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

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INTRODUCTION

The government's brief seeking the dismissal of this case runs to nearly sixty pages but can be summed up in a single sentence: No court should have any role in establishing or enforcing legal limitations on the executive's authority to use lethal force against U.S. citizens whom the executive has unilaterally determined to pose a threat to the nation. The government has clothed its bid for unchecked authority in the doctrinal language of standing, justiciability, equity, and secrecy, but the upshot of its arguments is that the executive, which must obtain judicial approval to monitor a U.S. citizen's communications or search his briefcase, may execute that citizen without any obligation to justify its actions to a court or to the public. While the Constitution designates the President Commander-in-Chief of the nation's armed forces, it does not provide him with a blank check over the lives of its citizens.

The government would exclude the courts from any role in determining when lethal force may be used against American citizens, whether lethal force has been applied unlawfully, whether the United States is engaged in an armed conflict, and whether there are limitations on the scope of that conflict. To reach this drastic outcome, the government distorts long-settled standing doctrine by insisting that an American citizen whose extrajudicial death sentence has been broadcast to the world through coordinated government leaks cannot establish a "case or controversy" because his fears are speculative and his father is an inappropriate representative of his interests. But by the government's reasoning, Plaintiff's claims will become non-speculative only after his son has been killed—and even then, the government would seek to repel any legal challenge by invoking the "state secrets" and "political question" doctrines. If the government's theories are adopted, no American (or his estate) will ever be in a position to seek protection

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 values and institutions.

ARGUMENT

I. PLAINTIFF HAS STANDING TO BRING THIS SUIT.

A. Plaintiff has satisfied the requirements of Article III.

The Court should reject the government's argument that Plaintiff lacks standing. To satisfy the standing requirements of Article III, a litigant seeking to invoke the authority of the federal courts need only show that he has suffered a "concrete and particularized" injury that is "actual or imminent" rather than "conjectural" or "hypothetical"; that there is a causal

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 Agency ("CIA") and Joint Special Operations Command ("JSOC") maintain lists of individuals who can be targeted and killed, that the lists include American citizens, that individuals added to the lists can remain on the lists for months at a time, that placement on the lists creates a standing authorization for use of lethal force, that Anwar al-Aulaqi has been added to the lists, and that the government has already conducted at least one missile strike with the intent of killing him. Wizner Decl. ¶¶ 4-13. These statements show not only a realistic danger that the government will kill Plaintiff's son, but a realistic

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.

For these reasons, the Court should reject the government's argument that Plaintiff lacks standing. Even if the Court agrees with the government that Plaintiff lacks standing to challenge his son's targeted killing, however, it should find that Plaintiff has standing to press his son's notice claim. That claim does not turn on the lawfulness of the standards under which the government adds U.S. citizens to government kill lists. Whether or not the government's standards are lawful, and whether or not Plaintiff can demonstrate a realistic danger that his son will be killed unlawfully, Plaintiff's U.S. citizen son has a constitutional right to know the standards under which the government has authorized his killing.[4]

B. Plaintiff has standing to bring this suit as next friend for his son.

The government argues that Plaintiff cannot permissibly bring this suit as next friend for his son. But as the government acknowledges, Gov't Br. 11, a litigant has standing to raise claims as "next friend" if he is truly dedicated to the best interests of the person whose rights he seeks to assert, and if that person is unable to assert his rights himself. *Whitmore*, 495 U.S. at 163. Plaintiff meets both of these requirements.

First, Plaintiff is dedicated to his son's best interests. One federal circuit has observed that "[t]here is essentially a *per se* rule that a parent meets this prong of the next friend standing test." *Vargas ex rel. Sagastegui v. Lambert*, 159 F.3d 1161, 1168 (9th Cir. 1998) (holding that

[4] If this Court finds that Plaintiff has standing to assert his son's notice claim but lacks standing at this time to assert his son's targeted killing claims, it should stay the targeted killing claims until it has adjudicated the notice claim. If Plaintiff prevails on the notice claim, the government will be required to disclose the standard under which the government adds U.S. citizens to government kill lists. (As Plaintiff has explained, this standard must be stated with sufficient specificity to allow individuals to conform their behavior to the law. Pl.'s Mem. in Supp. of Mot. for Prelim. Inj. ("Pl. Br.") 32-34). Once the government has disclosed its standard, it will be clear whether the government's standard is broader than Plaintiff contends it should be under the Constitution and international human rights law. If the government's standards are the same as those Plaintiff contends should apply, Plaintiff's targeted killing claims can be dismissed.

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 concluding that "from a practical point of view the detainees cannot be said to have unimpeded or free access to court." 310 F.3d at 1161. The court thus suggested that the detainees might indeed satisfy the inaccessibility prong as a result of the obstacles imposed on them by the government. The court, however, declined to decide the issue because the other *Whitmore* prong—the requirement of a "significant relationship"—had not been satisfied.

individuals who were detained, minors, or mentally incompetent, the courts have made clear that the relevant question is not whether the real party in interest falls into one of these categories but whether there is some impediment to that party's bringing suit. *See, e.g.*, *Whitmore*, 495 U.S. at 165 (stating that a next friend must show "that the real party in interest is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability"). The courts have taken a flexible, non-formalistic approach to this inquiry. *See, e.g.*, *id.* at 163 (stating that next friend must provide "*an adequate explanation* . . . why the real party in interest cannot appear on his own behalf" (emphasis added)); *Bismullah v. Gates*, 501 F.3d 178, 191 (D.C. Cir. 2007) ("whether a would-be next friend has standing is necessarily a matter to be determined case by case"). That no court has conferred next friend standing in a case precisely like this one, *see* Gov't Br. 12, is a testament not to the novelty of Plaintiff's standing theory, but to the extraordinary facts of this case. To Plaintiff's knowledge, the government has never before claimed the authority to carry out targeted killings of its own citizens.

