Nos. 12-3176, 12-3644

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHRISTOPHER HEDGES, et al.,
Plaintiffs-Appellees,
v.
BARACK OBAMA, individually and as representative of the United States of America, et al.,
Defendants.

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

Brief of *Amici Curiae* Senators John McCain, Lindsey Graham, and Kelly Ayotte in Support of Appellants

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CORPORATE DISCLOSURE

Pursuant to Fed. R. App. P. 26.1, *amici curiae* Senator John McCain, Senator Lindsey Graham, and Senator Kelly Ayotte submit the following identification of corporate parents, subsidiaries and affiliates:

NONE.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The United States is at war with al-Qaeda and associated terrorist entities. Following the September 11, 2001, attacks on the United States, Congress authorized the President "to use all necessary and appropriate force" to defeat the terrorist enemy and prevent future acts of international terrorism against the United States. Because terrorists do not wear uniforms and their alliances and affiliations are never static, that authorization did not declare any specific nation or organization our enemy, but delegated to the President the responsibility to identify and wage war against "those nations, organizations, or persons" behind the September 11 attacks. President George W. Bush and now President Barack Obama have done so, directing U.S. forces to fight and undermine al-Qaeda, those individuals who are part of or operationally support al-Qaeda, and those nations and organizations that have allied themselves with al-Qaeda.

Because "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war," Congress anticipated that the President would, pursuant to the Authorization for the Use of Military Force ("AUMF"), detain enemies not killed on this war's battle-

fields. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004). President Bush and President Obama have done so. Their administrations have used this authority to remove and keep from the battlefield numerous individuals, most in Afghanistan, who joined with al-Qaeda in waging war against the United States and its allies, to obtain valuable intelligence, and, where appropriate, to bring these individuals to justice through prosecution. The contours of this authority were developed by the executive branch over time, on a case-by-case basis, according to military necessity and subject to regular oversight by Congress and, when appropriate, the courts. That process culminated in the Obama Administration's March 2009 Memorandum setting forth the detention authority that had been exercised by the executive branch to that point and Congress's ratification of that authority in Section 1021 of the National Defense Authorization Act for Fiscal Year 2012 ("NDAA").

The plaintiffs, and the court below, ignore this history and, as a result, misconstrue Congress's purpose in enacting Section 1021. Far from seeking to authorize the detention of individuals for engaging in political activism or practicing journalism—something that Congress, in general, and *amici*, in particular, reject—Congress sought to endorse

the specific detention authority that had been exercised by the executive and approved by the courts and thereby place it on the strongest possible constitutional footing, consistent with *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring). And Congress did so in the plainest possible terms, expressly stating that "[n]othing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force" or to affect the rights of persons captured within the United States, including the right to challenge detention before a court of competent jurisdiction. NDAA §§ 1021(d), (e). But the court below refused to take Congress at its word. In so doing, it stymied Congress's exercise of its powers to declare war and authorize the use of force, to make rules concerning captures, and to regulate the armed forces.

Section 1021 is unquestionably a *legitimate* exercise of those powers. It is informed by the customary laws of war—including the detention of captured enemy personnel for the duration of hostilities and the law of co-belligerency—applying them to a type of conflict that involves shadowy non-state actors with fluid affiliations, rather than the uniformed soldiers of nation-states. Moreover, authorizations for exercise

of the war power—as opposed to the exercise of that power in specific circumstances—have never been subject to review for vagueness because they structure the operations of the government and, unlike statutes creating criminal offenses, do not work directly on individuals or impair individuals' rights. Nor, for the same reasons, are such structuring statutes subject to facial challenge for violation of First Amendment rights. In these ways, the decision below is inconsistent with centuries of constitutional practice in authorizing the use of military force. The plaintiffs may not circumvent precedent barring challenges to the authorization and use of military force by seeking to enjoin an essential aspect of that force.

"[O]ur Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." *Hamdi*, 542 U.S. at 531. The decision below defeats Congress's ability to carry out its constitutional obligation to provide for the nation's defense. It must be reversed.

INTEREST OF THE *AMICI*

Amici are Senators John McCain, Lindsey Graham, and Kelly Ayotte.[1] They are members of the Senate Committee on Armed Services and played a leadership role in the drafting and enactment of NDAA § 1021 on a bipartisan basis, making them uniquely qualified to explain its history and purpose. As Senators, *amici* have a strong interest in safeguarding Congress's constitutionally-prescribed role in matters of national security and war.

As a matter of policy and law, *amici* are committed to waging war against America's terrorist enemies, and believe that detention is a necessary and appropriate tool to remove those enemies from the battlefield, obtain intelligence, and prevent future attacks on the United States and its allies. The decision below jeopardizes the United States' authority to detain its sworn enemies, a fundamental incident of the power to wage war since the dawn of civilized combat.[2]

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[1] Although the amended complaint named Senator McCain as a defendant, he was never served and is not "properly part of this action at this time." SA-30.

