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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NEW JERSEY PEACE ACTION, *et al.* Plaintiffs,	) HONORABLE JOSE L. LINARES
v.	) 2:08-cv-02315-JLL-CCC
GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, IN HIS OFFICIAL CAPACITY, Defendant.	)
_____	) Motion Date: December 1, 2008

MEMORANDUM IN SUPPORT OF THE PRESIDENT
OF THE UNITED STATES' MOTION TO DISMISS

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Motivated by their disagreement with the policies of the current President, Plaintiffs seek to strip from all future Presidents foreign policy powers that have been constitutionally wielded since the beginning of the Republic, and to tie the hands of Congress as well, preventing it from authorizing military force in the absence of a declaration of war.

Plaintiffs challenge the 2003 war against the Saddam Hussein Iraqi regime. As discussed below, caselaw demonstrates that Plaintiffs lack Article III standing to bring this case. Moreover, because the Constitution commits the conduct of war and peace to the political branches, and those branches worked in concert on this occasion, the judiciary has no role in second guessing the judgment exercised by Congress and the President, and this action is barred by the political question doctrine. Finally, even if Plaintiffs' claim were justiciable, it would be without merit, as both the President and Congress have acted in accord with their respective constitutional powers.

BACKGROUND

Following "Iraq's war of aggression against and illegal occupation of Kuwait [in 1990], the United States forged a coalition of nations to liberate Kuwait and its people in order to defend the national security of the United States and enforce United Nations Security Council resolutions relating to Iraq." Pub. L. No. 107-243, 116 Stat. 1498 (2002). After the liberation of Kuwait in 1991, Iraq

entered into a United Nations sponsored cease-fire agreement which required, *inter alia*, that Iraq permit unfettered access by international weapons inspectors. *See id.* In contravention of this obligation, Iraq "attempted to thwart the efforts of weapons inspectors" and these attempts "finally resulted in the withdrawal of inspectors from Iraq on October 31, 1998." *Id.*; *accord Doe v. Bush*, 323 F.3d 133, 136 (1st Cir. 2003) ("Iraq has repeatedly been in breach of this agreement by, among other things, blocking inspections and hiding banned weapons. Iraq ended cooperation with the weapons inspection program in 1998."). Also in 1998, "Congress passed a joint resolution which chronicled Iraqi noncompliance and declared that 'the Government of Iraq is in material and unacceptable breach of its international obligations, and therefore the President is urged to take appropriate action, in accordance with the Constitution and relevant laws of the United States, to bring Iraq into compliance with its international obligations.'" *Doe*, 323 F.3d at 136 (quoting Pub. L. 105-235, 112 Stat. 1538, 1541 (1998)). Later that year, Congress passed the Iraq Liberation Act of 1998, Pub. L. 105-338, 112 Stat. 3178, which declared a United States policy to remove Iraqi leader Saddam Hussein from power, and authorized assistance, including military training and equipment, for Iraqi opposition organizations. *Id.* §§ 3, 4, 112 Stat. at 3179.

On September 12, 2002, the President addressed the United Nations General Assembly and called for a renewed effort to secure Iraq's compliance with its

international obligations. He indicated that if diplomacy failed, military force would be necessary. In response to this speech, Iraq "agreed to allow inspectors back into the country, but it . . . failed to comply fully with the earlier Security Council resolutions." *Doe*, 323 F.3d at 136. The week after his U.N. speech, the President proposed language for a congressional resolution supporting the use of force against Iraq. "Detailed and lengthy negotiations between and among congressional leaders and the Administration hammered out a revised and much narrower version of the resolution." *Id.*

Over three days in October 2002, Congress debated passing the Authorization for Use of Military Force Against Iraq Resolution of 2002, H. J. Res. 114, 107th Cong. (2d Sess. 2002) ("Joint Resolution"). In the House of Representatives, the debate opened with statements from the Chairman and Ranking Member of the Rules Committee. The Chairman noted that "at this moment the people's House begins debate on one of the most difficult questions we will ever face." 148 Cong. Rec. H7178 (2002) (statement of Rep. Dreier). The Ranking Member concurred that "today we begin a historic debate here in the House of Representatives. It will continue for 3 days, and every Member will have the opportunity to be heard." *Id.* at H7179 (statement of Rep. Frost).

The ensuing debate indeed provided that opportunity, with each Member having the opportunity to express his or her views on prospective military conflict

with the Saddam Hussein Iraqi regime. As Plaintiff Berlinrut's Representative,[1] Congressman Donald Payne, summarized it, even before the end of the debate: "The past 2 days with over 24 hours of debate has been an historic time in this House. A debate has endured that will be noted and [it] will be long-remembered what was said here." *Id.* at H7725 (statement of Rep. Payne); *see also id.* at H7428 ("Soon the hours of debate will come to an end. The House Chamber has echoed with the sentiments of almost every Member.") (statement of Rep. Pascrell). Indeed, Rep. Payne, although a leading opponent of the Military Force Resolution, was effusive in his praise of Resolution supporters for providing ample opportunity for debate.[2]

Many Members of Congress rose in support of the use of military force against the Saddam Hussein regime. For example, Plaintiff Rogovin's

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[1] The Amended Complaint alleges that Plaintiff Berlinrut is a registered voter in New Jersey's 10th Congressional District and that Plaintiff Rogovin is a registered voter in New Jersey's 9th Congressional District. At all times relevant to this matter, those districts have been represented by, respectively, Congressmen Donald Payne and Steven Rothman.

[2] *See id.* at H7725 ("Let me conclude by thanking the majority for the kindness and the thoughtfulness that they have given us. The gentleman from Illinois (Mr. Hyde) should be commended, as I mentioned earlier, a gentleman always, but to allow everyone to have a word to say.") (statement of Rep. Payne); *id.* at H7197 ("Mr. Speaker, this signal from the gentleman from California (Mr. Lantos), although he very strongly supports this resolution, . . . that he would yield 50 percent of his time so other voices could be heard is simply another example of the character of the gentleman from California.") (statement of Rep. Payne).

Representative, Congressman Rothman, stated:

> In considering the resolution before us, I have weighed all of the pros and cons, all of the risks of action and the risks of inaction . . . . I have spent a tremendous amount of time and study over the past several months on what to do about Saddam Hussein. . . . I conclude, beyond any reasonable doubt, that America must join forces with our allies, hopefully under the express authorization of the United Nations, but that we must take action to prevent Saddam Hussein from using his weapons of mass destruction against us.

Id. at H7418. On the other side, Plaintiff Berlinrut's Representative, Congressman Payne was one of the Members who strongly opposed the use of military force against the Saddam Hussein regime, asserting: "I oppose a unilateral first-strike attack by the United States without a clearly demonstrated and imminent threat of attack on our soil. . . . This resolution authorizes the potential use of force immediately, long before diplomatic options can be exhausted or even fully explored."). *Id.* at H7197; *see also id.* at H7725 ("We should attempt to avoid war at any cost.") (statement of Rep. Payne). Supporters and opponents of the Military Force Resolution were, however, united in their view of the magnitude of the issue at hand.[3] The Joint Resolution passed the House of Representatives by a vote of 296 to 133.

