12-3176, 12-3644

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHRISTOPHER HEDGES, Daniel Ellsberg, Jennifer Bolen, Noam Chomsky, Alexa O'Brien, US Day of Rage, Kai Wargalla, Hon. Birgitta Jonsdottir M.P.,

Plaintiffs-Appellees,

v.

BARACK OBAMA, individually and as representative of the United States of America, Leon Panetta, individually and in his capacity as the executive and representative of the Department of Defense,

Defendant-Appellant,

On Appeal from the United States District Court
for the Southern District of New York, Case No. 12-cv-331

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BRIEF FOR THE APPELLANTS

INTRODUCTION

This suit is brought by a handful of journalists and activists who, based on their stated activities, are in no danger whatsoever of being subject to capture and detention by the U.S. military, and who presented no evidence that anyone similarly situated has faced military detention in the current conflict under the detention standards as at issue here. The district court nonetheless issued an extraordinary and sweeping injunction at their behest. The court reached out to

strike down as facially unconstitutional a duly enacted Act of Congress, Section 1021(b)(2) of the National Defense Authorization Act (NDAA). Section 1021(b)(2) explicitly reaffirms that the President's detention authority under Congress's Authorization for Use of Military Force (AUMF) encompasses those who are "part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners." NDAA § 1021(b)(2). The AUMF was passed in the immediate aftermath of the terrorist attacks on September 11, 2001, and constitutes the President's central legislative authority for the ongoing military operations against al-Qaeda, the Taliban, and associated forces, including operations in Afghanistan.

The district court nonetheless entered a sweeping permanent injunction against the President, in his role as Commander in Chief, barring "enforcement of § 1021(b)(2) in any manner, as to any person" worldwide. SA-189-90. The court also reached out to reject longstanding interpretations of the AUMF, which had been endorsed by all three Branches of government, including Congress, two Presidents, and the D.C. Circuit, even though the AUMF was not challenged in this case. To make matters worse, the district court threatened the Executive with contempt sanctions if the military detains those it captures – even during ongoing operations in Afghanistan – in a manner inconsistent with the court's own narrow reading of the military's authority. SA-92.

As we will explain, the court's unprecedented order must be reversed for four independent reasons. First, the plaintiffs do not have standing because they face no threat of military detention under a proper interpretation of the law. Second, no action lies here to prospectively enjoining the President, as Commander in Chief, and those acting under his command in the conduct of congressionally authorized military operations against enemy forces as defined by Congress. Indeed, there is no precedent in our history for such a sweeping facial and *ex ante* challenge to the President's authority to wage war in a congressionally declared armed conflict. Third, a statute authorizing the use of military force in broad terms is not subject to an *ex ante* or facial challenge for being unconstitutionally vague or overbroad, and in any event Section 1021(b)(2) satisfies due process and First Amendment standards even if they were to apply. Finally, the injunction is not an appropriate exercise of a court's equitable powers in this context and, by applying worldwide and reaching actions that were not even challenged, it is, in any event, vastly overbroad.

STATEMENT OF JURISDICTION

The plaintiffs sought to invoke the district court's jurisdiction under 28 U.S.C. § 1331, but the district court lacked jurisdiction under Article III because plaintiffs lack standing as explained in Part I, below. The district court entered a preliminary injunction on May 16, 2012 and amended that order on June 6, 2012.

SA -3. The government filed a timely appeal of that order on August 6, 2012, *see* JA-271, which was docketed by this Court as No. 12-3176. This Court has jurisdiction over that appeal pursuant to 28 U.S.C. § 1292(a)(1). On September 12, 2012, the district court entered a permanent injunction and the government filed a timely appeal of that order on September 13, 2012, JA-312, which was docketed by this Court as No. 12-3644. This Court has jurisdiction over that appeal pursuant to 28 U.S.C. §§ 1291, 1292(a)(1). This Court has consolidated the two appeals.[1]

STATEMENT OF THE ISSUES

1. Whether plaintiffs have established standing to challenge a statutory provision, Section 1021(b)(2) of the NDAA, that affirmed pre-existing war-time detention authority provided by the 2001 AUMF, under circumstances where the AUMF has never been applied to their conduct and there is no prospect that Section 1021(b)(2) will be applied to their conduct.

2. Whether it is appropriate to allow this action to proceed and to award prospective injunctive relief against the President as Commander in Chief, and those acting under his direction, in implementing congressional authorizations or affirmations of military operations against enemy forces as defined by Congress.

[1] Given the district court's entry of a permanent injunction, the government's appeal of the preliminary injunction in No. 12-3176 is moot. *See Webb v. GAF Corp.*, 78 F.3d 53, 56 (2d Cir. 1996).

3. Whether Section 1021(b)(2) of the NDAA, in affirming the detention authority provided in the 2001 AUMF, violates, as a facial matter, the First Amendment or Due Process Clause of the Fifth Amendment.

4. Whether the district court erred in entering a sweeping worldwide injunction against a law affirming the President's detention authority in the armed conflict against al-Qaeda, Taliban, and associated forces, reaching circumstances far beyond those presented by plaintiffs and addressing claims they did not even bring.

STATEMENT OF THE CASE

Plaintiffs brought a facial challenge to Section 1021(b)(2) of the NDAA. The district court (Forrest, J.) entered an injunction against its enforcement "in any manner, as to any person." SA-189-90. That decision will be reported. *See Hedges v. Obama*, --- F. Supp. 2d ---, 2012 WL 3999839 (S.D.N.Y. Sept. 12, 2012).

STATEMENT OF FACTS

A. STATUTORY BACKGROUND

In response to the attacks of September 11, 2001, Congress passed the Authorization for Use of Military Force (AUMF) in 2001. Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). The AUMF authorizes "the President . . . to use all necessary and appropriate force against those nations, organizations, or persons he

determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." AUMF § 2(a).

The President has exercised this authority to order the United States armed forces to fight both the al-Qaeda terrorist network and the Taliban regime that harbored al-Qaeda in Afghanistan, and forces associated with them. The armed conflict with al-Qaeda, the Taliban, and associated forces remains ongoing in Afghanistan and elsewhere abroad, and has resulted in the capture and detention of hundreds of individuals pursuant to the AUMF.

In a challenge to the detention of an American citizen, a plurality of the Supreme Court explained in interpreting the AUMF that the "detention of individuals . . . for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality); *accord id.* at 587 (Thomas, J., dissenting); *see also Boumediene v. Bush*, 553 U.S. 723, 733 (2008) (reaffirming holding of *Hamdi*).

Over the years, spanning the Administrations of two Presidents, the Executive Branch has set forth publicly its interpretation of the AUMF. On March 13, 2009, the government submitted its definition of those detainable under the

AUMF to the federal district court in Washington, D.C. in the ongoing habeas litigation brought by Guantanamo detainees. *See* Memorandum Regarding Government's Detention Authority [March 2009 Memo.] (March 13, 2009), *available at* http://www.justice.gov/opa/documents/memo-re-det-auth.pdf. That definition, which the government explained was "informed by principles of the laws of war," includes

> persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

March 2009 Memo. at 1-2. The March 2009 interpretation refined a prior interpretation issued in 2004, which referred to "supporters" rather than "substantial supporters" and did not expressly invoke the laws of war to inform its interpretation. *See Parhat v. Gates*, 532 F.3d 834, 837-38 (D.C. Cir. 2008).

Over the last three-and-a-half years, the March 2009 interpretation has been relied upon by the Executive Branch in the habeas litigation brought by the Guantanamo detainees, and the courts have accepted and approved the interpretation, including the concepts of "substantial support"[2] and "associated forces."[3]

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[2] *See, e.g., Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010).
[3] *See, e.g., Khan v. Obama*, 655 F.3d 20, 32-33 (D.C. Cir. 2011).

In 2011, Congress enacted the National Defense Authorization Act for Fiscal Year 2012 (NDAA), Pub. L. No. 112-81, 125 Stat. 1298 (Dec. 31, 2011). Section 1021(a) of the NDAA expressly "affirms that the authority of the President" under the AUMF "includes the authority for the Armed Forces . . . to detain covered persons . . . under the law of war." Section 1021(b)(2) then defines "covered persons" to include:

> A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.

This is an essentially verbatim affirmation by Congress of the Executive Branch's interpretation of the AUMF. *See* March 2009 Memo. at 1-2. Section 1021(b)(2) thus makes it crystal clear that Congress intended to affirm for the Executive Branch the detention authority under the AUMF and the interpretation of that authority that the President had long articulated and exercised and that the Judiciary had repeatedly recognized.

Section 1021 further specifies that the NDAA affirms, and does not alter, the authority conferred by the AUMF. In particular, the NDAA states that "[n]othing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force." NDAA § 1021(d). Section 1021 further specifies that "[n]othing in this section shall be construed to affect

existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States." NDAA § 1021(e).

