No. 11-6480

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ESTELA LEBRON, *et al.*
Plaintiffs-Appellees,

v.

DONALD RUMSFELD, *et al.*
Defendants-Appellees.

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

BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*

MICHAEL F. HERTZ
Deputy Assistant Attorney General

BARBARA L. HERWIG
(202) 514-5425
ROBERT M. LOEB
(202) 514-4332
AUGUST E. FLENTJE
(202) 514-1278
Attorneys, Appellate Staff
Civil Division, Room 7242
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

Statutes:

Rules:

Regulations:

Legislative Materials:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-6480

ESTELA LEBRON, *et al.*
Plaintiffs-Appellees,

v.

DONALD RUMSFELD, *et al.*
Defendants-Appellees.

BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*

INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 29(a), the United States hereby submits this brief as *amicus curiae*.

The United States has a substantial interest in this matter. The threshold question presented is whether a court should recognize a federal common-law damage action against government officials for detaining Jose Padilla based on a determination by the President that he was closely associated with al-Qaida and should be detained by the military as an "enemy combatant" pursuant to the congressional Authorization for Use of Military Force. As we explain below, this case presents compelling "special factors" that strongly counsel against judicial

creation of a money-damage remedy. Where, as here, the claims principally implicate national security and war powers, courts have recognized that it is not appropriate to create a common-law damage remedy. Moreover, Congress has enacted other methods to review the legality of detention and protect detainees from mistreatment that make judicial recognition of a damages remedy particularly inappropriate. If Congress wishes to provide a damage remedy in this very sensitive setting, it may do so. In the absence of such congressional action, however, such a remedy should not be created by the court, as the district court concluded.

Although this Court need not, and should not, reach the issue, the district court also correctly held that the defendants have a right to qualified immunity. If the Court does reach the question, this is a situation where, under *Pearson v. Callahan*, 129 S.Ct. 808 (2009), this Court should hold the defendants immune without reaching the underlying constitutional issue, as the district court did below. The district court correctly held it was not clearly established at the time that placing Padilla in military detention was unconstitutional. The Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) recognized the President's authority, under the AUMF, to detain American citizens determined to be "enemy combatants." Further, this Court *upheld* the lawfulness of Padilla's military detention and recognized limitations on Padilla's communication that were inherent in such detention. *Padilla v. Hanft*, 423 F.3d 386,

395, 397 (4th Cir. 2005). These cases belie the conclusion that it was clearly established at the time that placing Padilla in military detention was unconstitutional.

In this brief, we do not address the details of Padilla's specific treatment allegations, which have already been thoroughly briefed by the individual defendants.[1] We note nonetheless that the court correctly granted qualified immunity because Padilla failed to sufficiently allege that the particular defendants personally participated in his alleged treatment. The defendants are also entitled to qualified immunity on Padilla's claim under the Religious Freedom Restoration Act.

ARGUMENT

I. A *Bivens* Action Should Not Be Recognized in this Context, Which Directly Implicates War Powers and National Security

This appeal presents a dispositive threshold issue, which supports dismissal of all of the claims asserted by plaintiffs under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). As the district court held, "'special factors' are present in this case which counsel hesitation in creating a right

[1] Notwithstanding the nature of Padilla's allegations, this case does not require the court to consider the definition of torture. Torture is flatly illegal and the government has repudiated it in the strongest terms. Federal law makes it a criminal offense to engage in torture, to attempt to commit torture, or to conspire to commit torture outside the United States. *See* 18 U.S.C. § 2340A. Moreover, consistent with treaty obligations, the President has stated unequivocally that the United States does not engage in torture, *see* May 21, 2009 Remarks by the President on National Security.

of action . . . in the absence of express Congressional authorization." JA 1525. Those factors "include the potential impact of a *Bivens* claim on the Nation's military affairs, foreign affairs, intelligence, and national security" given that the decision to detain Padilla was "made in light of the most profound and sensitive issues of national security, foreign affairs and military affairs." JA 1522, 1525. As the court explained, creating a cause of action would "by necessity entangle[] the Court in issues normally reserved for the Executive Branch, such as those issues related to national security and intelligence"; it would launch "a massive discovery assault in the intelligence agencies" and it "could "raise numerous complicated state secret issues." JA 1522-24. Additionally, creating a *Bivens* remedy is particularly inappropriate in this context given that "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 . . . money damages." JA 1522.