[2] All parties consent to the filing of this brief. No counsel for any party authored any part of this brief, and no person, other than *amici* and

BACKGROUND

A. The Executive Branch Detains the Enemy Pursuant to Congressional Authorization in the AUMF

Al-Qaeda terrorists attacked the United States on September 11, 2001.[3] Within the week, following consultations with the executive branch, Congress enacted the AUMF.[4] It provides—

> 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.

SA-1.

Relying on the AUMF, the President ordered U.S. Armed Forces to Afghanistan to destroy al-Qaeda and the regime that had harbored it, the Taliban. Also relying on the AUMF, the President undertook a

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their counsel, made a monetary contribution intended to fund the preparation of the brief.

[3] This was not al-Qaeda's first attack. Al-Qaeda had attacked the U.S.S. *Cole* in Yemen in 2000 and orchestrated the 1998 bombings of U.S. embassies in Kenya and Tanzania, the 1996 bombing of a military housing complex in Saudi Arabia, and the 1993 bombing of the World Trade Center.

[4] *See generally* Curtis Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2079 (2005).

global campaign targeting al-Qaeda and its affiliates. The goal of this campaign was to defeat terrorists and their organizations through every instrument of national power, including military force, intelligence, and law enforcement.[5] In 2002, the Bush Administration established the Guantanamo Bay detention facility to hold mostly high-value detainees, many affiliated with al-Qaeda or the Taliban, apprehended in these operations. The United States also held detainees in Afghanistan and at other sites.

In 2004, the Supreme Court in *Hamdi v. Rumsfeld* affirmed the President's authority to detain enemy combatants under the AUMF. Citing longstanding, consistent executive practice under the law of war, it held that "detention of individuals [who fought against the United States as part of the Taliban], for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Hamdi*, 542 U.S. at 518. The Court recognized that, in this non-state conflict, "[t]he legal catego-

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[5] The White House, *National Strategy for Combating Terrorism* 15-28 (2003).

ry of enemy combatant has not been elaborated upon in great detail," but expected that the "permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them," i.e., on a case-by-case basis. *Id.* at 522 n.1.

That process accelerated following the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), which held that, unless lawfully suspended by Congress, the constitutional habeas right extends to detainees held in Guantanamo Bay. In March 2009, the United States submitted its current interpretation of the AUMF detention authority to the United States District Court for the District of Columbia, which exercises jurisdiction over Guantanamo Bay habeas petitions. It provides:

> 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….

See Memorandum Regarding Government's Detention Authority 2 (March 13, 2009), http://www.justice.gov/opa/documents/memo-re-det-auth.pdf ("March 2009 Memorandum").

The Government explained that it was neither possible nor prudent to define, with absolute precision, the terms "substantial support" and "associated forces" because "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." *Id.* Instead, following the approach described in *Hamdi*, "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." *Id.* In adjudicating Guantanamo habeas petitions, the D.C. District Court and D.C. Circuit have engaged the judicial branch in that process. *See, e.g.*, *Uthman v. Obama*, 637 F.3d 400, 403 (D.C. Cir. 2011) (discussing cases).

B. Congress Endorses the Executive's Detention Framework

Although the Obama Administration asserted a robust detention authority in its court pleadings, it declined to exercise that authority with respect to several terrorist captures, citing legal risk. This situation caused concern among many Members of Congress. On December 25, 2009, Umar Abdulmutallab, a Nigerian citizen who had received training from al-Qaeda in the Arabian Peninsula, attempted to detonate

a bomb secreted in his underwear on an international flight to Detroit. After one brief interview, Abdulmutallab was arrested and read his *Miranda* rights, rather than detained and treated as an enemy combatant.[6] Many senators, including *amici*, sharply criticized that choice.[7] Additional concerns were raised by the treatment of Ahmed Warsame, a leader of the Somali insurgent group Harakat al-Shabaab al-Mujahideen, who was captured in April 2011 shortly after receiving training in explosives from al-Qaeda in the Arabian Peninsula. After a two-months detention, Warsame was transferred to civilian custody and

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[6] Walter Pincus, *Christmas Day bomb suspect was read Miranda rights nine hours after arrest*, Wash. Post, Feb. 15, 2010.

