No. 13-758

In the Supreme Court of the United States

CHRISTOPHER HEDGES, ET AL., PETITIONERS

v.

BARACK H. OBAMA, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners have standing to challenge the constitutionality of Section 1021(b)(2) of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (10 U.S.C. 801 note).

PARTIES TO THE PROCEEDING

Petitioners are Christopher Hedges, Daniel Ellsberg, Jennifer Bolen, Noam Chomsky, Alexa O'Brien, U.S. Day of Rage, Kai Wargalla, and Hon. Birgitta Jónsdóttir, M.P.

Respondents are Barack Obama, individually and as a representative of the United States of America, and Leon Panetta, individually and as a representative of the Department of Defense.[*] John McCain, John Boehner, Harry Reid, Nancy Pelosi, Mitch McConnell, and Eric Cantor, as representatives of the United States of America, were defendants in the district court but were not parties in the court of appeals, as the caption of that decision indicates. See *Hedges* v. *Obama*, 724 F.3d 170, 170 (2d Cir. 2013). Contrary to the petition (at iii), under Rule 12.6 of the Rules of this Court, those persons are not parties to this proceeding.

[*] The current Secretary of Defense is Chuck Hagel, who should automatically be substituted for former Secretary Panetta with respect to petitioners' claim against Secretary Panetta in his official capacity. See Sup. Ct. R. 35.3.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-75a) is reported at 724 F.3d 170. The order of the district court granting a permanent injunction (Pet. App. 76a-183a) is reported at 890 F. Supp. 2d 424. Two prior orders of the district court, the first granting a preliminary injunction (Pet. App. 192a-258a) and the second clarifying the first order (Pet. App. 184a-191a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2013. On October 3, 2013, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including December 16, 2013, and the petition was filed on that date. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In response to the attacks of September 11, 2001, Congress passed the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). The AUMF authorizes "the President * * * 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." AUMF § 2(a), 115 Stat. 224.

The President has exercised the authority granted by the AUMF to order United States armed forces to fight both al-Qaeda and the Taliban regime that harbored al-Qaeda in Afghanistan, as well as forces associated with them. The armed conflict with al-Qaeda, the Taliban, and associated forces remains ongoing in Afghanistan and elsewhere abroad and has resulted in the capture and detention of hundreds of individuals under the AUMF.

Interpreting the AUMF in response to a challenge to the detention of an American citizen, five Members of this Court recognized in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), that the "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." *Id.* at 518 (opinion of O'Connor, J.); accord *id.* at 587 (Thomas, J., dissenting); see *Boumediene* v. *Bush*, 553 U.S. 723, 733 (2008) (noting that five Justices accepted that aspect of

Hamdi). The plurality opinion in *Hamdi* further noted that "[t]he legal category of [detainable] enemy combatant has not been elaborated upon in great detail," but would be further defined in subsequent cases. 542 U.S. at 522 n.1; see *id.* at 584-586, 589, 592 (Thomas, J., dissenting) (Court owes deference to Executive's determination of detainability).

b. On March 13, 2009, the government submitted its definition of detainable individuals under the AUMF to the United States District Court for the District of Columbia in the ongoing habeas corpus litigation brought by detainees held at Guantánamo Bay, Cuba. See Memorandum Regarding Government Detention Authority (Mar. 13, 2009) (March 2009 Memorandum).[1] That definition, which the government explained was "informed by principles of the laws of war," includes

> 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 Memorandum 1-2.[2] The Executive has relied on the March 2009 interpretation of the AUMF

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[1] www.justice.gov/opa/documents/memo-re-det-auth.pdf.

[2] The March 2009 interpretation refined a prior interpretation issued in 2004, which referred to a person "supporting" rather than "substantially support[ing]" al-Qaeda, the Taliban, or associated forces, and did not expressly invoke the laws of war. Pet. App. 13a-14a; see *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 570 n.1 (2006).

in the habeas litigation brought by Guantánamo detainees, and the courts have accepted and approved that interpretation, including the concepts of "substantial support"[3] and "associated forces."[4]

c. In 2011, Congress enacted the National Defense Authorization Act for Fiscal Year 2012 (NDAA), Pub. L. No. 112-81, 125 Stat. 1298 (10 U.S.C. 801 note). Section 1021(a) of the NDAA expressly "affirms that the authority of the President" under the AUMF "includes the authority for the Armed Forces * * * to detain covered persons * * * under the law of war." 125 Stat. 1562. In language closely tracking the government's March 2009 Memorandum, Section 1021(b)(2) defines "covered person[s]" to include:

> 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.

Ibid.

Section 1021 also contains two provisos. First, subsection (d) states 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 Mili-

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[3] See, *e.g.*, *Ali* v. *Obama*, 736 F.3d 542, 544 n.1 (D.C. Cir. 2013); *Hamdan* v. *United States*, 696 F.3d 1238, 1240 (D.C. Cir. 2012); *Al-Bihani* v. *Obama*, 590 F.3d 866, 872-874 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1814 (2011).

