No. **11-6480**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ESTELA LEBRON, for herself and as Mother and Next Friend of Jose Padilla; **JOSE PADILLA**,

Plaintiffs-Appellants,

v.

DONALD H. RUMSFELD, Former Secretary of Defense; **CATHERINE T. HANFT**, Former Commander Consolidated Brig; **MELANIE A. MARR**, Former Commander Consolidated Brig; **LOWELL E. JACOBY**, Vice Admiral, Former Director Defense Intelligence Agency; **PAUL WOLFOWITZ**, Former Deputy Secretary of Defense; **WILLIAM HAYNES**, Former General Counsel Department of Defense; **ROBERT M. GATES**, Secretary of Defense in his official and individual capacities,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF OF CONSTITUTIONAL LAW AND FEDERAL COURTS PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Pursuant to Federal Rule of Appellate Procedure 26.1, *amici* certify that no *amicus* has a parent corporation and that no publicly held corporation owns 10% or more of their stock.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are professors of constitutional law and federal jurisdiction who teach and write about the law governing civil remedies for federal official misconduct, including the *Bivens* doctrine and the scope of common-law immunity defenses. *Amici* hold diverse views concerning the appropriate contours of the Supreme Court's *Bivens* and qualified immunity jurisprudence, and take no position in this brief on the coherence or normative desirability of the current state of either body of case law. Instead, *amici* come together out of a shared concern that the district court's analysis in this case departs significantly from the Supreme Court's extant jurisprudence on both *Bivens* and qualified immunity, and would, if affirmed, unjustifiably restrict the ability of private citizens to obtain remedies for governmental wrongdoing. Whether or not Padilla is ultimately entitled to recover against the defendants, *amici* file this brief to explain why the district court's reasons for denying relief are

1. Pursuant to Fed. R. App. P. 29(a), the parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

both unsupported by and inconsistent with the methodological approaches that the Supreme Court has articulated.

SUMMARY OF ARGUMENT

Amici address two issues: the *Bivens* remedy and qualified immunity.

Addressing first the *Bivens* remedy: In *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court held that, so long as (1) Congress had not displaced such a remedy; and (2) there were "no special factors counseling hesitation in the absence of affirmative action by Congress," the Fourth Amendment itself provides a damages remedy for violations thereof by federal officers. *Id.* at 396.

A review of the Court's post-*Bivens* jurisprudence shows that "special factors counseling hesitation" must be general reasons to disfavor judicial recognition of constitutional remedies in a particular sphere, as opposed to fact-based concerns about a particular defendant's liability to a particular plaintiff. Such a view of "special factors" analysis accommodates the need for courts both to provide a forum for

enforcing constitutional rights and simultaneously to respect the proper separation of powers.

Thus, whether a remedy is to be recognized under *Bivens* involves separation-of-powers concerns over interference with the *legislative*, rather than *executive*, prerogative. Fear of undue judicial interference with the executive branch has *not* been part of the Court's "special factors" analysis in applying *Bivens*. If anything, such concerns have found expression in the Court's analysis of other, more case-specific considerations, such as the question of individual officers' entitlement to immunity.

In light of this understanding, the "special factors" relied upon by the district court in this case differ in both kind and degree from any "special factors" that the Supreme Court has previously endorsed. The court below declined to infer a *Bivens* remedy because of "the potential impact of a *Bivens* claim on the Nation's military affairs, foreign affairs, intelligence, and national security and the likely burden of such litigation on the government's resources in these essential areas." *Lebron* v. *Rumsfeld*, No. 07-410, 2011 WL 554061, at *12 (D.S.C. Feb. 17, 2011). These concerns, however, go to the specifics asserted by the

defendants in Padilla's case, and not to structural considerations against general recognition of *Bivens* remedies for those challenging the legality of—and treatment within—their federal custody.

Thus, the district court's analysis led it to misapply *Bivens*: the court held it was simply refusing to recognize a "new" *Bivens* remedy, but its holding instead reflected an unwillingness to give effect to an old one. If this analysis is affirmed, it would vitiate the remaining core of the *Bivens* remedy, potentially insulating egregious governmental conduct from after-the-fact judicial scrutiny.

