[ORAL ARGUMENT NOT SCHEDULED]

No. 16-5377

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATHAN MICHAEL SMITH,

Plaintiff-Appellant,

v.

DONALD J. TRUMP, President of the United States,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici

Nathan Michael Smith was plaintiff in the district court and is appellant in this Court. Donald J. Trump, President of the United States, is appellee in this Court.[1] The Constitution Project was amicus in support of plaintiff in the district court and is amicus in support of appellant in this Court.

B. Rulings Under Review

Appellant appeals from the district court's opinion and order (Kollar-Kotelly, J.) of November 21, 2016. The district court's opinion is published at 217 F. Supp. 3d 283.

C. Related Cases

This case was not previously before this Court. Counsel is not aware of any other related cases within the meaning of Circuit Rule 28(a)(1)(C).

s/ H. Thomas Byron III
H. THOMAS BYRON III

[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), President Donald J. Trump has been substituted for former President Barack Hussein Obama, who was defendant in the district court and appellee in this Court.

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GLOSSARY

AUMF	Authorization for Use of Military Force
AQI	al-Qa'ida in Iraq
ISIL	Islamic State of Iraq and the Levant (also ISIS)
ISIS	Islamic State of Iraq and Syria (also ISIL)
NDAA	National Defense Authorization Act

INTRODUCTION

Plaintiff Nathan Michael Smith, a captain in the U.S. Army who was previously deployed in support of military operations against the Islamic State of Iraq and the Levant ("ISIL"),[2] seeks a declaratory judgment that those operations are illegal on the ground that they were not approved by Congress and are not within the President's constitutional authority. But the President has repeatedly explained that the operation against ISIL is within the scope of two statutes authorizing the use of military force, and Congress has never cast any doubt on that conclusion. Plaintiff's claim—seeking judicial review of the Executive's decision to engage military forces against an enemy abroad, against the background of extensive legislative support—is quintessentially non-justiciable, as the district court recognized, both because plaintiff lacks standing and because the political question doctrine precludes judicial inquiry. Indeed, plaintiff's standing is additionally suspect because he is no longer deployed and has been released from active duty; there is no imminent likelihood of injury resulting from his continued participation in military operations against ISIL.

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. § 1331. JA 7-8. The district court entered a final judgment dismissing plaintiff's complaint on November 21, 2016. JA 62, 96. Plaintiff filed a timely notice of appeal on December

[2] ISIL is also known as the Islamic State of Iraq and Syria ("ISIS").

19, 2016. JA 97; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly dismissed plaintiff's complaint for lack of Article III standing.

2. Whether dismissal of plaintiff's complaint was independently warranted because it presents a non-justiciable political question.

3. In the alternative, whether the district court's dismissal should be affirmed because equitable relief is not available against the President.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes are reproduced in the addendum to plaintiff's brief.

STATEMENT OF THE CASE

A. Factual and Legal Background

Plaintiff's complaint challenges the President's use of military force against ISIL (referred to as "Operation Inherent Resolve") as a violation of the War Powers Resolution and the President's constitutional duty to take care that the laws are faithfully executed. He seeks a declaratory judgment that the military operation is unlawful.

1. Operation Inherent Resolve

In September of 2014, then-President Obama announced a "comprehensive and sustained counterterrorism strategy" "to degrade and ultimately destroy the

terrorist group known as ISIL." President Barack Obama, *Address to the Nation on United States Strategy To Combat the Islamic State of Iraq and the Levant (ISIL) Terrorist Organization* (Sept. 10, 2014), https://go.usa.gov/xNEs3. The President explained that ISIL, formerly al-Qa'ida in Iraq, had "taken advantage of sectarian strife and Syria's civil war to gain territory on both sides of the Iraq-Syrian border." *Id.* The U.S. counterterrorism strategy would include "a systematic campaign of airstrikes" against ISIL targets in Syria and Iraq, as well as U.S. military assistance to Iraqi forces and Syrian opposition forces fighting ISIL on the ground. *Id.* President Obama confirmed that he had "secured bipartisan support for this approach here at home," that he "ha[s] the authority to address the threat from ISIL," and that he "welcome[s] congressional support for this effort in order to show the world that Americans are united in confronting this danger." *Id.*

Later that month, President Obama sent a letter to congressional leaders providing additional details about the scope of the military operations against ISIL and the legal basis for carrying them out. *See* Letter from President Barack Obama to the Speaker of the House of Representatives and the President pro tempore of the Senate (Sept. 23, 2014), https://go.usa.gov/xNPHj. The letter advised that, "with a new Iraqi government in place, and following consultation with allies abroad and the Congress at home," the President had "ordered the U.S. Armed Forces to conduct a systematic campaign of airstrikes and other necessary actions against [ISIL] in Iraq and Syria." *Id.* These military activities were "being undertaken in coordination with

and at the request of the Government of Iraq and in conjunction with coalition partners." *Id.* President Obama noted, as he had in several previous letters reporting on U.S. airstrikes against ISIL, that the September 23rd letter was "part of [his] efforts to keep the Congress fully informed, consistent with the War Powers Resolution," and that he ordered these actions "pursuant to [his] constitutional and statutory authority as Commander in Chief (including the authority to carry out Public Law 107-40 and Public Law 107-243)," his authority as Chief Executive, and his "constitutional and statutory authority to conduct the foreign relations of the United States." *Id.*

In October 2014, the Department of Defense designated military operations against ISIL in Iraq and Syria as Operation Inherent Resolve, including actions "since airstrikes against ISIL began Aug. 8 in Iraq." *See* U.S. Dep't of Defense, *Centcom Designates Ops Against ISIL as "Inherent Resolve"* (Oct. 15, 2014), https://go.usa.gov/xNy3f. The operation was designated by the Secretary of Defense as an "overseas contingency operation,"[3] which is a military operation "in which members of the armed forces are, or may become, involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force." 10 U.S.C. § 101(a)(13)(A).