[4] See, *e.g.*, *Ali*, 736 F.3d at 544; *Khan* v. *Obama*, 655 F.3d 20, 32-33 (D.C. Cir. 2011); *Barhoumi* v. *Obama*, 609 F.3d 416, 423 (D.C. Cir. 2010).

tary Force." 125 Stat. 1562. Second, subsection (e) states that "[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." *Ibid.*

2. Petitioners are journalists and other individuals who filed this suit against the President, the Secretary of Defense, and certain Members of Congress in the United States District Court for the Southern District of New York to obtain a declaratory judgment that Section 1021(b)(2) violates the First and Fifth Amendments and to enjoin the President's exercise of detention authority under that section. See Pet. App. 185a. Their challenge, however, does not encompass the President's exercise of authority under the AUMF. See *ibid.* (explaining that "the plaintiffs sought relief only as to [Section 1021(b)(2)]"); see also *id.* at 3a, 78a, 181a. They sought a preliminary injunction.

With respect to Article III standing, petitioners allege that they "hav[e] an actual and reasonable fear that their activities will subject them to indefinite military detention pursuant to § 1021(b)(2)." Pet. App. 78a. At a hearing on their motion for a preliminary injunction, petitioner Hedges, a U.S. citizen, testified that he is a journalist who has "interview[ed] al-Qaeda members who were later detained" and that some of "[h]is works have appeared on Islamic and jihadist websites." *Id.* at 90a-94a. Hedges stated that he feared detention under Section 1021(b)(2) because he does not understand what conduct it covers and believes that his journalistic activities may lead to his

military detention by the United States. *Id.* at 93a-94a.[5]

Petitioner O'Brien, also a U.S. citizen, testified that she founded a group called U.S. Day of Rage, which focuses on campaign-finance reform, and that, although the organization has no connection to terrorism, a private security firm once attempted to link it to Islamic radicals. Pet. App. 94a-99a, 211a. She also testified that she operates a journalistic website called WL Central, for which she has covered the release of classified government documents by the WikiLeaks website and published articles based on interviews with former Guantánamo detainees. *Id.* at 94a-95a. O'Brien stated that because she does not understand what Section 1021(b)(2) covers, she has withheld pub-

[5] The petition states, without citation, that Hedges testified that "he has been detained by the U.S. military in Saudi Arabia for his reporting activities." Pet. 4. The testimony to which petitioners appear to refer did not concern detention under the 2001 AUMF. Hedges testified in the district court that during the 1991 Gulf War he was taken into custody for a few hours by the U.S. military for violating rules requiring journalists to adhere to a press-pool system and to have an escort in certain areas, and he acknowledged that all journalists discovered outside the press-pool system were treated similarly, regardless of the content of their reporting. C.A. J.A. 123, 128-129. He also testified that the Gulf War incident "was the only time that [he had] been detained by the U.S. military." *Id.* at 129. The petition also states that Hedges was "detained at U.S. airports for [his reporting activities]." Pet. 4. Hedges testified that on one occasion, after a one-hour wait following his arrival in the United States on an international flight shortly after September 11, 2001, he overheard an immigration supervisor say "he's on a watch." C.A. J.A. 123. That testimony does not indicate that the delay was connected to Hedges's expressive activities.

lication of several articles out of fear of military detention. *Id.* at 96a-97a.[6]

Two non-U.S.-citizen petitioners also asserted that they fear detention under Section 1021(b)(2). Petitioner Wargalla, a citizen of Germany who resides in Great Britain, testified that she is involved with a group called Revolution Truth, which advocates on behalf of WikiLeaks; she also stated that she was involved in the Occupy London protests in 2011 and that her fears of detention have impeded her activism. Pet. App. 53a, 99a-101a; C.A. J.A. 28, 89. Petitioner Jónsdóttir, a citizen of Iceland and a member of the Icelandic parliament, testified that she too is associated with WikiLeaks, that her communications were once subpoenaed in connection with a U.S. criminal investigation related to WikiLeaks, and that accordingly she fears detention under Section 1021(b)(2) and will not travel to the United States. Pet. App. 52a-53a, 101a-102a.

3. a. The district court granted petitioners' motion for "a preliminary injunction * * * enjoining enforcement of Section 1021(b)(2)." Pet. App. 184a-185a. The court concluded that petitioners had established Article III standing based on their "realistic fear that [their] activities will subject [them] to detention under § 1021." *Id.* at 227a-236a. The court then determined

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[6] The petition states that the district court found that O'Brien's advocacy and journalism led to her organization's placement on a government "terrorist watch list." Pet. 4-5. O'Brien's testimony stated that an unnamed alleged federal employee told her that he had seen a government document linking O'Brien's organization to Anonymous, a cyberterrorist group; there is no reference in the testimony or in the district court's findings to a "terrorist watch list." See Pet. App. 212a-213a; C.A. J.A. 89, 91-92.