The government also errs in proposing that next friend standing is available only where authorized by statute or regulation. Before it was amended in 1948, the federal habeas statute did not authorize next friend suits. 28 U.S.C. § 454 (1940) ("Application for writs of *habeas corpus* shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, *signed by the person for whose relief it is intended* . . . ." (emphasis added)). Courts nonetheless entertained next friend suits filed for the benefit of individuals in detention. *See, e.g.*, *United States ex rel. Funaro v. Watchorn*, 164 F. 152, 153 (C.C.N.Y. 1908) ("Notwithstanding the language of [the *habeas* statute], it has been the frequent practice in this district to present habeas corpus petitions in deportation cases signed and verified by others than the person detained."); *Whitmore*, 495 U.S. at 162-63 & nn.3-4 (surveying history of next friend

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]

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[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 whose rights they sought to assert. In each of these cases, however, the real parties in interest repudiated the suit, failed to bring suit themselves even though there were no obstacles to doing so, or were not even identified by name and could not be represented by next friends who did not know their identities, let alone their interests. *See Idris v. Obama*, 667 F. Supp. 2d 25 (D.D.C. 2009) (Guantánamo detainee's brother denied next friend standing to bring *habeas* petition where detainee had repeatedly refused to meet with counsel who were seeking to represent him directly); *Hauser ex rel. Crawford v. Moore*, 223 F.3d 1316 (11th Cir. 2000) (death row inmate's mother denied next friend standing because her lawsuit was contrary to the express wishes of inmate, who had repeatedly declined to assert any potential claims and who had consistently been found mentally competent); *Davis ex rel. Potts v. Austin*, 492 F. Supp. 273, 276 (N.D. Ga. 1980) (death row inmate's cousin denied next friend standing because he had only a small amount of contact with inmate, there was no impediment to such contact, and cousin appeared motivated by philosophical and religious opposition to capital punishment rather than inmate's wishes); *Does 1-570 v. Bush*, No. 05-CV-313, 2006 WL 3096685 (D.D.C. Oct. 31, 2006) (attorneys did not have next friend standing for anonymous class of Guantánamo detainees that counsel could not identify by name, with whom counsel had no relationship, whose very existence was unclear, and whose best interests and wishes counsel could only speculate about).

Even if it were a close case whether Plaintiff can bring this lawsuit as next friend, it bears emphasis that the requirements of next friend standing are strictly "prudential" and are not mandated by the Constitution. *See, e.g.*, *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11-12, 17-18 (2004). Given that Plaintiff's son's life hangs in the balance, prudential concerns weigh heavily in favor of conferring next friend standing. *Cf. Rosenberg v. United States*, 346 U.S. 273, 294 (1953) (Clark, J. concurring for six Justices) ("Human lives are at stake; we need not turn this decision on fine points of procedure or a party's technical standing to claim relief"); *id.* at 290-91 (Jackson, J. concurring for the same six Justices) (joining Justice Clark's decision on the merits even though the person bringing the petition was "a stranger to the Rosenbergs and to their case" and even though "[h]is intervention was unauthorized by them and originally opposed by their counsel").

C. Plaintiff has third-party standing to raise his son's constitutional claims.

Plaintiff also has third-party standing to raise his son's constitutional claims. Under *Powers v. Ohio*, 499 U.S. 400 (1991), a litigant can assert the rights of another when: (i) the litigant has "suffered an injury in fact, thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute"; (ii) the litigant has a "close relation to the third party"; and (iii) there is "some hindrance to the third party's ability to protect his or her own interests." *Id.* at 411 (internal quotation marks and citations omitted).[8] All three prerequisites are satisfied here.

The injury threatened here—the killing of Plaintiff's son—is plainly sufficient to satisfy *Powers*' first requirement. Plaintiff would suffer a profound injury if the government carried out

[8] The latter two requirements are prudential considerations, while the first is a constitutional prerequisite to standing. *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955-56 (1984).

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 a "concrete interest" in the outcome of the case. *Cf. Jones v. Prince George's County*, 348 F.3d 1014 (D.C. Cir. 2003) (holding that daughter whose father had been killed had suffered injury in fact); *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1292-96 (D.C. Cir. 2007) (holding, in the context of challenge to agency's failure to implement automobile safety measure, that threat of "death, physical injuries, and property damage" could constitute an injury in fact where the increased "risk of harm" was from agency's failure to act); *Reed v. Islamic Republic of Iran*, 439 F. Supp. 2d 53, 58 (D.D.C. 2006) (holding that father's alleged imprisonment and torture constituted an injury in fact to his son); *Yaman v. U.S. Dep't of State*, --- F. Supp. 2d ---, No. 10-CV-537, 2010 WL 1783300 (D.D.C. May 5, 2010) (holding that non-custodial mother whose daughter had been denied a passport had suffered injury in fact).

Plaintiff also clearly satisfies *Powers*' second factor. As this Court has previously stated, "the relationship between a son and his father constitutes the requisite close relationship for the second prong of the third party standing test." *Reed*, 439 F. Supp. 2d at 62 (citing *Miller v. Albright*, 523 U.S. 420 (1998) (finding a father-child relationship sufficiently close to satisfy the second prong of *Powers*)).

