UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTOPHER HEDGES et al., Plaintiffs, v. BARACK OBAMA et al., Defendants.	12 Civ. 331 (KBF)

Government's Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction

PREET BHARARA
United States Attorney for the
Southern District of New York
86 Chambers Street
New York, New York 10007
Telephone: 212.637.2703, .2728
Fax: 212.637.2702
E-mail: benjamin.torrance@usdoj.gov
christopher.harwood@usdoj.gov

BENJAMIN H. TORRANCE
CHRISTOPHER B. HARWOOD
Assistant United States Attorneys

– Of Counsel –

Table of Contents

Table of Authorities

Preliminary Statement

Defendants Barack Obama, Leon Panetta, and the Department of Defense (collectively, the "government") respectfully submit this memorandum in opposition to plaintiffs' motion for a preliminary injunction, enjoining the operation of section 1021 of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, 125 Stat. 1298 (Dec. 31, 2011) (the "NDAA").[1] That provision is captioned "Affirmation of Authority of the Armed Forces of the United States to Detain Covered Persons Pursuant to the Authorization for Use of Military Force." As is apparent from that title, section 1021 serves to codify the government's authority to detain certain persons that was provided by the 2001 Authorization for Use of Military Force, Pub. L. 107–40, 115 Stat. 224 (Sept. 18, 2001) (the "AUMF"), the statute enacted shortly after September 11, 2001, to confer on the President authority to conduct the ongoing war against al-Qaeda and the Taliban.

Plaintiffs' challenge to section 1021 must be rejected. Properly understood, section 1021 merely restates the detention authority that the government already had under the AUMF. In the statute's own words, it "affirms" the AUMF's detention authority while expressly not "expand[ing]" it, and defines those "covered persons" who may be detained in terms no more broad than the government has advanced before the courts—and that the courts have upheld—for years.

Based on their misunderstandings of the law, plaintiffs now purport to fear that they will be subjected to indefinite military detention simply for their political views and expression. But those fears are baseless. Plaintiffs do not assert that they or anyone

---

[1] No defendant has been served with process by the date of this filing, and the government respectfully preserves all pertinent defenses. In particular, the amended complaint names members of Congress as defendants; they have not yet been served, have not appeared in this case through counsel, and, in any event, are unnecessary to the resolution of the preliminary injunction motion or to any relief requested in this action.

similarly situated have ever been detained or threatened with detention under the identical preexisting authority provided by the AUMF. Nor can they demonstrate that their subjective fears are reasonable in light of the government's implementation of its detention authority under the AUMF. For those reasons, plaintiffs lack standing, and therefore are unable to demonstrate a likelihood of success in this action, irreparable harm, or a balance of the equities involved that tips in their favor. Plaintiff's motion for a preliminary injunction, therefore, should be denied.

Argument

A. Preliminary Injunction Standard

"A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right." *Munaf v. Geren,* 553 U.S. 674, 679-80 (2008) (quotation marks and citations omitted). "[P]laintiff[s] seeking a preliminary injunction must establish that [they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council,* 555 U.S. 7, 20 (2008); *accord Salinger v. Colting,* 607 F.3d 68, 79-80 (2d Cir. 2010).

The Supreme Court has emphasized that a preliminary injunction cannot issue on the mere basis of speculation or possibility. *Winter*, 555 U.S. at 21-22. In *Winter*, the Supreme Court rejected a "more lenient standard" that allowed for a preliminary injunction "based only on a 'possibility' of irreparable harm." *Id*. at 22. The Supreme Court emphasized that a preliminary injunction should issue only upon a showing that irreparable harm is "likely in the absence of an injunction." *Id*. (emphasis added). In addition, the Supreme Court recently concluded that "[i]t is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a

court must determine that an injunction *should* issue . . . ." *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2757 (2010) (emphasis in original).

Here, the burden plaintiffs must carry to obtain preliminary injunctive relief is that much greater, because they seek to enjoin enforcement of an act of Congress. "[J]udicial power to stay an act of Congress, like judicial power to hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise." *Heart of Atlanta Motel v. United States*, 85 S. Ct. 1, 2 (1964) (Black, J., in chambers). Acts of Congress are presumptively constitutional. *United States v. Nat'l Dairy Prods.*, 372 U.S. 29, 32 (1963); *United States v. Rybicki,* 354 F.3d 124, 136 & n.9 (2d Cir. 2003) (en banc). As such, even a statute challenged as unconstitutional "should remain in effect pending a final decision on the merits by [the courts]." *Turner Broad. Sys. v. FCC*, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J., in chambers). Plaintiffs have not made the exceptional showing required to justify preliminary injunctive relief against enforcement of an Act of Congress.

B. Legal Background: The AUMF and the NDAA

1. The Government's Detention Authority Under the 2001 AUMF

The AUMF was enacted in the immediate wake of the September 11, 2001, terrorist attacks on the United States. It provides

> [t]hat 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.

Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001), § 2(a). Shortly thereafter, the President ordered U.S. armed forces to Afghanistan pursuant to the AUMF, "with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it." *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (plurality); *accord Rasul v. Bush*, 542 U.S. 466, 470 (2004). The

AUMF indisputably brings al-Qaeda and the Taliban within its scope; indeed, the principal purpose of the AUMF is to eliminate the threat those entities pose. *Hamdi*, 542 U.S. at 518 ("There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF."). During the ensuing hostilities, which are ongoing, the government has captured and detained a number of individuals pursuant to authority the Supreme Court recognized as conferred by the AUMF. *See Hamdi*, 542 U.S. at 518 ("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").[2]

Since *Hamdi* the government has explained the detention authority granted by the AUMF in the course of habeas corpus proceedings brought by detainees held at the United States Naval Station at Guantanamo Bay, Cuba. *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442, Repondents' Mem. Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, dated March 13, 2009 ("March 2009 Memorandum") (annexed hereto). To begin with, "[t]he detention authority conferred by the AUMF is necessarily informed by principles of the laws of war," *id.* at 1—consistent with *Hamdi*, which construed the AUMF "based on longstanding law-of-war principles." 542 U.S. at 520-21.[3] As informed by the laws of war, the government's detention authority

---

[2] Although *Hamdi* was a plurality opinion, the Court later recognized that five Justices concurred in this core holding. *Boumediene v. Bush*, 553 U.S. 723, 733 (2008).

