ORAL ARGUMENT SET FOR JANUARY 13, 2011

Nos. 07-5178, 07-5185, 07-5186, 07-5187

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARKAN MOHAMMED ALI, et al.,

Appellants,

v.

DONALD H. RUMSFELD, et al.,

Appellees.

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

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STATUTES AND REGULATIONS

Except for 5 U.S.C. §701, which is included in Addendum attached hereto, all applicable statutes and regulations are contained in the Addendum to the Brief for Appellants.

INTRODUCTION

The Plaintiffs brought this case seeking damages for torture they suffered in U.S. military custody as a direct result of Defendants' policies and practices. Plaintiffs, some of whom are under an explicit threat of re-detention, also seek a declaratory judgment to ensure that they will never suffer torture again at the hands of the U.S. military. Defendants do not dispute that the policies alleged in the complaint were unquestionably illegal under the U.S. Constitution, federal laws, U.S. military law, ratified treaties, and the law of nations. Instead, Defendants contend that the U.S. Constitution did not constrain their conduct because the torture took place in outside the United States, and that Defendants are immune from suit.

Defendants contend that this action should not be permitted to proceed no matter how heinous the alleged conduct. Indeed, in response to questioning by the district court during the hearing on the motion to dismiss, Defendants took the position that even if they had implemented a policy of genocide, injured persons would have no remedy and the only redress would be through the military justice system. Tr. of Oral Argument, Dec. 8, 2006, at 13-15. This extreme position cannot stand in the face of settled precedents.

Defendants assert that this Court's prior decisions, including *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009) ("*Rasul II*"), and *Kiyemba v. Obama*, 555 F.3d 1022, 1026-27 (D.C. Cir.), *vacated and remanded*, 130 S. Ct. 1235 (2009), *reinstated with modifications*, 605 F.3d 1046 (D.C. Cir. 2010), require affirmance. But those decisions, categorically holding that non-citizens outside the United States have no rights under the U.S. Constitution, are inconsistent with a long line of Supreme Court cases culminating in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

Defendants also argue that they are entitled to qualified immunity because it was not clearly established that non-citizens outside the United States had a remedy against U.S. government officials who caused their torture. This assertion ignores the universal proscriptions against torture and thus turns the doctrine of qualified immunity on its head.

Defendants urge the Court not to recognize a *Bivens* remedy even though there are no special factors warranting dismissal. None of the individual Defendants still holds office or military command and their conduct violated every applicable law including the U.S. Constitution and military law. Under these circumstances, permitting Plaintiffs' damages case to go forward would not interfere in any U.S. military or foreign policy

activities and indeed would reinforce the U.S. government's longstanding commitment to enforcing the laws prohibiting torture and providing an effective remedy for violations of those laws.

In addressing Plaintiffs' claims under the Alien Tort Statute ("ATS") for Defendants' violations of *jus cogens* norms of the law of nations, Defendants entirely fail to address well-established caselaw requiring that statutes be construed with an eye to whether the putative "plain" meaning would conflict with Congress's intent. Under that canon of statutory construction—which this Court has not previously considered in similar cases raising Westfall Act immunity issues—the Court should interpret the Westfall Act not to extend immunity to federal officials who engage in egregious violations of the law of nations as (1) Congress never intended such acts to be encompassed by the Westfall Act; (2) Congress intended claims brought under the Alien Tort Statute to be excepted from Westfall Act immunity; and (3) acts of torture are not within the scope of employment of U.S. officials and therefore fall outside the Westfall Act altogether. To the extent that the holdings of *Rasul II* or *Kiyemba* on the Westfall Act apply here, the Court should reconsider them in light of Plaintiffs' statutory construction argument, which has not been raised in any previous case.

Finally, Defendants fail to address the district court's error in dismissing Plaintiffs' claim for declaratory relief. Defendants rely entirely upon a mischaracterization of the allegations in the Complaint and a meaningless and unexplained citation to a section of the Administrative Procedure Act, 5 U.S.C. § 701, which has no applicability here.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING CATEGORICALLY THAT "ALIENS WITHOUT PROPERTY OR PRESENCE IN THE UNITED STATES" HAVE NO RIGHTS UNDER THE DUE PROCESS CLAUSE

In their Brief, Defendants persist in the mistaken notion that "non-resident aliens" outside the United States categorically have no rights under the Due Process Clause. Defendants do so by ignoring the governing precedent of *Boumediene v. Bush*, 128 S. Ct. 2229, 2255 (2008), in which the Supreme Court reaffirmed that whether a court should recognize a constitutional right extraterritorially hinges on whether it would be "impracticable and anomalous" to do so.

