**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

**MOTION INFORMATION STATEMENT**

**Docket Number(s):** 12-3644 Caption [use short title] Hedges, et al. v. Obama, et al.

**Motion for:** Stay Pending Appeal and Admin. Stay

Set forth below precise, complete statement of relief sought:

Immediate administrative stay of district court injunction and stay pending appeal.

**MOVING PARTY:** Barack Obama, et al.
☐ Plaintiff ☑ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

**OPPOSING PARTY:** Christopher Hedges, et al.

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Court-Judge/Agency appealed from: S.D.N.Y., Judge Forrest

**Please check appropriate boxes:**

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

**FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:**

Has request for relief been made below? ☑ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☑ No
Requested return date and explanation of emergency: Immediate. District court injunction injects dangerous confusion into the conduct of military operations abroad.

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

**Signature of Moving Attorney:**
s/August E. Flentje **Date:** 09/17/2012 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

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**ORDER**

**IT IS HEREBY ORDERED THAT** the motion is **GRANTED DENIED**.

**FOR THE COURT:**
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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|---|---|
| CHRISTOPHER HEDGES, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>BARACK OBAMA, et al.,<br><br>Defendants. | No. 12-3644 |

**DEFENDANTS-APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL AND FOR AN IMMEDIATE STAY DURING THE CONSIDERATION OF THIS MOTION**

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## INTRODUCTION AND SUMMARY

By this emergency application, the government requests an immediate administrative stay pending resolution of the government's motion for a stay, as well as a stay pending final disposition of this appeal.

This is a suit brought by a handful of journalists and activists who, based on their stated activities, are in no danger whatsoever of ever being captured and detained by the U.S. military. In accepting plaintiffs' constitutional challenges, the district court struck down, as unconstitutional on its face, a duly-enacted Act of Congress – Section 1021(b)(2) of the National Defense Authorization Act of 2012 (NDAA), Pub. L. No. 112-81, 125 Stat. 1298 (Dec. 31, 2011), and entered a sweeping permanent injunction against invoking it. Order (September 12, 2012) (attached as Exhibit 1). That law explicitly affirms the President's detention authority under the earlier Authorization for Use of Military Force (AUMF), 115 Stat. 224 (2001). The AUMF was passed by Congress in the immediate aftermath of the 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.

Not only did the court enjoin Section 1021(b)(2) of the NDAA, but the district court also went on to reject, albeit not enjoin, the Executive Branch's long-standing interpretation of the AUMF, which interpretation includes, in defining the scope of

detention authority, the concepts of "substantial support" and "associated forces." That interpretation has been endorsed by two Presidents, by the D.C. Circuit in habeas litigation brought by Guantanamo detainees, and by the Congress in Section 1021(b)(2). The district court nonetheless dispensed with that interpretation. Put another way, the district court has taken it upon itself to disagree with an interpretation of the military's detention authority that had previously been endorsed by *all three* Branches of government. What is more, the district court expressly invites actions for contempt sanctions if the military exercises detention authority in a manner inconsistent with the court's deeply flawed understanding of the scope of that authority.

This is vastly more troubling than the court's prior preliminary injunction. There the court expressly acknowledged that the government's AUMF authority remained, Memorandum Order at 5 (May 16, 2012), and explicitly "agree[d] [with the government] that the [preliminary] injunction does not go beyond Section 1021(b)(2)." Memorandum Order at 2 (June 6, 2012).

In the permanent injunction ruling, the district court has now taken the additional step of expressly inviting actions for contempt sanctions, apparently even by persons not party to the suit, if the military exercises detention authority in a manner consistent with the Executive's long-standing interpretation, endorsed by the courts and Congress, of the government's detention authority under the AUMF.

Order at 14. In inviting those contempt proceedings, the district court order threatens irreparable harm to national security and the public interest by injecting added burdens and dangerous confusion into the conduct of military operations abroad during an active armed conflict. There should be no mistake: the court's opinion, and its invitation of contempt proceedings, are addressed directly to detention practices in areas of active hostilities.

An immediate stay should be entered for these and other reasons:

First, the district court has enjoined wholesale an Act of Congress on the ground that it is facially unconstitutional. It is basic that all Acts of Congress are presumed constitutional and should remain in effect pending a final decision on the merits by the Supreme Court. This must be true especially in matters of national security and the conduct of military operations.

Second, the injunction, which was entered against the President as Commander-in-Chief in his conduct of ongoing military operations, is unprecedented and exceeded the court's authority. Moreover, the injunction appears to be worldwide in its effect, intruding upon military operations in the ongoing armed conflict against al-Qaeda, the Taliban, and associated forces.

Third, a stay will not harm plaintiffs. The district court entered this extraordinary injunction in a case in which none of the plaintiffs even have standing; the reality is they face absolutely no threat of military detention under Section 1021

of the NDAA or the AUMF based on the conduct in which they say they want to engage.

Fourth, the district court's objections to Section 1021(b)(2) are, as stated before, at odds with the interpretation that has been given to the President's detention authority by two Presidents, the D.C. Circuit, and the Congress itself. Further, in taking Congress to task for a lack of greater specificity or a scienter requirement in Section 1021(b)(2), the district court misunderstood the fundamental purpose of Section 1021(b)(2) and the AUMF; they are war authorizations conferred upon the President, not penal statutes intended to regulate and punish conduct. Throughout the history of this Nation, war authoritizations such as this simply do not, cannot, and should not provide the level of specificity that the district court believes they require.

