Nos. 12-3176, 12-3644

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHRISTOPHER HEDGES, Daniel Ellsberg, Jennifer Bolen, Noam Chomsky, Alexa O'Brien, US Day of Rage, Kai Wargalla, Hon. Birgitta Jonsdottir M.P.,

Plaintiffs-Appellees,

v.

BARACK OBAMA, individually and as representative of the United States of America, Leon Panetta, individually and in his capacity as the executive and representative of the Department of Defense,

Defendants-Appellants.

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

BRIEF OF AMICUS CURIAE THE RUTHERFORD INSTITUTE IN SUPPORT OF APPELLEES

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December 17, 2012

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amicus curiae* The Rutherford Institute is a nonprofit, non-stock corporation. There are no parent corporations and no publicly-held corporation which owns 10% or more of the stock in the corporation.

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IDENTITY AND INTERESTS OF AMICUS CURIAE

Since its founding over thirty years ago, The Rutherford Institute has emerged as one of the nation's leading advocates of civil liberties and human rights, litigating in the courts and educating the public on a wide variety of issues affecting individual freedom in the United States and around the world. The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms. *Amicus curiae* is interested in this case because it involves fundamental rights of due process and free speech.

All parties have consented to the filing of this Brief. No counsel for any party authored this Brief in whole or in part or contributed money intended to fund preparation or submission of this Brief, nor did any other person (other than *amicus curiae*, its members or counsel) contribute money intended to fund preparation or submission of this Brief.

INTRODUCTION

The National Defense Authorization Act, Pub. L. No. 112-81, 125 Stat. 1298 (Dec. 31, 2011) (hereinafter "NDAA"), if upheld, presents us with a grave constitutional crisis, for "[t]he very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive." *Hamdi v. Rumsfeld*, 542 U.S. 507, 555-56 (2004) (Scalia, J., dissenting). If the District Court is reversed, we face the potential of indefinite detention of U.S. citizens for exercising their fundamental First Amendment rights.[1]

The NDAA, § 1021, by its terms, authorizes the indefinite detention of any person who the Government deems to be a part of or to have "substantially supported" al-Qaeda, the Taliban, or "associated forces." But these terms are

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[1] In Appellants' Brief, they argue that U.S. citizens are not be subject to detention on U.S. soil because § 1021(e) provides that "[n]othing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens . . . who are captured or arrested in the United States." Appellants' Br., at 23-24. This position cannot be squared away with the fact that the Government could not initially say whether the NDAA provision would apply to Appellees -- several who are U.S. citizens living in the United States. That the Government has now stated that Appellees' conduct would not run afoul of the statute is of no consequence. As the District Court correctly noted, "[a] number of courts have found that a commitment [from the Government] that a statute will not be enforced against a particular plaintiff does not eliminate standing [and turn a facially invalid statute constitutional]." *Hedges v. Obama*, --- F. Supp. 2d ---, 2012 WL 3999839, at *25 (S.D.N.Y. Sept. 12, 2012) (citations omitted).

nowhere defined in the statute, and the Government itself cannot describe who is subject to the NDAA and for what kind of activity. Nor does the NDAA provide a scienter requirement, such that any person may be subject to "lawful" detention for "aiding the enemy forces" even if the support was given unintentionally. The statute's nebulous and sweeping terms thus permit detention for engaging in core political expression and speech.

Detaining citizenry without trial for expressing political views is what one would expect from a totalitarian state -- not a nation that has endured for more than two hundred years because of its commitment to democratic ideals. Accordingly, the decision below should be affirmed.

ARGUMENT

I. The NDAA Is Unconstitutionally Overly Broad and Vague

In December 2011, the President signed the NDAA into law. Section 1021 of that statute, titled "Affirmation of Authority of the Armed Forces of the United States to Detain Covered Persons Pursuant to the Authorization for Use of Military Force," permits the President to use "all necessary and appropriate force" to indefinitely detain:

> A person who was 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.