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[3] *E.g.*, *id.* at H7181 ("Mr. Speaker, we can engage in no more important task than this, debating whether to authorize the use of the Armed Forces of the United States. This task is difficult, but the issue before us is fundamentally clear.") (statement of Rep. Diaz-Balart); *id.* at H7383 ("[W]e are engaged in debating the most difficult decision that Members of Congress are called upon to make.") (statement of Rep. Stearns).

Similarly, the Senate debate provided opportunity for supporters[4] and opponents[5] of military force to express their views, and demonstrated the Senators' acute understanding of the importance of the issue.[6] The Joint Resolution passed the Senate by a vote of 77 to 23.

The Joint Resolution that Congress passed set forth a number of Congressional findings and conclusions, including:

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[4] *See, e.g.*, 148 Cong. Rec. S10233, S10310 (2002) ("I come before the Senate this evening to join in this debate, to express my support for our Nation's effort to address the threat Saddam Hussein poses . . . .") (Statement of Sen. Carper); *id.* at S10325 ("I am here to speak in support of the resolution before us, which I cosponsored. I believe we must vote for this resolution not because we want war, but because the national security of our country requires action.") (Statement of Sen. Edwards).

[5] *See, e.g.*, *id.* at S10234 ("The question is not whether we will disarm Saddam Hussein of his weapons of mass destruction but how. And it is wrong for Congress to declare war against Iraq now before we have exhausted the alternatives.") (Statement of Sen. Kennedy); *id.* at 10236 ("Before we put this great Nation on the track to war, I want to see more evidence, hard evidence . . . .") (Statement of Sen. Byrd)

[6] *See, e.g.*, *id.* at S10237 ("In my 22 years in the Senate, the only issue which has been of equal importance was the authorization for the use of force in 1991.") (Statement of Sen. Specter); *id.* at S10240 ("The Senate is now engaged in one of the most consequential debates addressed in this Chamber for many years. We are confronting the grave issues of war and peace.") (Statement of Sen. Daschle); *id.* at S10296 ("It is clear that each Member who came down here has thought long and hard about this very important vote.") (Statement of Sen. DeWine); *id.* at S10308 ("Mr. President, any contemplation of the use of military force is a very serious matter and calls for the Congress, the peoples' representatives, to be engaged and to discuss and debate the issue.") (statement of Sen. Sessions); *id.* at S10333 ("My constituents want us to consider the consequences of war.") (Statement of Sen. Lincoln).

> • "Iraq both poses a continuing threat to the national security of the United States and international peace and security in the Persian Gulf region and remains in material and unacceptable breach of its international obligations."
>
> • "Iraq persists in violating resolution[s] of the United Nations Security Council by continuing to engage in brutal repression of its civilian population thereby threatening international peace and security in the region."
>
> • "[T]he current Iraqi regime has demonstrated its continuing hostility toward, and willingness to attack, the United States."
>
> • "[T]he President has authority under the Constitution to take action in order to deter and prevent acts of international terrorism against the United States."

Joint Resolution, Preamble. The operative provision of the Joint Resolution provided that–

> The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to–
>
> > (1) defend the national security of the United States against the continuing threat posed by Iraq; and
> >
> > (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

Joint Resolution, § 3(a).

In March 2003, the President, having made the determination described above, ordered military action to remove Saddam Hussein from power. *See generally* Amen. Compl. ¶¶ 18-20. The Saddam Hussein regime was soon

deposed,[7] and on May 1, 2003, the President declared an end to major combat operations against Iraq. The building of a new, democratic regime in Iraq then commenced. On May 22, 2003, the U.N. Security Council recognized that the United States and its ally, the United Kingdom, had the "specific authorities, responsibilities, and obligations under applicable international law . . . as occupying powers." U.N.S.C. Res. 1483 (May 22, 2003). On June 13, 2003, a "broadly representative Governing Council of Iraq" was formed to give Iraqis a voice in governance. U.N.S.C. Res. 1500, ¶ 1 (Aug. 14, 2003). On June 28, 2004, the U.S. and U.K. handed sovereignty and "full governmental authority" to an Iraqi Interim Government endorsed by the United Nations Security Council. U.N.S.C. Res. 1637 (Nov. 8, 2005); U.N.S.C. Res. 1546, ¶ 1 (June 8, 2004). In January 2005, Iraq conducted elections for a transitional government and parliament. *See* U.N.S.C. Res. 1637 (Nov. 8, 2005). On October 15, 2005, the Iraqi people approved a new constitution, *id.*, and, pursuant to the new constitution, they elected a new parliament and government, *see* U.N.S.C. Res. 1770 (Aug. 10, 2007) (acknowledging that "a democratically elected and constitutionally based Government of Iraq is now in place"). United States military forces remain in Iraq, but now are neither an occupying force nor an

[7] Saddam Hussein was captured by U.S. forces on December 13, 2003. On December 30, 2006, he was executed by hanging by the Iraqi government after being convicted of crimes against humanity.

enemy of Iraq. To the contrary, U.S. forces operate in coordination with and in support of the sovereign, democratic Iraqi government. *See* U.N.S.C. Res. 1790 (Dec. 18, 2007) (noting that the U.S. led multinational force in Iraq is there "at the request of the Government of Iraq" and attaching the request of the Prime Minister of Iraq that the force's authorization be extended until December 31, 2008).

ARGUMENT

I. The Court Lacks Jurisdiction Over Plaintiffs' Claim

A federal court is presumed to lack subject matter jurisdiction until the plaintiff establishes otherwise. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Therefore, on a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of establishing that jurisdiction exists. *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 n.3 (3d Cir. 2006). Moreover, a district court may consider evidence outside the pleadings without converting the motion into one for summary judgment, and "no presumptive truthfulness attaches to plaintiff's allegations" where they are contradicted by outside evidence. *Id.* (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). A plaintiff's claims of jurisdiction should be closely scrutinized because a court has "an affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority." *Grand Lodge of the Fraternal Order of Police v.*

Ashcroft, 185 F. Supp. 2d 9, 13 (D.D.C. 2001).

As the Supreme Court has repeatedly emphasized, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)). Indeed, "the 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen v. Wright*, 468 U.S. 737, 750 (1984). The "several doctrines that have grown up to elaborate that requirement" reflect "concern about the proper – and properly limited – role of the courts in a democratic society." *Allen*, 468 U.S. at 750 (quotation omitted). These various related justiciability doctrines – including standing, mootness, and the political question doctrine – "state fundamental limits on federal judicial power in our system of government." *Id.* "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *Cuno*, 547 U.S. at 341.

Plaintiff's claim falls far short of these justiciability hurdles. In case after case, courts have held that challenges to the use of military force by the President are not justiciable. Plaintiff's claim fares no better than the more than 20 previous decisions (a subset of which are discussed below) that have found challenges to

the President's use of military force to be non-justiciable.

A. Plaintiffs Lack Article III Standing

A core element of Article III's case or controversy requirement is that a plaintiff must establish that he or she has standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."). "[T]he law of Art. III standing is built on a single basic idea – the idea of separation of powers." *Allen*, 468 U.S. at 752. And, the "standing inquiry [is] especially rigorous when reaching the merits of the dispute would force [the court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines*, 521 U.S. at 819-20.

