UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NASSER AL-AULAQI, Plaintiff, v. BARACK H. OBAMA, *et al*., Defendants.	No. 10-cv-01469 (JDB)

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Jameel Jaffer (admitted *pro hac vice*)
Ben Wizner (admitted *pro hac vice*)
Jonathan M. Manes

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from the courts when faced with credible threats of assassination (or actual assassination) by his or her own government.

The sum and substance of the government's demand for judicial abdication is perhaps best articulated by one of its amici:

> Amici do not mean to suggest that American citizens such as Al-Aulaqi are not entitled to the protections afforded by the U.S. Constitution. They most certainly are entitled to such protections. But under the Constitution, it is the province of the political branches of government, not the federal courts, both to determine the extent of those constitutional rights and to ensure that those rights are protected.

See Amicus Br. of Jack W. Klimp et al.("Klimp Amicus Br.") 23**.** Plaintiff respectfully suggests that, in the face of executive assertions that a U.S. citizen may be targeted for death away from a battlefield and without due process, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). If this Plaintiff is not permitted to raise these claims in this context, it is difficult to conceive of any plaintiff who will be, and the courts will have been categorically excluded from any role in resolving profound and critical questions involving the constitutional rights of US citizens. Adjudicating Plaintiiff's claims will do no harm to the nation's security; ratifying the government's extreme theories will do lasting harm to the nation's va

connection between his injury and the conduct or policy he challenges; and that it is "likely" that his injury would be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990). These requirements are satisfied here.[1]

At the most basic level, the injury here could not be clearer, or more profound: Plaintiff's suit is based on his fear that the government will kill his son. The government does not argue that Plaintiff's fear lacks foundation. To the contrary, it declares that Plaintiff's son is a leader of Al-Qaeda in the Arabian Peninsula ("AQAP"), and it asserts that the Authorization for the Use of Military Force ("AUMF") invests the executive branch with the authority to use "necessary and appropriate force" against that organization. Defs.' Mem. in Opp. to Pl.'s Mot. for Prelim. Inj. ("Gov't Br.") 6. It declines to disavow any of the government statements indicating that Plaintiff's son is on government kill lists. Declaration of Ben Wizner ("Wizner Decl.") ¶¶ 11-13. It also implicitly confirms that it is trying to kill Plaintiff's son by stating that he can avoid lethal force by surrendering himself to authorities. Gov't Br. 13. In these circumstances, it is beyond dispute that Plaintiff has standing. He asserts an injury—his son's death. The injury would be caused by the government's conduct—specifically, its decision to authorize the use of lethal force. And the feared injury would be redressible by the relief requested—an injunction prohibiting the government from using lethal force except in accordance with constitutional and human rights standards.

The government argues that Plaintiff has not established a constitutionally cognizable injury because he has not demonstrated that the government will kill his son "without regard to whether, at the time lethal force will be used, he presents a concrete, specific, and imminent

[1] The government does not challenge Plaintiff's standing to raise his claim under the Alien Tort Statute.

threat to life, or whether there are reasonable means short of lethal force that could be used to address any such threat." Gov't Br. 16 (quoting Compl. ¶ 23). This argument is misguided for several reasons. First, the government is wrong to suggest that Plaintiff must demonstrate to a certainty that the injury he fears will be realized. To satisfy Article III, a plaintiff need only demonstrate a "realistic danger" of injury. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *see also Biggerstaff v. FCC*, 511 F.3d 178, 183 (D.C. Cir. 2007). Second, the government conflates the standing inquiry with the merits. To satisfy Article III, Plaintiff must demonstrate that his injury results from the government's conduct, but he need not show that his injury results from the government's *unlawful* conduct—otherwise every case in which a plaintiff had standing to sue the government would necessarily result in a judgment in plaintiff's favor.

In any event, Plaintiff has shown precisely what the government says Article III requires him to show—he has shown a realistic danger that the government will kill his son in contravention of constitutional and human rights principles. Government officials have stated to the press that both the Central Intelligence Ag

danger that the government will kill him without compliance with constitutional and human rights standards.[2]

If there were any doubt about this point, the government's own brief dispels it. The government labels Plaintiff's son a leader of AQAP, labels AQAP "an organization against which the political branches have authorized the use of all necessary and appropriate force," and finds support for the use of lethal force against AQAP leaders in, among other things, the law of war. Gov't Br. 4. But the authorization to use lethal force is broader under the law of war than it is under constitutional and human rights standards. Declaration of Mary Ellen O'Connell ("O'Connell Decl.") ¶¶ 6-8. The government's repeated invocation of the law of war only confirms the possibility that Plaintiff's son will be killed without compliance with constitutional and human rights standards.[3]

[2] In adjudicating the government's motion to dismiss, the Court must take the allegations in the Complaint as true and draw all inferences in favor of Plaintiff. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1156 (D.C. Cir. 2005). In adjudicating Plaintiff's motion for a preliminary injunction, the Court can rely on the government's public statements quoted, and the facts asserted, in the myriad news reports cited in the record. *See, e.g.*, Wizner Decl. ¶¶ 3-18. This is the case both because the news reports are relevant for their existence as well as their truth, and because in the context of a preliminary injunction motion even inadmissible evidence can be considered, *see, e.g.*, *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary injunction hearing."); Charles Alan Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, 11A Federal Practice & Procedure § 2949 (2d ed. 2010) ("[i]n practice affidavits usually are accepted on a preliminary injunction motion without regard to the strict standards of Rule 56(e), and . . . hearsay evidence also may be considered"); *id.* ("the trial court should be allowed to give even inadmissible evidence some weight when it is thought advisable to do so in order to serve the primary purpose of preventing irreparable harm before a trial can be had").