that petitioners were likely to succeed on the merits of their challenge because the statute failed strict scrutiny under the First Amendment. *Id.* at 237a-243a. The court found that an injunction was appropriate because while petitioners faced the irreparable harm of detention under Section 1021(b)(2), an injunction would have "absolutely no impact on any Governmental activities at all," given that the NDAA was merely a reaffirmation of the AUMF, which was not being challenged. *Id.* at 251a-256a. The district court enjoined the President's enforcement of Section 1021(b)(2) as to any persons, not only the named plaintiffs. See *id.* at 185a-190a.

b. The district court later issued a permanent injunction barring the President and the Secretary of Defense from invoking any detention authority under Section 1021(b)(2). In opposing petitioners' motion for a permanent injunction, the government had expressly stated that the statute would not authorize detention based on petitioners' stated activities, because "individuals who engage in the independent journalistic activities or independent public advocacy described in plaintiffs' affidavits and testimony, without more, are not subject to law of war detention as affirmed by section 1021(a)-(c), solely on the basis of such independent journalistic activities or independent public advocacy." *Id.* at 81a-82a (quoting Government Memorandum of Law in Support of Motion for Reconsideration 4) (emphases omitted). The district court nevertheless maintained its view that petitioners had standing based on their fear of such detention. *Id.* at 135a-139a.

On the merits, the district court ruled that Section 1021(b)(2) is an unconstitutional content-based re-

striction on speech. Pet. App. 155a-169a. While the court acknowledged a "legitimate, non-First Amendment aspect" to the statute, *id.* at 157a, it believed that Section 1021(b)(2) might authorize the President to detain an individual based on "some amount of undefined activities protected by the First Amendment," *id.* at 169a. The court also held that Section 1021(b)(2) is unconstitutionally vague. *Id.* at 170a-179a.

The district court's order "permanently enjoin[ed] enforcement of § 1021(b)(2) in any manner, as to any person." Pet. App. 182a-183a. Despite the fact that petitioners had not raised any challenge related to the AUMF, the district court further stated that "[m]ilitary detention based on allegations of 'substantially supporting' or 'directly supporting' the Taliban, al-Qaeda or associated forces, is not encompassed within the AUMF and is enjoined by this Order regarding § 1021(b)(2)." *Id.* at 183a.

4. The court of appeals granted a stay of the district court's injunction pending appeal and subsequently vacated the district court's order. Pet. App. 1a-75a. The court held that petitioners lacked Article III standing.

a. The court of appeals began by construing Section 1021. It first observed that subsections (a) and (d) indicate that Section 1021 does nothing more than "affirm[]" the detention authority granted to the President by the AUMF, but at the same time subsection (b)(2) adds language not used in the AUMF. Pet. App. 41a. The court resolved this "apparent contradiction" by concluding that subsection (b)(2) is "naturally * * * understood to affirm that the general AUMF authority to use force against these organizations

[responsible for the September 11, 2001, attacks] includes the more specific authority to detain those who were part of, or those who substantially supported, these organizations or associated forces." *Id.* at 41a-42a. "Because one obviously cannot 'detain' an organization," the court continued, "one must explain how the authority to use force against an organization translates into detention authority." *Id.* at 42a-43a. The court therefore held that the function of subsection (b)(2) is to clarify that the AUMF's detention authority encompasses those who were part of or substantially supported one of the relevant organizations. And the court explained that the proviso in subsection (d) "ensures that Congress' clarification may not properly be read to suggest that the President did not have this authority previously." *Id.* at 44a.

The court of appeals also concluded that the proviso in subsection (e) "expressly disclaims any statement about existing authority" to detain U.S. citizens, permanent residents, or other persons captured or arrested in the United States. Pet. App. 45a. Accordingly, it held, Section 1021 "simply says nothing at all" regarding the detention of those persons. *Id.* at 47a.

b. Based on that construction of the statute, the court of appeals concluded that the U.S. citizen petitioners—Hedges and O'Brien—lacked Article III standing. Because Section 1021 "says nothing at all about the authority of the government to detain citizens," the court explained, "[t]here simply is no threat whatsoever that [the U.S. citizen petitioners] could be detained pursuant to that section." Pet. App. 49a. Thus, it held, those petitioners suffer no injury from Section 1021, nor could their fears of detention be

redressed by an injunction against the implementation of Section 1021. *Ibid.*

c. The court of appeals further held that the foreign petitioners also lack standing to challenge Section 1021(b)(2). See Pet. App. 50a-74a. The court first "assume[d] without deciding" that Section 1021(b)(2) authorizes the detention of the foreign petitioners based on their stated activities, despite the government's assurance that it does not. *Id.* at 63a. But the court concluded that the foreign petitioners had failed to show that they were at risk of immediate injury by the enactment of Section 1021 sufficient to establish Article III standing. See *id.* at 63a-74a. The court observed that "Section 1021 is not a law enforcement statute, but an affirmation of the President's military authority." *Id.* at 65a. The provision, it explained, "'at most *authorizes*—but does not *mandate* or *direct*'—the detention that plaintiffs fear." *Id.* at 66a (quoting *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1149 (2013)). The court held that under this Court's standing precedents, "while it generally may be appropriate to presume for standing purposes that the government will enforce the law against a plaintiff covered by a traditional punitive statute," plaintiffs challenging a statute that merely authorizes Executive action "must show more than that the statute covers their conduct to establish preenforcement standing." *Id.* at 67a-68a. Because the two foreign petitioners had "shown nothing further here," the court held that they lacked Article III standing, without addressing "what more is required" to establish standing. *Id.* at 68a.

