

No. 13-758

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**In The Supreme Court of the United States**

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CHRISTOPHER HEDGES et al.,  
*Petitioners,*

v.

BARACK H. OBAMA et al.,  
*Respondents.*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Second Circuit**

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**BRIEF OF AMICI CURIAE  
NATIONAL LAWYERS GUILD, THE CENTER FOR  
COMPETITIVE DEMOCRACY, AND RALPH NADER  
IN SUPPORT OF PETITIONERS**

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## QUESTIONS PRESENTED

1. Does the Second Circuit opinion overturning the District Court (that had held a law permitting the military to indefinitely detain Americans is unconstitutional) depart from this Court's prior holdings on First Amendment standing in "fear-based" or "chilling effect" cases, so that absent review, United States citizens, legal residents and other persons are threatened with indefinite military detention, thereby infringing their First and Fifth Amendment rights?

2. Is the Second Circuit's First Amendment decision focusing on "imminence of enforcement" as opposed to a "well founded fear of enforcement" contrary to the great weight of circuit precedent implementing *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988) and its progeny?

3. Is the Second Circuit's holding with respect to the interpretation of § 1021(b) and § 1021(e) contrary to this Court's many decisions barring the assertion of military jurisdiction over U.S. civilians beginning with *Ex parte Milligan* and continuing through *Hamdi v. Rumsfeld*?

4. To the extent that the Second Circuit opinion holds that *Korematsu* is among the "existing law and authorities" under § 1021(e) that relate to military detention of citizens and legal residents, should *Korematsu* be overruled?

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## INTEREST OF AMICI CURIAE\*

### **The National Lawyers Guild, Inc.**

The National Lawyers Guild, Inc. is a non-profit corporation formed in 1937 as the nation's first racially integrated voluntary bar association, with a mandate to advocate for fundamental principles of human and civil rights including the protection of rights guaranteed by the United States Constitution. Since then the Guild has been at the forefront of efforts to develop and ensure respect for the rule of law and basic legal principles.

The Guild has championed the First Amendment right to engage in unpopular speech for over seven decades. The Guild has a long history of defending individuals accused by the government of espousing dangerous ideas, including in hearings conducted by the House Committee on Un-American Activities and other examples of governmental overreaching that are now popularly discredited. *See, e.g., Kinoy v. District of Columbia*, 400 F.2d 761 (D.C. Cir. 1968). Since then, it has continued to represent thousands of Americans critical of government policies, from antiwar activists during

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\* Pursuant to Supreme Court Rule 37.6, counsel for Amici certifies that counsel authored this brief in its entirety. No attorney for a party authored any part of the brief, and no person or entity other than Amici made any monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, counsel for Amici certifies that timely notice of this filing was provided to counsel for Respondents, who has given Respondents' to the filing.

the Vietnam era to current day anti-globalization, peace, environmental, and animal rights activists.

The Guild is invested in the outcome of this case given the NDAA's great potential to infringe on free speech. The Guild has witnessed firsthand how terrorism-related legislation has suppressed lawful speech and advocacy when activists, journalists, academics and others—fearful of prosecution—curtail their activities, unsure what actions may be construed as in support of terrorism by an overreaching government.

### **The Center for Competitive Democracy**

The Center for Competitive Democracy was founded in 2005 to strengthen American democracy by increasing electoral competition. The Center works to identify and eliminate barriers to political participation and to secure free, open and competitive elections by fostering active civic engagement in the political process. Much of the Center's work involves litigation and advocacy on behalf of minor party and independent candidates and voters, who often represent or support ideas that may be outside the parameters of popular political discourse. The Center's interest in the instant case arises from the threat posed to free speech and association by the NDAA, and the need to ensure that no American citizen should fear the prospect of military detention as a result of activity that is protected by the First Amendment.