The district court's overbroad worldwide injunction is erroneous as a matter of law and threatens tangible and dangerous consequences in the conduct of an active military conflict. The order should be stayed immediately and remain stayed until final resolution of the appeal.

## STATEMENT

### A. Statutory Background

In response to the attacks of September 11, 2001, Congress passed the Authorization for Use of Military Force (AUMF) in 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), 115 Stat. 224. The President has exercised his authority to order the Armed Forces to fight both the al-Qaeda terrorist network and the Ta1iban regime that harbored it in Afghanistan. Armed conflict with al-Qaeda and the Taliban, and forces associated with them, remains ongoing, and in connection with those military operations, persons captured by the United States and its coalition partners have been detained pursuant to the AUMF authority. In a challenge to one of those detentions, and interpreting the AUMF, a plurality of the Supreme Court explained 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; *see also Boumediene v. Bush*, 553 U.S. 723, 733 (2008) (reaffirming holding of *Hamdi*).

Over the years, spanning two Presidents, the Executive Branch has adopted a publicly available interpretation of the AUMF. The government submitted a refined interpretation of the AUMF to the federal district court in Washington on March 13, 2009, 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.[1] That definition, which the government explained was "informed by principles of the laws of war," is as follows:

> The President has the authority to detain persons that the President determines planned, authorized, committed or aided the terrorists attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain 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 2.

Over the last three and a half years, this interpretation has been utilized by the Executive Branch in the habeas litigation brought by the Guantanamo detainees, and the courts have accepted and endorsed it – including, specifically, the concepts of "substantial support" and "associated forces." *See, e.g.*, *Khan* v. *Obama*, 655 F.3d 20, 32-33 (D.C. Cir. 2011); *Al-Bihani*, v. *Obama*, 590 F. 3d 866, 872 (D.C. Cir. 2010); *Al-Adahi* v. *Obama*, 613 F.3d 1102, 1103 (D.C. Cir. 2010), *cert. denied*, 131 S.Ct. 1001 (2011); *Barhoumi* v. *Obama*, 609 F.3d 416, 432 (D.C. Cir. 2010); *Awad*

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1 The March 2009 interpretation refined a prior interpretation issued in 2004, which generally covered all "supporters" rather than "substantial supporters" and was not expressly informed by the laws of war. *See Parhat v. Gates*, 532 F.3d 834, 837 38 (D.C. Cir. 2008) (describing 2004 definition).

v. *Obama*, 608 F.3d. 1, 11-12 (D.C. Cir. 2010), *cert. denied*, 131 S.Ct. 1814 (2011), *Gherebi* v. *Obama*, 609 F. Supp. 2d 43, 69 (D.D.C. 2009).

In 2011, Congress enacted its own endorsement of the Executive Branch's interpretation of its detention authority under the AUMF, when it passed Section 1021 of the National Defense Authorization Act (NDAA). Among other things, the law expressly "affirms that the authority of the President" under the AUMF "includes the authority for the Armed Forces * * * to detain covered persons." NDAA § 1021(a). Section 1021(b)(2) of the NDAA 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.

NDAA § 1021(b)(2). This is a nearly verbatim affirmation by the Congress of the Executive Branch's interpretation of the AUMF. *See* March 2009 Memo. at 1-2.

Section 1021 further specifies that the NDAA affirms, and does not alter, the authority encompassed by the AUMF, stating 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); *see also* Statement by Pres. Barack Obama upon Signing H.R. 1540, 2011 U.S.C.C.A.N. S11, S12 (Dec. 31, 2011) (provision "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"). 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 and Proceedings Below**

1. Plaintiffs are individual journalists and public advocates. *See* Order at 16-28. They filed this suit claiming that Section 1021(b)(2) of the NDAA violates their free speech and association rights as well as due process rights. Complaint at 18-19, 20-22. Plaintiffs claim that they "hav[e] an actual and reasonable fear that their activities will subject them to indefinite military detention pursuant to § 1021(b)(2)." Order at 3.[2]

2. The district court rejected the government's argument that plaintiffs lack standing to obtain a permanent injunction against Section 1021 because they face

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2 In support of their claims, some of the plaintiffs testified before the district court. For example, plaintiff Hedges testified that he is a journalist and had "interview[ed] al-Qaeda members who were later detained and that some of his works have appeared on Islamic and jihadist websites." *Id*. at 16, 19. Plaintiff O'Brien founded a group called the U.S. Day of Rage and operates a web site called WL Central. *Id*. at 20. She testified that she had published articles critical of Guantanamo and learned that "information about U.S. Day of Rage had been posted on . . . two al-Qaeda recruitment sites." Order at 22-23. Two other plaintiffs are foreign nationals living abroad. Order at 25-28; *see* Complaint ¶¶ 5-6.

no risk of harm from the statute, inasmuch as Section 1021 was only a "reaffirmation of the AUMF" that has been in place for more than 10 years, and plaintiffs had faced no prospect of detention during that time. Order at 33. The court disagreed based on its view that the "AUMF set forth detention authority tied directly and only to September 11, 2001," whereas Section 1021 "adds significant scope in its use of the phrases 'substantially supported,' 'associated forces that are engaged in hostilities against the United States or its coalition partners,' and 'directly supported.'" *Id*. at 35, 43. The court therefore concluded that plaintiffs reasonably feared application of the new law to them. *Id*. at 57.