B. FACTUAL BACKGROUND

1. Plaintiffs are individual journalists and advocates. *See* SA-94-106. They filed this suit in January 2012 claiming that Section 1021(b)(2) of the NDAA violates rights they assert under the First Amendment and Due Process Clause, and seeking *ex ante* injunctive relief against exercising the authority conferred by the law. JA-38-42. Plaintiffs claim, *inter alia*, that they "hav[e] an actual and reasonable fear that their activities will subject them to indefinite military detention pursuant to § 1021(b)(2)." SA-81.

Some of the plaintiffs testified before the district court at a preliminary injunction hearing held in March 2012. Plaintiff Hedges testified that he is a journalist and had "interview[ed] al-Qaeda members who were later detained" and that some of "[h]is works have appeared on Islamic and jihadist websites." SA-94, 97; *see* JA-118.

Hedges stated that he feared detention under Section 1021(b)(2). He asserted that the terms "associated forces" and "substantial support" are "nebulous," JA-119, and that the law "applies to American citizens on American soil." JA-120. Hedges testified that he planned speaking engagements in Europe

in April 2012 where he might "meet[] with sources that could be associated with ... al-Qaeda." JA-122. He claimed to fear that journalists who "'reach out to groups opposed to the U.S. in order to explain them to the American public will not be differentiated from terrorists under' . . . the NDAA." JA-127. He said he had no similar fears before passage of the NDAA. JA-130.

Plaintiff O'Brien testified that she founded a group called the U.S. Day of Rage and operates a web site called WL Central, for which she is also a journalist. SA-98; JA-89. WL Central, she explained, is a news web site, and O'Brien has "covered . . . WikiLeaks . . ., the JTF memoranda for Guantanamo Bay," and the "revolutions in Egypt, Bahrain, Yemen, and Iran." JA-88-89. As for U.S. Day of Rage, O'Brien explained that the purpose of the group is to "reform our corrupt elections," JA-89, but in 2011 a private security firm stated that "'information about U.S. Day of Rage had been posted on . . . two Al-Qaeda recruitment sites.'" SA-100-101. O'Brien, however, testified that the organization had never "had an association with al-Qaeda." JA-61.

O'Brien testified that there was a "causal relationship between the passage of the NDAA and [her] withholding" publication of two articles she had drafted about Guantanamo because she was concerned about the breadth of the terms "associated forces" and "substantial support." JA-96. She explained that, "[i]n a war on terror where intelligence collection . . . [is] competing with the press for

collection of information, it's very similar activities of collect, talking with people, getting information." JA-97. But O'Brien admitted that she knew, even prior to the enactment of the NDAA, that the "executive has previously claimed the authority to detain a person for substantially supporting al-Qaeda, the Taliban, or associated forces." JA-101. She also testified that she was "not aware of any U.S. government action taken against [her or U.S. Day of Rage] . . . under [that prior source of authority, the] AUMF." JA-101-02.

One other plaintiff, Kai Wargalla, testified. SA-103-05. Wargalla is a citizen of Germany who resides in London, England. JA-74. Wargalla is involved in a group called "Revolution Truth" and was involved in organizing the Occupy London protests in September 2011. JA-108. Revolution Truth is "an international group of volunteers conducting campaigns on Bradley Manning and WikiLeaks, and . . . also conducting online live panel discussions." *Id*. She testified that the NDAA had affected the live panels that Revolution Truth produces, explaining that we "have been thinking about inviting . . . groups like Hamas" but "probably wouldn't do that." JA-110.

Another plaintiff, Birgitta Jonsdottir, a citizen of Iceland and member of the Iceland parliament, submitted a declaration that was read into the record. JA-115. The declaration stated that Jonsdottir had been a "volunteer for WikiLeaks." JA-115. The declaration explained that in 2010, certain of her communications had

been subpoenaed by a federal magistrate judge in connection with an investigation of WikiLeaks. JA-116. Because of the subpoena, Jonsdottir "will not fly to the United States" and is "even more fearful" due to the enactment of Section 1021. JA-117. She explained that she was concerned that her work for WikiLeaks would be viewed as "'substantial support' to terrorists and/or 'associated forces.'" *Id*.

2. On May 16, 2012, the district court granted plaintiffs' motion for a preliminary injunction. The court held that the plaintiffs had established standing based on their testimony that the NDAA authorized their detention, and the government's failure to "state that [their] activities would not be subject to . . . Section 1021." SA-42. The court determined that plaintiffs were likely to succeed on the merits because the statute failed "strict scrutiny" under the First Amendment. SA-53. While plaintiffs faced detention, the government would not be harmed given the "Government's . . . argument . . . that § 1021 is simply an affirmation of the AUMF," which was not being challenged in the litigation. SA-67. Thus, enjoining Section 1021 "should have absolutely no impact on any Governmental activities at all." *Id*.

The government moved for reconsideration, explaining in response to the court's concerns that "individuals who engage in the independent journalistic activities or independent public advocacy described in plaintiffs' affidavits and testimony, without more, are not subject to law of war detention as affirmed by

Section 1021(a)-(c), solely on the basis of such" activity. *See* SA-85. The district court denied reconsideration in favor considering the matter in connection with whether to issue a permanent injunction. SA-71.

3. On September 12, 2012, the court issued a permanent injunction barring the President and Secretary of Defense from invoking any detention authority under Section 1021(b)(2). The district court again rejected the government's argument that plaintiffs lacked standing, and gave no weight to the government's statement that the law would not authorize detention based on plaintiffs' stated activities, describing it as a "new position" that "leave[s] plaintiffs at the mercy of 'noblesse oblige.'" SA-106-10.

On the merits, the court first ruled that Section 1021(b)(2) is unconstitutional on its face because it is an impermissible content-based restriction on speech. SA-160-75. The court acknowledged that the statute "does have a legitimate, non-First Amendment aspect," but the court permanently enjoined the law in all its applications because there was "some amount of undefined activities protected by the First Amendment" that might be covered by the law. SA-162, 175. The court also held that Section 1021(b)(2) is unconstitutionally vague in violation of due process because of its use of the terms "substantially supported" and "associated forces." SA-177.

The court's decision "permanently enjoins enforcement of § 1021(b)(2) in any manner, as to any person." SA-189-90. The decision also addresses the scope of the AUMF notwithstanding the court's prior indication that the preliminary injunction against Section 1021(b)(2) would have no effect on the military's operations since the AUMF was not challenged in this case. In particular, the court stated that "[m]ilitary detention based on allegations of 'substantially supporting' or 'directly supporting' the Taliban, al-Qaeda or associated forces, is not encompassed within the AUMF and is enjoined by this Order regarding § 1021(b)(2)." SA-190.

The government noticed an appeal on September 13, 2012 and requested a stay of the injunction.

4. On September 17, 2012, this Court "granted a temporary stay," and on October 2, 2012, this Court stayed the district court order pending appeal. JA-315. The Court explained that the government had "clarifie[d] unequivocally that, 'based on their stated activities,' plaintiffs, 'journalists and activists[,] . . . are in no danger whatsoever of ever being captured and detained by the U.S. military.'" JA-316 (quoting Mot. for Stay 1). The Court further explained that Section 1021 "does not affect the existing rights of United States citizens or other individuals arrested in the United States." *Id.* (citing NDAA § 1021(e)). Finally, the Court explained that the district court injunction "appears to go beyond NDAA § 1021

itself and to limit the government's authority under the [AUMF]" even though the AUMF had not been challenged in the suit. *Id*.

SUMMARY OF ARGUMENT

The district court improperly struck down as facially unconstitutional an Act of Congress – Section 1021(b)(2) – and erroneously entered a sweeping permanent injunction against its application. Section 1021(b)(2) affirms the President's detention authority under Congress's earlier AUMF, which is the central legislative authority for the ongoing military operations against al-Qaeda, Taliban, and associated forces. The AUMF's detention authority has been repeatedly upheld by the courts.

The district court order must be reversed for four independent reasons.

First, Plaintiffs lack standing because they face no prospect of being detained under the NDAA (or the AUMF) based on their stated activities. Plaintiffs purported to challenge only Section 1021(b)(2) of the NDAA, not the AUMF, and have focused almost entirely on the alleged effect of Section 1021(b)(2) and the use of war powers with respect to U.S. citizens and individuals apprehended in the United States. But Section 1021(b)(2) does not confer any new detention authority, and it does not affect the law that governs in these contexts. Indeed, the statute expressly states that it does not "affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens

of the United States, or any other persons who are captured or arrested in the United States." NDAA § 1021(e). Moreover, the independent advocacy and journalism activities in which plaintiffs say they engage are clearly outside the scope of the government's military detention authority under the AUMF, as affirmed in Section 1021(b)(2), as has been made plain by the government in this case. At bottom, the U.S. military does not detain people for producing independent journalism, for protesting, or for holding panel discussions, even if the journalist "[is] writing things that counter the official narrative." JA-124 (Hedges testimony).

