UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN ADMIRALTY

ROBERT DEXTER WEIR, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

No. 19-cv-01708 (TFH)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

For thirty-two days, the Coast Guard shackled Plaintiffs to the decks of Coast Guard ships, and denied them shelter, bedding, basic sanitation, proper food and water, and medical care, even as the deadliest Atlantic hurricane in more than a decade, struck the area. They also destroyed the men's small fishing boat, along with their fishing gear and personal possessions. The Coast Guard suspected—wrongly—that Plaintiffs, four Jamaican fishermen, were engaged in trafficking marijuana when all they had done was try to eke out a living by plying their trade. The Coast Guard denied the men any contact with their families who, after expecting them to return home in a few days, feared they had died at sea, mourned their passing, and gave away their livestock, vehicles, and personal belongings.

Plaintiffs bring this action under the framework established by Congress that expressly waives sovereign immunity and allows aggrieved individuals to sue the United States for maritime torts committed by U.S. agents, including the Coast Guard. After treating the men as less than human, the government moves to dismiss their suit by claiming it raises "political questions." The motion mischaracterizes the facts and misstates the law. The government asserts that Plaintiffs' main complaint is that they spent too much time at sea, as if they had been on a cruise ship that was late arriving to its destination. But the gravamen of Plaintiffs' suit is that the Coast Guard grossly mistreated them while in its custody and wrongfully destroyed their property. The motion also ignores that *every court* that has considered claims arising from Coast Guard misconduct during law enforcement operations has treated those claims as justiciable.

The political question doctrine, which the Supreme Court and this Circuit have repeatedly cautioned remains a narrow exception to a federal court's duty to adjudicate legal rights, does not remotely support the government's attempt to strip this Court of jurisdiction. Contrary to the

government's argument, Plaintiffs do not seek to enforce rights under an international treaty, nor do they challenge any action by the Jamaican government; Plaintiffs challenge only misconduct by the Coast Guard for actions taken by it on board U.S.-flagged ships pursuant to U.S. law. Nothing about this case renders it non-justiciable. This Court should reject the government's effort to radically expand the political question doctrine and deny Plaintiffs any remedy for the egregious mistreatment they suffered at the hands of U.S. officials.

STATEMENT OF FACTS

The Coast Guard's Seizure and Detention of Plaintiffs

Plaintiffs are four Jamaican fishermen. On September 13, 2017, together with a fifth crewmember, George Garee Thompson, Plaintiffs left their homes in Jamaica on board a thirty-two foot, Jamaican-registered boat, the *Jossette* WH 478. They set out on a two-day fishing trip to the Morant Cays, an off-shore island group located in Jamaican territorial waters. ECF 1, Complaint ("Compl.") ¶¶ 23–24. The next day, after being blown off-course during an unexpected storm, the United States Coast Guard ("Coast Guard") stopped the *Jossette* in international waters, just outside the territorial waters of Haiti. The Coast Guard suspected, wrongly, that the crew was involved in trafficking drugs. *Id.* ¶¶ 27–30.

After determining the nationality of the men and their boat, the Coast Guard obtained Jamaica's consent on September 14 to exercise U.S. jurisdiction over the *Jossette*, and thus to board and search the ship and its crew. ECF 12-1, Memorandum in Support of the United States' Motion to Dismiss ("MTD") at 22. Once on board, a Coast Guard officer asked the crew where they were heading, and one or more of the men responded that they had planned to go fishing on the Morant Cays but had lost their way in the storm and were trying to find their way back to Jamaica. Compl. ¶¶ 32–35. The officers searched the boat and the men for drugs. No drugs were

found onboard or on any of the men. The officers nevertheless forcibly removed Plaintiffs and Mr. Thompson from the *Jossette* to a Coast Guard ship waiting nearby. *Id.* ¶¶ 36–38. Several hours later, the Coast Guard officers destroyed the *Jossette* and all its contents, including Plaintiffs' fishing gear and Mr. Ferguson's fighting cock, Jah Roos. *Id.* ¶¶ 39, 43.

Four days after sinking the *Jossette*, on September 18, 2017, pursuant to Article 3 of the Agreement Between the Gov't of the United States of Am. & the Gov't of Jam. Concerning Cooperation in Suppressing Illicit Mar. Drug Trafficking, , the United States requested that Jamaica "waive its primary right to exercise jurisdiction over the vessel, its cargo, and crew." ECF 12-2, United States Department of State, Certification for the Maritime Drug Law Enforcement Act, Ex. A ¶ 4(e) ("State Dep't Cert."); MTD at 16. Jamaica provided that waiver on October 9, 2017, after Plaintiffs had already been in U.S. custody for 25 days. *Id*. ECF 12-2 at 3; MTD at 9.

At all times, during the Coast Guard's interdiction, boarding, and search of the vessel, and its search, seizure, and detention of Plaintiffs, as well as the Coast Guard's destruction of Plaintiff's property, Coast Guard officers were acting pursuant to claimed authority under U.S. law, specifically the Maritime Drug Law Enforcement Act, 46 U.S.C. § 70501 *et seq.* ("MDLEA").

The Coast Guard's Prolonged Detention and Mistreatment of Plaintiffs

For thirty-two days, Plaintiffs remained under the exclusive custody and control of the Coast Guard, shackled to the decks of four different ships. Coast Guard officers did not formally arrest Plaintiffs, but told the men that they were being detained for further investigation; no additional information was provided to the men. They were not told why or for how long they would be detained. Compl. ¶ 38. While in Coast Guard custody, the men were continuously

shackled, exposed to the elements, and denied shelter, bedding, basic sanitation, proper food and water, and medical care for injuries they sustained onboard.

As soon as the men were taken onto the first Coast Guard ship, Coast Guard officers ordered them to strip naked and to dress in paper-thin coveralls, which they were forced to wear throughout their confinement. *Id.* ¶¶ 40–41. The coveralls did little to protect the men from the elements. For the entirety of their confinement, each man remained shackled by one of his ankles to metal cables affixed to the decks of the ships. *Id.* ¶¶ 42, 45, 80. The men's shackles were extremely painful and cut into their ankles, leaving physical scarring that remained for a year. *Id.* ¶ 79. The only time the Coast Guard released the men from the cable was to allow them to relieve themselves in buckets or over the side of the ship. *Id*. ¶ 45. The pain caused by the shackles, combined with the lack of proper bedding materials (including mattresses and blankets) made sleeping outside on the rough metal decks of the ships extremely difficult. As a result, the men were barely able to sleep for the thirty-two days of their confinement. *Id.* ¶¶ 48, 61, 82. The men's ordeal included being chained outside on the deck of one of the ships when Hurricane Maria, a Category 5 hurricane and the deadliest Atlantic hurricane in more than a decade, struck the area. *Id.* ¶¶ 57, 59–60.

Coast Guard officers refused to provide the men with adequate shelter, including during the height of the hurricane. The men's skin blistered due to exposure to the constant sun, wind, and salt air. *Id.* ¶ 46. Exposure to the elements also resulted in the men developing saltwater rashes and other skin, ear, nose and throat infections from their constant and prolonged exposure to the sun, wind, salt water, and searing heat during the days, and cold and damp during the early mornings and nights that chilled them to the bone. *Id.* ¶¶ 61, 64. The men all developed fungal infections, which some of the men continue to suffer from today. *Id*. ¶¶ 4, 62. Plaintiff Williams

also suffered a severe tooth infection. *Id*. ¶ 64. Coast Guard officers did not provide the men with treatment for their injuries until shortly before bringing them to Miami. *Id*. ¶ 76.

