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UNITED STATES DISTRCT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTOPHER HEDGES,
DANIEL ELLSBERG, JENNIFER BOLEN,
NOAM CHOMSKY; ALEXA O'BRIEN,
US DAY OF RAGE; KAI WARGALLA,
HON. BRIGITTA JONSDOTTIR M.P.,

Plaintiffs,

INDEX NO. 1-12 CIV. 0331(KBF)

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,
JOHN McCAIN, JOHN BOEHNER,
HARRY REID, NANCY PELOSI,
MITCH McCONNELL, ERIC CANTOR
as representatives of the UNITED STATES
OF AMERICA

Defendants.

POST-HEARNG MEMORANDUM OF PLAINTIFFS

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STATEMENT OF THE CASE

A new law, the National Defense Authorization Act for Fiscal Year 2012, "affirms" the President's authority to detain without trial, try by military commissions or other means, and transfer to the custody or control of other countries or entities, persons who meet either of the law's two definitions of "covered persons." At issue here is the definition and scope of a "covered person" under section 1021(b)(2):

> A person who was a part 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 hostilities in aid of such enemy forces.

Section 1021(b)(2). The law does not define "substantially supported" or "associated forces" and the President appears to have unbounded discretion to interpret these terms

Plaintiffs are journalists, authors, and civic activists. In the ordinary course of their reporting and writing, various plaintiffs have communicated and met with leaders of individuals or groups the government might reasonably be expected to consider "associated forces" including Al-Qaeda or the Taliban, as testimony demonstrated. In some cases, various plaintiffs have disseminated the ideas of these individuals or groups — activities the government might reasonably be expected to consider lending "substantial support" on the facts of the case. For example, testimony showed that the London Metropolitan Police listed one plaintiffs' organization, Occupy London, with al-Qaeda and another terrorist group, in a "Terrorism/Extremist Update." The record also shows that the U.S. Department of Homeland Security has included plaintiff U.S. Day of Rage, an election reform organization, in its investigation of terrorist organizations. Various plaintiffs publicly support and endorse the work of Wikileaks and its founder, Julian Assange. Plaintiff Birgitta Jonsdottir testified that her private e-mail records have been subpoenaed in connection with the U.S investigation of

Assange under the Espionage Act. Plaintiff Alexa O'Brien, the founder of U.S. Day of Rage, has repeatedly been contacted by vendors of security services to the U.S. suggesting her group's links to Islamic extremist organizations and Al-Qaeda web sites, and her organization has been investigated by the Department of Homeland Security. The government might reasonably claim that these plaintiffs are within the ambit of section 1021(b)(2); indeed, at the preliminary injunction hearing the government did not dispute that plaintiffs expressive acts could bring them within the scope of the NDAA.

The government also does not dispute that "substantial support" and associated forces, " as used in section 1021(b)(2), have no fixed meaning. On the contrary, the government says that "[i]t is neither possible nor advisable . . . to attempt to identify, in the abstract, the precise nature and degree of 'substantial support,' or the precise characteristics of 'associated forces,' that are or would be sufficient to bring persons or organizations within the foregoing framework." The government indicates that the meaning of these terms will be determined ad hoc and after the fact, and cannot be known in advance of "their application to concrete facts in individual cases."[1]

The uncertain meaning of "substantial support", directly supporting" and "associated forces," and the potentially devastating consequences of guessing wrong, have chilled the plaintiffs' speech and other expression, in violation of the Due Process Clause. As the Court noted at the preliminary injunction hearing, the term "*directly* supported" as used in section 1021(b)(2) also has no definition; moreover, it appears to have a different meaning than the term

[1] Plaintiffs respectfully suggest that Justice Frankfurter's "soil" dictum, *see Bridges v. California*, 314 U.S. 252, 293 (1941), raised by the government, is inapposite. Justice Frankfurter was simply stating the unexceptionable proposition that, in interpreting provisions of the Constitution, judges should take account of their origins in English law. The phrase "substantially supported" is a term whose meaning is in the eye of the beholder but that is vague by design. *Cf. Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 243 (2008) (Breyer, J., joined by Stevens, J. dissenting) ("As with many questions of statutory interpretation, the issue here is not the meaning of the words. The dictionary meaning of each word is well known. Rather, the issue is the statute's scope. What boundaries did Congress intend to set? To what circumstances did Congress intend the phrase, as used in this statutory provision, to apply?"). Under the NDAA there are no boundaries since there are no defined provisions.

"*substantially* supported" used earlier in the statute. Thus, the NDAA is burdened with the undefined governing terms "substantially support," associated forces," and "directly supporting" that may even be at odds with one another, which heighten the uncertainty surrounding the NDAA's scope. See, e.g. *Reno v. ACLU*, 521 U.S. 844, 871 (1997) (potential inconsistency of two undefined provisions in the Communications Decency Act enhanced vagueness claim). This chilling effect also deprives the public of vital information on matters of utmost national concern.

Vagueness is not the only infirmity of section 1021(b)(2). If the government claims that an individual is a "covered person" for engaging in expressive activities protected by the First Amendment, section 1021(b)(2) violates protected First Amendment rights. At least five times during oral argument the government refused to concede that the Plaintiffs' expressive activities would be outside the scope of the NDAA. Cf. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010) (noting that "[t]he government has not argued to this Court that plaintiffs will *not* be prosecuted if they do what they say they wish to do.") (emphasis added).