To satisfy the burden of establishing standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751. Thus, to satisfy "the irreducible constitutional minimum of standing," Plaintiffs must satisfy three elements. *Lujan*, 504 U.S. at 560. First, Plaintiffs must show an injury-in-fact – "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (internal quotation marks and citations omitted). Second, Plaintiffs must show "a causal connection between the injury" and the challenged action. *Id.* "Third, it

must be likely, as opposed to merely speculative, that the [Plaintiffs'] injury will be redressed by a favorable decision." Id. at 561 (quotation and citation omitted).[8]

In his original Motion to Dismiss, defendant demonstrated that Plaintiffs' initial Complaint failed to establish standing. In an apparent acknowledgement of this, Plaintiffs filed an Amended Complaint substantially revising their standing-related allegations. In an attempt to obscure the fact that they can make no allegation that is legally sufficient to confer standing, Plaintiffs undertake a shotgun strategy, setting forth eight purported injuries:

1. Plaintiffs allegedly "felt compelled" to direct resources into anti-war activities. *See* Amen. Compl. ¶¶ 8, 10, 12.

2. Plaintiffs allegedly were unable to vote in the 2002 and 2004 elections on the basis of their respective Representatives' vote on war with Iraq. *See id.*

3. Plaintiff NJPA's members were allegedly "compelled to pay tax dollars" for something that they oppose. *Id.* ¶ 8.

4. Plaintiff Rogovin alleges that she was acutely concerned for her son, a U.S. Marine who has completed two tours of duty in Iraq. *See id.* ¶ 9-10.

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[8] For a membership organization such as Plaintiff New Jersey Peace Action ("NJPA") to establish Article III standing on behalf of its members, it must establish "[1] its members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Environmental Servs.*, 528 U.S. 167, 181 (2000). As set forth below, NJPA fails the first prong of this test because the member interests it claims – those of voters and taxpayers – are insufficient to confer Article III standing.

5. Plaintiff Berlinrut alleges that she has been acutely concerned for her son, a U.S. Marine who was scheduled to begin his third tour of duty in Iraq in September 2008. *See id.* ¶¶ 11-12.

6. Plaintiffs Rogovin and Berlinrut allegedly have "great anger" toward the President's decision to order the 2003 invasion of Iraq. *Id.* ¶¶ 10, 12.

7. Plaintiff Wheeler alleges that he served in the Army during and after the 2003 invasion of Iraq and that he "had to endure . . . emotional, psychological and physical affects arising from the ordeal of combat." *Id.* ¶ 14.

8. Plaintiff Wheeler alleges that, in obeying his orders during the invasion of Iraq, he "suffered injury by being compelled to obey orders that were unlawful." *Id.* ¶ 15.

Each of these alleged injuries is insufficient as a matter of law to confer standing, as Defendant demonstrates below. However, the most direct way of demonstrating Plaintiffs' lack of standing is showing how all of the claims of injury fail the third prong of the constitutional standing inquiry – redressability. Defendant thus discusses this latter prong first.

1. Plaintiffs' Alleged Injuries Are Not Judicially Redressable

Plaintiffs seek a declaration that the 2003 invasion to remove the Saddam Hussein regime in the absence of a declaration of war was unconstitutional. Amen. Compl., at 25-26. Even if they were to get such a declaration (which they are not entitled to for numerous reasons), it would not redress any of the injuries that they allege in their Amended Complaint. Most of these alleged injuries – *e.g.*,

Plaintiff Wheeler's military service and Plaintiffs' votes in past elections – are entirely in the past, and could not be redressed by declaratory relief. Even those alleged injuries that might be seen as ongoing or future – *e.g.*, Plaintiff Berlinrut's son's current deployment in Iraq – cannot be redressed by the declaratory relief that Plaintiffs seek. This is because the legality of the 2003 invasion is irrelevant to current and future deployments to Iraq (just as the legality of the Korean War is irrelevant to current deployments to South Korea) because these are deployments of troops to a friendly nation, at the request of that nation, and not "an offensive military strike against the nation of Iraq," Amen. Compl. ¶ 54. Plaintiffs have not alleged, and could not plausibly allege, that the Congressional power to declare war prevents the President from stationing troops in allied countries, and thus any adjudication of the legality of the 2003 invasion would have no effect on current and future deployments to Iraq.

Similarly, the declaration that Plaintiffs' seek would not redress their alleged inability to judge their Representatives' war views, even with regard to future Congressional elections. Such a declaration obviously would not give Plaintiffs any additional knowledge about their Representatives' views.[9]

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[9] In order to learn how each Representative would vote on a formal declaration of war, Plaintiffs would need the Court to order Congress to hold a vote on such a declaration. This Plaintiffs have not asked for and could not permissibly ask for. *See, e.g.*, *Mississippi v. Johnson*, 71 U.S. 475, 500 (1866) ("The Congress is the legislative department of the government; the President is

Plaintiffs appear to acknowledge that their alleged injuries are not redressable at this time in this Court, and thus they seek to take refuge in the doctrine of capable of repetition yet evading review. Indeed, Plaintiffs allege that "this a classic example of an issue which is capable (and likely) of repetition yet may otherwise evade review if not now considered by the courts." Amen. Compl. ¶ 4. Plaintiffs' assertion is incorrect as a matter of law and their resort to this doctrine is without merit.

First of all, the Supreme Court has made clear that the doctrine of capable of repetition yet evading review is an exception only to the doctrine of mootness and has no application where there is an initial lack of standing at the time the Complaint is filed: "Standing admits of no similar exception; if a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum." *Friends of the Earth, Inc. v. Laidlaw Environmental Servs.*, 528 U.S. 167, 191 (2000); *accord Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83,

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the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance."); *Franklin v. Massachusetts*, 505 U.S. 788, 829 (1992) (Scalia, J., concurring in part) (the judiciary has no power to "direct . . . the Congress to perform particular legislative duties"); *Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936) ("[T]he universal rule . . . is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference."). Moreover, to hold a vote now on a declaration of war against Iraq would be illogical, as Saddam Hussein is no longer in power.

109 (1998) (noting that "the mootness exception for disputes capable of repetition yet evading review . . . will not revive a dispute which became moot before the action commenced" (quotation omitted)). If Plaintiffs had brought their suit prior to the challenged military action – as many other plaintiffs have, both with regard to this and other military actions – the doctrine might have some applicability (although, Plaintiffs would still lose for other reasons). But because Plaintiffs waited until more than ***five years after*** the occurrence of the challenged action, Plaintiffs' alleged injuries were not redressable at the time of filing, Plaintiffs never had standing, and the doctrine of capable of repetition yet evading review is wholly inapplicable.

Moreover, even if the doctrine of capable of repetition yet evading review could be applied in a standing (as opposed to mootness) challenge, it would not save Plaintiffs' claims here. "[T]he capable-of-repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). Indeed, the doctrine has two requirements: "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same act again." *Davis v. FEC*, 128 S. Ct. 2759, 2769 (2008). Here, Plaintiffs fail both prongs.