Coast Guard officers denied the men access to basic sanitation, as well as proper food or water for the duration of their confinement. On all except one of the ships, Coast Guard officers provided the men with a metal bucket for a toilet or made them urinate or defecate over the side of the ships, and provided them only with an occasional, cold, salt-water shower to wash themselves. *Id.* ¶¶ 45, 47, 62. While docked at the Port of San Juan, Puerto Rico, for two days and nights, Coast Guard officers hid the men from view under a dark tarpaulin and forced the men to sleep next to a feces-filled bucket. *Id.* ¶¶ 66–67. On the fourth ship, a sewage pipe that the Coast Guard had chained the men next to burst, soaking the deck and the men in feces and other excrement. *Id*. ¶ 81.

The food rations that the Coast Guard provided to the men on all except one of the four ships were meager and barely edible, comprised of three identical meals a day of cold rice and beans. *Id.* ¶¶ 49, 83. The briny water provided made the men nauseous. *Id*. The men consequently drank less and less water over time, and began to suffer symptoms of dehydration, including severe exhaustion, dizziness, and headaches. *Id.* ¶ 75. The lack of proper food and water, coupled with the lack of sleep and extreme stress, caused the men to lose a significant amount of their body weight. *Id.* ¶ 86.

The Coast Guard's Denial of Any Communication with Plaintiffs' Families

The Coast Guard held the men incommunicado for their entire thirty-two-day detention. Coast Guard officers denied the men's repeated requests to contact their families in Jamaica, as well as their repeated requests that the Coast Guard inform their families that they were still alive. *Id.* ¶¶ 5, 51. The men feared, correctly, that if their families did not hear from them within

a day or two of their expected return from their fishing trip (*i.e.*, by September 16, 2017, at the latest) their families would presume they were either lost at sea or dead. *Id.* ¶¶ 51, 87–88. And, in fact, several family members considered Plaintiffs lost, mourned their deaths, and gave away their livestock, vehicles, and other personal possessions. *Id.* ¶ 88.

As the weeks of inhumane treatment and incommunicado detention ground on with no end to their captivity in sight, the men became so fearful, distressed, and hopeless about their situation that they had recurring thoughts of taking their own lives. *Id.* ¶ 69.

Plaintiffs Are Not Prosecuted For Any Drug Crime.

On October 16, 2017, the Coast Guard delivered Plaintiffs to Miami, and to the custody of the Drug Enforcement Administration. Compl. ¶ 85. On October 18, 2017, the United States charged each of the men in a Criminal Complaint with one count of conspiracy to possess with intent to distribute 100 kilograms or more of marijuana, in violation of 46 U.S.C. §§ 70503(a)(1) and 70506(b). The men pleaded not guilty and were detained pending trial. Compl. ¶ 89. The United States did not pursue these charges, however, and instead, on December 13, 2017, filed an Information charging each of them under a different statute, 18 U.S.C. §2237(a)(2)(B), with "knowingly and intentionally provid[ing] materially false information to a Federal law enforcement officer during a boarding of a vessel regarding the vessel's destination." Compl. ¶ 90; MTD at 17. This statute does not target drug trafficking or conduct that facilitates drug trafficking. H.R. Rep. No 109-333, §303 (Dec. 8, 2005) ("This section amends title 18 of the United States Code to make it a crime … (3) for any person on board a vessel to provide false information to a Federal law enforcement officer."). According to the Information, while on board a "vessel [that was] subject to the jurisdiction of the United States, . . . the defendants represented to a Coast Guard officer that the vessel's destination was the waters near Jamaica,

when in truth and in fact, and as the defendants then and there well knew, the vessel's destination was Haiti." MTD at 18. The men entered into substantively similar plea agreements with the United States in which they agreed to plead guilty to the sole count of the Information. Compl. ¶ 90; MTD at 18. Having been kept from their homes and their families for more than three months, Plaintiffs' guilty pleas presented them with the fastest possible path back to their homes and families in Jamaica. Compl. ¶ 91.

During the hearing on these false statement charges, the United States admitted that the Coast Guard found no drugs onboard the *Jossette* or on any of the men and that ion scans confirmed the absence of any indication that marijuana had ever been onboard the vessel or on its crew members. ECF 12-6, Transcript of Plea Colloquy, Ex. E at 23:8-9, 23: 23-25, 24; 1-3 ("Plea Transcript"). The United States also admitted that, although the Coast Guard found bales of marijuana in the sea, the bales were found a mile away from where the Coast Guard had stopped the *Jossette*. *Id*. at 23: 10-22. Official Coast Guard records confirm that those bales were in fact found 3 nautical miles (3.5 miles) away from the point of interdiction. *See* U.S. Coast Guard, Appendix (G) to COMDTINST M16247.1G, Ex. 1. Given the total lack of evidence connecting the men with trafficking drugs, the United States represented to the judge that "it would have required a miracle" to prove that there was ever marijuana onboard the *Jossette*. Compl. ¶ 92; Plea Transcript at 24:4-7.

The men were each sentenced to ten-months imprisonment. Compl. ¶ 90. On August 30, 2018, after serving their sentences and spending an additional two months in federal immigration detention due to delays in their removal caused by the U.S. government, the United States removed the men to Jamaica. *Id*. ¶ 93.

The Lasting Effects of Plaintiffs' Mistreatment

As a result of their forced disappearances and thirty-two days of inhumane and incommunicado detention onboard Coast Guard ships, the men suffered physical and psychological trauma, which they continue to suffer to this day. Compl. ¶¶ 94–99. The men also returned to their families financially ruined because Coast Guard officers stripped them of nearly all their personal possessions, confiscated their national identity cards, driving and fishing licenses, and destroyed their fishing boat and equipment. Without these items, and their fear of again being captured and abused by the Coast Guard, two of the men have not returned to their main source of income, fishing, since returning home. *Id*.

LEGAL FRAMEWORK

On June 12, 2019, Plaintiffs filed this lawsuit against the United States seeking damages for their forced disappearance and thirty-two days of prolonged arbitrary detention and inhumane treatment. Plaintiffs' suit also includes one claim for declaratory and injunctive relief against the then-head of the Coast Guard, Admiral Karl L. Schultz, that seeks to ensure Plaintiffs can once again freely pursue their trade as fishermen in international waters near Jamaica without fear of being subjected to the same mistreatment by the Coast Guard.[1]

[1] In separate proceedings in the Southern District of Florida, Plaintiffs have sought to vacate or set aside their convictions on the false information charges, challenging the statute under which they were convicted because Congress did not have the constitutional authority to criminalize such conduct. *See* ECF 1, Motion Under 28 U.S.C. § 2255 to Vacate or Set Aside Conviction, *Ferguson v. United States*, 1:19-cv-22901-UU-JJO (S.D. Fla. July 12, 2019); ECF 1, Petition for Issuance of Writs of Error Coram Nobis Vacating Convictions, *Weir et. al. v. United States*, 1:19-cv-23420-UU (S.D. Fla. Aug. 15, 2019). For purposes of this action and opposition, however, Plaintiffs have assumed that the Coast Guard's *initial* stop and detention of Plaintiffs were lawful. Plaintiffs reserve their right to seek appropriate relief, including their right to file an amended complaint, if their criminal convictions are vacated.

Plaintiffs' action arises under this Court's admiralty jurisdiction, 28 U.S.C. § 1333(1), because their personal injuries and property damage were caused by the Coast Guard and sustained when Plaintiffs were on navigable waters during their two-day fishing trip. *See Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co*., 513 U.S. 527, 534 (1995) (defining test for admiralty jurisdiction).

The Suits in Admiralty Act ("SIAA") provides a broad waiver of sovereign immunity for Plaintiffs to bring maritime tort claims for personal injuries and property damage against the United States and its agents that occur over navigable waters. 46 U.S.C. § 30903(a). The SIAA provides a waiver for all maritime tort claims that a plaintiff could not alternatively bring under the Public Vessels Act. *See United States v. United Cont'l Tuna Corp.*, 425 U.S. 164 (1976).