(emphasis added). The District Court accurately declared that "[t]he statute's vagueness falls short of what due process requires." *Hedges v. Obama*, --- F. Supp. 2d ---, 2012 WL 3999839, at *2 (S.D.N.Y. Sept. 12, 2012).

In considering a facial challenge to the constitutionality of a statute as overbroad and vague in the First Amendment context, this Court must first "determine whether the enactment reaches a substantial amount of constitutionality protected conduct." *Dorman v. Satti*, 862 F.2d 432, 436 (2d Cir. 1988) (citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982)) (internal quotation marks omitted). The overbreadth must be substantial and "the purported vagueness must be such that the statute is incapable of giving the person of ordinary intelligence a reasonable opportunity to know what is prohibited by failing to provide explicit standards ensuring that it is not arbitrarily enforced." *Id.* (citations, alterations, and internal quotation marks omitted). Here, § 1021 is facially unconstitutional for this precise reason: the terms of the statute do not provide adequate notice to persons as to who and what type of conduct is covered. The statute is so broad and unclear that it threatens individuals with indefinite detention for political speech and protest activities that stand at the core of our democratic society.

The District Court's decision correctly identified several features of the NDAA which undermine the most basic due process guarantees of the U.S. Constitution: (1) provisions that threaten indefinite detainment and imprisonment for a potentially broad range of speech and conduct without notice to what subjects a person to violation of its terms, (2) the lack of scienter in the provision which would allow imprisonment without trial for individuals who actually believed their conduct to be entirely innocent and legal; and (3) the wholesale elimination of any right to trial.

First, § 1021(b)(2) of the NDAA is fatally vague. The District Court aptly explained, "The Constitution requires specificity -- and that specificity is absent from § 1021(b)(2). . . . [Section] 1021(b)(2) is facially unconstitutional: it impermissibly impinges on guaranteed First Amendment rights and lacks sufficient definitional structure and protections to meet the requirements of due process." *Hedges*, 2012 WL 3999839, at *2, 5.

Under the broad and indefinite provisions of the NDAA, freedom of press and speech rights are necessarily curtailed. Engaging in the fundamental freedoms protected by the First Amendment could subject an individual to indefinite military detention under § 1021(b)(2). The root of this danger is that no one knows what are the outer limits of this statutory provision. *See, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("Vague laws may trap the innocent by not

providing fair warning . . . [and] impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.") (citations omitted).

Indeed, as written, § 1021(b)(2) allows detention of anyone suspected of providing "substantial support" not only to groups engaged in hostilities against the United States but "associated groups," or who has committed an undefined "belligerent act." But nobody -- including the Government arguing in favor of this provision -- can define the terms "belligerent act," "substantial support" and "associated groups" with any precision. *See, e.g.*, *Hedges v. Obama*, No. 12 Civ. 331 (KBF), 2012 WL 1721124, at *23 (S.D.N.Y. May 16, 2012) (noting that "even accepting the Government's definition of 'associated forces,' that does not resolve plaintiffs' concerns since they each testified to activities with or involving individuals or organizations that are 'associated forces' as defined by the Government"); *id.* (noting that the Government was "unable to define precisely what 'direct' or 'substantial' 'support' means"). The Government itself was initially "unable to state that plaintiffs' [activist and journalistic] conduct fell outside § 1021." *Id.* at *24. This lack of clarity potentially subjects activists engaged in political discourse and expression and even legitimate political

opponents of the Government to the prospect of detention, and raises well-founded fears about the erosion of our democratic society's core rights and values.

Second, § 1021 contains no scienter requirement. The Supreme Court in *City of Chicago v. Morales*, 527 U.S. 41 (1999), previously invalidated a similar criminal statute because it was vague and lacked a scienter requirement. *Compare Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719-22 (2010) (statute at issue was constitutional, in part, because it included a knowledge requirement). A person covered under the statute here similarly does not have to know or intend to commit a belligerent act or to support an "enemy force" to be subject to indefinite detention without due process guarantees to a trial. Someone with no awareness or appreciation that his or her conduct was wrongful or in violation of law could thus be imprisoned indefinitely without trial.

