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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.

SUPPLEMENTAL BRIEF OF PLAINTIFFS' IN SUPPORT OF APPLICATION FOR RESTRAINTS ON THE OPERATION OF THE HOMELAND BATTLEFIELD BILL PROVISIONS OF THE NATIONAL DEFENSE AUTHORIZATION ACT (2011)

INTRODUCTION

This Supplemental Brief is respectfully submitted by Plaintiffs in further support of their application for preliminary restraints on the operation and enforcement of the Home Battlefield provisions of the National Defense Authorization Act (NDAA).

ARGUMENT

At pre-trial conference, the Court directed the parties to address certain issues arising under standing doctrine including the decisions under *Holder v. Humanitarian Law Project*, 177 L.Ed. 2d 355 (2010), *Washington State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008) and *Pacific Capital Bank, N.A. v. Connecticut*, 542 F.3d 341 (2d Cir. 2008).

In *Washington State Grange* the Court of Appeals upheld a district court ruling that a state statute permitting any primary candidate to designate himself on the ballot as a member of any political party violated the parties' right to political association and free speech. *Grange* at 448-449. Plaintiffs in *Grange* made a facial challenge prior to the implementation of the statute or the issuance of regulations by the state. As the Supreme Court noted in *Grange,*

> "The State has had no opportunity to implement I-872, and its courts have had no occasion to construe the law in the context of actual disputes arising from the electoral context, or to accord the law a limiting construction to avoid constitutional questions." Id. at 450.

Ultimately, the Supreme Court in *Grange* held that because the statute had not yet been implemented and no state court had yet had the opportunity to construe its contours it would be premature to entertain a purely facial challenge. As to the plaintiffs' claims that the statute forced the political parties to associate with nominees not of their choosing, the Court held that the primary did not mandate the choice of nominee and did

not even choose a party's nominee, a process that took place outside of the primary under the new law. Id. at 453-454. The Court also held that the danger that voters will confuse the party's choice of candidate with the candidate's self-designation was "sheer speculation", Id. at 454, and that the Court had "a greater faith in the ability of individual voters to inform themselves about campaign issues.' ". Id. citing *Tashjian*, 479 U.S., at 220, 107 S. Ct. 544, 93 L. Ed. 2d 514.

The decision in *Grange* does not preclude the relief sought here. First, *Grange* is limited to a facial challenge, while this action also concerns the NDAA "as applied" to plaintiffs' particular vocational needs. Hence, those aspects of *Grange* focusing upon the premature nature of the facial challenge are not dispositive of this application.

Second, even as to the facial challenge, Grange does not resolve the issues on this matter. The Court in *Grange* noted that the state law at issue was directly within the States' constitutional powers to set the " 'broad power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," *U.S. Const*. Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices.'" *Grange* qoting *Clingman v. Beaver*, 544 U.S. 581, 586, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005) quoting *Tashjian*, 479 U.S., at 217, 107 S. Ct. 544, 93 L. Ed. 2d 514); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997) (same).

The statute in Grange was thus weighed by the Court in the context of the state's "broad power" under Article I to set the "Times, Places and Manner" of holding elections, *Grange*, supra, a governmental function directly within the state's delegated powers under the Constitution. As *Grange* noted, the "times, places and manner" power

has long been held to be a broad power invested in the States. *Grange*, citing *Clingman*, supra, *Tashjian*, supra, *Timmons,* supra.

In contrast, the NDAA imbues the Government with the power to place non-combatant civilians in the United States into military detention without access to the civil courts, a power no court has ever recognized and which the Supreme Court on multiple occasions has held is beyond the federal government's authority.

The decision in *Hamdi v. Rumsfeld*, 542 J.S. 507, 522 (2004) encapsulates the absence of federal authority to detain civilians in military custody. *Hamdi* recognized that the Court in *Ex parte Milligan*, 71 U.S. 2 (1866), reversed the civilian's detention precisely because Milligan was a civilian living in civilian life at the time of his arrest and was not in a theatre of combat:

> In that case [*Milligan*], the Court made repeated reference to the fact that its inquiry into whether the military tribunal had jurisdiction to try and punish Milligan turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there. [citation omitted] *That fact was central to its conclusion*. Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different. The Court's repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict, whether or not he was a citizen.

Hamdi, 542 U.S. at 522.

As *Milligan* itself held, civilians arrested outside the theatre of combat cannot be tried or detained by the military courts "when the courts were open and ready to try them." *Milligan* at 127. Milligan went on to note:

> "*All other persons*, citizens of states where the courts are open, if charged with crime, *are guaranteed the inestimable privilege of trial by jury*."