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. Order at 82-97. The court acknowledged that the statute "does have a legitimate, non-First Amendment aspect" – for example, it covers detention of "members of al-Qaeda fighting U.S. forces on a battlefield outside of U.S. territory." *Id*. at 84, 91. Nonetheless, the court concluded that the provision must be permanently enjoined on its face, *i.e.* in all its applications, because there is "some amount of undefined activities protected by the First Amendment" that might be covered by the law. *Id*. at 97.

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." Order at 99. The court rejected the government's argument that the scope of military detention authority had been defined with sufficient clarity, including in the series of D.C. Circuit cases involving Guantanamo detentions, which had interpreted the scope of detention authorized under the AUMF that Congress then explicitly reaffirmed in the NDAA. *Id*. at 106-07.

The court's order "permanently enjoins enforcement of § 1021(b)(2) in any manner, as to any person." Order at 111-12. It also states 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)." *Id*. at 112.

3. On September 14, 2012, the government filed a motion in the district court seeking a stay pending appeal and an immediate interim stay pending resolution of the stay motion. The district court denied the request for an immediate interim stay on September 14, and indicated informally that it would not resolve the stay motion until at least September 19. Later on September 14, the government informed this Court that it would seek an interim stay, and filed the instant emergency motion on September 17.

## ARGUMENT

An immediate administrative stay should be entered pending resolution of the

government's motion for a stay pending appeal of the district court's order. The district court has entered a sweeping injunction, directly against the President and the Secretary of Defense, that strikes down as facially unconstitutional a federal statute relating to the United States' power to detain individuals as part of the conflict with al-Qaeda, the Taliban, and associated forces, with implications for ongoing military operations and causing potential harm to national security. It also expressly includes an invitation for contempt proceedings that appears to envision an exercise of the court's authority beyond enjoining Section 1021(b)(2) to deter the military from continuing to adhere to the reading of the AUMF that has stood for years and has been approved by the D.C. Circuit and Congress. This Court has entered such immediate administrative stay orders in past cases, and should do so here to give it time to consider the submissions from the parties. *See, e.g.*, *Acorn v. United States*, No. 10-992, Order, D.E. 23 (2d Cir. April 2, 2010); *In re: Bureau of Alcohol, Tobacco, Firearms and Explosives*, No. 04-3738 (2d Cir. July 19, 2004). We have contacted counsel for plaintiffs, and they have indicated that they oppose the relief requested in this motion.

A full stay pending appeal is also necessary and fully warranted in this case. In considering a request for a stay pending appeal, this Court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a

stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007) (footnote omitted). Here, each factor weighs heavily in favor of staying the permanent injunction pending final resolution of the government's appeal.

Before addressing the stay factors in detail, however, it is critical to understand the unprecedented nature of the suit the district court entertained and the injunction it granted: they are against the President of the United States and the Secretary of Defense, concerning the conduct of congressionally-authorized military operations against al-Qaeda, the Taliban, and associated forces. No such injunctive action should lie in that context, and no such relief should be granted. This is a critical point that cuts across the stay factors: it is a threshold bar to the action, it is one of many reasons the government is likely to succeed on the merits, and it in any event is a powerful equity weighing against the granting of relief to plaintiffs.

The district court has enjoined the President, as Commander in Chief, from carrying out wartime operations specifically authorized by Congress. *See* NDAA § 1021(a) ("affirm[ing] the authority of the President to use all necessary and appropriate force," including the detention authority reaffirmed in § 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 802-803 (plurality). 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, "at the threshold, the District Court should have evaluated whether injunctive relief against the President was available." *Id*. at 803 (plurality opinion).[3]

If ever an action for injunctive relief might lie against the President, one does not lie in the context of this case, which relates to core military functions that are being carried out under the authority of the President at a time of ongoing armed conflict under a specific congressional authorization. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality) ("detention to prevent a

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

combatant's return to the battlefield is a fundamental incident of waging war"). The constitutional concerns are particularly acute where an injunction would entail "judicial intrusion into the Executive's ability to conduct military operations abroad." *Munaf v. Geren*, 553 U.S. 674, 700 (2008); *see also Holder v. Humanitarian Law Project [HLP]*, 130 S. Ct. 2705, 2727 (2010) (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). Here, the authority being enjoined stems directly from Congress's constitutional authority to declare war and raise and support armies, and the military's reliance on it stems directly from the President's constitutional authority as commander in chief. U.S. Const., Art. I, § 8 & Art. II. § 2.[4]

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4 Injunctive relief is also inappropriate against the Secretary of Defense in this case. Where, as here, Executive Branch officers assist the President in carrying out discretionary powers and responsibilities vested in the President by the Constitution, as is true of the Commander-in-Chief power, "their acts are his acts." *Marbury v. Madison*, 5 U.S. (1 Cranch) 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."). While in other contexts an injunction might run against an Executive Branch officer responsible for assistance to the President, *see Franklin*, 505 U.S. at 803, no such injunction is appropriate – at least absent the most extraordinary circumstances, which are plainly not present here – with respect to future military operations, including detention. 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

## I. The Balance of Harms and the Balance of Equities Warrant a Stay

The government has a strong likelihood of succeeding on appeal, but we first address the other three stay factors involving the balance of harms and the public interest because the order issued by the district court is specifically addressed to, and potentially disruptive of, ongoing wartime operations. The district court's injunction threatens significant institutional and practical harms for national security that make a stay pending appeal an imperative.