Second, it was improper to allow this proceeding to prospectively enjoin the President, as Commander in Chief, and those under his direction, in carrying out congressionally authorized military operations abroad against enemy forces as defined by Congress in the AUMF and reaffirmed in the NDAA. The nature of this suit is extraordinary. Plaintiffs do not challenge Congress's authority to authorize a military response to the September 11, 2001 terrorist attacks. But the district court nonetheless entered a world-wide order enjoining the President's authority to carry out congressionally authorized detention operations of the United States armed forces as part of that conflict, including when using of force in Afghanistan. No such injunctive action lies in this context and no such injunctive relief should be granted. An *ex ante* facial challenge is inappropriate in the

circumstances presented here, and other courts have consistently refused to accept broad injunctive claims against the operation of our military.

Third, plaintiffs' constitutional challenges to Section 1021(b)(2) fail on the merits. A statute authorizing the use of military force does not regulate primary conduct, and Section 1021(b)(2)'s affirmation of the AUMF authority is therefore not subject to the type of facial First Amendment or Due Process vagueness challenge sought by plaintiffs. Whenever Congress authorizes the use of military force, Congress must do so in general terms and, under the President's direction as Commander-in-Chief, our military then must exercise that authority in a manner consistent with whatever constraints the Constitution and other legal norms impose.

Moreover, even if ordinary vagueness and overbreadth doctrines applied, Section 1021(b)(2)'s affirmation of the Executive's longstanding interpretation of the AUMF would not violate them. Notably, the Executive Branch's long-standing interpretation of the AUMF – with respect to the concepts of "substantial support" and "associated forces" – has been recognized by the D.C. Circuit in habeas litigation brought by Guantanamo detainees, and affirmed by Congress in Section 1021(b)(2). These terms do not target speech, nor do they violate Due Process Clause vagueness principles that are applied to normal prohibitory legislation.

Finally, even if plaintiffs had standing, the district court properly entertained their suit to enjoin military operations, and their claims had merit, none of which is the case, the injunctive order is fundamentally flawed in several significant ways. It would be extraordinary to enter an injunction against the President as Commander in Chief in his conduct of ongoing military operations. Further, as this Court explained, the order goes "beyond the NDAA § 1021 itself" (JA-316), which was the only law challenged in this suit. The district court also erred in extending its order to all persons in the world, rather than just the plaintiffs in this case. The order also improperly proscribes applications of the NDAA that plaintiffs did not claim violated the Constitution.

STANDARD OF REVIEW

The "standard of review for the grant of a permanent injunction . . . is abuse of discretion." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negera*, 500 F.3d 111, 118-19 (2d Cir. 2007). The court will "find such an abuse of discretion if the district court 'applies legal standards incorrectly or relies upon clearly erroneous findings of fact, or proceed[s] on the basis of an erroneous view of the applicable law.'" *Id.*

ARGUMENT

The nature of this suit is extraordinary. A handful of journalists and activists, who face no danger of being subject to capture and detention by the U.S.

military, have sought to enjoin, *ex ante* and on its face, a law that affirms the President's core detention authority in military operations in Afghanistan and elsewhere around the world. Rather than interpret the law in a reasonable way, the district court purported to enjoin the President from carrying out his responsibilities under the law as Commander in Chief in an ongoing military conflict. This suit should have been dismissed at the outset for a simple and straightforward reason: plaintiffs lack standing because there is absolutely no basis for concluding that they would be detained under the challenged military force authorization. It was, moreover, also improper at the threshold to allow a suit to prospectively enjoin the President's authority to carry out congressionally authorized military operations against enemy forces as defined by Congress, and it was improper for the court to award such relief. And in any event, statutes authorizing or affirming the exercise of the use of force, including detention, are not subject to a facial challenge on First Amendment and due process vagueness grounds.

I. PLAINTIFFS LACK STANDING.

Section 1021(b)(2) has not injured the plaintiffs here, nor is there an imminent threat it will injure them in the future. Plaintiffs have not been detained, and they identify no reasonable basis for fearing that they will be held in law-of-war detention by the U.S. military in the future based on the conduct alleged in

their complaint and addressed in their testimony. *See* JA-316. Because there is no actual or imminent injury to be redressed, there is no standing and the complaint should have been dismissed on that threshold basis. *See Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983).

A. NDAA § 1021(b)(2) Causes Plaintiffs No Injury.

1. "[T]he law of Art[icle] III standing is built" on fundamental separation-of-powers principles, *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). Accordingly, application of Article III standing requirements must be "especially rigorous when," as here, "reaching the merits of the dispute would force [a court] to decide whether an action taken by [another] branch[] of the Federal Government was unconstitutional," *Raines*, 521 U.S. at 819-20 – all the more so when the plaintiff seeks to enjoin military operations.

To establish Article III standing, a plaintiff must demonstrate (1) that he has "suffered an injury in fact . . . which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) a sufficient "causal connection between the injury and the conduct complained of"; and (3) a "likel[ihood]" that "the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). And where, as here, a plaintiff seeks injunctive or declaratory relief, he must establish an ongoing,

present injury or an "actual and imminent" – not "conjectural or hypothetical" – threat of future injury. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). An "[a]bstract injury," *Lyons*, 461 U.S. at 101, and "[a]llegations of possible future injury" based on "speculation and conjecture," "do not satisfy the[se] requirements," *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Rather, "[a] threatened injury must be 'certainly impending' to constitute injury in fact." *Id*. Proof of an imminent and non-conjectural injury is also necessary to provide "the essential dimension of [factual] specificity" to a case, *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974), and to ensure that legal questions "will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action," *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982).

Significantly, the AUMF and Section 1021(b)(2) do not regulate or prohibit primary conduct. Rather, the AUMF is an authorization by Congress to the Commander in Chief to use the United States' war powers, and Section 1021(b)(2) is a reaffirmation of one part of that congressional authorization concerning detention. Neither statute *requires* the use of force, including detention, in any particular circumstance. Rather, they instead leave that decision to the considered judgment and discretion of the President, as Commander in Chief, and those acting

under his command. Moreover, the authorization and reaffirmation describe those subject to law-of-war detention during this conflict, but as we discuss further below, *see infra* p. 36, they do not directly regulate private conduct by plaintiffs or any other person. But even where a statute directly regulates primary conduct, a plaintiff cannot ask a court to opine on its constitutionality absent a showing by the plaintiff of a sufficiently "credible threat of [enforcement]." *Holder v. Humanitarian Law Project [HLP]*, 130 S. Ct. 2705, 2717 (2010). Likewise, when a plaintiff asserts the harm of "self-censorship" in challenging a statute, this Court requires "an actual and well-founded fear that the [statute] will be enforced against [the plaintiff]." *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000). In assessing such a claim of fear, this Court has stressed that the district court must employ a "stringent reasonableness" standard. *Amnesty Int'l v. Clapper*, 638 F.3d 118, 134 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 2431 (2012).

2. Plaintiffs obviously have not been detained. To have standing, therefore, they must face an imminent threat that they will be detained under Section 1021(b)(2). They do not. Accordingly, this suit must be dismissed.

In finding standing here, the district court erroneously held that plaintiffs had adequately demonstrated "a reasonable fear of detention pursuant to § 1021(b)(2)" based upon their journalism and public advocacy. SA-97, 103, 105-06. But there is nothing reasonable about plaintiffs' subjective fears. There is no

danger whatsoever that the activities asserted by plaintiffs will be a basis for law-of-war military detention of plaintiffs or anyone else.

Plaintiffs here did not challenge the AUMF or the detention authority provided by that law. *See* JA-37-42. The district court's analysis therefore rested on the court's mistaken belief that the NDAA altered the substantive detention standard in the conflict with al-Qaeda and the Taliban, or added new detention authority with respect to U.S. citizens, that had not previously been provided in the AUMF. Neither is true. Section 1021 itself specifies that "[n]othing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force." NDAA § 1021(d). The President similarly explained that the law "breaks no new ground and is unnecessary" because the "authority it describes was included in the 2001 AUMF, as recognized by the Supreme Court and confirmed through lower court decisions since then." Statement by President Obama upon Signing H.R. 1540, 2011 U.S.C.C.A.N. S11, S12 (Dec. 31, 2011). In short, the premise of the district court's decision – that the NDAA gave rise to a new fear of detention by plaintiffs – cannot be squared with the law itself.

a. This flaw in the court's analysis is especially apparent with respect to the U.S. citizen plaintiffs. As this Court noted in staying the district court's order, "the statute [at issue] does not affect the existing rights of United States citizens or

other individuals arrested in the United States." JA-316. Indeed, NDAA Section 1021(e) states:

> Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.

Plaintiffs challenged only Section 1021(b)(2), and Section 1021(e) explicitly and unambiguously states that it confers no new authority relating to the detention of U.S. citizens, lawful resident aliens, or other persons captured or arrested in the United States.

