11-6480

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

Reply Brief of Plaintiffs–Appellants

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INTRODUCTORY STATEMENT

Defendant Donald Rumsfeld opens his brief with the axiomatic statement that the "law of armed conflict forbids a policy of 'no quarter,'" and that the United States must therefore be permitted to detain enemies captured during hostilities. Rumsfeld Br. 3. No one would suggest otherwise. But the clear implication of Rumsfeld's argument is that only two options were practicably available to Defendants for incapacitating Jose Padilla: to execute him, or to subject him to unconscionable brutality in the Charleston Brig. The facts of this case powerfully rebut that construct. The military did not capture Jose Padilla on an Afghan battlefield, or even on an Illinois street; Padilla was seized from a New York jail, where he was already securely incapacitated. And when the government lost the courage or conviction to defend Padilla's military detention before the Supreme Court, Padilla was not let loose; he was tried and convicted on civilian criminal charges. The unavoidable truth is that the purpose of Padilla's military detention was *not* wartime incapacitation but rather brutal interrogation—a wholly impermissible ground for detaining a United States citizen, and a categorically unlawful means of treating one.

Rumsfeld is not alone in his disingenuous framing of this case. All of the briefs submitted by Defendants and their amici ignore or obscure the distinction between enemy soldiers captured on foreign battlefields and a U.S. citizen seized

from civilian criminal custody; between the "core strategic matters of warmaking" that are reserved to the political branches, *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004), and the "individual liberties" of U.S. citizens, regarding which the "Constitution … most assuredly envisions a role for all three branches" of government, *id.* at 536. Just days ago, another court rejected Rumsfeld's attempt to conflate the two, laying bare the fiction that the detention and torture of an American citizen away from any actual hostilities implicates the warmaking authority. *Doe v. Rumsfeld*, No. 1:08-CV-1902, 2011 WL 3319439, at *8–12 (D.D.C. Aug. 2, 2011) (allowing an American citizen detained and mistreated *in Iraq* to pursue a *Bivens* claim against Rumsfeld).

Relatedly, Defendants and their amici predicate their arguments on an allegation that is at odds with the complaint and that has never been adjudicated by any court: that Jose Padilla is an "enemy combatant." It is because of that status, Defendants argue, that this Court should neither recognize a constitutional cause of action that would be available to other citizens, nor hold Defendants liable for conduct that would be squarely prohibited in ordinary circumstances.

But Padilla is not an enemy combatant. JA-78 (3AC ¶ 44).[1] As this Court is well aware, at the precise moment during Padilla's habeas corpus proceedings

[1] Indeed, Defendants repeatedly cite "facts" and advance arguments that are at variance with the pleadings. In a short footnote, they defend that practice by contending misleadingly that the attachments to Plaintiffs' complaint trump the

when the government would have been required either to defend the legal validity of the "enemy combatant" designation (in the Supreme Court) or the factual validity of its application to Padilla (in the district court), the government abruptly terminated the proceedings by returning Padilla to civilian custody. *Padilla v. Hanft* (*Padilla VI*), 432 F.3d 582 (4th Cir. 2005). Indeed, even now, the government seeks to avoid a judicial determination of Padilla's status by asserting that he lacks standing to challenge the enemy-combatant designation. Defendants' insistence that a unilateral designation that has never been judicially affirmed (and

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allegations within it. Defs.' Br. 28 n.10. As a general statement of law, that is at best disingenuous. When attached documents include the self-serving justifications of the Defendants for the misconduct at issue in the litigation, they cannot possibly be deemed to override the complaint itself. *See, e.g., Jones v. Cincinnati*, 521 F.3d 555, 561 (6th Cir. 2008) (attachments do not control "[w]here a plaintiff attaches to the complaint a document containing unilateral statements made by a defendant, where a conflict exists between those statements and the plaintiff's allegations in the complaint, and where the attached document does not itself form the basis for the allegations"); *N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 455–56 (7th Cir. 1998) ("it is necessary to consider why a plaintiff attached the documents, who authored the documents, and the reliability of the documents"); *Pinder v. Knorowski*, 660 F. Supp. 2d 726, 736–37 (E.D. Va. 2009) ("While no Fourth Circuit cases have considered this particular issue, the reasoning is sound; Plaintiff did not attach Defendant Whitson's affidavit to prove the facts in the affidavit, but rather to support the allegations in his Complaint.") (adopting the approach of the Sixth and Seventh Circuits). A contrary rule would be irrational and unworkable: an employee alleging discriminatory termination could not attach the letter of termination to the complaint; a prisoner alleging unconstitutional arrest could not attach the police report following the arrest; and an investor alleging malfeasance could not attach the allegedly altered financial reports. Here, Plaintiffs rely on the attachments to show that Defendants detained and abused Padilla, not to endorse the dubious rationales for why they might have done so.

that has been challenged in this lawsuit) strips Plaintiffs of a cause of action and imbues Defendants with immunity for torture constitutes impermissible bootstrapping and should be flatly rejected by this Court.

Defendants and their amici similarly ignore or obscure that the overwhelming majority of the complaint's causes of action concern the cruel conditions under which Padilla was held and the inhumane interrogations to which he was subjected; only *one* of eleven causes of action challenges the lawfulness of his "enemy combatant" designation. Plaintiffs' claims of gross mistreatment receive very little attention in Defendants' pleadings. Rumsfeld states simply (and remarkably) that Padilla's allegations of abuse—which include beatings, excruciating stress positions, sleep and sensory deprivation, and threats of death—"are the normal consequence of classification as an enemy combatant." Rumsfeld Br. 10. The other Defendants and amici seek to evade the gravity of the allegations by insisting—on the basis of a willful misreading of the complaint—that Plaintiffs have not satisfied the pleading standards enunciated in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). To the contrary, as elaborated below, Plaintiffs have clearly and plausibly alleged that Defendants were directly responsible for Padilla's horrific ordeal.

At bottom, Defendants seek a "national security" exemption for the gross mistreatment of an American citizen on American soil. The district court's order

granting that exemption was, in the words of Retired Military amici, both "dangerous and wrong." Retired Military Amicus 9. To hold otherwise would reward these Defendants for their deliberate attempts to circumvent longstanding legal precedents and to undermine fundamental protections owed to all citizens: the right not to be arbitrarily detained and mercilessly abused by government officials.

ARGUMENT

I. Plaintiffs' Complaint Alleges Classic *Bivens* Claims.

As Plaintiffs set out in their opening brief, this suit seeks to hold individual federal officers liable for grave deprivations of constitutional rights, and Plaintiffs' claims are plainly cognizable under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). It is well established that U.S. citizens may seek a damages remedy for unlawful seizure and detention, *see id.*, and unconstitutional conditions of confinement, *see Carlson v. Green*, 446 U.S. 14 (1980). Moreover, the best reading of congressional intent is that Congress deliberately left intact a *Bivens* remedy for U.S. citizens in these circumstances, even as it eliminated damages remedies for similarly situated *non*-citizens.[2]

[2] *See* Pls.' Br. 20–21 (discussing section 7 of the Military Commissions Act ("MCA")). The United States as amicus contends, wholly unpersuasively, that in enacting section 7 of the MCA Congress intended to bar Guantánamo detainees from utilizing other non-*Bivens* remedies, such as the Uniform Code of Military Justice ("UCMJ") and the Military Claims Act. *See, e.g.*, U.S. Amicus Br. 16–17. But, as explained below, the UCMJ does not provide any remedy (it simply allows reporting), and as conceded by the government, the Military Claims Act would not

Defendants and their amici implausibly assert that Plaintiffs could have availed themselves of various alternative remedies (including, most improbably, the habeas corpus proceedings that Defendants sought to prevent and that the government cut short); that sweeping "national security" claims amount to "special factors" that preclude any cause of action, even for torture; and that military officials are wholly exempt from liability under *Bivens.* These arguments fail.