ARGUMENT

Petitioners contend that they have standing to challenge Section 1021(b)(2) because they may be subject to military detention under that provision based on their journalistic and political activities. The court of appeals correctly held that neither the U.S. citizen petitioners nor the foreign petitioners have standing to raise that challenge. That is so for two independent reasons. First, Section 1021(b)(2) by its terms does not authorize the detention of any of the four petitioners based on their stated activities (a conclusion the court of appeals reached only with respect to the U.S. citizen petitioners). Second, even if Section 1021(b)(2) authorized the detention of petitioners, they have not established a "certainly impending" threat of injury within the meaning of this Court's Article III standing precedents. *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (internal quotation marks omitted). The decision below does not conflict with a decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. To establish Article III standing, a plaintiff must show (1) that he has "suffered an injury in fact * * * which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) a sufficient "causal connection between the injury and the conduct complained of"; and (3) a "likel[ihood] * * * that the injury will be redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal quotation marks and citations omitted). Petitioners do not satisfy those requirements for the basic reason that the provision that they challenge, Section

1021(b)(2) of the NDAA, does not authorize detention based on their stated activities.

a. Section 1021 "affirms" that the authority the AUMF granted the President in 2001 includes the detention of persons who were "part of or substantially supported al-Qaeda, the Taliban, or associated forces." NDAA § 1021(a) and (b)(2), 125 Stat. 1562. In choosing that definition, Congress codified the Executive's interpretation of the AUMF in light of the laws of war, which had been presented to courts in the March 2009 Memorandum and repeatedly applied and upheld by courts. See March 2009 Memorandum 1-2 (explaining that the government's "definitional framework" for the AUMF includes "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"). That is clear from subsections (a) and (d) of Section 1021. Subsection (a) provides that the statute "affirms" that the President's authority under the AUMF includes the authority set forth in Section 1021. Subsection (d) in turn provides that "[n]othing in this section is intended to limit or expand the authority of the President or the scope of the [AUMF]." Through those provisions, Congress expressed its understanding that the definitional framework for detention under Section 1021(b) mirrored the Executive's interpretation and application of its detention authority under the AUMF as expressed in the March 2009 Memorandum. Pet. App. 44a. Accordingly, Section 1021(b)(2) simply affirms that the Executive possesses authority under the AUMF that it has stated for over a decade: to detain those enemy belligerents apprehended in the ongoing

armed conflict against al-Qaeda, the Taliban, and their associated forces, including those who were "part of" or "substantially supported" those organizations.

As the court of appeals explained, that clarification was warranted because the AUMF authorized the use of force against certain organizations without expressly describing how the President's detention authority applied to those organizations. See Pet. App. 41a-42a. By affirming that the AUMF's authority includes the detention of certain individuals who are "part of" or who "substantially supported" those organizations, Section 1021(b)(2) clarifies "how the authority to use force against an organization translates into detention authority" in a way that is fully consistent with the Executive's preexisting interpretation of its authority under the AUMF. *Id.* at 42a-43a. Although petitioners argue that the court of appeals' construction of Section 1021 as clarifying the Executive's legal authority "depriv[es] § 1021(b) of any independent force and effect" (Pet. 24), that is not so: As this Court has explained, "there is no canon against making explicit what is implied." *United States* v. *Sischo*, 262 U.S. 165, 169 (1923); see, *e.g.*, *Microsoft Corp.* v. *i4i Ltd. P'ship*, 131 S. Ct. 2238, 2245-2249 & n.8 (2011) (recognizing that Congress "meant to codify" an existing rule, "not to set forth a new [rule] of its own making").

Especially in light of the fact that Section 1021 was intended only to adopt the Executive's existing interpretation of its detention authority under the AUMF, Section 1021 cannot reasonably be construed to apply to the journalistic and political activities that petitioners assert they engage in. Pet. App. 62a. Petitioners claim to fear that they will be deemed to have "substantially supported" al-Qaeda, the Taliban, or associ-

ated forces because their advocacy could be seen as supporting those organizations. See *id.* at 52a-53a, 90a-102a, 206a-219a. But Section 1021 expressly refers both to the laws of war and to the AUMF, which a plurality of this Court has construed in light of "long-standing law-of-war principles." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 520-521 (2004) (opinion of O'Connor, J.).