Defendants' argument rests on the premise that *Boumediene* should be limited to claims under the Suspension Clause. But as set forth in the Brief for Plaintiffs-Appellants ("Opening Br.") at 9-12, the Supreme Court made it clear that its *Boumediene* test applies generally and is not limited to any

particular provision in the Constitution. Indeed, although Defendants entirely fail to address it, this Court has now recognized that *Boumediene* "explored the more general question of [the] extension of constitutional rights … applied extraterritorially." *Al Maqaleh v. Gates*, 605 F.3d 84, 93 (D.C. Cir. 2010). Under *Boumediene* and *Al Maqaleh*, Defendants cannot successfully contend that the Suspension Clause is the only constitutional provision that may have effect outside the United States.

Defendants ignore *Al Maqaleh* and instead rely upon the Court's opinion in *Kiyemba*.[1] But *Kiyemba*'s statement that "the due process clause does not apply to aliens without property or presence in the United States" was dicta, as the Court was merely speculating as to a possible basis for the district court's decision. 555 F.3d at 1026. Moreover, *Kiyemba* relied upon *Johnson v. Eisentrager*, 339 U.S. 763 (1950), which the Supreme Court expressly held did *not* establish a categorical rule against extraterritorial

[1] Defendants also mention the Court's *Rasul II* opinion in passing. Joint Br. of Defendants-Appellees ("Defs.' Br.") at 37. However, after this Court's original decision was vacated and remanded by the Supreme Court, this Court withdrew the portion of its original opinion holding that the plaintiff detainees had no rights under the U.S. Constitution and ruled instead on qualified immunity grounds. 563 F.3d 527 at 530.

After issuance of the original *Rasul* opinion but before the Court re-issued the opinion on remand from the Supreme Court, Plaintiffs-Appellants requested that the instant case be heard initially *en banc*. Appellants' Pet. For Initial Hrg. *En Banc* and Opp. To Mot. For Summ. Affirmance (Apr. 25, 2008). Plaintiffs-Appellants renew that request for *en banc* consideration.

application of the Constitution. *Boumediene*, 128 S. Ct. at 2257-58.[2] Although this Court reinstated the *Kiyemba* opinion on remand after *Al Maqaleh* was decided, *Al Maqaleh* is the more considered analysis of the extraterritoriality issue and definitively accepts that *Boumediene* is not limited to the Suspension Clause context. Defendants also ignore caselaw dictating that *Al Maqaleh* controls because it is the earlier-issued opinion. *Indep. Cmty. Bankers of Am. v. Bd. of Governors of Indep. Cmty. Bankers of Am.*, 195 F.3d 28, 34 (D.C. Cir. 1999); *see* Opening Br. at 13-14. Thus, Defendants' assertion that "nonresident aliens detained outside the United

[2] Later in *Kiyemba*, the Court stated: "But as the [Supreme] Court recognized, it had never extended any constitutional rights to aliens detained outside the United States; *Boumediene* therefore specifically limited its holding to the Suspension Clause." 555 F.3d at 1032 (citing *Boumediene*, 128 S. Ct. at 2262). Plaintiffs respectfully submit that this misreads *Boumediene*. The Supreme Court stated that it had not previously decided the precise question whether non-citizens detained by the United States in another country enjoy constitutional rights, but noted that this was because those precise circumstances had not previously arisen. *See Boumediene*, 128 S. Ct. at 2262 ("But the cases before us lack any precise historical parallel."). The Supreme Court's anaylsis in *Boumediene* made clear that under longstanding precedents starting with the Insular Cases, there was no categorical rule against extraterritorial application of the Constitution. *Id.* at 2258. *See* Opening Br. at 8-12. *Boumediene* explicitly rejected the government's contention that *Johnson v. Eisentrager*, 339 U.S. 763 (1950), had held that detainees in U.S. custody in a foreign country have no constitutional rights. 128 S. Ct. at 2258. And *Boumediene* makes clear that its test for extraterritorial application of the Constitution is not limited to the Suspension Clause. *See, e.g., id.* ("Nothing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution *or* of habeas corpus.") (emphasis added).

States have no constitutional due process rights" fails under this Court's opinion in *Al Maqaleh* as well as the Supreme Court's decision in *Boumediene*.

Defendants make no effort to explain why it would be impracticable and anomalous to recognize the fundamental constitutional prohibition against torture by U.S. government officials. As set forth in Plaintiffs' opening brief at 14-22, recognizing the constitutional proscriptions against torture in a damages action would be neither impracticable nor anomalous and Plaintiffs should have the opportunity to prove their claims on the merits.

II. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY AS IT WAS CLEARLY ESTABLISHED THAT THEIR CONDUCT WAS PROHIBITED UNDER THE U.S. CONSTITUTION AND ALL OTHER RELEVANT LAWS

Defendants recognize, as they must, that the qualified immunity doctrine does not excuse conduct that was clearly unlawful at the time it was committed. *See Hope v. Pelzer*, 536 U.S. 730, 739 (2002) ("qualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'") (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)); *accord Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (where "in the light of pre-existing law the unlawfulness" of official action is "apparent," qualified immunity does not protect the action).

Defendants do not contend that the conduct alleged in the Complaint was lawful at the time.[3] Nor could they plausibly make such an argument. As Plaintiffs have demonstrated, the U.S. Constitution, military law, U.S.-ratified treaties and the law of nations all absolutely prohibited torture. Opening Br. at 14-18, 23-28. Those controlling and long-settled laws also prohibited any conduct of a military commander or U.S. Secretary of Defense that would implement, condone or permit subordinates to commit torture. *Id.*

In an effort to sidestep the long-established and universally accepted prohibitions that applied to their conduct as alleged in the Complaint, the Defendants disregard the qualified immunity cases examining whether it was clearly established that their conduct was unlawful and focus instead on whether it was clearly established that Plaintiffs could bring a *Bivens* action to vindicate their rights not to be tortured. Defs.' Br. at 34-35. Defendants contend that they are immune from suit if that *remedy* was not clearly

[3] Defendants gratuitously mention that if this case is remanded, they intend to move to dismiss under *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and would also assert that Plaintiffs' claims are barred under § 7(a) of the Military Commissions Act of 2006 as they were "enemy combatants." Defs.' Br. at 29 n.4. If Defendants were to raise these new issues on remand, they would fail in light of existing allegations in the Complaint that the Plaintiffs were innocent civilians who were never even charged with wrongdoing, much less designated as enemy combatants. App. 25, 29 (Compl. ¶¶ 1, 16). But as these issues are not before the Court on this appeal, Plaintiffs do not address them here.

established at the time Plaintiffs were tortured. This argument undermines the very purpose of the qualified immunity doctrine.

Qualified immunity is designed to ensure that the prospect of liability does not unduly chill a government official's lawful "exercise [of] discretion" – that is, his "willingness to execute his office with the decisiveness and the judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 239-40 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183 (1984). In this case, the conduct of the Defendants was prohibited under every source of law including the U.S. Constitution, U.S. military law and policy, and the law of nations. *See* Opening Br. at 15-17, 23-27. Under those authorities, no reasonable official could have thought it within his discretion to torture an innocent detainee or to implement policies that would permit and encourage his subordinates to do so. Indeed, as set forth in the Brief *Amici Curiae* of Concerned Retired Military Officers (at 28), the grant of qualified immunity in this case "conflicts with and threatens to undermine military policy, which imposes command responsibility [for torture] as the foundation of military discipline."

The purpose of qualified immunity would not be served by immunizing officials for conduct that was clearly unlawful when it was

committed. Doing so would drastically upset the balance that qualified immunity strikes between "two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009).

Thus, Defendants can find no help in the qualified immunity cases that turn on whether a particular constitutional rule was sufficiently established to provide an official with fair notice, because in those cases the issue is the proper boundary between lawful and unlawful official *conduct*. *See*, *e.g.*, *Anderson*, 483 U.S. at 639-40. *But cf. Hope*, 536 U.S. at 739 (referring to "clearly established statutory or constitutional rights") (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). For example, courts naturally look to previous constitutional cases to determine whether an official had notice that a particular punishment is unlawful because it is "cruel and unusual" within the meaning of the Eighth Amendment, *Hope*, 536 U.S. 730, or that a particular search is "unreasonable" within the meaning of the Fourth Amendment, *Anderson*, 483 U.S. 635. In such cases, the defendant official may not have had fair notice that he was violating a person's rights, and where the law does not clearly prohibit certain conduct,

it is "improper to subject [defendants] to money damages." *Pearson*, 129 S. Ct. at 823.

Applying that test here, Defendants' assertion of qualified immunity fails. It has never been slightly in doubt that torture was prohibited under every applicable source of law, including not only the U.S. Constitution but also U.S. military laws, ratified treaties and *jus cogens* norms. Qualified immunity is not warranted where the illegality of the conduct alleged is undisputed and absolute. The question of what *remedies* might be available for unlawful conduct is not part of the qualified immunity analysis.