[3] Lead Inspector General for Overseas Contingency Operations, *Operation Inherent Resolve: Quarterly Report and Biannual Report to the United States Congress: December 17, 2014 – March 31, 2015*, at 12 (Apr. 30, 2015), https://go.usa.gov/xNPHW.

The Administration further explained the basis for concluding that Operation Inherent Resolve was within the scope of earlier authorizations by Congress in a report issued in December 2016. *See Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* 5-7, 15-17 (Dec. 2016) ("*Frameworks Report*"), https://go.usa.gov/xNEAG. The Frameworks Report addressed the legal support for a variety of military operations, including those targeting ISIL. *Id.* at i (Foreword noting that report explains how the "Administration has ensured that our uses of force overseas are supported by a solid domestic law framework"). It explained that the President has provided reports to Congress, consistent with the War Powers Resolution, concerning the use of military force in certain countries. *Id.* at 2. After reviewing the scope of earlier statutory authority (*id.* at 3-5), the Frameworks Report explained the history of military operations against ISIL and the factual basis for the President's determination that they were authorized by statute and supported by Congress (*id.* at 5-7).

2. Earlier Statutes Authorizing the Use of Military Force

The two statutes that President Obama relied upon as legislative authority for military action against ISIL, Public Law 107-40 and Public Law 107-243, each constitute a "specific statutory authorization" for the use of force within the meaning of the War Powers Resolution, 50 U.S.C. § 1544(b). Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(b)(1), 115 Stat. 224, 224 (2001) ("2001 AUMF") ("[T]he Congress declares that this section is intended to constitute specific statutory

authorization within the meaning of section 5(b) of the War Powers Resolution."); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3(c)(1), 116 Stat. 1498, 1501 ("2002 AUMF") (same).

a. The 2001 AUMF, enacted in response to the terrorist attacks of September 11, 2001, authorizes the President to

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.

Pub. L. No. 107-40, § 2(a), 115 Stat. at 224. Congress explicitly authorized the President to determine the "nations, organizations, or persons" to which the 2001 AUMF applies. Congress and the federal courts have confirmed the Executive Branch's view that the 2001 AUMF provides authority for counterterrorism actions against persons who were a part of or substantially supported al-Qa'ida, the Taliban, or associated forces "engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces," without limiting that authority to any particular foreign country. National Defense Authorization Act for Fiscal Year 2012, § 1021(b)(2), Pub. L. No. 112-81, 125 Stat. 1298, 1562 (2011); *see also Al Bihani* v. *Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010).

Pursuant to the 2001 AUMF, the United States has carried out military operations against a variety of terrorist groups in multiple locations. *See Frameworks Report* 5 & n.24; *see also* Stephen W. Preston, General Counsel, U.S. Dep't of Defense, The Legal Framework for the United States' Use of Military Force Since 9/11, Address to the Annual Meeting of the American Society of International Law (Apr. 10, 2015), https://go.usa.gov/xNPHZ. The Executive Branch has understood the 2001 AUMF to authorize the use of force against ISIL since at least 2004, when ISIL, then known as al-Qa'ida in Iraq ("AQI"), joined bin Laden's al-Qa'ida organization in its conflict against the United States. *Frameworks Report* 5. AQI had a direct relationship with bin Laden, and it waged that conflict in allegiance to him while he was alive. *Id.* at 5-6. ISIL continues to plot and carry out attacks against the United States and specifically continues "to denounce the United States as its enemy and to target U.S. citizens and interests." *Id.* at 6. For that reason, the Executive Branch has concluded that the 2001 AUMF continues to authorize military action against ISIL, despite ISIL's recent disagreement with and split from the current al-Qa'ida leadership. *Id.* (the enemy cannot "control the scope of the AUMF by splintering into rival factions while continuing to prosecute the same conflict against the United States").

b. The 2002 AUMF authorizes the President to "use the Armed Forces of the United States as he determines to be necessary and appropriate in order to defend

the national security of the United States against the continuing threat posed by Iraq." Pub. L. No. 107-243, § 3, 116 Stat. at 1501. The Executive Branch has explained:

> Although the threat posed by Saddam Hussein's regime in Iraq was the primary focus of the 2002 AUMF, the statute, in accordance with its express goals, has always been understood to authorize the use of force for the related dual purposes of helping to establish a stable, democratic Iraq and of addressing terrorist threats emanating from Iraq.

Frameworks Report 6 n.25. Even after Saddam Hussein's regime fell in 2003, the United States "continued to take military action in Iraq under the 2002 AUMF," "including action against AQI (now known as ISIL)," because that organization "posed a terrorist threat to the United States and its partners and undermined stability and democracy in Iraq." *Id.* Particularly in light of Congress's appropriation of billions of dollars to support continued military operations in Iraq between 2003 and 2011, the Executive Branch has concluded that the "2002 AUMF reinforces the authority for military operations against ISIL in Iraq and, to the extent necessary to achieve these purposes, elsewhere." *Id.*

3. Congressional Action Supporting, and Oversight of, Operation Inherent Resolve

Since 2014, Congress has indicated its support for military operations against ISIL "through an unbroken stream of appropriations over multiple years," made available after "close congressional oversight" of those activities, as well as by authorizing the President "to provide lethal and nonlethal assistance to select groups and forces fighting ISIL in Iraq and Syria." *Frameworks Report* 6.

