No. 11-1277

IN THE

Supreme Court of the United States

ESTELA LEBRON AND JOSE PADILLA,
Petitioners,

v.

DONALD H. RUMSFELD *et al.,*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Whether a person designated by the President as an enemy combatant, pursuant to Congressionally authorized war powers, may seek damages from military officials related to alleged conditions of the enemy combatant's military detention, through an implied cause of action under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971).

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INTRODUCTION

Petitioner Jose Padilla, now serving a lengthy prison sentence for supporting al Qaeda's terrorism, was in the months following the September 11, 2001 attacks designated by the President as an enemy combatant pursuant to war powers authorized by Congress. Padilla claims that he was subjected to unconstitutional conditions of confinement in a U.S. naval brig during his resulting military detention that concluded in 2006. Despite having pursued years of unsuccessful habeas litigation, Padilla and his mother now seek money damages against military officials personally for those alleged conditions, through an implied action under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). A district court and a unanimous panel of the Fourth Circuit rejected petitioners' claims.

Further review is unwarranted. Petitioners do not seek this Court's review of any issue related to the designation and detention of Padilla as an enemy combatant. Petitioners point to no final judgment of any court that has ever implied a *Bivens* action against military officials for formulating and executing military policy, and decisions of this Court are to the contrary. No conflict exists with any decision of this Court or any court of appeals. Indeed, petitioners acknowledge that other courts of appeals have acted consistently with the Fourth Circuit's decision, and since the petition was filed, the Ninth Circuit has dismissed petitioners' parallel *Bivens* suit against a former Department of Justice official. Settled law – including decisions of this Court – rejects extending *Bivens* liability into military affairs or subjecting officials to the risk of personal damages for their military decisions.

Even if the question presented merited review, this case would present a very poor vehicle for doing so. Petitioners' own complaint contradicts the factual basis for the question presented and fails to satisfy the standard of *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), and petitioners have dismissed all the original defendants with any direct role in Padilla's detention and interrogation. Petitioners effectively seek a judicial advisory opinion on a public policy debate, seeking only $1 from each defendant in a case ostensibly about the need for damages to remedy alleged violations of the Constitution. Relief is also barred by jurisdictional doctrines that ensure that habeas proceedings are not bypassed or re-litigated. And review would be pointless because the district court provided a sound alternative ground for dismissal, undisturbed by the court of appeals, by holding that defendants are entitled to qualified immunity.

The United States has already expressed its views in this case. As *amicus curiae*, it urged the Fourth Circuit to uphold the district court's determinations that no *Bivens* action can be implied here and that defendants are entitled to qualified immunity. See *infra* p. 17.

The petition should be denied.

STATEMENT OF THE CASE

A. Padilla's Detention, Extensive Habeas Proceedings, And Criminal Conviction For Terrorism Offenses.

1. Petitioner Jose Padilla, currently incarcerated in a high-security federal prison, was convicted of various offenses for his support of al Qaeda's terrorism. His convictions have been affirmed on

appeal to the Eleventh Circuit, which remanded his 17-year sentence for reconsideration because it was too lenient. See *United States* v. *Jayyousi*, 657 F.3d 1085 (11th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3597 (Apr. 2, 2012) (Nos. 11-1194, -1198, -9672). Petitioners do not contest the Fourth Circuit's description of Padilla as "a member of Al Qaeda, who has been an active participant in that organization's terrorist mission since at least the late 1990s." Pet. App. 7a.

2. Federal authorities arrested Padilla on May 8, 2002 after his travels from Afghanistan brought him to Chicago O'Hare International Airport. He was transported to a federal detention center in New York and assigned court-appointed counsel. On June 9, 2002, President Bush directed the Secretary of Defense to detain Padilla as an enemy combatant "closely associated with al Qaeda." C.A. App. 122. The President acted pursuant to the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"), by which Congress authorized the President to act against members of terrorist organizations associated with the September 11, 2001 attacks. Authorities transferred Padilla to military custody at the Naval Consolidated Brig in Charleston, South Carolina (the "Naval Brig").

3. Padilla shortly thereafter commenced his lengthy journey through the U.S. federal court system by initiating habeas proceedings and related appeals that would continue for nearly four years. Judge Michael Mukasey, later the U.S. Attorney General, initially denied Padilla's first habeas petition. Based upon evidence that Padilla was acting on behalf of al Qaeda, Judge Mukasey concluded that the President was authorized to detain Padilla pending further habeas proceedings.

Padilla v. *Bush*, 233 F. Supp. 2d 564, 587-99 (S.D.N.Y. 2002). A divided panel of the Second Circuit reversed, finding "ample cause" to suspect Padilla of a terrorist plot but concluding that the President nevertheless lacked authority to order such detentions. *Padilla* v. *Rumsfeld*, 352 F.3d 695, 699 & n.2, 724 (2d Cir. 2003). This Court vacated the Second Circuit's decision and held that venue for any habeas petition properly lay in the federal district court with jurisdiction over the Naval Brig. See *Rumsfeld* v. *Padilla*, 542 U.S. 426 (2004). The same day, this Court affirmed that the AUMF authorized detention of U.S. citizens as enemy combatants, at least when they take up arms against the United States. See *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality).