Even if Defendants were correct that the qualified immunity analysis delves into whether it was clearly established that Plaintiffs could bring a *Bivens* action to obtain redress, Defendants' arguments would still fail. Defendants' argument that the Fifth and Eighth Amendments did not clearly protect Plaintiffs against torture turns entirely on the fact that they were outside the United States (albeit in U.S. military custody) at the time that they were tortured. Like this Court in *Rasul II*, Defendants rely on the observation in *Boumediene* that the Supreme Court had not previously "held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution." 128 S. Ct. at 2262. But *Boumediene* itself makes the point

that the precise issue simply had never arisen before in a case before the Court. *Id.* ("But the cases before us lack any precise historical parallel…. Under these circumstances the lack of a precedent on point is no barrier to our holding."). The qualified immunity doctrine recognizes that the non-existence of a precedent exactly on point is not enough: "[E]arlier cases involving 'fundamentally similar' facts … are not necessary" to find that the law is clearly established." *Hope*, 536 U.S. at 741. Thus, the qualified immunity analysis does not hinge on whether there is a precise precedent holding that non-citizens held in exclusive U.S. custody in another country under pervasive U.S. control (*see* Opening Br. at 19-21).

Defendants thus take one sentence in *Boumediene* out of the context of the whole opinion, which analyzed decades of Supreme Court precedent starting with the Insular Cases and held that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* As Plaintiffs have previously explained, Opening Br. at 28-31, *Boumediene* did not announce a new legal rule and Defendants had ample notice that the U.S. Constitution constrained their conduct under the facts of this case, even if that conduct caused injuries to Plaintiffs outside U.S. borders. To the extent that the Court's qualified immunity ruling in *Rasul II* applies here, it should be reconsidered *en banc* as it failed to consider the full extraterritoriality

analysis in *Boumediene* and conflicts with the qualified immunity precedents focusing the inquiry on whether a defendant should have been on notice that his conduct was unlawful.

III. THE DISTRICT COURT ERRED IN HOLDING THERE ARE SPECIAL FACTORS COUNSELING AGAINST A *BIVENS* REMEDY WHEN THIS CASE WOULD NOT INTERFERE WITH ANY U.S. MILITARY POLICY OR ACTION

As demonstrated in Plaintiffs-Appellants' opening brief at 33-44, the district court erred in holding that special factors counsel against a *Bivens* remedy in this case. Plaintiffs are innocent civilians who were tortured while in U.S. military custody and then released without ever being designated, charged or prosecuted as enemy combatants or for any other wrongdoing. App. 25, 29 (Compl. ¶¶ 1, 16). They seek a *post hoc* remedy for torture they suffered as a direct result of Defendants' actions. Plaintiffs' claims do not require the Court to make any foreign policy judgments, review any battlefield decisions, or supervise the operation of any foreign military bases or detention facilities. There are no special factors warranting dismissal of this *Bivens* action.

In response to Plaintiffs' authorities demonstrating that there are no special factors counseling hesitation here, Defendants rely upon inapposite cases and mischaracterize Plaintiffs' claims as requiring a "new" extension of *Bivens*. Those arguments should fail.

First, Defendants fail to rebut the point that that the instant case poses no danger of "obstructing U.S. national security policy." As explained in their brief, Plaintiffs' action actually reinforces the uniform policy of both political branches and the U.S. military to prohibit torture absolutely and without exception, even if it is conducted in the name of national security. *See* Opening Br. at 14-18; 23-28; Br. of *Amici Curiae* Concerned Retired Military Officers at 6-16. Permitting this *Bivens* action would also reinforce the doctrine of command responsibility under U.S. military law, which requires commanders to be held liable when their subordinates commit torture. *See* Br. of *Amici Curiae* Concerned Retired Military Officers at 23-26.

Without addressing those authorities, Defendants rely upon inapposite cases concerning debatable points of foreign policy or military strategy. For example, Defendants rely heavily upon this Court's pre-*Boumediene* decision in *Sanchez-Espinoza*, 770 F.2d 202 (D.C. Cir. 1985), in which the plaintiffs alleged that the President was engaged in an unauthorized war in Nicaragua.[4] The instant case is distinguishable in that Plaintiffs do not

[4] Defendants' other authorities also are cases in which plaintiffs questioned controversial policy decisions of the political branches. *See, e.g., Wilson v. Libby*, 535 F.3d 697 (D.C. Cir. 2008) (seeking damages arising from covert operations by CIA); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982-83 (9th Cir. 2007) (concerning decision to provide equipment to Israeli military);

challenge a policy judgment or any question that is even arguably within the discretion of the political branches. No government official could reasonably argue that it was within his proper discretion to enact a policy of torture, contrary to all U.S. laws, treaties and the law of nations. Defendants' authorities therefore have no place here.