[3] To be sure, one of the questions in dispute in this case is whether the government can permissibly rely on the law of war to carry out the targeted killing of a U.S. citizen in Yemen. But the government cannot invoke the law of war as a justification for the use of lethal force against Plaintiff's son and then contend that Plaintiff lacks standing because the government may abide by the narrower limits that apply outside the context of armed conflict.

mother could act as next friend for adult son, and collecting cases). Here, Plaintiff has declared that he is dedicated to his son's best interests, Declaration of Nasser Al-Aulaqi ("Al-Aulaqi Decl.") ¶ 11, and the government has not introduced evidence to the contrary.

Second, Defendants' own actions prevent Plaintiff's son from accessing the courts himself. The government has declared that it is trying to kill Plaintiff's son, and it has tried to kill him at least once already. Wizner Decl. ¶¶ 11-13. Since the government made its intentions known, Plaintiff's son has gone into hiding. Al-Aulaqi Decl. ¶ 8 ("My son is currently in hiding in Yemen. He has been in hiding continuously since at least January 2010, when the United States' intention to kill him became clear."). Plaintiff's son has been out of contact with even his closest family members. Al-Aulaqi Decl. ¶ 9 ("Since the time my son went into hiding, neither I nor any of my family members have had any contact or communication with him."). Plaintiff himself has not attempted to locate his son for fear that doing so will jeopardize his son's life. Al-Aulaqi Decl. ¶ 9. Even the government's *amici* appear to acknowledge that Plaintiff's son is not in a position to file a lawsuit in U.S. courts. *See* Klimp Amicus Br. 15 n.5.[5]

The government's contention that next friend standing "has not been recognized outside of the habeas context to a mentally competent adult," Gov't Br. 12, is misguided. While the cases in which the courts have conferred next friend standing have generally involved

[5] The government cites *Coalition of Clergy, Lawyers & Professors v. Bush*, 310 F.3d 1153 (9th Cir. 2002) for the proposition that "even if [Plaintiff's son's] access to the courts were somewhat constrained by circumstances not of his own making . . . that would not suffice to establish next friend standing." Gov't Br. 14 n.6. But *Coalition of Clergy*, a case involving Guantánamo detainees, supports the opposite proposition. The court in that case emphasized that "detainees are not able to meet with lawyers, and have been denied access to file petitions in United States courts on their own behalf" before

standing in habeas and other contexts); *United States ex rel. Bryant v. Houston*, 273 F. 915, 916 (2d Cir. 1921) (characterizing next friend doctrine as "ancient and fully accepted"). The argument that the government advances here—that next friend standing requires congressional authorization—is one that the Supreme Court expressly declined to endorse in *Whitmore*. 495 U.S. at 164-65 (declining to hold that next friend standing is limited to contexts in which authorized by statute, and noting that federal habeas statute merely "codified the historical practice").

The government's argument that Plaintiff's son could avoid death by "surrender[ing] or otherwise present[ing] himself to the proper authorities," Gov't Br. 13, is flawed on several levels. As an initial matter, the government lacks authority to summarily execute fugitives from the law. The government cannot kill its own citizens simply because they refuse to present themselves to the proper authorities. But in any event Plaintiff's son is not a fugitive from the law, because neither the United States nor Yemen has publicly charged him with any crime. The government's argument that Plaintiff's son should "surrender" is predicated on the contention that Plaintiff's son is a participant in an armed conflict against the United States, but this is a contention that Plaintiff disputes. Plaintiff disputes that the United States is engaged in armed conflict in Yemen, and he disputes that the U.S. government has authority to kill his son in connection with any armed conflict. To accept the government's argument that Plaintiff's son should surrender to the proper authorities would require the Court to accept at the standing stage what is disputed on the merits.

In fact, it would be particularly inappropriate to deny next friend standing in the circumstances of this case. The action that Plaintiff seeks to challenge—the government's contemplated targeted killing of his son—is the same action that deprives his son of access to the

courts. The government should not be permitted to rely on the very conduct that Plaintiff alleges is unlawful in order to insulate that conduct from judicial review.

The government's contention that "there are good reasons to doubt that this suit reflects [Plaintiff's son's] wishes" is equally groundless. Gov't Br. 14-15. The government says that Plaintiff's "son's public pronouncements indicate that he has no desire to avail himself of protections afforded by the Constitution and courts of a nation that he deems an enemy deserving of violent attacks." Gov't Br. 15 (citing Public Clapper Decl. § 16). But no "pronouncement" cited in the paragraph comes even remotely close to saying what the government asserts. Plaintiff's public silence with respect to the present lawsuit supports an inference in his favor. This suit has received media attention throughout the world, *see, e.g.*, *Rights Groups Sue Over Kill List*, Al Jazeera, Aug. 31, 2010,[6] but Plaintiff's son has issued no statement disavowing or condemning it.[7]

[6] Available at http://english.aljazeera.net/news/americas/2010/08/2010831134842819315.html.

[7] The government cites a series of cases in which litigants were denied next friend standing because they could not establish that they were acting in accord with the wishes of those

its threat, and the government's actions have already deprived Plaintiff of the ability to talk or meet with his son. These injuries give Plaintiff

objectives are identical—to prevent the unlawful killing of the latter. If any proof were required of Plaintiff's earnest concern for his son's well being, the court need look no further than Plaintiff's advocacy on his son's behalf immediately after it was disclosed that the government had authorized his son's execution, and well before the present litigation was contemplated. *See* Al-Aulaqi Decl. ¶ 6 (discussing letter to President Obama); Paula Newton, *Al-Awlaki's Father Says Son Is 'Not Osama Bin Laden'*, CNN, Jan. 10, 2010 (discussing his son's targeting and pleading with the U.S. government not to carry out its threat).[9]