Ex Parte Milligan, 71 U.S. 2, 123 (1866) [emphasis added]; accord *Reid v. Covert*, 354 U.S. 1 (1957).[1]

Hamdi fully respects the precedent in *Milligan* and leaves no scope for detention of civilians unless they are "engaged in an armed conflict against the United States". Hamdi, 542 U.S. at 526.[2]

Grange, in contrast, concerned the exercise of governmental power that was expressly within the state's delegated function under Article I to regulate the "times, places and manner" of holding elections. Here, however, the power of civilian detention

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[1] Consistent with this case law, the Executive Office of the President, on November 17, 2011 issued a statement on the Homeland Battlefield Bill, stating:

> "applying this military custody requirement to individuals inside the United States, as some Members of Congress have suggested is their intention, would raise serious and unsettled legal questions and would be inconsistent with the fundamental American principle that our military does not patrol our streets." (Appendix A)

At the time, the President was referring to section 1032, but it is clear that the military custody provisions now apply to section 1031, codified at 1021. This statement from the President encapsulates succinctly the governing law established in *Ex Parte Milligan*.

The President himself recognized these defects in the law when he issued his signing statements:

> "I have signed this bill despite having serious reservations with certain provisions that regulate the detention, interrogation, and prosecution of suspected terrorists." (Appendix B)

The further highlighted the fundamental flaw with section 1021, by stating in the signing statement:

> "My Administration will interpret section 1021 in a manner that ensures that any detention it authorizes complies with the Constitution, the laws of war, and all other applicable law." It is not for the President to both expand the power of the Executive and to interpret that power. That power is reserved solely for Article III judges.

[2] This case law is addressed at length in Plaintiffs' Brief in Support of Application for Restraints at 14-21.

by the military is outside of the federal government's authority except in cases where, as recognized under *Hamdi,* the civilian is "engaged in an armed conflict against the United States". Id.

Thus, the NDAA does not have the presumptive facial validity of the statute in *Grange* since the NDAA, as applied to a civilian in the United States who is not actually engaged in armed conflict with the United States, is not only outside of the Government's constitutional powers, but such power has been repeatedly held to be a violation of 5th Amendment due process. *See* Plaintiffs' Brief in Support of Application for Restraints at 14-21, cases cited.

It is precisely because the detention power under the NDAA is not dependent upon the civilian being "engaged in armed conflict with the United States", *Hamdi*, supra, the statute itself is facially unconstitutional. By rendering civilians subject to military detention without a condition that they be "engaged in armed conflict with the United States" the NDAA violates the mandate of the Supreme Court in Hamdi where such power was recognized only as to a civilian "engaged in armed conflict with the United States". Id. thus, unlike the statute in Grange, the NDAA here *is* facially unconstitutional.

Holder v. Humanitarian Law Project, 177 L.Ed. 2d 355 (2010) concerned a challenge to the constitutionality of 18 U.S.C. §2339A and 2339B that rendered it a criminal offense to provide "material support or resources" to groups designated by the Secretary of State as terrorist organizations. The Court in *Holder* held that such criminalization did not impermissibly intrude upon expressive or associational rights in part because Congress had made a finding that training and other resource support would

tend to bolster the function of terrorist organizations and because Congress expressly defined such acts with a precision that is wholly absent under the NDAA.

Holder is wholly distinguishable from the NDAA.

First, Holder is a criminal statute that provides for arrest and trial in the civil courts under traditional due process protections. In contrast, the NDAA does not render the covered conduct criminal and makes no provision for trial in the civil courts but rather imposes the power of military detention upon civilians in the United States for the "duration" of the conflict, effectively a form of indefinite detention.

Second, §2339A and B provided for a specific designation of mental state by the defendant akin to traditional criminal law doctrine. As Holder recognized, Congress required

> "…knowledge of the foreign group's designation as a terrorist [**371] organization or the group's commission of terrorist acts. § 2339B(a)(1). Congress also added the term "service" to the definition of "material support or resources," § 2339A(b)(1), and defined "training" to mean "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," § 2339A(b)(2). It also defined "expert advice or assistance" to mean "advice or assistance derived from scientific, technical or other specialized knowledge." § 2339A(b)(3). Finally, IRTPA clarified the scope of the term "personnel" by providing:
>
> > "No person may be prosecuted under [§ 2339B] in connection with the term 'personnel' unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control." § 2339B(h).

Holder at 370-371.

As this excerpt shows, the statute at issue in *Holder* is a universe apart from the NDAA. In contrast to the act in *Holder,* the NDAA makes no requirement of a showing of intent or knowledge by the "covered person", it contains no definitions as to the nature of conduct that "substantially supported" the terrorist organization and does not require that the organizations be expressly identified by the Government but includes only a vague reference to "associated forces".

In short, all of the procedural and substantive protections that Congress imposed in *Holder* are *completely* absent in the NDAA that does not require a showing of knowingly intentional conduct by the detained civilian, does not define the nature of the conduct that is substantially supportive of the covered organizations and contains the broad brush reference to "associated forces" that, unlike the Secretary's list in *Holder*, gives no notice of the actual groups covered by the Act.