[7] *See, e.g.*, Letter from Senator Orrin Hatch, et al., to Eric Holder, Attorney General (Jan. 21, 2010), http://www.mainjustice.com/files/2010/01/Holder-letter.pdf; Letter from Senator Joe Lieberman, et al., to Eric Holder, Attorney General (Jan. 25, 2010), http://www.lieberman.senate.gov/index.cfm/news-events/news/2010/1/lieberman-collins-urge-administration-to-move-abdulmutallab-into-military-custody; Letter from Senator Mitch McConnell, et al., to Eric Holder, Attorney General (Jan. 27, 2010).

charged with providing material support to terrorist organizations.[8] Again, Members of Congress, including *amici*, expressed their concern.[9]

Prompted by these incidents and the release of several detainees from Guantanamo Bay who subsequently returned to battle, Congress resolved to clarify the President's detention authority under the AUMF and, in so doing, eliminate any possible excuse for the President's failure to exercise it in appropriate cases. *See, e.g.*, 157 Cong. Rec. S7660 (2011) (Sen. McCain); 157 Cong. Rec. S7661 (Sen. Chambliss). As Senator Ayotte explained, "this is an area that cried out for clarification on a bipartisan basis because it is so important to ensure that while we remain at war with terrorists that we have the right policies in place to protect Americans." 157 Cong. Rec. S7663. NDAA § 1021, which endorses the Obama Administration's March 2009 statement of detention authority, was the fruit of that effort.

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[8] Charlie Savage & Eric Schmitt, *U.S. to Prosecute a Somali Suspect in Civilian Court*, N.Y. Times (July 5, 2011), at A1, http://www.nytimes.com/2011/07/06/world/africa/06detain.html.

[9] *See, e.g.*, Letter from Senator Mark Kirk, et al., to Eric Holder, Attorney General (July 6, 2011), http://www.kirk.senate.gov/pdfs/WarsameLetter.pdf.

The Senate devoted considerable time to explaining the provision's purpose. In enacting § 1021, Congress would "make sure we understand the difference between fighting a war and fighting a crime." 157 Cong. Rec. S7667 (Sen. Graham). Senator Graham, and other supporters of § 1021, explained that this goal did not require altering existing law, only affirming it:

> [Section 1021] is a congressional statement of authority of already existing law. It 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 indefinitely to make sure we find out what they are up to; and they can be questioned in a humane manner consistent with the law of war.

157 Cong. Rec. S7956; *see also* 157 Cong. Rec. S8633 (Sen. Levin); 157 Cong. Rec. S8636 (Sen. McCain). As Senator Levin, Chairman of the Senate Committee on Armed Services, explained, "the detainee provisions in our bill do not include new authority for the permanent detention of suspected terrorists. Rather, the bill uses language provided by the administration to codify existing authority that was adopted by both the Bush administration and the Obama administration and that has been upheld in the Federal courts." 157 Cong. Rec. S7640.

During the Senate's deliberations, several Members expressed concern that the proposed language could be misinterpreted to alter the President's detention authority with respect to persons present in the United States. To address this concern, the Senate adopted an amendment offered by Senator Dianne Feinstein which clarified that § 1021 shall not "be construed to affect existing law or authorities relating to the detention of" such individuals. NDAA § 1021(e). As Senator Levin explained, this amendment "makes clear…that it does not affect existing law relative to the right of the executive branch to capture and detain a citizen. If that law is there allowing it, it remains. If…the law does not allow that, then it continues that way." 157 Cong. Rec. S8124; *id.* (Sen. Graham).

Ultimately, the NDAA (including § 1021) passed the House and the Senate by overwhelming majorities. President Obama signed it into law on December 31, 2011. Pub. L. 112-81, 125 Stat. 1298 (2011). In his signing statement, the President recognized that § 1021 "affirms the executive branch's authority to detain persons covered by the 2001 Authorization for Use of Military Force" and stated that the provision "breaks no new ground and is unnecessary." Presidential Statement on

Signing H.R. 1540, *reprinted in* 2011 U.S.C.C.A.N. S13. *Amici*, of course, do not agree that § 1021 is unnecessary.

ARGUMENT

I. The District Court Erred in Holding that Section 1021 Was Intended Other than To Affirm the AUMF Detention Framework

A. The District Court Ignored Congress's Intention in Enacting Section 1021

Congress could not have stated more clearly its intent to affirm the definition of detention authority as developed by the executive over the course of the Nation's war on terrorism. The district court's claim that § 1021 was intended as a "legislative attempt at an ex post facto 'fix'" to ratify past detentions unsupported by the AUMF, SA-87, is just wrong.

This Court need not guess at Congress's intentions, or even delve deep into the legislative history, because Congress expressed them plainly in the statutory text itself. Section 1021 is styled as an "Affirmation of Authority," and that concept is repeated in its operative provision: "Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the [AUMF] includes the authority…to detain covered persons…." NDAA § 1021(a). Were there

any possible doubt on this point, the statute instructs the executive and the courts to reject any interpretation of the provision inconsistent with preexisting law: "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." NDAA § 1021(d). This language is conclusive of Congress's view, shared by the President,[10] that § 1021 is an affirmation of established authority under the AUMF.