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apply to individuals detained at Guantánamo, U.S. Amicus Br. 14. Moreover, contrary to the government's claim, there is no evidence that Guantánamo detainees were actually utilizing these purported "remedies." The government's sole citation for that proposition does not support its argument; rather, it considers claims under the Administrative Procedure Act and the Alien Tort Claims Act—claims that were already unavailable to Guantánamo detainees, according to the precedent cited by the government. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480–81 (D.D.C. 2005).

It is far more likely that Congress had *Bivens* in mind when it enacted section 7. Indeed, in a report to the United Nations Committee Against Torture in April 2006, the U.S. State Department affirmed that "U.S. law provides various avenues for seeking redress, including financial compensation, in cases of torture and other violations of constitutional and statutory rights," and it expressly included among those "avenues" "[s]uing federal officials directly for damages under provisions of the U.S. Constitution for 'constitutional torts,' *see Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)." *United States Written Response to Questions Asked by the Committee Against Torture*, April 28. 2006, *available at* http://www.state.gov/g/drl/rls/68554.htm. Less than six months later, Congress enacted the MCA.

A. As in *Bivens*, Plaintiffs have no alternative remedy.

1. Padilla's habeas proceedings do not foreclose a *Bivens* remedy.

Defendants contend that Padilla's habeas proceedings foreclose a *Bivens* remedy because (1) habeas corpus is an "alternative, existing process" to a *Bivens* remedy, Defs.' Br. 24, (2) this Court's decision in *Padilla v. Hanft* (*Padilla V*), 423 F.3d 386 (4th Cir. 2005), collaterally estops Padilla from litigating "all the issues that he presses here," Defs.' Br. 25 n.7, and (3) Padilla's *Bivens* claims are a collateral attack precluded by *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and *Heck v. Humphrey*, 512 U.S. 477 (1994), Defs.' Br. 25–26. These arguments are frivolous.

Each suffers from two threshold failures obscured by Defendants. First, they ignore that Defendants held Padilla in incommunicado detention for nearly two years, without any access to counsel, courts, or family. JA-91, 93 (3AC ¶¶ 82, 91). By preventing Padilla from communicating to his counsel the details of his horrific abuse in Charlseton Brig, Defendants effectively denied Padilla the very remedy that, they now claim, was his only one. And they denied it specifically so that Padilla would come to understand—as Defendant Jacoby later explained—"that help is *not* on the way." *See* JA-611 (3AC Ex. 20) (emphasis added). In sum, Defendants barred Padilla's habeas counsel from any contact with him, and they

now contend that counsel should have raised claims of which she could not have been aware.

Second, Defendants' arguments are predicated on a deliberate misrepresentation of what actually transpired in Padilla's habeas proceedings. Padilla did *not*, as Defendants claim, Defs.' Br. 4, 26, waive his challenge to the factual basis for his detention. Rather, Padilla elected to litigate first the strictly legal question of whether—on facts assumed to be true—the government could detain him. Only if necessary, Padilla would thereafter litigate the factual predicate for his detention. His counsel repeatedly clarified this intent at the hearing cited by Defendants and repeatedly stressed that, in proposing this bifurcated approach to the proceedings, Padilla was not waiving his challenge to the factual basis for Padilla's detention.[3]

[3] *See, e.g.*, JA-1237–38 ("We would not, of course … withdraw our claim that he is entitled to a due process—to an appropriate hearing consistent with due process, should Your Honor find that the President does, in fact, have the power to detain him."); JA-1268 ("We are not waiving the other things, Your Honor, but we are agreeing to table them so that we can expeditiously resolve that legal issue."; "COURT: I understand that."); JA-1264–65, 1267 (discussing the bifurcated approach); *see also* JA-1244–46, 1248 (government counsel expressing the same understanding); JA-1247 (Judge Carr stating that "you're saying [you] want to litigate the legal issues all the way to the United States Supreme Court, and then, if [you] have to, come back and litigate all the factual issues all the way up to the United States Supreme Court"); JA-1216 (government counsel stating that "we have no objection to proceeding with that legal argument *first*" (emphasis added)).

The rationale for that strategy was no secret. At the time of Padilla's habeas challenge, at least five sitting Supreme Court justices considered the indefinite, incommunicado military detention of citizens seized in civilian settings in the United States to be unconstitutional, irrespective of process. *See* Pls.' Br. 9 n.2. Padilla's habeas counsel were understandably eager to have that issue—squarely presented by Padilla's case—decided by the Supreme Court.

This Court itself recognized that Padilla's habeas appeal presented only the legal question of the President's authority to detain on stipulated facts. After deciding that question against Padilla, this Court remanded for a factual hearing and an opportunity for Padilla to challenge, for the first time, the factual basis for his detention. *Padilla V*, 423 F.3d at 389–90 & n.1; *Padilla VI*, 432 F.3d at 584 ("the District Court in South Carolina, pursuant to our remand, was to accept briefing on the question whether Padilla had been properly designated an enemy combatant").

Accordingly, the premise of Defendants' arguments—that Padilla had an opportunity to fully litigate his habeas challenge yet voluntarily waived the right to do so—is unmistakably false.

Each of Defendants' arguments also fails for independent reasons. Defendants first make the sweeping claim that the writ of habeas corpus is an "alternative, existing process" that forecloses a *Bivens* remedy for unconstitutional

detention. Defs.' Br. 24–25. Such a holding would directly overrule both *Bivens* and *Carlson*. In both cases, the Supreme Court allowed federal detainees to seek damages based on the alleged unlawfulness of their detention: *Bivens* involved a challenge to the lawfulness of the seizure and detention itself, and *Carlson* involved claims relating to the conditions of confinement. *See Bivens*, 403 U.S. at 389–90; *Carlson*, 446 U.S. at 16–17. Neither case suggested that the availability of habeas corpus for prisoners mitigated the need for a damages remedy against the responsible federal officials.

Nor would that suggestion make sense. "*Bivens* from its inception has been based … on the deterrence of individual officers who commit unconstitutional acts," *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001), and on the need "to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer's unconstitutional conduct," *id.* at 70 (emphasis omitted). The availability of habeas corpus accomplishes neither of those objectives. Because it does not impose any sanction, it does not and cannot deter; and because it merely enjoins future unconstitutional action, it provides no remedy to the victim for past harm. Were the ability to seek an injunction against future unconstitutional action sufficient to displace a damages remedy, then no damages remedy would *ever* be available, as victims of such conduct may *always* seek a prospective injunction. *See, e.g.*, *Ex parte Young*, 209 U.S. 123 (1908).