[3] "The 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. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 603-04 (2006)." March 2009 Mem. at 1.

under the AUMF extends to those the President "determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for the September 11 attacks"—as provided in the language of the AUMF itself—as well as "those persons whose relationship to al-Qaida or the Taliban would, in appropriately analogous circumstances in a traditional international armed conflict, render them detainable." March 2009 Mem. at 1. Thus, the definitional framework for the government's AUMF detention authority is as follows:[4]

> The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist 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 Mem. at 1-2.[5]

Further, in the March 2009 Memorandum, the government explained with respect to the concept of "associated forces," that "many different private armed groups [have] trained

---

[4] Prior to the government's March 2009 articulation of AUMF detention authority, the Department of Defense defined a detainable person as "'an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.'" *Parhat v. Gates*, 532 F.3d 834, 837-38 (D.C. Cir. 2008) (quoting Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures (July 29, 2004), at E-1 § B, and Deputy Secretary of Defense, Order Establishing Combatant Status Review Tribunal (July 7, 2004), at 1).

[5] The government has further explained to the courts that while the circumstances justifying detention of an individual for providing "substantial support" to enemy forces will need to be identified case by case going forward, and "may require the identification and analysis of various analogues from traditional international armed conflicts," it is clear that "the concept of 'substantial support' . . . does not justify the detention . . . of those who provide unwitting or insignificant support" to al-Qaeda, the Taliban, or associated forces. *See also Salahi v. Obama*, 625 F.3d 745, 751-52 (D.C. Cir. 2010) (recognizing that determination of detainability must be made case by case, but "purely independent conduct of a freelancer is not enough" under "part of" test (quotation marks omitted)).

and fought alongside al-Qaida and the Taliban. In order 'to prevent any future acts of international terrorism against the United States,' AUMF, § 2(a), the United States has authority to detain individuals who, in analogous circumstances in a traditional international armed conflict between the armed forces of opposing governments, would be detainable under principles of co-belligerency." *See* March 2009 Mem. at 7; *Hamlily v. Obama*, 616 F. Supp. 2d 63, 74-75 (D.D.C. 2009) ("associated forces" under government's March 13, 2009 articulation of detention authority "mean[s] 'co-belligerents' as that term is understood under the laws of war"); *cf.* Parry & Grant, *Encyclopaedic Dictionary of Int'l Law* (3d ed. 2009) 102 (defining co-belligerents as states "engaged in a conflict with a common enemy, whether in alliance with each other or not"); 2 *Oppenheim's International Law: A Treatise* § 77 & n.1 (7th ed. 1952) (defining term "principle belligerents" to include "those parties to a war who wage it . . . by virtue of having become party to the war irrespective of a treaty of alliance," and noting that "co-belligerents" are "associated with one another for purposes of the war"). The General Counsel of the Department of Defense, recently addressed the issue, stating that the term "associated force"

> is based on the well-established concept of co-belligerency in the law of war. . . . An 'associated force,' as we interpret the phrase, has two characteristics to it: (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners.

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

The definitional framework articulated by the government in the March 2009 Memorandum has been repeatedly endorsed by the courts in the *habeas corpus* litigation involving aliens detained at Guantanamo under authority of the AUMF. *See*, *e.g.*,

Barhoumi v. Obama, 609 F.3d 416, 432 (D.C. Cir. 2010); *see also In re Petitioners Seeking Habeas Corpus Relief*, 700 F. Supp. 2d 119, 135 (D.D.C. 2010) (recognizing circuit's holding approving government's detention authority definition).[6]

2. Section 1021's Affirmation of the AUMF's Detention Authority

In section 1021 of the NDAA, Congress affirmed the preexisting authority described above, adopting the government's definitional framework stated in the March 2009 Memorandum nearly verbatim, and noting that the new provision was not intended to change the government's authority. The section begins by stating that "Congress *affirms* that the authority of the President to use all necessary and appropriate force pursuant to the [AUMF] 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." Pub. L. No. 112-81, 125 Stat. 1298, 1562, § 1021(a) (emphasis added). "Covered persons," in turn, are described using the language of the March 2009 Memorandum:

> (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.

---

[6] *See also al-Bihani v. Obama*, 590 F.3d 866, 873-74 (D.C. Cir.), *rhg. en banc denied*, 619 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011). While the *al-Bihani* majority disagreed with the government's view that the AUMF detention authority must be informed by principles of international laws of war, 590 F.3d at 871, the government consistently has made clear that it views its detention authority under the AUMF as informed by the laws of war. *See, e.g.*, Br. for Respondents in Opp. to Pet. for Cert., *al-Bihani v. Obama*, S. Ct. No. 10-1383, at 10 (Nov. 23, 2011); Response to Pet. for Rhg. & Rhg. En Banc, *al-Bihani v. Obama*, D.C. Cir. No. 09-5051, at 6-7 (May 13, 2010).

Id. § 1021(b). In short, section 1021 restates authority under the AUMF to detain in essentially identical language to that asserted by the government in its March 2009 description of AUMF detention authority, affirmed by the courts as described above.

To the extent there could be any doubt that section 1021, in "affirm[ing]" the AUMF authority, does not confer any new or additional authority, Congress provided that "[n]othing in this section is intended to limit *or expand* the authority of the President or the scope of the [AUMF]," *id*. § 1021(d) (emphasis added), and, "[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," *id*. § 1021(e).

The President expressed the same understanding upon signing the NDAA. As he put it in his signing statement:

> Section 1021 affirms the executive branch's authority to detain persons covered by the 2001 [AUMF]. This section *breaks no new ground* and is unnecessary. The *authority it describes was included in the 2001 AUMF*, as recognized by the Supreme Court and confirmed through lower court decisions since then. Two critical limitations in section 1021 [subsections (d) and (e), quoted above] confirm that it *solely codifies established authorities*. . . . My Administration strongly supported the inclusion of these limitations in order to *make clear beyond doubt* that the legislation does *nothing more than confirm authorities* that the Federal courts have recognized as lawful under the 2001 AUMF.

Statement by Pres. Barack Obama upon Signing H.R. 1540, 2011 U.S.C.C.A.N. S11, S12 (Dec. 31, 2011) ("NDAA Signing Statement") (emphasis added). The President further stated that "my Administration will not authorize the indefinite military detention without trial of American citizens. Indeed, I believe that doing so would break with our most important traditions and values as a Nation." *Id*. Finally, the President noted that "[m]y 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." *Id*.