On the basis of the evidence presented at the preliminary injunction hearing, namely that the plaintiffs themselves have already been chilled in their expressive acts, that plaintiffs have had direct contact from government agents or vendors as to their purported relations with Islamic fundamentalist and terror organizations, that plaintiffs' organizations have been investigated by the U.S. for links to terrorist organizations, plaintiff Hedges's own personal experience of detention even prior to the enactment of the NDAA and his being placed on a terrorist watch list by the U.S. for his work as a journalist, Hedges testimony that he has changed the manner in which he speaks with sources as a result of the NDAA, Plaintiff Wargalla's testimony that her group RevolutionTruth has changed its media production plans and limited its invited guests to

its web panels in fear of the NDAA, and Plaintiff O'Brien's testimony that she has withheld publication and completion of several journalistic pieces out of fear of the NDAA, plaintiffs seek the following remedies:

1. A declaration that §1021(b)(2) is facially void for vagueness;

2. A declaration that §1021(b)(2) is unconstitutionally overbroad as it brings within its scope protected expressive conduct;

3. In the alternative, a declaration that §1021(b)(2) is unconstitutional as applied to the types of expressive behavior brought forth on the record through plaintiffs's testimony.

4. A declaration that §1021(b)(2) is unconstitutional as applied to U.S. citizens under the holding of *Ex parte Milligan*, 7 U.S. 2 (1866) and *Hamdi,* supra.

STATUTORY BACKGROUND

On December 31, 2011, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2012.[2] Sections 1021-1030, referred to herein as the NDAA, address the treatment of individuals captured in the war on terror.[3] The present case requires the Court to determine the constitutionality of NDAA § 1021(b)(2),[4] as applied to the plaintiffs' speech and other expressive activity. Section 1021 provides, in pertinent part (italics added):

> SEC. 1021. AFFIRMATION OF AUTHORITY OF THE ARMED FORCES OF THE UNITED STATES TO DETAIN COVERED PERSONS PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE.
>
> (a) In General.--Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107-40; 50 U.S.C. 1541 note) includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war.

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2 Pub. L. No. 112-81, 125 Stat. 1298 (2011).

3 125 Stat. at 1562-1570 (10 U.S.C. 801 note).

4 *Id.* at 1562-1564.

> (b) Covered Persons.--A covered person under this section is any person as follows:
>
> (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.
>
> (2) 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.
>
> (c) Disposition Under Law of War.--The disposition of a person under the law of war as described in subsection (a) may include the following:
>
> (1) Detention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force.
>
> (2) Trial under chapter 47A of title 10, United States Code (as amended by the Military Commissions Act of 2009 (title XVIII of Public Law 111-84)).
>
> (3) Transfer for trial by an alternative court or competent tribunal having lawful jurisdiction.
>
> (4) Transfer to the custody or control of the person's country of origin, any other foreign country, or any other foreign entity.
>
> (d) Construction.--Nothing 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.
>
> (e) Authorities.--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.

As noted, section 1021(b)(2) does not define "substantially supported", "directly supporting" or "associated forces" but does impress upon U.S. law a power of civilian detention by the military with no prior analogue in either case law or statutory law and without the limiting condition that a citizen or civilian so detained must be "engaged in armed conflict with the United States". *Hamdi*, supra.

I. THE GOVERNMENT'S CONTENTION THAT THE NDAA MERELY RE-CODIFIES THE AUMF

The government's primary argument against plaintiffs' standing is that §1021(b)(2) has long been authorized under the AUMF and, therefore, that plaintiffs have no ground for imminent harm since they have never been targeted under the AUMF. Despite pressing this defense repeatedly, the government has been unable to offer any support for the claim that the power to detain U.S. citizens or civilians has long been recognized under the AUMF. The government's position is not based on the language of the AUMF or any legislative history but solely on the government's own briefing in the *Hamlilly* matter in which the government argued - without identifying a source in the AUMF - that the President has the authority to detain any person who has "substantially supported" the relevant terrorist entities:

> 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.[5]

This statement comes not from the language of the AUMF but from a brief memorandum that the government submitted to a district court in 2009, eight years *after* Congress enacted the AUMF.

The government attempts to ground its detention authority under section 1021(b)(2) in what it claims has been this longstanding practice under AUMF despite the lack of any legislative history or statutory language to such effect.[6] The government's authority for what it describes as this longstanding interpretation of the AUMF comes solely from its own briefing in two Guantanamo cases and a statement by the general counsel to the Navy at a lecture at Yale Law School. The Supreme Court in *Hamdi* itself denied the viability of this theory as applied to

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[5] Resp'ts' Mem. Regarding the Government's Detention Authority Relative to Detainees Held at Guantánamo Bay, March 13, 2009, at 2 ("March 13 Mem."), Misc. No. 08-442 (D.D.C.) (Doc. 462).

[6] *Id.* at 1.

U.S. citizens except where they are "engaged in armed conflict with the United States," *Hamdi*, supra, a limiting provision that appears nowhere in the NDAA.