First, military action does not evade review because of its duration. Numerous plaintiffs, many of whose cases are discussed below, have initiated timely challenges to military action (including to the 2003 Iraq invasion). Plaintiffs inability to timely litigate this matter was the result of their own litigation decisions (*i.e.*, filing suit five years after the invasion). Of course it is true that even timely challenges to military action generally have not resulted in judicial review of Presidentially-ordered military action. But this is not because of the duration or timing, but rather because these challenges present inherently unreviewable political questions. *See infra* Part I.B.

Finally, Plaintiffs can present nothing more than speculation that the events of the 2003 invasion – *i.e.*, that the President will identify a foreign sovereign as a threat whose leaders must be removed by force, that Congress will authorize that force but not declare war, and that the President will use that authorization – will reoccur, let alone that they will cause the same alleged injuries to Plaintiffs.

2. Plaintiffs' Alleged Injuries Fail to Establish Standing for Additional Reasons

a. Plaintiffs' Opposition to United States Foreign Policy, Regardless of How Strongly Felt, Does Not Constitute a Concrete and Particularized Injury Sufficient to Confer Standing

Certain of Plaintiffs' alleged injuries – including their decisions to put resources into anti-war activities and their anger at the President's order – amount

to nothing more than Plaintiffs disagreement, albeit strongly held, with the President's foreign policy decision. Such disagreement with governmental policy, no matter how genuinely and strongly felt, can never be the basis of Article III standing as it is simply not the type of concrete, particularized injury that the Constitution requires. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992) (holding that "special interest in the subject" of government action does not constitute a basis for Article III standing (quotation and alteration omitted)); *Evans v. Lynn*, 537 F.2d 571, 598 (2d Cir. 1975) ("Disagreement with government action or policy, however strongly felt, does not, standing alone, constitute an 'injury' in the Constitutional sense which is cognizable in the federal courts and susceptible of remedy by the judicial branch."); *Wasserman v. Three Seasons Ass'n No. 1, Inc.*, 998 F. Supp. 1445, 1448 (S.D. Fla. 1998) (rejecting "the overbroad conclusion that philosophical disagreement with a policy alone confers standing to challenge the policy"). Indeed, the first two prongs of the standing inquiry would be meaningless if a plaintiff could assert injury simply by alleging that she was distressed by a governmental policy and/or had used resources to protest it.

b. The Fact that Plaintiffs Voted For or Against Representatives Who Had Not Voted on a Declaration of War Does Not Confer Standing

Plaintiffs' alleged deprivation "of the opportunity to vote for or against

[their] elected representatives based upon how they voted on the issue of going to war in Iraq" is an entirely contrived injury. Amen. Compl. ¶¶ 10, 12; *see also id.* ¶ 8. As an initial matter, while each citizen has a right to vote, there is no right to have the candidates take positions on any particular issue. A voter must decide based on the case that the candidate chooses to make. Secondly, in no way were Plaintiffs prevented from learning their Representatives' positions on military action to remove Saddam Hussein. Indeed, as described above, the views of Plaintiffs' Representatives, and indeed of every Member of Congress, were made known by the debate and vote on the Joint Resolution.

Moreover, even if Plaintiffs were genuinely unable to learn their Representatives' positions on military action, this would not be a "concrete and particularized" injury. The Supreme Court has "consistently stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is ***particularized*** as to him." *Raines*, 521 U.S. at 819 (emphasis supplied). Here, Plaintiffs' purported ignorance of their Representatives' positions is the very opposite of particularized. It is shared by, at least, all eligible voters in all 50 States.

Indeed, it is clear that even members of Congress would have no standing to challenge the President's order because the "injury they [would] allege is wholly abstract and widely dispersed." *Raines*, 521 U.S. at 829; *accord Campbell v.*

Clinton, 203 F.3d 19 (2000) (holding that members of Congress lacked standing to challenge President Clinton's decision to attack Yugoslavia); *Kucinich v. Bush*, 236 F. Supp. 2d 1, 6-9 (D.D.C. 2002) (holding that members of Congress lacked standing to challenge President's decision to withdraw from ABM Treaty). Surely, if a Member of Congress' interest is not particularized because the alleged injury "damages all Members of Congress and both Houses of Congress equally," *Raines*, 521 U.S. at 821, then a constituent's claim – which is shared by all eligible voters in each of the 50 states – is far too "widely dispersed" to confer Article III standing. *See also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217, 220 (1974) (holding that injury to "the generalized interest of all citizens in constitutional governance" is "an abstract injury"and that "standing to sue may not be predicated upon an interest of [this kind] which is held in common by all members of the public").

Additionally, Plaintiffs' allegations regarding their supposed ignorance of their Representatives' views fail the second prong of the Article III standing test as the act that Plaintiffs claim was illegal – the President's decision to order military action in Iraq in the absence of a formal declaration of war – did not cause Plaintiffs' lack of knowledge about their Representatives; they would have no more knowledge of their Representatives's views if the President had not ordered military action in Iraq.

c. Plaintiffs Do Not Have Standing Based on Their Status as Taxpayers

The law is clear that a citizen's status as a taxpayer does not provide him or her with standing to challenge the President's military decisions. As the Supreme Court has stated, "suits premised on federal taxpayer status are not cognizable in the federal courts because a taxpayer's 'interest in the moneys of the Treasury . . . is shared with millions of others, is comparatively minute and indeterminable.'" *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613-14 (1989) (quoting *Forthington v. Mellon*, 262 U.S. 447 (1923)). For this reason, suits in which taxpayers sue to challenge Executive action in the realm of military policy are routinely dismissed. *E.g.*, *Schlesinger*, 418 U.S. at 227-28; *Taxpayers of United States v. Bush*, 2004 WL 3030076, at *4 (N.D. Cal. Dec. 30, 2004) (no taxpayer standing to challenge 2003 invasion of Iraq); *Mahorner v. Bush*, 224 F. Supp. 2d 48, 50-52 (D.D.C. 2002) (no taxpayer standing to challenge foreign aid to Israel), *aff'd*, 2003 WL 349713 (D.C. Cir. Feb. 12, 2003); *Pietsch v. Bush*, 755 F. Supp. 62 (E.D.N.Y. 1991) (no taxpayer standing to challenge the first Gulf War).

d. Plaintiffs Rogivin and Berlinrut Cannot Bring Suit Based on the Military Service of Their Adult Children

Two Plaintiffs also assert standing based on the military service of their sons. Extensive caselaw makes it clear, however, that plaintiffs cannot assert standing based on alleged injuries to their adult children.