In addition, section 1021 is consistent with the government's position that its detention authority under the AUMF is informed by the laws of war. Section 1021(c)(1) of the NDAA explicitly refers to "[d]etention under the law of war." Senate floor statements confirm that members of Congress understood that section 1021 concerned detention consistent with the laws of war.[7] In addition, other provisions in the same subtitle of the NDAA repeatedly refer to the law of war. For example, section 1023(b) describes the Secretary of Defense's periodic review of the threat posed by those in "law of war detention," and section 1024(b) describes procedures for determining the status of those held in "long-term detention under the law of war pursuant to the [AUMF]." NDAA §§ 1023(b), 1024(b). Section 1023(b) also refers to Executive Order 13,567 (governing periodic reviews), which in turn defines "law of war detention" as "detention authorized by the Congress under the AUMF, as informed by the laws of war." Exec. Ord. 13,567, 76 Fed. Reg. 13,277, 13,280, § 9(a) (Mar. 7, 2011).

In sum, section 1021, properly understood, affirms the government's preexisting authority to detain those persons who were "part of" or "substantially supported" al-Qaeda, the Taliban, or associated forces that engaged in hostilities against the United States—an authority informed by the laws of war and that has been upheld by the Article III courts. Based on such an understanding, plaintiffs demonstrably lack standing to pursue their challenge to the statute.

---

[7] *See* 157 Cong. Rec. S7638, S7670 (Nov. 17, 2011) (Sen. Graham: "When someone is captured as a member of al-Qaida . . . [t]hey are being held under the law of war." Sen. Levin: "That is correct."); *id*. at S7956 (Sen. Graham: section 1021 "reaffirms the fact this body believes al-Qaida and affiliated groups are a military threat to the United States and they can be held under the law of war").

C. Plaintiffs Lack Standing, and Therefore Cannot Demonstrate They Are Likely to Succeed in This Action

Plaintiffs' request for a preliminary injunction must first be denied because they have failed to demonstrate a likelihood of success on the merits of their claims. *Munaf,* 553 U.S. at 680. Although plaintiffs' constitutional attack on section 1021 of the NDAA would fail on the merits, it is equally clear that plaintiffs lack standing to assert their claims in the first place. That alone suffices to eliminate any conceivable prospect they may have had of prevailing in this litigation, and it is therefore all that the Court must determine at this time in order to deny their request for preliminary relief.

1. Plaintiffs' Assertion of Standing to Sue Rests on a Misunderstanding of Applicable Precedent and of Section 1021, Which Is Valid on Its Face

To begin with, plaintiffs are attempting to mount a facial attack on section 1021's validity, asking the Court to declare the statute "void as unconstitutional" and to enjoin it as such. *See, e.g.,* Amended Verified Complaint ("Compl.") 22 (request for relief); *id.* 17-18. In so doing, plaintiffs have assumed a particularly difficult burden. "Facial challenges are disfavored" as 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) (quotation marks and citations omitted). 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 (same). "[A] facial challenge must fail where the statute *has a plainly legitimate sweep*." *Id.* (emphasis added).

Plaintiffs cannot hope to prevail on their facial challenge to section 1021, a mere recodification of the detention authority that the AUMF already provides the President in the ongoing war against al-Qaeda, the Taliban, and associated forces. They maintain that

section 1021 is facially unconstitutional because it could apply to U.S. citizens and other "covered persons" who, in plaintiffs' view, cannot lawfully be detained or tried by the military. Compl. ¶¶ 29-35, 38; Plaintiffs' Brief in Support of Application for Restraints (Feb. 28, 2012) ("Pls. Br.") 14. But—although the government does not offer a complete explication of the statute and the governing precedent in this preliminary proceeding—whatever the outer bounds of the government's detention authority, the statute's legitimate sweep is illustrated by the numerous cases that have upheld the authority it grants. Even as to detention of U.S. citizens, in *Hamdi* the Supreme Court held that "[t]here is no [constitutional] bar to this Nation's holding one of its own citizens as an enemy combatant," at least where the individual in question was "part of or supporting forces hostile to the United States or coalition partners in Afghanistan, and who engaged in armed conflict against the United States." 542 U.S. at 516-19; *see also id.* at 589 (Thomas, J., dissenting)). *Ex Parte Quirin,* 317 U.S. 1 (1942), held that enemy belligerents, whether aliens or those holding "citizenship in the United States," can be tried by military tribunal for violations of the laws of war. *Id.* at 29-35, 37.

The Government has rarely exercised detention authority over U.S. citizens pursuant to the AUMF, and, as discussed above, the President has said that he will not use that authority to subject U.S. citizens to long-term detention without trial. And jurisdiction of the military commissions authorized by the Military Commissions Act of 2009, by which trial is provided for under section 1021(c)(2), expressly excludes U.S. citizens. 10 U.S.C. § 948c.[8] As a result, the courts have not resolved the scope of the military's authority to

---

[8] Even as to aliens, the subject matter jurisdiction of the commissions is restricted to offenses "committed in the context of and associated with hostilities," *id.* § 950p(c), with "hostilities" defined as "any conflict subject to the laws of war," *id.* § 948a(9).

Moreover, plaintiffs' characterization of *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006), (continued...)

detain or try citizens. But that question, along with the scope of authority over those who substantially support organized armed groups engaged in the ongoing armed conflict with the United States, concern only the outer bounds of the Government's authority. Thus, because section 1021 simply affirms the President's pre-existing wartime authority, as affirmed in *Hamdi* and other cases, "the statute has a plainly legitimate sweep," and is not subject to facial invalidation. *Washington State Grange,* 552 U.S. at 449. Questions about the precise outer bounds of this legitimate authority do not support a facial challenge to the President's wartime authority.[9]

---

[8] (...continued)
as concluding that military commissions inherently lack necessary procedural safeguards, *see* Pls. Br. 18-19, is inaccurate. *Hamdan* dealt only with the system of military commissions before it, which had been organized pursuant to presidential order. 548 U.S. at 568-70. The current system of military systems was created following *Hamdan*, when Congress enacted the Military Commissions Acts of 2006 and 2009, Pub. L. Nos. 109-366 & 111-84. As now constituted by statute, military commissions guarantee defendants a panoply of procedural rights to ensure the fundamental fairness of the proceedings, *see* 10 U.S.C. §§ 948k, 949a(b)(2)(B), 949c, 949f(a), 949j, 949*l*, with independent judicial review of commission judgments in the D.C. Circuit. *Id.* § 950g. Courts have since recognized that the Military Commission Acts of 2006 and 2009 cured the procedural deficiencies that concerned the Court in *Hamdan*. *Khadr v. Obama,* 724 F. Supp. 2d 61 (D.D.C. 2010)*; Al Odah v. Bush,* 593 F. Supp. 2d 53, 58 (D.D.C. 2009); *Khadr v. Bush,* 587 F. Supp. 2d 225 (D.D.C. 2008); *Hamdan v. Gates,* 565 F. Supp. 2d 130 (D.D.C. 2008).