In its March 2009 briefing in *Hamllily*, incorporated by the government into the instant briefing, the government stated that the standard for interpreting "substantial support" and "associated forces" should be malleable, their meaning ad hoc and determined after the fact and without statutory guidance:

> There are cases where application of the terms of the AUMF and analogous principles from the law of war will be straightforward. It is neither possible nor advisable, however, to attempt to identify, in the abstract, the precise nature and degree of "substantial support," or the precise characteristics of "associated forces," that are or would be sufficient to bring persons and organizations within the foregoing framework. Although the concept of "substantial support," for example, does not justify the detention at Guantanamo Bay of those who provide unwitting or insignificant support to the organizations identified in the AUMF, and the Government is not asserting that it can detain anyone at Guantanamo on such grounds, the particular facts and circumstances justifying detention will vary from case to case, and may require the identification and analysis of various analogues from traditional international armed conflicts. Accordingly, the contours of the "substantial support" and "associated forces" bases of detention will need to be further developed in their application to concrete facts in individual cases.[7]

The March 2009 filing does not define "unwitting or insignificant support," or explain where the line lies between "substantial" and "insignificant" support. The filing continues:

> The AUMF is not limited to persons captured on the battlefields of Afghanistan. Such a limitation "would contradict Congress's clear intention, and unduly hinder both the President's ability to protect our country from future acts of terrorism and his ability to gather vital intelligence regarding the capability, operations, and intentions of this elusive and cunning adversary. Under a functional analysis, individuals who provide substantial support to al-Qaida forces in other parts of the world may properly be deemed part of al-Qaida itself. Such activities may also constitute the type of substantial support that, in analogous

[7] *Id.* at 2.

> circumstances in a traditional international armed conflict, is sufficient to justify detention.[8]

While the government asserts that it will not bring "unwitting" acts within the scope of section 1021(b)(2), the Supreme Court, in *Reno*, rejected a similar discretionary power that the government sought to assert under the Communications Decency Act (CDA). In *Reno* the Court affirmed the district court's finding that there was no basis in the undefined text of the CDA to support the government's position that only "pornographic materials" would be brought within the bounds of the (undefined) terms "indecent" or "patently offensive":

> "[The district judge] found no statutory basis for the Government's argument that the challenged provisions would be applied only to "pornographic" materials, noting that, unlike obscenity, "indecency has *not* been defined to exclude works of serious literary, artistic, political or scientific value." *Id.*, at 863. Moreover, the Government's claim that the work must be considered patently offensive "in context" was itself vague because the relevant context might "refer to, among other things, the nature of the communication as a whole, the time of day it was conveyed, the medium used, the identity of the speaker, or whether or not it is accompanied by appropriate warnings."

Reno, 521 U.S. at 862-63 (citing *A.C.L.U. v. Reno*, 929 F. Supp. 824, 864 (E.D. Pa. 1996). In view of the undefined nature of the NDAA, the government's argument that "unwitting" violations will not be brought within the NDAA is no more availing than in *Reno.*

I. PREVIOUS APPLICATION OF THE AUMF

The Court asked counsel to indicate whether and how the United States has applied the Authorization for Use of Military Force ("AUMF").

Signed into law by President George W. Bush on September 18, 2001,[9] the AUMF provides, in pertinent part:

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[8] *Id.* at 7 (citation and internal quotation marks omitted).

[9] Pub. L. No. 107-40, 115 Stat. 224 (2001) (50 U.S.C. 1541 note). On October 16, 2002, President Bush signed into law an Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002) (50 U.S.C. 1541 note).

> Section 2 - Authorization For Use of United States Armed Forces
>
> (a) IN GENERAL- That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Plaintiffs do not have a complete list of actions in which the Obama and Bush administrations have relied on the AUMF. By way of example, however, one or both administrations have relied on the AUMF to invade Afghanistan; use lethal force against al-Qaeda leaders in Pakistan, Yemen, and Somalia; detain suspected al-Qaeda and Taliban members in Guantánamo and Afghanistan; and conduct warrantless wiretapping by the NSA.

Turning to cases, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Supreme Court held that the AUMF authorizes detention in the context of battlefield capture of individuals fighting against the United States as an incident of the use of the "necessary and appropriate force". But in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court held that the AUMF did not authorize the President to establish what turned out to be the first incarnation of military commissions.

In *United States v. Farhane*, 634 F.3d 127 (2d Cir. 2011), the Second Circuit held that the AUMF was evidence that Congress did not mean to limit al Qaeda to its designation as a "terrorist organization" under a provision of the Immigration and Naturalization Act. In *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), the Second Circuit held that the AUMF did not provide the "specific congressional authorization" required to overcome the Non-Detention Act, 18 U.S.C. § 4001(a), which precludes the detention of American citizens on American soil. The Supreme Court reversed on jurisdictional grounds, obviating the need to reach the merits.

The D.C. Circuit has decided eighteen Guantánamo habeas cases on the merits.[10] In fifteen, the court found that the detainee was "part of" Al-Qaeda and thus lawfully detained under the standard set out in the government's March 13, 2009 filing. In the other three, the court found the detainee part of an "associated force" and thus lawfully detained under the government's standard.[11] (As would be expected, the "associated force" in each case was a military unit.) The D.C. Circuit has not construed "substantially supported" in any of the cases despite the government's insistence that its briefing in the *Hamlily* case establishes that the AUMF permits detention of individuals based on the "substantially supported" principle.