The district court all but ignored Section 1021(e). The court's one citation of it completely misapprehended its import. *See* SA-173 n.40. The court stated that this provision was not relevant because it "relates only to detention, specifically." *Id.* But detention is the only thing plaintiffs challenge. Plaintiffs claim that they fear military detention under the NDAA, JA-35, which reaffirms the military authority "to detain covered persons." NDAA § 1021(a). The central premise of plaintiffs' Amended Complaint is a misguided assertion that Section 1021(b)(2) supposedly grants *new* domestic authority to detain. *See* JA-22 (referring to law in complaint as the "Homeland Battlefield Act"); JA-127. But as the NDAA makes clear, it does no such thing. It provides no new domestic detention authority. NDAA § 1021(d)-(e). Nor does it grant any new authority as to the detention of U.S. citizens. *Id.* The President has further made clear that,

under the NDAA or otherwise, he "will not authorize the indefinite military detention without trial of American citizens." Statement by Pres. Obama, 2011 U.S.C.C.A.N. at S12. The assumption of the plaintiffs and the court to the contrary is simply wrong.

Plaintiff Hedges, for example, stated that he was worried because the NDAA "applies to American citizens on American soil" and "permit[s] the military to function on U.S. soil as a civilian law enforcement agency." JA-120, 127. But especially because Hedges and O'Brien are citizens, any claimed fears of new detention authority, *see, e.g.*, JA-96, 122, are completely unfounded. *See Amnesty Int'l*, 638 F.3d at 139 (fears "based on 'mere conjecture,' delusional fantasy, or unfounded speculation" do not support standing).

Moreover, two alien plaintiffs, Jonsdottir and Wargalla, are outside of the United States, but neither expressed any fear of being detained by the United States military while in their home countries or abroad. JA-117 (Jonsdottir); JA-113 (Wargalla). Jonsdottir specifically tied her fear to travel within the United States, JA-117, but as explained above, Section 1021(b)(2) confers no new authority for detention in the United States, NDAA § 1021(e). And Wargalla testified that there were "no activities that [she] ha[s] not engaged in because of section 1021." JA-113. In other words, she had no tangible fear of detention at all.

Further, Jonsdottir and Wargalla do not even allege that they have any substantial connection to the United States that would support their invocation of the constitutional rights they claim. *See* SA-103-06. Wargalla had never been in the United States before coming to testify in this trial. JA-108. And Jonsdottir is an elected official in a foreign country who will not travel to the United States due to a subpoena in a criminal case that has nothing to do with the NDAA. *See* JA-115; SA-105. They are not in a position to invoke due process vagueness principles or the First Amendment to challenge, under the U.S. Constitution, actions of the United States government, in a suit to obtain an injunction against the President and Secretary of Defense from the use of duly authorized military force during an ongoing armed conflict. *See Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950) (due process); *United States v. Verdugo-Urquidez*, 494 US 259, 265 (1990) (citing *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904), for the proposition that an "[e]xcludable alien is not entitled to First Amendment rights"); *Klendienst v. Mandel*, 408 U.S. 753, 762 (1972) (First Amendment).

b. The district court also erroneously concluded that the challenged terms in Section 1021(b)(2) referring to "substantially support" and "associated forces" could reasonably be read to authorize, and create a likelihood of, military detention on the basis of independent journalism and advocacy. *See* SA-142 (reasoning that law would apply when "plaintiff has engaged in activities in which he or she is

associating with, writing about, or speaking about or to al-Qaeda, the Taliban, or other organizations"). Those claimed fears, however, are based on a fundamentally flawed reading of the statute, a complete failure to account for the more than ten years of history of how the military detention power, based on those terms – or even broader terms – under the AUMF, and the government's express representation that plaintiffs face no prospect of detention under the authority of the AUMF or the NDAA.

Interpretation of the terms "substantially support" and "associated forces" is "informed by . . . the laws of war," which "include a series of prohibitions and obligations [that] have developed over time and have periodically been codified in treaties such as the Geneva Conventions or become customary international law." March 2009 Mem. at 1; *see* NDAA § 1021(a) (affirming authority to detain "under the law of war").[4] The term "substantial support" covers support that, in analogous

[4] The district court mistakenly believed that the government's invocation of the laws of war to inform its interpretation of the AUMF somehow served to *expand* Presidential authority, and that this expansion was "rejected" by the D.C. Circuit in *Al-Bihani*, 590 F.3d at 871-72. Order at 39-40, 42. In fact, the issue addressed by the D.C. Circuit in *Al-Bihani* was the converse – whether the laws of war, by informing the interpretation of the AUMF, *limited* the President's AUMF authority, as the government argued. Seven judges of the D.C. Circuit noted, in denying rehearing *en banc*, that the *Al-Bihani* panel's discussion of international law was "not necessary to the disposition of the merits." *Al-Bihani v. Obama*, 619 F. 3d 1, 1 (D.C. Cir. 2010). In any event, the NDAA now makes clear that the detention authorized by the AUMF is informed by the laws of war. *See* NDAA §

Continued on next page.

circumstances in a traditional international armed conflict, is sufficient to justify detention. The term thus encompasses individuals who, even if not considered part of the irregular enemy forces at issue in the current conflict, bear sufficiently close ties to those forces and provide them support that warrants their detention in prosecution of the conflict. *See, e.g.*, Geneva Convention III, Art. 4.A(4) (encompassing detention of individuals who "accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany"); Int'l Comm. Of the Red Cross Commentary on Third Geneva Convention 64 (Pictet, ed. 1960) (Art. 4(a)(4) intended to encompass certain "classes of persons who were more or less part of the armed force" while not members thereof); *see also, e.g.*, *Gov't Br. in Al Bihani v. Obama*, No. 99-5051, 2009 WL 2957826, at 41-42 (D.C. Cir. Sept. 15, 2009) (explaining that petitioner "was unequivocally part of" an enemy force, but even if he "was not part of enemy forces, he accompanied those forces on the battlefield and performed services (e.g. cooking, guard duty)" for them that justified military detention). Under those principles, the term

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1021(a); *see Hamdan v. United States*, No. 11-1257, --- F.3d ---, 2012 WL 4874564, at *8 n.8 (D.C. Cir. Oct. 16, 2012).

"substantially support" cannot give rise to any reasonable fear that it will be applied to the types of independent journalism or advocacy at issue here. *See* March 2009 Mem. at 2 ("substantially support" does not include those who provide "unwitting or insignificant support" to al-Qaeda); *cf. Bensayah*, 610 F.3d at 722, 725 ("purely independent conduct of a freelancer is not enough").

The same is true of the term "associated forces." That term is well understood to cover cobelligerent groups that fight together with al-Qaeda or Taliban forces in the armed conflict against the United States or its coalition partners. *See Khan*, 655 F.3d at 32-33; *Al-Bihani*, 590 F. 3d at 872; *Barhoumi v. Obama*, 609 F.3d 416, 431 (D.C. Cir. 2010); *Hamlily v. Obama*, 616 F. Supp. 2d 63, 74-75, 78 (D.D.C. 2009). Obviously, the United States could not defeat al-Qaeda and Taliban forces in Afghanistan and elsewhere without the authority to use military force against their allied armed groups, some of which have killed hundreds of U.S. soldiers and continue to pose a grave threat to the United States. But that term does not, and cannot, be properly read to cover the types of unarmed advocacy organizations involved in this suit such "Occupy London" or "U.S. Day of Rage." Instead, after carefully considering how traditional law-of-war concepts apply in this armed conflict against non-state armed groups, the government has made clear that an "'associated force' . . . has two characteristics":

> (1) an organized, armed group that has entered the fight alongside al Qaeda, [that] (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners.

Jeh C. Johnson, "National Security Law, Lawyers, and Lawyering in the Obama Administration," Dean's Lecture at Yale Law School, Feb. 22, 2012 (available at http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/).

The advocacy organizations at issue here obviously fail both tests: Occupy London and U.S. Day of Rage are not armed groups, and they have not taken up arms as co-belligerents alongside al-Qaeda or the Taliban in hostilities against the United States or its coalition partners. *See Khan*, 655 F.3d at 32-33 ("associated force" includes a group that "played an important and deliberate role in supporting continued attacks against coalition and Afghan forces throughout 2002"). In short, plaintiffs challenge a statute, Section 1021(b)(2), that does not apply to the conduct they describe, and cannot support their asserted objectively reasonable fear of military detention.