More broadly, the first two prongs of the *Powers* test are intended to ensure that "the relationship between the litigant and the third party [is] such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Singleton v. Wulff*, 428 U.S. 106, 115 (1976); *see also Lepelletier v. FDIC*, 164 F.3d 37, 43 (D.C. Cir. 1999) ("[T]he reason for the 'close relation' factor is to ensure that the plaintiff will act as an effective advocate for the third party." (internal quotation marks omitted)). In this case, father's and son's interests and

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 circumstances, "the court . . . can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will not be unaffected by the outcome of the suit." *Singleton*, 428 U.S. at 114-15.[10]

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[9] Available at: http://articles.cnn.com/2010-01-10/world/yemen.al.awlaki.father_1_awlaki-qaeda-yemeni-officials.

[10] It is possible that *Haitian Refugee Center* establishes a basis for third-party standing separate and independent from the *Powers* test. *See Am. Immig. Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1362 (D.C. Cir. 2000) ("It could be that *Haitian Refugee* and *Powers* now coexist and a party can establish third party standing by meeting either standard."). Under *Haitian Refugee Center*, a litigant has third-party standing "[i]f the government has directly interfered with the litigant's ability to engage in conduct together with the third party, for example, by putting the litigant under a legal disability with criminal penalties, and if a statute or the Constitution grants

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] and the economic burdens of litigation" were sufficient hindrance); *Singleton*, 428 U.S. at 117-18 (holding that privacy concerns of women who wish to seek an abortion, along with concerns about "imminent mootness" of claims raised by pregnant women, were sufficient hindrance); *Campbell v. Louisiana*, 523 U.S. 392, 398 (1998) (holding that third parties' lack of incentive to file suit was sufficient hindrance); *United Auto Workers v. Nat'l Right to Work Legal Def. & Educ. Found.*, 590 F.2d 1139 (D.C. Cir. 1978) (holding that union contributors' desire to remain anonymous was sufficient hindrance). The Supreme Court has even approved third-party

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the third party a right to engage in that conduct with the litigant." *Haitian Refugee Ctr.*, 809 F.2d at 808. Plaintiff satisfies this standard too: the government's contemplated killing of Plaintiff's son "has directly interfered" with Plaintiff's ability "to engage in conduct together with" his son. Further, the father-son relationship that the government would end is clearly protected by the Constitution not only through its protection for the right to life—which Plaintiff asserts here—but also in its protection of fundamental rights. *See, e.g.*, *Franz v. United States*, 707 F.2d 582, 594-95 (D.C. Cir. 1983) ("Among the most important of the liberties accorded . . . special treatment [as a fundamental liberty interest protected by the Constitution] is the freedom of a parent and child to maintain, cultivate, and mold their ongoing relationship.").

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 government's avowed intent to use lethal force against a citizen outside armed conflict.

The government also argues that Plaintiff's proposed injunction would be unenforceable because the Court would be "ill-equipped to evaluate whether such standards are satisfied in any particular circumstances," Gov't Br. 17, and because enforcement would require the Court to evaluate "real-time, heavily fact-dependent decision made overseas by military and other officials on the basis of complex and sensitive intelligence, tactical analysis, and diplomatic considerations." Gov't Br. 18-19. But Plaintiff does not propose that the Court should engage in real-time evaluation of the government's targeting decisions. If the relevant standard incorporates an "imminence" requirement, as Plaintiff submits that it does, then real-time judicial review—that is, prior judicial review of the government's compliance with the injunction—is infeasible by definition; exigency forecloses it. That real-time judicial review is infeasible, however, does not mean that the requested injunction would be unenforceable. The injunction could be enforced through an after-the-fact contempt motion, or an after-the-fact damages action

(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 government's true objection is not to the *timing* of judicial review, but to its *existence*. Gov't Br. 19 (arguing that courts are ill-equipped to "assess[] whether a particular threat to national security is imminent and whether reasonable alternatives for the defense of the Nation exist to the use of lethal military force. Courts have neither the authority nor expertise to assume these tasks."). The government's extraordinary proposition is that the President's power to carry out targeted killings of suspected terrorists, including American citizens, is beyond the authority and competence of the judiciary to police—that this power is subject to judicial review neither before it is used nor after. But the government's arguments about "authority" and "competence" simply do not stand up. The courts routinely evaluate claims that executive officials used excessive force. Pl. Br. 10-16 (discussing cases). And the courts in this district have become accustomed to evaluating information that is sensitive for reasons of foreign policy, military strategy, and national security. In the Guantánamo detention cases, judges in this district routinely evaluate the decisions that executive officers made in the context of armed conflict. *See, e.g.*, *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008); *Khan v. Obama*, --- F. Supp. 2d ---, No. 08-CV-1101, 2010 WL 3833917, at *2-3 (D.D.C. Sept. 3, 2010). If the courts have authority and competence to conduct this kind of review for non-citizens detained by the government in the context of armed conflict, they surely have authority and competence to conduct this kind of review for Americans killed by the government outside the context of armed conflict.

[11] While Plaintiff submits that entry of injunctive relief is appropriate and necessary here, it is open to the Court to issue declaratory relief as an alternative. *Steffel v. Thompson*, 415 U.S. 452, 466 (1974).

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 Court, the National Guard had new use-of-force regulations and training that plaintiffs did not "quarrel" with, *id.* at 11 n.15, and plaintiffs (who were no longer students) only sought "[c]ontinued judicial surveillance to assure compliance with the changed standards." *Id.* at 6. The Court looked at a combination of justiciability doctrines involving the advisory nature of the opinion sought, mootness, standing, and the political question doctrine, and found that these doctrines together rendered plaintiffs' claims nonjusticiable. *Id.* at 10.