Moreover, § 1021 unambiguously restates the detention authority set forth in the March 2009 Memorandum. A side-by-side comparison confirms that Congress adopted the Memorandum's language nearly verbatim, and made no material change with respect to the scope of detention authority—i.e., which individuals may be subject to detention. *Compare* NDAA § 1021(b) *with* March 2009 Memorandum at 2. And with respect to the disposition of such individuals, § 1021 mirrors executive practice, as upheld by the courts, of detention for the duration of hostilities, trial by military commission, and transfer. *See Hamdi*, 542 U.S. at 521 (detention); *Al Odah v. Bush*, 593 F.Supp.2d 53, 59 (D.D.C.

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[10] Presidential Signing Statement on H.R. 1540, *supra*.

2009) (military commissions); *Munaf v. Geren*, 553 U.S. 674, 692-705 (2008) (transfer); *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) (transfer). Section 1021 does not attempt to work any change in the law, nor does it.

The extensive legislative history of § 1021 confirms this interpretation. Members of the Senate, and *amici* in particular, consulted repeatedly with the Obama Administration to tailor the statutory language to match existing authorities. *See, e.g.*, 157 Cong. Rec. S7639-40 (Sen. Levin) (describing consultations and revisions); 157 Cong. Rec. S7663 (Sen. Ayotte) (same). Through that process, Congress arrived at statutory language that would, as intended, "codify the military's existing detention authority, as stated by both the administration of President Bush and the administration of President Obama and approved by the courts." 157 Cong. Rec. S7641 (Sen. Levin). In numerous colloquies, § 1021's supporters promoted it on that basis. *Id.*; 157 Cong. Rec. S7956 (Sen. Graham); 157 Cong. Rec. S8124 (Sen. Graham); 157 Cong. Rec. S8636 (Sen. McCain); 157 Cong. Rec. S8663 (Sen. Ayotte).

By contrast, the legislative record is bereft of evidence that Congress had some hidden, contrary agenda. *See* SA-87 (stating that Con-

gress's true intent was "obscured by language in the new statute"). While positively citing decisions such as *Quirin* and *Hamdi*, § 1021's sponsors identified no court decision that they intended or believed that it would overrule. Nor did § 1021's sponsors identify any instance of detention, whether actual or hypothetical, that would be authorized only under § 1021, and not the AUMF. And where there was even the slightest uncertainty that § 1021 might alter the law with respect to persons present within the United States, its text was amended to unambiguously reject that result. NDAA § 1021(e); 157 Cong. Rec. S8124 (Sens. Levin and Graham).

The district court's theory that Congress conspired with the Obama Administration to guarantee the lawfulness of past detentions is contradicted by the Administration's public opposition to § 1021. *See* SA-87-88. A November 2011 Statement of Administration Policy on the NDAA urged Congress to drop § 1021, arguing that it is not "necessary" and "poses some risk" of unintended consequences.[11] The President's

[11] Statement of Administrative Policy, National Defense Authorization Act (Nov. 17, 2011),

signing statement repeated these objections. Rather than collude with Congress to achieve some hidden purpose through § 1021, the Administration sought to defeat it. *See* 157 Cong. Rec. S7663 (Sen. Ayotte). And its opposition was understandable: by affirming the Administration's legal positions on detention authority, § 1021 was also an implicit criticism of the President's reluctance to exercise that authority. *See* 157 Cong. Rec. S7660 (Sen. McCain) (characterizing the Administration's detainee policy as "a total and abysmal failure").

Finally, the district court read far too much into § 1021's references to the "law of war." First, § 1021 does not "incorporate[]" or "embod[y] vague 'law of war' principles," SA-116, but merely utilizes the term "disposition under the law of war," which it defines to include "[d]etention under the law of war," trial by military commission, and transfer. NDAA § 1021(c). Neither reference to the "law of war" even purports to affect the scope of detention authority—i.e., who may be detained—but only the disposition of individuals already subject to detention under existing law. Second, detention for the duration of hostilities

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http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf.

is unquestionably authorized by the AUMF, whether or not it is assumed to "incorporate" the law of war. *Hamdi*, 542 U.S. at 519. Third, incorporation of the law of war would, if anything, serve to limit, not expand, the President's potential authority under the AUMF and Article II. That was, in fact, the view of the *Al-Bihani* panel, which rejected the proposition that "the war powers granted by the AUMF…*are limited* by the international laws of war." *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010) (emphasis added). The district court's interpretation of *Al-Bihani* as restricting detention authority is wrong. *See* SA-117-18 (characterizing *Al-Bihani* as "judicial resistance" to the Administration's asserted detention authority). Section 1021 is not "an attempt to solve legislatively the [law-of-war holding] in *Al-Bihani*," SA-118, not least because there was no problem to be solved.[12]

In this case, "the interpretive inquiry begins with the text and structure of the statute." *Alexander v. Sandoval*, 532 U.S. 275, 288 n.7

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[12] The D.C. Circuit subsequently described the *Al-Bihani* panel's law-of-war holding as dicta, and the issue remains open. *Al-Bihani v. Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010) (Sentelle, C.J., concurring in denial of rehearing en banc); *Hamdan v. United States*, No. 11-1257, 2012 WL 4874564, *8 n.8 (D.C. Cir. Oct. 16, 2012).