The claimed fear of detention is especially untenable given the years of experience with how the military and the courts interpret and apply these military detention standards. The AUMF has been interpreted by two Presidents for more than eight years to encompass detention of those who are part of, or substantially support, al-Qaeda, the Taliban, or associated forces – including the support and "associated forces" elements that are challenged here. *See Parhat*, 532 F.3d at

837-38 (describing 2004 CSRT definition); March 2009 Memo. at 2 ("substantially supported" and "associated forces").[5] That interpretation of the AUMF has been upheld by the D.C. Circuit and affirmed by Congress. *See* NDAA § 1021(b)(2); *Al-Bihani*, 590 F.3d at 872 (upholding the "definition offered by the government that requires that an individual 'substantially support' enemy forces" because the AUMF "grant[s] the government the power to craft a workable legal standard to identify individuals it can detain, but also cabin the application of these definitions"); *Khan*, 655 F.3d at 32-33 (associated forces).[6]

During that entire period, none of the plaintiffs was detained or threatened with military detention, and none alleges having had a fear of detention. Indeed, plaintiffs offered *no evidence* of any military detentions by the United States based upon independent journalism or advocacy. Absent such proof, and given the history of how the Executive and the courts have interpreted and implemented the military detention authority, there is simply no way plaintiffs can meet their burden

[5] The Executive previously articulated a definition that referred to those who "support" rather than "substantially support" al-Qaeda, the Taliban, or associated forces, as in the definition adopted by the Executive in March 2009 and affirmed by Congress in Section 1021(b)(2) of the NDAA; yet there is no claim it resulted in plaintiffs, or others in their position, being detained or threatened with detention, or filing an action based on any fear of detention.

[6] Indeed, plaintiff O'Brien admitted she knew that, before the NDAA, the "executive has previously claimed the authority to detain a person for substantially supporting al-Qaeda, the Taliban, or associated forces," but neither she nor her organization faced any action taken under that claimed authority. JA-101.

of showing they have an objectively reasonable fear of detention. The reality is that plaintiffs face no risk of detention now, just as they faced no risk of detention under the AUMF for the last 11 years.

c. In finding standing and a reasonable fear of military detention as a result of the NDAA, the district court mistakenly concluded that the military force already authorized by the AUMF – an authorization that has existed since September 2001 without causing plaintiffs to fear any harm – applies only to individuals directly involved in the September 11th attacks. SA-123 ("AUMF does not encompass detention for individuals other than those directly linked to the events of September 11, 2001"). But the AUMF by its terms, and of necessity, is not so limited. The AUMF authorizes all "necessary and appropriate" military force against "those nations, *organizations*, or persons [the President] determines planned, authorized, or aided the terrorist attacks," AUMF § 2(a) (emphasis added), including, of course, al-Qaeda. The AUMF therefore applies to the organizations linked to the September 11, 2001, attacks, including – contrary to the district court's conclusion – those who were part of those organizations when captured but were not individually connected to those attacks. *See Hamdi*, 542 U.S. at 512-13 (upholding detention of person not alleged to have individually participated in attacks). To successfully defeat al-Qaeda and Taliban forces, the

scope of detention authority could not – and did not – restrict the scope of detention to those personally responsible for the attacks on September 11, 2001.

Even if the district court's parsing of the language of the AUMF made sense, there is no doubt that the Executive Branch and the courts have long interpreted the AUMF to include "substantially support" and "associated forces" components, informed in each case by the law of war. Thus, the district court's belief that the enactment of the NDAA was a sea change that now provides a reasonable basis for independent journalists and advocates to reasonably fear military detention is completely unfounded.

3. For all the reasons set forth above, plaintiffs' claimed fears of military detention are nether "credible," *HLP*, 130 S. Ct. at 2717, nor "well founded," *Vermont Right to Life*, 221 F.3d at 382. Notably, plaintiffs could not even show – despite their claimed fears – that they actually have changed their behavior in any material way. As Wargalla stated, there were "no activities that [she] ha[s] not engaged in because of section 1021." JA-113; *see also* SA-97-98 (Hedges "anticipated" changing activities); SA-104 (Wargalla "considered" not inviting group to conference); SA-105 (Jonsdottir "concerned" about her involvement with WikiLeaks).

Oddly, the district court cited, and plaintiffs identified, concerns about the legality of the Occupy protests, routine border activities, and criminal

investigations. SA-99-105.[7] None of those matters, however, bears any relationship to the NDAA. The remaining claimed fears relate to activities that are so common – and so obviously not the subject of the armed conflict – that any claimed fear of military detention is wholly unreasonable. Plaintiffs cite familiar and ubiquitous journalistic and advocacy activities that have been ongoing during this entire armed conflict without any evidence or threat of military detention based thereupon.[8] There have been countless articles critical of the United States' military policies over the past decade, yet plaintiffs point to no examples to support their far-fetched claim that the U.S. military will round up the authors of these articles and subject them to indefinite military detention. Accordingly, there is no support for plaintiff Hedges' speculation that journalists who "'reach out to groups opposed to the U.S. in order to explain them to the American public will not be differentiated from terrorists under' . . . the NDAA." JA-127.

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[7] *See* JA-116 (Jonsdottir "now fear[s] going to the United States" because of the WikiLeaks subpoena); JA-129 (Hedges blamed sources drying up on "decision . . . to charge six . . . leakers under the Espionage Act"); JA-96 (O'Brien concerned about accidentally publishing classified information); JA-92 (O'Brien concerned about being linked to group that planned to "tak[e] down the stock exchange" during Occupy protests); JA-99 (O'Brien concerned about being searched when entering the United States).

[8] *See* SA-95 (Hedges concerned about reporting on terrorist groups); JA-96 (O'Brien claimed she decided not to publish articles critical of Guantanamo); JA-97 (O'Brien concerned about similarities between "intelligence collection" and journalism); JA-110 (Wargalla has "been thinking about inviting . . . groups like Hamas" for a panel discussion but "probably wouldn't do that").

At bottom, the U.S. military does not detain people for producing independent journalism or for holding panel discussions, even if the journalist "[is] writing things that counter the official narrative." JA-124. Indeed, after the district court's unwarranted entry of a preliminary injunction, the United States expressly represented to the court that plaintiffs would not, as a matter of law, be subject to military detention for the types of conduct they allege in their complaint. *See* SA-85. As this Court explained, in granting a stay of the district court's ruling, "the government [has clarified] unequivocally that, 'based on their stated activities,' plaintiffs . . . 'are in no danger whatsoever of ever being captured and detained by the U.S. military." JA-316 (quoting Mot. for Stay at 1). That representation should be dispositive in a standing inquiry based on fear that the authorization affirmed in Section 1021(b)(2) would be invoked to detain them. *See Amnesty Int'l*, 638 F.3d at 138 (plaintiffs fear monitoring based on law that is "susceptible to such an interpretation, and the government has not controverted this interpretation or offered a more compelling one"); *see also Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 n.5 (1982) (in facial challenge, court is required to "consider any limiting construction that a[n] . . . enforcement agency has proffered"); *Graham v. Butterworth*, 5 F.3d 496, 499 (11th Cir. 1993) (First Amendment challenge moot after prosecutor informed plaintiff conduct "would not fall within the ambit of the statute"). Those representations confirm what should

be clear in any event: plaintiffs' claims that they reasonably fear military detention under the NDAA have no merit. *See Lyons*, 461 U.S. at 107 n.8 (subjective fears do not establish "the *reality* of the threat of injury").

B. Plaintiffs Lack Standing Because the NDAA Does Not Proscribe Primary Conduct.

Plaintiffs lack standing for a second independent reason based on the nature of this claim as challenging the law on its face: standing cannot be based on the purported chill to plaintiffs' activities caused by the NDAA because the statute is not "regulatory, proscriptive, or compulsory in nature," and the plaintiff is not "presently or prospectively subject to the regulations, proscriptions, or compulsions that he [is] challenging." *Laird v. Tatum*, 408 U.S. 1, 11 (1972). That is, a law is not susceptible to challenge before it is invoked and applied if it does not carry with it "an affirmative obligation . . . impose[d] on [plaintiffs]'" by the government. *Id*. at 12; *see United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (challenged Executive Order "issues no commands or prohibitions for these plaintiffs, and sets forth no standards governing their conduct").

Here, Section 1021 is not susceptible to an *ex ante* challenge, before it is invoked and applied in particular circumstances, because it does not regulate, prescribe, or compel anything, nor does it impose any other affirmative obligation on plaintiffs or any other private party. Section 1021 is instead an affirmation of

Congress's authorization for detention as an element of military force – it outlines the circumstances under which Congress has authorized the President to detain individuals as part of the exercise of military force; it does not *require* the exercise of military force or detention authority in any particular instance. And other laws and limitations, in turn, work to limit the exercise of that authority when it is actually invoked. The decision to use the force authorized by Congress (including to detain) is, in turn, committed to the judgment and discretion of the President and those under his command in *exercising* the authority for the use of military force in the AUMF against al-Qaeda, the Taliban, and associated forces. Under *Laird*, and for reasons similar to why such an authorization does not give rise to a facial challenge, *infra* p.46, a court cannot properly base standing on speculation about how the judgment and discretion of the President and those acting under his command will be exercised, and thus about whether or in what manner the use of force, including detention, might be exercised in particular circumstances that may arise in the future. "Carried to its logical end," the district court's standing analysis "would have the federal courts as virtually continuing monitors of the wisdom and soundness" of Congress's decision to authorize military force and the President's judgment in invoking that authority. *Laird*, 408 U.S. at 15. If standing could be established based simply on a law that simply "*authorizes* [Executive activities]" but "does not *direct* . . . them," *United Presbyterian*, 738 F.2d at 1380,

it would entail "courts . . . 'oversee[ing] legislative or executive action' [in a manner] that would 'significantly alter the allocation of power away from a democratic form of government.'" *Amnesty Int'l*, 638 F.3d at 132.