Plaintiffs' sons are adults and, as a large body of caselaw attests, Plaintiffs simply have no right to assert the alleged rights of other adults. *See, e.g.*, *Lance v. Coffman*, 127 S. Ct. 1194, 1196 (2007) (per curiam) (plaintiff may only seek relief that "directly and tangibly benefits *him*" (quoting *Lujan*, 504 U.S. at 574) (emphasis supplied)); *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("The Art. III judicial power exists only to redress or otherwise to protect against injury *to the complaining party*" (emphasis supplied)). This is true even where the plaintiff seeks to assert the rights of an adult child or other relative. *Brewer v. Lewis*, 989 F.2d 1021, 1025-26 (9th Cir. 1993) (mother did not have standing to assert constitutional rights of adult son who was facing execution); *Velvel v. Nixon*, 415 F.2d 236, 238 (10th Cir. 1969) (plaintiff whose relative had been wounded in Vietnam War lacked standing to contend that the conflict was illegal because Congress had not declared war); *Schuppin v. Unification Church*, 435 F. Supp. 603, 606 (D. Vt. 1977) (holding that "plaintiffs . . . have no standing to assert claims on their daughter's behalf"); *Liese v. Local Bd. 102*, 314 F. Supp. 521, 524 (E.D. Mo. 1970) (parents had no standing to challenge order of induction from draft board seeking to draft their son into military service). Indeed, the Third Circuit has specifically held that parents have no judicially cognizable constitutional rights stemming from the treatment of their independent adult children. *McCurdy v. Dodd*, 352 F.3d 820, 829-30 (3d Cir. 2003) ("[C]hildhood

and adulthood are markedly distinct, thus requiring different constitutional treatment."). Plaintiffs' sons' service thus cannot provide Plaintiffs with Article III standing.

e. Plaintiff Wheeler Cannot Bring Suit To Challenge Orders Given by His Commander in Chief, and to the Extent that Plaintiffs Rogivin and Berlinrut Claim Injury Based on Their Sons' Service, They Are Similarly Barred

Plaintiff Wheeler lacks standing to challenge the order of his Commander in Chief because a member of the military cannot challenge the order of a superior in a judicial forum. *See, e.g.*, *Chappell v. Wallace*, 462 U.S. 296, 300, 304 (1983) (holding that "[c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers" because "that relationship is at the heart of the necessarily unique structure of the military establishment" and noting the "disruption" of the "peculiar and special relationship of the soldier to his superiors that might result if the soldier were allowed to hale his superiors into court" (quotation omitted)); *United States v. Stanley*, 483 U.S. 669, 682-83 (1987) (holding that members of the military cannot raise constitutional claims against military officials for injuries incident to service because "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate").

Moreover, to the extent Plaintiffs Rogovin and Berlinrut base their claim of standing on injury suffered as a result of their sons' service, they too lack standing. *See Skees v. United States*, 107 F.3d 421, 425-26 (6th Cir. 1997) (widow could not bring loss of consortium claim because it was derivative of service member's barred claim); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 201, 202-04 (1987) (family members' claims relating to service members' exposure to Agent Orange barred).

B. Plaintiffs' Claim Is Barred by the Political Question Doctrine

Even if Plaintiffs had standing, and they do not, their claim would still be non-justiciable. If there is one thing that can be definitively stated about the Constitution's allocation of foreign affairs and military powers, it is that those powers are allocated to the political branches and not to the Judiciary.[10] For this

[10] American diplomatic and foreign affairs - including the use of the Armed Forces to defend the United States' interests abroad - has long been recognized as one of the items relegated to the province of the political branches and not the judicial branch. *See, e.g., Haig v. Agee*, 453 U.S. 280 (1981); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *United States v. Pink*, 315 U.S. 203, 222-23 (1942); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936). Thus, courts routinely find a "textually demonstrable constitutional commitment" of United States diplomacy and foreign policy to the political branches of government. *Baker v. Carr*, 369 U.S. 186, 217 (1962); *see also Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("policies in regard to the conduct of foreign relations [and] the war power . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference").

reason, courts have consistently held that the allocation of powers between the two political branches cannot be adjudicated in the absence of an impasse between those branches.[11]

The most commonly cited reason for this conclusion is the political question doctrine. Numerous courts have recognized that the political question doctrine bars claims such as the one here because it would require this Court to make determinations that are committed to the political branches of the government.[12]

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[11] Even if there were an actual impasse between the two branches, the political question would likely still bar adjudication of the case. *See, e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) (holding that whether the President "in fulfilling his duties as Commander-in-chief" was justified in treating the southern States as belligerents and instituting a blockade against them was a question "to be decided by him" and which the Court could not question but must leave to "the political department of the Government to which this power was entrusted"). Nevertheless, because the political branches were aligned on the Iraq invasion, the Court need not reach the issue of whether it could adjudicate an actual dispute between the branches over the scope of the political branches' respective war powers.

[12] *E.g.*, *Mahorner*, 224 F. Supp. 2d 48 (dismissing *sua sponte* action seeking injunction against President's Middle East policies, including commitment of troops there), *aff'd*, 2003 WL 349713 (D.C. Cir. Feb. 12, 2003); *Campbell*, 203 F.3d at 24-25 (Silberman, J., concurring) ("We lack 'judicially discoverable and manageable standards' for addressing [plaintiffs' claims], and the War Powers Clause claim implicates the political question doctrine"); *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990) (dismissing challenge to deployment to Persian Gulf prior to first Gulf War); *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987) (dismissing action by members of Congress to declare that events in Persian Gulf triggered reporting requirements of War Powers Resolution), *appeal dismissed*, No. 87-5426 (D.C. Cir. Oct. 17, 1988); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) (affirming dismissal of challenge to aid to Nicaraguan contras); *Conyers v. Reagan*, 578 F. Supp. 324 (D.D.C 1984) (dismissing challenge to

That doctrine, the roots of which go back as far as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803), counsels courts to abstain from ruling on questions properly reserved to the political branches of government.

The Supreme Court has set forth the following formulation for determining whether an issue constitutes a political question:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). Application of this formulation to the

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invasion of Grenada), *appeal dismissed*, 765 F.2d 1124 (D.C. Cir. 1985); *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982) (rejecting challenge to provision of aid to El Salvador), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam); *DaCosta v. Laird*, 471 F.2d 1146, 1157 (2d Cir. 1973) (dismissing action challenging air and naval strikes in North Vietnam as non-justiciable political question); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (rejecting challenge to Vietnam war); *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973) (same); *Massachusetts v. Laird*, 451 F.2d 26, 30-34 (1st Cir. 1971) (same); *Drinan v. Nixon*, 364 F. Supp. 854, 858 (D. Mass. 1973) (rejecting challenge to military activity in Cambodia); *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972) (three-judge court) (rejecting challenge to Vietnam war), *aff'd*, 411 U.S. 911 (1973); *Sarnoff v. Connally*, 457 F.2d 809 (9th Cir. 1972) (same); *Velvel v. Johnson*, 287 F. Supp. 846 (D. Kan. 1968) (same); *United States v. Sisson*, 294 F. Supp. 511 (D. Mass. 1968) (same); *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir. 1967) (same).

claim Plaintiffs have presented here leads to the inescapable conclusion that this case is non-justiciable under the political question doctrine. *See, e.g.*, *Massachusetts v. Laird*, 451 F.2d 26, 31-34 (1st Cir. 1971) (claim that the President cannot continue to commit troops to hostilities when there has been no congressional declaration of war is, in the absence of any conflicting congressional claim of authority, a non-justiciable political question).

Thus, in *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990), the court found non-justiciable a challenge to the President's deployment orders and activities in the Persian Gulf in the absence of a congressional declaration of war. In so concluding, the *Ange* court noted that "[p]rimary among the conditions [set forth in the *Baker v. Carr* formulation] is the 'textually demonstrable constitutional commitment' of the war powers to both political branches and the 'respect due' the political branches in allowing them to resolve this long-standing dispute over the war powers by exercising their constitutionally conferred powers." *Id.* at 512.