Third, the District Court correctly recognized that when one's right to trial is eliminated and only habeas review is available, such as would be the case for those detained under § 1021(b)(2), the core constitutional rights of U.S. citizens for criminal matters are eliminated. *Hedges*, 2012 WL 3999839, at *31. Section 1021(b)(2) essentially eliminates all elements of the constitutionally required due process, leaving only the writ of habeas corpus as a mechanism for challenging unlawful detainment. This standard does not satisfy the constitutional guarantees of the Fifth Amendment, because habeas petitions take years to resolve and are

reviewed under a "preponderance of the evidence" standard. *Id.* at *31, 42. Thus, at its core, the NDAA imposes criminal penalties without the requirement of proof that the alleged conduct is unlawful "beyond a reasonable doubt."

By eliminating these fundamental aspects of due process and only allowing for post-detention habeas review, any U.S. citizen accused of violating § 1021(2)(b) is, by definition, denied his or her constitutional rights in a criminal proceeding. This failure to afford a trial -- let alone a speedy trial guaranteed by the Sixth Amendment -- combined with the indefiniteness of the provision results in a systematic method for detaining those whom the Government finds objectionable. Indeed, the inability of a covered person to challenge his or her detainment but for the habeas process makes the vagueness of the statute all the more constitutionally infirm. The lack of due process to appeal to a judicial body until years into one's detention, along with uncertainty as to who and what acts fall under the statute, creates very real fear that one may be indefinitely detained for exercising protected speech and association.

Because of these shortcomings, the NDAA is facially unconstitutional.

A. As Written, the NDAA Permits Indefinite Detention Without Any Limits

The NDAA, § 1021 is breathtakingly broad and ill-defined. This lack of definition for crucial terms in the NDAA creates serious confusion as to what conduct may subject an individual to indefinite detention -- and could potentially

justify imprisonment without trial of those who are exercising basic constitutional rights to free expression:

"Associated forces": The statute does not define what "associated forces" it prohibits individuals from supporting. This raises the danger that the Government may simply dictate, without evidence or process, what individuals or groups it labels "terrorists" or "in league with the enemy." For example, Appellee Christopher Hedges has been a foreign correspondent for twenty years; won the Pulitzer Prize for his journalistic works; and routinely publishes articles in prominent newspapers and magazines like the New York Times, the Christian Science Monitor, the Dallas Morning News, Harper's Magazine, and the New York Review of Books. *Hedges*, 2012 WL 3999839, at *6. He is, by all accounts, a respected and accomplished journalist. But his work has taken him to places like the Middle East, and he has interviewed high-profile persons including al-Qaeda terrorists. *Id.* at *6-7. There is no evidence, however, that Appellee Hedges is a terrorist by any lay definition.

Nevertheless, as Appellees reference in their Brief, "Hedges himself testified that though he was accredited to the New York Times, an organization most would regard as an 'independent' journalistic outfit, he was placed by the Transportation Safety Administration (TSA) on a terrorist watch list and detained at airports for nothing other than performing such 'independent' journalistic work." Appellees'

Br., at 35-36. Although by relative standards, Appellee Hedges' airport detentions were short, nothing stopped the Government from detaining him for hours, days, weeks or years. For the sole reason that he had in the past exercised his First Amendment right to speech and association, he was watched by the Government and subject to detention. And if the Government considers Appellee Hedges to be "associated" with enemy forces, the terms of the statute could be read to justify imprisonment of his employer who "support" his journalistic work, or even family members or spouses.

"Substantially supported": The statute likewise provides no definition of "substantially supported." Unlike the definition of "material support" in the Antiterrorism and Effective Death Penalty Act, which lists specific forms of prohibited assistance such as giving money, arms, or training to terrorist groups, the broad term "substantial support" in the NDAA could be read to encompass an enormous range -- not only of conduct but of political speech and journalism.