This case is not like *Gilligan.* The Supreme Court expressly distinguished the claims in that case—"a broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard"—from "an action seeking a restraining order against some specified and imminently threatened unlawful action." *Id.* at 5-6. Moreover, the injunctive relief requested in *Gilligan* was to monitor governmental compliance with new regulations that were already in place and that no one contended had been violated. The *Gilligan* Court was also concerned that the judicial relief sought would impermissibly interfere with the "complex[,] subtle, and professional decisions as to the composition, training, equipping, and control of a military force." *Id.* at 10. But the present case does not seek to interfere with such matters.[12]

[12] Here and elsewhere, the government and one of its *amici* suggest that the injunction or declaration sought would inhibit the ability of the President to command the armed forces, and otherwise interfere with the orderly and effective operation of the military. *See, e.g.*, Gov't Br. at

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 should not exercise its equitable discretion to issue an injunction against the President, Gov't Br. 37, and then extends that argument to the completely insupportable proposition that the Court must also refrain from enjoining the Secretary of Defense and Director of the CIA on the grounds that "any action taken by these subordinate officials in the context of this case necessarily implicates the President's own authority and discretion in directing the use of force," Gov't Br. 38-39. Nothing in the law

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18-19, 23-24, 27-28; Amicus Br. of Veterans of Foreign Wars ("VFW Amicus Br."). But the military's own internal targeting process already recognizes that there are legal limits to the circumstances in which the government can use lethal force—even in the context of armed conflict. *See* Declaration of Jonathan Manes ("Manes Decl."), Ex. A at 8-10 (briefing slides from Joint Chiefs of Staff which exhaustively describe the process by which the armed forces select, vet, plan, approve, engage, and assess targets). The government's targeting operations already incorporate internal legal review at specific, defined points. *Id.* Ex. A at 9-10 (indicating that legal review for compliance with "Law of War (LOW)/Law of Armed Conflict (LOAC) and Rules of Engagement (ROE)" occurs during the "Target Development and Prioritization"); *id.* Ex. A at 8 (indicating that even before specific targets are identified and vetted, senior military leadership – the President, Secretary of Defense, Combatant Commander or Joint Forces Commander – establish "ground rules/policies" and "scope/restrictions" on targeting). With respect to "real-time" targeting decisions, an injunction from this Court would simply ensure that the legal standard being applied by the Defense Department is the correct one.

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, the court enjoins . . . the acts of the official . . . ."); *Swan v. Clinton*, 100 F.3d 973, 979 (D.C. Cir. 1996) (stating that "[i]f [plaintiff's] injury can be redressed by injunctive relief against subordinate officials, he clearly has standing; moreover this approach would make it unnecessary to determine whether . . . the President can be enjoined to perform a ministerial duty"); *Newdow v. Bush*, 391 F. Supp. 2d 95, 105-07 (D.D.C. 2005).

The government's reliance on *Mississippi v. Johnson*, 71 U.S. 475 (1866), is misplaced. That case concerned an attempt to enjoin the President from carrying into effect two of the Reconstruction Acts enacted in the wake of the Civil War. The Court declined to issue such an injunction on the grounds that such an order would enjoin the "purely executive and political" duties of the President. *Id.* at 499. But while *Johnson* may remain good law for the proposition that the President should not be enjoined from carrying out "purely executive and political" duties, this lawsuit does not trench on questions reserved to the exclusive judgment of the executive branch. *See* Section II, infra; *see also Minn. Chippewa Tribe v. Carlucci*, 358 F. Supp. 973 (D.D.C. 1973) (interpreting *Johnson* as a forerunner of the modern political question doctrine). *Johnson* does not and could not stand for the proposition that subordinate officials are not amenable to injunctive relief, still less that the executive branch can authorize the killing of a

citizen in violation of the Fourth and Fifth Amendments immune from any and all judicial scrutiny. Richard H. Fallon, Jr. et al., Hart & Wechsler's Federal Courts and the Federal System 1137 (5th ed. 2003) ("[E]xecutive officials in general have no immunity from suit for prospective relief—a conclusion supported by the entire history of suits against officers as a means of ensuring governmental accountability.").

Insofar as the government asks this court to stay its hand because the case implicates "the authority of the President . . . to protect the national security from a terrorist threat," Gov't Br. 39, the government presses a proposition that the courts have already rejected. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Ex Parte Endo*, 323 U.S. 283 (1944). As the Supreme Court wrote in *Hamdi*, "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." 542 U.S. at 536.[13]

II. PLAINTIFF'S CLAIMS ARE NOT BARRED BY THE POLITICAL QUESTION DOCTRINE.

The government argues that the issues raised by this case pose non-justiciable political questions. But the question of whether and in what circumstances the government may target and kill an American citizen in Yemen is no less justiciable than the question of whether the executive branch could indefinitely detain an American citizen captured in Afghanistan, a question the Supreme Court addressed in *Hamdi*; or indefinitely detain non-citizens at

[13] The government cites *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), as contrary authority. But that case is entirely inapposite. There, the court withheld discretionary relief because the case involved "the conduct of . . . diplomatic relations with [a] foreign state[]." This case, by contrast, involves only the conduct of the United States with respect to one of its citizens. Furthermore, *Sanchez-Espinoza* did not allege the infringement of any individual's constitutional rights, let alone the violation of a citizen's constitutional right not to be killed in violation of the Fourth and Fifth Amendments.

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 which are undoubtedly committed to the judiciary, even where adjudicating them might implicate the areas of foreign policy and national security. The question of the proper legal framework that applies to the planned targeting here – the threshold question of the existence or absence of an armed conflict – is also squarely a question for the courts. Indeed, to the extent the executive's claimed authority to use force is pursuant to the AUMF, the question is one of statutory interpretation, which is quintessentially a judicial task.