**Ralph Nader**

Ralph Nader is a consumer advocate, author and attorney who has run for President of the United States as both a minor party and an independent candidate. He first actively campaigned for president in 2000, as the Green Party nominee, and he ran again in 2004 and 2008 as an independent candidate. Mr. Nader campaigned as an unwavering critic of the unconstitutional use of military force abroad, including in Iraq and Afghanistan, and of executive overreach under the guise of national security, among many other issues the major party candidates often neglected or completely failed to address. Mr. Nader's interest in this case arises from his continued advocacy on behalf of minor party and independent candidates and other citizens who seek to broaden the public discourse and increase participation in the democratic process.

Mr. Nader has founded numerous public interest organizations that were instrumental in the establishment of federal laws and regulatory agencies that protect consumers, workers and the environment, including the Consumer Product Safety Commission (1972), the Occupational Safety and Health Administration (1970), the Environmental Protection Agency (1970), the National Highway Traffic Safety Administration (1972) and many others. In 1965, the publication of his book, UNSAFE AT ANY SPEED, led to the adoption of basic automobile safety features like seatbelts, collapsible steering columns and air bags, which have saved hundreds of thousands of lives and prevented even more unnecessary injuries.



## INTRODUCTION

This case involves a constitutional challenge to the National Defense Authorization Act (“NDAA”). Petitioners claim that Section 1021 of the NDAA violates their First and Fifth Amendment rights, because it authorizes the United States military to detain without trial any person who, *inter alia*, “substantially supported” al-Qaeda, the Taliban, or associated forces engaged in hostilities against the United States, until the end of such hostilities. 2012 NDAA § 1021. The statute does not exempt American citizens from its scope. *See id.* at § 1021(e). The NDAA thus raises the chilling prospect that American citizens may be subject to indefinite military detention if they engage in speech or associational activity that is deemed to provide substantial support to the aforementioned groups.

Despite the fundamental importance of the issues raised in this case, the Court of Appeals for the Second Circuit declined to rule on the merits of Petitioners’ claims. Instead, it held that Petitioners lack standing to assert them. According to the Second Circuit, the 2001 Authorization for Use of Military Force (“AUMF”) provides the sole authority for the military to detain persons, and the NDAA merely “affirms” that authority. App. 41a-47a. The Second Circuit thus disposed of the claims asserted by the American citizen Petitioners (Hedges and O’Brien) on the ground that “there simply is no

threat whatsoever that they could be detained pursuant to [Section 1021].” App. 49a.

Amici submit the instant brief to draw the Court’s attention to a critical error in the Second Circuit’s reasoning with respect to the American citizen Petitioners. Specifically, the Second Circuit found that these Petitioners cannot challenge Section 1021 unless the NDAA itself authorizes the military detention of American citizens. App. 49a-50a. That is incorrect. Whether the NDAA is construed as an independent grant of authority, or only as an affirmation of the authority conferred by the AUMF, the undisputed evidence in the record demonstrates that the NDAA impermissibly chills Hedges and O’Brien from engaging in protected First Amendment conduct. Consequently, even if this Court accepts the Second Circuit’s construction of the NDAA, long-recognized principles of standing permit these Petitioners to challenge its constitutionality.



## SUMMARY OF ARGUMENT

Section 1021 of the NDAA purports to “affirm” that the power “to detain covered persons” was included in the authority granted to the President by the AUMF. 2012 NDAA § 1021(a). Although the text of the AUMF nowhere mentions the power of detention, the Second Circuit adopted this statutory construction, and concluded that any power the United States military has to detain American citizens was granted not by Section 1021, but by the AUMF. On the basis of that conclusion, the Second

Circuit held that the American citizen Petitioners lack standing to pursue this action, because they challenge Section 1021, and not the AUMF. This was error.

The American citizen Petitioners have standing to challenge the NDAA based on the chilling effect that Section 1021 creates, by subjecting American citizens to the threat of indefinite military detention if they engage in speech or associational activities that may be deemed to provide substantial support to certain entities or organizations. The Second Circuit's disposition of this case on standing grounds elevates form over content to an intolerable degree, particularly in view of the fundamental importance of Petitioners' First Amendment claims. This Court should grant certiorari to correct the Second Circuit's errors, and to ensure that no American citizen must choose between the free exercise of First Amendment rights and the risk of indefinite military detention.