For example, would a journalist interviewing an al-Qaeda member be "substantially supporting" al-Qaeda by giving that terrorist a media voice? What if the journalist were to ask a question or to make a comment that the Government deemed sympathetic to the interviewee? The terms of the statute could be read to penalize such press activities with indefinite detention without trial. This is no far-fetched concern: Appellee-activist Kai Wargalla testified that in organizing panel

discussions on foreign policy, she would likely "not invite Hamas to participate because [she] would not want to put [herself] in danger of prosecution under § 1021." *Hedges*, 2012 WL 1721124, at *10.

Even a blogger, critical of U.S. foreign policy, who writes that American forces should abandon fighting in Afghanistan could, under the sweeping terms of the statute, be labeled as someone "supporting" the enemy forces. During the Iraq war, for example, it was not uncommon for those who opposed the war or sought withdrawal from hostilities to be accused of emboldening or supporting terrorists.[2] Particularly without any scienter requirement, the statute would by its terms cover such basic political expression. Could someone protesting the detention of a terrorist held without trial, or even assisting in the legal defense effort of such a detainee, be herself detained as providing "substantial support" to the enemy? The terms of the statute do not answer such questions.

"Belligerent act": Under the statute, "belligerent act" is not defined or limited to military conduct, terroristic acts, or other violence done in support of

[2] *See, e.g.*, Adam Liptak, *Supreme Court to Consider the Arrest of a Cheney Critic*, N.Y. Times (Dec. 5, 2011), *available at* http://www.nytimes.com/2011/12/06/us/supreme-court-agrees-to-hear-reichle-v-howards.html?_r=0 (discussing Steven Howard's 2006 arrest for approaching Vice President Cheney and calling the Bush administration's policies in Iraq "disgusting"); Michelle York, *Trial of 4 War Protesters Upstate Ends with a Mixed Verdict*, N.Y. Times (Sept. 27, 2005), *available at* http://www.nytimes.com/2005/09/27/nyregion/27protest.html (discussing trial of antiwar activists who threw blood at a military recruiting station, with prosecutor comparing defendants to Timothy McVeigh).

enemy forces. Indeed, depending on what dictionary is used, "belligerent" can mean something as mild as being "inclined to or exhibiting assertiveness . . . ." Merriam Webster Online Dictionary. *See also* Dictionary.com ("Belligerent: marked by readiness to fight or argue; aggressive."); American Heritage Online Dictionary ("Belligerent: inclined or eager to fight, hostile or aggressive."). There is accordingly nothing under the statute that prevents the indefinite detention of activists like Appellee Alexa O'Brien, who has written articles criticizing the Government's handling of detainees at Guantanamo Bay. Or perhaps it would include persons like Appellee Wargalla, who organized Occupy London. Occupy London describes itself as "part of a global social movement . . . [aimed at fighting] for a sustainable economy . . . ."[3] The organization, however, has also been identified by the London Police in its "terrorism and extremism" update. *Hedges*, 2012 WL 1721124, at *10.

Only highlighting the uncertainty in the statutory provisions, the Government itself was unable to state definitively whether Appellees' First Amendment activities would run afoul of the NDAA and subject Appellees to indefinite detention. *Hedges*, 2012 WL 1721124, at *24. Even though the Government knew Appellees' positions and conduct in advance of the preliminary

[3] Occupy London, *About Occupy London*, http://occupylondon.org.uk/about/about-occupy-london-2 (last visited Dec. 14, 2012).

injunction hearing, when asked about the NDAA's scope, it responded, "I can't make specific representations as to particular plaintiffs. I can't give particular people a promise of anything." *Id.* at *14.

If the Government cannot even identify who and what type of conduct is subject to § 1021, then how can the people subject to such detainment possibly know this information?