This Circuit has been particularly inclined to grant third-party standing "when the third party's rights protect that party's relationship with the litigant." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 809 (D.C. Cir. 1987); *see also Fair Employment Council of Greater Wash., Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1280-81 (D.C. Cir. 1994) (observing that "the Court has allowed litigants to assert third parties' rights in challenging restrictions that do not operate directly on the litigants themselves, but that nonetheless allegedly disrupt a special relationship—protected by the rights in question—between the litigants and the third parties"). In this case, a father seeks to preserve the very existence of a relationship with his son by protecting his son's right to life. In such circ

The third prong of the *Powers* test—the existence of some "hindrance" to the third-party's assertion of his own rights—is also easily satisfied here. As discussed above, Plaintiff's son is under threat of death and cannot contact counsel, much less access the courts, without exposing himself to death or, at the very least, indefinite detention without charge. Notably, the "hindrance" requirement under *Powers* has been more liberally construed and is significantly less stringent than the analogous consideration under the doctrine of next friend standing. In the latter context, Plaintiff must show that "the real party in interest is *unable* to litigate his own cause." *Whitmore*, 495 U.S. at 150 (emphasis added). By contrast, the Supreme Court and D.C. Circuit have routinely found that a "hindrance" exists—and third-party standing is appropriate—even in cases where it was clearly possible for the third-party to sue on his or her own behalf. *See, e.g.*, *Powers*, 499 U.S. at 415 (holding that the "small financial stake involved [in litigation]

standing in a case where it found no cognizable obstacle at all to the third-party's ability to raise his own constitutional claim. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989). The Court in that case reasoned that the absence of any hindrance was outweighed by the other factors relevant to the third-party standing analysis. *Id.*

Where, as here, Plaintiff would be profoundly injured if the government were to act on its expressed intention to kill his son, and Plaintiff's son is not simply hindered but all but foreclosed from accessing the courts himself, it would be wholly inappropriate to deny Plaintiff the opportunity to assert his son's rights.

D. The Court does not lack authority to grant the relief that Plaintiff requests.

The government makes a series of other arguments in support of the contention that the Court cannot or should not grant the relief that Plaintiff requests. These arguments, too, lack merit.

The government argues that Plaintiff has requested relief that is "untethered to any particular fact situation." Gov't Br. 17. This is decidedly not a case, however, in which a plaintiff seeks to reform a law or policy in which he has no direct stake apart from a special interest in the subject matter. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Plaintiff seeks to prevent the government from killing his son. His claims arise out of the government's past and contemplated actions with respect to his son. Although there is no doubt that this case raises questions of broad importance, the relief Plaintiff requests is very much tethered to a particular fact situation: it would limit the circumstances in which the government can use lethal force against a specific American whom the government has labeled an enemy of the state.

The government also argues that equitable relief is inappropriate because there is "[no] basis for assuming that the United States would otherwise disregard applicable legal constraints." Gov't Br. 17. The government's brief itself, however, provides ample basis for this assumption. The government repeatedly references the law of armed conflict, making clear its belief that this body of law provides the framework under which the targeted killing of Plaintiff's son should be evaluated. Plaintiff disputes, however, that the law of war governs this case. Accordingly, while it may be true that the government does not intend to "disregard [what it believes are the] applicable legal constraints," Gov't Br. 17, there is a dispute about which legal constraints are applicable, and there is plainly a basis for assuming that the government will, absent an injunction, apply a standard different from the one that Plaintiff believes should apply. That was true even before the government filed its brief, *see* Wizner Decl. ¶¶ 4-9; it is all the more true now. This is precisely why a judicial declaration of "what the law is" is necessary.

The government also argues that the injunction Plaintiff seeks is "extremely abstract – simply a command that the United States comply with generalized constitutional standards." Gov't Br. 17; *see also id.* at 18 & n.18 (suggesting that the requested relief is insufficiently specific). The government is mistaken. The general rule is "that an injunction may not be so broad or imprecise as to leave one subject to it in doubt as to the conduct actually prohibited." *SEC v. Savoy Indus., Inc.*, 665 F.2d 1310, 1317 (D.C. Cir. 1981). This Circuit has held that an injunction is appropriate even if it does no more than parrot the language of governing statute, so long as the language of the statute itself "is sufficiently specific to pass muster." *Id. at* 1318; *see also United States v. Miller*, 588 F.2d 1256, 1261 (9th Cir. 1978) ("[T]he mere fact that the injunction is framed in language almost identical to the statutory mandate does not make the language vague."). The injunction and declaration that Plaintiff seeks certainly meet this

standard. Indeed, the relief Plaintiff seeks is no more "abstract" than the command issued by the Supreme Court in *Tennessee v. Garner*, 417 U.S. 1 (1985); *see also* Pl. Br. 10-12 (discussing legal standard). The government has been held to the standard in countless excessive force cases, and the government should not now be heard to argue that the standard that governs the use of force by every law enforcement agency in the country is too "abstract" or "imprecise" to govern the CIA and Department of Defense. Plaintiffs do not ask this Court to order the government simply to comply with the Constitution, but rather to require its compliance with the specific legal constraints that apply in the specific circumstances presented here: the

(in which the injunction would preclude the government from arguing that the law was not clearly established).[11]

The government's argument is actually far broader than it first appears, because the

Gilligan v. Morgan, 413 U.S. 1 (1973), which the government contends is "analogous," is not. In that case, which involved the aftermath of the Kent State University shootings in 1970, plaintiffs filed suit seeking a sweeping injunction that would have prohibited the Governor from "prematurely ordering National Guard troops to duty in civil disorders" and "restrain[ed] leaders of the National Guard from future violation of the students' constitutional rights." 413 U.S. at 3. By the time the case arrived at the Supreme Co

Plaintiff does not ask this Court to supervise the military's real-time decisions, or its internal organization or processes. While the government seeks to rely on *Gilligan* for the proposition that the judiciary cannot enforce compliance with the Constitution in military matters, Gov't Br. 17-19, the *Gilligan* Court explicitly disclaimed that notion. 413 U.S. at 11-12 ("[W]e neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law for specific unlawful conduct by military personnel, whether by way of damages *or injunctive relief*." (emphasis added)). *Gilligan* therefore does not suggest that the "specific unlawful conduct" at issue here—unlawful targeted killing of citizens outside of armed conflict—is beyond judicial review.