Following the President's budget requests, in December 2014, Congress passed the Consolidated and Further Continuing Appropriations Act 2015. Pub. L. No. 113-235, 128 Stat. 2130 (2014) ("2015 Appropriations Act"). In that statute, Congress appropriated the additional $5.6 billion that President Obama sought for overseas contingency operations to counter ISIL, including Operation Inherent Resolve, in categories and amounts virtually identical to those that President Obama had requested. 128 Stat. at 2285-95; *see* Letter from President Obama to the Speaker of the House of Representatives (Nov. 10, 2014), https://go.usa.gov/xNycc; *see also* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, §§ 1209(a), 1236(a), 128 Stat. 3292, 3541, 3559 (2014) ("2015 NDAA") (authorizing the Secretary of Defense to provide assistance to Iraq to "[d]efend[] Iraq . . . from the threat posed by [ISIL]" and to "[d]efend[] the Syrian people from attacks by [ISIL]").

Similarly, the following year, Congress approved the President's subsequent budget request for funds to support the fight against ISIL, enacting the Consolidated Appropriations Act, 2016. Pub. L. No. 114-113, 129 Stat. 2242 (2015) ("2016 Appropriations Act"). The Explanatory Statement highlighted the threat posed by the "rise of [ISIL]," and noted that the Act "provide[s] additional funding for the Army, Navy, Marine Corps, and Air Force to conduct counter-ISIL operations." 1 Staff of H. Comm. on Appropriations, 114th Cong., Consolidated Appropriations Act, 2016, at 289 (Comm. Print 2016), http://go.usa.gov/xNmH4; *see also* National Defense

Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, §§ 1223, 1224, 129 Stat. 726, 1049, 1053 (2015) ("2016 NDAA") (expressing "the sense of the Congress that . . . [ISIL] poses an acute threat to the people and territorial integrity of Iraq" and that "defeating ISIL is critical to maintaining a unified Iraq" and authorizing funds for Operation Inherent Resolve).[4]

The President has also sent Congress periodic reports about Operation Inherent Resolve "consistent with the War Powers Resolution." *See*, *e.g.*, Letter from President Trump to the Speaker of the House of Representatives and the President pro tempore of the Senate (June 6, 2017), http://go.usa.gov/xNyZz; Letter from President Obama to the Speaker of the House of Representatives and the President pro tempore of the Senate (Dec. 11, 2014), https://go.usa.gov/xNPHk.

In addition to those letters, Congress also receives multiple reports concerning the details of Operation Inherent Resolve (including costs, personnel deployment, and other information). *See* 2015 Appropriations Act, § 8097, 128 Stat. at 2276; 2016 Appropriations Act, § 8093, 129 Stat. at 2373; Department of Defense Appropriations

[4] The most recent appropriations provisions also support the military effort against ISIL. *See* Department of Defense Appropriations Act, 2017, Pub. L. No. 115-31, div. C, tit. IX, 131 Stat. 229, 277; *id.* tit. X, § 1005, 131 Stat. at 300 (providing funds for counter-ISIL activities, including overseas contingency operations); Further Continuing and Security Assistance Appropriations Act, 2017, Pub. L. No. 114-254, div. B, tit. I, 130 Stat. 1005, 1023-26 (2016) (granting President Obama's request for an additional $5.8 billion in funding for overseas contingency operations, including Operation Inherent Resolve).

Act 2017, Pub. L. No. 115-31, div. C, tit. IX § 9006, 131 Stat. 229, 289; 2016 NDAA, § 1224, 129 Stat. at 1053; *see also* Lead Inspector General for Overseas Contingency Operations, Operation Inherent Resolve, Report to the U.S. Congress, at ii (Mar. 31, 2017), https://go.usa.gov/xNPH8.

Further, since 2014, Congress has held multiple hearings on the campaign against ISIL, and has heard from such high-ranking officials as the Secretary of Defense and the Chairman of the Joint Chiefs of Staff.[5]

B. Prior Proceedings

Plaintiff, a U.S. Army captain, filed this action against then-President Barack Obama on May 4, 2016, seeking a declaratory judgment that the President's use of United States armed forces "against ISIS in Syria and Iraq violates the War Powers Resolution" and the Take Care clause. JA 17. Plaintiff alleged that "[h]e believes that the operation [against ISIS] is justified both militarily and morally," JA 8, but that he became concerned that the President was "waging war" against ISIS, JA 9, "without having obtained from Congress either a declaration of war or 'a specific statutory authorization' for its use." JA 12. He alleged that such action is therefore "illegal" under the War Powers Resolution, which "requires the President to obtain a

[5] *See, e.g., U.S. Policy Towards Iraq and Syria and the Threat Posed by the Islamic State of Iraq and the Levant (ISIL): Hearing Before the S. Comm. on Armed Services*, 113th Cong. 5-72 (2014) (statements of Chuck Hagel, Secretary of Defense, and General Martin E. Dempsey, Chairman of the Joint Chiefs of Staff); *The Administration's Strategy and Military Campaign Against Islamic State in Iraq and the Levant: Hearing Before the H. Comm. on Armed Services*, 113th Cong. 4-46 (2014) (same).

declaration of war or specific authorization from Congress within sixty days" of his introduction of armed forces into hostilities, and that "the White House's failure to publish a serious legal justification for the war" within sixty days also violates the Take Care clause's requirement that the President "faithfully execute" the laws. JA 6, 13.

Plaintiff alleged that when he was commissioned as an officer in 2010, he "took an oath to 'preserve, protect, and defend' the Constitution." JA 9. At the time of suit, plaintiff alleged that he was deployed in support of Operation Inherent Resolve. JA 7. That deployment has since ended, JA 63, and plaintiff has been released from active duty military service, Br. 1-2. According to the complaint, the President's actions "made it impossible for Captain Smith to determine whether his present mission is inconsistent with his [officer's] oath." JA 13. As a result, he alleged that his "conscience bothered" him. JA 9.