A. <u>The text of the Constitution clearly commits the resolution of Plaintiff's claims to the Judiciary.</u>

The Supreme Court has relied on the political question doctrine only twice in the last fifty years, *El-Shifa Pharm. Indus. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (*en banc*) (Kavanaugh, J., concurring in the judgment) (citing *Nixon v. United States*, 506 U.S. 224 (1993) and *Gilligan*, 413 U.S. 1), *petition for cert. filed*, No. 10-328 (Sept. 7, 2010), invoking it in cases

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 *Baker* factor,] 'whether there is a textually demonstrable constitutional commitment of the issue to a coordinate political department.'" *Lamont v. Woods*, 948 F.2d 825, 831 (2d Cir. 1991) (citation omitted) (finding challenge to foreign aid program did not usurp political branches' foreign policy).

Plaintiff asserts the rights of his U.S. citizen son under the Fourth and Fifth Amendments of the Constitution.[14] These rights are not "textually committed" to the political branches. To the contrary, the judiciary is charged with the responsibility of interpreting and ultimately safeguarding legal rights. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177. The judiciary is the "ultimate interpreter of the Constitution," *Baker*, 369 U.S. at 211, and "the final authority on issues of statutory construction." *Chevron, U.S.A., Inc. v. NRDC, Inc*., 467 U.S. 837, 843 (1984). It is also the judiciary's role to ascertain international law. *The Paquete Habana*, 175 U.S. 677, 700 (1900). The court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs and Trainmen*, 130 S. Ct. 584, 590 (2009) (citation omitted).

Defendants do not assert that resolution of Plaintiff's claims is vested in the political branches by a specific provision of the Constitution, but argue broadly that the judiciary cannot interfere in decision-making in the areas of foreign policy and national security, relying generally

[14] *Amici* Klimp et al. concur that U.S. citizens are entitled to constitutional protection, but assert that it is the role of the political branches to determine the extent of those rights and ensure their protection. Klimp Amicus Br. 8. This extraordinary assertion—one that is essential to Defendants' case—merely highlights the absurdity of the government's position.

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").

destruction of Plaintiff's son's property in Yemen would be justiciable but a constitutional claim to enjoin the taking of his life would not be.

As this Court found in *Abu Ali v. Ashcroft*, "[t]here is simply no authority or precedent . . . for respondents' suggestion that the executive's prerogative over foreign affairs can overwhelm to the point of extinction the basic constitutional rights of citizens of the United States to freedom from unlawful detention by the executive." 350 F. Supp. 2d 28, 61-62 (D.D.C. 2004). This statement surely applies with even greater force in the circumstances presented here. Plaintiff challenges "the United States' alleged actions against a citizen in violation of certain constitutional duties."[17] *Id.* at 64. "[T]he D.C. Circuit has left little doubt that the political question doctrine will not trump the due process rights that lie at the heart of this dispute." *Id.* at 65.[18]

Gilligan v. Morgan is not to the contrary. As discussed above, *see* Section I.d, *supra*, the facts in *Gilligan*, the nature of the relief sought, and the posture of the case bear no resemblance to those here. The Court did not decide that the political question doctrine alone warranted

[17] Amici Klimp et al. argue that deference is due to the government's political question argument. Klimp Amicus Br. 21-22. But the government's legal arguments "merit no special deference." *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004). As this Court noted with regard to the Act of State doctrine in *Abu Ali*, "[w]hatever limited bearing the . . . doctrine has on this case in light of the above analysis is only diminished further by the fact that the doctrine is being invoked here by the United States in an attempt to shield itself from judicial inquiry for its own allegedly unconstitutional acts against one of its citizens." *Abu Ali*, 350 F. Supp. 2d at 60.

[18] Other circuits agree. "[A]n area concerning foreign affairs that has been uniformly found appropriate for judicial review is the protection of individual or constitutional rights from government action." *Flynn v. Shultz*, 748 F.2d 1186, 1191 (7th Cir. 1984) (citing *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976)); *see also Pangilinan v. INS*, 796 F.2d 1091, 1096 (9th Cir. 1986) (political question doctrine does not bar court from hearing cases involving individual rights to equal protection and due process). "This protection of the individual unquestionably extends to cases involving United States Government action taken against our citizens abroad." *Flynn* at 1191. "The pervasive influence of political-question doctrine in fields touching on foreign affairs has not led courts to surrender their power to protect individuals against government action." 13C Charles Alan Wright et al., Federal Practice & Procedure § 3534.2 (3d ed. 2008).

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; *see also Laird v. Tatum*, 408 U.S. 1, 16 (1972) ("There is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.").

Nor does *El-Shifa* alter this fundamental principle: the "political question doctrine does not bar a claim that the government has violated the Constitution simply because the claim implicates foreign relations." 607 F.3d at 841 (citing *INS v. Chadha*, 462 U.S. 919 (1983)). In *El-Shifa*, plaintiffs brought tort claims for a military strike on their pharmaceutical plant in Sudan, which the President had asserted was a chemical weapons factory associated with Osama bin Laden. However, the plaintiffs in *El-Shifa* were noncitizens. *See El-Shifa*, 607 F.3d at 844 ("the courts cannot assess the merits of the President's decision to launch an attack on a *foreign* target" (emphasis added)). Upholding the constitutional rights of a U.S. citizen is clearly the judiciary's role, which cannot be abdicated.[20]

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[19] To the extent that *Gilligan* analyzed plaintiffs' claims under the political question doctrine, it noted that the relief sought would "embrace critical areas of responsibility" in the political branches given that Congress has the power to "provide for organizing, arming, and disciplining" the National Guard, 413 U.S. at 6 (quoting U.S. Const., Art. I, § 8, cl. 16), and that Congress had expressly authorized the President "to prescribe regulations governing the organization and discipline of the National Guard," *id.* at 7. In other words, the precise role that plaintiffs asked the court to play in *Gilligan* was a role that the Constitution expressly and exclusively committed to the political branches.