Adjudicating Plaintiffs' claim seeking to declare that the President's decision to order military action against Iraq in 2003 was unconstitutional would thrust this Court into the midst of the inter-branch activities of the political branches and their decision-making with respect to United States policy regarding Iraq. Such an intrusion would require the Court to gauge the President's (and prior Presidents') and Congress' efforts (both diplomatic and through various

military actions) with regard to Iraq over the course of a number of years. But these types of judgments are quintessentially political questions that are more appropriately entrusted to the political branches. "The judicial branch . . . is neither equipped nor empowered to intrude into the realm of foreign affairs where the Constitution grants operational powers only to the two political branches and where decisions are made based on political and policy considerations." *Id.* at 513. These, in the words of the *Ange* court, "are decisions of a kind for which the Judiciary has neither the aptitude, facilities nor responsibility and which ha[ve] long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Id.*

Applying similar reasoning, numerous courts have recognized the applicability of the doctrine of non-justiciability in cases such as this and have properly yielded to the prerogatives committed to the political branches under the Constitution. *See supra* Note 12. As one such court said when facing a challenge to a plaintiff's draft into the Vietnam war because war had not been declared by Congress:

> [T]he distinction between a declaration of war and a cooperative action by the legislative and executive with respect to military activities in foreign countries is the very essence of what is meant by a political question. It involves just the sort of evidence, policy considerations, and constitutional principles which elude the normal processes of the judiciary and which are more suitable for determination by coordinate branches of government. It is not an act

> of abdication when a court says that political questions of this sort are not within its jurisdiction. It is a recognition that the tools with which a court can work, the data which it can fairly appraise, the conclusions which it can reach as a basis for entering judgments, have limits.

United States v. Sisson, 294 F. Supp. 511, 515 (D. Mass. 1968).

Similarly, the Eastern District of Pennsylvania, sitting as a three judge panel, held that a challenge to U.S. military involvement in Southeast Asia presented a non-justiciable political question, holding:

> Congress is, of course, the only branch of government with the power to declare war. Implicit in this constitutional provision may be congressional authority to take steps short of a formal declaration of war, equivalent to an authorization.
> . . .
> Because the Constitution has given to Congress, and not the courts, the initial policy determinations whether to declare war formally and, if not, what steps to take short of formal declaration, we are bound not to enter the realm of foreign policy committed to another branch of government by adjudicating this question on the merits.

Atlee v. Laird, 347 F. Supp. 689, 706 (E.D. Pa. 1972). On direct appeal, the Supreme Court affirmed. *Atlee v. Richardson*, 411 U.S. 911 (1973).[13]

Here, Congress clearly ratified what these Plaintiffs now challenge: the authority of the President to commit troops to military action against the Saddam Hussein Iraqi regime. Congress authorized the President to use force by enacting the Joint Resolution, which authorized the President to use the Armed Forces "as

[13] Plaintiffs' assertion that none of the prior decisions in this area have been affirmed by the Supreme Court is thus incorrect. *See* Amen. Compl. ¶ 2.

he determines necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq." Pub. L. No. 107-243, 116 Stat. 1501, §3(a). Furthermore, Section 3(c) identifies the Joint Resolution as "specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." *Id.* at §3(c). The political branches, therefore, are in harmony with respect to this issue. Unequivocally, the political branches have resolved the political question, and there is no justiciable issue for this Court to address.

Indeed, numerous courts have rejected the very challenge brought by Plaintiffs here – that military action against Iraq was unconstitutional because Congress' October 2002 Joint Resolution authorizing military action was not a formal declaration of war – finding the claim to be barred by the political question doctrine because "it is abundantly clear that [claims] concerning the Executive Branch's ability to conduct both military and foreign affairs are non-justiciable political questions." *Mahorner v. Bush*, 224 F. Supp. 48, 52-53 (D.D.C. 2002) (holding that challenge to the 2003 invasion of Iraq was barred by the political question doctrine), *aff'd*, 2003 WL 349713 (D.C. Cir. Feb. 12, 2003); *accord Olson v. Bennett*, 2008 WL 525336, at *3 (D. Utah Feb. 26, 2008) (same); *Taxpayers of United States v. Bush*, 2004 WL 3030076, at *3 (N.D. Cal. Dec. 30,

2004) (same).

For example, in *Doe v. Bush*, 257 F. Supp. 2d 436 (D. Mass. 2003), the court noted that "the war powers are understood to be shared by the political branches without judicial interference, even in the event of undeclared war," and thus held that "[t]he manner and form that Congress uses to ratify the President's decision to initiate military action is entirely discretionary, and the courts have no power to second guess the wisdom or form of such approval." *Id.* at 439. Because Congress had "expressly endorsed the President's use of the military against Iraq," plaintiffs challenge to military action was barred by the political question doctrine. *Id.* at 440.

The First Circuit affirmed, also finding the case to be non-justiciable. *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003). The court noted that the Congressional authorization was "narrowly focused" and operated in the "zone of shared congressional and presidential responsibilit[ies]" of war and foreign affairs. *Id.* at 142-43. Because the political branches were operating together rather than in conflict, it was clear that the matter was non-justiciable. *Id.* In particular, the court observed that Congress was properly engaged, along with the President, in dealing with Iraq:

> Congress has been deeply involved in significant debate, activity, and authorization connected to our relations with Iraq for over a decade, under three different presidents of both major political parties, and

> during periods when each party has controlled Congress. It has enacted several relevant pieces of legislation expressing support for an aggressive posture toward Iraq, including authorization for the prior war against Iraq and of military assistance for groups that would overthrow Saddam Hussein. It has also accepted continued American participation in military activities in and around Iraq, including flight patrols and missile strikes. Finally, the text of the October [2002 Joint] Resolution itself spells out justifications for a war and frames itself as an "authorization" of such a war.

Id. at 144. The court concluded by noting that "courts are rightly hesitant to second-guess the form or means by which the coequal branches choose to exercise their textually committed constitutional powers." *Id.* On plaintiffs' motion for rehearing, the First Circuit reiterated that because "Congress has taken no action which presents a 'fully developed dispute between the two elected branches,'" "the case continues not to be fit for judicial review." *Doe v. Bush*, 322 F.3d 109, 110 (1st Cir. 2003) (quotation omitted).

Decades of precedent, including multiple cases based on the 2003 Iraq invasion, make it clear that, where the political branches have made decisions regarding military action, any judicial review of that action is precluded. Notwithstanding this precedent, Plaintiffs ask the Court to substitute its judgment for that of both the President and Congress. The Court should decline, and the case should be dismissed.

II. Plaintiffs' Claim Lacks Merit

Because Plaintiffs' case fails to surpass these threshold justiciability issues, the Court should not reach the merits of their Amended Complaint. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'"(quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869))). Should the Court reach the merits, it should find that the Amended Complaint fails to state a claim on which relief may be granted.