Two judges of the District Court for the District of Columbia reached opposite conclusions about whether the AUMF authorizes detention based on "substantial support": *Gherebi v. Obama*, 609 F. Supp.2d 43 (D.D.C. 2009) (does authorize); *Hamlily v. Obama*, 616 F. Supp.2d 63 (D.D.C. 2009) (does not authorize). Both cases, however, were decided within the framework of an overall detention standard that the D.C. Circuit later abrogated. *See Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011), *cert. pet. pending*, No. 11-413. (Because the D.C. Circuit abrogated the overall detention standard under which *Hamlily* and *Gherebi were* decided, the government's reliance on *Hamlily* to define "associated forces"[12] is questionable, particularly since *Uthman* appeared to rely upon the vastly different "material support" standard under the

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[10] For economy, we cite only the petitioner's name: *Suleiman*, 670 F.3d 311 (D.C. Cir. 2012); *Kandari*, --- F.3d --, 2011 WL 6757005 (D.C. Cir. Dec. 9, 2011), *cert. pet. pending*, No. 11-1054; *Latif*, 666 F.3d 746 (D.C. Cir. 2011), *cert. pet. pending*, No.11-1027; *Khan*, 655 F.3d 20 (D.C. Cir. 2011); *Almerfedi*, 654 F.3d 1 (D.C. Cir. 2011), *cert. pet. pending*, No. 11-683; *Al Alwi*, 653 F.3d 11 (D.C. Cir. 2011), *cert. pet. pending*, No. 11-7700; *Al-Madhwani*, 642 F.3d 1071 (D.C. Cir. 2011), *cert. pet. pending*, No. 11-7020; *Esmail*, 639 F.3d 1075 (D.C. Cir. 2011); *Uthman*, 637 F.3d 400 (D.C. Cir. 2011), *cert. pet. pending*, No. 11-413; *Hatim*, 632 F.3d 720 (D.C. Cir. 2011); *Warafi*, 409 F. App'x 360 (D.C. Cir. Feb. 11, 2011); *Salahi*, 625 F.3d 745 (D.C. Cir. 2010); *Al-Adahi*, 613 F.3d 1102 (D.C. Cir. 2010); *Al Odah*, 611 F.3d 8 (D.C. Cir. 2010); *Bensayah*, 610 F.3d 718 (D.C. Cir. 2010); *Barhoumi*, 609 F.3d 416 (D.C. Cir. 2010); *Awad*, 608 F.3d 1 (D.C. Cir. 2010); *Al-Bihani*, 590 F.3d 866 (D.C. Cir. 2010), *cert. pet. pending*, No. 10-1383.

[11] *Khan*, 655 F.3d 20; *Al-Bihani*, 590 F.3d 866; *Bensayah*, 610 F.3d 718.

[12] Gov't's Mem. of Law in Opp'n to Pls.' Mot. for a Prelim. Inj., at 6, 23 (filed Mar. 26, 2012) (Doc. 24).

Anti-Terrorism and Effective Death Penalty Act upheld in *Holder*. See *Uthman,* 637 F.3d at 402, n.2.

II. PLAINTIFFS' CLAIMS

Plaintiffs make three primary claims, as described oral arugment.

A. DUE PROCESS.

Section 1021(b)(2) of the National Defense Authorization Act of 2102 ("NDAA") violates the Due Process Clause of the Fifth Amendment. The basis of this claim is that the provision fails to give individuals of ordinary intelligence fair notice of what speech or other expression ("expressive activity") may bring them within the definition of "covered persons." Cf., *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973) (A statute is impermissibly vague where "men of common intelligence must necessarily guess at its meaning").

B. FIRST AMENDMENT

Section 1021(b)(2) of the NDAA violates the First Amendment. The basis of this claim is that (1) the provision's failure to give individuals of ordinary intelligence fair notice of what expressive activity may bring them within the definition of "covered persons" has a chilling effect on, or impermissibly burdens their expressive activity, and (2) to the extent expressive activity may bring individuals within the definition of "covered persons," the provision violates the First Amendment. And because it brings expressive conduct inevitably within its ambit, the statute lacking any definitional limitation, is overbroad.

C. THE "AS APPLIED" REMEDY

Alternately, the Court should, if it finds that the statute impacts the expressive rights of the Plaintiffs declare section 1021(b)(2) to be unconstitutional as applied to expressive and

advocacy activities and, based on the holding of *Hamdi v. Rumsfeld*, supra, unconstitutional as applied to U.S. citizens who are not "engaged in armed conflict with the United States."

IV. STANDING CONSIDERATIONS

A. NDAA AND AUMF

The Court asked counsel whether the plaintiffs would have standing if section 1021 does no more than state in express terms authority latent in the AUMF.

Section 1021declares that it "affirms" the detention authority granted by the AUMF. Section 1021(b)(2) authority, however, is obviously broader than AUMF authority. AUMF authority is linked to the 9/11 attacks, and the purpose of AUMF authority is "to prevent any future acts of international terrorism against the United States" by those involved in the 9/11 attacks, and those that harbored them. By contrast, Section 1021(b)(2) authority is linked to no event, states no specific purpose, and extends to 'covered persons" who "substantially support" those "that are engaged in hostilities against the United States or its coalition partners," a far broader "catchment" than the AUMF.

This Court need not and should not indulge the fiction that section 1021 merely acknowledges authority latent in the AUMF. To be sure, "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969). But such legislation is no more than an aide to construction and "is not, of course, conclusive in determining what the previous Congress meant." *FHA v. Darlington, Inc.,* 358 U.S. 84, 90 (1958) (citing *United States v. Stafoff*, 260 U.S. 477, 480 (1923)). It is not conclusive here. As Justice Holmes wrote in *Stafoff*, regarding the case before the Court: "Of course a statute purporting to declare the intent of an earlier one might be of great weight in assisting a court when in doubt, although not entitled to control judicial action.