Rather than confront Plaintiffs' authorities demonstrating that the purposes of the special factors limitation on *Bivens* actions would not be served by its application here, Defendants merely invoke the terms "war and national security" as a talisman against *Bivens* liability. But as the Supreme Court recognized in *Boumediene* and *Rasul v. Bush*, 542 U.S. 466 (2004), there is a vital role for the judiciary to play in such cases. As the Supreme Court emphasized in *Boumediene*:

> Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political

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Schneider v. Kissinger, 412 F.3d 190, 197 (D.C. Cir. 2005) (concerning covert operations in Chile); *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1369 (Fed. Cir. 2004) (concerning President's decision to launch missile strikes against suspected chemical weapons plant); *Aktepe v. United States*, 105 F.3d 1400, 1403-04 (11th Cir. 1997) (alleging negligence in U.S. Navy's firing of missile); *Beattie v. Boeing Co.* 43 F.3d 559, 563-66 (10th Cir. 1994) (denial of a security clearance); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (concerning bombing of Cambodia); *DaCosta v. Laird*, 448 F.2d 1368 (2d Cir. 1971) (challenging Congress's authority to engage in military operations in Vietnam).

> branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is."

128 S. Ct. at 2259 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Defendants fail to distinguish Supreme Court cases involving judicial inquiry into the rights of detainees in U.S. military custody (*see* Opening Br. at 38-41).

Defendants merely address *Boumediene* by stating in conclusory terms that the adjudication of "matters directly pertaining to war and national security" is limited to "some exceptional instances not applicable here." Defs.' Br. at 20. But this assertion flies in the face of the numerous federal cases, beginning in the early 19th Century and continuing through the Supreme Court's recent national security decisions, in which courts have entertained damages cases involving national security concerns and military operations. *See* Opening Br. at 37-38 & n.16. Here again, Defendants have no response to these precedents.

Indeed, even the opinions cited by the Defendants affirm that the courts may properly hold military personnel accountable for violating individual rights. For example, while *Gilligan v. Morgan*, 413 U.S. 1 (1973), concluded that a particular claim for systemic injunctive relief against the National Guard was nonjusticiable, the Supreme Court expressly

emphasized that "it should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief." *Id.* at 11-12.

Defendants also fail to acknowledge the Supreme Court's rejection in *Boumediene* of the notion that judicial review or any aspect of litigation would impermissibly interfere with military operations. The Supreme Court has affirmed that the burdens of litigation on the government are manageable concerns that do not outweigh the courts' important role of enforcing individual rights. Opening Br. at 38-41. And *Boumediene* did so in habeas corpus actions, where the risk of intrusion into military operations is greater than in an action for retrospective damages relief. *See* Opening Br. at 40-41.

Defendants also persist in citing inapposite cases in which courts have declined to infer a *Bivens* remedy in cases brought by U.S. service members to challenge military policies or actions. *See* Defs.' Br. at 19, 21, 23 (citing *United States v. Stanley*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983); *Orloff v. Willoughby*, 345 U.S. 83 (1953)). But as Plaintiffs pointed out in their opening brief (at 41-43), those cases are not on point because they are based entirely on concerns that permitting suits by military

personnel would undermine military discipline. No such concerns are present here this lawsuit does not involve a U.S. service members' challenge to military policy. Defendants ignore this key distinction.

Defendants' reliance on *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc), is also misplaced. Defs.' Br. at 21. In *Arar*, a divided Second Circuit held by a 7-to-4 en banc vote that a *Bivens* action should not be inferred in a case involving "extraordinary rendition," which the court held "is treated as a distinct phenomenon in international law." 585 F.3d at 572. Because the plaintiff challenged the U.S. government's decision to transfer him into Syrian custody, the Second Circuit ruled that the case would improperly embroil the courts in sensitive determinations impacting diplomacy and foreign policy. *Id.* at 574-75. In this case, Plaintiffs were in the exclusive custody and control of the U.S. military at all times and there are no sensitive issues relating to foreign relations.

Defendants assert that it is Congress's place to decide whether a damages action is available. Defs.' Br. at 18, 27-28. Yet Defendants do not point to any congressional statement suggesting that a *Bivens* remedy should not be available. Indeed, Defendants ignore enactments by Congress (cited in Plaintiffs' opening brief at 33-34) that actually *support* the courts' recognition of a *Bivens* remedy in this case. The Detainee Treatment Act

specifically contemplates that officials may be liable "[i]n any civil action or criminal prosecution," providing only a limited affirmative defense. Detainee Treatment Act § 1004(a), Pub. L. No. 109-148, 42 U.S.C. § 2000dd-1(a). And the Military Commissions Act ("MCA") provides further evidence of Congress's recognition that a *Bivens* remedy would be available here. While the MCA restricts jurisdiction over claims relating to "any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien" who has been found to be an *enemy combatant*, it contains no such limitation with respect to claims such as those here, which are brought by individuals who have never been found to be enemy combatants. Military Commissions Act of 2006 § 7(b), Pub. L. No. 109-366, 28 U.S.C. § 2241(e)(2). *Cf. Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (applying statutory construction principle of *expressio unius est exclusio alterius*).