[20] Plaintiffs in *El-Shifa* sought a declaration that the government's failure to compensate them violated international law and that the statements made about them were defamatory, as

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)).

Mexican War); *Ford v. Surget*, 97 U.S. 594 (1878) (soldier was not exempt from civil liability for actions that were not in accordance with the usages of civilized warfare); *The Paquete Habana*, 175 U.S. 677 (1900) (court imposed damages for seizure of two Spanish fishing vessels by U.S. forces during Spanish American War because they had not been authorized by Congress). Other claims arising in the context of U.S. military operations have been adjudicated by the Supreme Court as well. *See Youngstown Sheet & Tube Co.*, 343 U.S. at 596 (enjoining President Truman's seizure of steel mills during the Korean War); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (rejecting foreign relations objections to publication of the Pentagon Papers); *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814) (rejecting executive power to seize domestic property of enemy alien during War of 1812).

Defendants' argument that problems of enforceability render Plaintiff's claims non-justiciable is based on a misapprehension of the relief Plaintiff seeks. *See, e.g.*, Gov't Br. 24.[22] As discussed above, *see* Section I.d, *supra*, Plaintiff does not ask the court to intervene in real-time decision-making by the executive regarding the use of lethal force. Again, if the relevant standard incorporates an "imminence" requirement, real-time judicial review is infeasible by definition. But if the government were to execute Plaintiff's son with an injunction in place, this Court could be asked to review the legality of the government's actions, including whether its actions violated the injunction.[23] As "*Youngstown* illustrates, when the enjoined defendant is a

[22] As to Plaintiff's request for disclosure of the criteria the Government uses in deciding whether to target a U.S. citizen for killing, Plaintiff seeks the operative legal standards used by the executive branch – the equivalent of the information that would appear in a federal statute; he does not seek targeting criteria or policy judgments.

[23] Defendants also argue that no judicially manageable standards exist to determine whether Anwar Al-Aulaqi poses a concrete, specific, and imminent threat, and whether means other than lethal force are available. Gov't Br. 27. The "concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it," *Nixon v. United States*, 506 U.S. 224,

responsible government officer residing in the nation's capital . . . , questions of evaluating and guaranteeing compliance are not insurmountable." *Ramirez*, 745 F.2d at 1511. The role of the judiciary in such circumstances would be no different than in any of the cases above, any action for damages, or any case seeking review of the reasonableness of a killing in a law enforcement context.[24]

To be clear, Plaintiff does not propose that *ex post* judicial review would be sufficient in this context. *Cf. Ramirez*, 745 F.2d at 1511 ("[M]ere monetary relief would be insufficient under any concept of justice."). To say that the Court cannot supervise the executive's real-time targeting decisions is not to say that this Court has no role to play until Plaintiff's son has been killed. This Court should, and must, ensure that the government's real-time targeting decisions are being made with reference to the appropriate legal standard. It has a crucial role to play in

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228 (1993), which is the second *Baker* factor. It is the judiciary's role to interpret the Constitution, and there are manageable standards for doing so. *See, e.g.*, *Powell v. McCormack*, 395 U.S. 486, 549 (1969). Moreover, "universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the" ATS. *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (citing *Nixon*, 506 U.S. at 227-29).

[24] Defendants further argue that a judicial pronouncement might interfere with presidential commands, giving rise to multifarious pronouncements "to officials in the field with respect to the real-time use of force against AQAP." Gov't Br. 24. The sixth *Baker* factor, "the potentiality of embarrassment from multifarious pronouncements by various departments on one question," *Baker*, 369 U.S. at 217, is the least important of the factors. *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004). Again, Plaintiff is not seeking relief that would require real-time judicial supervision of the government's conduct. Moreover, "[o]ur system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Powell*, 395 U.S. at 549; *see also*, *Alperin v. Vatican Bank*, 410 F.3d 532, 558 (9th Cir. 2005) ("[f]ulfilling our constitutionally-mandated role to hear controversies properly before us does not threaten to cause embarrassment or multiple pronouncements.").

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.

between the United States and Al-Qaeda in Afghanistan. 548 U.S. at 629-31. The Court described the conflict as a non-international armed conflict and found that the government's authority was thus circumscribed by the rules applicable to such conflicts. *Id.* at 630-32; *see also Hamdi*, 542 U.S. at 521 (finding a state of armed conflict in Afghanistan in 2004, referencing active military operations and thousands of U.S. troops on the ground).

To the extent the government claims the AUMF as the source of its authority to target Plaintiff's son in Yemen, the question of whether and under what circumstances such force is authorized is a matter of statutory interpretation. Indeed, since the AUMF was passed, the courts have repeatedly pronounced upon the meaning of the statute—and rejected the government's arguments for unreviewable discretion—in addressing questions concerning the scope of the executive's authority. *See, e.g.*, *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005); *Hamdi*, 542 U.S. 507; *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009).

In construing the terms of the AUMF, the Supreme Court has interpreted the statute in light of "longstanding law-of-war principles," including the Geneva Conventions. *Hamdi*, 542 U.S. at 521.[28] While the laws of war provide standards regarding the categories of persons and the types of conduct that render individuals subject to military force, which the courts have applied in interpreting the AUMF in the detention context, they similarly provide standards for determining the existence and type of an armed conflict, which is an essential precondition to the

[28] This Court and others have followed suit, *see e.g.*, *Hamlily*, 616 F. Supp. 2d 63, and the administration itself has taken the position in the courts and the public that its authority pursuant to the AUMF should be informed by the laws of war. *See* Resp'ts' Revised Mem. Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re Guantanamo Bay Detainee Litig.*, No. 08-442 (D.D.C. Mar. 13, 2009) (TFH); Speech of Harold Koh, Legal Adviser, U.S. Dep't State, Annual Meeting of the American Society International Law, Washington, DC (Mar. 25, 2010) ("Let there be no doubt: the Obama Administration is firmly committed to complying with all applicable law, including the laws of war, in all aspects of these ongoing armed conflicts" (referring to conflicts in Iraq, Afghanistan and against Al-Qaeda)).

application of the laws of war. *See* O'Connell Decl. ¶ 9-13. Contrary to the government's claim about the lack of "judicially manageable standards," Gov't Br. 34, courts have regularly applied and evaluated these criteria in addressing the threshold question of the existence or absence of armed conflict, as discussed below.