Holder based its dismissal of the challenge to the act largely on the fact that the act expressly and specifically required as a condition to conviction intent by the defendant that their "material support" was for the purpose of facilitating violent acts. Holder noted that the operative language of the act in §2339A and C required proof that the defendant acted with intent to:

> "provides material support or resources . . . knowing or intending that they are to be used in preparation for, or in carrying out, a violation of" statutes prohibiting violent terrorist acts (§2339A);
>
> or
>
> "unlawfully and willfully provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be

> used, in full or in part, in order to carry out" other unlawful acts (§2339C(a)(1) .

These statutory conditions in *Holder*, that import into the act traditional requirements of criminal intent consistent with due process concerns, are wholly and completely absent in the NDAA that does not even cross reference to these statutory conditions as a predicate to incarceration. In the end, it was this very clear definitional structure that Congress incorporated into the act in Holder that led the Court to reject the claim of unconstitutionality:

> Congress also took care to add narrowing definitions to the material-support statute over time. These definitions increased the clarity of the statute's terms. See § 2339A(b)(2) (" 'training' means instruction or teaching designed to impart a specific skill, as opposed to general knowledge"); § 2339A(b)(3) (" 'expert advice or assistance' means advice or assistance derived from scientific, technical or other specialized knowledge"); § 2339B(h) (clarifying the scope of "personnel"). And the knowledge requirement of the statute further reduces any potential for vagueness, as we have held with respect to other statutes containing a similar requirement. See *Hill* v. *Colorado*, 530 U.S. 703, 732, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000); *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 523, 526, 114 S. Ct. 1747, 128 L. Ed. 2d 539 (1994); see also *Hoffman Estates*, 455 U.S., at 499, 102 S. Ct. 1186, 71 L. Ed. 2d 362.

Holder at 376.

Unlike the statute in *Holder*, no definitions are present in the NDAA, none are imported even by reference to other statutes, thereby depriving the NDAA of the very definitional specificity that save the statute in Holder. To the contrary, the undefined terms in the NDAA are more akin to those circumstances where *Holder* acknowledges statutes have been infirm for lack of legislative direction thereby requiring the citizen make "untethered, subjective judgments" to avoid liability under the enactment. See *Holder* at 376, citing cases. Here, the generalized standard of "substantially supported" in the NDAA without *any* definitional structure, not even by indirect adoption from other

statutes, renders this the very type of infirm Congressional enactment that was found to be absent in *Holder*. Holder also found that the term "material support" was not directed at speech since the phrase "material" was referable generally to financial or support by means of physical aid, not speech:

> "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."

Holder at 379. Again, in contrast to *Holder,* the NDAA contains none of the limiting terms that saved the enactment in *Holde*r and, unlike *Holder*, the reference to "substantially supported" is not referable to "material" aid but is far broader encompassing anything that might be deemed of value or benefit to the intended groups.

As to standing issues, *Holder* held that even though the plaintiffs sought "preenforcement review", the complaint presented a justiciable controversy and that the plaintiffs presented a "credible threat of prosecution". Specifically, the Court in *Holder* held that the plaintiffs should not be forced to wait until enforcement of the act to make a claim of its lack of constitutionality:

> "One last point. Plaintiffs seek preenforcement review of a criminal statute. Before addressing the merits, we must be sure that this is a justiciable case or controversy under Article III. We conclude that it is: Plaintiffs face "a credible threat of prosecution" and "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt* v. *Farm Workers*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979) (internal quotation marks omitted). See also *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 128-129, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007)."

Here, as in *Holder*, the plaintiffs have demonstrated (and will do so at the hearing) that they are engaged in activities that will bring them arguably within the very broad

scope of the NDAA. Plaintiff Hedges, for example, has frequently been imbedded with leaders of terrorist organizations in the course of his work as a journalist. He has testified in his certification that he has been in the homes of Hamas leaders and even been in combat missions as a journalist with numerous terrorist groups and their operatives. Such associations certainly can, when accompanied by favorable news coverage of the groups' commitment and dedication, along with discussions of their ideologies, reasonably bring Hedges into the scope of the undefined and vague term of having "substantially supported" forces "associated" with Al Quaeda or the Taliban, as provided in the NDAA. Indeed, it is the absence of definition of the designated groups in the NDAA that renders it an equally, if not more compelling basis for standing than in *Holder* where Congress specifically designated the groups and the actual conduct that would give rise to liability. Here, in contrast, no designation of the "associated" groups or of the actual conduct is made, rendering the likelihood that Hedges and other plaintiffs will be brought within the scope of the NDAA even greater than in *Holder*.[3]