Equally unpersuasive is the government's contention that the Court does not have the power to enjoin executive officers. The government argues that this Court

supports the proposition that the courts' traditional reluctance to issue an injunction directly against the President can cloak subordinate officers with a similar immunity against injunctive or declaratory relief. This Court is bound not only by common sense but by clear precedent to reject the government's novel theory. *See, e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) ("[W]e need not decide whether injunctive relief against the President was appropriate, because we conclude that the injury alleged is likely to be redressed by declaratory relief against the Secretary alone."); *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) ("If a case for preventive relief be presented,

Guantánamo Bay, a question the Supreme Court addressed in *Rasul* and *Boumediene*; or charge and try suspects in ad-hoc military commissions, a question the Supreme Court addressed in *Hamdan*. In each of these cases and others, the Supreme Court and other federal courts flatly rejected the government's claims of unreviewable war powers over individuals suspected of terrorism. As Justice O'Connor wrote for the plurality in *Hamdi*:

> [W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. . . . Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.

542 U.S. at 535-36.

Plaintiff asserts claims concerning the right of his United States citizen son not to be killed in violation of the Constitution, claims

implicating the first two factors identified in *Baker v. Carr*, 369 U.S. 186, 217 (1962). *Baker* outlined six formulations describing a political question, at least one of which must be inextricable from the case in order to dismiss on nonjusticiability grounds. The "dominant consideration in any political question inquiry is [the first

on the numerous powers vested in Congress under Article I, Section 8, and on the President's Commander in Chief power. U.S. Const., art. II, § 2; Gov't Br. at 23-24. But Plaintiff's constitutional claims are undoubtedly justiciable, even where adjudicating them might implicate foreign policy and national security.[15]

B. Claims asserting individuals' constitutional rights are justiciable even if they implicate foreign policy and national security.

Defendants acknowledge that claims asserting constitutionally protected interests may require the court to address the powers of the political branches in the area of foreign policy and national security, yet assert that the Court should have no role here. Gov't Br. 23. But claims asserting the constitutional rights of U.S. citizens are justiciable even when they implicate these areas. In *Committee of United States Citizens Living in Nicaragua v. Reagan*, U.S. citizens living in Nicaragua sought to enjoin U.S. funding of the Contras, alleging that it violated their Fifth Amendment rights of liberty and property because Americans were targets of the Contras. 859 F.2d 929, 935 (D.C. Cir. 1988). The court found plaintiffs' claims and request for injunctive relief justiciable, noting that "the Supreme Court has repeatedly found that claims based on [citizens' fundamental liberty and property rights] are justiciable, even if they implicate foreign policy decisions." *Id.* (citing *Regan v. Wald*, 468 U.S. 222 (1984); *Dames & Moore v. Regan*, 453 U.S. 654 (1981)); *see also, Marbury*, 5 U.S. (Cranch) 166 (political questions "respect the nation, not individual rights"); *Reid v. Covert*, 354 U.S. 1, 5 (1957) (plurality opinion) (rejecting

[15] Notably, in reviewing Israel's targeted killing policy, the Israeli High Court of Justice rejected the Israeli government's argument that the issues were non-justiciable, finding that the doctrine did not apply to the enforcement of human rights; that the questions were legal, not political (despite the likelihood of political implications), including the question regarding norms of proportionality; that international courts had decided the same types of questions; and that judicial review would ensure that objective *ex post* examinations functioned appropriately. HCJ 769/02 *Pub. Comm. against Torture in Israel v. Gov't of Israel* [2006] IsrSC 57(6) 285 ¶¶ 47-54.

"the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights").[16]

"The Executive's power to conduct foreign relations free from the unwarranted supervision of the Judiciary cannot give the Executive *carte blanche* to trample the most fundamental liberty and property rights of this country's citizenry." *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1515 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985). In *Ramirez,* a U.S. citizen sought to enjoin the Secretaries of Defense and State from occupying and destroying his ranch in Honduras by operating a military training camp on it, alleging a Fifth Amendment deprivation of the use and enjoyment of his property. The court rejected the government's political question argument, finding plaintiffs' claims were "not exclusively committed for resolution to the political branches," but were "narrowly focused on the lawfulness" of defendants' deprivation of his private property. *Id.* at 1512; *see also Linder v. Portocarrero*, 963 F.2d 332, 336-37 (11th Cir. 1992) (finding torture and murder claims justiciable even though a civil war was in progress and the acts were allegedly "part of an overall design to wage attacks . . . as a means of terrorizing the population" because the complaint was "narrowly focused on the lawfulness of the defendants' conduct in a single incident"). Plaintiff's claims here are likewise narrowly focused on the constitutional deprivation of his son's life; he does "not seek judicial monitoring of foreign policy" or to "challenge United States relations with any foreign country." *Id.* at 1513. It cannot be that a constitutional claim to enjoin the

[16] Defendants misplace reliance on *Bancoult v. McNamara*, as it affirmed this principle. 445 F.3d 427, 435 (D.C. Cir. 2006) ("claims based on 'the most fundamental liberty and property rights of this country's citizenry,' such as the Takings and Due Process Clauses of the Fifth Amendment, are 'justiciable, even if they implicate foreign policy decisions.'" (citations omitted)); *see also id.* at 437 ("the presence of constitutionally-protected liberties could require us to address limits on the foreign policy and national security powers assigned to the political branches").