For the reasons stated above, it is a powerful factor against equitable relief that the relief granted, through *ex ante* judicial orders to the President and Secretary of Defense, respecting the conduct of military operations, invades the President's power as Commander in Chief with respect to matters authorized by Congress. Making matters worse, the district court did not simply provide relief to the plaintiffs before it, but the court inexplicably enjoined application of Section 1021(b)(2) "in any manner, as to *any person*." Order at 111-12 (emphasis added).

The worldwide injunction places an entirely unjustified and harmful burden on the conduct of military operations during an active military conflict. Indeed, the court magnified the scope of this fundamental error by inviting motions for

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Defense." *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) (Scalia, J.). The injunction therefore strikes at the heart of authority conferred upon the political Branches.

contempt, perhaps even by non-party detainees, against the President and the Secretary of Defense, with regard to not only Section 1021(b)(2), but also the AUMF, which was not enjoined by the district court and was not challenged by plaintiffs in this suit. In doing so, the court wholly misinterpreted the AUMF – the Executive Branch's central congressional authority for the ongoing armed conflict against Al Qaeda, the Taliban, and associated forces – contrary to interpretations by Congress itself, the D.C. Circuit, and two Presidents. *See* Order at 14 ("If, following issuance of this permanent injunctive relief, the Government detains individuals under theories of 'substantially or directly supporting' associated forces, as set forth in § 1021(b)(2), and a contempt action is brought before this Court, the Government will bear a heavy burden indeed"); Order at 112 ("[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)").

The President and the D.C. Circuit interpret the AUMF to provide detention authority over those who are "part of" or "substantially support" al-Qaeda, the Taliban, or associated forces. *See supra*, pp. 5-7. As noted above, Congress's express purpose in the NDAA was to affirm this interpretation. NDAA § 1021(d).

Although the district court states, on the one hand, that the permanent injunction against invoking Section 1021(b)(2) "removes no tools from the

Government's arsenal," Order at 110, it also states, in the context of discussing contempt, that the government would face "a heavy burden indeed" if it detains individuals because they are "'substantially or directly supporting' associated forces." Order at 14.

In this respect, the permanent injunction entered by the court is vastly more troubling than the court's prior preliminary injunction, and is the reason for this emergency motion for a stay. In entering a preliminary injunction, the district court assured the government that "preliminarily enjoining enforcement" of Section 1021(b)(2) "should not remove any enforcement tools from those the Government currently assumes are within its arsenal," including preexisting detention authority under the AUMF. Memorandum Order at 5 (May 16, 2012). The court further clarified that it "agree[d] [with the government] that the [preliminary] injunction does not go beyond Section 1021(b)(2)" to limit AUMF authority. Memorandum Order at 2 (June 6, 2012). While purporting to repeat the assurance that the government would have "tools" in its permanent injunction order, Order at 110, the district court then issued its injunctive command in the *same sentence* in which it announced its narrow view of the AUMF. Order at 112. In that sentence the court expressly rejected the Executive's long-standing interpretation of the government's detention authority under the AUMF that had been endorsed by the courts and Congress. *Id.* ("Military detention based on . . . 'substantial[] support[]' . . . is not

encompassed within the AUMF and is enjoined by this order regarding § 1021(b)(2)"); *see also id.* at 14 (rejecting government's interpretation of AUMF together with discussion of possible contempt sanctions).

By rejecting the government's longstanding understanding of its AUMF authority, in a context in which deference to the Executive's interpretation should be at its zenith, the court has placed the military in a difficult and burdensome position rife with confusion. The confusion engendered by this extraordinary ruling is heightened by the court's failure to issue its injunction in a separate injunctive order.[5]

The court's opinion thus appears to contemplate curtailing the U.S. military's ability to continue to adhere to the Executive's longstanding interpretation of the AUMF, an interpretation approved by Congress, and it does so in a case that did not even challenge that authority. To be clear: the court's opinion, and the invitation of contempt proceedings, may impact detention practices in areas of active hostilities.[6]

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5 *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").

6 Were the contempt proceedings invited by the district court to be brought by military detainees at Guantanamo or in Afghanistan, such proceedings could evade various review limitations enacted by Congress, constitutional limitations on the writ of habeas corpus, and the directive of the Supreme Court in *Boumediene v. Bush*. *See* 553 U.S. 723, 795-96 (2008) (to "reduce administrative burdens on the Government," a "legitimate objective," detainee review petitions should be "hear[d]. . . [in] the United States District Court for the District of Columbia"); s*ee Maqaleh v. Gates*, 605 F. 3d 84, 99 (D.C. Cir. 2010) (no constitutional habeas

Plainly, this unprecedented order threatens irreparable harm, both on the military and the public interest, and should not stand. It should be stayed pending final resolution of the government's appeal.