Finally, Plaintiffs respectfully submit that the Court should reconsider its special factors ruling in the *Rasul II* case. In a footnote in that opinion, this Court adopted as an alternative holding that special factors barred a *Bivens* remedy for detainees who were tortured while in U.S. military custody at Guantanamo. *Rasul II* stated without explanation that "[t]he danger of obstructing U.S. national security policy" was dispositive. 563

F.3d 527, 532 n.5. But government conduct that is unquestionably unlawful cannot be justified by "special factors." No branch of government has ever suggested that torture may form part of U.S. national security policy; thus, no court ruling that provides a *post hoc* remedy for torture can be viewed as "obstructing U.S. national security policy." Plaintiffs respectfully submit that the alternative holding in *Rasul II*, devoid of reasoning and conflicting with Supreme Court precedents, should be reconsidered by the Court en banc.

IV. THE DISTRICT COURT'S INTERPRETATION OF THE WESTFALL ACT WAS ERRONEOUS

As shown in Plaintiffs-Appellants' opening brief, the district court erred in three respects in holding that the United States should be substituted for the Defendants under the Westfall Act, 28 U.S.C. § 2679, and that Plaintiffs' claims brought under the ATS for violations of *jus cogens* norms of the law of nations should be dismissed: (1) The Westfall Act's exception for any action "brought for a violation of a statute of the United States" must be construed to encompass claims under the ATS; (2) The Westfall Act's provision immunizing federal employees for "negligent or wrongful" acts cannot be construed to encompass egregious torts in violation of *jus cogens* norms of the law of nations; and (3) The United States cannot be substituted for the individual Defendants under the Westfall Act because it was not

within the scope of employment for the U.S. Secretary of Defense and high-ranking military commanders to implement a policy of torture; such conduct that violated *jus cogens* norms was not foreseeable. Defendants fail to address Plaintiffs' key arguments.

A. Defendants Fail To Address Authorities Requiring the Court To Construe the Westfall Act in Light of Congress's Intent

In their brief, Defendants rely entirely upon *Rasul II*, incorrectly stating that the Court in that case rejected the plaintiffs' argument that the Westfall Act does not encompass violations of *jus cogens* norms. *See* Defs.' Br. at 43. But in fact, this Court has never considered the statutory construction arguments advanced by the Plaintiffs here, either in *Rasul II* or any other case.[5] There are two separate statutory interpretation issues presented here:

- Does the Westfall Act's grant of immunity for "negligent or wrongful acts" encompass egregious torts that violate *jus cogens* norms of the law of nations?

[5] The other cases cited by the Defendants, *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006), *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006), and *Alvarez-Machain v. United States*, 266 F.3d 1045, 1052-54 (9th Cir. 2001), also did not address this canon of statutory interpretation in construing the Westfall Act.

- Does the Westfall Act's exception for any action "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized" include an action brought under the ATS for a violation of a *jus cogens* norm?

The plain language of these two provisions of the Westfall Act does not provide a clear answer to these questions. However, the legislative history makes it clear that Congress only intended for the Westfall Act to immunize federal employees for "common garden variety type negligence suits." 134 Cong. Rec. H4718-03 (statement of Rep. Frank). *See also* Opening Br. at 48-50. The legislative history is also clear that at the time of the Westfall Act's enactment, Congress understood the Alien Tort Statute, 28 U.S.C. §1350 ("ATS"), to be a statute giving rise to a right of action and thus intended the statutory action exception to apply to cases brought under the ATS. Opening Br. at 52-55.

In light of this legislative record, and even if the statutory language were not ambiguous, the Supreme Court has held that courts should look to the legislative history and interpret the statute so that it does not conflict

with Congress's intent.[6] *See* Opening Br. at 46-48 (citing cases). In addition to the cases cited in the opening brief of Plaintiffs-Appellants, other authorities establish that this Court should not adopt a construction of the Westfall Act that contradicts Congress's clearly stated intent. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (confirming interpretation of statute by reference to legislative history although "the plain language of th[e] statute appears to settle the question"); *id.* at 433 n.12 (citations and internal quotation marks omitted). The Supreme Court has reaffirmed this principle of statutory construction as recently as last Term, holding that even when it is "literally possible" that the plain terms of a statute have one meaning, the courts should examine the legislative history to confirm whether that interpretation would comport with Congress's intent. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2287 n.9, 2291 & n.19 (2010). This is true even when the statute appears to have a clear meaning on its face. *See Cardoza-*

[6] The district court's decision and *Rasul II* also contravene another basic canon of statutory interpretation—that statutes should be construed so that they do not violate the law of nations. *See*, *e.g.*, *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("It has been observed that an act of Congress ought never be construed to violate the law of nations if any other possible construction remains…."). As explained in the Brief of *Amici Curiae* Human Rights and Torture Treatment Organizations, construing the Westfall Act to immunize Defendants would be contrary to the universal principles of the law nations that torture is absolutely forbidden and that where there is a right not to be tortured, there must be an effective remedy.