The Public Vessels Act ("PVA") provides a narrower waiver of sovereign immunity. The PVA allows Plaintiffs to sue the United States and its agents for maritime torts arising from "damages caused by a public vessel of the United States." 46 U.S.C. §31102(a). The PVA thus allows Plaintiffs to seek redress against the United States and the Coast Guard for property damage and personal injuries caused directly by a public vessel and as a result of the negligent operation of such a vessel. *See Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 224–25 (1945); *American Stevedores, Inc. v. Porello*, 330 U.S. 446, 449–50 (1947).

Plaintiffs bring their maritime tort claims of false imprisonment, negligence, assault and battery, intentional and negligent infliction of emotional distress, and customary international law-based maritime tort claims under the SIAA because Coast Guard personnel committed these torts while Plaintiffs were in Coast Guard custody onboard U.S.-flagged ships on the high seas. Plaintiffs bring their tort claim of conversion against the United States under the PVA because that claim arises directly from the Coast Guard's destruction of Plaintiff Ferguson's boat and

Plaintiffs' other property. *See Uralde v. United States*, 614 F.3d 1282, 1286 (11th Cir. 2010) ("[W]hen Coast Guard personnel are negligent in performing functions other than those 'in the operation of' public vessels, the claims arising from those acts fall under the SAA, rather than the PVA.").

ARGUMENT

The government's motion seeks a dramatic and unprecedented expansion of the political question doctrine. The government effectively urges the Court to provide the Coast Guard with a sweeping grant of *de facto* immunity from civil liability for the agency's detention and mistreatment of individuals seized in law enforcement operations. Under the government's view, it would not matter how long the Coast Guard imprisoned an individual or how grossly it mistreated them (and the mistreatment here was manifestly egregious, much as the government tries to ignore it). Nor would it matter whether the individual was innocent of any involvement in criminal activity. This Court should reject the government's unsupported and unprecedented position.

Plaintiffs' claims do not present a political question. The Coast Guard's treatment of individuals in its custody is not textually committed to the political branches. Instead, judicially manageable standards exist to resolve Plaintiffs' maritime tort claims based on their prolonged detention and mistreatment by the Coast Guard, and prudential factors favor judicial review. Notably, *every other court* that has considered similar tort claims against the Coast Guard has treated them as justiciable.

The three alternate grounds for dismissal the government identifies, but elects "not [to] brief," are likewise without merit. MTD at 36–37. First, Plaintiffs can demonstrate reciprocity under the PVA—*i.e.*, that a U.S. citizen could bring a reciprocal lawsuit in similar circumstances

in the country of the foreign plaintiff (i.e., Jamaica). Second, the discretionary function exception does not bar Plaintiffs' claims because, as Plaintiffs would show if the government seeks dismissal on this ground, the Coast Guard's mistreatment of Plaintiffs violates federal law and, alternatively because such egregious mistreatment is not the type of judgment the exception was designed to protect. Third, Admiral Schultz is a proper defendant with respect to Plaintiffs' single claim for declaratory and injunctive relief.

I. This Case is Justiciable

The political question doctrine is a "narrow exception" to the judiciary's "responsibility" to decide cases. *Zivotofsky v. Clinton*, 566 U.S. 189, 194–95 (2012). The Supreme Court has dismissed a case under the doctrine only twice in the last fifty years, *El-Shifa Pharmaceutical Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2018) (Kavanaugh, J., concurring), and this Circuit has repeatedly emphasized the doctrine's "limited" and "narrow" scope, *see, e.g.*, *Al-Tamimi v. Adelson*, 916 F.3d 1, 8 (D.C. Cir. 2019) (internal quotations omitted). A court cannot avoid its obligation to adjudicate legal rights merely because issues have "political implications," *Zivotofsky*, 566 U.S. at 196 (citing *INS v. Chadha*, 462 U.S. 919, 943 (1983)), or "touch[ ] foreign relations," *Baker v. Carr*, 369 U.S. 186, 211 (1962). A court instead "must conduct a discriminating analysis of the particular question posed' in the 'specific case' before it to determine whether the political question doctrine prevents a claim from going forward." *El-Shifa*, 607 F.3d at 841 (quoting *Baker*, 369 U.S. at 211). A court, moreover, may dismiss only if a political question is "inextricable from the case." *Baker*, 369 U.S. at 217.

To determine if a political question renders a case non-justiciable, courts in this Circuit follow a three-step process. *See Al-Tamimi*, 916 F.3d at 8. First, the court identifies the issues

raised by the complaint. *Id.* Second, the court applies the following six factors articulated in *Baker* to determine if any of these issues raise a political question:

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

369 U.S. at 217. Finally, if one or more political questions is presented, the court decides whether any of "the plaintiff's claims can be resolved without considering [a] political question." Only if the answer is no is dismissal of the complaint justified. *Al-Tamimi*, 916 F.3d at 8.

The government's efforts to cram this lawsuit into the narrow exception to justiciability fail. As set forth below, none of the issues raised by Plaintiffs' complaint are political questions and there is no basis for dismissal of any of their claims under that doctrine. But even if the Court concluded that Plaintiffs' single claim seeking prospective relief presented a political question, that claim is extricable and Plaintiffs' damages claims should be allowed to proceed.

A. The Government Misconstrues the Issues.

The government asserts that Plaintiffs seek to "reengineer" maritime counter-narcotics enforcement, call into question two international agreements, and challenge diplomatic relations between the United States and Jamaica. MTD at 21–22. These assertions are false. They distort Plaintiffs' allegations and mischaracterize the issues before the Court.

Plaintiffs, four Jamaican fishermen, seek redress from the United States for their prolonged detention and inhumane treatment by the Coast Guard on U.S.-flagged ships during a standard U.S. law enforcement operation. Plaintiffs' Complaint does not question the wisdom of

U.S. counter-narcotics enforcement policy. No part of Plaintiffs' claims turns on diplomatic relations, and Plaintiffs do not seek either to vindicate or challenge any treaties. Instead, their claims call upon the Court to determine whether the Coast Guard may subject individuals in its custody to prolonged and abusive detention in violation of U.S. and maritime law.[2]

The government argues that to resolve any of Plaintiffs' claims would require "questioning" whether the United States violated its obligations under the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95, 28 I.L.M. 493 ("1988 Vienna Convention") and the Agreement Between the Gov't of the United States of Am. & the Gov't of Jam. Concerning Cooperation in Suppressing Illicit Mar. Drug Trafficking, Feb. 6, 2004, T.I.A.S. No. 98-310, *available at* https://www.state.gov/98-310 ("Bilateral Agreement"). MTD at 22. The government is wrong. Plaintiffs have not sued to enforce rights under either treaty. Instead, Plaintiffs' claims arise under general maritime law and challenge only U.S. conduct. *See* Compl. ¶¶ 105–54 (asserting maritime torts of, *inter alia*, false imprisonment, negligence, and assault and battery). Resolution of those well-established legal claims will not require this Court to either invalidate or call into question U.S. obligations under either treaty.

[2] Ten of Plaintiffs' eleven claims seek monetary damages and only one seeks declaratory and injunctive relief. Compl. ¶¶ 155–58. In that claim, Plaintiffs do not desire "cutters with interior cabins" constructed and fitted on Coast Guard ships. MTD at 21, but rather a declaration that their treatment violated maritime tort law and a guarantee that the Coast Guard will treat them in accordance with the requirements of that body of law should Plaintiffs encounter the Coast Guard in international waters in the future. That such a declaration and injunction could impact future detention conditions on Coast Guard ships does not render the issue political. That contorted logic would render every suit to enjoin unlawful detention conditions nonjusticiable. In any event, Plaintiffs hereby clarify that the scope of the declaratory and injunctive relief they seek is such relief as will prevent the Coast Guard from again subjecting them to the same mistreatment to which they were subjected when detained by the Coast Guard in 2017.