dismissal of plaintiffs' claims, but looked at a combination of justiciability doctrines.[19] In any case, the *Gilligan* Court itself made clear that it neither held nor implied "that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief." *Gilligan*, 413 U.S. at 11-12;

Moreover, in finding plaintiffs' claims nonjusticiable, the D.C. Circuit explained that it had "distinguished between claims requiring us to decide whether taking military action was 'wise'—'a policy choice and value determination constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch—and claims presenting purely legal issues' such as whether the government had legal authority to act." *El-Shifa*, 607 F.3d at 842 (citations omitted). Plaintiff does not seek a determination that carrying out a targeted killing against his U.S. citizen son would be unwise as a matter of policy. His claims present purely legal issues—whether the targeted killing of his U.S. citizen son outside of armed conflict, and in the absence of an imminent threat that cannot be addressed with non-lethal means, violates the Constitution and international law.[21]

C. Courts routinely adjudicate claims implicating war powers and national security.

Plaintiff's claims would be justiciable even if this case involved armed conflict. *See Hamdi*, 542 U.S. at 636 ("We have long . . . made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."). Since 9/11, the Supreme Court has routinely adjudicated issues implicating national security and the President's war powers. *See Hamdi*, 542 U.S 507; *Rasul*, 542 U.S. 466; *Boumediene*, 553 U.S. 723; *Hamdan*, 548 U.S. 557.

The Supreme Court has also historically permitted actions against U.S. soldiers and officials for wrongful or tortious conduct taken in the course of warfare. *See, e.g., Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851) (U.S. soldier sued for trespass while in Mexico during

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well as an injunction requiring retraction of the statements. *El-Shifa*, 607 F.3d at 840. They did not seek to enjoin an impending execution in violation of the Constitution.

[21] *El-Shifa* is also distinguishable because, as discussed further below, Plaintiff's claims involve the government's use of lethal force outside the context of armed conflict. *See El-Shifa*, 607 F. 3d at 845 (relying on Congress's power to declare war (U.S. Const., art. I, § 8, cl. 11), and the Executive's power as commander in chief (U.S. Const., art. II, § 2, cl. 1)).

ensuring, *before* the government takes the life of an American citizen, that the government is interpreting the law correctly.[25]

D. The existence and scope of the armed conflict is not a political question.

The government additionally claims that it is beyond the competence of the courts to determine whether the targeting of Plaintiff's son in Yemen is properly evaluated under the law of armed conflict.[26] Gov't Br. 32. Supreme Court precedent proves otherwise, and to the extent the government relies on the AUMF as authority for the expansive reach of its "war against Al-Qaeda," the scope of the force authorized by the statute is squarely a question for the judiciary.[27] In *Hamdan*, the Supreme Court responded to the government's claim of unbounded authority to create ad-hoc military commissions with which to prosecute "enemy combatants" by applying the laws of war and determining the threshold question of the existence and nature of the conflict

[25] Defendants cite no authority for the proposition that their motion to dismiss on political question grounds is properly brought under Rule 12(b)(1) for lack of subject matter jurisdiction, and *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005), cited by Amici Klimp et al. at 10-11, is not dispositive. *See Oryszak v. Sullivan*, 576 F.3d 522, 527 (D.C. Cir. 2009) (Ginsburg, J., concurring); *see also Baker*, 369 U.S. at 198. In any event, a constitutional claim cannot be dismissed on jurisdictional grounds unless it is "unsubstantial and frivolous." *Baker*, 369 U.S. at 199.

[26] Even if the government is correct that the law of armed conflict applies here, there are still limitations on the circumstances in which the government can use lethal force against a civilian – even a suspected terrorist. Civilians may be targeted with lethal force only if they are directly participating in the armed conflict. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (IV) art. 3, Aug 12, 1949, 75 U.N.T.S. 287. Even civilians who are directly participating in hostilities can be targeted only in accordance with principles of military necessity, proportionality and precaution. *See* Nils Melzer, *Targeted Killing in International Law* 397-411 (2008). The authority to kill is narrower than the authority to detain.

[27] The government vaguely asserts "other legal bases under U.S. and international law for the President to authorize the use of force against al-Qaeda and AQAP, including the inherent right to national self-defense recognized in international law." Gov't Br. 24. To the extent the Executive invokes a right to self-defense, however, the question of whether the use of force by one state within the territory of another is lawful is separate and distinct from the question of whether the targeting of the individual himself is lawful, as Plaintiff explained in his opening brief. *See* Pl. Br. 30-31.

Subsequent decisions of the ICTY and other courts have applied and interpreted these criteria in evaluating whether various situations of violence constituted armed conflict. With respect to the level of organization of a party, courts have looked to, *inter alia*, the existence of a headquarters and command structure; territorial control by the group; and the extent of the group's ability to access military equipment to recruit and provide military training to members, to use military tactics, and to speak with one voice. Regarding the level of intensity of a conflict, indicators have included, *inter alia*, the number and frequency of attacks, the extent of civilian casualties and displacement, and the severity of the state's response. *See Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84-T, Judgment, ¶¶ 90-99 (Apr. 3, 2008) (citing evidence of a group's membership of hundreds to thousands of soldiers, considerable control of territory, and sophisticated access to arms to find that it was "organized," and evidence of nearly 1,500 attacks by the group, daily shelling and clashes involving state forces and the group, deployment of state forces numbering 1,500 to 2,000, and the flight and disappearances of civilians to find the requisite "intensity" of fighting); *see also, e.g., Prosecutor v. Halilovic*, Case No. IT-01-48-T, Judgment (Nov. 16, 2005); *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-A, Judgment (Dec. 17, 2004); *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan. 29, 2007).