But that is not this case." *Id.* at 480.This case also is not such a case since §1021 does not declare a Congressional understanding of the intent of the AUMF but merely acknowledges its continued existence.

As noted earlier, the government's defense to standing is based on its claim that section 1021 merely incorporates long-standing policy under the AUMF and since the AUMF has never been enforced as to purely expressive conduct the plaintiffs are in no imminent danger and thus have no standing to seek preliminary injunctive relief.

But this argument is based on no case law under the AUMF that recognized the expansive claim to detain individuals under a "substantially supporting" standard. As noted, the government's position was rejected in *Hamilily* and has never been adopted by any court construing the AUMF. Since the government singular basis for arguing the absence of standing is without substantial merit and the government will not acknowledge that expressive conduct is outside the scope of the NDAA, it is clear that plaintiffs testimony as to the chilling effect of the NDAA on their expressive conduct imbues them with standing. Moreover, as in *Amnesty International v. Clapper,* 638 F.3d 118 (2d Cir. 2011), the government has not controverted plaintiffs' testimony as to the chilling impact of the NDAA on their expressive conduct.

B. STANDARDS UNDER *AMNESTY INTERNATIONAL V. CLAPPER*

Clapper addressed whether the plaintiffs had standing to challenge the constitutionality of the Foreign Intelligence Surveillance Act Amendments Act ("FAA"). The FAA created "new procedures for authorizing government electronic surveillance targeting non-United States persons outside the United States for purposes of collecting foreign intelligence." 638 F.3d at 121. As summarized by the Second Circuit:

> '[T]he plaintiffs argue that they have standing because the FAA's new procedures cause them to fear that their communications will be

> monitored, and thus force them to undertake costly and burdensome measures to protect the confidentiality of international communications necessary to carrying out their jobs. Because standing may be based on a reasonable fear of future injury and costs incurred to avoid that injury, and the plaintiffs have established that they have a reasonable fear of injury and have incurred costs to avoid it, we agree that they have standing.

638 F.3d at 121-22.

> The plaintiffs' uncontroverted testimony that they fear their sensitive international electronic communications being monitored and have taken costly measures to avoid being monitored—because we deem that fear and those actions to be reasonable in the circumstances of this case—establishes injuries in fact we find are causally linked to the allegedly unconstitutional FAA. We therefore find that plaintiffs have standing to challenge the constitutionality of the FAA in federal court.

Id. at 150.

Specifically, the *Clapper* plaintiffs alleged injury arising from enforcement of the FAA against third party targets that would impair the Clapper plaintiffs' own independent First Amendment activities. 638 F.3d at 140-45. The court's analysis of the plaintiffs' claim of injury in fact in *Clapper* rested on the fact that the plaintiffs there claimed indirect injury. Addressing the plaintiffs' indirect injury claim, the *Clapper* court stated: "[A] plaintiff who is indirectly harmed by a regulation needs to show more than does a plaintiff who is directly regulated by the challenged law." *Id.* at 141. "It is therefore 'ordinarily substantially more difficult' to establish standing based on indirect injuries than on direct injuries." *Id.* (citation omitted). The court added:

> Despite not being directly regulated, a plaintiff may establish a cognizable injury in fact by showing that he has altered or ceased conduct as a reasonable result of the challenged statute. If the plaintiff makes such an allegation, he must identify the injury with 'specificity,' and 'he must proffer some objective evidence to substantiate his claim that the challenged conduct has deterred him from engaging in protected activity.'

Id. [second element of Clapper will be added below].

In contrast to *Clapper,* plaintiffs here allege direct injury arising from the reasonable likelihood they will be treated as "covered persons" under section 1021(b)(1) based on the expansive definition of "substantially" or "directly" supporting covered entities or "associated forces" as it applies to their expressive conduct. As plaintiffs here allege direct harm to their own expressive activities, their burden is lower than in *Clapper*. The *Clapper* plaintiffs faced a "substantially" greater burden in establishing injury in fact than the plaintiffs here face, because the injury the *Clapper* plaintiffs alleged was indirect, while the injury the plaintiffs here allege is directly derivative of their own expressive conduct.

V. PRELIMINARY INJUNCTION CONSIDERATIONS

A. LIKELIHOOD OF SUCCESS

1. FACIAL VAGUENESS CLAIM

Facial vagueness arises where a person of ordinary intelligence cannot determine the nature of the conduct covered by the enactment. *Broadrick*, supra, citing *Connally* v. *General Construction Co*., 269 U.S. 385, 391 (1926). See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-114 (1972); *Colten* v. *Kentucky*, 407 U.S. 104, 110-111 (1972); *Cameron* v. *Johnson*, 390 U.S. 611, 616 (1968). *Broadrick,* though concerned with a statute with sufficient definitional structure so as to pass a vagueness challenge, makes it clear that where there is a lack of direction as to the covered conduct the statute will fall for facial vagueness. In *Broadrick*, like the later decision in *Holder*, the statute prohibited defined covered activity but the Court held that, as in *Holder,* the extensive statutory description of the covered conduct defeated any vagueness challenge. 413 U.S. at 603 n.1.