Defendants next claim that this Court's decision in *Padilla V* collaterally estops Padilla from litigating "all the issues that he presses here." Defs.' Br. 25 n.7. This argument ignores the relevant facts and controlling law. To establish collateral estoppel, Defendants would have to demonstrate, among other things, that "the prior judgment [was] final and valid," that Padilla "had a full and fair opportunity to litigate the issue in the previous forum," and that "the issue sought to be precluded is identical to one previously litigated." *Sedlack v. Braswell Servs. Grp., Inc.*, 134 F.3d 219, 224 (4th Cir. 1998). None of these factors is present here. *Padilla V* was not a final judgment. As explained above, it merely reversed a grant of summary judgment and remanded for further proceedings. *See Padilla VI*, 432 F.3d at 584. It is hornbook law that the reversal of a grant of summary judgment is not a "final" judgment because it merely remits the case for trial. *See, e.g.*, *Aurora City v. West*, 74 U.S. 82, 92–93 (1868). Moreover, no final judgment has ever issued on the merits of Padilla's habeas petition, and the factual validity of Padilla's classification as an "enemy combatant" has never been tested. *See Padilla VI*, 432 F.3d at 584. For the same reasons, Padilla has not had a "full and fair opportunity" to litigate any of the issues on which Defendants seek estoppel. Before the legal conclusion of this Court could be reviewed by the Supreme Court, and before the factual averments of the government could be tested in the district court, the government transferred Padilla to civilian custody. Finally, the present

claims are not identical to the issues determined in *Padilla V*. That decision analyzed only the legal question of detainability on facts presumed to be true. Here, Padilla alleges different facts (effectively contesting the factual predicate of *Padilla V*). Accordingly, the purely legal holding of *Padilla V* has no preclusive effect on Padilla's claims.

Finally, Defendants' suggestion that Padilla's *Bivens* claims are a collateral attack precluded by *Preiser* and *Heck* is utterly meritless. Even were *Heck* applicable outside the criminal context, it would not apply here because there is no underlying court judgment to protect. *Heck* was intended to foreclose "a collateral attack that may result in two inconsistent results—for example, a valid criminal conviction and a valid civil judgment under § 1983 for monetary damages due to unconstitutional conviction or imprisonment." *Wilson v. Johnson*, 535 F.3d 262, 265 (4th Cir. 2008). Padilla was detained on the basis of a unilateral executive decision, which no court has affirmed. Allowing Padilla's *Bivens* claims to proceed would not, therefore, risk allowing two courts to reach inconsistent results.

For these reasons, Defendants' contention that Padilla's habeas proceedings foreclose his *Bivens* remedy fails. But even were the Court to accept any variant of that claim, at most it would implicate only *one* of Padilla's eleven claims for relief. Padilla's habeas proceedings addressed the constitutionality of his military detention on a set of stipulated facts. *See, e.g.*, *Padilla V*, 423 F.3d at 389; *Padilla*

VI, 432 F.3d at 584. Only one claim in the complaint, however, challenges Padilla's unconstitutional military detention. JA-104–05 (3AC ¶ 137(h)). Plaintiffs' other claims principally relate to the conditions of Padilla's confinement and his abusive interrogation—issues that were not and could not have been addressed in Padilla's habeas proceedings. In other words, Padilla's habeas proceedings could not possibly have constituted an "alternative, existing process" for his claims relating to unconstitutional interrogation and conditions of confinement; and they could not possibly collaterally estop him or preclude him from litigating those claims under *Bivens*.

2. No other alternative remedies were available to Plaintiffs.

The United States as amicus also argues that Congress has provided alternative remedies for Padilla's gross mistreatment in the UCMJ and the Military Claims Act. U.S. Amicus Br. 13–15; *see also* Rumsfeld Br. 20–22. This is quite wrong. The UCMJ provides no remedy at all; it simply allows "[a]ny person [to] *report* an offense subject to trial by court-martial." Manual for Courts-Martial Rule 301(a) (emphasis added). The report might eventually lead to some punishment of an offender for violations of the UCMJ; however, much like the criminal law, the UCMJ provides no remedy to the *victims* of unlawful abuse. *See, e.g.*, Rumsfeld Br. 20–21 (describing criminal punishments available for violations of the UCMJ but not any remedies for victims). Were the ability to report

mistreatment sufficient on its own to displace a *Bivens* remedy for Padilla, that same ability to report federal crimes to the Department of Justice would undo *Bivens* altogether. The plaintiff in *Bivens* could have, after all, reported his allegedly unlawful arrest to the authorities for investigation. That possibility had no bearing on the decision in *Bivens*, and it has never been considered sufficient to displace a *Bivens* remedy.

The government's reliance on the Military Claims Act is equally misplaced. As the government itself concedes, the Act likely would not apply to Padilla by virtue of the government's unilateral designation of him as an "enemy combatant." *See* U.S. Amicus Br. 14. Moreover, even if the Act applied to Padilla, it would not cover any claims against Rumsfeld, Haynes, and Wolfowitz, because they were not civilian officers or employees of the Department of the Army, Navy, or Air Force. *See* 10 U.S.C. § 2733(a) (relief potentially available for claims against "a civilian officer or employee of that department, or the Coast Guard, or a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard").

And even if the Military Claims Act provided *any* remedy to Padilla—which it emphatically does not—the Supreme Court's decision in *Carlson* forecloses the government's arguments. In *Carlson*, the Supreme Court rejected the government's claim that the Federal Tort Claims Act ("FTCA") preempted *Bivens*. *Carlson*, 446 U.S. at 19–23. The Military Claims Act operates much like the

FTCA for certain claims not otherwise covered by the FTCA, *see* 10 U.S.C. § 2733(b)(2), except that it provides even more limited relief. Under the Military Claims Act, relief is limited in amount and is purely discretionary, 10 U.S.C. § 2733(a); denials of relief are generally not subject to judicial review, 10 U.S.C. § 2735; and claimants may seek relief only for the actions of members or officers of one of the branches of the armed forces, 10 U.S.C. § 2733(a). Thus, at best, the Military Claims Act is a limited replacement of the FTCA in the military context. Because the FTCA does not displace *Bivens*, *Carlson*, 446 U.S. at 19–23, the Military Claims Act cannot do so either.

B. No "special factors" counsel hesitation.

Defendants propose a host of putative special factors related to "military operations," "foreign affairs," and "national security" that, in their view, preclude any damages remedy for an American citizen arrested on American soil and tortured in an American prison. As Plaintiffs explained in their opening brief, these "factors" have no basis either in Supreme Court or Fourth Circuit precedent. Pls.' Br. 21–27.