Courts at the national level have similarly addressed this question. *See, e.g*, HCJ 769/02 *Pub. Comm. against Torture in Israel v. Israel* [2006] IsrSC 57(6) 285, ¶16 (finding an armed conflict and citing evidence of "severe combat," the use of "military means" by the parties, and thousands of civilian casualties); *HH & Others*, CG [2008] UKAIT 00022 (U.K. Asylum and Immigration Tribunal) (Jan. 28, 2008) (relying on criteria used in *Tadic* to determine that the violence in Somalia constituted a non-international armed conflict for purposes of determining a

"tactical decision," *id*. at 1310. But the legal determination sought here, of the permissible bounds of the AUMF, is not a tactical decision but a question of law on which courts have pronounced upon many times before.

While the government is correct that the existence of an armed conflict between the United States and Al-Qaeda in one location "does not mean it cannot exist outside this geographic area," that does not mean it exists everywhere. *See* O'Connell Decl. ¶ 13 ("[A]rmed conflict has a territorial aspect. It has territorial limits."). Nine years ago Congress authorized the President to use force against those "nations, organizations, or persons" responsible for the attacks of September 11, pursuant to which the President launched a military campaign against Al-Qaeda and the Taliban regime in Afghanistan. But the AUMF was not "a blank check." *Hamdi*, 542 U.S. at 536. The existence of an armed conflict is governed by the laws of war and depends upon objective criteria, namely, the existence of organized parties and intense conflict. *See* O'Connel Decl. ¶¶ 9-12. Those criteria are not met here. *See id*. ¶¶ 14-17.

As the declaration of Bernard Haykel describes, Al-Qaeda in the Arabian Peninsula ("AQAP") is a fragmented group with differing interests and no unified strategy, and numbers no more than a couple of hundred individuals. *See* Declaration of Bernard Haykel ("Haykel Decl.") ¶ 7. Attacks by the group have been sporadic and numbered some two dozen since 2006. *See id*. ¶ 11. In contrast, a war has been waged in the north of the country since 2004 between the Yemeni government and a group called the Huthis, which has resulted in thousands of casualties, tens of thousands of refugees, destroyed villages and depopulated entire areas, employed all types of armaments, and involved international groups and countries offering mediation services to reach a cease fire and a resolution to the hostilities. *See id*. ¶ 11. According to Haykel, the government's military engagements with AQAP do not compare in terms of the number of

victims, refugees, destruction, and the use of armaments; the nature of the battle against elements of AQAP is in the nature of a police action. *See id*; O'Connell Decl. ¶ 15 (concluding that there is no armed conflict in Yemen).

In addition to being constrained by the laws of war, by its plain terms the AUMF also requires a nexus to the individuals and organizations responsible for the September 11 attacks.[31] While Al-Qaeda and the Taliban fall under this rubric, AQAP is a separate and distinct group that is not known to have any actual association with Al-Qaeda, whether in terms of command structure or activities, and no connection to September 11. *See id*. ¶ 13; *see also, e.g.*, *Hamlily*, 616 F. Supp. 2d at 75 n.17 (holding that "'[a]ssociated forces' do not include terrorist

cobelligerent, of Al-Qaeda," it provides absolutely no support for this claim in its declaration or elsewhere.[32] Gov't Br. 8, 24, 32-33. In the face of the evidence provided by the Plaintiffs as to the nature of AQAP, the situation in Yemen, and the non-existence of an armed conflict, the government's bald assertion to the contrary cannot stand. *See generally* Haykel Decl.; O'Connell Decl.

III. PLAINTIFF HAS ASSERTED A PROPER CAUSE OF ACTION FOR EXTRAJUDICIAL KILLING UNDER THE ALIEN TORT STATUTE.

The government moves to dismiss Plaintiff's ATS claim on the grounds that it presents a "novel" cause of action and is barred by sovereign immunity. The government misunderstands Plaintiff's claim, and misapplies the law on sovereign immunity.

A. Plaintiff's claim is well recognized under the ATS.

The government characterizes Plaintiff's claim as one for intentional infliction of

killing of his son.[33] Thus, while the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) urged caution when recognizing new causes of action under the ATS,[34] there is nothing new about the international norm—the prohibition of extrajudicial killing—upon which Plaintiff bases his ATS claim.

Nor is the injunctive and declaratory nature of the relief Plaintiff seeks unprecedented under the ATS. As an initial matter, nothing in the plain language of the ATS limits the type of relief courts may grant.[35] 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of *any civil action* by an alien for a *tort* only, committed in violation of the law of nations or a treaty of the United States." (emphasis added)); *see also City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 726 n.1 (1999) (Scalia, J., concurring) ("Since the merger of law and equity, any type of relief, including purely equitable relief, can be sought in a tort suit."); *see also* Restatement (Second) of Torts § 933(1) (injunctions are available "against a committed or threatened tort" if appropriate).

Furthermore, courts have previously granted equitable relief for ATS claims. In *Von Dardel v. Union of Soviet Socialist Republics*, the district court in this circuit issued a default judgment against the Soviet Union, granting injunctive, declaratory and compensatory relief under the ATS, and ordering the Russian government to release a political prisoner or otherwise

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[33] If Plaintiff's son was indeed subject to an extrajudicial killing and Plaintiff sought damages under the ATS, he would be the appropriate party to bring the claim under applicable law. He is therefore the appropriate party to bring this claim for injunctive relief.

[34] One consideration behind the caution *Sosa* urged was the fear that U.S. courts would overly intrude upon the treatment of foreign citizens by their own governments. *Sosa*, 542 U.S. at 728 ("It is one thing for American courts to enforce constitutional limits on our own State and Federal Government's power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens."). By contrast, Plaintiff's claim concerns the United States' treatment of one of its own citizens.