The decision of the International Criminal Tribunal for the former Yugoslavia ("ICTY") in *Prosecutor v. Tadic* provides a widely accepted standard for determining the existence of an armed conflict. *Tadic*, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), ¶ 70 (Oct. 2, 1995). The *Tadic* tribunal found that an armed conflict existed – noting that the hostilities at issue exceeded certain "intensity requirements" and there had been "protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups" – and in so doing, the tribunal distilled two key criteria for determining the existence of an armed conflict: 1) its intensity and 2) the organization of the parties to the conflict.[29] With respect to non-international armed conflicts in particular, "these closely related criteria are used . . . for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law." *Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶ 562 (May 7, 1997).[30]

[29] *See also* ICRC, III *Commentary on the Geneva Conventions of 12 August 1949* 36 (J.S. Pictet ed., 1960); Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9, reprinted in 37 I.L.M. 999; European Commission for Democracy Through Law (Venice Commission), Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners, Op. no. 363/2005, CDL-AD (2006)009 ("Venice Comm'n Op.").

[30] *See also* Venice Commission Op. ("[S]poradic bombings and other violence acts which terrorist networks perpetrate in different places around the globe and the ensuing counter-terrorism measures, even if they are occasionally undertaken by military units, cannot be said to amount to an 'armed conflict' in the sense that they trigger the applicability of International Humanitarian Law.").

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

claim for asylum).

As these cases show, there are indeed "judicially manageable standards" for courts to apply in addressing questions concerning the existence and scope of armed conflict, as well as "access to the requisite information," contrary to the government's assertion. Gov't Br. 34. Indeed, evidence relied upon in cases discussed above came from publicly available sources. *See, e.g., Prosecutor v. Thomas Lubanga Dyilo*, ¶¶ 235-236 (relying on news reports, human rights organization analyses, and United Nations reports).

For its contrary argument, the government relies on two distinguishable Second Circuit cases. In *DaCosta v. Laird*, the Second Circuit refused to hear the case on political question grounds only after "[h]aving previously determined, in accordance with our duty, that the Vietnamese war has been constitutionally authorized." 471 F.2d 1146, 1157 (2d Cir. 1973). In the prior decision cited by the *DaCosta* court, the Second Circuit had expressly rejected the government's argument that determining the legality of the Vietnam war was foreclosed by the political question doctrine. *Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir. 1971) ("[T]he constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation in the prosecution of war. Judicial scrutiny of that duty, therefore, is not foreclosed by the political question doctrine."). Even in terms of escalation of a previously-determined lawful war, the *DaCosta* court wrote that the issue may be justiciable if "litigants raising such a claim . . . [could] present to the court a manageable standard which would allow for proper judicial resolution of the issue." 471 F.2d at 1156. In *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), the court recognized that the "role of the Judiciary is to determine the legality of the challenged action," *id.* at 1309, while ultimately finding that the challenged action constituted a non-justiciable

"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 organizations who merely share an abstract philosophy or even a common purpose with al Qaeda – there must be an actual association in the current conflict with al Qaeda or the Taliban"). Thus, the use of force against AQAP is not authorized by the AUMF.

While the government's claimed authority for targeting Plaintiff's son appears to be premised largely on a purported relationship between AQAP and Al-Qaeda, evidence of this crucial link appears nowhere in its declarations. Indeed, it is remarkable that while the government relies heavily and repeatedly on the assertion that "AQAP is an organized armed group that is either part of al-Qaeda or, alternatively, is an organized associated force, or

[31] The legislative history confirms that such a nexus is required. *See, e.g.*, 147 Cong. Rec. S9417 (Sen. Feingold) (AUMF is "appropriately limited to those entities involved in the attacks that occurred on September 11") (daily ed. Sept. 14, 2001); *id.* at S9416 (Sen. Levin) ("[The AUMF] is limited to nations, organizations, or persons involved in the terrorist attacks of September 11. It is not a broad authorization for the use of military force against any nation, organization, or persons who were not involved in the September 11 terrorist attacks."). Moreover, President Bush specifically proposed – and Congress rejected – an earlier version of the AUMF that would have authorized the President to use force to "deter and pre-empt any future acts of terrorism or aggression against the United States" that are unrelated to the September 11th attacks. Richard F. Grimmett, *Authorization for Use of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History*, CRS Report for Congress (Jan. 16, 2007).

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 emotional distress, arguing that such a tort "is not even universally recognized under domestic law, let alone international law," Gov't Br. 41. But this is not the claim Plaintiff brings. Plaintiff alleges that Defendants' authorization for the targeted killing of his son in Yemen would constitute an extrajudicial killing—a *jus cogens* violation of international law, and a tort consistently recognized by U.S. courts since the beginning of modern ATS litigation and indeed codified in domestic law under the Torture Victim Protection Act. *See* Pl. Br. 25-26. While Plaintiff certainly will suffer harm if Defendants succeed in killing his son, which the government misconstrues as the basis for his claim, he brings the claim to enjoin the extrajudicial

[32] It is also worth pointing out that the government does not appear to have decided whether it regards AQAP as "part of al-Qaeda" or as an "organized associated force or cobelligerent."