Resolving the constitutional claims on this basis, without reaching the underlying constitutional issues, is consistent with the Supreme Court's decision in *Wilkie v. Robbins*, 551 U.S. 537, 550, 554 (2007), where, without reaching the constitutional issues, the Court dismissed the *Bivens* action based on the special factors presented by the context there. It is also consistent with the well established

rule that courts should avoid deciding difficult or novel constitutional claims where the issues can be more easily resolved on non-constitutional grounds. *See Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable.").

Here, where Padilla's damage claims directly relate, inter alia, to the President's war powers, including whether and when a person captured in this country during an armed conflict can be held in military detention under the laws of war, it would be particularly inappropriate for this Court to unnecessarily reach the merits of the constitutional claims. As Justice Kennedy noted in the Supreme Court's denial of review of the Fourth Circuit's ruling after Padilla was transferred to civilian criminal custody, "[t]hat Padilla's claims raise fundamental issues respecting the separation of powers, including consideration of the role and function of the courts, also counsels against [unnecessarily] addressing those claims." *Padilla v. Hanft*, 126 S.Ct. 1649, 1650 (2006) (Kennedy, J., concurring). That advice applies equally to Padilla's claims here.

In *Bivens*, the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's

constitutional rights." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1947 (2009). In creating a common law action under the Fourth Amendment against federal officials for conducting a warrantless search for drugs, the Court reasoned that there were "no special factors counseling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396-397.

Subsequent to *Bivens*, the Supreme Court's "more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988). As this Court has explained, "since Bivens, the Court has been very hesitant to imply other private actions for money damages." *Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 409 (4th Cir. 2003). Indeed, in "the 38 years since *Bivens*, the Supreme Court has extended it twice only: in the context of an employment discrimination claim in violation of the Due Process Clause . . . and in the context of an Eighth Amendment violation by prison officials." *Arar v. Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc). Other than those cases, the Supreme Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001).

Because the power to create a new constitutional-tort cause of action is "not expressly authorized by statute," it must be undertaken with great caution if it is to

be exercised at all. *Malesko*, 534 U.S. at 66-70. In *Malesko*, the Court observed that the *Bivens* Court had "rel[ied] largely on earlier decisions implying private damages actions into federal statutes," but the Court has since "retreated" from those decisions and "abandoned" that practice. *Id*. at 67 & n.3. "The Court has therefore on multiple occasions declined to extend *Bivens* because Congress is in a better position to decide whether or not the public interest would be served by the creation of new substantive legal liability." *Holly v. Scott*, 434 F.3d 287, 290 (4th Cir. 2006); *see also Iqbal*, 129 S.Ct. at 1948 (*Bivens* liability has not been extended to new contexts "[b]ecause implied causes of action are disfavored"); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases"). The Eighth Circuit has described the Supreme Court's recent decisions as erecting a "'presumption against judicial recognition of direct actions for violations of the Constitution by federal officials.'" *Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005).

Here, there are multiple special factors counseling against recognition of a *Bivens* claim, and those factors, "[t]aken together," *Chappell v. Wallace*, 462 U.S. 296, 304 (1983), counsel strongly against creating a *Bivens* remedy.

A. A *Bivens* Remedy Should Not Be Created Because This Case Directly Implicates National Security and War Powers

The national security and war powers context presented by the claims here clearly counsels against the recognition of a *Bivens* action.

Even outside the *Bivens* context, the courts have recognized that "[m]atters intimately related to * * * national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981). As the Supreme Court explained, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988). Thus, it is hardly surprising that courts have been particularly careful not to intrude upon quintessential sovereign prerogatives by creating a *Bivens* remedy in contexts involving armed conflict and national security. *See United States v. Stanley*, 483 U.S. 669, 678-85 (1987) ("the Constitution confers authority over the Army, Navy, and militia upon the political branches" and "counsels hesitation in our creation of damages remedies in this field"); *Arar*, 585 F.3d at 574-75 ("[i]t is a substantial understatement to say that one must hesitate before extending *Bivens* into such a context"); *Rasul v. Meyers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) ("[t]he danger of obstructing U.S. national security policy is one such [special] factor" counseling hesitation); *Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008); *Beattie v. Boeing*

Co., 43 F.3d 559, 563-66 (10th Cir. 1994); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985).