[3] Although Holder noted that in the years since the statute was first enacted, there had been approximately 150 proceedings, the Court as to standing was primarily focused on whether the plaintiffs' anticipated conduct would reasonably bring them within the scope of the act. The Court expressly recognized that it would *not* be appropriate to defer consideration of the plaintiffs' as applied challenges until after they were arrested and charged, i.e., to be forced to wait until they "undergo a criminal prosecution as the sole means of seeking relief." *Holder v. Humanitarian Law Project*, 177 L.Ed 2d. 355 (2010). Here, the risk of delay is far greater and more threatening than in *Holder* since the plaintiffs here face, not criminal prosecution with all of its due process considerations, but indefinite detention in military custody with no trial and no judicial recourse. Indeed, the threat of irreparable harm to the rights of persons incarcerated under the NDAA is enhanced by the absolute failure of Congress to mandate any regulation or Presidential directive as to persons who may be incarcerated under §1021. Congress mandated such regulation only in the case of persons taken as members of hostile forces under §1032. U.S. citizens and aliens resident in the U.S. can, therefore, be taken into custody under §1021 without the benefit even of any regulation, unlike foreign combatants taken under

Similarly, *Pacific Capital Bank, N.A. v. Connecticut,* supra, makes it clear that the lack of present or threatened enforcement is not a barrier to standing:

> "[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)
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> To show injury, " [a] plaintiff bringing a pre-enforcement facial challenge against a statute need not demonstrate to a certainty that it will be prosecuted under the statute . . ., but only that it has 'an actual and well-founded fear that the law will be enforced against it." *Vermont Right to Life Committee, Inc. v. Sorrell,* 221 F.3d 376, 382 (2d Cir. 2000) (quoting *Virginia v. American Booksellers Ass'n,* 484 U.S. 383, 393, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988)). If a plaintiff's interpretation of a statute is "reasonable enough" and under that interpretation the plaintiff "may legitimately fear that it will face enforcement of the statute," then the plaintiff has standing to challenge the statute. *Vermont Right to Life Committee, Inc. v. Sorrell,* 221 F.3d at 383.

542 F.3d at 350

In the context of a pre-enforcement challenge even the 'indirectness" of the threat does not bar standing:

> "A plaintiff does not lack standing simply by virtue of the indirectness of his or her injury . . . ." *Heldman v. Sobol,* 962 F.2d 148, 156 (2d Cir. 1992). A plaintiff may satisfy the causation requirement if the complaint "aver[s] the existence of [an] intermediate link between the state regulations and the injury."

Pacific Capital at 350.

Pacific Capital thus endorses Plaintiffs' standing since each plaintiff has either worked directly with persons and groups who are among the NDAA's described terrorist organizations or have worked in the field of media and journalistic endeavors that promote or at least convey the ideologies of such groups. The broad language of the

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§1032 as to whom Congress mandated a Presidential directive to govern their incarceration.

statute – drawing into its reach persons who "substantially supported" such organizations and groups but having none of the definitional structure found in *Holder* to save the enactment – makes it reasonable that Plaintiffs will have an "actual and well-founded fear" of being brought under the aegis of the statute. As in *Pacific Capital*, "certainty" of enforcement is not required. 542 F.3d at 350.

So long as the plaintiff's "interpretation of a statute is 'reasonable enough' and under that interpretation the plaintiff 'may legitimately fear that it will face enforcement of the statute,' then the plaintiff has standing to challenge the statute." *Pacific Capital* at 350 quoting *Vermont Right to Life Committee, Inc. v. Sorrell,* 221 F.3d 376, 383 (2d Cir. 2000) (the literal interpretation of the phrase "on whose behalf" in a campaign finance statute without definition "could apply to any of a number of types of communication that implicitly or impliedly advocate for the success or defeat of a candidate and are published in the interest of a candidate, political party or political committee" and therefore "could be applied to VRLC's described activities.")

Similarly, the broad sweep of the NDAA with its undefined but breathtakingly wide invocation of persons who "substantially supported" suspect organizations certainly "could apply to any of a number of types of communication that implicitly or impliedly advocate", *Vermont Right to Life,* supra, the views, ideologies, objectives and goals of terrorist organizations or their "associated forces", the other material undefined term in the NDAA. Plaintiffs, who engage in a wide variety of such communications, both as platform hosts and as journalists and advocates can certainly reasonably fear being brought within the aegis of this wide, broad and wholly undefined statute. Moreover, the fact that the Government would face virtually no due process constraints since detention

under the NDAA would be outside the criminal laws would render the risk of such incarceration greater in many respects than in the case of a conventional criminal statute where the Government would have to meet a plethora of procedural barriers.

CONCLUSION

For the foregoing reasons and for those expressed in the Plaintiffs' initial Memorandum, the requested injunctive relief should be granted.

Respectfully submitted,

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