(2001). Both are plainly inconsistent with the district court's insistence that Congress conspired to do precisely the opposite of what the statutory text actually states.

B. The District Court's Pinched View of Detention Authority Under the AUMF Ignores Consistent Executive Practice and Case Law

The district court's assertion that the AUMF detention authority extends only to persons with "a direct involvement in the attacks of September 11, 2001," SA-121, and other *ad hoc* limitations, have absolutely no basis in law or practice. This is important inasmuch as the court concluded that the coverage of section 1021 differs from that of the AUMF.

First, even the spare text of the AUMF prescribes a far broader application. Its authorization of force against "those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided" the September 11 attacks cannot possibly be read as limited to persons who themselves participated in those attacks. Such a limitation—which would exclude al-Qaeda terrorists recruited after 2001 and members of al-Qaeda "franchises" in the Arabian Peninsula and elsewhere—would completely undermine the stated purpose of the

AUMF: "to prevent any *future* acts of international terrorism against the United States" by those entities responsible for the September 2001 attacks. *Cf. Hamdi*, 542 U.S. at 510 (AUMF authorized, *inter alia*, "a mission to subdue al Qaeda and quell the Taliban regime").

Instead, and more sensibly, the AUMF requires a nexus with those entities. Bradley & Goldsmith, *supra* n.4, at 2082. This requirement is both flexible and dynamic:

> Just as an individual can become part of a covered "organization" by joining it after the September 11 attacks…, so too can a group of individuals. While a terrorist organization that did not harbor al Qaeda or aid it in the September 11 attacks is not…covered by the AUMF, a terrorist organization that joins al Qaeda in its conflict with the United States, even after September 11, can be viewed as part of the "organization" against which Congress authorized force.

Id. at 2110 (citations omitted). In that manner, Congress authorized the President to *wage war* against terrorist entities, whose memberships and affiliations are constantly shifting, to prevent future attacks. By contrast, the district court's constricted interpretation is wholly unequal to that purpose, suited only to proving a crime, not preventing additional attacks.

Second, the courts have appropriately rejected so pinched a view of the AUMF. In a series of decisions, the D.C. Circuit has held that

"the AUMF authorizes the Executive to detain, at the least, any individual who is functionally part of al Qaeda," because that status satisfies the AUMF's nexus requirement. *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 1020) (citing cases); *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010) ("Once [a detainee is shown to be] part of al Qaeda…the requirements of the AUMF [are] satisfied"). Contrary to the district court, SA-121-22, there is no requirement that a detainee himself "aided the September 11 attacks." *Salahi v. Obama*, 625 F.3d 745, 747 (D.C. Cir. 2010). Contrary to the district court, SA-121, there is no requirement that a detainee be captured while "carrying arms." *Bensayah*, 610 F.3d at 720 (describing arrest of alleged terrorist plotter by Bosnian police on immigration charges); *Salahi*, 625 F.3d at 749-50 (detainee "performed computer activities with a goal of helping al-Qaida"). And contrary to the district court, SA-121, there is no requirement that a detainee be captured on any particular "field of battle"—a particularly inappropriate limitation for an authorization of force against terrorist entities that operate worldwide. *Bensayah*, 610 F.3d at 720 (detainee captured in Bosnia); *Salahi*, 625 F.3d at 750 (Mauritania). No other court has accepted such *ad hoc* limitations on the AUMF detention authority.

Third, the district court's claim that § 1021's inclusion of "associated forces" "adds significant scope" to the AUMF detention authority, SA-121, ignores precedent. The D.C. Circuit has repeatedly held that the AUMF authorizes detention based on membership in an "associated force" to al-Qaeda. "The statutes authorizing the use of force and detention…grant the government the power to craft a workable legal standard to identify individuals it can detain…." *Al-Bihani*, 590 F.3d at 872. Accordingly, the D.C. Circuit has upheld the detention of individuals who were part of "associated forces that are engaged in hostilities against the United States or its coalition partners." *Id.* at 870. This includes a member of a brigade fighting alongside the Taliban in Afghanistan, *id.* at 873; a member of Abu Zubaydah's militia, *Barhoumi v. Obama*, 609 F.3d 416, 423 (D.C. Cir. 2010); and a member of a Hezb-i-Islami Gulbuddin terror cell, *Khan v. Obama*, 655 F.3d 20, 21 (D.C. Cir. 2011). Without the flexibility to detain individuals who are part of associated forces, the United States would be utterly hobbled in waging the hostilities authorized by the AUMF.