The government moved to dismiss the complaint for lack of jurisdiction. JA 64; *see also* Def.'s Mot. to Dismiss, Dkt. No. 9. The district court granted the government's motion to dismiss, concluding that plaintiff lacks standing because he failed to identify a concrete injury sufficient for Article III jurisdiction. The court likewise concluded that dismissal was warranted on the independent ground that plaintiff's claims raise non-justiciable political questions. JA 64. The court did not reach the government's other asserted bases for dismissal. JA 70.

In concluding that plaintiff failed to establish a concrete and particularized injury for standing, the district court reasoned that "Plaintiff's bare disagreement with,

or simple uncertainty about the legality of, President Obama's decision to take military action against ISIL does not constitute an injury in fact." JA 72. The court explained that plaintiff does not allege any concrete injury to himself, such as "physical or emotional harms . . . associated with deployment to a theatre of combat," any "violation of his own constitutional rights or liberties" caused by his involuntary participation in military action, or "any moral or philosophical objections to the military action against ISIL." JA 72-73. Indeed, the district court recognized that plaintiff seeks to "'continue fighting.'" JA 73 (quoting Pl.'s Opp'n at 44, Dkt. No. 10).

The district court explained that there is no duty, either under the officer's oath or pursuant to Supreme Court precedent, for plaintiff to disobey military orders merely on the ground that he has questions about whether Congress has authorized a military operation. JA 74, 76-77. "To the contrary, it appears well-settled . . . that there is no right, let alone a duty, to disobey military orders simply because one questions the Congressional authorization of the broader military effort." JA 76. And, although plaintiff's oath "may require [him] to refrain from violating the Constitution," that does not mean that the oath "require[s] disobedience of military orders based on an officer's legal interpretation of whether Congress had properly authorized the broader military effort." JA 77. Indeed, as the district court recognized, such an interpretation of the officer's oath would have "obvious and problematic practical consequences" on military operations by leaving individual

officers to decide which orders to follow and which to disobey, based on their own analyses of whether an operation was authorized by Congress. JA 77-78.

Because plaintiff could not claim that he was under any obligation to disobey military orders, plaintiff could avoid any risk of military punishment by obeying his orders. JA 78. The court rejected plaintiff's effort to create standing under "oath of office" cases. JA 79-80. As the district court noted, "even assuming that Plaintiff is correct that the President violated the War Powers Resolution, it does not follow that any act Plaintiff himself was asked to take as an intelligence officer in that Operation would itself be unconstitutional." JA 81.

The district court concluded that plaintiff's complaint rests on a "bare desire to have the legality of Operation Inherent Resolve determined," which does not support standing. JA 74-75; *see also* JA 82 (noting that "[p]laintiff's interest, in knowing *whether* participation in Operation Inherent Resolve is consistent with his oath" cannot be the basis for standing because that means plaintiff does not have "'a stake in the controversy at issue, i.e., he himself must perceptibly win or lose depending on the outcome'") (quoting *Harrington v. Bush*, 553 F.2d 190, 209 (D.C. Cir. 1977)).

The district court also concluded that the political question doctrine provided an "independent" ground for dismissal of plaintiff's complaint. JA 95. As the district court recognized, plaintiff's claim that Operation Inherent Resolve is illegal is "premised on the notion that Congress has not previously authorized the use of force against ISIL," which depends upon a determination that neither the 2001 nor the

2002 AUMF authorizes the use of force against ISIL. JA 86. The district court held that those issues implicate two of the political question factors under *Baker v. Carr*, 369 U.S. 186, 217 (1962), in that those issues "are primarily ones committed to the political branches of government, and the Court lacks judicially manageable standards, and is otherwise ill-equipped, to resolve them." JA 87.

As the district court explained, certain elements at issue in this case, such as whether the use of force is "necessary and appropriate" within the meaning of the 2001 and 2002 AUMFs, "are indisputably and completely committed to the political branches of government." JA 89 (also noting that the court lacks any "judicially manageable standards to adjudicate" what is necessary and appropriate in this context). Moreover, the factual questions raised by plaintiff's claims, such as whether ISIL is connected with al-Qa'ida, are ones that involve "sensitive military determinations" that the court is not well equipped to resolve. JA 90. Finally, the district court observed that there is no dispute between the political branches as to the challenged action, as evidenced by Congress's "numerous hearings" on and continued funding for the operation. JA 91-93.

SUMMARY OF ARGUMENT

Even if plaintiff remained on active duty and were still deployed in support of Operation Inherent Resolve, he could not demonstrate the injury required to show standing under Article III. He does not allege that he was or would be required to follow any military order requiring him to violate the Constitution or any law of the

United States, and he asserts only that he is uncertain whether Congress has authorized the military operation. Even if he had a more substantial reason to disagree with the legal analysis of the Executive, which has consistently and expressly maintained that the military operation is authorized by Congress, the law is well settled that an officer has no duty to disobey an order on the ground that he disagrees with the President's determination.

Second, even apart from the standing inquiry, this effort to second-guess the judgment of the political branches concerning deployment of the military against particular foreign targets is at the core of the justiciability concerns embodied in the political question doctrine. The decision to use military force is committed to the political branches, and is not appropriate for judicial intrusion, especially where Congress and the President are in agreement. Moreover, there are no judicially manageable standards to resolve plaintiff's claim, which would require the federal courts to second-guess the President's determination, pursuant to statutorily conferred authority, that ISIL is within the scope of the 2001 and 2002 AUMFs, and that the military operation here is necessary and appropriate.