B. Permitting Indefinite Detention for Speech and Political Activity Is Contrary to Our Country's Core Values and Is Reminiscent of Totalitarian Regimes

Allowing indefinite detention of individuals for political speech -- which, as described above, this statute plainly allows -- is fundamentally at odds with our free society. Indeed, leaving the NDAA provision unchecked represents a dangerous step towards history repeating itself. Indefinite detention for simply exercising one's freedom of speech and the elimination of procedures for judicial review of detentions are not new ideas, but were the hallmarks of some of the most notorious totalitarian regimes in history.

For example, Maoist China relied on concepts similar to NDAA § 1021(b)(2) to detain citizens indefinitely -- even during "peacetime." There was a paper façade of law, which did formally allow the "right of appeal," but exercising it was treated as an offense, "a demand for further punishment," which may result

in one's sentence being doubled, for daring to doubt the wisdom of "the people."[4] Millions were arrested without trial, and penal colonies were established in the frozen wastelands of Heilongjiang and in sparsely populated lands in the west: up to half of the prisoners dispatched to these regions perished.[5] Yet charges were rarely specified. Victims were not actually sentenced, so there was no fixed term for their detention, despite the fact that these victims had not been formally stripped of their civil rights.[6]

Similarly, after the Bolsheviks seized control of the Russian government, the new regime institutionalized the notion of the "enemy of the people," which in practice included anyone whom the Communist Party deemed a threat. In other words, anyone who provided "substantial support" to "associated groups," known as "undesirables," were deemed an "enemy of the people." Vladimir Lenin signed a decree that "all leaders of the Constitutional Democratic Party, a party filled with enemies of the people, are hereby to be considered outlaws, and are to be arrested immediately and brought before a revolutionary court."[7] While waiting for the

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[4] Jung Chang & Jon Halliday, *Mao: The Unknown Story* 319 (Alfred A. Knopf ed., 2005).

[5] Jasper Becker, *Hungry Ghosts: Mao's Secret Famine* 103 (Holt Paperbacks ed., 1998).

[6] Stéphane Courtois et al., *The Black Book of Communism: Crimes, Terror, Repression* 500 (Mark Kramer trans., Jonathan Murphy ed., 1999).

[7] *Id.*

new penal code to be drawn up, judges were granted tremendous latitude to assess the validity of existing legislation "in accordance with revolutionary order and legality,"[8] a notion so *vague* that it encouraged all sorts of abuses.

Indefinite detention was likewise a central feature of the Nazi regime. In his opening statement at the Nuremberg Trials, chief U.S. prosecutor Robert Jackson highlighted how the Nazi government perverted the rule of law: "Secret arrest and indefinite detention, without charges, without evidence, without hearing, without counsel, became the method of inflicting inhuman punishment on any whom the Nazi police suspected or disliked. No court could issue an injunction, or writ of habeas corpus, or certiorari."[9]

The NDAA raises the specter of a government that, like these horrific regimes, can round up innocent people and incarcerate them for life without a trial -- leaving the Due Process Clause of the Constitution utterly meaningless. A free society simply is not possible if the Government circumvents long-established, cherished rights and guarantees, and recognizes no limits on its power.

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8 *Id.*

9 Robert H. Jackson, Chief of Counsel for the United States, Opening Statement Before the International Military Tribunal (Nov. 21, 1945), *available at* http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/.

CONCLUSION

For the aforementioned reasons, *amicus curiae* respectfully requests that this Court affirm the decision of the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 3,411 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This Brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this Brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in Times New Roman 14-point font.

/s/ Anand Agneshwar
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CERTIFICATE OF SERVICE

I certify that on December 17, 2012, I caused the foregoing Brief of *Amicus Curiae* The Rutherford Institute in Support of Appellees with the Clerk of Court to be electronically filed via the Court's CM/ECF System; all of the parties listed on the attorney service preference report have been served via the Court's CM/ECF system.

I further certify that on December 17, 2012, I caused six (6) copies of the foregoing Brief of *Amicus Curiae* to be delivered via Federal Express to the Clerk of the United States Court of Appeals for the Second Circuit.

/s/ Anand Agneshwar
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