Turning to the issue of qualified immunity: Unlike the availability of a cause of action, there is no question that case-specific factual circumstances factor into analysis of whether defendant officers are entitled to qualified immunity. But whereas factual circumstances are relevant to qualified immunity analysis, their uniqueness is not dispositive, since the Supreme Court has steadfastly refused to "require a case directly on point," *Ashcroft* v. *al-Kidd*, No. 10-98, 2011 WL 2119110, at *7 (U.S. May 31, 2011). Instead, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002).

Contrary to these principles, the district court's analysis of the defendants' immunity focused on the uniqueness of the facts of Padilla's case, particularly (and all-but exclusively) the fact that he had been declared an enemy combatant, and that a pitched internal debate took place within the Department of Justice over the legality of particular interrogation methods as applied to enemy combatants.

But there is a vast body of case law holding various forms of prisoner abuse to be unlawful, and the proper question is whether in light of this body of law the defendant officers had "fair warning" that their alleged mistreatment of Padilla was unlawful. The district court suggested (implicitly) that Padilla's status as an enemy combatant rendered nugatory his rights under the general case law concerning abusive interrogation, but it did not explain why this was so. In this the district court committed error, and its analysis, if affirmed, would provide too convenient a means around some of the most vital constitutional protections against official misconduct.

ARGUMENT

I. THE DISTRICT COURT RELIED ON AN UNDULY SWEEPING VIEW OF "SPECIAL FACTORS" CUTTING AGAINST A *BIVENS* REMEDY THAT WOULD UPSET DECADES OF SETTLED LAW

In *Bivens*, the Supreme Court held that, in appropriate cases, the Fourth Amendment itself provides a damages remedy for violations thereof by federal officers. Relying on the uncontroversial proposition that "damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty," 403 U.S. at 395, the *Bivens* majority recognized that, in many contexts, "[t]he interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile," *id.* at 394. To that end, the Court concluded that a federal damages remedy was appropriate for Fourth Amendment violations, so long as (1) Congress had not displaced such a remedy; and (2) there were "no special factors counseling hesitation in the absence of affirmative action by Congress." *Id.* at 396; *see also id.* at 404 (Harlan, J., concurring in the judgment) ("[T]he presumed availability of federal equitable relief against threatened invasions of constitutional interests appears entirely to negate the contention that the status of an interest as constitutionally protected divests federal courts of the power to grant damages absent express congressional authorization.").

Although *Bivens* has met with skepticism in recent years, *see, e.g.*, *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (" *Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action —decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition."), the Supreme Court has refused invitations to overrule it—and, indeed, has left its core intact, *see, e.g.*, *Hartman* v. *Moore*, 547 U.S. 250 (2006) (assuming that a *Bivens* remedy would be available if plaintiff could plead and prove a lack of probable cause for his criminal prosecution in a First Amendment retaliation case). Thus, the only relevant questions in deciding whether to recognize a *Bivens* cause of action remain whether Congress has affirmatively displaced a *Bivens* remedy (which it clearly has not done here), or whether "special factors counsel hesitation" to infer such a remedy.

a. *Bivens'* Identification of "Special Factors Counseling Hesitation" Focused on General Contexts in Which a Federal Damages Remedy Would Be Neither Necessary Nor Appropriate

The Court in *Bivens* did not provide an exhaustive list of the kinds of "special factors" that would "counsel[] hesitation." Nevertheless, its discussion of exemplar cases is instructive. Thus, the

Bivens majority noted how "We are not dealing with a question of 'federal fiscal policy,' as in *United States* v. *Standard Oil Co.*, 332 U.S. 301, 311 (1947)," in which the United States as plaintiff sought to recover from the defendant for injuries inflicted upon a service member the costs of which were incurred by the federal government. *See Bivens*, 403 U.S. at 396. Similarly, the Court distinguished *Wheeldin* v. *Wheeler*, 373 U.S. 647 (1963), in which the plaintiff sought to impose liability "on a congressional employee for actions contrary to no constitutional prohibition, but merely said to be in excess of the authority delegated to him by the Congress." *Bivens*, 403 U.S. at 397. In both *Standard Oil* and *Wheeldin*, the "special factors" shorthand reflected the broader proposition that, as distinct from the typical case, there were reasons to require *affirmative* action by Congress to provide a judicial remedy..