C. The Cases Cited By the District Court Do Not Support Standing.

The district court erred in believing that *Amnesty International* supported a finding of standing in the present case. SA-136. The government disagrees with this Court's approach in *Amnesty International*, and the Supreme Court granted the government's petition for a writ of certiorari. The case has been argued and is presently being considered. Even under the approach in *Amnesty International*, however, there is no standing in this case.

In *Amnesty International*, plaintiffs could not know whether the government had monitored their communications under a statute authorizing such monitoring, but they contended that it was "likely [they would be] monitored under [the challenged law]" because the law "plainly authorizes the acquisition of [their] international communications" and plaintiffs "regularly communicate . . . with precisely the sorts of individuals that the government will most likely seek to monitor," namely, those "associated with terrorist organizations." *Amnesty Int'l*, 638 F.3d at 133, 138; *see id*. at 138 (key factor is that the law "authorized the potentially harmful conduct"). Here, in contrast, plaintiffs would know if they were ever detained – they have not been. And the government has also explained

why there is *no* likelihood that plaintiffs will be detained under the NDAA in the future. *See id*. at 138 ("[i]t is significant that the injury that plaintiff fear results from conduct that is authorized by statute"); *cf. id*. at 134 (plaintiffs "cannot bootstrap their way into standing by unreasonably incurring costs to avoid a merely speculative or highly unlikely potential harm").

Likewise, *Virginia v. American Booksellers*, 484 U.S. 383 (1988), does not support the district court's rulings. In that case, plaintiffs were booksellers who were found to suffer an injury – even in advance of prosecution – from a law barring the sale and display of sexually explicit materials. 484 U.S. at 392. The Court explained that, because the law was "aimed directly at plaintiffs" and they must "take significant and costly compliance measures or risk criminal prosecution," they suffered a concrete injury based on a reasonable fear of prosecution. *Id*. The case certainly does not stand for the proposition, as the district court suggested, that "there is an exception to the requirement of an injury-in-fact where infringement of First Amendment rights are at issue." SA-132. And the plaintiffs in *American Booksellers* – booksellers who sold the very materials being specifically regulated, *see* 484 U.S. at 390-91, had a concrete case of injury, unlike plaintiffs here, who have no reasonable fear of injury.

In sum, because plaintiffs' alleged fear of military detention is not objectively reasonable in this case, the district court erred in holding that plaintiffs have standing to challenge Section 1021(b)(2).

II. ENTERTAINING A SUIT OF THIS NATURE IS INAPPROPRIATE ABSENT EXTRAORDINARY CIRCUMSTANCES, WHICH ARE NOT PRESENTED HERE.

While the absence of standing requires dismissal of this suit, there is an additional threshold obstacle that would also compel its dismissal and that highlights its extraordinary nature. There is no precedent for entertaining a suit seeking *ex ante* injunctive or declaratory relief against the Commander in Chief regarding his conduct of an armed conflict pursuant to congressionally conferred authority for the use of military force, including detention. *Compare Aulaqi v. Obama*, 727 F. Supp. 2d 1, 47-52 (D.D.C. 2010) (court would not consider request to prospectively enjoin military operations "[b]ecause decision-making in the realm of military and foreign affairs is textually committed to the political branches" and "courts are functionally ill-equipped to make the types of complex policy judgments that would be required to adjudicate the merits of plaintiff's claims"). Instead, courts regularly decline to entertain these types of claims. *See Gilligan v. Morgan*, 413 U.S. 1, 6-7 (1973) (refusing to balance general due process interests against Congress's Article I, § 8 authority to organize, arm, and discipline the militia because it would require "continuing surveillance by a federal court" that "embrace[d] critical areas of responsibility vested by the Constitution in

the Legislative and Executive Branches of the Government"); *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention"); *Laird*, 408 U.S. at 3-4, 11 (no standing to challenge military implementation of statute providing general authority to "quell insurrection and other domestic violence"); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985); *Aulaqi*, 727 F. Supp. 2d at 17, 28 n.9, 47-52 (even if plaintiff had standing to challenge alleged plan to take military action against his son, suit to enjoin military operations would not be entertained). This is a critical point that cuts across the legal issues presented by this case.

The first problem with this type of claim is that the district court has purported to enjoin the President, as Commander in Chief, from carrying out wartime military operations that were specifically authorized by Congress. *See* NDAA § 1021(a) ("affirm[ing]" that "the authority of the President to use all necessary and appropriate force" includes the detention authority in Section 1021(b)(2)). Even outside the war context, the Supreme Court has made clear that an injunctive action against the President could lie, if at all, only in very limited circumstances, and that any such injunction would be extraordinary. Thus, in *Franklin v. Massachusetts*, 505 U.S. 788 (1992), the plurality concluded that, although the Court had "left open the question whether the President might be

subject to a judicial injunction requiring the performance of a purely 'ministerial' duty, *Mississippi v. Johnson*, 4 Wall. 475, 498-499 (1867)," and had held that the President may be subject to a subpoena to provide information relevant to an ongoing criminal prosecution, "in general" the courts have "'no jurisdiction of a bill to enjoin the President in the performance of his official duties,'" *id*. at 802-03 (plurality). In his separate opinion, Justice Scalia reached the same conclusion, quoting the same passage from *Mississippi v. Johnson*, *id*. at 827, and also quoting a treatise for the proposition that "[n]o court has ever issued an injunction against the president himself," *ibid*. (citation omitted). Thus, "[a]t the threshold, the District Court should have evaluated whether injunctive relief against the President was available." *Id*. at 803 (plurality opinion).[9]

The second problem is that, if ever an action for injunctive relief might lie against the President, it does not lie in the context of this case, which relates to Congress's power to authorize the use of military force against a defined enemy group and the President's power as Commander in Chief to use force against that group at a time of ongoing armed conflict pursuant to Congress's specific authorization. To this end, the Supreme Court has recognized that concerns are particularly acute where equitable relief would entail "judicial intrusion into the

[9] *See also id*. at 827-28 (Scalia, J., concurring) ("For similar reasons, I think we cannot issue a declaratory judgment against the President").

Executive's ability to conduct military operations abroad." *Munaf v. Geren*, 553 U.S. 674, 700 (2008); *see also HLP*, 130 S. Ct. at 2727 (in national security matters, courts are reluctant to issue an injunction in part due to the "lack of competence" on the part of the courts); *cf. El-Shifa Pharmaceutical Industries v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) ("the courts lack the competence to assess the strategic decision to deploy force or to create standards to determine whether the use of force was justified or well-founded"). Such a direct judicial command to the President regarding the use of military force would conflict with the Constitution's vesting of command in the President as Commander in Chief.

The concerns are all the more acute here where the court has enjoined Congress's affirmation of the AUMF authority defining the enemy for purposes of detention – namely al-Qaeda, the Taliban, associated forces, and their substantial supporters. *Cf. El-Shifa Pharmaceutical Industries*, 607 F.3d at 844 ("[i]t is not the role of judges to second-guess . . . another branch's determination that the interests of the United States call for military action"). The statutory provision at issue here was an exercise of Congress's constitutional authority to declare war and raise and support armies. It is inconsistent with separation of powers for a court, in this context, to allow an action for injunctive relief to proceed against the President as Commander in Chief with respect to the exercise of congressionally authorized war powers based upon speculation as to how the authorization may be

implemented in the future – particularly based on completely unfounded speculation.

While in some contexts an injunction might run against an Executive Branch officer responsible for assisting the President, *see Franklin*, 505 U.S. at 803, no such injunction is appropriate – at least absent the most extraordinary circumstances, which are not remotely present here – to bar other Executive officers from implementing a congressional statute defining the enemy forces and reaffirming that the authorization for the use of military force includes the authority to detain them. As the D.C. Circuit has explained, it is "an abuse of . . . discretion to provide discretionary relief" that could affect military operations approved by "the President [and] the Secretary of Defense." *Sanchez-Espinoza*, 770 F.2d at 208 (Scalia, J.). In this context, where Executive Branch officers assist the President in carrying out discretionary powers and responsibilities vested in the President directly by the Constitution, as is true of the Commander-in-Chief power, "their acts are his acts." *Marbury v. Madison*, 5 U.S. 137, 166 (1803); *see also* 10 U.S.C. § 113(b) (Secretary of Defense is the "principal assistant to the President" in defense matters, whose authority is "[s]ubject to the direction of the President"); *id.* § 162(b) ("Unless otherwise directed by the President, the chain of command to a unified or specified combatant command runs – (1) from the President to the Secretary of Defense; and (2) from the Secretary of Defense to the commander of

the combatant command."). Nor can the military be expected, in the course of suits for injunctive and declaratory relief, to furnish repeated advisory opinions about when, whether, or in what manner military authority might be exercised in the future; and the courts should similarly not assume that task, especially based on speculation about possible exercises of authority.