[35] Compare with the relief provided under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b)(1) (limiting recovery to monetary damages) and the Administrative Procedure Act ("APA"), 28 U.S.C. § 702 (limiting recovery to equitable relief).

account for his whereabouts. 623 F. Supp. 246 (D.D.C. 1985), *vacated on other grounds*, 736 F. Supp. 1 (D.D.C. 1990). As noted in Plaintiff's opening brief, in *Kadic v. Karadzic*, the district court granted a permanent injunction against Radovan Karadzic, enjoining him from committing or facilitating extrajudicial killings among other acts.[36] Pl. Br. 24 n.8.

B. Plaintiff's claim is not barred by sovereign immunity.

Sovereign immunity does not bar Plaintiff's ATS claim because the claim falls within the APA's waiver of sovereign immunity for non-monetary relief. *See* 5 U.S.C. § 702 (waiving sovereign immunity for "[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority"). "The APA's waiver of sovereign immunity applies to any suit whether under the APA or not." *Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006) (citation omitted); *see also Sanchez-Espinoza*, 770 F.2d at 207 (Scalia, J.) (noting that the APA's waiver of sovereign immunity may be available for ATS claims against federal defendants "in their official capacity for *nonmonetary* relief ").

Alternatively, Plaintiff's ATS claim may proceed under the "*Larson-Dugan*" exception to sovereign immunity. The Supreme Court in

take action in the sovereign's name is claimed to be unconstitutional"). "Actions for *habeas corpus* against a warden and injunctions against the threatened enforcement of unconstitutional statutes are familiar examples of [the constitutional] type [of excepted cases]." *Larson*, 337 U.S. at 690.

In fashioning this exception, the *Larson* Court reasoned that in cases of unconstitutional acts, "the conduct against which specific relief is sought is beyond the officer's power and is, therefore, not the conduct of the sovereign." *Larson*, 337 U.S. at 690; *see also id.* ("The only difference [from a claim alleging *ultra vires* conduct] is that in this case the power has been conferred in form but the grant is lacking in substance because of its constitutional invalidity."). The *Larson* exception applies to official capacity actions such as this. *See, e.g., Doe v. Wooten*, 376 F. App'x 883, 885 (11th Cir. 2010) (agreeing that a "plaintiff may be able to obtain injunctive relief against a federal officer acting in his official capacity when the officer acts beyond statutory or constitutional limitations" (citing *Larson*)); *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1233 (10th Cir. 2005) (holding *Larson* rule waives sovereign immunity in suit against prison officials in their official capacity). Regardless of this Court's conclusions regarding Defendants' waiver of immunity under the APA, therefore, Defendants are not entitled to sovereign immunity because the conduct Plaintiff's ATS claim seeks to enjoin—targeted killings outside of armed conflict, in the absence of judicial process or where lethal force is not a last resort to prevent an imminent threat to life, Compl. ¶ 29—is both a violation of international law and unconstitutional. *See Swan*, 100 F.3d at 981 ("[S]overeign immunity does not apply as a bar to suits alleging that an officer's actions were unconstitutional or beyond statutory authority." (citing *Larson*)); *Am. Policyholders Ins. Co. v. Nyacol Prods.*, 989 F.2d 1256, 1265 (1st Cir. 1993) (the "case's underlying merits" must fall within scope of *Larson* exceptions).

While Defendants are correct that the President may not be enjoined pursuant to a waiver under the APA, Gov't Br. 40-41, he may be enjoined under the *Larson* exception described above. *See Made in the USA Found. v. United States*, 242 F.3d 1300, 1309 n.20 (11th Cir. 2001) (sovereign immunity does not bar injunctive action against President where conduct falls under *Larson* exception). "It is now well established that 'review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive.'" *Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (quoting *Franklin v. Massachusetts*, 505 U.S. at 828 (Scalia, J., concurring in part and concurring in the judgment)); *see also Soucie v. David*, 448 F.2d 1067, 1072 n.12 (D.C. Cir. 1971) ("[C]ourts have power to compel subordinate executive officials to disobey illegal Presidential commands."). While Presid

money damages arising out of or relating to the same

IV. LITIGATION OF PLAINTIFF'S CLAIMS IS NOT FORECLOSED BY THE STATE SECRETS PRIVILEGE.

Finally, the government moves to dismiss this suit without any adjudication of its merits on the ground that litigation of Plaintiff's claims would force the disclosure of state secrets and result in "significant harm to the national security of the United States." Gov't Br. 43. The

combat a terrorist organization overseas, and, if so, the specific targets of such action" would provide the nation's enemies with "critical information needed to evade hostile action," Public Declaration of Robert M. Gates ("Gates Public Decl.") ¶ 7, must be taken here with a grain of salt: any harm associated with such disclosures in this instance has already occurred, and the government has only itself to blame.[39] Now that the government has placed its asserted authority to kill Plaintiff's son into the public debate, its attempt to preclude judicial consideration of the limits of that authority is both impermissible and unseemly.