Read in that context, the term "substantial support" in Section 1021 covers actions that, in analogous circumstances in a traditional international armed conflict, are sufficient to justify detention. While the laws of war make clear that detention is a lawful consequence of certain activities, the independent journalism and advocacy petitioners identify as the basis for their claims are not within the category of activities contemplated by the laws of war as a legal ground for detention. It is an established law of war norm, which is reflected in Article 79 of Additional Protocol I to the Geneva Conventions, that "journalists" are generally to receive protection as "civilians." See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 79(1), 1125 U.N.T.S. 40 ("Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians."); see also Int'l & Operational Law Dep't, U.S. Army Judge Advocate General's School, *Law of War Handbook* 172 (2005) ("Journalists" are "[g]iven protection as 'civilians' provided they take no action adversely affecting their status as civilians."). Although the United States is not a party to Additional Protocol I, it supports and respects this important principle. For that reason, Section 1021 does not authorize petitioners' detention based on

their stated activities. Petitioners are therefore under no threat of injury for Article III purposes.

Petitioners incorrectly assert that "the Government conceded on the record that § 1021(b) is directed to speech and that journalists—including Petitioners—could be taken under its provisions." Pet. 9. The government repeatedly maintained just the opposite on both points. See, *e.g.*, C.A. J.A. 298 ("[T]hese independent journalistic activities and independent public advocacies * * * , as [petitioners] describe them, would not subject them to Law of War of detention."); Gov't C.A. Br. 16 (explaining that petitioners' asserted activities "are clearly outside the scope of the government's military detention authority under the AUMF, as affirmed in Section 1021(b)(2)"); *id.* at 17 (explaining that terms of statute "do not target speech"); Government Memorandum of Law in Support of Final Judgment 2 (explaining that "statute is not even aimed at speech or expressive conduct"); *id.* at 20 (explaining that petitioners' asserted activities "do not implicate the military detention authority affirmed in section 1021").

Petitioners further assert that at the initial hearing in the district court, the government declined to offer assurances that they would not be detained under any circumstances. Pet. 14, 34-38. But no legal principle requires the government to provide litigants with such advance assurances or otherwise to delineate the bounds of its authority—particularly in the context of armed conflict—in response to speculative fears of harm asserted in litigation. See *Clapper*, 133 S. Ct. at 1149 n.4 (it is "not the Government's burden to disprove standing"). That is especially true in circumstances where the government does not know the full

scope of an individual's past conduct or what that individual plans to do in the future. See C.A. J.A. 137 ("[W]e can't know the universe of [their] activities, so we can't make representations as to particular plaintiffs."). In any event, the government's unequivocal statements after that hearing make clear that the government does not believe that petitioners are subject to detention based on their stated activities.

There is no sound reason for further review when the government confirms that Section 1021 does not cover petitioners' stated activities and that understanding reflects the best reading of the statutory text in light of the background law-of-war principles expressly incorporated into the statute.

b. As the court of appeals concluded, the detention of the two U.S. citizen petitioners is not authorized by Section 1021(b)(2) for an additional reason: Section 1021 does not affect the law at all with respect to the detention of U.S. citizens. Subsection (e) provides that "[n]othing in this section shall be construed to affect existing law or authorities relating to the detention of U.S. citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States." Thus, Section 1021 "says nothing at all about the authority of the government to detain citizens," and so "[t]here simply is no threat whatsoever that [the U.S. citizen petitioners] could be detained pursuant to that section." Pet. App. 49a.

Despite the government's acknowledgement that Section 1021 does not enhance or supplement its authority to detain U.S. citizens, petitioners contend (Pet. 19-25) that Section 1021 does affect the President's authority to detain U.S. citizens and that they

should therefore be able to challenge the section's constitutionality because of their fear of being detained. They focus on the text of subsection (b)(2), arguing that it is "broad [and] undefined" and does not exclude citizens. Pet. 19-20. But that argument ignores subsection (e), which makes clear that the statute does nothing to affect any preexisting limits on the President's authority to detain U.S. citizens when acting under the AUMF.

Petitioners assert (Pet. 24-25) that subsection (e) "raises more questions than it answers" because "neither Congress nor the President ha[s] Constitutional power to impose military detention over U.S. citizens or residents." That is not an accurate characterization of settled law. Five Members of this Court recognized in *Hamdi*, *supra*, that the President has the authority to detain U.S. citizens or residents where authorized by the AUMF. See 542 U.S. at 516-517, 519 (opinion of O'Connor, J.); *id.* at 587-588 (Thomas, J., dissenting); see *Boumediene* v. *Bush*, 553 U.S. 723, 733 (2008) ("In [*Hamdi*], five Members of the Court recognized that detention of individuals who fought against the United States in Afghanistan 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.") (internal quotation marks omitted). The *Hamdi* plurality determined that *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), on which petitioners rely extensively, did "not undermine [its] holding" regarding detention authority. 542 U.S. at 521-522 (opinion of O'Connor, J.); accord *id.* at 592-593 (Thomas, J., dissenting). Although petitioners suggest that *Hamdi* ruled out

detention of persons who were not actively engaged in armed combat (Pet. 27-28), the plurality in fact expressly left open the "permissible bounds of the category" of detainable enemy belligerents. 542 U.S. at 522 n.1 (opinion of O'Connor, J.); see *id.* at 584-586, 589, 592 (Thomas, J., dissenting). Petitioners therefore err in contending that subsection (e) of Section 1021 is unclear. In straightforward terms, the provision establishes that Section 1021 does not have any effect whatsoever on the President's preexisting authority, recognized in *Hamdi* and elsewhere, to detain U.S. citizens in the context of the armed conflict against al-Qaeda and the Taliban.[7]