[9] Plaintiffs rely on *Ex parte Milligan*, 71 U.S. 2 (1866), for the proposition that "military jurisdiction" cannot extend to "civilians." Pls. Br. 14. *Milligan* establishes that the exercise of war powers, including detention authority, is limited by the Constitution, not that a broad grant of war powers can be subject to facial attack simply because some military actions may cross constitutional boundaries. In *Milligan*, the Court held that a citizen and long-time resident of Indiana, who was arrested at his home during the Civil War, could not be tried by military commission but was instead entitled to trial by jury, as Indiana was not in rebellion against the federal government and its courts were open. 71 U.S. at 107-08, 121-24. But as later explained in *Quirin* and *Hamdi,* the decision in *Milligan* turned on the fact that Milligan was "not an enemy belligerent," nor "part of or associated with the armed forces of the enemy," and therefore was "not subject to the law of war." *Quirin,* 317 U.S. at 45; *see Hamdi*, 542 U.S. at 521-22. As the government has affirmed repeatedly, its detention authority is informed by law of war principles, and as the President has stated, such authority is limited by the Constitution.

In support of the same argument, plaintiffs also offer quotations from *Laird v. Tatum*, 408 U.S. 1, 17-19 (1972). Pls. Br. 14-15. Although they attribute those quotations to
(continued...)

For these reasons, Plaintiffs also have no discernible likelihood of success on their overbreadth claim. *See* Compl. ¶¶ 39-44. An overbreadth claim is a "second type of facial challenge," applicable in the First Amendment context, "under which a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional." *Id.* at 449 n.16 (quotation marks and citations omitted). Invalidation on grounds of overbreadth is considered "strong medicine" that courts must apply "with hesitation, and then 'only as a last resort.'" *Los Angeles Police Dep't v. United Reporting Pub. Corp.,* 528 U.S. 32, 39 (1999) (quoting *New York v. Ferber,* 458 U.S. 747, 767 (1982)). To succeed on an overbreadth claim a party must show that the "law's application to protected speech [is] 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003). The claimant "bears the burden of demonstrating, from the text of the law and from actual fact, that substantial overbreadth exists." *Id.* at 122 (quotation marks, brackets, and citation omitted). And "[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." *Id.* at 124.

The NDAA is not a statute "specifically addressed to speech" but (as relevant here) to the detention of individuals who are part of or substantially supported al-Qaeda, Taliban, or associated forces engaged in hostilities against the United States and its coalition partners. Its "plainly legitimate applications" are illustrated by the thousands of persons whom the military has lawfully detained in Afghanistan under the AUMF, as well as by the numerous decisions upholding the government's detention authority relative to

---

[9] (...continued)
"the Court," in fact they are taken from the dissenting opinion.

Guantanamo detainees. *See, e.g., Barhoumi,* 609 F.3d at 432. By contrast, plaintiffs have not shown "from actual fact" that the NDAA, or the AUMF, has ever been or is ever likely to be applied to anyone on the basis of the kind of independent expressive activity they describe in their declarations. *See infra* Part C.2.a. Hence they have shown no apparent chance of succeeding on their overbreadth claim.

The plaintiffs' vagueness claim, Compl. ¶¶ 34-37, is even more fundamentally misconceived. Declarations of war and war powers authorizations are necessarily written in expansive terms, giving the President the authority to effectuate their fundamental purpose of providing for the Nation's defense. As explained above, section 1021 simply restates the detention authority provided in a war powers authorization, the AUMF. Just like other war powers authorizations, the AUMF confers broad authority on the President to use "all necessary and appropriate force," which he may exercise consistent with the Constitution, other applicable law, including the law of war. Plaintiffs cannot facially invalidate, as unconstitutionally vague, section 1021's codification of the President's detention authority under the AUMF, authority *Hamdi* makes clear is a "necessary incident of war," simply because in their view the statute's terms "may leave room for uncertainty at [its] periphery." *FEC v. Nat'l Right To Work Comm.*, 450 U.S. 197, 211 (1982); *see also U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers,* 413 U.S. 548, 578-79 (1973) (a statute "will not be struck down as vague even [if] marginal cases could be put where doubts might arise").

2. Plaintiffs Cannot Prevail, as They Lack Standing

As observed above, however, for the present purpose of assessing plaintiffs' likelihood of success, the Court need not address the merits of plaintiffs' claims, for they have failed to establish their standing to raise these claims in the first place. "The judicial power of the

United States . . . is not an unconditioned authority to determine the [validity] of legislative or executive acts," but is limited by Article III of the Constitution "to the resolution of 'cases and controversies.'" *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982). Standing is "an essential and unchanging part of the case-or-controversy requirement" under Article III, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), assuring that litigants have a sufficient "personal stake in the outcome of the controversy . . . to justify exercise of the court's remedial powers on [their] behalf," *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). Standing is, accordingly, a threshold jurisdictional requirement, "determining the power of the court to entertain the suit," *Warth*, 422 U.S. at 498, and, as such, "is an indispensable part of the plaintiff's case," *Lujan*, 504 U.S. at 561.

"[T]he irreducible constitutional minimum of standing contains three elements," injury in fact, causation, and redressability, the first of which—injury in fact—requires a plaintiff to demonstrate "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or *imminent*, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560-61 (emphasis added; citations, alterations, and quotation marks omitted); *Pacific Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 350 (2d Cir. 2008). "Abstract injury," *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983), 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); *accord Lyons*, 461 U.S. at 102 (noting that threat of injury must be "immediate and real"). To satisfy these requirements, plaintiffs seeking pre-enforcement review of a statute must demonstrate that they face "a credible threat of [enforcement]." *Holder v. Humanitarian*

Law Project, 130 S. Ct. 2705, 2717 (2010). Plaintiffs have made no such showing here, and the resulting jurisdictional impediment to even reaching the merits makes plaintiffs' prospects of success exceedingly unlikely. *Munaf*, 553 U.S. at 690.