The permanent injunction further causes irreparable harm and undermines the public interest through its invalidation of a federal statute as unconstitutional on its face. Section 1021(b)(2), "like all Acts of Congress, * * * is presumptively constitutional" and "[a]s such, it 'should remain in effect pending a final decision on the merits by [the Supreme] Court.'" *Turner Broadcasting System, Inc. v. F.C.C.*, 507 U.S. 1301, 1301 (1993) (Rehnquist, J., in chambers); *Maryland v. King*, No. 12A48, 2012 WL 3064878, at *2 (Roberts, C.J., in chambers) ("'[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury'") (quoting *New Motor Vehicle Bd. Of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *see Heart of Atlanta Motel, Inc. v. United States*, 85 S. Ct. 1, 2 (1964) (Black, J., in chambers). The "'presumption of constitutionality which attaches to every Act of Congress . . . [is] an equity to be considered in favor of [the government] in balancing hardships.'" *United States v. Comstock*, No. 08A863 (Apr. 3, 2009) (Roberts, C.J., in chambers) (quoting *Walters v. National*

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jurisdiction to hear habeas petitions filed by detainees in Afghanistan); 28 U.S.C. § 2241(e)(2) (no federal court jurisdiction to hear actions other than habeas proceedings by detainees determined to be enemy combatants or awaiting such a determination).

*Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, in chambers)). Absent a stay, an injunction against the military's reliance on a statutory authorization of detention as an aspect of the use of military force harms these democratic interests, because the policy of Congress "is in itself a declaration of the public interest." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937).

Further, a stay will not harm plaintiffs. For reasons discussed further below, the plaintiffs have suffered no injury due to Section 1021(b)(2), and the government made clear on the record that the activities described by plaintiffs could not subject them to military detention. Therefore, plaintiffs not only lack standing, but also will not be harmed by a stay. The plaintiffs thus can present no equities at all to outweigh the competing interests of the government and the public. The balance of the harms, and the public interest, therefore call for the issuance of a stay pending appeal.

## II. The Government Is Likely to Prevail on the Merits.

The government is highly likely to prevail on the merits of this appeal for at least three reasons. First, plaintiffs lack standing. Second, facial invalidation of Section 1021(b)(2) was unwarranted under either a due process or First Amendment theory. Third, equitable relief is not appropriate here, and the injunction is overbroad. Standing alone, each of these errors provides an adequate basis for a

stay and reversal. The combination of errors makes all the more clear the government's likelihood of success on the merits and the need to enter a stay of the injunction now.

As an initial matter, the district court analyzed the legal issues posed by this case based on a profound misunderstanding of the principles of statutory interpretation, military detention, and the laws of war, and without adequate attention to the analysis by the D.C. Circuit, which has developed particular experience in the past decade in these areas.

First, the court believed that the AUMF applies only to individuals directly involved in the September 11th attacks. Order at 45 ("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, authorizes all "necessary and appropriate" military force against "those . . . *organizations* [the President] determines planned, authorized, or aided the terrorist attacks," AUMF § 2(a) (emphasis added), including, of course, al-Qaeda. It therefore applies to individuals or forces that have a sufficient tie to al-Qaeda or the Taliban, whether or not the individuals were themselves directly linked to the events of September 11, 2001. The standards developed by two Presidents, embraced by the Supreme Court in *Hamdi*, validated by the D.C. Circuit, and affirmed by Congress in NDAA § 1021(b)(2), all involve determining whether a person or force is sufficiently tied to

al-Qaeda, which operates clandestinely, to be a proper subject of military force, including military detention. *See, e.g.*, *Salahi v. Obama*, 625 F.3d 745, 751-52 (D.C. Cir. 2010). These standards do not – and could not – restrict the scope of detention to those personally responsible for the attacks on September 11, 2001.

Second, the district court fundamentally erred in reasoning that § 1021(b)(2)'s terms are impermissibly ambiguous. An Act of Congress such as the AUMF is addressed to the President in the exercise of war powers; it is not a statute regulating private conduct. A Congressional authorization for the use of force, such as the AUMF or a declaration of war, authorizes the use of necessary force to address an existing state of armed conflict or an identified threat.[7] Traditionally, war powers are authorized by Congress in the most general terms, *see supra* n.7, without the type of specificity the district court apparently believed necessary. Those very concise acts implicate a regime of other legal authorities and standards, including the international laws of war, that inform the exercise of war powers. In the present case, the laws of war inform the interpretation of the AUMF and NDAA, such that they apply to "those persons whose relationship to al-Qaida or the Taliban would, in

[7] *See, e.g.*, Auth. for Use of Military Force Against Iraq Res. of 2002, Pub. L. No. 107-243, 116 Stat. 1498; 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); Joint Res. of Dec. 8, 1941, ch. 561, 55 Stat. 795 (Japan); 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).

appropriately analogous circumstances in a traditional armed conflict, render them detainable." March 2009 Memo. at 1; *see* NDAA § 1021(a) (detentions authorized "under the laws of war"). The district court failed to recognize this key to understanding the AUMF and the NDAA.