In *Holder* the Anti-Terrorism and Effective Death Penalty Act (AEDPA) barred "material support" for certain terrorist organizations, but the Court again denied the vagueness challenge as

the statute contained extensive definitional provisions describing the type of "support" that was deemed "material". Indeed, the Court in *Holder* noted that Congress "took care to add narrowing definitions to the material-support statute over time. These definitions increased the clarity of the statute's terms." *Humanitarian Law Project v. Holder*, 1130 C. Ct. 2705, 2720 (2010).

There are *no* "narrowing definitions" in the NDAA which contains no limiting principle or definitional contours, as did the AEDPA in *Holder* or the Oklahoma statute in *Broadrick*. Moreover, as the Court here noted during oral argument the NDAA is not conditioned upon "knowing" or "intentional" conduct, but applies to any conduct deemed to be "substantially supporting" or "directing supporting" the covered entities. In *Holder* the Court held that the statute was not void, in part, because it contained a scienter or willfulness standard that is utterly lacking in the NDAA. See also *Grayned v. City of Rockford*, 408 U.S. at 113-114 (noise ordinance not void where it contained definitional provisions of covered conduct and required that any violation be "willfully done").

In *Reno v. A.C.L.U.,* however, the Court invalidated provisions of the CDA precisely because they were tainted by the same definitional vagueness that burdens the NDAA. *Reno v. A.C.L.U.*, supra. In this context, the Court is respectfully asked to note the distinction between the NDAA at issue here and the AEDPA at issue in *Holder*. Unlike the NDAA, the AEDPA construed in *Holder* is targeted towards defined "material" support to terrorist entities through an extensive definitional structure identifying with specificity the financing and in-kind support of designated terrorist groups that AEDPA targets. As the Court in *Holder* noted, the term "material support or resources" in the AEDPA contains a specific and highly targeted focus on prohibited non-speech activity:

> [3] "[T]he term 'material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials."

18 U.S. C. § 2339A(b)(1); 18 U.S.C. § 2339B(g)(4). In contrast the NDAA is devoid of definitional structure and does not even import by reference the definition of "material support" as used in the AEDPA. Consequently, the NDAA must be deemed facially void for vagueness as no legislative guidance exists as to the nature of conduct that is proscribed and that can place a "covered person" in military detention.

2. FIRST AMENDMENT OVERBREADTH

A statute is overbroad for First Amendment purposes where its language casts too broad a sweep in relation to its legitimate purposes. Supreme Court jurisprudence does *not* require that a statute be directed at speech or that it be primarily concerned with speech to be susceptible of overbreadth concerns. As the Court recognized in *Virginia v. Hicks*, 539 U.S. 113, 122 ( ), a statute is overbroad where its text sweeps protected expressive conduct into its scope in a manner that exceeds its necessary policy aims. A statute violates the First Amendment where it

> "*taken as a whole*, is substantially overbroad judged in relation to its plainly legitimate sweep. [3] See *Broadrick, supra,* at 615, 37 L Ed 2d 830, 93 S Ct 2908. The overbreadth claimant bears the burden of demonstrating, "from the text of [the law] and from actual fact," that substantial overbreadth exists. *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14, 101 L. Ed. 2d 1, 108 S. Ct. 2225 (1988).

In *Broadrick* the Court rejected an overbreadth challenge because the class of plaintiffs, civil servants barred under the statute from political activity who were themselves legitimate targets of the Oklahoma statute, "falls squarely within the "hard core" of the statute's proscriptions and appellants concede as much." *Broadrick* at 608. In contrast, plaintiffs here are

journalists and political advocates who obviously are not the "hard core" of the NDAA's perceived objectives but who logically can be brought within its confines because of its expansive and unconstrained text. *Broadrick* did not reject the premise that the Oklahoma statute could be deemed overbroad because of the sweep of its language, but rather held that the plaintiffs in *Broadrick,* being legitimate or "core" targets of the State's interest in limiting political activity by civil servants, did not have standing to bring the overbreadth challenge.

Plaintiffs here are not legitimate targets of the federal government's anti-terrorism policies but are likely to be brought within the rubric of "substantially supporting" or "directly supporting" such groups by their close association with terrorist organizations in the course of their journalistic and advocacy endeavors. Unlike plaintiffs in *Broadrick* who lacked standing to make an overbreadth challenge because they were legitimate targets of the statute, plaintiffs here undoubtedly have standing to assert that the unconstrained and undefined NDAA is void for overbreadth.

Overbreadth follows from a statute that lacks limiting contours but by its unconstrained language sweeps speech into its ambit. In *Reno v. ACLU*, 521 U.S. 844 (1996), the Court was concerned with a important policy initiative – the Communications Decency Act - that contained generalized terms prohibiting the transmission of "indecent" and "patently offensive' materials over the internet so that such materials could not be reached by minors. Despite finding that such policy represented a "compelling" governmental interest, the Court struck down the statute as overbroad because of the lack of definition in the operative terms "indecent" and "patently offensive". Because the statute had criminal penalties, including two years incarceration, the absence of definitional limitations heightened the illegality because of the likelihood of what the Court termed "discriminatory enforcement". Id. at 872.