The government mischaracterizes Plaintiffs' allegations. The United States did not detain Plaintiffs "at Jamaica's direction," and the government provides nothing to support this assertion. MTD at 22. Coast Guard officers also were not enforcing an international agreement when they seized and detained Plaintiffs and destroyed Plaintiffs' boat, despite the government's suggestion to the contrary. MTD at 21–22. As the Complaint alleges, Plaintiffs were detained by and at the direction of the Coast Guard. Compl. ¶¶ 29–39, and in doing so, the Coast Guard was enforcing U.S. law. Specifically, the Maritime Drug Law Enforcement Act ("MDLEA") authorizes the Coast Guard to search, seize, and detain individuals for suspected narcotics-trafficking in violation of U.S. law, including those onboard foreign-flagged vessels on the high seas. 46 U.S.C. § 70501 *et seq.*; *see, e.g.*, *United States v. Carvajal*, 924 F. Supp. 2d. 219, 231–34 (D.D.C. 2013) (discussing the MDLEA). The MDLEA provides that a foreign-flagged vessel is subject to U.S. jurisdiction once that foreign nation has consented or waived objection to "the enforcement of United States law by the United States." 46 U.S.C. § 70502(c)(1)(C). Here, the Bilateral Agreement merely outlines the mechanism for Jamaica to provide that consent for the United States to obtain jurisdiction over the Jamaican-flagged vessel, which Jamaica concededly provided on September 14, 2017, after the Coast Guard intercepted the *Jossette* and prior to boarding it. *See* State Dep't Cert. ¶ 4(b). The Coast Guard's subsequent search, seizure, and detention of Plaintiffs, and destruction of Plaintiffs' property, were conducted pursuant to U.S. law. *See* 46 U.S.C. § 70502(c)(1)(C) (defining a "vessel subject to the jurisdiction of the United States" as "a vessel registered in a foreign nation if that nation has consented or waived objection to *the enforcement of United States law by the United States*" (emphasis added)).

The government nevertheless maintains that Plaintiffs remained "under Jamaica's jurisdiction" from September 14 until October 9, 2017, when Jamaica consented to the United

States' prosecuting Plaintiffs, as required by the Bilateral Agreement. MTD at 16, 22 (citing Bilateral Agreement art. 3(5)). But in fact, Plaintiffs were under U.S. jurisdiction as of September 14, when the Coast Guard boarded the *Jossette* and took Plaintiffs into custody, regardless of whether Jamaica had consented to their eventual prosecution by the United States. Indeed, that is exactly what the U.S. government recently represented to another federal court in moving to dismiss Plaintiffs' petitions seeking to vacate or set aside their convictions—that the United States obtained jurisdiction over Plaintiffs and their vessel on September 14, when Jamaica gave its consent for the United States to board and search the *Jossette*. Otherwise, as the United States explains, it could not have prosecuted Plaintiffs for providing false information on September 14, 2017. *See* ECF 15, Gov't's Answer at 9–10, *Ferguson v. United States*, 1:19-cv-22901-UU-JJO (S.D. Fla. July 12, 2019) ("the United States exercised jurisdiction over the vessel and its occupants with the consent of the flag nation"); ECF 15, Gov't's Answer at 11, *Weir et. al. v. United States*, 1:19-cv-23420-UU (S.D. Fla. Aug. 15, 2019) at 11 (same). In any event, Jamaica's October 9, 2017 consent to the United States' prosecution of Plaintiffs is irrelevant to Plaintiffs' claims here because Plaintiffs are not challenging their prosecution by the United States or Jamaica's consent to it. Whether or not Jamaica provided that consent, the Coast Guard could not lawfully shackle Plaintiffs to the decks of Coast Guard ships and abuse them for more than a month.

The government, moreover, wrongly asserts that the Complaint's "center of gravity" is that Plaintiffs "spent too much time at sea," MTD at 9, as if they had been on a cruise ship that was late arriving to its destination. The gravamen of Plaintiffs' suit is that the Coast Guard grossly mistreated them while in its custody and wrongfully destroyed their property. *See* Compl. ¶¶ 40–88 (describing Plaintiffs' inhumane treatment and incommunicado detention on Coast

Guard ships and the Coast Guard's destruction of their property). Thus, any delay by Jamaica in providing its consent to the United States to prosecute Plaintiffs would be relevant only, if at all, to the length of Plaintiffs' detention, and not to its conditions which were determined and imposed by the Coast Guard. Further, any Jamaican delay does not render the Plaintiffs' claim of prolonged inhumane detention "political." At most, it may inform the Court's resolution of whether the conditions or duration of detention were reasonable under the circumstances. *See generally, e.g.*, *United States v. Munoz-Flores*, 495 U.S. 385, 396 (1990) (finding case justiciable and noting that our "judicial system [is] capable of determining when punishment is 'cruel and unusual,' when bail is '[e]xcessive,' [and] when searches are 'unreasonable').

The government further references a provision in the Bilateral Agreement on the resolution of disputes in arguing that Plaintiffs' action implicates diplomatic relations. MTD at 22 (citing Bilateral Agreement, art. 20). But Plaintiffs are suing to enforce their rights under U.S. and maritime law, and not under that agreement. Moreover, the treaties themselves do not purport to supersede the rights under U.S. and maritime law that Plaintiffs seek to enforce through this action. *See* Bilateral Agreement, art. 20 (any consultation between the two parties regarding implementation of the treaty "shall [be] without prejudice to any other legal rights which may be available to the Parties *or to any persons or entities affected by [a party's] action*" (emphasis added)).

Stripped to its essence, the government's argument has no limiting principle. It dictates that any time the Coast Guard boards a foreign-flagged vessel and seizes and detains a foreigner onboard, with the consent of that foreigner's government, a court must dismiss the suit on political question grounds, no matter how long that detention lasts or how brutal the treatment, and no matter whether the person is trafficking narcotics or not. Such a suit would, according to

the government, be nonjusticiable even if the Coast Guard tortured or executed a person in its custody, on the theory that the challenged conduct would implicate an international agreement and diplomatic relations. The Court should reject this distorted and unbounded view of the political question doctrine.

B. No Claims Present a Political Question under the Six *Baker* Factors

Plaintiffs challenge their mistreatment by the Coast Guard and the Coast Guard's unlawful destruction of their property during a standard law enforcement operation. Their claims do not question the wisdom or value of the Coast Guard's counter-narcotics operations at sea, nor do they question the Coast Guard's decisions about which boats to board and search or which suspects to detain and prosecute. Plaintiffs, moreover, challenge *only* U.S. conduct on U.S.-flagged vessels based on U.S. and maritime law. Their challenge does not seek to enforce any rights under an international treaty or otherwise implicate foreign relations. But even if their claims did have some international law dimension, they are plainly justiciable. *See, e.g.*, *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 229–30 (1986) (demand that U.S. government evaluate legality of a foreign government's whaling practices did not render suit "unsuitable for judicial review" even though it "involve[d] foreign relations"); *Baker* 369 U.S. at 211 ("it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance").

Plaintiffs, in short, assert the type of maritime tort claims against the Coast Guard that courts have *always* found justiciable. As set forth below, none of the *Baker* factors supports the government's efforts to strip this Court of its jurisdiction to consider them.

1. Mistreatment and the Destruction of Property by the Coast Guard Is Not Textually Committed to the Political Branches.

The government's argument that Plaintiffs' treatment by the Coast Guard is committed exclusively to the political branches is wrong for three overarching reasons. First, the government ignores the legal framework and established body of precedent demonstrating the justiciability of suits against the Coast Guard for maritime torts committed during law enforcement operations. Second, Jamaica's actions (or inactions) do not deprive this Court of its power to decide Plaintiffs' legal challenges to how the Coast Guard treated them while in its custody. Third, nothing about what the government describes as the case's "international law context" even remotely renders it non-justiciable. MTD at 22–28.

a. Courts have consistently adjudicated similar maritime tort suits against the Coast Guard pursuant to the framework established by Congress.