Here, the context of Padilla's *Bivens* claims plainly implicates these matters. Padilla was detained by the military upon the decision of the President to designate him an "enemy combatant." He claims that the military detention was unconstitutional and seeks money damages from those who implemented this Presidential directive. His detention-related *Bivens* claims would require a court to consider the legality of a decision by the President to detain Padilla as an "enemy combatant." Padilla also seeks damages in regard to the lawfulness of his treatment while in military detention. Thus, a court would have to inquire into, and rule on the lawfulness of, the conditions of Padilla's military confinement and the interrogation techniques employed against him. Congress has not provided any such cause of action, and, as the district court concluded (JA 1522), a court should not create a remedy in these circumstances given the national security and war powers implications. *Cf. Arar*, 585 F.3d at 580-81 ("Congress is the appropriate branch of government to decide under what circumstances (if any) these kinds of policy decisions – which are directly related to the security of the population and the foreign affairs of the country – should be subjected to the influence of litigation").

B. A *Bivens* Remedy Should Not Be Created Because Congress has Created Other Mechanisms To Protect Padilla's Interests, But Chosen Not to Create a Damage Remedy.

In the national security and war powers context, "it is irrelevant to a special factors analysis whether the laws currently on the books afford * * * an adequate federal remedy." *Stanley*, 483 U.S. at 683. That being said, in addition to these compelling separation of powers factors suggesting hesitation, Congress has addressed Padilla's claimed harm in a manner that also calls for the federal courts to stay their hand in creating a damage remedy.

Even outside the national security and war powers context, where there is "any alternative, existing process for protecting" the plaintiff's interests, such existing process would raise the inference that Congress "expected the Judiciary to stay its *Bivens* hand" and "refrain from providing a new and freestanding remedy in damages." *Wilkie v. Robbins*, 551 U.S. 537, 550, 554 (2007). The congressionally-authorized mechanism need not provide for a damages action. *See Zimbelman v. Savage*, 228 F.3d 367, 371 (4th Cir. 2000). Instead, it is more than sufficient that it reflect Congress's chosen method for protecting the interest at stake, including its judgment as to who should and should not benefit from the scheme. *See id.*; *Judicial Watch*, 317 F.3d at 410 (no *Bivens* remedy where "Congress has sufficiently attended to the rights and remedies"); *see also Miller v. U.S. Dep't of Agr. Farm Serv. Agency*,

143 F.3d 1413, 1416 (11th Cir. 1998) ("a right to judicial review under the APA is[], alone, sufficient to preclude * * * a *Bivens* action").

This is true even where the mechanism excludes groups that might include the plaintiff seeking to utilize *Bivens*. As this Court explained in *Zimbelman*, "[t]o view the exemption [of certain employees] . . . as an invitation for the judicial creation of new . . . remedies" is not appropriate and "courts have thus uniformly rejected the efforts" of those exempt from the congressional scheme "to bring a *Bivens* action." 228 F.3d at 371. Thus, "[t]he 'special factors' concept 'include[s] an appropriate judicial deference to indications that congressional inaction has not been inadvertent.'" *Hall v. Clinton*, 235 F.3d 202, 204 (4th Cir. 2000).

Here, Congress has provided a set of mechanisms to prevent detainee mistreatment by the military and to challenge unlawful detention. These mechanisms must be viewed in the unique context presented: action by our military in carrying out its war powers where courts normally refrain from intervening, as we have discussed. Given Congress's delineation of when court involvement is appropriate and the war powers context of this case, no *Bivens* damages remedy should be created.

1. As to the lawfulness of detention and access to counsel claims, here there was an alternative congressionally authorized mechanism to protect the very interest

he asserts. *See* 28 U.S.C. § 2241. By bringing a habeas action, Padilla was able to challenge the lawfulness of his detention and seek access to counsel to make that remedy meaningful. As we know, two days after military detention was authorized, Padilla's counsel filed a petition for a writ of habeas corpus challenging his military detention, and counsel access was sought. JA 1507-10. Eventually, this Court upheld his detention as lawful based upon facts stipulated by Padilla to resolve "whether the President has the authority to detain Padilla." *Padilla*, 423 F.3d at 390 n.1. This Court also recognized the "importan[ce of] . . . restrict[ing] the detainee's communication with confederates so as to ensure that the detainee does not pose a continuing threat." *Id*. at 395.

Thus, Padilla had a congressionally-authorized mechanism for challenging the lawfulness of his detention. In the wartime context presented, the habeas process should preclude the creation of a *Bivens* remedy. The fact that the habeas statute provides no damage remedy or personal redress against Defense Department officials is not a ground for supplementing that remedy with a judicially-created money damage claim. *See Zimbelman*, 228 F.3d at 371. The wartime context, and the habeas statute together provide "a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages" in regard to Padilla's claim of unlawful military detention. *Wilkie*, 551 U.S. at 550.