As subsequent Supreme Court decisions have expanded the scope of "special factors," they have also provided a more coherent understanding of the term's content. Thus, in *Chappell* v. *Wallace*, 462 U.S. 296 (1983), the Court identified the military's internal system of discipline—and the need to avoid undue judicial interference therewith—as a "special factor" counseling against the recognition of a

Bivens claim for racial discrimination brought by enlisted personnel against their superior officers. And in *United States* v. *Stanley*, 483 U.S. 669 (1987), the Court held that "special factors" warranted against inferring a *Bivens* remedy for an action brought by a serviceman claiming that he was secretly subjected to LSD as part of an Army experiment. As Justice Scalia there explained, "[t]he 'special facto[r]' that 'counsel[s] hesitation' is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." *Id.* at 683 (quoting *Bivens*, 403 U.S. at 396) (alterations in original). As the Court's discussion made clear, the special factors analysis was not driven merely by a desire to keep the federal courts out of disputes *involving* the military, but rather disputes specifically *between* the military and its members, *see id.* at 683–84; *see also Feres* v. *United States*, 340 U.S. 135 (1950) (holding that service members may not invoke the Federal Tort Claims Act for claims arising out of their military service), a matter that was best left to the internal remedial system that Congress had created for the military. *See Stanley*, 483 U.S. at 684 (quoting *Feres*, 340 U.S. at 146). Thus, special

factors were not case-specific considerations, but rather structural reasons why judicial recognition of a constitutional remedy would be inappropriate in *all* cases founded on a similar basis. *See, e.g.*, *id.* at 683 ("[I]t is irrelevant to a special factors analysis whether the laws currently on the books afford Stanley . . . an adequate federal remedy for his injuries . . . ." (internal quotation marks omitted)).[2]

Finally, in *Wilkie* v. *Robbins*, 551 U.S. 537 (2007), the Court refused to infer a *Bivens* claim under the Takings Clause of the Fifth Amendment to remedy an allegedly systematic pattern of harassment and retaliation by officials at the U.S. Bureau of Land Management. The *Wilkie* majority identified as a "special factor counseling hesitation" the "difficulty" inherent in finding a new *Bivens* remedy to redress Robbins's injuries collectively, because "a general provision for tort-like liability when Government employees are unduly zealous in pressing a

2. It bears emphasizing that *Chappell* and *Stanley* do not stand for the more general proposition that "special factors" counsel against recognizing *Bivens* remedies arising out of any conduct by the U.S. military. Rather, the core analysis of each decision turns, like the *Feres* doctrine in FTCA litigation, on the specific concerns that would arise if service members could use *Bivens* as a means of litigating "injuries that 'arise out of or are in the course of activity incident to service.'" *Stanley*, 483 U.S. at 683 (quoting *Feres*, 340 U.S. at 146). It necessarily follows that the special factors recognized in *Chappell* and *Stanley* do not apply in cases in which the plaintiff is *not* a service member.

governmental interest affecting property would invite an onslaught of *Bivens* actions." *Id.* at 562. Given that various state and federal laws arguably provided alternative remedies to the plaintiff, the Court therefore declined to recognize a "new" *Bivens* remedy. *See id.*

Although various aspects of the Court's analysis in these cases have met with criticism, the undeniable upshot of these holdings is that "special factors counseling hesitation" must be general reasons to disfavor judicial recognition of constitutional remedies in a particular sphere, as opposed to fact-based concerns about a particular defendant's liability to a particular plaintiff.