Here, plaintiffs allege that they have suffered three types of injuries. *First*, as a result of their independent journalistic activities and public advocacy (collectively, "expressive activities"), plaintiffs claim that they fear they will be deemed "covered persons" under section 1021, and thus subject to military detention. *See, e.g.*, Hedges Aff. ¶¶ 28-29, 34; Bolen Aff. ¶ 10; Wargalla Aff. ¶¶ 13-17; Jonsdottir Aff. ¶¶ 20-21; O'Brien Aff. ¶¶ 26, 29. *Second*, plaintiffs claim that they have incurred significant financial and professional costs due to their fear that section 1021 will be applied against them. *See, e.g.*, Bolen Aff. ¶¶ 11-16; O'Brien Aff. ¶ 30; Wargalla Aff. ¶ 18; Hedges Aff. ¶ 35. *Third*, plaintiffs claim that they have refrained from engaging in certain expressive activities based on their fear that, if they engage in the activities, they will be deemed "covered persons" under section 1021. *See, e.g.*, Bolen Aff. ¶¶ 7-10; O'Brien Aff. ¶¶ 9, 28; Jonsdottir Aff. ¶ 22. As explained below, however, plaintiffs are not likely to succeed in establishing standing based on any of these alleged injuries. This Court accordingly lacks jurisdiction, and must deny the preliminary injunction on that ground alone.

a. Plaintiffs Have Not Established That They Are in Real and Immediate Danger of Injury or Have an Objectively Reasonable Fear of Being Deemed "Covered Persons" Under Section 1021

Plaintiffs' first alleged injury—their fear that, as a result of their expressive activities, they will be deemed "covered persons" under section 1021, and thus subject to indefinite military detention—is insufficient to confer standing because plaintiffs have not shown that they face a real and immediate threat of injury or that their fear is objectively reasonable.

Plaintiffs rely on *Amnesty Int'l USA v. Clapper*, 638 F.3d 118 (2d Cir.), *reh'g en banc*

denied, 667 F.3d 163 (2d Cir. 2011), *pet. for cert. filed* (Feb. 17, 2012) (No. 11-1025), as precedent to support their standing to pursue their claims in this case. Pls. Br. 10-12. Although the government respectfully disagrees with the Court of Appeals's decision in that case and has filed a petition for *certiorari*, even under *Amnesty Int'l*, to establish standing based on a fear of future injury, a plaintiff must show that there is "an objectively reasonable likelihood" that the alleged future injury will occur. 638 F.3d at 134 ("To determine whether the plaintiffs have standing under their future-injury theory, we would need to determine whether the FAA [*i.e.*, the statute there challenged] creates an objectively reasonable likelihood that the plaintiffs are being or will be monitored under the FAA."); *see also Lyons*, 461 U.S. at 107 n.8 ("It is the reality of the threat of [future] injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions."); *Pac. Capital Bank*, 542 F.3d at 350 ("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." (quotation marks omitted)); *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 382 (2d Cir. 2000) (a plaintiff has standing to bring a pre-enforcement challenge to a statute if the plaintiff has "an actual and well-founded fear that the [statute] will be enforced against it" (quotation marks omitted)). Here, plaintiffs have failed to demonstrate that there is "an objectively reasonable likelihood" that section 1021 will be applied against them. That is so for at least four separate reasons, each applicable to some or all of the plaintiffs. Thus, plaintiffs' first alleged injury is insufficient to confer standing.

First, the government's statutory detention authority affirmed in section 1021 has existed since the passage of the AUMF in 2001, and plaintiffs have not identified a single instance in which that authority has been applied against individuals similarly situated to

plaintiffs or merely for engaging in independent journalistic activities or public advocacy, much less the specific types of expressive activities described by plaintiffs in their affidavits. As discussed above, section 1021 breaks no new ground; the authority it describes—including the authority to detain "covered persons"—was previously granted in the 2001 AUMF. *See supra* Part B.2.

Indeed, in July 2004, the government articulated its detention authority as extending to any "individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." *See supra* at 5 n.4. Then, in the March 2009 Memorandum, the government described its detention authority under the AUMF in a more limited way, extending as informed by the laws of war to any "person[] who w[as] 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." March 2009 Mem. at 2 (emphasis added). The government's July 2004 and March 2009 descriptions of its detention authority are no more restrictive—indeed, in the case of the July 2004 standard, the description is more broad—than the definition of "covered persons" in section 1021. *Compare id.* at 2 and *supra* at 5 n.4 *with* section 1021(b).

Thus, for years before the passage of the NDAA, the government has had the detention authority described in section 1021. Moreover, the courts have upheld the government's interpretation of its detention authority—as that authority is now described in section 1021. *See, e.g.*, *al-Bihani*, 590 F.3d at 873-74; *Barhoumi*, 609 F.3d at 432. Notwithstanding these facts, plaintiffs have not identified a single instance in which the government has used that authority against a person merely for engaging in independent journalistic activities or public advocacy. Having failed to make such a showing, plaintiffs

have not established that there is an "objectively reasonably likelihood" that they will be detained under section 1021 for engaging in the types of expressive activities described in their affidavits. *Amnesty Int'l*, 638 F.3d at 134.

Plaintiffs claim *Amnesty Int'l* supports a conclusion that they have standing to challenge section 1021, but that case is readily distinguishable from plaintiffs' present challenge. In *Amnesty Int'l*, a group of activists, attorneys, and journalists whose work sometimes required them to engage in international communications with individuals they believed to be associated with terrorist or activist organizations challenged the constitutionality of section 702 of the Foreign Intelligence Surveillance Act of 1978 ("FISA"). 638 F.3d at 121, 127. Section 702, which was added to FISA by section 101(a)(2) of the FISA Amendments Act ("FAA") of 2008, created new procedures for authorizing government electronic surveillance targeting non-citizens outside the United States. *Id*. These procedures "significantly broadened" surveillance orders by eliminating several preexisting statutory requirements. *Id*. at 126. The *Amnesty Int'l* plaintiffs asserted they had standing to raise a pre-enforcement challenge to the new procedures because the new procedures caused them to fear that their international communications would be monitored by the government, which in turn, forced them to undertake allegedly costly and burdensome measures to protect the confidentiality of their communications. *Id*. at 121-22.