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 *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), and later in *Dugan v. Rank*, 372 U.S. 609 (1963), held that "sovereign immunity does not apply as a bar to suits alleging that an officer's actions were unconstitutional or beyond statutory authority." *Swan*, 100 F.3d at 981 (citation omitted); *Larson*, 337 U.S. at 690 (sovereign immunity does not attach where the "order conferring power upon the officer to

[36] *Kadic v. Karadzic*, No. 93-1163, at 2 (S.D.N.Y. Aug. 16, 2000) ("Under the equitable powers of this Court and the Court's authority under the Alien Tort Claims Act . . . the defendant [and defendant's forces] . . . are hereby immediately and permanently ENJOINED and RESTRAINED from . . . committing or from aiding, abetting, directing or facilitating others to commit, any acts of . . . extrajudicial killing . . . .").

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 President Obama may be enjoined under the *Larson* exception, he need not be enjoined for Plaintiff to receive his desired relief. *Cf. Made in the USA Found.*, 242 F.3d at 1309 (APA waiver of sovereign immunity would not be available because *only* the President could carry out act sought to be enjoined).

The government further argues that the FTCA bars the APA's waiver of sovereign immunity. While the APA "excludes from its waiver of sovereign immunity . . . claims seeking relief expressly or impliedly forbidden by another statute," *Fornaro v. James*, 416 F.3d 63, 66 (D.C. Cir. 2005) (citation omitted), the government's assertion that the FTCA "comprehensively addresses" suits against the United States for personal injury and death is incorrect. The plain language of the FTCA confirms that it is solely "exclusive of any other civil action or proceeding *for money damages* by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee." 28 U.S.C. § 2679(b)(1) (emphasis added); *see also id.* ("Any other civil action or proceeding *for*

money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded." (emphasis added)).[37] As such it does not address—expressly or impliedly—whether *equitable* relief may be sought under a separate statute.

This Circuit has confirmed this view. In *U.S. Info. Agency v. Krc*, 989 F.2d 1211 (D.C. Cir. 1993), the court held that sovereign immunity did not bar plaintiff's injunctive claim even though the plaintiff could not proceed under the FTCA. The Court contrasted the FTCA to the Tucker Act and the Little Tucker Act, which comprehensively address contract cases, finding that the "FTCA specifically bars money damages as a remedy for [plaintiff's] claim, which by parity of reasoning implies that injunctive relief is available." 989 F.2d. at 1216. Defendants' reliance on *Moon v. Takisaki*, 501 F.2d 389 (9th Cir. 1974) is misplaced. In *Moon*, the Ninth Circuit merely noted that it was not possible to seek injunctive relief for an FTCA claim, 501 F.2d at 390, and not that the FTCA precluded injunctive relief—even impliedly—in other statutes. *See also Hui v. Castaneda*, 130 S. Ct. 1845, 1851 (2010) ("Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy." (quoting *Carlson v. Green*, 446 U.S. 14, 20 (1980))). Because the government cannot identify any statute that impliedly or expressly prohibits injunctive relief for a claim of extrajudicial execution, the APA provides a waiver of sovereign immunity for Plaintiff's ATS claim.[38]

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[37] Indeed, because of the constitutional and statutory exceptions in the act, 28 U.S.C. § 2679(b)(2)(A)-(B), which provide that the FTCA's exclusivity provision does not preclude claims for relief for violations of the Constitution or another statute, the FTCA does not even "comprehensively address" monetary claims for personal injury or death resulting from U.S. official conduct.

[38] The government relies on *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) for the argument that the Court should not exercise its discretion to enjoin or declare illegal a "military operation" that receives the approval of the President, Secretary of Defense and the Director of the CIA, and purportedly implicates foreign relations. Gov't Br. at 41. But the equitable relief plaintiffs sought in *Sanchez-Espinoza*—ranging from "end[ing] appellees' alleged disregard of Congress's right to declare war and of a prohibition against supporting the

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 government's assertion of an evidentiary privilege to foreclose judicial consideration of a U.S. citizen's claim that, absent requested relief, he faces extrajudicial execution is without precedent and should be rejected.

The government's sweeping invocation of the state secrets privilege to shut down this litigation is as ironic as it is extreme: that Anwar Al-Aulaqi has been targeted for assassination is known to the world only because senior administration officials, in an apparently coordinated media strategy, advised the nation's leading newspapers that the National Security Council had authorized the use of lethal force against him. *See, e.g.*, Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. Times, Apr. 6, 2010; Greg Miller, *Muslim Cleric Aulaqi is 1st U.S. citizen on List of those CIA Allowed to Kill*, Wash. Post, Apr. 7, 2010. Had the government itself adhered to the overriding secrecy concerns so solemnly invoked in its pleadings, those senior officials would *not* have broadcast the government's intentions to the entire world, and intelligence officials, speaking on the record, would have refused all comment rather than providing tacit acknowledgement that Plaintiff's son is being targeted. Thus, the Defense Secretary's assertion that "disclosure of whether or not lethal force has been authorized to

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Contras imposed by Congress through statute" to "enjoin[ing] an alleged nuisance created by the maintenance and operation of paramilitary camps," *id*. at 205—is clearly distinguishable from the relief Plaintiff seeks here, namely, preventing the execution of a U.S. citizen in violation of the Fourth and Fifth Amendments and applicable international law. Even the D.C. Circuit in *Sanchez-Espinoza*, while wary of intruding on military operations approved by senior officials, noted that the "consequences [of such an intrusion] are tolerated when the officer's action is unauthorized because contrary to statutory or constitutional prescription." *Id.* at 207.

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.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Motion to Dismiss and grant Plaintiff's Motion for a Preliminary Injunction.

Respectfully submitted,

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