuse and torture. "The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes." *Chambers v. Florida*, 309 U.S. 227, 237 (1940) (observing that departures from the common law procedures were often accompanied by "physical and mental torture and coercion"); *see also Hamdi* 542 U.S. at 530 (noting that "history and

common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse"). Abuse is virtually inevitable when the government is able to ignore the Constitution's "hard-won guarantees" and replace them with "dubious, if also more convenient substitutions." *See In re Oliver*, 333 U.S. 257, 281 (1948) (Rutledge J., concurring).

CONCLUSION

The judgment of the district court should be reversed, and the petition for writ of habeas corpus should be granted.

Respectfully submitted,

PAUL SMITH*
JOSHUA A. BLOCK
JENNER & BLOCK LLP
919 Third Avenue
New York, NY 10022
(212) 891-1600

*Counsel of Record

KATE MARTIN
JOSEPH ONEK
CENTER FOR NATIONAL
SECURITY STUDIES
1120 19th Street NW
Washington, DC 20036

LEMA BASHIR
AMERICAN-ARAB
ANTI-DISCRIMINATION COMMITTEE
1732 Wisconsin Avenue, NW
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AIMEE J. BALDILLO
ASIAN AMERICAN JUSTICE CENTER
1140 Connecticut Avenue, NW
Suite 1200
Washington, DC 20036

MARY MEG MCCARTHY
NATIONAL IMMIGRANT JUSTICE CENTER
208 S. LaSalle Street
Suite 1818
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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-7427 **Caption:** Al-Marri v. Wright

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Attorney for Amici Curiae

Dated: November 20, 2006

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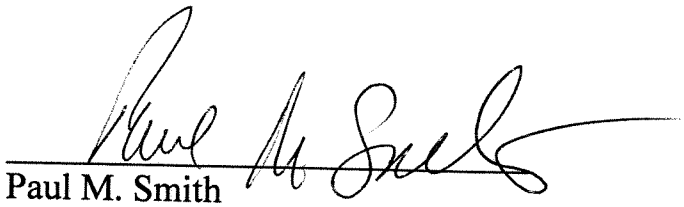
I hereby certify that on this 20th day of November, 2006, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via UPS, the required number of copies of this Amicus Brief and further certify that I served, via UPS, the required number of said Brief to the following:

Kevin F. McDonald
Office of the U.S. Attorney
1441 Main Street
Suite 500
Columbia, South Carolina 29201
(803) 929-3000

Gregory G. Garre
David B. Salmons
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 514-2206

Jonathan Hafetz
Brennan Center for Justice
161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998-6289



Paul M. Smith