More than just a correct understanding of the Supreme Court's jurisprudence in this field, such a view of "special factors" analysis also dovetails with the underlying tension animating *Bivens*: the need for courts to provide a forum for the enforcement of constitutional rights while respecting the proper separation of powers. Whereas Congress may affirmatively displace *Bivens* remedies, "special factors" analysis recognizes that, in appropriate cases, there are structural constitutional reasons to preclude *Bivens* remedies even in the *absence* of formal congressional displacement.

Bivens and its progeny also stand for the distinct but related proposition that the separation of powers concerns underlying constraints on *Bivens* remedies invariably reduce to concerns over interference with the *legislative*, rather than *executive*, prerogative. *See, e.g.*, *Bivens*, 403 U.S. at 418 (Burger, C.J., dissenting); *id.* at 428–29 (Black, J., dissenting); *see also Malesko*, 534 U.S. at 75 (Scalia, J., concurring). Put another way, even as the Supreme Court in recent years has consistently declined to expand the scope of *Bivens*, it has justified such restraint as a means of protecting against judicial arrogation of Congress's power to provide remedies.

So understood, concerns over judicial interference with the executive branch, as such, have not factored into the Court's "special factors" analysis. If anything, such concerns have manifested themselves in the Court's analysis of other, more case-specific considerations, including an officer's entitlement to immunity. *See, e.g.*, *al-Kidd*, 2011 WL 2119110, at *11 (Kennedy, J., concurring) ("[N]ationwide security operations should not have to grind to a halt even when an appellate court finds those operations unconstitutional. The doctrine of qualified immunity does not so constrain national

officeholders entrusted with urgent responsibilities."). Thus, as Justice Scalia explained in *Stanley*, "the *Bivens* inquiry . . . is analytically distinct from the question of official immunity from *Bivens* liability. " 483 U.S. at 684 ; *see also Hui* v. *Castaneda*, 130 S. Ct. 1845, 1852 (2010) ("Many of our . . . *Bivens* decisions . . . address[] only the existence of an implied cause of action for an alleged constitutional violation. This case presents the *separate* question whether petitioners are immune from suit for the alleged violations. " (emphasis added; citations omitted)).

b. As Such, the "Special Factors Counseling Hesitation" Identified in *Bivens* Do Not Include Case-Specific Considerations, Such as the Merits-Based Concerns Reflected in the District Court's Analysis

In light of this understanding, the "special factors" relied upon by the district court in this case differ in both kind and degree from any "special factors" that the Supreme Court has previously endorsed. Indeed, the fundamental misstep in the district court's analytical approach is apparent from the beginning of its discussion of *Bivens*, which opened with the observation that "In analyzing this substantial body of case law relating to *Bivens* claims, it is useful to soberly and deliberately evaluate the factual circumstances of Padilla's arrival and the then-available intelligence regarding his background and plans on

behalf of Al Qaeda." *Lebron*, 2011 WL 554061, at *10. Quite to the contrary, whatever their bearing on other aspects of the case, the factual circumstances of Padilla's arrival (and of his case, more generally) should have very little to do with the existence *vel non* of "special factors counseling hesitation."

Nevertheless, after detailing them in full, the court proceeded to hold that these unique factual circumstances were precisely what counseled against a *Bivens* remedy:

> The designation of Padilla as an enemy combatant and his detention incommunicado were made in light of the most profound and sensitive issues of national security, foreign affairs and military affairs. It is not for this Court, sitting comfortably in a federal courthouse nearly nine years after these events, to assess whether the policy was wise or the intelligence was accurate. The question is whether the Court should recognize a cause of action for money damages that by necessity entangles the Court in issues normally reserved for the Executive Branch, such as those issues related to national security and intelligence. This is particularly true where Congress, fully aware of the body of litigation arising out of the detention of persons following September 11, 2001, has not seen fit to fashion a statutory cause of action to provide for a remedy of money damages under these circumstances.