Defendants' "national security" cases—all lower-court decisions from other circuits—uniformly address claims of non-citizens injured abroad and are thus wholly distinct and distinguishable from the case of an American citizen, already incapacitated, who was seized from a civilian jail and brutalized in military

custody. *See* Retired Military Amicus Br. 21–22. Defendants' insistence that Padilla's treatment occurred "in the midst of a conflict authorized by Congress," Defs.' Br. 17, is unavailing; the complaint alleges that Padilla was *not* a legitimate target of military force, and Defendants may not, at the pleading stage, rely on their own version of the facts in order to eliminate Plaintiffs' right to redress.[4]

Moreover, as Plaintiffs explained in their opening brief, Defendants' implausible, speculative, and case-specific concerns about the "intrusion" into executive-branch warmaking authority that might be caused by this litigation are properly addressed through other doctrines, including evidentiary privileges and, where appropriate, qualified immunity. Indeed, the Supreme Court's *Bivens* jurisprudence makes clear that the separation of powers concerns that animate "special factors" analysis involve uninvited "interference with the *legislative*, rather than the *executive*, prerogative." Law Professors Amicus Br. 12 (citing *Bivens*, 403 U.S. at 418; *Malesko*, 534 U.S. at 75). In any event, as Retired Military amici eloquently demonstrate, the "affirmation of a strong norm against

[4] Along those lines, Defendants disparage as "lawfare" a United States citizen's attempt to enforce constitutional prohibitions against arbitrary detention and torture. *See* Defs.' Br. 15 n.1. But there is a pot and kettle problem here: as the complaint alleges, it was *Defendants* who enlisted unscrupulous lawyers to manipulate the law by crafting legal memoranda that would immunize them for conduct that had long been deemed criminal by the United States. JA-78–83 (3AC ¶¶ 46–54). Unlike Defendants' unwarranted smearing of Plaintiffs' counsel, Plaintiffs' allegations must be accepted as true for purposes of this appeal.

torture and inhumane treatment not only will cause no interference with the legitimate mission of our military forces but will provide an incentive to proper and legal decision-making and a bulwark against any failure of discipline within the military." Retired Military Amicus Br. 24.

Defendants are compelled to rely on two Supreme Court cases—*United States v. Stanley*, 483 U.S. 669 (1987), and *Chappell v. Wallace*, 462 U.S. 296 (1983)—that address a materially distinct set of circumstances. Contrary to Defendants' suggestion, those cases do *not* stand for the proposition that federal courts should forebear from adjudicating cases involving military misconduct generally; rather, they turn on the specific concerns that would be raised by judicial intrusion into internal disputes between the military and its own members. *See* Law Professors Amicus Br. 10 n.2. By stretching those precedents far beyond their rationales, Defendants effectively ask this Court to eliminate a *Bivens* remedy for *any* United States citizen who is gravely injured by the unlawful conduct of military officials. Had the Supreme Court wished to adopt so broad a rule, it could have done so.

Indeed, Defendants' reliance on *Stanley* and *Chappell* is particularly problematic here, because Padilla has alleged that the military had no authority to detain and interrogate him in the first place. By Defendants' circular reasoning, the very conduct for which they have been called to account provides the basis for

denying Plaintiffs—and any American citizens similarly abused in the future—a cause of action. That is not the law.

II. Defendants Are Not Entitled to Qualified Immunity.

A. Defendants ignore controlling authority concerning "novel" factual circumstances.

Four briefs—two by Defendants and two by amici—urge this Court to affirm the district court's holding that Defendants are entitled to qualified immunity for the brutal conduct alleged in the complaint. In those four briefs, there is not a single citation to the Supreme Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002), a case that not only supplies the governing legal standard, but also, like this case, involves an inmate's allegations of forced stress positions and environmental manipulation. *Compare* JA-90–91 (3AC ¶ 81) (detailing allegations of prolonged shackling, stress positions, death threats, sensory deprivations, administration of drugs and noxious fumes, exposure to extreme temperatures and sleep deprivation), *with Hope*, 536 U.S. at 738–41 (denying qualified immunity for state prison officials who forced plaintiff prisoner into "restricted position of confinement for a 7 hour period," which involved "exposure to the heat of the sun," and "to prolonged thirst and taunting"). Indeed, in holding that Defendants could not have been on notice that the incommunicado detention and brutal treatment of Jose Padilla violated the Constitution because no case expressly

prohibited them from inflicting barbarity on a suspected enemy combatant, the district court, too, neglected to cite—let alone distinguish—*Hope*.

It is not difficult to understand why. There is simply no way to square the district court's holding that Defendants are entitled to qualified immunity because of the assertedly novel factual circumstances, JA-1529–31, with the Supreme Court's holding that "officials can still be on notice that their conduct violates established law even in novel factual circumstances," *Hope*, 536 U.S. at 741. And there is no way to distinguish Defendants' argument that no clearly established law prohibited the *abuse* of "enemy combatants" from the argument—available in any future case—that no clearly established law prohibits the extrajudicial *execution* of "enemy combatants" (or any other newly minted category of detainees). Indeed, the district court's decision constitutes an open invitation to government officials to evade liability for clearly established wrongs simply by inventing new labels and thereby creating "new" circumstances.

Until this case, no court had suggested that a citizen's right to be free from torture could be abrogated by a status or classification unilaterally imposed on him by his torturers. This Court should not affirm so radical a departure from the Nation's laws and traditions.

B. Plaintiffs' factual allegations satisfy *Iqbal*'s pleading standards.

Defendants argue that Plaintiffs' allegations fail the pleading standards enunciated in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The district court was unpersuaded by that contention during oral argument, *see* JA-1453–54, but it did not rule on the question. In any event, Defendants are wrong: Plaintiffs easily satisfy *Iqbal*'s pleading standards.

First, contrary to Defendants' suggestion, Plaintiffs' claims do not rely upon a theory of "supervisory liability": each of the six Defendants personally engaged in unconstitutional conduct, either directly or by ordering others to do so. Second, Plaintiffs plead concrete facts supporting their claims that Defendants personally ordered and implemented the designation, detention, and mistreatment of Padilla. And finally, those allegations state a plausible claim. Unlike *Iqbal*, in which one of 762 individuals detained in a facility alleged a sprawling conspiracy by the Attorney General to invidiously discriminate against him, this case involves one of only *two* Americans detained by the military on U.S. soil as a suspected "enemy combatant," and the only one to be seized in the United States.

The complaint and accompanying exhibits establish that Defendants controlled every aspect of the military detention of Americans, that those same officials personally authorized the interrogation techniques used against alleged enemy combatants detained at Guantánamo Bay, and that Brig officials were

ordered to conform the procedures and conditions of confinement at the Brig to the procedures devised for the detainees at Guantánamo Bay. Given the extraordinarily high-level attention focused on the American detainees, and the documented micromanagement of their detention and captivity, it is not simply plausible, but unmistakable, that Defendants were personally involved in Padilla's unlawful detention and treatment.

The complaint alleges that Rumsfeld, Haynes, Jacoby, and Wolfowitz were personally involved in developing the process by which Padilla was designated, JA-76 (3AC ¶ 36), in approving the military detention of Padilla pursuant to that process, JA-77 (3AC ¶ 38), and in recommending that the President designate Padilla an "enemy combatant," JA-78 (3AC ¶ 42). It alleges that Rumsfeld personally ordered Padilla's military detention after his designation. JA-78 (3AC ¶ 43).