Even apart from those justiciability concerns—either of which provides a basis to affirm the district court's dismissal—this suit could not proceed because plaintiff's request for equitable relief against the President is inappropriate.

STANDARD OF REVIEW

This Court reviews de novo the dismissal of a complaint on jurisdictional grounds. *See Rangel v. Boehner*, 785 F.3d 19, 22 (D.C. Cir. 2015) (standing and political question).

ARGUMENT

"Federal courts are courts of limited jurisdiction," and the plaintiff bears the burden of establishing that jurisdiction exists. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). The "case or controversy" requirement, U.S. Const. art. III, § 2, limits the jurisdiction of federal courts based on the Constitution's separation of powers. *Allen v. Wright*, 468 U.S. 737, 750 (1984). "In an attempt to give meaning to Article III's case-or-controversy requirement, the courts have developed a series of principles termed 'justiciability doctrines,' among which are standing. . . and the political question doctrine." *National Treasury Emps. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996). Both doctrines require dismissal here.

I. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFF'S COMPLAINT FOR FAILURE TO ALLEGE AN INJURY SUFFICIENT FOR STANDING.

A party seeking to invoke federal court jurisdiction bears the burden of establishing his standing to sue. To meet that burden, a plaintiff must show that he has suffered an injury in fact that is fairly traceable to the defendant's challenged conduct and that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). To establish injury in fact, a plaintiff must

show that he has suffered "an invasion of a legally protected interest" that is "concrete and particularized." *Id.* at 1548. The injury must be "actual or imminent." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (quoting *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997)). A general "interest in proper application of the Constitution and laws," without more, will not support an injury sufficient for standing purposes. *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam).

The district court here properly concluded that plaintiff lacks standing under these principles. Plaintiff's only claim of injury arises from his uncertainty about whether the President's legal analysis—that Operation Inherent Resolve is authorized by the 2001 and 2002 AUMFs—was correct. As the court explained, plaintiff's doubt about whether Operation Inherent Resolve is authorized by Congress "does not constitute an injury in fact" because that "uncertainty presents no 'concrete' harm, nor is it 'particularized' because it does not affect Plaintiff in any individual or particular way." JA 72. Nor has plaintiff alleged that his deployment has caused any actual injury to himself, such as physical or emotional harm or a violation of his own rights or liberties. JA 72-73.

Plaintiff contends that his continued participation in Operation Inherent Resolve could result in "potential" harm (Br. 8) because, if the President had failed to comply with the War Powers Resolution or the Take Care Clause, plaintiff would allegedly risk violating his officer's oath to support and defend the Constitution; he suggests that his oath would require him to disobey his orders regarding his

participation in Operation Inherent Resolve and risk military punishment. Br. 8-13, 22. But that argument proceeds from a false premise: Even if the President in some way acted unlawfully by directing a military operation, plaintiff fails to allege that he himself has been, or will be, compelled to perform any specific action that would be unconstitutional and thereby violate his oath.

Mere participation in a military operation that an officer perceives to be potentially unauthorized does not conflict with an oath to support and defend the Constitution. Plaintiff does not allege that he has been ordered to engage in any unlawful conduct. Rather, plaintiff simply questions whether the President has properly determined that Congress has authorized the military operation.

But military personnel "are duty-bound to implement whatever policy decisions the civilian leadership may make." *United States v. New*, 55 M.J. 95, 110 (C.A.A.F. 2001) (Effron, J., concurring). As a result, "subordinates are not required to screen the orders of superiors for questionable points of legality, and may, absent specific knowledge to the contrary, presume that orders have been lawfully issued." Office of Gen. Counsel, Dep't of Def., *Law of War Manual* § 18.3.2.1, at 1076 (June 2015, updated December 2016). Plaintiff has made no allegations that his service would force him to take any specific actions that would violate his oath. Absent such allegations, his asserted injury is entirely speculative.

Plaintiff's claim to standing is even more attenuated, given that he has returned from his deployment in support of Operation Inherent Resolve and was released

from active duty this month. Br. 1-2. Although he may remain in the reserves for approximately one more year, he has not identified any basis to conclude that there is an "actual or imminent" likelihood of future deployment in support of Operation Inherent Resolve during that period. *Clapper*, 133 S. Ct. at 1147.

In any event, plaintiff's theory of standing also fails because he seeks to litigate a general grievance about the operation of the government, a grievance shared in more or less equal measure with "a subclass of citizens who suffer no distinctive concrete harm." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992). He has not identified any particular order that he believes he is likely to receive in the future that would require him to violate his oath, nor has he explained how any specific order could result in a violation of his oath. Indeed, he has not even pointed to any specific orders he received in the past that allegedly represent the kind of injury he fears in the future. *Cf. City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (prior injury insufficient to show standing for prospective relief).

Plaintiff's expansive theory of standing would "confer standing on any public official who believes that a statute which he or she is charged with enforcing is unconstitutional." *City of S. Lake Tahoe v. California Tahoe Reg'l Planning Agency*, 625 F.2d 231, 237 (9th Cir. 1980). But swearing an oath to defend the Constitution does not transform a federal officer's abstract, generalized concerns into a personal, particularized, and concrete injury needed for Article III standing. A three-judge district court dismissed a similar claim by a Foreign Service Officer who alleged that