Application of the political question doctrine is particularly inappropriate where, as here, Plaintiffs seek to give effect to congressional enactments. *See, e.g.*, *Zivotofsky*, 566 U.S. at 196 ("[t]he existence of a statutory right . . . is certainly relevant to the Judiciary's power to decide [a] claim"). 28 U.S.C. § 1333 provides admiralty jurisdiction over maritime torts, and the SIAA and PVA provide explicit waivers of sovereign immunity to allow aggrieved individuals to sue the United States for maritime torts committed by its agents, including the Coast Guard. Thus, as in *Zivotofsky*, "[t]he federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy . . . should be." 566 U.S. at 196. Instead, Plaintiffs seek to obtain relief through a legal framework that Congress specifically created for this purpose. This is a "familiar judicial exercise." *Id.*

Federal courts sitting in admiralty have adjudicated maritime tort claims since the early days of the Republic. *Little v. Barreme*, 6 U.S. 170 (1804); *L'Invincible*, 14 U.S. 238 (1816). Likewise, claims arising out of Coast Guard misconduct during counter-drug enforcement operations have long been addressed under maritime tort law. *See, e.g.*, *Tobar v. United States*, 731 F.3d 938, 946–47 (9th Cir. 2013); *Coumou v. United States*, 107 F.3d 290, 295–96 (5th Cir. 1997), *modified on rehearing*, 114 F.3d 64 (5th Cir. 1997). Not a single court has suggested that a suit to recover for the Coast Guard's unlawful detention and mistreatment of individuals in its custody or its destruction of their property during such operations present a non-justiciable political question. Such suits, moreover, have arisen in similar contexts to Plaintiffs', involving foreign plaintiffs, international agreements, and U.S. communications with foreign governments. *See, e.g.*, *Tobar*, 731 F.3d at 946–47 (suit to recover for personal injury and property damage based on Coast Guard's exceeding the terms of Ecuador's authorization in boarding Ecuadorian-flagged boat, searching it for drugs, and towing it to Ecuador); *Coumou*, 107 F.3d at 296–97, *modified on rehearing*, 114 F.3d at 65 (same based on Coast Guard's decision to turn over boat and its crew to Haitian authorities after Coast Guard's search revealed contraband); *Harrington v. United States*, 748 F. Supp. 919, 924 (D. P.R. 1990) (same based on Coast Guard's decision to treat vessel as stateless following communications with Australia).

Courts have likewise, without exception, treated as justiciable maritime tort claims brought under the SIAA and PVA challenging the lawfulness of searches, detentions, and destruction of property by the Coast Guard on the high seas. *See e.g.*, *Harrell v. United States*, 875 F.2d 828 (11th Cir. 1989). None of these cases suggests that the existence of an international agreement or involvement of a foreign sovereign would have rendered the claims non-justiciable.

The government ignores this extensive body of SIAA and PVA caselaw. Instead, it relies on a handful of suits challenging the wisdom of military decision-making in exceptional circumstances; none involved a challenge to the lawfulness of a standard law enforcement operation like the one here. MTD at 22–25.

In *El-Shifa*, this Circuit held that the President's decision, as Commander-in-Chief of U.S. military forces, to launch a military strike against a terrorist-affiliated organization inside a foreign country presented the type of "quintessential 'policy choice [] and value determination [] constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.'" 607 F.3d at 844–45 (quoting *Japan Whaling Ass'n*, 478 U.S. at 230). The decision, the Circuit explained, reflected a "substantive political judgment" that Plaintiffs challenged as "mistaken," and not a legal determination appropriate for judicial review. *Id.* at 845; *see also id.* at 842 (cabining first *Baker* factor to suits challenging "the wisdom of discretionary decisions made by the political branches in the realm of foreign policy or national security"). *El-Shifa* reiterates that not every question that touches on foreign affairs presents a political question and that a court "must conduct 'a discriminating analysis of the particular question posed' in the 'specific case' before [it]." *Id.* at 841 (quoting *Baker*, 369 U.S. at 211). Plainly, this case does not involve a "substantive political judgment" or any military decision-making at all—much less a specific military targeting decision made by the President as Commander-in-Chief.

The government's reliance on *Schneider v. Kissinger*, 310 F. Supp. 2d 251 (D.D.C. 2004), is similarly misplaced. *Schneider* challenged covert actions directed by senior U.S. officials, including the U.S. national security advisor, in connection with an attempted coup in Chile that resulted in the death of Chile's top general, who had opposed it. *Id.* at 254–55. The

U.S. government's decision to support a military coup to topple a foreign government, the court explained, "implicate[s] policy decisions in the murky realm of foreign affairs and national security best left to the political branches." *Id.* at 258. As in *El-Shifa*, the court confined its decision to the narrow—and exceptional—foreign policy context before it and emphasized that "[d]etermining whether a particular foreign affairs context presents a non-justiciable political question . . . requires a case-by-case inquiry." *Schneider*, 310 F. Supp. 2d at 259. Again, the issues in this case do not remotely resemble those implicated by covert U.S. support for a foreign military coup.

And in *Al-Tamimi*, the Circuit found non-justiciable *only* Plaintiffs' demand that the Court decide who has sovereignty over disputed territory in the Israeli-Palestinian conflict—a quintessential political determination. 916 F.3d at 10. Critically, *Al-Tamimi* held that the second issue in the case—whether Israeli settlers committed genocide (regardless of who exercised sovereignty over the territory)—did *not* present a political question but was a legal issue squarely within the Judiciary's power and province to decide. *Id.* at 11–12.[3] If the question of whether a foreign military force committed genocide against a group of individuals is not a political question, *id.*, the question of whether the Coast Guard abused four fishermen during a standard law enforcement operation certainly also does not present a political question.[4]

[3] The Fourth Circuit recently reached a similar conclusion in *Al-Shimari v. CACI Premier Technology, Inc.*, 840 F.3d 147 (4th Cir. 2016). The Fourth Circuit held that determining whether a military contractor conspired with the U.S. government to commit war crimes and related torts during an armed conflict in Iraq represented "the traditional judicial exercise of determining whether particular conduct complied with applicable law," including applicable treaties and international agreements entered into by the executive branch. *Id.* at 158.

[4] The government notes that the Executive Branch has described illegal drug smuggling as a threat to "public safety" and "national security," and that Congress has described it as "a serious international problem." MTD at 26. Such characterizations do not render issues nonjusticiable or

b. Plaintiffs exclusively challenge misconduct by the Coast Guard while in U.S. custody and Jamaica's actions are immaterial to the political question analysis.

The government asserts that the "key fact" in this case is that Jamaica did not provide its consent for the United States to prosecute Plaintiffs until October 9, 2017 (even though Jamaica gave its consent to the Coast Guard to board the *Jossette* and exercise U.S. jurisdiction over the vessel and its crew twenty-five days earlier). MTD at 26–27 (citing State Dep't Cert. at ¶ 4). This assertion is both inaccurate and immaterial to the political question analysis.

First, the thrust of Plaintiffs' challenge is to their abhorrent treatment by the Coast Guard, and not merely that they were held "too long." MTD at 9. *See supra* at 15-16.

Second, even as to Plaintiffs' false imprisonment claim based on the length of their detention, the State Department's Certification of "conclusiveness" is irrelevant since Plaintiffs have not challenged Jamaica's consent to their prosecution by the United States and the Court need not review it to resolve that or any other claim. The question the Court needs to review is whether the Coast Guard may permissibly, *under U.S. and maritime law*, hold individuals at sea for more than a month and under the conditions alleged here. Decisions by Jamaican authorities to waive any objection to the United States exercising jurisdiction over the Plaintiffs do not absolve Coast Guard officers from their own obligation to follow U.S. and maritime law, nor do they strip jurisdiction over legal questions from U.S. courts.