Third, the 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 v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010). Order at 39-40, 42. In fact, the question before the D.C. Circuit was the converse – whether the laws of war *limited* the President's AUMF authority, and the D.C. Circuit panel in that case rejected the notion that the laws of war constrain the President's authority. *Al-Bihani*, 590 F. 3d at 872. In other words, the D.C. Circuit panel in *Al-Bihani* concluded that the laws of war could not be invoked to *narrow* the scope of detention authority conferred by the AUMF. The opinion cannot plausibly be read to hold, or even suggest, that the detention of substantial supporters is not authorized under the AUMF.[8]

These overarching errors just discussed reinforce the conclusion that the

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8 A majority of the judges responding to a petition for rehearing *en banc* in *Al*-Bihani then issued a statement leaving resolution of that question for a future case because the "panel's discussion of that question is not necessary to the disposition of the merits." *Al-Bihani v. Obama*, 619 F. 3d 1, 1 (2010) (statement of seven judges on denial of en banc review).

district court further erred in numerous ways that demonstrate that the government is very likely to succeed on the merits of the appeal.

**A. Plaintiffs Lack Standing.** The district court entered this extraordinary and fundamentally flawed order in a context where there was not even a party before it with standing. Section 1021(b)(2) has not injured the plaintiffs, and there is no imminent injury to be redressed by the court's order striking down the statute. *See Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983).

To establish standing, a "plaintiff must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A court's standing inquiry 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 v. Byrd*, 521 U.S. 811, 819-20 (1997).

An "[a]bstract injury," *Lyons*, 461 U.S. at 101, and "[a]llegations of possible future injury" that enter "the area of 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.* (quotation marks omitted). Even in a case involving a statute – unlike the AUMF or Section 1021(b)(2), *see infra* pp. 30-32 – that directly regulates private conduct by

imposing penalties for engaging in statutorily proscribed acts, plaintiffs who claim a constitutional right to take the forbidden action must demonstrate a sufficiently "credible threat of [enforcement]." *HLP*, 130 S. Ct. at 2717. And when plaintiffs invoke the harm of "self-censorship" in challenging such a statute that regulates private conduct, this Court has required at least "an actual and well-founded fear that the [statute] will be enforced against [them]." *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000).[9]

The primary injury accepted by the district court as sufficient to support standing was the prospect that plaintiffs would be detained under Section 1021(b)(2) based upon their journalism and public advocacy. *See* Order at 19-20, 23-24, 26, 27-28. The district court's first error in analyzing this standing claim was to ignore a key provision of the NDAA. The NDAA explicitly and unambiguously states that the challenged provision, Section 1021(b)(2), does *not* affect citizens or people arrested in the United States. *See* NDAA § 1021(e) (NDAA § 1021 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). The President has further made clear that he "will not authorize the indefinite military detention without trial of American citizens."

9 The United States disagrees with this Court's view that a self-imposed chill based on a reasonable fear of enforcement is sufficient, *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 133-135, 137-138 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 2431 (2012), but recognizes that panels of this Court are currently bound by that precedent.

Statement by Pres. Obama, 2011 U.S.C.C.A.N. at S12.

Thus, the only plaintiffs NDAA § 1021(b)(2) might impact are noncitizens who are outside of the United States. Indeed, the non-citizen plaintiffs in this case do not even claim any substantial connection to the United States. 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 – especially to enjoin the President and Secretary of Defense 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).

Even putting aside this fundamental threshold flaw in the district court's standing analysis, the claimed fears of detention, as found by the district court, are woefully inadequate to establish a "credible," *HLP*, 130 S. Ct. at 2717, "well founded," *Vt. Right to Life Comm.*, 221 F.3d at 382, or in any way *reasonable* fear of detention under Section 1021(b)(2). Some of the findings do not show any real fear of enforcement or establish the plaintiffs changed their behavior to allay such fears. Order at 20 (Hedges "anticipated" changing activities); *id.* at 26 (Wargalla "considered" not inviting group to conference); *id.* at 27 (Jonsdottir "concerned"

about her involvement with WikiLeaks). The remaining claimed fears relate to activities that are so common – and so obviously not the subject of the war against al-Qaeda, the Taliban, and associated forces – that a fear of detention based on them would be wholly unreasonable. Prelim. Inj. Order at 22 (O'Brien concerned about publishing articles critical of Guantanamo); *id*. at 23 (O'Brien concerned about similarities between "intelligence collection" and journalism); *id*. at 17 (Hedges concerned about reporting on terrorist groups). These fears are not objectively reasonable. *See Lyons*, 461 U.S. at 107 n.8 (subjective fears do not establish "the reality of the threat of injury"); *Laird*, 408 U.S. at 13-14.

The district court largely based its finding of standing on its dissatisfaction with the government's assurance that the NDAA does not reach the conduct in which plaintiffs say they want to engage. *See* Order at 29-30. Standing, however, must be established by plaintiffs. *See Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011). In any event, the government considered each of the plaintiffs' personal circumstances and represented to the district court on the record that plaintiffs could not be subject to detention as a matter of law, under either the AUMF or the NDAA, based on their stated activities. *See* Order at 29-30. Those representations conclusively rebut plaintiffs' claims that they reasonably fear detention.

But even apart from those representations, plaintiffs' stated fears, for three

reasons, are not objectively reasonable.