The district court did not point to any statute purporting to authorize such a suit. And the Constitution itself furnishes an avenue for resolving challenges to Executive detention. That remedy, where applicable, is habeas corpus, *Boumediene*, 553 U.S. at 771; *Munaf*, 553 U.S. at 686, not a suit for *ex ante* injunctive relief against the President and the Secretary of Defense.

In sum, the injunction strikes at the heart of the authority of Congress and the President to define the enemy and authorize and carry out military operations, and these basic principles militate strongly against the courts entertaining plaintiffs' request for such relief.

III. PLAINTIFFS' CONSTITUTIONAL CLAIMS LACK MERIT.

For the reasons explained above, this Court should not reach the merits of plaintiffs' constitutional claims. But if it does, it should hold that the district court improperly issued a permanent injunction because Section 1021(b)(2) is constitutional and it was error to facially invalidate it under the Due Process and Free Speech Clauses.

A. Section 1021(b)(2) Is Not Subject To Facial Constitutional Invalidation under the First Amendment or Fifth Amendment.

The constitutional rights asserted here must be viewed in the context of an authorization by Congress for use of military force that was designed not to regulate private conduct through the imposition of penalties but to authorize and enable United States military operations in an active armed conflict. There is no doubt that in that context, Congress has great leeway to authorize the use of military force, and to do so in general terms. Indeed, Plaintiffs do not deny that Congress had the power under Article I to authorize the use of military force, in the AUMF, in response to the September 11, 2001, terrorist attacks. The Constitution expressly grants Congress the authority to declare war, and it imposes no constraints on how that declaration should be worded. U.S. Const., Art. I, § 8, cl. 11. The military is in turn obliged to apply that force consistent with whatever limitations and principles are applicable under federal law, the law of war (including relevant treaties of the United States), and the Constitution. *See Laird*, 408 U.S. at 3-4, 11, 15-16 (court will not evaluate general operations under law authorizing "armed forces to quell insurrection and other domestic violence," but courts are competent to evaluate specific "claims of judicially cognizable injury resulting from military intrusion into the civilian sector"). Our constitutional structure thus provides that, if force were exercised in a way that impinged on a constitutional liberty, the situation would be addressed through appropriate,

tailored remedies as applied to the specific circumstances, not *ex ante* judicial orders striking down the force authorization on its face and directing or enjoining the conduct of military operations.

The district court manifestly erred in departing from these principles. Indeed, under the district court's constitutional analysis, every declaration of war or authorization for the use of force in our Nation's history would be unconstitutional. By necessity, congressional authorizations for the use of military force and declarations of war have always been written in general terms. For example, when Congress declared war against Japan in World War II, it stated:

> the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and, to bring the conflict to a successful termination . . . .

Joint Res. of Dec. 8, 1941, ch. 561, 55 Stat. 795. The authorization is thus stated in the broadest terms, with no precise descriptions of who exactly may be the subject of force (including detention) or under what circumstances, and without any express carve-outs for arguably protected speech. This pattern holds for every authorization for the use of military force in our Nation's history – including the AUMF.[10]

[10] *See, e.g.*, Auth. for Use of Military Force Against Iraq Res. of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (President "authorized to use the Armed Forces . . . as he determines to be necessary and appropriate in order to . . . defend the

Continued on next page.

These authorizations have conferred very broad authority to wage war and employ the military force necessary to prevail in the military conflict. *See id.* (President charged with "bring[ing] conflict to a successful termination"); *United States v. Macintosh*, 283 U.S. 605, 622 (1931) ("In express terms Congress is empowered 'to declare war,' which necessarily connotes the plenary power to wage war with all the force necessary to make it effective"), *overruled on other grounds*, *Girouard v. United States*, 328 U.S. 61 (1946). Under the district court's theory, all of those laws would be invalid on their face.

As constitutional exercises of Congress's Article I powers, including its power to declare war and define the enemy against whom military force may be used, U.S. Const., Art. I, § 8, cl. 11, these laws, like the NDAA, are not subject to facial invalidation under the First or Fifth Amendments. They may be subject to as-applied challenges in habeas corpus or other tailored remedial proceedings. *See*, *e.g.*, *Hamdi*, 542 U.S. at 524-25 (imposing due process requirements on application

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national security of the United States against the continuing threat posed by Iraq"); Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991); Joint Res. of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384 (Vietnam) (Congress supports "determination of the President . . . to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression"); Joint Res. of Apr. 6, 1917, ch. 1, 40 Stat. 1 (Germany); Act of Apr. 25, 1898, ch. 189, 30 Stat. 364 (Spain); Act of May 13, 1846, ch. 16, 9 Stat. 9 (Mexico); Act of June 18, 1812, ch. 102, 2 Stat. 755 (Britain).

of the AUMF). But they cannot be struck down on their face for being too broad or vague. As Congress has consistently recognized for more than 200 years, to authorize the President to defeat our enemies, such statutes *must* be broad.

The district court's constitutional analysis is even more problematic because it struck down as unduly broad and vague Section 1021(b)(2), which is more specific than other authorizations for use of military force. The court's approach represents a seriously flawed importation of legal principles governing challenges to criminal statutes to a context in which they were not designed to govern and are singularly out of place. *See Hamdi*, 542 U.S. at 518 (authorization of military detention is "devoid of all penal character," and the detainee is "no convict"). Against this background, Section 1021(b)(2) should not be subject to a First Amendment or due process vagueness challenge in advance of its possible application.

Similar principles apply even outside the circumstances of authorizations of the use of military force or declarations of war. Laws that confer authority on the Executive are frequently written in broad and general terms. *See, e.g.*, 28 U.S.C. § 533 (general authority of FBI to "detect . . . crimes" and "conduct . . . investigations"); 10 U.S.C. § 331 (President may use armed forces "as he considers necessary to suppress the insurrection"); 10 U.S.C. § 332 (President may use armed forces "to suppress the rebellion"); 10 U.S.C. § 333 (similar). For example,

Congress granted the FBI authority to "detect . . . crimes against the United States" and "conduct such other investigations regarding official matters . . . as may be directed by the Attorney General." 28 U.S.C. § 533. This is plainly a valid exercise of Congress's Article I powers, and it does not violate the non-delegation doctrine. Accordingly, even though it is broadly worded and conceivably could be applied in a manner that affected protected speech it is not subject to a facial constitutional challenge under the First Amendment (or Fifth Amendment). Instead, the FBI is obliged to comply with the Constitution in exercising its authority, and as-applied challenges may be raised in appropriate proceedings to enforce those limitations.

Those general enactments are not be subject to challenge on a facial First Amendment or Due Process basis, and the law here is on a similar footing. *See*, *e.g.*, *Alabama v. United States*, 373 U.S. 545, 545 (1963) (in case challenging actions taken under 10 U.S.C. § 333 to "station[] military personnel in the Birmingham area," explaining that "[s]uch purely preparatory measures and their alleged adverse general effects upon the plaintiffs afford no basis for the granting of any relief"). Instead, executive officers who implement such general and broad statutory authorizations have the "correspondent responsibility" to do so consistent with constitutional protections. *Martin v. Mott*, 25 U.S. 19, 29 (1827) (addressing authority to "call the militia into . . . service").

B. Even Under Ordinary Principles Applied to Statutory Prohibitions, Plaintiffs' Facial Challenge to Section 1021(b)(2) Must Fail.

Even outside the context of a military force authorization, "[f]acial challenges are disfavored" because they "often rest on speculation" and "run contrary to the fundamental principle of judicial restraint that courts should [not] anticipate a question of constitutional law in advance of the necessity of deciding it." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). Accordingly, "a plaintiff can only succeed in a facial challenge by establishing . . . that the law is unconstitutional in all of its applications." *Id*. at 449. At the least, "a facial challenge must fail where the statute has a plainly legitimate sweep." *Id*. (quotation marks omitted). Section 1021 plainly passes that test.

1. Section 1021(b) is Not Unconstitutionally Vague.

With respect to due process, a facial challenge for vagueness cannot succeed when the statute has a "core" that is an "imprecise but comprehensible normative standard." *Smith v. Goguen*, 415 U.S. 566, 578 (1974). Here, Section 1021(b)(2) plainly has just such a core – it affirms the authority to detain those who are "part of" al-Qaeda and Taliban forces, a detention authority standard that plaintiffs do not challenge. That authority has been applied and upheld by the D.C. Circuit time and again (and the Supreme Court has time and again allowed those rulings

interpreting the AUMF to stand). *See, e.g.*, *Madhwani v. Obama*, 642 F.3d 1071, 1073-74 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012). That accepted core authority is sufficient alone to defeat plaintiffs' facial challenge.