2. With respect to allegations regarding Padilla's treatment, Congress has provided a set of enforcement mechanisms to prevent detainee mistreatment by the military. This scheme, combined with the unique context of the case, are convincing reasons to refrain creating a damages remedy.

First, as former Secretary Rumsfeld argues (Br. 19-20), the military is governed by a comprehensive system of military discipline that provides for the reporting of and investigation into any credible claims of detainee mistreatment. *See* Uniform Code of Military Justice, 10 U.S.C. § 801, *et seq*. Thus, as with servicemembers in *Chapell*, this "comprehensive internal system of justice . . . . provides for the review and remedy of complaints and grievances such as those presented" here. 462 U.S. at 302. This scheme, created by the political branches pursuant to their near-plenary authority over military matters, is designed to protect the interests of detainees, and comprises the "alternative, existing process for protecting" the plaintiff's interests that Congress selected. *Wilkie*, 551 U.S. at 550. As the D.C. Circuit explained in a related context, "Congress has passed comprehensive legislation dealing with the subject of war crimes, torture, and the conduct of U.S. citizens acting in connection with military activities abroad . . . . [b]ut Congress has declined to create a civil tort cause of action." *Saleh v. Titan Corp.*, 580 F.3d 1, 13 n.9 (D.C. Cir. 2009) (citing, among other things, the UCMJ), *cert. denied*, 2011 WL 2518834 (June 27, 2011).

Further, Congress created special compensation schemes for personal injuries caused by the military. *See* Military Claims Act, 10 U.S.C. § 2733; *Saleh*, 580 F.3d at 13. In the Military Claims Act, Congress provided that the military "may settle, and pay in an amount not more than $100,000, a claim against the United States for . . . personal injury . . . caused by a civilian officer or employee . . . or a member of the . . . Navy . . . acting within the scope of his employment, or otherwise incident to noncombat activities of that department." 10 U.S.C. § 2733(a).[2] This compensation statute is one of "the various 'enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries'" caused by the military, and show that an additional *Bivens* remedy should not be created in this context. *Chappell*, 462 U.S. at 299.

To be sure, military regulations might preclude or limit a claim brought by an "enemy combatant" detainee like Padilla. *Cf.* 32 C.F.R. § 750.45(a)(5) (allowing only property claims to be brought by prisoners of war); 32 C.F.R. § 750.44(I) (precluding claims by a "national . . . of a country in armed conflict with the United States, or an ally of such country, unless the claimant is determined to be friendly to the United States"). But the fact the Congress conferred upon the Secretary of the Navy the authority to define and limit the circumstances when such claims would be

[2]The Military Claims Act applies only to claims not covered by the Federal Tort Claims Act (FTCA). *See* 10 U.S.C. § 2733(b)(2).

appropriate is a strong sign that this Court should not "add layers of process to what Congress has already provided" (*Zimbelman*, 228 F.3d at 371) by creating a *Bivens* remedy.[3]

Additionally, Congress has repeatedly considered the rights of wartime enemies detained and interrogated in U.S. custody. *See*, *e.g.*, Detainee Treatment Act, § 1003(a) (prohibiting cruel, inhuman, or degrading treatment of detainees). While Congress has created and bolstered mechanisms to ensure that detainee treatment is lawful and appropriate, it has notably *declined* to create a damages remedy. Thus, in addition to the alternative review mechanisms described above, the fact that Congress has considered the issue, yet not created a damages remedy in court, should preclude the creation of a *Bivens* remedy here. *See Wilkie*, 551 U.S. at 550. In short, "Congress is in a far better a position than a court to evaluate the impact of a new species of litigation against those who act on the public's behalf," and "can tailor any

---

[3] Congress has more generally provided a variety of ways for a detainee to challenge the conditions of confinement while in federal custody. *See*, *e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979) (28 U.S.C. § 1361); *Bunn v. Conley*, 309 F.3d 1002, 1009 (7th Cir. 2002) (APA). With respect to the APA, Congress has chosen carefully in delineating how it would apply to activities of the military. *See* 5 U.S.C. § 701(b)(1)(G) (excluding from review "military authority exercised in the field in time of war"). It is not clear whether that limitation would have been applicable with respect to Padilla's detention, but it undoubtedly evidences Congress's intention of carefully regulating judicial review in the context of the military's exercise of war powers, not *inviting* further review through the creation of a *Bivens* remedy. *Cf. Chappell*, 462 U.S. at 300 (restricting judicial involvement through the FTCA and *Bivens* "becomes imperative in combat").

remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees." *Id.* at 562; *see Arar*, 585 F.3d at 581 ("if Congress wishes to create a remedy for individuals * * *, it can enact legislation that includes enumerated eligibility parameters, delineated safe harbors, defined review processes, and specific relief to be afforded"). Thus, as the district court correctly observed, "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." JA 1522. This factor strongly militates against extending a *Bivens* remedy to these circumstances.