Hillary Clinton's appointment and service as Secretary of State was unlawful, and that his service under her therefore violated his Foreign Service Officer oath to "support and defend the Constitution." *Rodearmel v. Clinton*, 666 F. Supp. 2d 123, 125 (D.D.C. 2009) (three-judge court) (per curiam), *appeal dismissed*, 560 U.S. 950 (2010). Like plaintiff here, "Rodearmel has not alleged that he has been required to take any action that he believes is itself unconstitutional and that would therefore lead him to violate his oath of office." *Id.* at 130; *id.* at 131 ("Assuming Clinton unconstitutionally holds office as Secretary of State, it does not follow that a Foreign Service Officer generally serving under, taking direction from and reporting to Clinton performs an unconstitutional act thereby[.]"). Other courts have similarly rejected efforts by federal employees to rely on an oath as a basis for raising general questions about the legal authority of government action. *See*, *e.g.*, *Drake v. Obama*, 664 F.3d 774, 780 (9th Cir. 2011) (rejecting standing of active-duty military officer seeking to challenge President Obama's qualifications as Commander in Chief); *Crane v. Johnson*, 783 F.3d 244, 253 (5th Cir. 2015) (Immigrations and Customs Enforcement agent lacked standing to challenge a Department of Homeland Security directive based on the "subjective belief that complying with the Directive will require him to violate his oath").

Plaintiff has failed to identify any specific way in which he would be required to take actions that would themselves violate the Constitution. He offers only the general assertion that he "*has* been ordered 'to take an action'—supporting [Operation

Inherent Resolve]." Br. 22. That failure demonstrates the absence of any cognizable injury. Thus, although the military officer's oath "may require Plaintiff to refrain from violating the Constitution," it does not support plaintiff's "extremely expansive and apparently novel interpretation of the officer's oath that would require disobedience of military orders based on an officer's legal interpretation of whether Congress had properly authorized the broader military effort." JA 77; *see also* JA 78 n.9.[6]

Plaintiff's reliance (Br. 19-22) on *Board of Educ. v. Allen*, 392 U.S. 236 (1968), likewise fails because he has not identified any action that would require him to violate the Constitution.

> Plaintiffs in *Allen* believed that the action *they were being required to take* violated the Constitution. By contrast, Plaintiff in this case alleges that President Obama has violated a statute . . . and violated the Take Care Clause of the Constitution . . . . Even accepting these allegations as true, Plaintiff fails to allege that *he*, like the plaintiffs in *Allen*, is being asked to undertake any action that would be a violation of the Constitution and therefore his oath.

JA 80.[7] As the district court properly explained, "even assuming" that Operation Inherent Resolve was not properly authorized by Congress, "it does not follow that any act Plaintiff himself was asked to take as an intelligence officer in that Operation

[6] Plaintiff's assertion (Br. 8-13) that the district court failed to appreciate the significance of the officer's oath is thus incorrect.

[7] The district court also noted the "persuasive . . . opinions of various Courts of Appeal that have questioned whether such 'oath taker' standing would still be considered sufficiently 'concrete' under modern Supreme Court standing precedent." JA 79-80 (citing cases). But the court did not need to decide that question because it concluded that *Allen* was distinguishable.

would itself be unconstitutional." JA 81; *see also* JA 82 ("Even accepting his allegations as true [as to the purported violations of the War Powers Resolution and Take Care Clause], he is not himself being ordered to violate the Constitution, and therefore his oath."). Moreover, as the district court also recognized, in *Allen* the alleged violation of the oath was imminent. JA 82. Plaintiff, however, has alleged only that he is uncertain whether Operation Inherent Resolve is lawful; at most, therefore, he is uncertain whether, if he were again deployed, some unspecified future action of his might violate his oath. *Id.*

The district court correctly held that there is no legal authority requiring plaintiff in these circumstances to disobey orders. JA 77-78. Plaintiff (Br. 13-19) cites an 1804 admiralty decision, *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). As the Supreme Court has subsequently explained, *Little* illustrates the principle that "a federal official was protected for action tortious under state law only if his acts were authorized by controlling federal law." *Butz v. Economou*, 438 U.S. 478, 490 (1978). The district court correctly recognized that "*Little* does not stand for the proposition . . . that military personnel have a *duty to disobey* orders they believe are beyond Congressional authorization." JA 76. Plaintiff fails to identify any "authority that has interpreted *Little* to stand for [that] proposition," JA 76, and we are aware of none.[8]

[8] Plaintiff cites (Br. 16) *Butz* and *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (*Zivotofsky II*), arguing that they "affirm[] the continuing vitality" of *Little* and therefore provide further support for his claim that there is a duty to disobey

Indeed, the district court noted that "it appears well-settled in the post-*Little* era that there is no right, let alone a duty, to disobey military orders simply because one questions the Congressional authorization of the broader military effort." JA 76 (citing *United States ex rel. New v. Rumsfeld*, 448 F.3d 403, 411 (D.C. Cir. 2006)).

In any event, plaintiff does not even contend that he himself is convinced that the military operation is not authorized. He claims only that he is uncertain whether the President properly determined that Operation Inherent Resolve has been authorized by Congress. JA 13 (President's actions have "made it impossible for Captain Smith to determine whether his present mission is inconsistent with his oath"). The risk of military discipline arising out of disobedience of orders that are not patently illegal, therefore, is a self-inflicted injury that does not give plaintiff standing. *Clapper*, 133 S. Ct. at 1151 (parties "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending").

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unlawful military orders. But those cases do not address military orders at all. And plaintiff has identified no prospect (as in *Butz*) that he could be sued for his conduct as part of Operation Inherent Resolve. *See* JA 76 n.7. Nor is there any disagreement (as in *Zivotofsky II*) between the Executive and Legislative Branches concerning the military operation. See *infra* pp. 26-28.

II. IN THE ALTERNATIVE, THE DISTRICT COURT CORRECTLY DISMISSED THE COMPLAINT AS PRESENTING A NON-JUSTICIABLE POLITICAL QUESTION.