## ARGUMENT

### **I. The American Citizen Petitioners Have Standing to Challenge the NDAA Because Section 1021—Not the AUMF Alone—Threatens Them With Military Detention.**

This Court has long recognized that plaintiffs facing a choice between curtailing their First Amendment activities and risking criminal prosecution may pursue a pre-enforcement challenge to the statute that poses the threat. *See Virginia v. Am. Booksellers Ass'n., Inc.*, 484 U.S. 383, 393 (1988)

(citing *Secretary of State of Maryland v. J. H. Munson Co.*, 467 U.S. 947, 956-957 (1984); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)). That is precisely the dilemma Petitioners face here. The District Court concluded that enactment of the NDAA has chilled the American citizen Petitioners' speech and associational activities, and it made extensive findings to support that conclusion. App. 130a, 136a. Under settled principles of standing, therefore, Hedges and O'Brien are entitled to pursue their claims for relief from the NDAA. *See id.*

The Second Circuit did not disturb the District Court's findings. App. 34a-35a. Instead, it ruled as a matter of law that the American citizen Petitioners lack standing, because any power the military has to detain American citizens is conferred by the AUMF, and not by the NDAA. App. 49a-50a. Because the NDAA merely "affirms" that the power conferred by the AUMF includes the power to detain individuals, the Second Circuit concluded, there is "no threat whatsoever" that Hedges and O'Brien could be detained pursuant to Section 1021. App. 49a. But the Second Circuit's focus on whether Section 1021 independently authorizes military detention is misplaced.

Regardless of whether Section 1021 itself authorizes military detention, or merely "affirms" that the AUMF does, the American citizen Petitioners have standing to challenge the NDAA because Section 1021 forces them to curtail their First Amendment activities or risk military detention. It is Section 1021—not the AUMF—which specifies that the President has the power to detain

persons who “substantially supported” al-Qaeda, the Taliban or associated forces. 2012 NDAA § 1021(a), (b). It is Section 1021—not the AUMF—which provides these Petitioners with notice that they face such a threat. By contrast, the relevant portion of the AUMF provides only that the President has the authority “to use all necessary and appropriate force” against those responsible for perpetrating the September 11, 2001 terrorist attacks. AUMF § 2(a). Nothing in that text can reasonably be construed to threaten American citizens with military detention if their speech or associational activities are found to provide substantial support to terrorists. Consequently, the NDAA, and not the AUMF alone, creates the chilling effect that establishes the American citizen Petitioners’ standing under the *American Booksellers* line of cases.

Even if this Court accepts the Second Circuit’s construction of the NDAA, and concludes that Section 1021 must be read only as an affirmation of power previously granted by the AUMF, it does not follow that Section 1021 “neither adds to nor subtracts from whatever authority would have existed in its absence,” as the Second Circuit found. App. 49a. Contrary to the Second Circuit’s assertion, it is not readily apparent that the “general” authority granted by the AUMF includes the “specific” power to detain a person without trial until the end of hostilities. App. 42a. At a minimum, therefore, Section 1021 clarifies that the exercise of such power may be a “necessary and appropriate use of force” under the AUMF. In addition, as the Second Circuit concedes, Section 1021 clarifies—as its framers intended—that this power may be exercised against

American citizens on American soil, provided that “existing law” permits it. App. 49a. In fact, Congress expressly rejected an amendment to Section 1021, which would have eliminated this threat. App. 29a-30a.

Where Congress fails to take appropriate action to protect citizens’ constitutional rights against infringement by the executive, it is incumbent on this Court to intervene. As the District Court recognized, the proper remedy in this case is to enjoin Section 1021 insofar as it may be construed to authorize or affirm the President’s power to detain American citizens without trial. Such an injunction would redress the American citizen Petitioners’ injury, by permitting them, once again, to engage in their speech and associational activities, free from the threat of detention. The First Amendment demands nothing less.



## CONCLUSION

For the foregoing reasons, and those set forth in the Petition for Certiorari, this Court should grant certiorari, vacate the decision of the Second Circuit, and order the District Court to reinstate its injunction of Section 1021.

Respectfully submitted,

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January 23, 2014