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strip the Judiciary of its power to decide them. As then-Judge Kavanaugh observed, "from the time of John Marshall to the present, the Court has decided many sensitive and controversial cases that had enormous national security or foreign policy implications." *See El-Shifa*, 607 F.3d at 856 n.3 (Kavanaugh, J., concurring) (citing cases). And cases involving drug smuggling are routinely adjudicated by U.S. courts—indeed, the government brings most of those cases itself.

Third, U.S. jurisdiction to prosecute under the MDLEA may be obtained from a foreign government any time before trial. *See, e.g.*, *United States v. Greer*, 285 F.3d 158, 175 (2d Cir. 2002). Thus, the government is wrong to suggest that the Coast Guard could not have brought Plaintiffs to the United States and initiated criminal proceedings sooner. In any event, whether the Coast Guard's one-month-plus detention of Plaintiffs at sea was justified is a legal, not a political, question.

Fourth, the government's argument should be rejected as it has no limiting principle. In *Greer*, for example, the foreign government did not provide its consent to prosecute until five years after the alleged criminal conduct. *Id.* at 176. Under the government's view, a judge could not review a challenge even to such a lengthy period of extrajudicial detention because the consent would "conclusively" determine the issue. This extreme expansion of unreviewable detention authority has no basis in law.

Fifth, the government also protests that any judicial inquiry into whether it should have brought Plaintiffs to the United States would necessarily "infringe[ ] into matters constitutionally committed to the political powers" and that doing so could have "been perceived as a violation" of the 1988 Vienna Convention and Bilateral Agreement. MTD at 28. But nothing in either treaty would have prevented the United States from bringing Plaintiffs to a safer location pending the United States' obtaining Jamaica's consent to their prosecution. And, in fact, the Coast Guard brought Plaintiffs into U.S. territory three times in the thirty-two days that it held them: for several hours at St. Thomas, the U.S. Virgin Islands, Compl. ¶ 65, overnight at the Guantanamo Bay Naval Base, *id*. ¶¶ 52–53, and for two days and two nights at a pier in the Port of San Juan, where the Coast Guard kept the men chained next to a feces-filled bucket and covered them with a dark tarpaulin to hide their presence from onlookers, *id.* ¶¶ 66–67.

Finally, *even if* the timing of Jamaica's consent to Plaintiffs' prosecution was relevant to Plaintiffs' single claim for false imprisonment, *id.* ¶¶ 105–08, it would not render that claim non-justiciable. Rather, the timing would merely be one factor for the Court to consider in determining the reasonableness of the United States' delay in bringing Plaintiffs before a federal judge, and thus in resolving the claim on the merits. *See, e.g.*, *United States v. Purvis*, 768 F.2d 1237 (11th Cir. 1985) (examining reasonableness of Coast Guard's delay in bringing suspects before a court in light of relevant circumstances); *United States v. Torres-Iturre*, No. 15-cr-2586, 2016 WL 2757283, at *3–*4 (S.D. Ca. May 12, 2016) (same). The government, moreover, does not, and could not, assert that the entirety of Plaintiffs' imprisonment occurred while awaiting a decision from Jamaican authorities.

c. Neither international law nor foreign relations renders this case non-justiciable.

The government further asserts that the "international law context" of this case renders it non-justiciable. MTD at 27–31. The government cites the "non-self-execution" doctrine and argues that Plaintiffs have no cause of action for alleged violations of the Bilateral Agreement. *Id.* at 28–29. But Plaintiffs are not suing to enforce rights under the Bilateral Agreement or any other treaty, so that doctrine is irrelevant.

The government cites *Tarros S.p.A. v. United States*, 982 F. Supp. 2d 325 (D.D.C. 2013), but the district court there applied the political question doctrine only because the "particular question posed" sought "review of discretionary military decision related to military operations," and not because of any "international law context." *Id.* at 333; *see id.* at 334 ("decision . . . to divert a vessel bound for a wartorn nation in order to enforce an international arms embargo is a delicately-calibrated [one] based on military judgment, expertise, and intelligence-gathering" (internal quotation marks and citation omitted)). Courts have consistently distinguished such

exceptional military actions from the type of traditional law enforcement activity at issue here, to which the political question doctrine has never been applied. *See, e.g., Wu Tien Li-Shou v. United States*, 777 F.3d 175, 182–83 (4th Cir. 2015) (contrasting military operation in NATO counter-piracy mission with traditional law enforcement operations, including those conducted at sea).

The government, moreover, misconstrues the terms of the 1988 Vienna Convention and the Bilateral Agreement. The government observes that these two treaties do not "mandate specific details about conditions of detention at sea." MTD at 27. But again, Plaintiffs do not seek to enforce any rights under either treaty. Nor do the treaties purport to supersede the rights that Plaintiffs seek to enforce here. The Bilateral Agreement, for instance, expressly preserves Plaintiffs' rights to seek available remedies in this Court for their mistreatment. *See* Bilateral Agreement. art. 20 (agreement is "without prejudice to any other legal rights which may be available to the Parties *or to any persons or entities affected by [a party's] action*" (emphasis added)). Further, to the extent this Court's interpretation of either treaty was relevant to Plaintiffs' claims, such interpretation is a core judicial function, notwithstanding any political ramifications. *See, e.g.*, *Japan Whaling Ass'n*, 478 U.S. at 230 ("courts have the authority to construe treaties"); *Hourani v. Mirtchev*, 796 F.3d 1, 8 (D.C. Cir. 2015) (finding a case justiciable where "the standards needed to resolve" and the claims at issue were "the workaday tools for decision-making that courts routinely employ," even if a judgment "might implicate the actions of a foreign government").

To divert attention from Plaintiffs' allegations of U.S. misconduct, the government raises the red herring of diplomatic relations with Jamaica. MTD at 29–30. As noted above, the mere fact of political or diplomatic consequences does not render a case non-justiciable. But to the

extent Jamaica's views are pertinent, the Jamaican government has expressly approved of Plaintiffs' suit. *See* Ministry of Foreign Affairs, "Foreign Ministry's Response to Jamaican Fisherman Ordeal" (June 14, 2019) ("We note . . . that the matter is now before a court of law in the United States. It is hoped that justice will be delivered through this process."), *available at* https://twitter.com/AndrewHolnessJM/status/1139594763987034112.[5]

2. Judicially Manageable Standards Exist to Address Plaintiffs' Claims.

The government asserts that there are no judicially manageable standards to review Coast Guard decisions about which vessels to interdict or which suspects to detain. MTD at 34. But Plaintiffs do not here challenge the Coast Guard's decision to interdict their boat or to take them into custody. They challenge only the destruction of their boat, the length of time they were held, and, above all, the conditions of their detention. Courts have, without exception, treated such claims as justiciable, and this Court should reject the government's unfounded argument to the contrary.