The political question doctrine is "primarily a function of the separation of powers," *Baker v. Carr*, 369 U.S. 186, 210 (1962), and is "designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government," *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990). In *Baker*, the Supreme Court recognized that cases presenting non-justiciable political questions typically include one or more of the following factors:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. As the district court properly concluded, plaintiff's claims are subject to the political question doctrine because they implicate at least the first two factors.

Decisions regarding the use of military force are committed to the President and the Congress. "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches . . . [than the] complex, subtle, and professional decisions as to the . . .

control of a military force . . . ." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *see also*, *e.g.*, *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952). Moreover, Congress is fully capable of policing the boundaries of the respective roles of the political branches. *See Schneider v. Kissinger*, 412 F.3d 190, 200 (D.C. Cir. 2005) ("If the executive in fact has exceeded his appropriate role in the constitutional scheme, Congress enjoys a broad range of authorities with which to exercise restraint and balance."); *Massachusetts v. Laird*, 451 F.2d 26, 34 (1st Cir. 1971) ("When the executive takes a strong hand, Congress has no lack of corrective power."). Thus, especially where the President and Congress are acting in concert, rather than in conflict, as to their shared responsibilities in the war powers context, there is no need for judicial inquiry to determine the appropriate boundaries or roles as between the political branches. *See, e.g., Massachusetts*, 451 F.2d at 33 ("joint concord" of political branches "precludes the judiciary from measuring a specific executive action against any specific [constitutional] clause in isolation"), *id.* at 34 ("Because the branches are not in opposition, there is no necessity of determining boundaries).

Courts have understood the political branches to be acting in concert, thus reinforcing the non-justiciability of an issue concerning military activities, when Congress has undertaken affirmative action that suggests support for Executive actions, such as by appropriating funds. *See, e.g.*, *Sanchez-Espinosa v. Reagan*, 770 F.2d 202, 211 (D.C. Cir. 1985) (R.B. Ginsburg, J., concurring) (where Congress had "expressly allowed the President to spend federal funds to support paramilitary

operations in Nicaragua," a challenge under the War Powers Resolution was not justiciable); *Massachusetts*, 451 F.2d at 34 (political question doctrine barred challenge to military actions "where the executive continues to act not only in the absence of any conflicting Congressional claim of authority but with steady Congressional support"); *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971) ("legislative action furnishing the manpower and materials of war," including billions of dollars in appropriations, was sufficient participation between the political branches to foreclose further consideration of war powers challenge). Congress's inaction also supports a conclusion that the political question doctrine precludes interference in decisions concerning the use of military force. *See*, *e.g.*, *DaCosta v. Laird*, 471 F.2d 1146, 1157 (2d Cir. 1973) (political question doctrine foreclosed judicial inquiry where Congress had "taken a position" by "not cutting off the appropriations" for military operations); *Crockett v. Reagan*, 558 F. Supp. 893, 899 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) (political question doctrine precluded judicial inquiry into whether U.S. involvement in El Salvador had triggered War Powers Resolution where Congress had taken no contrary action).

Those principles control here: Given that the President and Congress share constitutional authority concerning the use of military force, and plaintiff has identified no dispute between the political branches, it would be inappropriate for the judiciary to step in to determine the proper allocation of the respective powers between the other branches. The President explained that the 2001 and 2002 AUMFs

(which expressly satisfy the terms of the War Powers Resolution) authorize Operation Inherent Resolve. And, since that operation began, Congress has conducted extensive oversight and appropriated billions of dollars for military action against ISIL. Those affirmative actions confirm that there is no disagreement between the political branches, and demonstrate the inappropriateness of judicial intrusion into this sensitive area.

Plaintiff does not point to any evidence of disagreement between Congress and the President about whether the military operation against ISIL is properly authorized. Plaintiff (Br. 48-51) refers to several appropriations provisions stating that no funds made available for Operation Inherent Resolve are to be used "in contravention" of the War Powers Resolution. *See, e.g.*, 2015 Appropriations Acts §§ 8140, 9014, 128 Stat. at 2285, 2300; 2016 Appropriations Act §§ 8122, 9019, 129 Stat. at 2380, 2397. But those provisions confirm that Congress does not disagree with the Executive: if Congress believed that the United States had been conducting airstrikes and other counter-ISIL military activities "in contravention of the War Powers Resolution," it would have made no sense for Congress to use the "in contravention" proviso in the same laws that made funds available for the express purpose of continuing those military activities. *Cf. Holtzman v. Schlesinger*, 484 F.2d 1307, 1313 (2d Cir. 1973) (proviso in appropriations bill that no funding could be used for certain military operations after specified date indicated congressional approval of operations occurring prior to that date). Plaintiff disputes that either the 2001 or 2002 AUMF

authorizes Operation Inherent Resolve, and further contends that congressional funding does not constitute specific authorization for the President's use of force within the meaning of the War Powers Resolution. But as the district court correctly noted, such arguments go "to the *merits* of Plaintiff's claims, not their *justiciability*." JA 92.

Plaintiff counters that this case allegedly involves a purely legal issue. *See* Br. 23, 26 (citing *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (*Zivotofsky II*)). But *Zivotofsky II* presented a direct conflict between the political branches: The Executive thus argued, and the Supreme Court held, that Congress lacked the constitutional power to enact the statute at issue, which directed the Secretary of State, upon request, to list "Israel" as the place of birth on the passport of an American citizen born in Jerusalem. *Id.* at 2084, 2095-96. Unlike *Zivotofsky II*, this case does not present a dispute between the political branches requiring judicial resolution.