As noted above, according to the court, "[t]o determine whether the plaintiffs have standing under their future-injury theory, we would need to determine whether the FAA creates an objectively reasonable likelihood that the plaintiffs are being or will be monitored under the FAA." 638 F.3d at 134. Applying this standard, the Court ruled that the *Amnesty Int'l* plaintiffs' interpretation of section 702's new procedures as permitting the government to intercept their international communications was reasonable because the

"FAA was passed specifically to permit surveillance that was not permitted by FISA." *Id*. at 138. Given that "both the Executive and the Legislative branches of government believe that the FAA authorizes new types of surveillance," the Court reasoned that it is "extremely likely that such surveillance will occur" and plaintiffs' communications will be monitored—especially since the individuals plaintiffs communicated with were "precisely the sorts of individuals that the government will most likely seek to monitor." *Id*. 138-39. Thus, the Court concluded, the plaintiffs' fears of governmental monitoring of their international communications were not "based on conjecture," *id*. (citations omitted); rather they were "fairly traceable" to the FAA. *Id*. at 139.

By contrast here, section 1021 did not expand the government's detention authority under the AUMF, but rather merely affirmed that pre-existing authority. Unlike the FAA and section 702's relationship with pre-existing FISA authorities, section 1021 does not authorize military detention in circumstances where it was not previously authorized under the AUMF. Plaintiffs' interpretation of section 1021 as broadening the Executive Branch's detention authority, therefore, is not reasonable; indeed, it is incorrect. Plaintiffs have no greater reason now to fear being subjected to military detention than they have had at any time since the AUMF was passed in 2001.[10] And apart from the lack of change from pre-

[10] Likewise, plaintiffs cannot look to *Pacific Capital Bank*, 542 F.3d 341, to support standing. In *Pacific Capital*, the Court affirmed the district court's finding that Pacific Capital had standing to bring a pre-enforcement challenge to a state statute that placed a ceiling on the amount of interest banks could charge for refund anticipation loans in contravention of a federal statute allowing national banks to charge, in any state, interest rates that are permitted by their home states. 542 F.3d at 346-47. The Court ruled that Pacific Capital had "reasonably interpreted" the state statute's limitation as applying to Pacific Capital because the language of the statute "by its exact wording limits permissible interest rates on refund application loans with no apparent exception for national banks." *Id*. at 350 (quotation marks omitted). Section 1021, however, as explained above, by its exact wording, merely "affirms" the government's detention authority existing prior to the enactment of the NDAA.

existing authorities, it is decidedly not otherwise "extremely likely that [plaintiffs' feared detention] will occur." *Id.* at 138. Accordingly, plaintiffs' future-injury theory fails for this reason alone.

Second, plaintiffs have been engaging for years in the same types of expressive activities that they now claim they fear will cause them to be deemed "covered persons" under section 1021, and they have not alleged that the government has ever sought to detain them in military custody. According to their affidavits and the complaint, plaintiffs have engaged in the following expressive activities:

> **Christopher Hedges.** During the course of Hedges' work as a journalist and activist "for twenty years," Hedges has: (1) had "direct contact in person with at least 17 organizations that are terrorist organizations on the State Department's List of Foreign Terrorist Organizations"; (2) "interviewed and disseminated the opinions and ideas of not only the organizations[']leadership but also their rank and file"; and (3) "published opinion pieces about these organizations and expressed agreement or sympathy for their ideas or fights, as in the case of Hamas . . . ." Hedges Aff. at ¶¶ 10, 13-14, 16-17.
>
> **Alexa O'Brien.** Since "January of 2011," O'Brien has been "writing for WL Central, an independent news site endorsed by WikiLeaks." O'Brien Aff. ¶ 3. In this capacity, O'Brien has "covered the WikiLeaks release of [purported] US State Department Cables, Joint Terrorism Task Force (JTTF) memoranda known as the Guantanamo Files . . . , and revolutions across Egypt, Bahrain, Iran, and Yemen." *Id.* at ¶ 4 (annotation added). In addition, in June 2011, O'Brien published an interview with a former Guantanamo detainee, *id.* at ¶ 7, which was "sympathetic to the plight of detainees," *id.* at ¶ 8. O'Brien also started the organization U.S. Day of Rage, which supports campaign finance reform in the United States and "endorsed the call to Occupy Wall Street on September 17, 2011." *Id.* at ¶¶ 10-11.
>
> **Kai Wargalla.** Since "January 2011," Wargalla has been "organizing rallies, demonstrations, and protests in support of Julian Assange and WikiLeaks." Wargalla Aff. ¶ 8. In addition, since "February 2011," Wargalla has been "working with [Jennifer] Bolen and Revolution Truth . . . on [a] campaign in support of WikiLeaks and Julian Assange." *Id.* at ¶ 9. Moreover, in September 2011, Wargalla "co-founded the Facebook page 'Occupy the London Stock Exchange' . . . and [has] continued as the most involved organizer behind the Occupy London movement." *Id.* at ¶ 4.

Jennifer Bolen. Bolen is "a founder and officer of Revolution Truth," an "organization that, for over a year, conducted a web-based campaign in defense of WikiLeaks and Bradley Manning." Bolen Aff. ¶ 2; Compl. ¶ 4.

Birgitta Jonsdottir. Jonsdottir "helped [WikiLeaks] produce a video called Collateral Murder in early 2010." Jonsdottir Aff. ¶ 4.[11]

The above-described expressive activities are the same types of expressive activities that plaintiffs now claim they fear will cause them to be deemed "covered persons" under section 1021. *See, e.g.*, O'Brien Aff. ¶ 8 ("I am now fearful of doing the type of reporting that I have done . . . ."); Wargalla Aff. ¶ 17 ("The work I'm doing makes me frightened that I could be legally detained on foreign soil by the United States government . . . ."); Jonsdottir Aff. ¶ 20 ("I . . . fear . . . that my work could be construed as giving 'substantial support' to terrorists and/or 'associated forces' . . . ."); Hedges Aff. ¶ 19 ("I believe that there is a realistic danger of my being detained indefinitely because . . . many of my writings, contacts and meetings could be considered to provide 'substantial support' to terrorist organizations."). Although plaintiffs have been engaging in these expressive activities for years, and although the government has had the military detention authority described in section 1021 for years, plaintiffs have not alleged that the government has ever sought to exert that authority against them or any other individuals merely for engaging in independent journalistic activities or public advocacy.[12] For this additional reason, plaintiffs have not shown that there is an "objectively reasonable likelihood" that section 1021 will be applied against them.