Fourth, the district court's assertion that § 1021's "substantially supported" language goes beyond the AUMF detention authority, SA-

121, also ignores precedent. The D.C. Circuit has repeatedly held that the AUMF authorizes the detention of individuals who are not formal members of al-Qaeda or associated forces, based upon the extent of their support of those forces. "[T]he determination of whether an individual is 'part of' al-Qaida 'must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization.'" *Salahi*, 625 F.3d at 751-52 (quoting *Bensayah*, 601 F.3d at 725). Such actions might include "refer[ing] prospective jihadists" to the organization or "assist[ing] the organization with telecommunications projects." *Id.* at 752. In this way, a person "could properly be considered 'part of' al-Qaida even if he never formally received or executed any orders." *Id.* *See also Awad*, 608 F.3d at 11; *Uthman*, 637 F.3d at 403.

The D.C. Circuit has also held that "the Executive also may detain those who 'purposefully and materially support al Qaeda or Taliban forces in hostilities against U.S. Coalition partners.'" *Uthman*, 637 F.3d at 402 n.2 (quoting *Al-Bihani*, 590 F.3d at 872, and citing *Hatim v. Gates*, 632 F.3d 720, 721 (D.C. Cir. 2011)). As the *Al-Bihani* court explained, "the government's detention authority logically covers a catego-

ry of persons no narrower than is covered by its military commission authority," and the Government's military commission authority reaches "those who purposefully and materially support [forces associated with Al Qaeda or the Taliban] in hostilities against U.S. Coalition partners." 590 F.3d at 872. Such support includes, for example, "traditional food operations essential to a fighting force and the carrying of arms." *Id.* at 873. Although the *Al-Bihani* court, following *Hamdi's* instruction to proceed on a case-by-case basis, declined to identify the "outer bounds" of "substantial support," no one seriously contends that it provides authority to sweep up "the errant tourist, embedded journalist, or local aid worker." *Almerfedi v. Obama*, 654 F.3d 1, 7 (D.C. Cir. 2011) (quoting *Hamdi*, 542 U.S. at 534). Neither the executive nor Congress has ever even asserted such authority.[13]

In sum, § 1021 is an affirmation of executive practice under the AUMF, as reviewed and upheld by the courts with jurisdiction over the

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[13] *Al-Bihani* abrogated the district court decision that the court below claimed "rejected the broader iteration of detention authority" asserted by the executive. SA-113-14; *compare Hamlily v. Obama*, 616 F. Supp. 2d 63, 69 (D.D.C. 2009), *with Al-Bihani*, 590 F.3d at 872. The district court's claim that *Hamdi* also rejected the "broader interpretation" is incorrect. *See* SA-113.

habeas petitions of detainees held in Guantanamo Bay. As such, it embodies the case-by-case approach endorsed by the Supreme Court in *Hamdi* and is perfectly consistent with the AUMF detention authority exercised and upheld to date.

II. Section 1021 Is Constitutional

A. Section 1021 Is Supported by the War Power, as Informed by the Law of War

The United States Constitution confers on Congress the power "[t]o declare war," Art I, § 8, cl. 11, and Congress exercised that power in both the AUMF and § 1021. Congress's authority to enact § 1021, including its "associated forces" and "substantially supported" language, cannot be in doubt.

Section 1021, like the March 2009 Memorandum, is informed by the principles of the law of war that have traditionally guided exercise of the war power. *See Hamdi*, 542 U.S. at 518-19, 521; *Hamdan v. Rumsfeld*, 548 U.S. 557, 603-04 (2006). That law recognizes that "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war." *Hamdi*, 542 U.S. at 519. In § 1021, Congress has done no more than apply that principle in a context where combatants, though deadly as any soldier, are unlikely to be formal

members of a regular military force. To disallow that exercise of power would be to hold that the Constitution precludes successfully waging war on non-state entities. It assuredly does not. *See, e.g.*, Pub. L. 15-101, 3 Stat. 532, 532-33 (1819) (authorizing force against slavers); Pub. L. 15-77, 3 Stat. 510, 510-11 (1819) (pirates); Pub. L. 17-7, 3 Stat. 721 (1823) (same); 33 U.S.C. §§ 381-82 (same).