Fonseca, 480 U.S. at 452 (Scalia, J., concurring in the judgment) (criticizing majority of Court for consulting legislative history when statutory language is clear on its face). *Samantar*, 130 S. Ct. at 2293 (Scalia, J. concurring in the judgment) (same).

B. The Westfall Act's Exception for Actions Based Upon Violation of a Statute Applies to Plaintiffs' Alien Tort Statute Claim

In particular, this canon of statutory interpretation requires the Court to construe the Westfall Act's exception for actions based upon violation of a statute to encompass Plaintiffs' claims under the ATS. "Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). Applying this principle, it is clear from the legislative history that Congress intended that the Westfall Act "*does not change the law*, as interpreted by the Courts, with respect to the availability of other recognized causes of action; nor does it either expand or diminish rights established under other Federal Statutes." H.R. Rep. No. 100-700 at 7 (1988) (emphasis added).

At the time of the Westfall Act's enactment, Congress understood that the ATS was just such a "recognized cause[] of action." *See* Opening Br. at

54-55 (citing cases). Thus, in light of the "precedents and authorities" that were in effect at the time of the Westfall Act's passage, it is clear that Congress intended that actions brought under the ATS would remain unaffected by Westfall Act immunity.

Despite the clear legislative history demonstrating Congress's intent that ATS claims remain available and not subject to Westfall Act immunity, Defendants assert that the exception for actions brought under a statute does not apply, citing *United States v. Smith*, 499 U.S. 160, 174 (1991). But Defendants entirely fail to address the distinction between the statute at issue in *Smith* and the ATS, which Plaintiffs set forth in their opening brief (at 54 n.24). Unlike the Gonzalez Act at issue in *Smith*, which was a statutory grant of immunity and unquestionably did not create a cause of action, the ATS was understood by Congress to provide a cause of action. And Congress made clear its intent to leave that cause of action undisturbed when it drafted the Westfall Act.

C. Violations of *Jus Cogens* Norms Are Not Merely "Wrongful" Within the Meaning of the Westfall Act

The Westfall Act's provision of immunity for a "negligent or wrongful act" cannot be construed to encompass violations of *jus cogens* norms without directly frustrating Congress's intent as expressed in the legislative history. *See* Opening Br. at 48-50 (citing cases). Defendants

contend that if Congress had wished to make an exception to Westfall Act immunity for "all seriously criminal or egregious torts," it should have said so. Defs.' Br. at 44. But this argument contravenes the settled Supreme Court precedents that require this Court to construe the statutory language so that it is not contrary to Congress's intent as expressed in the legislative history. As Plaintiffs have shown (Opening Br. at 48-50), that legislative history demonstrates that Congress only intended to immunize "garden-variety" negligence torts and not egregious torts in violation of *jus cogens* norms. Defendants' argument would lead to a result directly at odds with Congress's stated intent in passing the Westfall Act and thus flips the canon of statutory construction on its head.

D. The Court Should Reconsider Its Holding that a U.S. Government Official Acts Within the Scope of Employment in Engaging in the Entirely Unforeseeable Conduct of Implementing a Policy of Torture

If the Court construes either of the terms in the Westfall Act consistently with Congress's intent as set forth above—an issue not considered in *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008) ("*Rasul I*") or *Rasul II* or in any other previous case before this Court—then the Court need not reach the question whether Defendants acted within the scope of their employment. However, if the Court should reach the latter question, it should reconsider its ruling in *Rasul I* that a U.S. Secretary of Defense and

high-ranking U.S. military commanders necessarily act within the scope of their employment when they implement a policy of torture. As set forth at length in the Brief of *Amici Curiae* Concerned Retired Military Officers, it would be a perversion of U.S. military laws to hold that a deliberate program of torture, such as that alleged in the Complaint, is within the scope of Defendants' employment.

Defendants' brief misapplies the D.C. law on scope of employment. Defendants rely upon *Rasul I*, which in turn cited cases like *Weinberg v. Johnson*, 518 A.2d 985 (D.C. 1986) and *Lyon v. Carey*, 533 F.2d 649 (D.C. Cir. 1976), concerning employees who committed violent crimes against customers in disputes over services and payment. Defendants argue that under those precedents, the proper test is whether their interrogation and detention policies were among their official duties. Defs.' Br. at 42. But this focuses on only one of the inquiries D.C. law requires. In *Weinberg*, the D.C. Court of Appeals held that "for an employer to be held vicariously liable for the intentional tort of a servant, the tortious act must occur within the scope of employment. The tort must be actuated, at least in part, by a purpose to further the master's business *and not be unexpected in view of the servant's duties*." 518 A.2d at 990 (emphasis added); *see also id.* at 991-92.