Plaintiff nevertheless contends that the War Powers Resolution limits the President's powers to undertake the military operation against ISIL, and he disagrees with the President's contrary determination. But the War Powers Resolution did not affect the well-established justiciability principles that prevent courts from making a merits determination in the war powers context where Congress has taken no action to express disagreement with the Executive Branch. *See, e.g., Sanchez-Espinoza*, 770 F.2d at 211 (R.B. Ginsburg, J., concurring); *Ange v. Bush*, 752 F. Supp. 509, 512

(D.D.C. 1990) (deciding whether deployment order violates the Resolution would require determining "precisely what allocation of war power the text of the Constitution makes to the executive and legislative branches"); *Lowry v. Reagan*, 676 F. Supp. 333, 339 (D.D.C. 1987) (dismissing challenge under the Resolution and distinguishing it from a "true confrontation between the Executive and a unified Congress, as evidence by its passage of legislation to enforce the Resolution").

The political question doctrine also precludes judicial action where there are no "judicially discoverable and manageable standards." *Baker*, 369 U.S. at 217. Determining whether Operation Inherent Resolve is authorized would require this Court to review not only the President's judgment that ISIL is an appropriate military target, but also the sensitive factual and policy decisions underlying his judgments – and all in the very midst of a live armed conflict. See *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 843 (D.C. Cir. 2010) (en banc) ("The conclusion that the strategic choices directing the nation's foreign affairs are constitutionally committed to the political branches reflects the institutional limitations of the judiciary and the lack of manageable standards to channel any judicial inquiry into these matters."); *see also, e.g.*, *DaCosta*, 471 F.2d at 1155 (declining to consider whether mining harbors in Vietnam was an "escalation" of war beyond congressional authorization); *Holtzman*, 484 F.2d at 1310 (declining to consider claim that bombing of Cambodia was a "basic change" in the scope of the war); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 44-52 (D.D.C. 2010) (dismissing as non-justiciable claim for prospective relief prohibiting

the President from using force in counterterrorism operation under 2001 AUMF). Because federal judges "lack[] vital information upon which to assess the nature of battlefield decisions, . . . sitting thousands of miles from the field of action," *DaCosta*, 471 F.2d at 1155, they are not equipped to review the myriad political and strategic decisions regarding the use of military power in response to external threats, *El-Shifa*, 607 F.3d at 844-45.

Plaintiff disputes the President's determination that the 2001 and 2002 AUMFs authorize the use of force against ISIL.[9] Plaintiff contends (Br. 29, 31-39) that this issue presents unexceptional questions of statutory interpretation. But the 2001 AUMF permits the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Pub. L. No. 107-40, § 2(a), 115 Stat. at 224. And the 2002 AUMF uses similarly broad language to permit the President to use military force where "necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq." Pub. L. No. 107-243, § 3(a)(1), 116 Stat at 1501. The statutory language presents no judicially manageable standards by which this Court could review, for example, what force is "necessary and appropriate"; or whether the President

[9] Plaintiff also suggests (Br. 32-34) that the 2002 AUMF is no longer in force, citing a letter sent to the Speaker of the House on July 25, 2014 by then-National Security Advisor Susan Rice. But that letter said no such thing, and it did not purport to disclaim the President's authority to rely on the 2002 AUMF in the future.

correctly determined that certain nations, organizations, or persons participated in the September 11 attacks, or were part of such organizations such that military operations were necessary "in order to prevent any future acts of international terrorism against the United States"; or whether the President reasonably assessed that fighting ISIL is properly part of the effort to defend the national security against the threat posed by Iraq.

Those determinations cannot be made without implicating the sensitive national security judgments on which they rest. *DaCosta*, 471 F.2d at 1155. Any such inquiry would thrust the Court into the realm of "delicate, complex" policy judgments beyond the competence of the judiciary, *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), in part because the question turns on military, intelligence, and foreign policy considerations that are appropriately left to the political branches, particularly where the core judgment at issue is whether to deploy U.S. forces against an adversary overseas. This Court has recognized that courts cannot consider questions of this nature "without first fashioning out of whole cloth some standard for when military action is justified." *El-Shifa*, 607 F.3d at 845.

III. PLAINTIFF CANNOT OBTAIN EQUITABLE RELIEF AGAINST THE PRESIDENT.

Plaintiff's request for a declaratory judgment against the President is improper. Ordinarily, injunctive relief is not available against the President. *Franklin v. Massachusetts*, 505 U.S. at 802-03; *id.* at 826 (Scalia, J., concurring) ("[N]o court has

authority to direct the President to take an official act."); *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982) ("The President's unique status under the Constitution distinguishes him from other executive officials."). The same is true as to declaratory relief. *Newdow v. Roberts*, 603 F.3d 1002, 1012 (D.C. Cir. 2010) ("A court—whether via injunctive or declaratory relief—does not sit in judgment of a President's executive decisions."); *Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) ("[S]imilar considerations regarding a court's power to issue relief against the President himself apply to [a] request for a declaratory judgment.").

In any event, declaratory relief is within a court's equitable discretion. Here, the equities counsel against entering relief that would entail "judicial intrusion into the Executive's ability to conduct military operations abroad." *Munaf v. Geren*, 553 U.S. 674, 700 (2008); *see also Sanchez-Espinoza*, 770 F.2d at 208 ("we think it would be an abuse of our discretion to provide discretionary relief"; rejecting request for "interjection into so sensitive a foreign affairs matter as" a challenge to support of military forces in Nicaragua); *Mitchell v. Laird*, 488 F.2d 611, 616 (D.C. Cir. 1973) ("[A] court would not substitute its judgment for that of the President, who has an unusually wide measure of discretion in this area, and who should not be judicially condemned except in a case of clear abuse amounting to bad faith.").

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 8401 words.

s/ H. Thomas Byron III
H. THOMAS BYRON III

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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