---

[11] These expressive activities are indistinguishable from those allegedly engaged in by the two plaintiffs who did not submit affidavits. Compl. ¶¶ 2-3.

[12] Notably, Hedges asserts that he has "been accused of providing substantial support to terrorists . . . by the US State Department," and that his "reporting out of Gaza for the New York Times was criticized in this vein by State Department spokespeople." Hedges Aff. ¶ 30. Yet Hedges does not allege that he has ever been detained, or even threatened with detention, under the AUMF or section 1021.

Third, plaintiffs' alleged fear that they will be subjected to unprecedented military detention for engaging in journalism and advocacy is not reasonable in light of the terms of section 1021 and the government's application and articulation of its detention authority in the March 2009 Memorandum, including that such authority must be informed by the laws of war. Plaintiffs claim to fear that their expressive activities will be considered "substantial support" provided to al-Qaeda, the Taliban, or an "associated force[]" of al-Qaeda or the Taliban under section 1021. As established above, those terms (or broader ones) have been in place for years, and plaintiffs have not identified a single instance where an individual was detained for engaging in journalism or advocacy of the sort described in plaintiffs' affidavits—notwithstanding that plaintiffs have for years engaged in such activities.

Plaintiffs also attempt to rewrite the statute by substituting "'terrorist' groups" or similar terms for "al-Qaeda, the Taliban, or associated forces." *E.g.*, Hedges. Aff. ¶¶ 6, 19, 30, 32, 34; O'Brien Aff. ¶ 8; Jonsdottir Aff. ¶ 20; Wargalla Aff. ¶ 16. The "associated forces" covered by section 1021, however, include only "'co-belligerents' as that term is understood under the laws of war." *See supra* 5-6; *Hamlily*, 616 F. Supp. 2d at 74-75. "An 'associated force,' as [the government] interpret[s] the phrase, has two characteristics to it: (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners." Jeh C. Johnson, "National Security Law, Lawyers, and Lawyering in the Obama Administration," Dean's Lecture at the Yale Law School, Feb. 22, 2012 (text available at http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/). Accordingly, the term "associated forces" cannot be viewed as a mere synonym for terrorist groups—and

it could never reach groups, such as WikiLeaks or Occupy Wall Street, that are not armed groups at all.

Here, many of the expressive activities described in plaintiffs' affidavits and the complaint (and in the case of the non-citizen plaintiffs, *all* of the activities described) relate to organizations other than al-Qaeda, the Taliban, or any other armed group. Indeed, they relate to WL Central, WikiLeaks, U.S. Day of Rage, Occupy Wall Street, Occupy London, or Revolution Truth. *See, e.g.*, O'Brien Aff. ¶¶ 3-5, 11 (WL Central, WikiLeaks, U.S. Day of Rage, Occupy Wall Street); Wargalla Aff. ¶¶ 4, 8-10 (Occupy London, WikiLeaks, Revolution Truth); Jonsdottir Aff. ¶¶ 4-6 (WikiLeaks); Compl. ¶¶ 2, 4-7 (WikiLeaks, Revolution Truth, Occupy London, U.S. Day of Rage). Actual cases involving individuals detained as part of associated forces illustrate the kinds of armed groups that can be an "associated force," as well as the kinds of activities in relation to those armed groups that have been found to warrant detention under the AUMF. *See, e.g., Khan v. Obama*, 655 F.3d 20, 32-33 (D.C. Cir. 2011) (affirming detention of terrorist operative involved in plotting attacks on U.S. and coalition forces, who was part of Hezb-i-Islami Gulbuddin ("HIG"), an "associated force" under AUMF, based on evidence of joint Taliban/HIG office to recruit and raise money for attacks, alliance and collaboration between HIG and al-Qaeda and Taliban forces, HIG ties to bin Laden, and attacks staged by HIG in Afghanistan). Accordingly, plaintiffs' fears that their expressive activities relating to these groups will result in the military detention of plaintiffs are not reasonable.

Fourth, the subjective fears of the five plaintiffs who are United States citizens—Hedges, O'Brien, Bolen, Ellsberg, and Chomsky, *see* Compl. ¶¶ 1-4, 7—that section 1021 will be applied to subject them to military detention, are especially ill-founded and unreasonable. As explained above, the President has made clear that U.S. citizens will not

be placed in indefinite military detention. Indeed, the day he signed section 1021 into law, the President stated:

> Moreover, I want to clarify that my Administration will not authorize the indefinite military detention without trial of American citizens. Indeed, I believe that doing so would break with our most important traditions and values as a Nation. 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.

NDAA Signing Statement, 2011 U.S.C.C.A.N. at S12. Thus, the case here is once again distinguishable from *Amnesty Int'l*. There, according to the Court, a policy that authorized the feared injurious conduct bolstered the argument that the injury was likely to occur. 638 F.3d at 137. In this case, as to U.S. citizens, the government's policy is inconsistent with plaintiffs' fears. Accordingly, none of the plaintiffs in this case have established that there is an "objectively reasonable likelihood" that §1021 will be applied against them.

b. Plaintiffs Have Not Established That the Costs They Have Allegedly Incurred in Connection With This Lawsuit Confer Standing

Plaintiffs' second alleged injury—their assertion that they have incurred financial and professional costs due to their fear that section 1021 will be applied against them—also fails. Here, most of the costs that plaintiffs have allegedly incurred relate to their efforts to advocate against section 1021 and to pursue this litigation. *See, e.g.*, O'Brien Aff. ¶ 30 ("I have spent money on phone calls and travel to discuss these issues with fellow activists and lawyers."); Bolen Aff. ¶¶ 11-17 (alleging that Bolen has incurred financial costs due to "being a plaintiff in and coordinating a global lawsuit involving other plaintiffs," and that Revolution Truth expects to incur financial costs "for the build out of its website . . . for the purpose of supporting the legal effort to challenge section 1021 of the NDAA"); Wargalla Aff. ¶ 18 (alleging that Wargalla has spent time "planning and working on this case," and that she will incur costs in participating in this litigation). Such costs, however, are

insufficient to confer standing; if they were, any citizen would have standing to challenge any law merely by advocating against the law and initiating a lawsuit, contrary to the firmly established prohibition on standing predicated only on status as a taxpayer or citizen stating a generalized grievance. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342-48 (2006); *Lujan*, 504 U.S. at 573-74.