Defendants ignore this second prong of the scope of employment test, which goes to the foreseeability of a defendant's actions. *Id.*

Applying this foreseeability test to the particular facts alleged in the Complaint, Defendants' conduct in implementing a deliberate policy of torture cannot be held as a matter of law to be within the scope of employment. Taking the facts in the Complaint as true, as the Court must at this stage, it was not foreseeable that the U.S. Secretary of Defense and high-ranking U.S. Army commanders would implement a policy violating the fundamental prohibition against torture that the United States has long championed and enforced under U.S. law, U.S. military policies, treaties ratified by the United States, and the law of nations. As *amici curiae* retired military officers and military law scholars explain, it cannot be within the scope of employment for the U.S. Secretary of Defense and U.S. Army commanders to implement such a policy of torture in light of the universally accepted proscriptions on such conduct.

Cases like *Weinberg* and *Lyon* are distinguishable as they affirmed findings based on the particular facts that the employer businesses could have foreseen that their employees might engage in such criminal conduct and effectively concluded that the employers could have taken steps to prevent such action and therefore should be held liable. *See*, *e.g.*, *Lyon*, 533

F.2d at 654. Those are not the circumstances here. On the facts of this case, it was not foreseeable that the U.S. Secretary of Defense and high-ranking Army commanders would set policies in such egregious contravention of U.S. law and the law of nations and there is no reason to immunize such conduct and to leave *no one* liable to Plaintiffs for their injuries. Congress never intended for the Westfall Act to cover such egregious conduct and the Court should reconsider its holding in *Rasul I* and *Rasul II*.

In the alternative, the Court should at least reverse the district court's ruling and remand. In *Weinberg* and *Lyon*, the court in each case upheld a finding, applying the law to the particular facts, that the defendant had acted within the scope of employment. At the least, in this case the district court erred in dismissing Plaintiffs' action on this ground and should have permitted Plaintiffs to develop the record and to prove their case on summary judgment or at trial.

V. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS FOR DECLARATORY RELIEF

Defendants attempt to defend the district court's dismissal of Plaintiffs' claims for declaratory relief by asserting that "plaintiffs have only alleged a past injury." Defs.' Br. at 50. This mischaracterizes the Complaint, which alleges in detail that Plaintiffs are subject to ongoing or future injury. App. 39, 68, 70, 72, 74, 76, 78, 80, 82, 84-85, 90, 92, 101

(Am. Compl. ¶¶ 38, 161, 162, 172, 176, 180, 184, 188, 192, 193, 197, 198, 207, 208, 210, 233, 234). Among other facts, Plaintiffs allege that U.S. military personnel expressly threatened some of them with re-detention and that their detention was unjustified in the first instance. Thus, as alleged in the Complaint, Plaintiffs cannot avoid future injury simply by not engaging in any wrongdoing and dismissal under *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) was improper.

Defendants also assert that Plaintiffs' claim for declaratory relief "would also be barred by 5 U.S.C. § 701(b)(G) [sic]." Defs.' Br. at 51. But 5 U.S.C. § 701(b)(1)(G) merely sets forth limits on the scope of judicial review under the Administrative Procedure Act. Section 701(a) provides that "[t]his chapter [*i.e.*, the judicial review provisions of the Administrative Procedure Act] applies, according to the provisions thereof, except to the extent that … statutes preclude judicial review … or … agency action is committed to agency discretion by law." Section 701(b)(1)(G) then provides that "[f]or the purpose of this chapter … "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include … military authority exercised in the field in time of war or in occupied territory…." This case was not brought under the Administrative Procedure Act and Section 701

does not include any language that would bar Plaintiffs' action for declaratory relief.

CONCLUSION

The district court's order dismissing Plaintiffs' action should be reversed.

Dated: November 29, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(B)(ii) and the Court's order dated June 25, 2010. It contains fewer than 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman.

Dated: November 29, 2010

/s/ Cecillia D. Wang
Cecillia D. Wang

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2010, Appellants electronically filed the REPLY BRIEF FOR APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Furthermore, I certify that I will deposit eight copies of the REPLY BRIEF FOR APPELLANTS by U.S. Postal Service Priority Mail, postage paid, for delivery to the Clerk of the Court within two business days of the electronic filing.

The REPLY BRIEF FOR APPELLANTS was served on the following counsel using the CM/ECF system.

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I declare under penalty of perjury that the above is true and correct.

Dated: November 29, 2010
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s/ Lorena Fernandez
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ADDENDUM

Table of Contents:

5 U.S.C. § 701

(a) This chapter applies, according to the provisions thereof, except to the extent that--

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.