Padilla argues (Br. 20-21) that a remedy should be implied because the DTA expressly bars all actions filed by aliens detained *at Guantanamo*, but does not otherwise expressly preclude lawsuits by citizens – including this lawsuit. *See* 28 U.S.C. § 2241(e)(2) (barring "any other action against the United States or its agents relating to any aspect of the detention" at Guantanamo). This argument misses the mark. As just explained, Congress had created a host of possible avenues for judicial review of various matters that that could have been – and were being – utilized by Guantanamo detainees. *See*, *e.g.*, *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480-81 (D.D.C. 2005) (describing various claims). The Detainee Treatment

Act provision cited by Padilla ensured that review mechanisms like these were *not* available to Guantanamo detainees; the law says or suggests nothing about whether a court should create a *Bivens* remedy and, instead, the factors just discussed lead to the conclusion that no such remedy can properly be created either for Padilla or the detainees at Guantanamo. *Cf. Rasul*, 563 F.3d at 532 n.5.

In sum, judicial creation of a damages remedy is inappropriate because this case implicates national security and war powers where the judicial branch normally stays its hand, and Congress has enacted other mechanisms to protect Padilla's interests. This Court should therefore affirm the holding of the district court declining to create a *Bivens* remedy, without reaching the merits of his claims.

II. THE *BIVENS* CLAIMS ARE BARRED BY QUALIFIED IMMUNITY.

If this Court holds that no *Bivens* remedy should be created here, then it need not and should not reach the issue of qualified immunity in regard to those claims. If the Court does, however, reach this issue, it should hold that the district court properly found the defendants entitled to qualified immunity.

A. This Court Should Reject The Detention Claims On The Ground That The Law Was Not Clearly Established

1. Government officials 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). Importantly, "the right the official is alleged to have violated must have been 'clearly established' in a . . . particularized . . . sense." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Underlying the right to qualified immunity is a recognition that damages actions "can entail substantial social costs" and "unduly inhibit officials in the discharge of their duties." *Anderson*, 483 U.S. at 638; *see also Harlow*, 457 U.S. at 807. The immunity stems from the potential injustice "of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion," and "the danger that the threat of such liability would deter 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). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011). It also ensures that able candidates for government office are not deterred by

the threat of damage suits from entering public service. *Harlow*, 457 U.S. at 814.

The Supreme Court has emphasized that courts may "exercise their sound discretion" to bypass the threshold question of whether there was a constitutional violation and instead simply hold that the law was not clearly established at the time. *See Pearson*, 129 S.Ct. at 818; *Walker v. Prince George's County*, 575 F.3d 426, 429 (4th Cir. 2009) ("We . . . decline to invest 'a substantial expenditure of scarce judicial resources' by engaging in the 'essentially academic exercise' of determining whether that right exists at all").

Indeed, as the Supreme Court recently explained, courts "should think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.'" *al-Kidd*, 131 S. Ct. at 2080. The discretion recognized in *Pearson* permits a court, where appropriate, to adhere to the general rule of constitutional avoidance – the rule that a court should not pass on questions of constitutionality, unless such adjudication is necessary. 129 S.Ct at 821; *see Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011) ("our usual adjudicatory rules suggest that a court *should* forbear resolving this issue" because a "'longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them'").

2. As the district court held, this case can be resolved on the ground that the relevant law was not clearly established on the legality of Padilla's detention, and this Court should not address the broader constitutional issues. Constitutional avoidance is particularly appropriate here, where a ruling would directly implicate core war powers and national security functions.

The claims relating to Padilla's detention can therefore be resolved by holding that the military detention of a citizen, apprehended in the United States in a congressionally authorized armed conflict, was not clearly established to be unconstitutional at the time. In *Hamdi*, the Supreme Court held that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), authorized the military detention of an American citizen who was captured in Afghanistan and detained in the United States. 542 U.S. at 518-22. The *Hamdi* plurality specifically recognized that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant." *Id.* at 519. While Padilla was apprehended in the United States, and not in Afghanistan like Hamdi, *Hamdi* nonetheless confirms that a federal officer at the time could reasonably believe that military detention was constitutional.