Further support is found in the law of co-belligerency. Under the law of war, "[a] co-belligerent state is a fully fledged belligerent fighting in association with one or more belligerent powers. One way that a state can become a co-belligerent is through systematic or significant violations of its duties under the law of neutrality." Bradley & Goldsmith, *supra* n.4, at 2112 (quotation marks omitted). "Terrorist organizations that act as agents of al Qaeda, participate with al Qaeda in acts of war against the United States, systematically provide military resources to al Qaeda, or serve as fundamental communication links in the war against the United States, and perhaps those that systematically permit their buildings and safehouses to be used by al Qaeda in the war against the United States," are al-Qaeda's co-belligerents and therefore equally America's enemies. *Id.* at 2113. *Cf.* 10 U.S.C.

§ 950t(26) (establishing wrongfully aiding "co-belligerents of the enemy" as an offense triable by military commission).

Similarly, while the law of war distinguishes between combatants and non-combatants, and generally limits targets to the former group, it also "extend[s] combatant status…to persons who take a 'direct' part in hostilities," including certain acts of direct support of combatants. Bradley & Goldsmith, *supra* n.4, at 2115. Again, this principle applies, in straightforward fashion, to unconventional war against non-state actors.

Finding support in the law of war, the detention of those who "substantially support" America's terrorist enemies and "associated forces" is unquestionably within Congress's power to authorize, and the President's power to use, military force.[14]

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[14] Amici do not, however, argue that such support is required. *See Hamdan*, 2012 WL 4874564, at *7 n.6 (Kavanaugh, J.) ("Congress's war powers under Article I are not defined or constrained by international law….").

B. Exercises of the Power To Declare War Are Not Subject to Vagueness or Overbreadth Analysis

While the courts may pass on the constitutionality of individual detentions in appropriate circumstances, legislative exercise of the war power, including the AUMF and § 1021, is never susceptible to vagueness analysis or facial challenge under the First Amendment. By holding otherwise, the district court clashed with centuries of constitutional practice, improperly intruding on powers reserved to Congress.

The exigencies of armed conflict require that authorizations of military force be stated in general terms. The 1941 declarations of war against Germany and Japan are each (like the AUMF) a single sentence and authorize the President "to employ the entire naval and military forces of the United States and the resources of the Government to carry on war…." Pub L. 77-328, 55 Stat. 795 (1941) (Japan); Pub L. 77-331, 55 Stat. 796 (1941) (Germany). Those declarations were consistent with constitutional practice dating back to the Nation's earliest military forays. *E.g.*, Pub. L. 7-4, 2 Stat 129, 129-30 (1802) (authorizing force against "Tripolitan Cruisers"); Pub. L. 13-110, 3 Stat. 230 (1815) ("Algerine cruisers"); Pub. L. 12-102, 2 Stat. 755 (1812) (declaring war against the United Kingdom). The consistent practice of assigning to the Presi-

dent the choice of the means of waging war—carried through to this day in the AUMF—acknowledges that "the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." *The Federalist No. 74* (Alexander Hamilton).

Such an assignment cannot be, as the district court held, "impermissibly vague under the Fifth Amendment." SA-186. A force authorization structures relationships between the branches, activating or affirming the full extent of the President's war powers. *Cf. The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862). Only "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required," *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012), and § 1021, like the AUMF, regulates no person and neither forbids nor requires any conduct. *Hamdi*, 542 U.S. at 518 (Detention "is devoid of all penal character."). Accordingly, a force authorization is not subject, or even susceptible, to vagueness analysis.

Similarly, exercises of the power to declare war are not subject to facial challenge under the First Amendment. Section 1021, just like the AUMF, neither prohibits nor restricts any speech or associative activities. Instead, as described above, it affirms one aspect of the war power

originally authorized by the AUMF. Specific applications of that power may be subject to as-applied challenge. *E.g., Boumediene v. Bush,* 553 U.S. 723 (2008)*; Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121-27 (1866). And statutes regulating individual conduct, even when in the interest of national security or in the furtherance of exercising war power, may be subject to facial challenge. *E.g.*, *United States v. Robel*, 389 U.S. 258, 263-64 (1967) (striking down statute prohibiting Communist Party members from defense industry). But § 1021 is neither, and no precedent supports subjecting an authorization of force (much less, as here, only an aspect of force) to facial First Amendment scrutiny.

The district court's constitutional holdings, if let stand, would preclude Congress from exercising its power to authorize the use of military force in any effective fashion. Indeed, no prior force authorization or declaration of war would pass muster. To avoid vagueness and overbreadth claims, force authorizations would have to be drafted with the same careful, prescriptive detail as criminal statutes, specifying each instance in which the President may act to wage war—and potentially intruding on the President's power as Commander-in-Chief. But that requirement may be confidently rejected, on the basis of longstanding

constitutional practice and the fundamental principle that "[t]he war power of the national government is the power to wage war successfully." *Lichter v. United States*, 334 U.S. 742, 767 n.9 (1948).