First, the AUMF detention authority had been in force for more than ten years prior to the enactment of Section 1021(b)(2). During that time none of the plaintiffs were threatened with detention and none allege that they feared being detained. Nor was there evidence of any detentions based upon independent journalism or advocacy.[10] The AUMF has been interpreted by two Presidents for more than eight years to authorize detention of those who are part of or substantially support al-Qaeda, the Taliban, or associated forces – including the very two elements, "substantial support" and "associated forces," that are challenged here. *See Parhat v. Gates*, 532 F.3d 834, 837-38 (D.C. Cir. 2008) (describing 2004 CSRT definition); March 2009 Memo. at 2 ("substantially supported" and "associated forces"). That interpretation has been upheld by the D.C. Circuit, *see*, *e.g.*, *Al-Bihani*, 590 F.3d at 872, and affirmed by Congress. NDAA § 1021(b)(2). Thus, irrespective of the district court's view as to the proper scope of the AUMF – and irrespective of the court's faulty theory that it is narrower than Section 1021(b)(2) of the NDAA – there is no doubt that the Executive Branch has *interpreted* the AUMF to include a "substantial support" and "associated forces" component.

Second, the district court's rationale for rejecting the relevance of this

10 The Executive previously used a "support" definition that is broader than that adopted by the Executive in March 2009 and affirmed by Congress in Section 1021(b)(2) of the NDAA, yet it also did not result in plaintiffs, or others in their position, being detained or threatened with detention.

historical understanding is seriously mistaken. Section 1021(b)(2) of the NDAA expressly codified the President's already existing interpretation of the AUMF, as upheld by the D.C. Circuit, and enactment of Section 1021(b)(2) therefore did not expand the scope of detention authority in any substantive respect. Congress specified, in the statutory text itself, that the statutory definition "affirms" the AUMF detention authority and is not "intended to limit or expand the authority of the President or the scope of the [AUMF]." NDAA § 1021(d); *see* Statement by Pres. Barack Obama upon Signing H.R. 1540, 2011 U.S.C.C.A.N. S11, S12 (Dec. 31, 2011) (provision "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"). The district court clearly erred in declining to defer to the Executive's interpretation and a settled body of law by the appellate court that has been accorded particular responsibility and has considerable expertise in construing the AUMF. 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 11years.

Third, contrary to the district court's misguided view of the role of the law of war, in March 2009 the government interpreted the AUMF as informed by law-of-war principles to determine the scope of AUMF authority, not to expand it. Indeed, the standard adopted by Congress was based on the standard upheld in

*Hamdi* as comporting with the laws of war. *See* 542 U.S. at 518-19 (authority to detain those who are "'part of or supporting forces hostile to the United States or coalition partners in Afghanistan' and 'engaged in an armed conflict against the United States'" 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"). The laws of war inform the interpretation of the AUMF and NDAA and therefore the detention authority applies to "those persons whose relationship to al-Qaida or the Taliban would, in appropriately analogous circumstances in a traditional armed conflict, render them detainable." March 2009 Memo. at 1; *see* NDAA § 1021(a) (detentions authorized "under the laws of war").

While the district court reasoned that the laws of war are "vague" and support plaintiffs' general fear of being subject to detention, Order at 38, this contention is without merit. Those laws of war have been developed over centuries, and they do not support the plaintiffs' claimed fear that they will be detained based on their independent journalism or public advocacy. March 2009 Mem. at 1 ("laws of war include a series of prohibitions and obligations, which have developed over time and have periodically been codified in treaties such as the Geneva Conventions or become customary international law"). Indeed, as explained, the government advised the district court that the plaintiffs' stated activities would not subject them to detention as a matter of law.

Plainly, the district court erred in holding that plaintiffs have standing to seek a worldwide injunction regarding the military's detention powers under Section 1021(b)(2). But even if plaintiffs were somehow found to satisfy the requirements of Article III, any likelihood of harm is so attenuated that it could not remotely outweigh the profound equities of the government and public against recognizing a cause of action for equitable relief in these circumstances – even assuming such an action could ever be brought to enjoin the President and Secretary of Defense in this context.

**B. NDAA § 1021(b)(2) is Constitutional.** The government is also likely to prevail on the merits because NDAA § 1021(b)(2) is constitutional and it was error to facially invalidate it under the Due Process and Free Speech Clauses.

1. As an initial matter, the asserted constitutional rights must be viewed in the context of a military force authorization designed not to regulate private conduct through the imposition of penalties, but to authorize and enable wartime operations abroad in an active military conflict. There is no doubt that in that context, Congress has great leeway to authorize force generally. Our constitutional structure then provides that if that force were to be exercised in a way that impinges on a constitutional liberty, the situation will be addressed not through *ex ante* judicial orders directing the conduct of military operations abroad, but through appropriate, tailored remedies as applied to the specific circumstances. Indeed,

historically, as we have explained, force authorizations are written in general terms, and would never properly be held to violate constitutional protections on their face because they granted authority in general terms or did not sufficiently carve out First Amendment protected speech. *See, e.g.*, Joint Res. of Dec. 8, 1941, ch. 561, 55 Stat. 795 (Japan) ("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"). The notion that a force authorization like NDAA § 1021(b)(2) – which is more specific and therefore imposes *more* constraints on the President than historical force authorizations – confronts a greater risk of invalidation because Congress imposed those constraints is counterintuitive and 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. Against this background, a statute like Section 1021(b)(2) cannot be challenged on ordinary due process vagueness grounds.