The complaint further alleges that Rumsfeld, Haynes, Jacoby, and Wolfowitz personally participated in authorizing Padilla's unlawful conditions of confinement. It alleges, for example, that those four defendants personally approved Padilla's detention "without access to counsel, courts, or family, and without due process of law," JA-77 (3AC ¶ 38), that they "were personally involved in making decisions about the range of interrogation techniques that should be generally permitted and even the specifics of individual detainees'

conditions of detention and interrogation," JA-84 (3AC ¶ 56); that they "gave specific instructions for the interrogations and conditions of confinement applicable to detainees held at the Norfolk and Charleston Brigs, including Mr. Padilla," JA-98 (3AC ¶ 109); and that they subjected Padilla to a long list of interrogation techniques, most of which they previously approved for use against detainees held at Guantánamo Bay, JA-90–91 (3AC ¶ 81); *see also* JA-91, 93 (3AC ¶¶ 82, 89).

These allegations against Rumsfeld, Haynes, Jacoby, and Wolfowitz are supported, and made plausible, by other concrete factual allegations. The complaint's allegations establish that the government viewed Padilla as a class of one. In a speech given to the American Bar Association's Standing Committee on Law and National Security, Alberto Gonzales, then-Counsel to the President, outlined the process used to determine whether to detain Padilla and whether to allow him access to counsel. JA-111–13 (3AC Ex. 1). The process was "far more elaborate" than the one used in deciding to detain the only other American detained in the United States because, unlike that individual, Padilla was seized in the United States. JA-111 (3AC Ex. 1) ("As for [alleged] enemy combatants who are American citizens and are captured here in the U.S., as a matter of prudence and policy the decision-making steps we have employed have been far more elaborate."). Gonzales's remarks make absolutely clear that the decision to detain

Padilla was critically informed by the Secretary of Defense (Defendant Rumsfeld), the Deputy Secretary of Defense (Defendant Wolfowitz), and the Department of Defense generally. *Id.*

Rumsfeld made the final recommendation to the White House to detain Padilla as an enemy combatant. JA-112 (3AC Ex. 1) ("The Secretary of Defense then transmits this package of information to the President, recommending that the President designate the individual as an enemy combatant."). Wolfowitz made the final determination as to whether and when Padilla would receive access to counsel. *Id.* ("The Deputy Secretary [of Defense] then makes a final decision whether the two prongs of the DoD access to counsel policy are satisfied."); *see also* JA-113 (3AC Ex. 1) ("That is precisely the course we have followed both with Yaser Hamdi and Jose Padilla.").

The special attention focused on Padilla—as the only U.S. citizen seized and detained on U.S. soil as an alleged "enemy combatant"—was not limited to the decision to detain him. Senior officials, including Defendants, also directed the conditions of his confinement and the interrogation techniques used on him. As a former Brig commander explained, the Brig was closely supervised by senior officials and had "immediate visibility not only with the Secretary of Defense but in the White House." JA-99 (3AC ¶ 113). Accordingly, Defendants controlled even the minor details of detention at the Brig. "For example, in May 2002,

Norfolk brig staff responsible for Mr. Hamdi [the other U.S. citizen "enemy combatant"] 'received written direction … that the detainee is not permitted visit from legal counsel, family members or others unless specifically authorized by SECDEF [Rumsfeld] or his designee.'" JA-98 (3AC ¶ 109), JA-650 (3AC Ex. 27); *see also* JA-98 (3AC ¶ 109) ("In May 2002, Defendant Haynes' office instructed Norfolk Brig staff to 'deny access to detainee if [federal public defender] happens to show up at the brig, and in June 2002, Brig staff were instructed to withhold legal correspondence directed to Mr. Hamdi because 'DOD GC [Haynes] and DEPSECDEF [Wolfowitz] still have that for action.'"); JA-652–53 (3AC Ex. 28).

More importantly, senior officials, including Rumsfeld, Haynes, Jacoby, and Wolfowitz, directed Padilla's conditions of confinement and the interrogation techniques applied to him. JA-84–98 (3AC ¶¶ 59–110). *Iqbal* does not require Plaintiffs to *prove* their case at the pleading stage, only to plausibly allege facts that establish liability. Thus, while Plaintiffs cannot yet prove that Rumsfeld, with the advice and support of Haynes, Jacoby, and Wolfowitz, personally approved and ordered the interrogation techniques used on Padilla, that he did so is plausible (and indeed inescapable) based on the facts alleged. Rumsfeld personally approved—and Rumsfeld, Haynes, Jacoby, and Wolfowitz later *re*-approved—the interrogation techniques used at Guantánamo Bay. JA-84–89 (3AC ¶¶ 61–78). Rumsfeld also personally authorized the specific interrogation plan to be used on at

least one detainee at Guantánamo Bay, JA-84 (3AC ¶ 59), and he was personally involved in the minutiae of detention at the Brig, JA-98 (3AC ¶ 109).

The techniques that Defendants authorized for use at Guantánamo Bay are similar, and in many cases identical, to the techniques used on Padilla. *Compare* JA-90–91 (3AC ¶ 81) (techniques used on Padilla), *with* JA-419, 430–32 (3AC Ex. 13) (techniques approved by Rumsfeld on December 2, 2002), *and* JA-574–77 (3AC Ex. 17) (techniques recommended by the Working Group, including Haynes, Wolfowitz, and Jaocby, and approved by Rumsfeld on April 16, 2003). The correspondence was no coincidence: there was a high-level "lash-up" between treatment at Guantánamo and the Brig, noted by Brig staff in several email exchanges. *See* JA-97, 638–45 (3AC ¶ 107, Exs. 23–25). For example, Padilla was subjected to, among other things, prolonged isolation; deprivation of light; prolonged exposure to light; extreme variations in temperature; sleep adjustment; painful stress positions; noxious fumes; deception with respect to his location and the identity of his interrogators; the withholding of a mattress, pillow, sheet, and blanket; extreme and deliberate variations in temperature; forced grooming; and removal of religious items. JA-90–91 (3AC ¶ 81). All of those techniques were authorized by Defendants for use at Guantánamo Bay. *See* JA-430–31 (3AC Ex. 13) ("isolation"; "deprivation of light"; "stress positions"; "Techniques of deception"; "Removal of all comfort items (including religious items)"; "Forced

grooming"); JA-574–77 (3AC Ex. 17) ("Isolation"; "Environmental Manipulation," including "adjusting temperature or introducing an unpleasant smell"; "Sleep Adjustment"; "Incentive/Removal of Incentive").