Further, as we have noted, the terms "substantially support" and "associated forces" also have a comprehensible, core meaning informed by the laws of war, which are expressly referenced in the NDAA itself and in the President's interpretation of the AUMF, on which the statute was based. *See supra* pp. 27-30. With respect to substantial support, moreover, the support cannot be "unwitting or insignificant." March 2009 Memo. at 2. In this context, where the scope of congressional authority is normally and necessarily broad – and the statute is an authorization of military force, not a regulation of primary conduct – the delimitations provided by the term "substantially support" are more than sufficient under the Due Process Clause. *Cf. HLP*, 130 S. Ct. at 2722 (rejecting vagueness challenge to material support statute and explaining that "[w]e think a person of ordinary intelligence would understand that independently advocating for a cause is different from providing a service to a [terrorist] group").

The term "associated forces" also has a straightforward meaning. As we have explained, *supra* pp. 29-30, an associated force is an "organized, armed group that has entered the fight alongside al Qaeda" or the Taliban and is "a co-belligerent with al Qaeda [or the Taliban] in hostilities against the United States or

its coalition partners." Johnson, Dean's Lecture. In short, a "person of ordinary intelligence," *HLP*, 130 S. Ct. at 2722, should understand what it means to join or substantially support a cobelligerent group such as one that is "play[ing] an important and deliberate role in supporting continued attacks against coalition . . . forces." *Khan*, 655 F.3d at 32-33. Accordingly these terms, even if subject to a vagueness challenge, easily satisfy any such requirement.

2. Section 1021(b) Does Not Violate the First Amendment on Its Face.

The Supreme Court has explained that when "conduct" rather than "'pure speech'" is at issue, "[a]pplications of the [challenged] policy that violate the First Amendment . . . [must] be remedied through as-applied litigation." *Virginia v. Hicks*, 539 U.S. 113, 124 (2003). That rule is fatal to plaintiffs' claims. Providing substantial support to al-Qaeda is not "pure speech." Rather, the "substantial support" prong addresses actions like "plan[ning] to take up arms against the United States" on behalf of al-Qaeda and "facilitat[ing] the travel of unnamed others to do the same." *See Bensayah*, 610 F.3d at 722 (describing district court support rationale). Joining an associated force "that has entered the fight alongside al Qaeda," Johnson, Dean's Lecture, also is not pure speech. The challenged provisions do not mention any form of expression or regulate any private, primary speech. The AUMF authorized the President to take action against persons with the requisite ties to al-Qaeda, the Taliban, and associated forces, and Section 1021

affirmed that authority; neither provision is directed to speech as such. *See Hicks*, 539 U.S. at 124 ("[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech").

In any event, even if Section 1021(b)(2) were impermissibly content-based as applied to some expressive activity, the First Amendment challenge here would still fail. Under the test that applies in that context, a law is facially invalid only if the "law's application to protected speech [is] 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Hicks*, 539 U.S. at 119-20. Here, a facial challenge to Section 1021(b)(2) of the NDAA must fail because, contrary to the district court's reasoning, SA-164-75, the statute has a plainly legitimate sweep: fighting a war against the United States is not expressive activity.

The district court acknowledged as much in its preliminary injunction order. *See* SA-49 (section 1021(b)(2) "has a plainly legitimate sweep" and plaintiffs' activities are "without a doubt *not* the core conduct that is intended to be covered by the statute"). Moreover, Section 1021 has a plainly legitimate sweep with respect to enemy forces who cannot invoke First Amendment rights under our Constitution. *See supra*, p. 26. In short, Section 1021(b)(2) easily withstands a facial challenge under the First Amendment.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN ENTERING A WORLDWIDE INJUNCTION

The district court committed reversible error in issuing an expansive, worldwide injunction, not limited to the handful of named plaintiffs here.

"An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 32 (2008). A plaintiff seeking a permanent injunction must satisfy the traditional four-factor test, demonstrating (1) irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *eBay Inc. v. MercExchange*, 547 U.S. 388, 391 (2006).

1. As an initial matter, because this case involved the President's use of military force abroad in carrying out the armed conflict against al-Qaeda, the Taliban, and associated forces, the district court should not have entertained any action for injunctive relief. *Cf. Munaf*, 553 U.S. at 699-700 (equitable habeas relief should not be granted in case involving "detainees . . . captured by our Armed Forces" in "an active theater of combat" when it would amount to an "unwarranted judicial intrusion into the Executive's ability to conduct military

operations abroad"). For substantially the same reasons, the balance of equities here weighs sharply against an injunction.

On one side of the balance, as set forth above, plaintiffs have not suffered any irreparable injury – indeed, they have suffered no injury at all. On the other side, the district court has threatened to halt the President's authority to carry out congressionally authorized military operations against a congressionally declared enemy. The Supreme Court in *Winter* determined that the potential harm to national security precluded an injunction against Navy training exercises. 555 U.S. at 32-33. This case does not involve training exercises, but the threatens to interfere with the conduct of actual military operations in an active conflict. As *Winter* shows, there is no basis for entering an injunction when the balance of the equities is this lopsided and the potential harm to the national defense and security is this significant. *Id*.

2. Even putting to the side the extraordinary nature of this action, the injunction is overbroad in several respects that require reversal.

First, it is well established that when a party challenges a statute – even on its face – a district court cannot properly enjoin the government with respect to nonparties on a nationwide basis, let alone worldwide. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2760 (2010) (narrowing injunction in part because the plaintiffs "do not represent a class, so they could not seek to enjoin such an

order on the ground that it might cause harm to other parties"); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) (noting that "neither declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs"). Thus, it is well established that "relief should be limited to the parties before the Court." *United States v. National Treasury Employees Union*, 513 U.S. 454, 477 (1995).

Here, the district court improperly enjoined enforcement of Section 1021(b)(2) "in any manner, as to any person." SA-189-90. The worldwide injunction, coupled with the threat of contempt proceedings, could enable one district court to control military detention worldwide. It also prevents the government from defending the constitutionality of the law in any other court in any other circumstance. *See Dep't of Defense v. Meinhold*, 510 U.S. 939 (1993) (issuing a stay pending appeal of the portion of an injunction that "grant[ed] relief to persons other than" the named plaintiff); *United States v. Mendoza*, 464 U.S. 154, 159 (1984) ("the Government is not in a position identical to that of a private litigant, both because of the geographic breadth of government litigation and also, most importantly, because of the nature of the issues the government litigates"). This was improper here, where an injunction limited to the parties before the court would "fully protect the litigants." *National Treasury Employees Union*, 513 U.S. at 477-78.

Second, a court cannot enjoin statutory provisions that are not challenged in a suit. *Williams*, 448 U.S. at 367 ("the District Court exceeded its jurisdiction under Art. III in declaring the Hyde Amendment unconstitutional" because "[n]one of the parties to these cases ever challenged the validity of the Hyde Amendment"). Here, the court addressed the government's understanding of its detention authority under the AUMF, stating, in the injunctive section of its ruling, that "detention based on allegations of 'substantially supporting' or 'directly supporting' the Taliban, al-Qaeda or associated forces, is not encompassed within the AUMF and is enjoined by this Order regarding § 1021(b)(2)." SA-190. Moreover, the court invited contempt actions for government detention of individuals under theories of "substantially or directly supporting" associated forces. SA-92. But the AUMF is not challenged in this suit. *See* JA-37-42. Thus, to the extent the district court intended for its injunction to apply to the AUMF, it plainly could not stand, and the government does not interpret the injunctive order to apply to the AUMF. *Compare* SA-188 (since AUMF authority remains, "enjoining . . . § 1021(b)(2) removes no tools from the Government's arsenal") *with* JA-316 (district court injunction "appears to go beyond NDAA § 1021 itself and to limit the government's authority under the [AUMF]"); *see Allen Bradley Co. v. Local Union No. 3*, 164 F.2d 71, 73 (2d Cir. 1947) (when no separate

injunctive order issued, "separating the licit from the illicit seems a heavy task for [those] . . . against whom the court's command is directed").

Third, the injunction is fatally overbroad. It is well established that a court should not enjoin enforcement of a statute beyond what is necessary to resolve the case at hand. *See Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328-30 (2006); *Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733, 750 (2d Cir. 1994) ("injunctive relief [should] be no broader than necessary to cure the effects of the harm caused"). Here, the injunction also strikes down application of Section 1021(b)(2) "in any manner," SA-189, even though plaintiffs did not challenge aspects of Section 1021(b)(2), such as its affirmation of authority to detain those who are "part of" al-Qaeda or the Taliban.

In sum, the district court's order is improper. The injunction and accompanying threat of contempt proceedings interferes with active military operations, yet was entered against the President as Commander in Chief in a suit in which the plaintiffs suffer no harm. The district court's order should be reversed and the case dismissed.

CONCLUSION

The permanent injunction order of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a 14-point proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,910 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/August E. Flentje
AUGUST E. FLENTJE

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2012, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that I will cause 6 paper copies of this brief to be filed with the Court.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/August E. Flentje
AUGUST E. FLENTJE