This Court's decision in Padilla's own habeas case also mandates a grant of qualified immunity. This Court held that the President possessed authority under the

AUMF to detain Padilla in military custody. *Padilla*, 423 F.3d at 389, 395. After finding that Padilla qualified as an enemy combatant under the definition adopted by the Supreme Court in *Hamdi*, this Court declared that "[Padilla's] military detention . . . is unquestionably authorized by the AUMF as a fundamental incident to the President's prosecution of the war against al Qaeda in Afghanistan." *Padilla*, 423 F.3d at 392. This Court explained that this authority covered a "committed enem[y] such as Padilla, who associated with al Qaeda and the Taliban regime, who took up arms against this Nation in its war against these enemies, *and* who entered the United States for the avowed purpose of further prosecuting that war by attacking American citizens and targets on our own soil." *Id.* at 397; *cf. al-Madhwani v. Obama*, — F.3d —, 2011 WL 2083932, at *2 (D.C. Cir. May 27, 2011) ("the authority conferred by the AUMF covers at least 'those who are part of forces associated with Al Qaeda or the Taliban'"); *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *vacated as moot*, 129 S. Ct. 1545 (2009). The issue here, for the purposes of qualified immunity, is not whether this Court's decision was correct, whether the Supreme Court would have agreed had it reviewed the decision, or whether the detention of Padilla was ultimately constitutional or appropriate as a matter of policy. The issue, rather, is whether the conclusion by three Judges of this Court upholding the detention rebuts any claim that the contrary view was clearly established at the time. It does.

Further, contrary to the reasoning of another district court, *see Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1037 n.4 (N.D. Cal. 2009), *appeal pending*, No. 09-16478 (9th Cir.), qualified immunity is warranted even though, like *Hamdi*, this Court's decision issued after many of the events at issue here. *See Bame v. Dillard*, 637 F.3d 380, 387-88 (D.C. Cir. 2011) ("decisions of the courts of appeals reached after the events . . . are relevant to the issue of qualified immunity" because "'[i]f judges . . . disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy'") (quoting *Pearson*, 129 S.Ct. at 823). The Court of Appeals, after all, sought in *Padilla* to ascertain the existing law, not to pronounce new law for prospective application. In sum, as the district court recognized, given this Court's prior holding it is difficult to see how the Court could conclude "that the contrary position . . . was the then 'clearly established' law." JA 1529.

3. The rulings of other courts addressing the legality of Padilla's detention do not preclude qualified immunity here. *See*, *e.g. Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003). Disagreement among the courts would be an inappropriate basis for concluding that the point in dispute is clearly established. As the district court explained, these "strikingly varying judicial decisions appear to be the very definition of unsettled law." JA 1529. Thus, the conflicting rulings on the legality of Padilla's detention compel a court to grant, rather than deny, qualified immunity because they

attest to the lack of a clearly established rule. *See al-Kidd,* 2011 WL 2119110, at *10 (Kennedy, J., concurring) ("the national officeholder need not guess at when a relatively small set of appellate precedents have established a binding legal rule"). Officers who were required to guess in such a manner "would be deterred from full use of their legal authority" and, in words that apply squarely to these circumstances, the "consequences of that deterrence must counsel caution by the Judicial Branch, particularly in the area of national security." *Id*.

Padilla argues that this Court's earlier decision is of no moment given that this Court "assum[ed] the facts alleged by the Executive were true" and that now Padilla alleges a different set of facts and disputes whether he carried a weapon in Afghanistan. Br. 39-40. But this argument does not change the reality that the decision to detain Padilla was based on - as Padilla alleges (JA 77) - information that he was operating in Afghanistan in conjunction with al-Qaida. *See* JA 117 (Padilla was "in Afghanistan in 2001"; "met with senior Usama Bin Laden lieutenant Abu Zubaydah"; "approached Zubaydah with their proposal to conduct terrorist operations within the United States"; and then received "training from Al Qaeda operatives in wiring explosives"). Padilla presents no reason to believe that the new facts he alleges now would have altered this Court's decision. *Cf. al-Madhwani*, 2011 WL 208392, at *2 (AUMF inquiry requires "a functional rather than a formal approach"

that "focus[es] upon the actions of the individual in relation to the organization"). Further, Padilla does not allege (*see* JA 77) that the defendants knew and predicated their actions on the facts Padilla now alleges years later to be true. *See Anderson*, 483 U.S. at 641 (qualified immunity inquiry is made "in light of clearly established law and the information the searching officers possessed").