Padilla was also threatened with death, extraordinary rendition, and physical abuse, and was administered (or made to believe that he was being administered) psychotropic drugs. JA-90 (3AC ¶ 81f–i). Guantánamo officials requested approval for the use of such techniques: "The use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family." JA-431 (3AC Ex. 13). Although Rumsfeld's December 2, 2002 authorization did not provide a "blanket approval" for these techniques, JA-418 (3AC Ex. 13), neither did it foreclose them; it left open the possibility that they could be approved upon request. Rumsfeld's later authorization of interrogation techniques, signed on April 16, 2003, potentially authorized at least some of those techniques under the euphemism of "Fear Up Harsh," which entailed "Significantly increasing the fear level in a detainee." JA-575 (3AC Ex. 17). Rumsfeld's 2003 authorization also contemplated the use of "additional interrogation techniques for a particular detainee" if requested directly from Rumsfeld. JA-574 (3AC Ex. 17). One of the techniques proposed by the Working Group to Rumsfeld at that time was "Threatening to transfer the subject to a 3rd country that subject is likely to fear would subject him to torture or death." JA-551

(3AC Ex. 16). Though not included in Rumsfeld's April 16, 2003 authorization, that technique could have been approved on an ad hoc basis.

In short, Rumsfeld, Haynes, Jacoby, and Wolfowitz directed virtually every aspect of the detention and interrogation of detainees at Guantánamo Bay, up to and including the approval of the use of specific interrogation techniques on specific detainees. Those same officials even more closely managed the detention of Padilla given his status as the only American "enemy combatant" seized and detained on U.S. soil. It is beyond dispute that Defendants directed at least certain aspects of Padilla's detention and interrogation, and it is alleged and clearly plausible that Defendants also directed—as they did for non-U.S. detainees at Guantánamo Bay—the specific interrogation techniques used on Padilla. These allegations and supporting facts easily satisfy *Iqbal*'s pleading standards.[5]

[5] Other factual allegations in the complaint lend further support to the claims against Rumsfeld, Haynes, Jacoby, and Wolfowitz. *See, e.g.*, JA-79–80, 124–25 (3AC ¶¶ 47, 49, Ex. 4) (Haynes part of a self-styled War Council of senior administration officials in charge of developing policy in the war on terrorism, including directing John Yoo to draft legal memoranda providing a veneer of legality to those policies); JA-84 (3AC ¶ 58) (Haynes instructed the interrogators of one detainee to "take the gloves off"); JA-85 (3AC ¶¶ 62–63) (Haynes visited Guantánamo Bay on September 25, 2002 to observe an ongoing interrogation, to suggest certain interrogation techniques, and to tell interrogators, on behalf of Rumsfeld, to "do whatever needed to be done"; the next day, Haynes flew directly to the Brig for a briefing in connection with Padilla's detention); JA-97–98, 647 (3AC ¶ 108, Ex. 26) (Jacoby headed the Defense Intelligence Agency, which housed the Defense HUMINT Services, which was responsible for the interrogations of detainees and oversaw day-to-day decisionmaking regarding detainees' conditions); JA-91, 604–12 (3AC ¶ 83, Ex. 20) (Jacoby's declaration in

With respect to the commanders of the Brig, the complaint alleges that Hanft and Marr personally implemented Padilla's incommunicado detention as well as the conditions of his confinement, and that they ignored his requests for medical assistance. *See* JA-90–91, 95, 99–100 (3AC ¶¶ 81–82, 101–02, 112–15, 118). They were responsible, in other words, for carrying out the detention and abuse ordered by Rumsfeld, Haynes, Jacoby, and Wolfowitz. In doing so, they were deliberately indifferent to the effects of Padilla's conditions of confinement and interrogation upon his health. These allegations also satisfy *Iqbal*, and, contrary to Defendants' brief, do not rely on a theory of *respondeat superior*. "A showing that a supervisor acted, or failed to act, in a manner that was deliberately indifferent to an inmate's Eighth Amendment rights is sufficient to demonstrate the involvement—and the liability—of that supervisor." *Starr v. Baca*, No. 09–55233, 2011 WL 2988827, at *3 (9th Cir. July 25, 2011). "[W]hen a supervisor is found liable based on deliberate indifference, the supervisor is being held liable for his or her own culpable action or inaction, not held vicariously liable for the culpable action or inaction of his or her subordinates." *Id.*; *see also Sandra T .E. v. Grindle*, 599 F.3d 583, 591 (7th Cir. 2010) (*Iqbal* does not change the fact that "[w]hen a

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Padilla's habeas case describing his familiarity with and the purpose of Padilla's interrogation); JA-84, 417 (3AC ¶ 61, Ex. 12) (declassified FBI email establishing that Wolfowitz personally approved the use of specific interrogation techniques at Guantánamo Bay).

state actor's deliberate indifference deprives someone of his or her protected liberty interest in bodily integrity, that actor violates the Constitution, regardless of whether the actor is a supervisor or subordinate, and the actor may be held liable for the resulting harm."); *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 49 (1st Cir. 2009) ("Although 'Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*,' supervisory officials may be liable on the basis of their own acts or omissions," including supervising "with deliberate indifference toward the possibility that deficient performance of the task may contribute to a civil rights deprivation" (quoting *Iqbal*, 129 S. Ct. at 1948) (some internal quotation marks omitted)).

C. Defendants are not entitled to qualified immunity against Plaintiffs' RFRA claim.

The district court dismissed Plaintiffs' claim under the Religious Freedom Restoration Act ("RFRA") on qualified immunity grounds, citing the "legal uncertainty" that Defendants deliberately sought to create by labeling Padilla an "enemy combatant." JA-1532. As Plaintiffs have elsewhere explained, changing a label does not change the law. The district court's reasoning permits government officials to be the architects of their own immunity.

Defendants also urge affirmance on the basis of several arguments never considered by the district court. None has any merit.

Defendants contend that RFRA does not authorize individual-capacity suits for damages. This is incorrect. RFRA allows a person whose exercise of religion has been "substantially burden[ed]" by "government" to "obtain appropriate relief." 42 U.S.C. § 2000bb-l(a), (c). It defines "government" to include an "official (or other person acting under color of law) of the United States." 42 U.S.C. § 2000bb-2(l). Courts have consistently interpreted the phrase "person acting under color of law" as establishing *individual* liability for civil rights violations.[6] And they have done so for RFRA as well.[7] This Court should follow that precedent.

Defendants argue that *Sossamon v. Texas*, 131 S. Ct. 1651 (2011), alters this analysis, but their reading of the case is misplaced at best. That case asked whether Congress's provision of "appropriate relief against a government"—in the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA")—abrogated sovereign immunity, thus allowing suits for damages against the States.

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[6] *See, e.g.*, *Morse v. Republican Party of Va.*, 517 U.S. 186, 221 n.34 (1996); *Hafer v. Melo*, 502 U.S. 21, 31 (1991); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834 (9th Cir. 1999); *White v. Gregory*, 1 F.3d 267, 269–70 (4th Cir. 1993).

[7] *See, e.g.*, *Woods v. Evatt*, 876 F. Supp. 756, 761 (D.S.C.), *aff'd*, 68 F.3d 463 (4th Cir. 1995); *see also Jama v. INS*, 343 F. Supp. 2d 338, 371–73 (D.N.J. 2004); *Lepp v. Gonzales*, No. C-05-0566 VRW, 2005 WL 1867723, at *8 (N.D. Cal. Aug. 2, 2005); *Agrawal v. Briley*, No. 02 C 6807, 2006 WL 3523750, at *9 (N.D. Ill. Dec. 6, 2006); *Mack v. O'Leary*, 80 F.3d 1175, 1177 (7th Cir. 1996) (Posner, J.), *vacated on other grounds*, 522 U.S. 801 (1997); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 537–38 (1st Cir. 1995).