Even if the government had not itself generated the very public controversy it seeks now to extinguish, invocation of an evidentiary privilege to prevent a court from adjudicating a litigant's potentially meritorious claims related to the executive's asserted authority to kill him would be unconscionable. "[T]he action of the sovereign in taking the life of one of its citizens . . . differs dramatically from any other legitimate state action." *Gardner v. Florida*, 430 .S. 349, 357-358 (1977). For that reason, the common-law privilege recognized by the Supreme Court in *United States v. Reynolds,* 345 U.S. 1, 12 (1953), whereby a private litigant's right of redress must in some cases yield to the executive's obligation to safeguard military secrets, takes on an altogether different dimension when the interest at stake is not the recovery of property but the preservation of life. The singularity of this situation "is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." *Ford v. Wainwright,* 477 U.S. 399, 411 (1986) (Marshall, J., plurality opinion). Indeed, the unique circumstances of this case raise serious questions about the propriety of the

[39] There is no indication that the senior government officials who disclosed this information to the world are being criminally investigated for risking "exceptionally grave harm" to the nation's security.

any reliance on the state secrets privilege as a basis for declining to adjudicate Plaintiff's claims.[40]

In his public declaration in support of the government's state secrets assertion, the Director of National Intelligence alleges that Plaintiff's son has engaged in conduct that, if supported by evidence, would be prosecutable under numerous criminal statutes. It is beyond dispute that were the government to prosecute Plaintiff's son criminally, rather than execute him without charge or trial, invocation of the state secrets privilege would be categorically impermissible. Rather, under the ample protections offered by the Classified Information Procedures Act, the government would be required to present evidence derived from intelligence sources in support of its allegations that Plaintiff's son is an "operational" terrorist who has conspired in terrorist plots against the United States. That is because, as the Supreme Court held in *Reynolds*, it would be "unconscionable to allow [the government] to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." 345 U.S. at 12.

The present circumstances raise an even more grave concern: the government is seeking to impose the ultimate penalty *without* trial while claiming a secrecy privilege that would be unavailable *with* trial. It would be an odd and remarkable rule that would permit the government to avoid all judicial scrutiny simply by electing to bypass trial in favor of summary execution. In that regard, the government's widely publicized intent to kill Plaintiff's son places him more in the position of "the accused," *Reynolds*, 345 U.S. at 12, than of an ordinary civil litigant in cases

[40] *See, e.g.*, Charlie Savage, *U.S. Debates Response to Targeted Killing Lawsuit*, N.Y. Times, Sept. 15, 2010 (quoting "David Rivkin, a lawyer in the White House of President George H. W. Bush," expressing concern that "if someone came up to you and said the government wants to target you and you can't even talk about it in court to try to stop it, that's too harsh even for me.").

in which courts have upheld invocations of the state secrets privilege. The government can cite to no remotely similar case in which it has been permitted to block a citizen's access to court even as it proceeded with ongoing efforts to deprive him of his life, or even his liberty.

In fact, with regard to Plaintiff's claim that the government's refusal to disclose the standards by which it targets U.S. citizens for death violates the notice requirement of the Due Process Clause, the government's argument is, if anything, even more extreme. As Plaintiff has argued, due process requires at a minimum that citizens be put on notice of what may cause them to be put to death. Just as due process prohibits the government from convicting a person on the basis of a secret law, so, too, does it prohibit killing him pursuant to secret legal standards. The constitutional right to meaningful notice cannot be trumped by an evidentiary privilege. Put otherwise, the government's invocation of the state secrets privilege with respect to Plaintiff's due process notice claim is itself a constitutional violation: the very information the government seeks to suppress is the information to which Plaintiff is constitutionally entitled.[41]

By broadcasting its intent to target a U.S. citizen for death, the government has initiated an extraordinary controvery about the limits on executive authority to use lethal force, the scope of the armed conflict in which the United States is now engaged, and the rights of U.S. citizens who are suspected of involvement with terrorist organizations. Plaintiff's interest in establishing

[41] The government's contention that disclosure of "any criteria or procedures that may be utilized in connection with [operations in Yemen]" would reveal state secrets, Gov't Br. 49-50, is untenable in light of the documents that it recently disclosed in response to a FOIA request. *See* Manes Decl. Ex. A. On October 1, 2010—after the government filed its brief in this case—the government disclosed a set of 47 Department of Defense briefing slides that set out in detail the various steps that occur before and after targeting operations. Among other details, the slides identify the types of targets that may be identified, *id*. Ex. A at 6; the considerations taken into account in deciding whether to prioritize a target, *id*. Ex. A at 9-10, 23, 25; the process for determining what weapons system to use against a specific target, *id*. Ex. A at 11; the considerations that factor into approval of particular operations, *id*. Ex. A at 12; and a remarkably detailed description of the considerations that guide the operational decision to launch a strike in light of potential civilian casualties, *id*. Ex. A at 13, 15-20, 24, 26-38.

these limits in accordance with constitutional and international standards is manifestly different and more direct than that of others who may share a generalized concern about U.S. policy. Plaintiff is trying to protect his son against unlawful killing by the U.S. government. By invoking the state secrets privilege to terminate this litigation at its very outset, the government seeks to exclude from this controversy the only branch of government that can provide an authoritative resolution. There can be no question that Plaintiff's complaint raises profound and difficult questions concerning the relationship between liberty and security. But "[s]ecurity subsists, too, in fidelity to freedom's first principles." *Boumediene v. Bush*, 553 U.S. at 797. And no principle can be more firmly embedded in our constitutional system than the centrality of the right to life, and the gravity of its deprivation at the hands of the government. This Court should reject the government's effort to declare these matters off-limits for judicial review.

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CONCLUSION

For the foregoing reasons, this Court shoul

Respectfully submitted,

Jameel Jaffer (admitted *pro hac vice*)
Ben Wizner (admitted *pro hac vice*)
Jonathan M. Manes
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel.: (212) 519-7814
jjaffer@aclu.org

Pardiss Kebriaei (admitted *pro hac vice*)
Maria C. LaHood (admitted *pro hac vice*)
William Quigley
Center for Constitutional Rights
666 Broadway, 7th floor
New York, NY 10012
Tel.: (212) 614-6452
pkebriaei@ccrjustice.org

s/ Arthur B. Spitzer
Arthur B. Spitzer (D.C. Bar No. 235960)
American Civil Liberties Union
of the Nation's Capital
1400 20th Street, N.W., Suite 119
Washington, DC 20036
Tel.: (202) 457-0800
Fax: (202) 452-1868
artspitzer@aol.com

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