A. A Formal Declaration of War Is Not Required in Order for the President to Commence Hostilities To Protect American Interests

The agreement between the President and Congress regarding the possible use of military force against Iraq not only makes this case non-justiciable as described above, but it also forecloses Plaintiffs' claim on the merits. It is not enough for Plaintiffs to argue that the President must secure the approval of Congress to use military force against Iraq, for even if that were correct (and, as discussed below, it is not), the simple fact is that the President did secure Congress' approval. To prevail on the merits, the Plaintiffs therefore must establish a far more radical and far-reaching proposition: that even when Congress approves in advance the use of military force by the President, and even when it

codifies that approval through the "finely wrought and exhaustively considered" lawmaking procedures of Article I, *INS v. Chadha*, 462 U.S. 919, 951 (1983), as it has here, the President is still powerless to act absent a formal declaration of war.

There is absolutely no merit to "the formalistic notion that Congress only authorizes military deployments if it states, 'We declare war.'" *Doe v. Bush*, 323 F.3d 133, 141 n.10 (1st Cir. 2003). As the First Circuit stated, "[t]his has never been the practice and it was not the understanding of the founders." *Id.* Indeed, Plaintiffs' contention is contradicted by more than two centuries of history. Only five military conflicts in our Nation's history have involved formal declarations of war,[14] yet the President has deployed the armed forces more than one hundred times. *See, e.g.*, Congressional Research Service, Library of Congress, Instances of Use of United States Armed Forces Abroad, 1798-2007 (2008). As early as the 1790s, the United States engaged in an undeclared "quasi-war" with France without any suggestion by Congress - whose members included many of the Constitution's Framers - that a declaration of war was required. *See Laird*, 451

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[14] *See* Act of June 18, 1812, 2 Stat. 755 (1812) (War of 1812); Act of May 13, 1846, 9 Stat. 9 (Mexican-American War); Act of Apr. 25, 1898, 30 Stat. 364 (Spanish-American War); Joint Resolution of Apr. 6, 1917, 40 Stat. 1 (World War I: Germany); Joint Resolution of Dec. 7, 1917, 40 Stat. 429 (World War I: Austria-Hungary); Joint Resolution of Dec. 8, 1941, 55 Stat. 795 (World War II: Japan); Joint Resolution of Dec. 11, 1941, 55 Stat. 797 (World War II: Italy); Joint Resolution of June 5, 1942, 56 Stat. 307 (World War II: Hungary); Joint Resolution of June 5, 1942, 56 Stat. 307 (World War II: Rumania).

F.2d at 33 ("The hostilities against France in 1799 . . .[were] an authorized but undeclared state of warfare."). More recently, the United States has engaged in major and protracted conflicts in Korea and Vietnam and has committed armed forces to combat in the Persian Gulf, Afghanistan, Kosovo, Somalia, Haiti, Panama, and Grenada - all without a single declaration of war. Given that "traditional ways of conducting government . . . give meaning to the Constitution," *Mistretta v. United States*, 488 U.S. 361, 401 (1988), this deeply rooted practice, spanning the entire history of this country, demonstrates that a declaration of war is not a constitutional predicate for the President's use of armed force abroad.[15]

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[15] Contrary to the assertion in paragraph 39 of Plaintiffs' Amended Complaint, *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800), provides no support to their position. *Bas* suggests that a formal declaration of war "might" create "a perfect state of war," but it says nothing about what types of hostilities (if any) would ***require*** a formal declaration of war. 4 U.S. at 41 (Op. of Washington, J.). Quite the opposite, *Bas* clearly holds that Congress may choose to authorize war against a foreign sovereign without enacting a formal declaration of war. *See id.* at 40-41; *id.* at 43 ("Congress has not declared war in general terms; but [C]ongress has authorized hostilities on the high seas by certain persons in certain cases. . . . So far it is, unquestionably, a partial war; but nevertheless, it is a public war, on account of the public authority from which it emanates.") (Op. of Chase, J.).

Similarly, in *The Prize Cases*, 67 U.S. (2 Black) 635 (1862), the Supreme Court recognized that the President can lawfully wage war without a formal declaration. *Id.* at 670 ("The proclamation [by the President] of blockade is itself official and conclusive evidence to the Court that a state of war existed . . . . If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in [Congressional enaction of] laws to enable the Government to prosecute the war with vigor and efficiency" as well as a blanket ratification of Presidential action previously taken).

The historical record similarly disposes of any claim that a declaration of war is required if, but only if, the President is not responding to an attack and the military engagement is not a "limited war," Amen. Compl. ¶ 46. As the *Laird* court observed, the use of military force during the quasi-war with France was "obviously not confined to repelling attack," 451 F.2d at 33, and the participation of the United States in hostilities in Korea and Vietnam did not have "a clearly understandable limit on the time, place and manner," Amen. Compl. ¶ 46, nor did they grow out of attacks on this country.

Even in its most expansive moments, Congress has never taken the view of its own authority that the Plaintiffs are now invoking. The high-water mark of Congress' assertion of authority over the war-making powers of the United States is the War Powers Resolution, 50 U.S.C. §§ 1541-48. Since the War Powers Resolution was enacted in 1973, every President has taken the position that it trenches impermissibly on the powers of the President under Article II. Yet the War Powers Resolution itself recognizes that the President may "introduce United States Armed Forces into hostilities" not only pursuant to a declaration of war or an attack on the United States, but also "pursuant to . . . specific statutory authorization," and it sets out specific mechanisms for Congress to authorize the use of military force by statute rather than declaration of war. *Id.* §§ 1541(c)(2), 1544(b), 1545. If Plaintiffs' constitutional theory is correct, the extraordinary

implication is that the War Powers Resolution is unconstitutional not because it goes too far in restraining the President, but because it does not go far enough. No authority supports that proposition.

The Plaintiffs purport to derive their extraordinary theory from a single provision of the Constitution – the provision of Article I that vests Congress with the power "to declare war." Const. art. I, § 8, cl. 11. But as the *Laird* court pointed out, the bare fact that Congress has the power to declare war does not imply "the more general negative . . . that Congress has no power to support a state of belligerency beyond repelling attack and short of a declared war." 451 F.2d at 33. Indeed, "[t]he drafters of the Constitution, who were not inept, did not say, 'power to commence war'[,] [n]or did they say, 'No war shall be engaged in without a declaration by Congress unless the country is 'actually invaded, or in such imminent Danger as will not admit of delay'" – the language used elsewhere in Article I to permit states to engage in undeclared war. *Id.* In short, Plaintiffs' claim runs aground at its very starting point – the text of the Constitution.

For that reason, the *Laird* court concluded that "in a situation of prolonged but undeclared hostilities, where the executive continues to act not only in the absence of any conflicting Congressional claim of authority but with steady Congressional support, the Constitution has not been breached." 451 F.2d at 34. Here, Congress has manifested its agreement with the President far more clearly

and unambiguously than it had done in *Laird*. In *Laird*, the court inferred "Congressional support" for military action from appropriations made after Congress had expressly repealed its prior authorization of hostilities. Here, in contrast, Congress deliberated before American forces were sent into battle, and Congress made a considered and explicit determination that circumstances "combine[d] to justify action by the United States to defend itself." Pub. L. No. 107-243, 116 Stat. at 1499. If the Constitution "has not been breached" when Congress supports the President's use of force implicitly and after the fact (as in *Laird*), then *a fortiori*, it is not breached when Congress deliberately and explicitly approves the use of military force in advance.