Id. at 1658. In concluding that it did not, the Court emphasized: "The context here—where the defendant is a *sovereign*—suggests, if anything, that monetary damages are not 'suitable' or 'proper.'" *Id.* at 1659 (emphasis added). Here, Defendants are not sovereign, and consequently, "appropriate relief" properly includes monetary damages. *See Jama*, 343 F. Supp. 2d at 373; *Lepp*, 2005 WL 1867723, at *8; *see also* S. Rep. No. 103-111, at 12 (1993) (RFRA "does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Court's free exercise jurisprudence … prior to *Smith*."); H.R Rep. No. 106-219, at 29 (1999) (RFRA creates "a private cause of action for damages").

Defendants also compare RFRA's phrase "person acting under color of law" to language in 28 U.S.C. § 1391(e). Defs.' Br. 47 (citing *Stafford v. Briggs*, 444 U.S. 527 (1980)). While § 1391(e) applies to an "officer or employee" of the U.S. "acting in his official capacity or under color of legal authority," it does not separately include any "other person acting under color of law." *Id.* RFRA should be interpreted in light of the similar language of § 1983, not the dissimilar language of § 1391(e).

Finally, Defendants argue that it was not clearly established that RFRA applied to their alleged conduct "because Padilla does not challenge 'neutral rules of general applicability.'" Defs.' Br. 49. What matters for RFRA is not whether

defendants intentionally discriminated, however, but whether they intentionally placed a substantial burden on Padilla's free exercise of his religion. 42 U.S.C. § 2000bb-l(a). They did. *See also Lovelace v. Lee*, 472 F.3d 174, 196 (4th Cir. 2006) (holding that it has been clearly established since 2000 that "intentional conduct … is *surely* sufficient to establish fault" under RLUIPA (emphasis added)). It bears mention, too, that Defendants seek to avoid liability by claiming that they could not have known that intentional violations of religious rights were forbidden. That is a stunning claim. Whether such violations are actionable under RFRA, or directly under the First Amendment, or both, no reasonable official could have doubted that they were forbidden.

III. Rumsfeld's Contention That Plaintiffs Lack Article III Standing Is Wholly Meritless.

Rumsfeld—and only Rumsfeld—advances the novel contention that Plaintiffs lack standing to pursue their damages claims against him.[8] Rumsfeld contends that because President Bush signed the order designating Padilla an enemy combatant, this Court lacks jurisdiction to review Rumsfeld's role not only in bringing about that order, but in directing Padilla's subsequent abuses as well. That is obviously wrong.

[8] Rumsfeld presented this theory to the district court as well, but that court did not address it.

No court has ever held that subordinate federal officers are immune from liability for grave misconduct so long as they act pursuant to a presidential order—much less that courts lack jurisdiction to hear such claims. To the contrary, the Supreme Court has exercised jurisdiction over habeas suits against those detaining enemy combatants pursuant to presidential order, upheld an injunction against the Secretary of Commerce for seizing steel mills pursuant to a presidential order, and even held the commander of an American warship liable in damages for an illegal seizure commanded by presidential order. *See Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804).[9] And in *Harlow v. Fitgerald*, 457 U.S. 800 (1982), the Supreme Court held that a *Bivens* action for damages could proceed against two White House aides who allegedly conspired—through internal White House memoranda—to fire the plaintiff in retaliation for

[9] These same cases refute Rumsfeld's argument—made for the first time on appeal—that Plaintiffs' claims involve a "political question" beyond the jurisdictional reach of this Court. Rumsfeld Br. 18–22. Failing to acknowledge the many instances where courts have exercised jurisdiction over the military's handling of its captives, Rumsfeld asserts that this case is non-justiciable because of Congress' textually committed power "[t]o make Rules for the Government and Regulation of the land and Naval Forces." U.S. Const. art. I, § 8, cl. 14. By that logic, however, *Boumediene*, *Hamdan*, *Rasul*, and countless other cases were improperly decided.

negative congressional testimony. *Id*. If Rumsfeld's theory were correct, the Supreme Court would have lacked subject matter jurisdiction in all of these cases. It did not.

Moreover, even on its own radical terms, Rumsfeld's argument cannot possibly reach the lion's share of the claims in this case, which speak to Padilla's allegations that he was brutally interrogated in a regime approved and ordered by Rumsfeld—but never ordered by President Bush. Rumsfeld points to nothing in the complaint (or beyond it) remotely suggesting that the President personally approved the vicious interrogation methods to which Padilla was subjected as a result of Rumsfeld's actions. Rather, he vaguely refers to the fact that "[o]nly the President could, and did, take action affecting Appellants' legal interests." Rumsfeld Br. 15. There is no basis in the complaint for Rumsfeld's speculation; the President is not alleged to have known of—let alone played any role in—the abuse suffered by Padilla. To the contrary, the complaint alleges specific actions by Rumsfeld that caused Padilla's mistreatment.

Rumsfeld's implication is plain: when a President orders a citizen detained as an enemy combatant, he *must* mean that the citizen should be treated as Padilla was. Even if the President never issues any order on the subject, Rumsfeld implies, he should be presumed—as a matter of law—to have silently and secretly ordered that the citizen be subjected to incommunicado detention, death threats,

sleep deprivation, sensory deprivation, and forced stress positions. Rumsfeld Br. 15. That argument is not only offensive to the institution of the Presidency but utterly at odds with this Nation's history and traditions.

Finally, Rumsfeld's assertion that an award of damages to Plaintiffs would not redress their injuries, Rumsfeld Br. 17–19, is flatly contradicted by the law. Injunctive claims can present difficult redressability issues. But as Justice Scalia noted, writing for the Court in *Steel Company v. Citizens for a Better Environmentt*, 523 U.S. 83, 96 (1998), it is "a different matter if the relief requested by the plaintiffs" is "money damages," which "of course" redress an injury. In *Carey v. Piphus*, 435 U.S. 247, 266 (1978), the Court went even further, recognizing that "courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money."

Lacking any support in the case law, Rumsfeld revives his argument that he was not to blame for any constitutional injury—President Bush was. Rumsfeld Br. 17. But Rumsfeld fares no better here: more than one person can be liable for a constitutional injury, and in any event, President Bush's order never approved the brutal treatment at issue in this case. This Court should reject Rumsfeld's attempt to shoehorn what is at best an argument about causation—whether he or the

President is more to blame for the abuses Plaintiffs suffered—into a new rule of Article III standing.

III. Padilla Has Standing to Challenge His Continuing Designation as an "Enemy Combatant."

For almost four years, Padilla languished in a military jail where he was subjected to brutal interrogation and extraordinary invasions of the constitutional rights usually enjoyed by American citizens—all on the strength of the Executive's unilateral determination that Padilla was an "enemy combatant." Although Padilla was finally transferred to civilian custody to stand trial on unrelated charges, the Executive has never rescinded the enemy combatant designation or disclaimed the authority to send Padilla back to the Brig when he is released from civilian custody. The designation therefore continues in effect, and its existence inflicts two injuries on Padilla—the terrifying prospect of renewed military detention and the unique stigma of being branded a traitor. Defendant Panetta's narrow claim is that the Court lacks jurisdiction because Padilla's seventeen-year criminal sentence renders both injuries illusory. It doesn't.