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the Court struck down as overbroad a statute that prohibited without greater definition **“**"any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct." Because the operative term “any visual depiction’ would embrace protected speech as well as non-protected speech, the Court declared the statute to be overbroad. Other enactments have been similarly declared void because of such undefined contours. For example, in *Cox v. Louisiana*, 379 U.S. 536 (1965), an ordinance made it illegal to congregate with others "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned…" 379 U.S. at 462. Because such language contained no limiting principle or definitional restraint but could be applied to ordinary political assemblies, the Court held it unconstitutionally overbroad as it lacked any narrowness or specificity as to the covered conduct. 379 U.S. at 462-463.

The overbroad nature of the NDAA is amply demonstrated by the government’s repeated refusal to concede at the preliminary injunction hearing that the NDAA will not apply to plaintiffs’ expressive activities. At the hearing, the Court initially raised the question of whether the NDAA can be subject to overbreadth doctrine if it does not by its terms embrace “speech” activities or only touches protected speech incidentally. On this basis the Court asked whether the appropriate remedy would be an “as applied” challenge, rather than invalidity due to overbreadth. The Court’s primary concern was that the term “substantially supported” in the NDAA did not appear to be intended by Congress to target protected speech but rather to speech used in non-protec ted criminal or terrorist contexts.

But overbreadth does not typically arise where the statute is focused upon protected speech (since such occurrences are rare) but is more appropriately found where the statute

properly seeks to target non-protected criminal speech but is burdened by such undefined terms that by its nature the statute must embrace protected speech activities. In Ashcroft v. Free Speech Coalition, the Court found the CPPA to be unconstitutionally overbroad despite its proper purpose in targeting child pornography since the language used by Congress was sufficiently broad that it necessarily brought into its scope protected expressive conduct. Thus overbreadth doctrine is very much at home even if Congress's purpose is to target unprotected speech activity if the statute's language is sufficient broad that it cannot reasonably permit judicial narrowing.

That §1021(b)(2) substantially embraces speech or other protected conduct can be inferred from a comparison with the AEDPA construed in *Holder*. *Holder* rejected an overbreadth challenge to the AEDPA precisely because nothing in the AEDPA's definitional provisions contained any reference to protected speech, expression or association as proscribed activities. Looked at in this light, the AEDPA *already* provides a Congressional ban on such non-protected activity, yet Congress enacted the NDAA as a *further* prohibition on "substantial support" without any of the limiting features of the AEDPA. Since Congress is presumed to have a purpose in its enactments, the Court must infer that the NDAA, being unconstrained by any of the definitional limitations in the AEDPA, is intended to reach conduct *not* regulated under Holder. In this light, the government's refusal to acknowledge that the NDAA will not reach the plaintiffs' expressive activities makes it clear that the NDAA reaches expression and that Congress enacted the statute to give it greater scope than existing law in the AEDPA.

The text of §1021(b)(2) itself gives rise to this expansive application. The primary definition of "support" has always been to advocate for or endorse an idea, position, individual

or other premises. The Merriam Webster Dictionary defines "support" directly within the scope of expressive conduct:

> *"a (1)* **:** *to promote the interests or cause of* (2) **:** *to uphold or defend as valid or right* **:** *advocate* <*supports* fair play> *(3)* **:** *to argue or vote for* <*supported* the motion to lower taxes> *b (1)* **:** assist, help <bombers *supported* the ground troops> *(2)* **:** to act with (a star actor) *(3)* **:** to bid in bridge so as to show support for *c* **:** to provide with substantiation **:** corroborate <*support* an alibi>. "

See Merriam Webster On-Line Dictionary, M-W.com [emphasis added]. The Oxford English Dictionary also gives priority to a definition of "support" that is squarely within protected First Amendment activity. OED defines "support", in part, as "*Corroboration or substantiation (*of *a statement, principle, etc.); advocacy* (*of* a proposal, motion, etc.): chiefly in phr. in support of." See Oxford English Dictionary, Second Edition, 1989, On-Line Version 2012 [emphasis added].

As these standard definitions show, "support" is primarily understood in terms that echo protected First Amendment interests. While support has other definitions including monetary and material support, it bears a primary definition focused around expressive conduct. Thus, based on the common usage of the term "support", §1021(b)(2) must be deemed to embrace speech. That it may have been intended by Congress to target illegal support for terrorist groups no more saves it from overbreadth than did the CPPA's purpose of targeting unprotected child pornography in *Ashcroft*. The government's refusal to concede that the NDAA does not embrace plaintiffs' expressive acts further enhances the presumption of overbreadth.

Plaintiffs have reasonably met their burden for purposes of the preliminary injunction of demonstrating "from the text of [the law] and from actual fact" that substantial overbreadth exists", *Virginia v. Hicks*, supra, and that the law "*taken as a whole*" punishes a substantial amount of protected free speech, judged in relation to [its] plainly legitimate sweep." *Virginia v.*

Hicks, supra at 118-19. The Court need not be concerned with wholesale invalidation of a statute, since the plaintiffs' overbreadth argument goes to the limited provision of section 1021(b)(2) leaving intact section (b)(1) governing actual participants in terrorist organizations and section 1022 intact as to combatants taken outside the United States. Moreover, the government still retains its powers under the AEDPA to prosecute actual material support of terrorists organizations. Hence, the totality of the Congressional policy objective is left intact even if the Court finds overbreadth review as to the limited provision of section 1021(b)(2).