The conclusion that the President and Congress can jointly pursue military action without a declaration of war does not mean that Congress' power to declare war is a nullity, or that a declaration of war has no independent legal effect. As recognized in *Laird*, a declaration of war "trigger[s] treaty obligations and domestic emergency powers." 451 F.2d at 31. For example, when war has been declared, the government may prosecute certain criminal cases without a grand jury (U.S. Const. amend. V); troops may be quartered in private homes without the consent of the homeowner (U.S. Const. amend. III); and States may arm themselves without further authorization by Congress (U.S. Const. art. I, § 10, cl. 3). In short, a declaration of war plays an important role in expanding the

emergency powers of the government over American citizens, as well as altering the juridical relationship between the United States and its adversary under international law and potentially triggering treaty obligations. When Congress determines that these consequences are demanded by the exigencies of a particular conflict, it is free to employ a declaration of war to bring them about. But there is no reason why Congress should be compelled to enlarge the powers of the government and curtail the rights of citizens in this fashion whenever it, or the President, determines that the use of military force would be appropriate. Nothing in the Constitution so constrains the political branches.

B. The Joint Resolution Is Not an Unconstitutional Delegation

Plaintiffs assert that Congress' power to declare war cannot be delegated to the President. *See* Amen. Compl. ¶ 44A. But, Congress has done nothing of the sort here. As the court recognized in *Laird*, the power to declare war and the power to commence undeclared hostilities are very different. *See* 451 F.2d at 33. When the President decided that (in the words of the Joint Resolution) it was "necessary and appropriate" to initiate military action to protect the United States against the threat posed by Iraq, he did not thereby declare war, and none of the emergency powers discussed above was triggered.

Nor is the Joint Resolution otherwise suspect under the general requirements of the non-delegation doctrine. As long as Congress provides "an

intelligible principle" to govern the exercise of authority assigned to the Executive Branch, "such legislative action is not a forbidden delegation of legislative power." *Mistretta*, 488 U.S. at 372 (internal quotation marks omitted). "Intelligible principles" can be found not only in the text of the enactment, but also in "the purpose of the Act, its factual background and the statutory context." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946). The requirement of an "intelligible principle" is an exceedingly mild one; "[o]nly the most extravagant delegations of authority, those providing no standards to constrain administrative discretion, have been condemned by the Supreme Court as unconstitutional." *Humphrey v. Baker*, 848 F.2d 211, 217 (D.C. Cir. 1988).

Moreover, the limits on delegations of Congressional power "are . . . less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975). Here, Article II vests the President with broad constitutional authority over the use of military force, which reduces the demands of the non-delegation doctrine to a minimum. *See Loving v. United States*, 517 U.S. 748, 768 (1996) (with respect to non-delegation challenges, "we give Congress the highest deference in ordering military affairs[,] . . . [a]nd it would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority").

Judged against these standards, the Joint Resolution easily passes constitutional muster. The Joint Resolution specifically identified the nature of the military threat that Congress determined was facing the nation. The Joint Resolution also specified the objectives that Congress wished to inform the President's decision regarding the use of force – "defend[ing] the national security of the United States against the continuing threat posed by Iraq" and "enforc[ing] all relevant United Nations Security Council Resolutions regarding Iraq." The Joint Resolution thus provided a readily intelligible principle regarding the decision to use military force against Iraq – a principle that is no less intelligible than those sustained by the Supreme Court in other cases. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474-75 (2001).

Finally, the terms of the Joint Resolution provide the President with no more discretion than he would have enjoyed if Congress had enacted a formal declaration of war. As the Commander-in-Chief, the President has the sole authority to issue orders to the armed services regarding the deployment of military force. A declaration by Congress that a state of war exists between the United States and Iraq thus would leave the President entirely free to decide how and when – and even whether or not – our armed forces should take action against Iraq. If the President were to determine that military action against Iraq should be postponed indefinitely, or even that unexpected developments eliminated the need

for military action altogether, nothing about a declaration of war would curtail in the least his constitutional power and authority to act in accordance with his own judgments. The executive discretion that the Plaintiffs complain of, far from suggesting a constitutional problem, inheres in the terms of the Constitution itself, and Congress' decision to act through a joint resolution rather than a declaration of war is simply irrelevant to the existence and extent of that discretion.

C. The President's Article II Powers Empower Him to Order Military Action Even in the Absence of Congressional Authorization

The President's authority to respond with military force to the threat posed by Iraq does not ultimately depend on the existence of any Congressional approval above and beyond its provision of military resources to the President. The "executive power" vested in the President by Article II and the President's constitutional authority as Commander-in-Chief empower him to conduct military actions with whatever resources Congress has provided him, while Congress' power of the purse gives it the countervailing ability to curtail any military actions that it opposes.[16] Indeed, the Constitution more than 200 years of Congressional

[16] Because the President so clearly does have specific and explicit Congressional approval to employ military force in this case, the Court ultimately need not determine the precise boundaries of the President's independent powers under Article II, and instead, can and should reserve the question of the President's power to engage in military action without specific Congressional authorization or approval until a case arises in which that sensitive constitutional

action – including the Joint Resolution – support the President's unilateral war-making powers – with or without a Congressional declaration of war. The Constitution vests the President with full "executive Power," U.S. Const. art. II, §1, cl. 1, and designates him "Commander in Chief" of the Armed Forces, U.S. Const. art. II, §2, cl. 1. These provisions are a substantive grant of broad war power that authorizes the President to unilaterally use military force in defense of the United States' national security interests. As the Supreme Court has recognized, the Commander-in-Chief clause "vest[s] in the [P]resident the supreme command over all the military forces, – such supreme and undivided command as would be necessary to the prosecution of a successful war." *United States v. Sweeny*, 157 U.S. 281, 284 (1895); *see also Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) (the President "is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy").[17] The President's independent constitutional power thus presents yet

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question is actually presented.

[17] Pursuant to his Commander-in-Chief authority, for example, President George H.W. Bush launched Operation Desert Storm, *see* Letter to Congressional Leaders on the Persian Gulf Conflict, 1 Pub. Papers of George Bush 52 (Jan. 18, 1991), and in 1992, he involved the United States in the enforcement of the southern no-fly zone pursuant to that same authority, *see* Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions, 2 Pub. Papers of George Bush 1574, 1575 (Sept. 16, 1992). When

another reason why this action should be dismissed.

CONCLUSION

For the reasons stated above, Plaintiffs' action should be dismissed.

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Respectfully submitted,

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President Clinton ordered the 1993, 1996 and 1998 missile strikes against Iraq, he likewise pointed to his constitutional authority as Commander in Chief and Chief Executive. *See* Letter to Congressional Leaders on Military Strikes Against Iraq, 2 Pub. Papers of William Jefferson Clinton 2195, 2196 (Dec. 18, 1998); Letter from President William J. Clinton, to the Honorable Newt Gingrich, Speaker of the House of Representatives at 2 (Sept. 5, 1996); Letter to Congressional Leaders on the Strike on Iraqi Intelligence Headquarters, 1 Pub. Papers of William Jefferson Clinton 940 (June 28, 1993). In these and other instances, Congress did not interfere with or attempt to regulate the President's exercise of his Commander-in-Chief powers.