Damages claims are particularly judicially manageable. *See, e.g.*, *Gilligan v. Morgan*, 413 U.S. 1, 5 (1973). And courts consistently apply the well-established legal standards to adjudicate the maritime torts alleged in this case. *See generally, e.g.*, Robert Force & Martin J. Norris, The Law of Maritime Personal Injuries, §§ 8:1-8:22, 9:5-9:10, 9:12, 9:16, 9:27, 11:7 (5th

[5] In response to the Coast Guard's repeated refusal to allow Plaintiffs to contact their families or even to contact their families on their behalf, which resulted in their families' believing they were dead, the government argues that it informed the Jamaican government of their detention. MTD at 31. This may be true, but Plaintiffs' forced disappearance claim challenges only U.S. conduct in refusing to allow Plaintiffs to contact their families, not Jamaica's independent actions. Compl. ¶¶ 139–43. Whether the United States' communication to the Jamaican government is sufficient to avoid liability for the tort of forced disappearance is not a political question, but a legal question appropriate for judicial resolution.

ed. 2004 & Supp. 2018) (discussing, *inter alia*, negligence, false imprisonment, intentional infliction of emotional distress, and negligent infliction of emotional distress).[6]

Every court to consider the type of maritime torts asserted against the Coast Guard here—prolonged detention, mistreatment, and/or destruction of property—has either assumed the existence of judicially manageable standards or applied those standards to resolve the particular claims. *See, e.g.*, *Tobar*, 731 F.3d at 946–47 (Coast Guard liable for damages for breach of non-discretionary obligations in searching vessel's crew and towing vessel); *Harrell*, 875 F.2d at 831 (adjudicating reasonableness of Coast Guard's search and detention of plaintiffs); *Uralde*, 614 F.3d at 1287 (negligence claims against Coast Guard for failure to provide proper and timely medical care to passenger on vessel interdicted at sea properly before the court under the SIAA); *Coumou*, 114 F.3d at 65 (remanding to district court to consider whether government breached its duty of reasonable care under the established maritime tort of negligence in transferring suspects and their vessel to Haitian authorities following narcotics search); *B & F Trawlers, Inc. v. United States*, 841 F.2d 626, 632 (5th Cir. 1988) (Coast Guard liable if it destroys a drug-running vessel in violation of its own regulations); *see also Torres-Iturre*, 2016 WL 2757283, at

[6] *See also, e.g.*, *Bentkowski v. Marfuerza Compania Maritima, S.A.*, 70 F.R.D. 401 (E.D. Penn. 1976) (considering tortious injuries caused by tainted cruise ship food and/or water); *Sawyer Bros., Inc. v. Island Transporter, LLC*, 887 F.3d 23, 29 (1st Cir. 2018) (holding that "under maritime negligence law, a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew," and awarding damages for property destruction, negligence, and emotional distress) (quoting *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959) (internal quotations omitted)); *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1409 (9th Cir. 1994) (holding that "claims for emotional distress are cognizable under admiralty law"); *Ramjack v. Austro-American S.S. Co.*, 186 F. 417, 418 (5th Cir. 1911) (awarding damages for personal injury and false confinement of passenger injured aboard a vessel).

*5 (reviewing claims of unlawful conditions on Coast Guard vessel in motion to dismiss indictment).[7]

Indeed, claims asserting unlawful detention and mistreatment are so inherently judicially manageable that courts have repeatedly found them justiciable even when the conduct occurs in foreign territory and outside a mere law enforcement operation like the one here. *See, e.g.*, *Salim v. Mitchell*, 183 F. Supp. 3d. 1121, 1127–30 (E.D. Wash. 2016) (claims that government contractors tortured suspected terrorists in CIA custody overseas not political question); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011) (plaintiffs may bring common law tort claims alleging torture, assault, battery, and false imprisonment by an American corporation and local security forces during a period of civil unrest in Indonesia); *Mehinovic v. Vockovic*, 198 F. Supp. 2d 1322, 1349–50, 1358–60 (N.D. Ga. 2002) (adjudicating whether one-month detention of Bosnian refugees by a Bosnian Serb soldier, during which time detainees were abused,

[7] *See also, e.g.*, *Fiesta Charters v. United States*, No. 98-civ-7182, 2000 WL 33666897, at *1–*2 (S.D. Fla. Jan. 31, 2000) (confirming court's authority to decide plaintiff's maritime law claims for damage to his vessel resulting from Coast Guard narcotics search; rejecting bailment claim on the merits and allowing negligence claim to proceed); *Montego Bay Imports LTD. v. United States*, No. 86-civ-2103, 1990 WL 98044, at *1–*4 (S.D. Fla. Jan. 2, 1990) (reviewing challenge to Coast Guard's destruction of vessel in narcotics search and rejecting claim after finding no abuse of discretion or negligence); *In re United States in a Cause for Exoneration from or Limitation of Liability with Respect to DHS-CBP Vessel M382901 (M901)*, 331 F. Supp. 3d 1112, 1124–26 (S.D. Ca. 2018) (reviewing and deciding on the merits maritime tort claims alleging negligence by U.S. Border Patrol vessel in connection with collision with vessel smuggling undocumented persons from Mexico to the United States); *cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 737 (2004) (adjudicating whether detention of suspect in Mexico by Drug Enforcement Administration officials constituted unlawful detention under customary international law; finding that detention of less than one day does not meet that standard).

constitutes unlawfully prolonged detention, and awarding compensatory and damages on municipal tort law claims).[8]

The government relies on an entirely different type of case—challenges to the wisdom of tactical decisions of the U.S. military to use armed force or of covert intelligence operations. MTD at 31–34 (citing cases).[9] None of these cases involves law enforcement and none involves the detention and mistreatment of persons in U.S. custody.

The government further suggests the Court lacks judicially manageable standards because it would have to "analyze the diplomatic communications with a foreign sovereign." MTD at 31. But Plaintiffs' claims do not turn on diplomatic communications with Jamaica. *See supra* at 24–26. Plaintiffs' claims do not require the Court to inquire into or otherwise analyze Jamaica's consent to the Coast Guard to exercise U.S. jurisdiction to board and search Plaintiffs' boat, a Jamaican-flagged vessel; nor will the Court be asked to assess the propriety of Jamaica's consent to Plaintiffs' prosecution by the United States. Although the government relies extensively on the timing of that latter consent, it is relevant, if at all, only to Plaintiffs' single claim for false imprisonment. Jamaica's consent to prosecute Plaintiffs has no bearing on the Coast Guard's inhumane treatment of Plaintiffs, including shackling Plaintiffs with excessive force on the

[8] *See also, e.g.*, *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258, 1325-27 (N.D. Cal. 2004) (weeks-long detention by Chinese authorities without the opportunity to speak with family and counsel states claim for unlawful detention under customary international law); *Al-Tamimi*, 916 F.3d at 11–12 (judicially manageable standards exist to determine whether defendants committed genocide).

[9] The cited cases are: *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997) (missiles fired from American naval carrier during NATO training exercise); *Wu Tien Li-Shou*, 777 F.3d at 181 (accidental destruction of fishing vessel and death during NATO counter-piracy mission); *Tarros*, 982 F. Supp. 2d at 327–28 (military decision to divert vessel near Tripoli, Lebanon, to enforce international arms embargo during Libyan civil war); *Chaser Shipping Corp. v. United States*, 649 F. Supp. 736, 737 (S.D.N.Y. 1986) (damage to vessel struck by mine in Nicaraguan harbor manufactured and planted by CIA in a high-level covert national security operation).

exposed decks of its ships (even in the middle of a hurricane), refusing Plaintiffs any contact with their families (who believed they were dead), and denying Plaintiffs adequate shelter, basic sanitation, proper food and water, and medical treatment for injuries they suffered while in Coast Guard custody. And even if Jamaica's consent to prosecute Plaintiffs were relevant to the length of Plaintiffs' detention, it does not render that claim non-justiciable; it is simply a factor to be considered in assessing the reasonableness of the Coast Guard's conduct, which is the only conduct Plaintiffs challenge. *See supra* at 23–25.

Further, even if Plaintiffs' claims regarding U.S. misconduct somehow implicated diplomatic communications, that does not render those claims "beyond judicial cognizance." *Japan Whaling Ass'n*, 478 U.S. at 230 (citing *Baker*, 369 U.S. at 211). Courts routinely consider diplomatic communications in determining the legality of Coast Guard searches, seizures, and detentions. *See, e.g.*, *United States v. Guerrero*, 114 F.3d 332, 339–41 (1st Cir. 1997) (examining State Department certifications regarding Honduras' waiver of objection to the United States enforcing its drug law against vessel, crew, and contraband); *United States v. Aragon*, 15-cr-292, 2017 WL 2889499, at *6–*8 (S.D.N.Y. July 5, 2017) (scrutinizing Coast Guard communications with Ecuador to determine if it satisfied the Coast Guard's legal obligation to verify whether vessel was stateless before boarding, as required by MDLEA and U.S.-Ecuador bilateral treaty); *United States v. Mosquera-Murillo*, 902 F.3d 285, 289–91 (D.C. Cir. 2018) (analyzing State Department certification regarding diplomatic communications with Colombia to determine scope of Colombia's consent to U.S. enforcement of its criminal law against interdicted vessel and its crew). The suggestion that Plaintiffs' claims are beyond judicial cognizance is without merit.