4. Finally, Padilla argues that even if it was lawful to detain him, defendants are personally liable for aspects of his detention in military custody – including the fact that he was unable to meet with his attorneys or other visitors from June 2002 until March 2004 (JA 91) – because at the very least it was clearly established that he could not be "deprive[d] . . . of contact with attorneys or family." Br. 40; *see* JA 91 (Padilla isolated from counsel to allow "United States [to] . . . obtain all possible intelligence"). It is true, as Padilla argues, that *Hamdi* requires, without elaborating, that detainees receive due process that is meaningful. *See Hamdi*, 542 U.S. at 533 (detainee must receive "fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker"). But again, in Padilla's habeas case, this Court reasoned that military detention could properly "restrict the detainee's communication with confederates so as to ensure that the detainee does not pose a continuing threat to national security even as he is confined." *Padilla*, 423 F.3d at 395; *see also Hamdi v. Rumsfeld*, 296 F.3d 278, 284 (4th Cir. 2002). Given that Padilla was able to meet

with counsel before being moved into military detention (JA 76, 1507) and "[w]ithin two days of his designation and detention, Padilla's able counsel moved . . . for a writ of habeas corpus, which allowed an independent judicial officer to hear and consider the detainee's challenge to the President's . . . order" to detain him, JA 1528, it was not clearly established at the time that these aspects of Padilla's detention were unconstitutional.[4]

Accordingly, the district court properly granted qualified immunity as to the claims regrading the legality of Padilla's detention in military custody.

B. The Claims of Unlawful Treatment Were Properly Dismissed Based on Qualified Immunity.

While this Court likewise need not address Padilla's treatment allegations given that special factors preclude a *Bivens* suit, if it does, it should affirm the district court's holding granting qualified immunity. Padilla has failed to sufficiently allege the personal involvement by the defendants in his alleged mistreatment.

Iqbal requires that "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." 129 S.Ct. at 1948. A defendant's position as a supervisor or the head

---

[4] Padilla's access to the courts claim (Br. 36) likewise fails. To properly allege such a claim, one must identify a legal claim that could not be brought because of the actions of the defendants. *See Christopher v. Harbury*, 536 U.S. 403, 412-15 (2002). Here, the only such claim was Padilla's habeas action, which he was able to litigate.

of a particular agency is not sufficient to state a claim under *Bivens*. *See Trulock v. Freeh*, 275 F.3d 391, 402 (4th Cir. 2001); *see also Iqbal*, 129 S. Ct. at 1948 ("Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior"). *Bivens* liability is accordingly limited to those who are "directly responsible" for the clear constitutional violation. *Malesko*, 534 U.S. at 70-71.

Padilla has not sufficiently alleged personal involvement by the defendants that remain in the case.[5] He alleges that "Senior Defense Policy Defendants" authorized his abuse (JA 96) but does not differentiate among these defendants or identify what role each defendant played in the alleged constitutional violations. Such generalized allegations are inadequate, as "the burden rests on the plaintiffs to provide fair notice of the grounds for the claims made against each defendant." *Robbins v. Oklahoma*, 519 F.3d 1242, 1250 (10th Cir. 2008).

The few allegations that identify the actions of specific individuals do not relate to Padilla. Rather, they relate to policies that apply to the treatment of detainees *held outside of the United States*.[6] Further, the only allegations that link

---

[5] Padilla voluntarily dismissed his claims against many of the original defendants, including the interrogators and guards who had direct contact with him (JA 75). *See* Notice of Dismissal (Dec. 14, 2010).

[6] *See*, *e.g.*, JA 84-85 (¶¶ 59, 61, 62) (alleging Rumsfeld, Wolfowitz, and Haynes (continued...)

actions abroad with those at the Brig have nothing to do with interrogation methods or Padilla's alleged treatment. *See* JA 97 (¶ 107) (alleging similar "privileges" provided to Hamdi and al-Marri as are provided at Guantanamo and describing a request to use similar translation services at Guantanamo and the Brig). Padilla also cannot rely on the conclusory assertion, lacking any support, that policies used at Guantanamo were being used at the Brig. JA 96, 101 (¶¶ 105, 125) (assertion that Guantanamo policies were being used "elsewhere"). And Padilla cannot avoid dismissal with allegations so general that they amount to a respondeat superior theory of liability. *See* JA 84 (¶ 56) (defendants "involved in making decisions about the range of interrogation techniques that should be generally permitted"), JA 97, 98 (¶¶ 108 & 110) (Jacoby's agency "was responsible for interrogations"). Further, some of his more serious allegations – for example, his claim of threats of death or serious injury (JA 90) – are not tied to any alleged policy even at Guantanamo. *See* JA 86, 419, 431.