C. All Three Branches Have Approved the Detention Authority Expressed in § 1021

The district court's wholesale rejection of the detention authority affirmed by § 1021 disregards and disrespects the opinions of all three branches of the Federal Government, which have unanimously upheld its constitutionality.

In the calculus of Justice Jackson's *Youngstown* opinion, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube Co.*, 343 U.S. at 635-36 (Jackson, J., concurring). Section 1021 enjoys *at least* this degree of support, being an express authorization of an executive policy that was, in addition, expressly approved by the courts. *Al-Bihani*, 590 F.3d at 872. As such, its constitutionality is supported by "the strongest of presumptions and the widest latitude of judicial interpretation." *Youngstown*, 343 U.S. at 637.

For that reason, the district court should not have disregarded the constitutional judgment of Congress, the executive, and the United States Court of Appeals for the District of Columbia Circuit or been so quick to assume that all three had conspired to "fix" prior violations of law. SA-87, -121. The considered opinions of co-equal branches and sister courts are entitled to far greater respect.

III. The Constitutional Separation of Powers Precludes Adjudication of the Plaintiffs' Claims

That the decision below implicates so many justiciability doctrines reveals the central error of this litigation: the constitutional separation of powers precludes the judicial branch from passing judgment on Congress's exercise of its power to declare war. Barred by precedent from directly challenging the authorization of military force, the plaintiffs' attempted to circumvent that limitation by challenging "a fundamental incident" of the use of military force, detention. *See Hamdi*, 542 U.S. at 519. That claim, too, is barred.

First, the plaintiffs lack standing. Aside from the fact that § 1021 is not the cause of the plaintiffs' alleged injuries, *supra* § I.B, those injuries are necessarily "conjectural" and therefore insufficient to support standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

As described above, § 1021 does not operate directly on individuals, establishing no prohibitions or requirements for their conduct. Instead, detention requires affirmative, discretionary action by the executive branch. Unless and until the executive branch undertakes, or at least threatens, such action, the plaintiffs' alleged injuries are necessarily conjectural. *See Brito v. Mukasey*, 521 F.3d 160, 168 (2d Cir. 2008) (no standing where the plaintiff "alleges only a potential for [an] agency's overreaching that has not yet occurred").

Second, and for similar reasons, the plaintiffs' claims are not ripe. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotations omitted). That perfectly characterizes a future decision to detain that is completely discretionary in the executive and, if undertaken, would be premised on a record that does not and cannot exist at this time. In the absence of a "concrete fact situation"—that is, in the absence of the executive's determination to detain a particular individual based on the facts at his disposal and his discretionary judgment—the plaintiffs nec-

essarily seek "a series of advisory opinions." *Zemel v. Rusk*, 381 U.S. 1, 20 (1965).

Third, even if the plaintiffs ever had standing, their claims are moot. The government has stated, in the clearest possible fashion, that the activities alleged by plaintiffs are not within the ambit of § 1021 or the AUMF detention authority because the plaintiffs lack the requisite nexus with al-Qaeda. *See* SA-29-30. Because detention is a discretionary power of the executive, this determination is conclusive. *See Sossamon v. Texas*, 560 F.3d 316, 325 (5th Cir. 2009), *aff'd,* 131 S.Ct. 1651 (2011); *Sussman v. Crawford*, 548 F.3d 195, 199 (2d Cir. 2008).

Fourth, and most fundamentally, the plaintiffs' claims are not suitable for judicial resolution. This Court has long and consistently recognized that the political question doctrine bars challenges to the sufficiency and "constitutional propriety" of congressional authorization of military activity, on the basis that such issues are matters of "policy, committed to the discretion of the Congress and outside the power and competency of the judiciary, because there are no intelligible and objec-

tively manageable standards by which to judge such actions." *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971).[15]

A necessary incident to war can be no more subject to judicial invalidation than war itself. To allow otherwise would be to render the power to declare war impotent and its assignment to Congress a nullity.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

Respectfully submitted,

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[15] *See also DeCosta v. Laird*, 471 F.2d 1146, 1147 (2d Cir. 1973); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309 (2d Cir. 1973).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because it contains 6,882 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced type-face using Microsoft Word 2010 in 14-point Century font.

Dated: November 13, 2012

/s/ David B. Rivkin, Jr.
David B. Rivkin, Jr.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of *Amici Curiae* and Addendum was filed electronically with the Court by using the CM/ECF system on the 13th day of November 2012. Participants in the case who are registered CM/ECF users will be served through the CM/ECF system. Two copies of the foregoing brief will also be served on all parties by U.S. mail, first-class, postage-prepaid.

Dated: November 13, 2012

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