Id. The district court's invocation of congressional silence in Padilla's case is curious, since, as it noted elsewhere, Padilla was essentially "a class of one." *id.* at *14. Indeed, whereas other congressional statutes

directed toward detainees—such as the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006—applied by their terms to the hundreds of *non*-citizens in U.S. custody, *see, e.g.*, 10 U.S.C. § 948b(a), it would hardly have made sense for Congress to legislate rules to govern a category of detainees that at no time included more than two individuals.[3]

The district court also relied upon the "massive discovery assault" that Padilla's case might precipitate, suggesting that part of the "special factors" calculus includes the fact that "[t] he management and conduct of such pre-trial litigation would require the devotion of massive governmental resources, which by necessity would then distract the affected officials from their normal security and intelligence related duties," *Lebron*, 2011 WL 554061, at *11, and which "would likely raise numerous complicated state secret issues," *id.* Thus, in all,

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3. If anything, the fact that the MCA (like the DTA before it) expressly cuts off access to civil remedies for *non*-citizens detained as enemy combatants, *see* 28 U.S.C. § 2241(e)(2) (foreclosing jurisdiction over claims "relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien"), should cut the other way here—as manifesting congressional intent to leave such remedies intact for the two *citizens* who were so detained, *cf.* 18 U.S.C. § 4001(a) ("No citizen shall be imprisoned or otherwise detained except pursuant to an Act of Congress.").

the court identified the "the potential impact of a *Bivens* claim on the Nation's military affairs, foreign affairs, intelligence, and national security and the likely burden of such litigation on the government's resources in these essential areas" as the reasons for declining to infer a *Bivens* remedy in Padilla's case. *Id.* at *12.

But these concerns each go to the specifics of Padilla's case (which are speculative at the pleadings stage), and not to structural considerations against general recognition of *Bivens* remedies for those challenging the legality of—and treatment within—their federal custody. Moreover, this analysis appears on its face to be designed to avoid undue interference with the *executive* branch, even though the Supreme Court's jurisprudence shows that the real concern in a *Bivens* case is interference with *legislative* authority.

To that end, as the decisions surveyed above suggest, the Supreme Court has never identified the burden on the government of litigation as a *Bivens* "special factor," nor has it suggested that the volume of governmental resources a particular claim requires is a relevant consideration in deciding whether to infer a *Bivens* remedy—as noted below, the Supreme Court has expressly rejected these

considerations.[4] And perhaps most tellingly, the district court's observation that discovery in Padilla's case "would likely raise numerous complicated state secret issues" conflates the merits with the existence of a cause of action—and converts a potential evidentiary privilege (the application of which is necessarily case-specific) into a categorical ban on causes of action.

As a result, the district court's analysis would deny a cause of action to plaintiffs based on the entirely hypothetical possibility that the lawsuit, if it went forward, *might* interfere with state secrets, and *might* require the government to devote substantial resources to mounting a defense. Moreover, the government would never have to raise these concerns; because "special factors" analysis is categorical, a cause of action would be foreclosed in any case raising any of the concerns identified by the district court, without regard to the merits.

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4. In *FDIC* v. *Meyer*, 510 U.S. 471 (1994), the Supreme Court *did* suggest that "a potentially enormous financial burden for the Federal Government" counseled against recognizing a *Bivens* remedy against federal agencies, as opposed to federal officers. But *Meyer* only proves the point; the very next sentence of Justice Thomas's opinion concluded that it was irrelevant to "special factors" analysis "that the Federal Government already expends significant resources indemnifying its employees who are sued under *Bivens*." *Id.* at 486.

c. To the Contrary, the Allegations in this Case are Precisely the Types of Claims for Which No "Special Factors" Have Been Found To Exist

The district court's reliance on case-specific national security and intelligence considerations may obscure the extent to which the type of claim Padilla is pursuing is one in which the Supreme Court has already suggested that no "special factors" exist.