A. The conviction and sentence do not make the threat of redetention "speculative."

The conviction and criminal sentence do not make the threat of redetention "speculative," Panetta Br. 5–7, because Plaintiffs have alleged (1) public assertions by the Executive of authority to redetain any suspected enemy combatant even

after acquittal at military commissions or after serving a prison sentence, and (2) a particularized warning from the Deputy Solicitor General that the Executive retains discretion militarily to redetain him on the basis of the enemy combatant designation even after transfer to civilian custody. *See* Pls.' Br. 48–52.

These factual allegations clearly are sufficient to state a non-speculative injury. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 106 (1983); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710–11 (4th Cir. 1999); *Nakell v. Att'y Gen.*, 15 F.3d 319, 323 (4th Cir. 1994) (attorney had standing to appeal contempt conviction based on *possibility* of disciplinary proceedings, even though the State Bar had already dismissed a grievance based on the same conviction).[10] Accordingly, Padilla has standing unless Defendant Panetta has controverted those allegations by affidavit or other evidence. He has not.

Defendant Panetta makes no attempt to deny that the Executive has asserted authority to redetain enemy combatants after civilian sentences. His only claim is

[10] *Gul v. Obama*, No. 10-5117, 2011 WL 2937166 (July 22, 2011), is not to the contrary. To be sure, *Gul* rejected alien enemy combatants' argument that their habeas petitions were not mooted by their release from detention at Guantánamo Bay because the government might detain them again in the future. *Id*. at *7. But the *Gul* petitioners had been transferred to the custody of foreign sovereigns and gave the court "no basis whatsoever for believing the Government might pursue them because of their continuing designation (or for that matter, any other reason)." *Id*. By contrast, Padilla remains in the custody of the U.S. government and has received a personal warning that the enemy combatant designation has not been rescinded and that the Executive could militarily redetain him at any time, even after transfer to civilian custody.

that Plaintiffs lack evidence that the Executive plans to exert that authority over Padilla because the Deputy Solicitor General's statement was made while Padilla was still in military custody and "therefore provides no support for Padilla's claim that he would be returned to military custody after being transferred into the criminal justice system." Panetta Br. 7 (emphasis omitted). That argument makes no sense. It was plain enough that the Executive could detain Padilla as an enemy combatant before the transfer (since that is what it was already doing); the only plausible purpose for making such a statement *after* President Bush ordered Padilla's transfer to civilian custody was to communicate the Executive's position on detention rights *after* that transfer had been accomplished.[11] Accordingly, Plaintiffs have adequately alleged, and have standing to sue based upon, a concrete and particularized risk of military redetention.

B. The conviction and sentence do not alter the stigma of being branded a traitor.

In addition to exposing Padilla to the risk of military redetention, the unretracted enemy combatant designation injures Padilla by stigmatizing him as a traitor. Defendant Panetta claims that Padilla cannot predicate standing on this reputational injury because "reputation alone is not a sufficient interest" under Article III, and Padilla's criminal conviction leaves him with no reputation left to

[11] Significantly, Defendant Panetta makes no attempt to support his revisionist interpretation of Deputy Solicitor General Garre's statement with an affidavit from its author.

injure. Panetta Br. 8–9. These claims are meritless.

First, it is well-established that even if "mere injury to reputation is not enough of an impingement on a person's liberty or property interest to trigger a requirement of due process[,] … injury to reputation can nonetheless suffice for purposes of constitutional standing." *McBryde v. Comm. to Review Circuit Council Conduct*, 264 F.3d 52, 56–57 (D.C. Cir. 2001); *see* Pls.' Br. 54.[12] Second, the injury that Padilla alleges stems from the unrescinded enemy combatant designation and therefore does not fall within the rule that "'when injury to reputation is alleged as a secondary effect of an otherwise moot action, we have required that some tangible, concrete effect remain, susceptible to judicial correction.'" *See* Panetta Br. 9 (quoting *McBryde*, 264 F.3d at 57). "Case law is clear that where reputational injury derives directly from an unexpired and unretracted government action, that injury satisfies the requirements of Article III standing to challenge that action." *Foretich v. United States*, 351 F.3d 1198, 1213

[12] Panetta attempts to paper over this flaw in his argument by asserting, for the first time, that Padilla must identify a liberty interest protected by the due process clause in order to state a claim that the designation violates substantive due process. Panetta Br. 9 n.5. This argument fails. Reputational harm can "implicate a constitutionally protected liberty interest," provided that it "at least 'impl[ies] the existence of serious character defects such as dishonesty or immorality.'" *Zepp v. Rehrmann*, 79 F.3d 381, 388 (4th Cir. 1996) (quoting *Robertson v. Rogers*, 679 F.2d 1090, 1092 (4th Cir. 1982)). Accusations of treason clearly satisfy that test.

(D.C. Cir. 2003). Padilla's reputational injury satisfies that test.[13]

Finally, Padilla's criminal conviction does not negate the reputational injury caused by his designation. Standing is assessed at the time the claim is brought, and the claims for injunctive and declaratory relief against Defendant Gates were first filed on February 9, 2007, many months before Padilla's criminal conviction (August 16, 2007). *See* Pls.' Br. 56. Moreover, the reputational injury inflicted by allegations of treason is categorically distinct from the damage inflicted by charges that Padilla engaged in activities in the 1990s that were directed overseas, charges that this Court had already held were "considerably different from, and less serious than, those acts for which the government had militarily detained Padilla." *Padilla VI*, 432 F.3d at 584.[14]

[13] The D.C. Circuit's contrary holding in *Gul* involved non-citizens who had been adjudicated "enemy combatants" by a designated tribunal, not a U.S. citizen who has never been so adjudicated by any court or tribunal. Moreover, Padilla's citizenship produces the additional stigma of being branded a traitor to his country.

[14] Defendant Panetta also claims that the stigma of the designation cannot be redressed by a ruling in Plaintiffs' favor because the criminal conviction was based in part on attendance at an al-Qaida training camp and Plaintiffs therefore cannot show that the enemy combatant designation was false. *See* Panetta Br. 10–11. This argument is unavailing because the harm to Padilla's reputation does not stem from his alleged attendance at a training camp but rather from allegations—never proven by the government in any tribunal—that Padilla intended to commit acts of terrorism on U.S. soil against U.S. citizens.

CONCLUSION

For the foregoing reasons and the reasons stated in Plaintiffs' opening brief, this Court should reverse the decision of the district court and remand for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) and with the order of this Court because it contains 9,963 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 type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman.

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August 4, 2011

CERTIFICATE OF SERVICE

I certify that this brief was filed electronically on August 4, 2011. Notice of this filing will be sent by operation of this Court's electronic filing system to all parties.

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August 4, 2011