The district court's analysis of plaintiffs' First Amendment challenge is wrong for similar reasons. And more specifically, Section 1021 is not a content-based restriction on speech. Indeed, it does not even mention any form of expression or even regulate private, primary conduct. It is a statute that operates as

a grant of general war powers. The AUMF authorized the President to take action against persons with the requisite ties to al Qaeda, the Taliban, and associated forces, and Section 1021affirmed that authority; neither statute is directed to speech as such, and cannot be treated in the same manner as a criminal statute that may reach certain expressive activity. *See Virginia v. Hicks*, 539 U.S. 113, 124 (2003) ("[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").

Moreover, for the reasons we explained above, courts generally lack authority to enjoin the President in carrying out official duties. *See supra* at pp. 12-14. Instead, with respect to executive detention, the Constitution itself creates the procedure for resolving challenges to Executive detention – namely, habeas corpus review – and in that manner accommodates the exercise of war powers with individual liberties. *See Hamdi*, 542 U.S. at 524 (habeas is the "process constitutionally due to a citizen who disputes" the validity of military detention). The claims brought here, seeking *ex ante* judicial direction to the President and Secretary of Defense regarding wartime operations, should not have been entertained by the district court. *See, e.g.*, *Aulaqi v. Obama*, 727 F. Supp. 2d 1, 47-52 (D.D.C. 2010) (court would not consider request to 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"); *cf. Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

2. General principles of constitutional analysis, even apart from those applicable in the context of military force authorizations, further demonstrate that the government is likely to succeed on the merits in this case.

"Facial 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. "[A] facial challenge must fail where the statute has a plainly legitimate sweep." *Id*.

With respect to due process, a facial challenge of 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, although Section 1021(b)(2) is not amenable to a vagueness challenge for the reasons stated above, even if it were, the terms challenged by plaintiffs are not impermissibly vague. They are informed by the laws of war, which are expressly referenced in the NDAA, the President's interpretation, and D.C. Circuit precedent. *See* March 2009 Memo.

at 2 (substantial support does not include those who provide "unwitting or insignificant support" to al-Qaeda); *see also Khan v. Obama*, 655 F.3d 20, 32-33 (D.C. Cir. 2011) (applying "associated force" definition to a group that "played an important and deliberate role in supporting continued attacks against coalition and Afghan forces throughout 2002"); Geneva Convention III, Art. 4(a)(4) (contemplating lawful detention of certain people who accompany military forces).

Similarly, with respect to the First Amendment, 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 itself should have been fatal to plaintiffs' claims. It is obviously not "pure speech" to be part of, or substantially support, al-Qaeda, and there is no First Amendment protection for "directly support[ing] . . . hostilities in aid of enemy forces." In any event, even if Section 1021(b)(2) were content-based, a First Amendment overbreadth challenge would be viable only if the "law's application to protected speech [were] '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. Plaintiffs' facial challenge to Section 1021(b)(2) of the NDAA must fail under these precedents as well because, contrary to the district court's reasoning, Order at 86-97, the statute has a plainly legitimate sweep to individuals who in no sense are engaging in expressive activities (as indeed

the district court itself recognized in its preliminary injunction order, May 16 Order at 47). Moreover, as explained above, the NDAA's effect runs only to aliens abroad. By it terms, 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); *see supra*, p. 25.

**C. Worldwide Injunction Was Improper**. Finally the district court committed reversible error in issuing an expansive, worldwide injunction, not limited to the handful of identified plaintiffs here. As an initial matter, because this case involved the President's use of military force abroad in carrying out the war against al-Qaeda, the Taliban, and associated forces, the district court should not have entertained an action for injunctive relief. *Cf. Munaf*, 553 U.S. at 700 (equitable habeas relief should not be granted in case involving "detainees . . . captured by our Armed Forces" in "an active theater of combat" because it would amount to an "unwarranted judicial intrusion into the Executive's ability to conduct military operations abroad").

Further, it is well established that when a party challenges the application of a statute, the court cannot properly enjoin the government with respect to nonparties on a nationwide, let alone worldwide, basis. *See Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 16 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"). Additionally, "injunctive relief [should] be no broader than necessary to cure the effects of the harm caused." *Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733, 750 (2d Cir.1994); *Patsy's Italian Restaurant, Inc. v. Banas*, 658 F.3d 254, 272 (2d Cir. 2011).

Both these principles were violated by the district court order. The worldwide injunction, coupled with the threat of contempt proceedings, effectively attempts to enable one district court to prevent the government from defending the constitutionality of the law in any other court in any other circumstance, and thus interferes with the development of the law in other circuits – a particularly acute concern here given that other courts have applied and upheld the detention authority enjoined by the district court. *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 geographical breadth of government litigation and also, most importantly, the nature of the issues the government litigates"). This

is particularly magnified here given the impact of the injunction and threatened contempt proceedings on national security and the conduct of military operations abroad during wartime, as we have explained above.

In sum, the injunction is improper and it, along with the accompanying threat of contempt proceedings, interferes with active military operations and was entered in a law suit where the plaintiffs suffer no harm. The district court's order should be promptly stayed pending final resolution of the government's appeal.

## CONCLUSION

For the foregoing reasons, the Court should stay the district court's permanent injunction entered on September 12, 2012, pending final resolution of the government's appeal, and should grant an immediate administrative stay pending its consideration of this motion.

Respectfully submitted,

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SEPTEMBER 2012

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17the day of September 2012, I caused this motion to be filed with the Court electronically by CM/ECF. I certify that the following counsel in this case who is a registered CM/ECF user will be served by the appellate CM/ECF system:

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