In *Carlson* v. *Green*, 446 U.S. 14 (1980), the Court recognized a *Bivens* claim under the Eighth Amendment's Cruel and Unusual Punishments Clause where a federal prisoner died after an acute asthma attack because various federal prison officials (including the lead defendant, the Director of the Federal Bureau of Prisons) knowingly refused to provide him with proper treatment. In explaining why "no special factors counsel[ed] hesitation," the *Green* Court emphasized two points: *First*, the defendant officers "do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Id.* at 19 (citing *Davis* v. *Passman*, 442 U.S. 228, 246 (1979)).[5] *Second*, "even if

5. In *Davis*, the "independent status" to which the Court referred was the fact that the defendant was a sitting member of Congress. *See* 442 U.S. at 246. Even then, though, the Court held that the "special

requiring [the federal prison officials] to defend respondent's suit might inhibit their efforts to perform their official duties, . . . qualified immunity . . . provides adequate protection." *Id.* (citing *Butz* v. *Economou*, 438 U.S. 478 (1978)).

Green thereby both (1) recognized the existence of a *Bivens* remedy for cases in which federal prisoners sue their jailers claiming mistreatment while in federal custody; and (2) rejected one of the central arguments relied upon by the district court here—that the practical impact of such a suit might itself be a "special factor" counseling hesitation against inferring such a cause of action. Indeed, *Green* went one step further, holding that the availability of such relief was not affected by the fact that the plaintiff might also have a claim under the Federal Tort Claims Act. *See id.* at 19–23.

The Supreme Court has resisted efforts to expand *Green* into other contexts, as in *Malesko*, where the Court declined to infer an Eighth Amendment-based *Bivens* remedy in a suit against a private

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factors" counseling hesitation in such a case were coextensive with the protections of the Speech and Debate Clause. U.S. CONST. art. I, § 6, cl. 1. In other words, either the Constitution immunized Passman, in which case the existence of a *Bivens* cause of action would have been irrelevant, or the Constitution did not confer immunity, in which case no "special factor" counseled hesitation.

corporation in charge of a halfway house for federal inmates. As Chief Justice Rehnquist noted, "Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants." 534 U.S. at 68.[6]

But for present purposes, it is sufficient that Padilla's case presents *neither* a "new context" nor a "new category of defendants." Like Green, Padilla seeks damages against the individual federal officers responsible for his alleged mistreatment (and wrongful detention) while in federal custody. The district court's decision was therefore not a refusal to recognize a "new" *Bivens* remedy, but rather a decision not to give effect to an old one.[7]

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6. The *Malesko* Court emphasized that part of the justification for not extending *Bivens* liability to private corporations was that there would be far less of a deterrent effect if a plaintiff could sue corporate defendants, rather than the officials who were directly responsible. *See* 534 U.S. at 71; *see also Meyer*, 510 U.S. at 485 ("[T]he purpose of *Bivens* is to deter the [federal] officer from infringing individuals' constitutional rights."). Here, by contrast, there can be little doubt that a viable *Bivens* claim would have a deterrent effect on the future conduct of government officers.

7. Nor can the *Bivens* issue here be distinguished from *Green* on the ground that this case involves a military detainee and national security concerns. Not only do other doctrines exist to protect the government's legitimate security interests (such as the state secrets privilege), but doctrines also exist to address the possibility that the specific nature of Padilla's case might render relief inappropriate (such as qualified

d. The District Court's Analysis to the Contrary, If Affirmed, Would Vitiate the Remaining Core of the *Bivens* Remedy

What cannot be gainsaid about the district court's analysis is its limitlessness. Even if were reconcilable with the Supreme Court's *Bivens* jurisprudence (which, as described above, it is not), the effect of the court's reasoning would be to vitiate the remaining core of the *Bivens* remedy. After all, any suit against government officers will involve unique facts that might make relief inappropriate, including the officers' potential immunity; the possible availability of evidentiary privileges; and, in virtually every instance, "the devotion of massive governmental resources, which by necessity would then distract the affected officials from their normal . . . duties." *Lebron*, 2011 WL 554061, at *11. Other doctrines exist to protect legitimate claims along these lines. Accounting for these concerns through *Bivens* is inconsistent with the Supreme Court's teachings and would insulate the most egregious governmental conduct from judicial scrutiny. And although the district court's analysis focused on "national security and

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immunity). To the extent Padilla's claim is that his detention and treatment at the hands of federal prison officials and their superiors was unlawful, Green's recognition of a Bivens remedy remains directly on point.

intelligence" concerns, presumably such reasoning could apply with no less force to other areas of governmental responsibility, including prison supervision, law enforcement, governmental employment, and so on.