Petitioners place substantial emphasis (Pet. 20-25) on the drafting history of Section 1021. They believe that Congress's decision not to adopt clearer language excluding U.S. citizens from the scope of Section 1021 suggests that the provision applies to U.S. citizens, noting that "the Senate twice failed to pass legislation that would exclude citizens and lawful resident aliens from the scope of § 1021(b)'s detention authority." Pet. 20 (emphases omitted). That reasoning is flawed. This Court has been reluctant to conclude that Congress's "failure to enact various proposals * * *

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[7] Other precedents cited by petitioners (Pet. 26-29) for their argument that the Executive lacks authority to detain citizens are inapplicable, as they do not address detention authority. *Reid* v. *Covert*, 354 U.S. 1 (1957), concerned military trials of servicemembers' spouses, not the law-of-war detention of enemy belligerents. *Id.* at 3-5. Similarly, *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006), addressed the legality of a particular form of military commission, expressly disclaiming any consideration of detention under the law of war. *Id.* at 567, 635 ("[W]e do not today address[] the Government's power to detain [Hamdan] for the duration of active hostilities.").

amounts to legislative disapproval" of an interpretation of a statute consistent with those proposals. *Brecht* v. *Abrahamson*, 507 U.S. 619, 632-633 (1993); accord *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 306 (1988); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 382 n.11 (1969) (noting that "unsuccessful attempts at legislation are not the best of guides to legislative intent"). That is particularly true when such "inconclusive history was * * * superseded by the specific statutory language" that was ultimately added. *Red Lion*, 395 U.S. at 382 n.11. In any event, regardless of any implication that might be drawn from the legislative history if subsection (e) were ambiguous, the text is clear: Subsection (e) prohibits "construe[ing]" any other provision of Section 1021 "to affect existing law or authorities relating to the detention of U.S. citizens." The only reasonable reading of that subsection is that Section 1021 has no effect on the President's authority to detain U.S. citizens.[8]

c. Because Section 1021(b)(2) does not authorize the detention of any of the four petitioners based on their stated activities (and does not apply to the U.S. citizen petitioners at all), they are threatened with no cognizable Article III injury. They therefore lack standing to seek declaratory or injunctive relief against the President and the Secretary of Defense barring the exercise of authority under that provision.

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[8] The court of appeals correctly rejected petitioners' contention that subsection (e) serves merely to preclude any change to the right to seek habeas corpus: The phrase "'existing law or authorities'" is "a broad term that bears no indication that it should be limited to habeas rights, particularly when Section 1021 says nothing else about habeas." Pet. App. 48a n.135.

2. The court of appeals assumed, without deciding, that Section 1021(b)(2) authorizes the detention of the two foreign petitioners, Pet. App. 62a-63a, but held that they had not "established a basis for concluding that enforcement against them is even remotely likely" and therefore lacked standing, *id.* at 68a. The holding that they lacked standing was correct and provides an alternative basis to conclude that none of the four petitioners has standing to challenge Section 1021(b)(2).

a. This Court has "repeatedly reiterated" that to establish standing based on a threatened future injury, the "'threatened injury must be *certainly impending*'" and that "'allegations of *possible* future injury' are not sufficient." *Clapper*, 133 S. Ct. at 1147 (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990)) (brackets omitted). A plaintiff typically will not be able to show "certainly impending" injury when challenging a law that does not regulate primary conduct but instead simply authorizes government officials to take certain actions in the future. In *Clapper*, for example, the Court held that the plaintiffs did not have standing to challenge a statute authorizing government surveillance, where their assertions of injury "relie[d] on a highly attenuated chain of possibilities" about how various entities might act. 133 S. Ct. at 1148; see *id.* at 1148-1150. Nor could the plaintiffs "manufacture standing" by altering their primary conduct "based on their fears of hypothetical future harm that [was] not certainly impending." *Id.* at 1151.