In sum, this Court should affirm the district court's holding that the defendants were entitled to immunity on Padilla's mistreatment claims.

---

[6](...continued)
involved in Guantanamo interrogation techniques); JA 85-89 (¶¶ 64-78) & JA 402, 418, 433 (interrogation techniques at Guantanamo); JA 123 (reporting on detainees outside of the U.S.); JA 295 (addressing "combatants held outside the United States").

C. The RFRA Claims Were Properly Dismissed Based On Qualified Immunity.

The district court also properly dismissed Padilla's claims brought under the Religious Freedom Restoration Act (RFRA). As an initial matter, we join in appellees' argument that RFRA does not create an individual damages action against federal officials. *See* Hanft Br. 46-48; *see also Sossamon v. Texas*, 131 S. Ct. 1651, 1659 (2011).

Qualified immunity was appropriate even if RFRA does create a damages remedy. Padilla alleges his access to a Koran was "revoked" beginning on an unspecified date and lasting until March 2004 (JA 94) and that he was not given a clock or other means to know when to pray. *Id*. He alleges that this activity was part of an interrogation plan. JA 96. Although defendants must accept the allegations of the complaint as true at the motion to dismiss stage, we note that current Department of Defense policy does not permit denial of access to religious texts or undue interference with prayer. In any event, Padilla's allegations do not show a violation of statutory rights that were clearly established at the time of his detention.[7]

RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion" unless it "further[s] . . . a compelling interest" and is the "least

[7] Additionally, as with Padilla's other treatment allegations, he fails to allege personal involvement by any specific defendant in this activity. *See* JA 96.

restrictive means" to further it. 42 U.S.C. § 2000bb-1. When applying RFRA in the detention context, officials retain broad discretion in devising appropriate policies to further legitimate detention-related government interests. *Cf.* S. Rep. No. 103-111, 1993 U.S.C.C.A.N. 1899-1900 (courts should "giv[e] due deference to the experience and expertise of prison . . . administrators in establishing necessary regulations and procedures to maintain good order, security and discipline"); *Turner v. Safley*, 482 U.S. 78, 84-85 (1987).

As for qualified immunity, in the context of RFRA – even where the compelling interest test applies – government officials cannot properly be held personally liable for a policy that burdens religion unless it was "clearly established . . . that the . . . [p]olicy . . . was not . . . the least restrictive means of furthering a compelling governmental interest." *Redd v. Wright*, 597 F.3d 532, 535 (2d Cir. 2010); *see also DiMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir. 1995) (First Amendment inquiry required "a particularized balancing that is subtle, difficult to apply, and not yet well defined" would "only infrequently" be "clearly established" for purposes of qualified immunity).

Assuming that RFRA applies here, we may further assume that Padilla has alleged a "substantial[] burden" on religious exercise. However, even if Padilla could establish that the policy at the time was not the least restrictive means to further the

government's undoubtedly compelling interest in successfully interrogating him about potential al-Qaida attacks, the defendants here would and must be entitled to qualified immunity. Immunity is warranted because it simply was not "clearly established by either the Supreme Court or this court that" an interrogation policy burdening a detainee's religious practice "was *not* . . . the least restrictive means of furthering a compelling governmental interest." *Redd*, 597 F.3d at 535 (emphasis added). Padilla cannot "point to . . . case law declaring [a] . . . substantially similar policy" invalid. *Id*. Without such a clear holding in the context of intelligence interrogation, it is not appropriate to hold government officials personally liable, even if it may be that they struck the balance between the competing interests incorrectly. As the district court concluded, "[n]o American court during this period had ever definitively addressed the potential applicability of RFRA to persons who were undergoing interrogation as enemy combatants" and there were "no 'bright lines' establishing . . . settled federal law" on those issues. JA 1532. Thus, the district court properly granted the defendants qualified immunity on the RFRA claims.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

MICHAEL F. HERTZ
Deputy Assistant Attorney General

BARBARA L. HERWIG
(202) 514-3602
ROBERT M. LOEB
(202) 514-4332
AUGUST E. FLENTJE
(202) 514-1278
Attorneys, Appellate Staff
Civil Division, Room 7242
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

JULY 2011

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) and 32(a)(7)(B) because this brief contains 6979 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared with WordPerfect-X5 in a proportional typeface with 14 characters per inch in Times New Roman.

s/August E. Flentje
August E. Flentje
Counsel for the United States

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2011, I electronically filed the foregoing "BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*" with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/August E. Flentje
August E. Flentje
Counsel for the United States