If the existence of a *Bivens* claim turn s on factors such as those relied upon by the district court, it is hard to see how anything would be left of *Bivens* itself. Indeed, if the potential discovery of sensitive law enforcement information, the potential interference with law enforcement operations, or the potential burden on the public fisc were relevant considerations with respect to the availability of a cause of action, *Bivens* itself would have come out the other way.

II. THE DISTRICT COURT'S QUALIFIED IMMUNITY ANALYSIS DOES NOT ACCOUNT FOR THE SETTLED JURISPRUDENCE ESTABLISHING THE UNLAWFULNESS OF PADILLA'S ALLEGED MISTREATMENT

Unlike the availability of a cause of action, there is no question that, as discussed above, case-specific factual circumstances should—and do—factor into proper analysis of whether defendant officers are entitled to qualified immunity. The Supreme Court has provided that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of

which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); *see also al-Kidd*, 2011 WL 2119110, at *7 ("A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)) (alterations in original)).

Whether the defendant's conduct violated "clearly established" rights "of which a reasonable person would have known" inevitably requires the application of law to facts, *i.e.*, whether it should have been clear based on prior precedent that the defendant's alleged actions toward the plaintiff were unlawful.

a. The Supreme Court Has Consistently Reiterated that Novel Factual Circumstances Do Not of Themselves Compel Immunity

Because qualified immunity analysis therefore turns on the application of general legal principles to specific facts, the Supreme Court has steadfastly refused to "require a case directly on point," *al-Kidd*, 2011 WL 2119110, at *7, lest immunity result from even the most minute case-to-case variations. In *Hope* v. *Pelzer*, for example, the

Supreme Court expressly rejected the "rigid gloss" that the Eleventh Circuit had added to the qualified immunity standard, pursuant to which officers were entitled to immunity unless their conduct was "materially similar" to that which had previously been adjudged unlawful. *See* 536 U.S. at 739. Instead, the Court repeated its own prior precedents for the proposition that,

> For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. (citations and internal quotation marks omitted). Put another way, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 741; *see also Anderson*, 483 U.S. at 640 (rejecting the proposition that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful").

Thus, the relevant question is not whether the plaintiff's claim presents "novel factual circumstances" in the abstract, but rather whether the state of the case law at the time of Padilla's detention and

alleged mistreatment gave the defendants fair warning that their conduct was unconstitutional. *See Hope*, 536 U.S. at 741 (citing *United States* v. *Lanier*, 520 U.S. 259, 270–71 (1997)).

b. The District Court's Analysis Failed Properly to Account for the State of the Case Law at the Time of Padilla's Alleged Mistreatment

Notwithstanding the Supreme Court's repeated refusal to require material similarity of facts in order to overcome qualified immunity, the district court's analysis of the defendants' immunity turned largely on the descriptive uniqueness of the facts of Padilla's case, rather than whether the case law, at the time of his detention, gave defendants the requisite warning about their conduct. As the district court explained,

> Padilla was . . . essentially a class of one, an American citizen detained on American soil and designated an enemy combatant. To say the scope and nature of Padilla's legal rights at that time were unsettled would be an understatement. As amply documented by the Plaintiffs in attachments to their Third Amended Complaint, the Department of Justice's Office of Legal Counsel issued lengthy memoranda, prior to and after Padilla's detention, concluding that various coercive interrogation techniques, including ones allegedly utilized in Padilla's interrogations, were lawful. Some of these conclusions were vigorously challenged within the government, including by the General Counsel of the Navy and a representative of the FBI. A detailed report issued by a Department of Defense working group on detainee interrogations, issued on March 6, 2003, concluded that the interrogation techniques being utilized on

> enemy combatants were lawful. No court during the period of Padilla's detention as an enemy combatant, extending from June 9, 2002 until January 4, 2006, ever addressed the lawfulness of the interrogation techniques utilized on persons designated as enemy combatants.