Similarly, in *Summers* v. *Earth Island Institute*, 555 U.S. 488 (2009), the Court found no threat of imminent and concrete injury to plaintiffs who challenged regulations authorizing the U.S. Forest Ser-

vice to take certain land-management actions without satisfying certain procedural prerequisites, *id.* at 495-496, rejecting contentions that an imminent injury could be shown based on a "statistical probability," or even a "*realistic* threat," of harm. *Id.* at 497-500. And in *Laird* v. *Tatum*, 408 U.S. 1 (1972), the Court found a challenge to an Army data-gathering program non-justiciable notwithstanding the contention that the program "produce[d] a constitutionally impermissible chilling effect upon the exercise of [the plaintiffs'] First Amendment rights," emphasizing that "[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." *Id.* at 13-14.

b. Under these Article III standing principles, petitioners have not met their burden to show a genuine threat of imminent injury. Pet. App. 68a-70a. As with the detention power that is inherent in any authorization for the use of military force, the detention power that Section 1021 "affirms" to be, when invoked, part of the AUMF serves the "purpose * * * to prevent captured individuals from returning to the field of battle and taking up arms once again," and is "devoid of all penal character." *Hamdi*, 542 U.S. at 518-519 (opinion of O'Connor, J.) (internal quotation marks omitted); accord *id.* at 592-593 (Thomas, J., dissenting). Like the laws at issue in *Clapper* and *Summers*, Section 1021(b) does not regulate primary conduct but rather authorizes the Executive to take action in the future, leaving it to the President's discretion when to exercise that authority. The statute does not require the President to apprehend any individual. Even assuming that Section 1021 covers petitioners, but see pp. 12-20, *supra*, petitioners "can only

speculate as to whether the Government will seek" to use the Section 1021(b) authority to apprehend them. *Clapper*, 133 S. Ct. at 1149. The fact that Section 1021 reflects Congress's authorization for the President to employ military force—an area in which the President necessarily exercises broad discretion in deciding what course of action advances the security interests of the Nation—further underscores petitioners' lack of standing, for the Judiciary should not engage in speculative judgments about the President's future exercise of authority conferred on him as Commander-in-Chief.[9]

As the court of appeals explained, moreover, petitioners have made no showing that their detention under Section 1021 "is even remotely likely." Pet. App. 68a. Specifically, they have pointed to nothing indicating that the government intends to detain them or that anyone similarly situated with respect to the sort of activities they identify has ever been detained under military authority. *Id.* at 68a-70a. And the government has expressly represented in the proceedings below that Section 1021(b) does not authorize

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[9] That proposition applies with equal force to petitioners' claim against the Secretary of Defense. Where Executive officers assist the President in carrying out discretionary powers and responsibilities vested in the President directly by the Constitution, as is true of the Commander-in-Chief power, "their acts are his acts." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 166 (1803); see also 10 U.S.C. 113(b) (Secretary of Defense is the "principal assistant to the President" in defense matters, whose authority is "[s]ubject to the direction of the President"); 10 U.S.C. 162(b) ("Unless otherwise directed by the President, the chain of command to a unified or specified combatant command runs—(1) from the President to the Secretary of Defense; and (2) from the Secretary of Defense to the commander of the combatant command.").

petitioners' detention based on their stated activities. Thus, any prospect that Section 1021 would affect petitioners is, at best, "purely a matter of speculation." *Id.* at 72a.

There is no merit to petitioners' contention (Pet. 10-18) that the court of appeals employed an erroneous standard to determine whether they have standing to sue. The court of appeals accurately described the principles of standing established by this Court, noting that courts have employed various formulations of the test that governs claims of future injury. Pet. App. 53a-60a. That discussion echoed this Court's observation in *Clapper* that it has on occasion found standing based on an alternative articulation that there is "a 'substantial risk' that the harm will occur." 133 S. Ct. at 1150 n.5 (citing, *inter alia*, *Monsanto Co.* v. *Geertson Seed Farms*, 561 U.S. 139, 153-156 (2010); *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). Moreover, *Clapper* explained that even if "the 'substantial risk' standard is relevant and is distinct from the 'clearly impending' requirement," the plaintiffs in that case had still fallen short of showing an imminent injury. *Ibid.* So, too, the court of appeals here correctly held that it "need not determine" precisely what petitioners would have to show to demonstrate a cognizable threat of future injury, because they had alleged nothing more than that the statute authorized the President to detain them. Pet. App. 68a & n.184. Under any conceivable standard, that allegation is insufficient.

Petitioners likewise err in asserting that *Clapper* recognized an exception to the "clearly impending" standard under which standing in First Amendment cases requires a lesser showing of injury. Pet. 12, 16,

18. *Clapper* itself involved a First Amendment challenge and found that the plaintiffs lacked standing because the plaintiffs had not established that their injury was "certainly impending." *Clapper*, 133 S. Ct. at 1149; see *id.* at 1146 ("[R]espondents filed this action seeking * * * a declaration that [50 U.S.C.] 1881a, on its face, violates the Fourth Amendment, the First Amendment, Article III, and separation-of-powers principles."); see also, *e.g.*, *McConnell* v. *FEC*, 540 U.S. 93, 225-226 (2003), overruled on other grounds by *Citizens United* v. *FEC*, 558 U.S. 310 (2010); *Tatum*, 408 U.S. at 13.