3. Prudential Factors Favor Judicial Review.

If neither of the first two *Baker* factors is present, more is required to establish a political question than apparent inconsistency between a judicial decision and the position of another branch. *See Al-Tamimi*, 916 F.3d at 12 (citing *Zivotofsky*, 566 U.S. at 194–201).[10] Here, neither of the first two *Baker* factors is present. Further, U.S. law and policy prohibit the mistreatment of individuals in U.S. custody, no matter where they are held. *See e.g.*, Detainee Treatment Act, 42 U.S.C.A. § 2000dd(a) ("No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."). And the treaty the government invokes to shield the Coast Guard's misconduct requires that Coast Guard officers "observe norms of courtesy, respect, and consideration for persons on board the suspect vessel." Bilateral Agreement, art. 3(4). Thus, a legal determination that Coast Guard agents engaged in such misconduct, thereby committing maritime torts, would not result in any inconsistency with the position of the Executive branch.

The government's prudential factors argument rests on the State Department Certification regarding Jamaica's consent for the United States to prosecute Plaintiffs. MTD at 35–36. But as noted above, Plaintiffs do not challenge that certification or the factual basis underlying it; they challenge only the conduct of Coast Guard officers onboard U.S.-flagged ships. *See supra* at 22–24. Courts, moreover, routinely consider the legal implications of such certifications in resolving claims involving Coast Guard counter-narcotics enforcement. *See supra* at 30. No prudential considerations support denying Plaintiffs any redress in these circumstances, particularly given

[10] In *Zivotofksy*, the Court did not even discuss the prudential factors in deciding the case was justiciable after finding *Baker*'s first two factors were not present. *Zivotofksy*, 566 U.S. at 195.

that the legal framework not only prohibits the alleged misconduct, but also confirms Plaintiffs' right to seek a judicial remedy for it in this Court.

C. Dismissal of the Entire Action Would be Unwarranted.

For the reasons stated above, none of Plaintiffs' claims presents a political question, including their claim for declaratory and injunctive relief. But even if the Court concluded that this claim presented a political question because it requires prospective relief, Plaintiffs' request for such relief is extricable from their damages claims. *See Baker*, 369 U.S. at 217 (court may dismiss under the political question doctrine only where the question is "inextricable"); *see also Al-Tamimi* 916 F.3d at 13–14.

II. Other Purported Grounds for Dismissal.

The government suggests three alternate grounds for dismissal but elects "not [to] brief [them] here." MTD at 36–37. Assuming the government has not waived these grounds, *see* Fed. R. Civ. P. 12(g), all three are without merit, as Plaintiffs will demonstrate if the government actually raises them.

First, the government observes that Plaintiffs have not shown reciprocity required by the PVA—*i.e.*, that a U.S. citizen could bring a reciprocal lawsuit in similar circumstances in the country of the foreign plaintiff. But Plaintiffs need only satisfy the reciprocity requirement for their second claim for relief based on the Coast Guard's unlawful destruction of their property. *See e.g.*, *Uralde*, 614 F.3d at 1286. And, as Plaintiffs will show if government seeks dismissal on this basis, Plaintiffs easily satisfy this requirement since a U.S. citizen would be able to bring suit in Jamaican courts for the types of tort injuries Plaintiffs sustained at the hands of the Coast Guard, and sovereign immunity would not bar such a lawsuit.

The government also suggests that the discretionary function exception bars Plaintiffs' maritime tort claims. MTD at 37–38. This exception covers only "acts that 'involv[e] an element of judgment or choice.'" *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (quoting *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)). The discretionary function exception does not apply "if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'" *Id*. Further, even if the challenged conduct involves an element of judgment, it must be "the kind [of judgment] that the discretionary function exception was designed to shield.'" *Id.* at 322–23. As this Circuit has emphasized, this exception must not be read to "effectively immunize" a government employee from suit under the SIAA in every case in which their actions reflect an exercise of judgment. *See, e.g.*, *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1086 (D.C. Cir. 1980). And, moreover, it remains a proper judicial function to draw the line to determine what government choices are permissible under this exception. *Id.*

Because the government has elected "not [to] brief" the discretionary function exception, Plaintiffs will not brief it in response. However, should the government raise the exception, Plaintiffs will demonstrate that it does not apply for at least two reasons: first, because the Coast Guard's unlawful detention and mistreatment of Plaintiffs violates the U.S. Constitution and federal law, and therefore falls outside the exception, *see, e.g.*, *Gaubert*, 499 U.S. at 322; *Loumiet v. United States*, 828 F.3d 935, 943 (D.C. Cir. 2016); and second, because this egregious mistreatment is not the type of judgment the exception was designed to protect, *Gaubert*, 499 U.S. at 322.

Finally, the government argues that because the only proper defendant in suits brought under the SIAA and PVA is the United States, Admiral Schultz should therefore be dismissed

from this action. MTD at 38. The government is incorrect. Plaintiffs have sued Defendant Schultz in his official capacity, which is the same as suing the United States. *See e.g., Dugan v. Rank*, 372 U.S. 609, 621–22 (1963) (federal officers are subject to suit where they act within the scope of their authority but where "the powers themselves or the manner in which they are exercised are constitutionally void"); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949) (sovereign immunity does not shield executive officer from suit if the officer acted either "unconstitutionally or beyond his statutory powers"). The Supreme Court has long recognized that courts are permitted to enjoin such unlawful conduct when committed by a federal official even without an express waiver of sovereign immunity. *See, e.g.*, *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619–21 (1912) (collecting cases); *id*. at 620 ("[I]n [the] case of an injury threatened by [a federal officer's] illegal action, the officer cannot claim immunity from injunction process."); *see also Patriot Contract Services v. United States*, 388 F. Supp. 2d. 1010, 1017 (N.D. Cal. 2005) (recognizing that courts can grant injunctive relief under the SIAA). Accordingly, Admiral Schultz is a proper defendant for Plaintiffs' claim for declaratory and injunctive relief.

CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss should be denied.

Respectfully submitted,

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Exhibit 1

CONTRABAND DEBRIS FIELD – JETTISON INFORMATION
Number of bales recovered: 11
Estimate size of debris field: 3 NAUTICAL MILES
Estimated position (LAT/LONG/geographic reference) of center of debris field: 18°15.0N, 074°51.7w
Position where vessel began jettisoning (LAT/LONG/geographic reference): 18°15.0N, 074°50.0W
Position where vessel ceased jettisoning (LAT/LONG/geographic reference): 18°15.0N, 074°50.0W
Position where vessel was stopped (LAT/LONG/geographic reference): 18°16.5N, 074°48.1W
Distance in nautical miles from position where vessel was stopped to closest bale: 3 NAUTICAL MILES
Distance in nautical miles from position where vessel was stopped to estimated center of the debris field: 3 NAUTICAL MILES
Distance in nautical miles from position where vessel was stopped to farthest bale: 3 NAUTICAL MILES
Time of recovery of first bale: 1550Z
Time of interdiction of the suspect vessel: 1545Z

ATTACHMENT CHECKLIST	
☑ Witness Statements	☐ Video Log
☑ Unit Smooth Log (copy)	☑ Photo Log
☑ Message Traffic	☑ Prisoner/Detainee Log
☐ Radiotelephone Log	☑ Drug Detection/Identification Evidence
☑ Chain of Custody Documents	☑ Evidence of Drug Quantity/Destruction
☑ Diagram of Seized Vessel Layout	☑ Sample Drug Packaging
☑ Representative Drug Sample	