Lebron, 2011 WL 554061, at *14 (citations omitted); *see also id.* at *15 ("While it is true there was vigorous intra-governmental debate on this issue during Padilla's detention, the qualified immunity case law makes clear that government officials are not charged with predicting the outcome of legal challenges or to resolve open questions of law.").

Instead of using these facts to supplement its analysis of what the case law held or why it did not apply to Padilla, the district court used these observations to supplant case law concerning mistreatment of federal detainees. Thus, although the court stated that, "[t]o say the scope and nature of Padilla's legal rights at that time were unsettled would be an understatement," *id.* at *14, it cited no authority for that conclusion. Nor did it cite or distinguish the vast body of case law holding various forms of prisoner abuse to be unconstitutional. Such case law would include *Hope* itself, and *Brown* v. *Mississippi*, 297 U.S. 278 (1936), which recognized that the right not to be tortured is

"fundamental," *id.* at 286 (citing *Hebert* v. *Louisiana*, 272 U.S. 312, 316 (1926)).

Faced with settled law holding the mistreatment of prisoners or detainees to be unlawful, and faced with a fact that Padilla had been named an enemy combatant, a court's task in assessing a defense of qualified immunity should have been to analyze the cases to determine whether there was any basis for concluding that "enemy combatant" status rendered that case law beside the point. The district court here did not do that, *i.e.*, it did not identify any judicial precedents supporting the conclusion that the illegality of Padilla's alleged mistreatment was not "clearly established."[8]

Instead, the district court's analysis of whether the law concerning Padilla's treatment was "clearly established" turned on non-judicial guidance. In large part, the district court focused on the internal debate within the Justice Department over the legal considerations governing treatment of enemy combatants, the divisions

8. Whether or not an outlier case would be *sufficient* to demonstrate that the relevant law was not clearly established, *see, e.g.*, *Safford Unified Sch. Dist. No. 1* v. *Redding*, 129 S. Ct. 2633, 2643–44 (2009); *see also al-Kidd*, 2011 WL 2119110, at *11 (Kennedy, J., concurring), such a decision must at least be *necessary* in light of the overwhelming authority providing to the contrary.

within which suggested to the court that the law must *not* have been clearly established.

To bolster this conclusion, the district court suggested that a balancing of interests should tilt close cases in favor of government defendants: "The courts have also shown a marked reluctance to deny qualified immunity to officials in circumstances where they were required to balance competing interests of the citizen and the government." *Lebron*, 2011 WL 554061, at *12. As it explained, "Engaging in such 'particularized balancing' of interests precludes a finding of clearly established law, except in the most egregious circumstances." *Id.* at *15.

But neither of these discussions involved or drew on a careful analysis of existing jurisprudence, which is what the Supreme Court has commanded the lower courts to do when assessing whether a plaintiff's constitutional rights were "clearly established." Thus, the district court implicitly concluded that Padilla's status as an "enemy combatant" rendered nugatory the settled judicial precedents prohibiting torture, but without analyzing whether the logic of those settled judicial precedents justified that conclusion - and even though

none of those prior cases had ever suggested that a prisoner's specific status might bear on the legality of his mistreatment.

Rather than protecting the good-faith official acting in an area of legal uncertainty, the district court's analysis, if affirmed, would allow qualified immunity to become a shield for the bad-faith official who could take advantage of (or himself provoke) internal executive branch disagreements notwithstanding the clarity of judicial precedent, and would thereby bar recovery for allegations that, if proven, encompass some of the gravest violations of the supreme Law of the Land.

CONCLUSION

Amici respectfully suggest that, with regard to both the *Bivens* question and the qualified immunity question, the district court asked the wrong questions and misapplied Supreme Court precedent. For the foregoing reasons, *amici* respectfully submit that the decision below be reversed.

Respectfully submitted,

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June 14, 2011

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 6301 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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June 14, 2011

CERTIFICATE OF SERVICE

I certify that this brief was filed electronically on June 14, 2011. Notice of this filing will be sent by operation of this Court's electronic filing system to all parties.

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June 14, 2011