Furthermore, even under *Amnesty Int'l* plaintiffs cannot demonstrate standing based on their costs because, among other things, plaintiffs acted unreasonably in incurring the costs. In *Amnesty Int'l*, the Second Circuit found that the costs that the plaintiffs in that case had incurred, in order to avoid having communications intercepted under an allegedly unlawful statute authorizing such interception, were sufficient to confer standing. *See* 638 F.3d at 133-34. But the Court of Appeals reached that conclusion based on its finding (which the government disputes, *see supra* at 16), that the plaintiffs had a reasonable basis to believe that the statute there at issue, the FAA, would be applied in a way that would directly affect them (*i.e.*, their own communications would be intercepted). *See id.* at 139. The Court noted, however, that if the possibility that a statute will be applied against a plaintiff is "remote or fanciful," then the plaintiff had "no reasonable basis" to incur the costs and the costs will not support a finding of standing. *Id.* at 134 (plaintiffs "cannot bootstrap their way into standing by unreasonably incurring costs to avoid a merely speculative or highly unlikely potential harm."). In short, incurring costs "cannot support standing . . . if the[] [costs] are caused by a fanciful, paranoid, or otherwise unreasonable fear" of a statute's application. *Id.*

Here, as discussed above, plaintiffs have not established that there is an "objectively reasonable likelihood" that section 1021 will be applied against them. *See supra* Part C.2.a. As a result, plaintiffs have failed to show that it was reasonable for them to incur costs to

avoid the effect of section 1021.[13] Accordingly, the costs that plaintiffs allegedly incurred do not support a finding of standing. *See Amnesty Int'l*, 638 F.3d at 133-34.

c. Plaintiffs Have Not Established That It Was Reasonable for Them to Stop Engaging in Expressive Activities to Avoid Being Deemed "Covered Persons" Under Section 1021

Plaintiffs' final alleged injury—their assertion that they have refrained from engaging in certain expressive activities based on their fear that, if they engage in the activities, they will be deemed "covered persons" under section 1021—fails for the same reason: plaintiffs' fears are unreasonable. The mere fact that a plaintiff alleges that he or she has stopped engaging in expressive activities because of a subjective fear of enforcement of a statute does not confer standing on the plaintiff to challenge the statute. *Alexander v. United States*, 509 U.S. 544, 554 (1993); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 60 (1989); *Latino Officers Ass'n v. Safir*, 170 F.3d 167, 170 (2d Cir. 1999); *Bordell v. General Elec. Co.*, 922 F.2d 1057, 1060-61 (2d Cir. 1991). Rather, to establish standing, a plaintiff who alleges a "subjective 'chill'" must also show that the statute has caused the plaintiff some other cognizable injury, such as a "specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) ("[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm"); *Amnesty Int'l*, 638 F.3d at 147-48 (finding that the plaintiffs had standing because, unlike the plaintiffs in *Laird*, they had alleged injuries beyond a mere subjective chill). In other words, to establish standing, a plaintiff who claims that his or her expressive activities have been chilled by a statute must also demonstrate that (1) there is an

---

[13] In addition, the nature of most of the costs allegedly incurred here (the expense of a lawsuit) are altogether different than the costs at issue in *Amnesty Int'l,* which involved costs that the plaintiffs there incurred due to taking specific actions to avoid or thwart the interception of their communications that the challenged statute allegedly permitted. As explained above, mere lawsuit-related expenses are insufficient to confer standing.

objectively reasonable likelihood that, if he or she engages in the activities, the statue will be applied against him or her; or (2) he or she has suffered some other cognizable harm. *See Amnesty Int'l*, 638 F.3d at 149.

Here, plaintiffs do not have a reasonable fear that section 1021 will be applied against them. *See supra* Part C.2.a. Accordingly, plaintiffs' allegations of subjective chill stand alone and, consequently, are insufficient to confer standing. *See Laird*, 408 U.S. at 13-14; *Amnesty Int'l*, 638 F.3d at 147-48.

D. Plaintiffs Cannot Establish Irreparable Harm

As explained above, a preliminary injunction cannot issue on the mere basis of speculation or possibility, but rather the movant has the burden of demonstrating that irreparable harm is "likely in the absence of an injunction." *Winter*, 555 U.S. at 21-22. Here, as discussed above, plaintiffs have not established that there is an "objectively reasonable likelihood" that section 1021 will be applied against them and, thus, that they are likely to sustain irreparable harm in the absence of an injunction. *See supra* Part C.2.a.

E. The Balance of Equities Requires That the Preliminary Injunction Be Denied

Nor have plaintiffs demonstrated that a balancing of the equities supports their requested injunction. Plaintiffs offer no argument with respect to such balancing of the equities other than to assert that because the government does not intend to apply section 1021 to U.S. citizens, then it will suffer no harm from an injunction against enforcement of the statute. Pls. Br. 9. This approach, however, turns the appropriate standard on its head, for the Supreme Court has explained that "[i]t is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue . . . ." *Monsanto*, 130 S. Ct. at 2757 (emphasis in original). For all the reasons explained above, plaintiffs

have not established that there is an "objectively reasonable likelihood" that section 1021 will be applied against them—indeed, the citizen plaintiffs argue the opposite—and, thus, that any appropriate equity supports the injunction they seek. *See supra* Part C.2.a. On the other hand, there is a significant public interest in not enjoining a duly enacted and presumptively constitutional statute concerning a military detention standard that has been upheld by other courts. *See supra* Part C.1.

Conclusion

The motion for a preliminary injunction should be denied.

Dated: New York, New York
March 26, 2012

Respectfully submitted,

PREET BHARARA
United States Attorney for the
Southern District of New York

By: /s/ Benjamin H. Torrance

BENJAMIN H. TORRANCE
CHRISTOPHER B. HARWOOD
Assistant United States Attorneys
86 Chambers Street
New York, New York 10007
Telephone: 212.637.2703, .2728
Fax: 212.637.2702
E-mail: benjamin.torrance@usdoj.gov
christopher.harwood@usdoj.gov