Finally, petitioners assert that under the decision below, no one could ever have standing to challenge Section 1021. Pet. 32. Even if true, that is no reason to find standing where none exists. See *Clapper*, 133 S. Ct. at 1154; *United States* v. *Richardson*, 418 U.S. 166, 179-180 (1974). But in any event, it is not true: Numerous decisions adjudicating the legality of military detention in habeas corpus proceedings have demonstrated the ability of federal courts to determine the validity of the standards applied by the Executive in cases brought by persons who were indisputably affected by the government's actions. *E.g.*, *Ali* v. *Obama*, 736 F.3d 542, 544 n.1 (D.C. Cir. 2013); *Khan* v. *Obama*, 655 F.3d 20, 32-33 (D.C. Cir. 2011); *Al-Bihani* v. *Obama*, 590 F.3d 866, 872-874 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1814 (2011). But individuals who have not been detained, and who have not established that they face an imminent threat of detention, lack Article III standing.[10]

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[10] Although the court of appeals did not reach the issue, the district court's injunctions suffered from other flaws apart from petitioners' lack of Article III standing. Among them, they purported

c. Petitioners argue that the court of appeals' conclusion that the foreign petitioners do not face an imminent threat of injury conflicts with decisions of other courts of appeals. Pet. 16-18. As an initial matter, even if that were true, this would not be an appropriate case in which to resolve the conflict, because the government has acknowledged that the statute does not apply to petitioners' stated activities at all. See pp. 12-20, *supra*.

But in any event, no conflict exists. Petitioners suggest that an "imminence" of harm standard applied by the court of appeals here differs from a "substantial risk" or "well-founded fear" test used by other courts of appeals. Pet. 13, 16, 18. As *Clapper* and prior cases make clear, however, "actual or imminent"

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to enjoin the President, as Commander-in-Chief, from carrying out wartime military operations that were specifically authorized by Congress. See NDAA § 1021(a), 125 Stat. 1562. Even outside the war context, this Court has made clear that an injunctive action against the President could lie, if at all, only in very limited circumstances, and that any such injunction would be extraordinary. Thus, in *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), the plurality concluded that, although the Court had "left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely 'ministerial' duty, *Mississippi* v. *Johnson*, 4 Wall. 475, 498-499 (1867)," and had held that the President may be subject to a subpoena to provide information relevant to an ongoing criminal prosecution, "in general" the courts have "'no jurisdiction of a bill to enjoin the President in the performance of his official duties,'" *id.* at 802-803 (opinion of O'Connor, J.). In his separate opinion, Justice Scalia reached the same conclusion, quoting the same passage from *Mississippi* v. *Johnson*, *id.* at 827 (concurring in part and concurring in the judgment), and also quoting a treatise for the proposition that "[n]o court has ever issued an injunction against the president himself," *ibid.* (citation omitted).

injury is required in every case. 133 S. Ct. at 1147 (quoting *Monsanto*, 561 U.S. at 149); see, *e.g.*, *Horne* v. *Flores*, 557 U.S. 433, 445 (2009) ("To establish standing, a plaintiff must present an injury that is concrete, particularized, and actual or imminent."). Tests to determine if there is "certainly impending" harm, a "realistic danger" of injury, *Babbitt*, 442 U.S. at 298, a "credible threat of prosecution," *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 15 (2010), or cause for an "actual and well-founded fear" of enforcement (Pet. App. 63a-64a) are methods of determining whether the actual or imminent injury requirement is satisfied, rather than distinct standards, *Clapper*, 133 S. Ct. at 1147; *Lujan*, 504 U.S. at 565 n.2.

Consistent with this Court's settled framework, and contrary to petitioners' contention (Pet. 16-18), the courts of appeals have required that a threatened future injury be imminent. See, *e.g.*, *Wolfson* v. *Brammer*, 616 F.3d 1045, 1063 (9th Cir. 2010) ("genuine threat of imminent prosecution") (emphases and citation omitted); *Brammer-Hoelter* v. *Twin Peaks Charter Acad.*, 602 F.3d 1175, 1183 n.6 (10th Cir. 2010) ("imminent, credible threat" of enforcement); *Ord* v. *District of Columbia*, 587 F.3d 1136, 1140-1141 (D.C. Cir. 2009) (requiring showing of both credible and imminent threat of prosecution); *Fieger* v. *Michigan Supreme Court*, 553 F.3d 955, 978 (6th Cir. 2009) ("sufficient immediacy" shown by "'a realistic danger' or 'credible threat'" of enforcement), cert. denied, 558 U.S. 1110 (2010). The cases cited by petitioners—none of which involved a mere authorization for the Executive to take action in the areas of military and intelligence affairs, as in this case and *Clapper*—do not depart from that basic requirement. *E.g.*, *Wilson*

v. *Stocker*, 819 F.2d 943, 946 (10th Cir. 1987) (examining "immediacy of the threat of harm").

Accordingly, further review of the court of appeals' application of this Court's settled standing principles to petitioners' complaint is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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