3. THE "AS APPLIED" REMEDY

In *Holder* the Court held that no "as applied" remedy would be available because the conduct that the plaintiffs sought to engage was directly proscribed by the statute and was non-expressive or was limited to expressive conduct that was in itself criminal:

> "The statute does not prohibit independent advocacy or expression of any kind." Brief for Government 13. Section 2339B also "does not prevent [plaintiffs] from becoming members of the PKK and LTTE or impose any sanction on them for doing so." *Id.*, at 60. Congress has not, therefore, sought to suppress ideas or opinions in the form of "pure political speech." Rather, Congress has prohibited "material support," which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations."

130 S. Ct. at 2723. Unlike the AEDPA in *Holder* the record in this action shows that the NDAA is an undefined umbrella that brings protected expressive conduct within its reach. It has been long recognized that the test for "as applied" unconstitutionality requires that the statutory language "'conveys sufficiently *definite* warning as to the proscribed conduct when measured by common understanding and practices.' " Cf, *Jordan v. De George*, 341 U.S. 223, 231-32 (1951). It is here, in the absence of "sufficiently *definite* warnings" as to the nature of the covered conduct that the Court

must impose the "as applied" remedy. The government's repeated refusal to rule out detention of plaintiffs and those in a similar position for their expressive conduct renders the statute inherently intrusive upon their protected First Amendment activities and those of others similarly situated. While in *Holder* the speech at issue – operational advice to terrorist organizations – was well within Congress' power to regulate, the plaintiffs here do not seek to provide any aid or support to terrorist organizations. But the inherent vagueness of the newly-imposed term "substantially supported" or "directly supporting" without definition renders their journalistic and advocacy work susceptible to such intrusions. Nor are these without support based on the record before the Court.

Plaintiff Hedges testified in detail about his detention by the U.S. military while he was in Saudi Arabia under a Saudi visa. Hedges testified that his visa came with no limitations or requirements to submit to U.S. jurisdiction yet he was detained by the U.S. military and had his Saudi-issued credentials taken because he chose to report outside the U.S. military pool system. Similarly, Hedges testified that he has been repeatedly detained at airports and was expressly told by a U.S. agent that he was on a "Watch List", meaning a terrorist watch list. He experience alone gives rise to the basis for a chilling effect on his expressive conduct.

Plaintiff O'Brien testified that her organization has been placed on a terrorist watch report by the Department of Homeland Security and that she was forced to leave her employment because of repeated contacts by federal agents to her employer questioning her advocacy activities and that her organization had been tied to Islamic fundamentalists by security professionals with contacts with the U.S. Plaintiff Wargala

testified that her organization Occupy London has been placed on a government watch list with Al Queda and other terrorist organizations. Wargalla also testified that her organization RevolutionTruth has already altered its panel discussions to exclude speakers with ties to terrorist groups in consequence of the statute.

Assuming, *arguendo*, that the Court accepts the government's contention that the statute is not overbroad because it does not directly regulate speech, under *Clapper* plaintiffs have standing to challenge the statute on an "as applied" basis either because of its facial vagueness or because its undefined terms sweep broadly enough to bring their protected conduct into its reach. The Court in *Holder* was careful to limit its holding to those plaintiffs' immediate claims but noted that "other statutes" may well *not* be constitutional, particularly if they seek to target the activities of domestic organizations:

> " It is also not to say that any other statute relating to speech and terrorism would satisfy the First Amendment. In particular, we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations. We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations." 130 S. Ct. at 2730.

For these reasons, if the Court, *arguendo*, finds that it cannot at this stage rule on overbreadth or facial vagueness, the plaintiffs have amply demonstrated that their expressive activities are likely to be brought within the ambit of §1021(b)(2) and the Court should fashion an "as applied" remedy holding that expressive conduct cannot render plaintiffs or persons similarly situated within the scope of the NDAA.

C. BALANCING OF THE EQUITIES

The government presented no witnesses and offered no basis on which to infer that it will suffer harm or interference with any material security function if preliminary relief is granted. In

this respect, the circumstances are similar to *Clapper* where the government effectively waived its defenses to standing and related causation claims. Here the plaintiffs have set forth cognizable claims of injury, chilling effect upon their journalist endeavors, specific instances of how they have changed their journalistic conduct in fear of the implications of the NDAA, concrete examples of having been tied by government agencies to terror and radical groups, being placed on government watch lists, investigated by the Department of Homeland Security and, in the case of Jonsdottir, faced the unusual subpoena of her personal email accounts though being a member of a NATO ally's parliament. The government not only failed to dispute these assertions but offered no testimony that such were the result of anything other than the plaintiffs' ordinary exercise of their particular expressive interests. Moreover, the government repeatedly refused to acknowledge that plaintiffs' expressive acts would not bring them under the scope of the NDAA. Hence, the government would appear to have waived any rebuttal to the harm presented by plaintiffs and, by failing to call witnesses, has made no showing of any harm to the United States to be caused by any preliminary relief as to section 1021(b)(2). Indeed, the government cannot make a showing of harm since the AEDPA, as construed in *Holder*, amply provides the government with prosecutorial tools to direct against any actor who undertakes actual material or physical support of terrorist organizations.

Under these circumstances, the weighing of the equities favors entry of preliminary injunctive relief particularly on an "as applied" basis.

CONCLUSION

For the foregoing reasons, and based on the testimonial record, plaintiffs respectfully seek entry of preliminary injunction relief invaliding section 1021(b)(2) or imposing preliminary injunctive relief on an "as applied" basis.

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