Padilla refiled his habeas petition in the United States District Court for the District of South Carolina. Rather than contest the evidence that he took up arms against the United States in Afghanistan and acted on behalf of al Qaeda, Padilla elected to challenge the legal basis for his detention, which the district court found lacking. *Padilla* v. *Hanft*, 389 F. Supp. 2d 678 (D.S.C. 2005). The Fourth Circuit reversed, unanimously concluding that the AUMF authorized Padilla's military detention under the facts proffered by the United States – including that Padilla had taken up arms against U.S. forces in Afghanistan. See *Padilla* v. *Hanft*, 423 F.3d 386 (4th Cir. 2005).

While Padilla's subsequent petition for certiorari was pending, the Government indicted Padilla on criminal charges and sought to transfer him to civil custody to face trial in the Southern District of Florida. The Fourth Circuit initially denied the transfer request, see *Padilla* v. *Hanft*, 432 F.3d 582

(4th Cir. 2005), but this Court authorized the transfer that resulted in Padilla's criminal conviction and denied his petition for certiorari. See *Hanft* v. *Padilla*, 546 U.S. 1084 (2006); *Padilla* v. *Hanft*, 547 U.S. 1062 (2006).

B. Petitioners' *Bivens* Action.

1. Petitioners Padilla and his mother, represented by counsel from an international human rights clinic and, later, the ACLU, sued more than 60 current and former military and government officials in early 2007. Defendants included former Attorney General Ashcroft; former senior officials of the Department of Defense, including the Secretary, Deputy Secretary, General Counsel and Director of the Defense Intelligence Agency; military officials who interrogated Padilla; military officials responsible for Padilla's medical treatment and psychological care; supervisors of those personnel and military lawyers who advised them; and Commanders of the Naval Brig. Invoking *Bivens*, petitioners challenged the constitutionality of Padilla's detention and the conditions of his confinement, and they alleged violations of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et seq*. His allegations ranged from complaints about his bedding, food, and air quality to claims of being administered psychotropic drugs and threatened with death. See C.A. App. 90-91. Petitioners sought $1 of damages from each defendant and separately sought injunctive relief against the then Secretary of Defense, Robert Gates.

In late 2010, petitioners dropped from their suit all but seven of the original defendants, including all those with direct responsibility for Padilla's treatment in military detention. See Pet. App. 11a-12a. The remaining defendants are high-ranking officials responsible for formulating and implementing

national security policy: former Secretary of Defense Donald Rumsfeld, former Deputy Secretary Paul Wolfowitz, former Director of the Defense Intelligence Agency Lowell Jacoby, former Department of Defense General Counsel William J. Haynes II, and two former Brig Commanders, Captain Melanie Marr and Captain Catherine Hanft. Petitioners maintained their claim for an injunction against Secretary Gates.

In the district court, defendants other than Secretary Gates moved to dismiss the complaint based on petitioners' failure to plead facts establishing that defendants' personal actions had violated the Constitution (under *Ashcroft* v. *Iqbal* and related cases); the unavailability of an implied *Bivens* damages action for matters related to authorized military detention, especially those reflecting an exercise of the President's war powers (under *United States* v. *Stanley*, 483 U.S. 669 (1987), and related cases); the preclusion of a *Bivens* action resulting from Padilla's prior habeas proceedings (under *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), and related cases); qualified immunity; and the inapplicability of RFRA. Defendant Rumsfeld additionally moved for dismissal on grounds that included standing and the existence of alternative remedies, and defendant Haynes moved for dismissal based upon absolute statutory immunity. Secretary Gates sought dismissal based on petitioners' lack of standing.

2. District Judge Richard M. Gergel, recently appointed to the bench, dismissed the *Bivens* claims on two alternative grounds without reaching defendants' other asserted bases for dismissal. *First*, the district court held that "special factors" which "counsel hesitation" preclude an implied *Bivens* action where, as here, "the most profound and sensitive issues" related to "the Nation's military

affairs, foreign affairs, intelligence, and national security" are implicated. Pet. App. 67a, 70a. *Second*, the court separately held that defendants are entitled to qualified immunity because their conduct violated no "'clearly established statutory or constitutional rights of what a reasonable person would have known.'" *Id.* at 71a (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). The court concluded that it is "hard . . . to imagine a credible argument that the alleged unlawfulness of Padilla's designation as an enemy combatant and detention were 'clearly established' at that time," and, even assuming the allegations regarding Padilla's conditions of confinement were true, "[t]o say the scope and nature of Padilla's legal rights at that time were unsettled would be an understatement." *Id.* at 75a, 76a. Qualified immunity was further compelled because "[n]o court had specifically and definitively addressed the rights of enemy combatants, and the Department of Justice had officially sanctioned the use of the techniques in question." *Id.* at 77a. The court also rejected petitioners' RFRA challenge and held that petitioners lacked standing to seek an injunction against Secretary Gates.

3. The Fourth Circuit unanimously affirmed. Without reaching the qualified immunity or pleading issues, the panel noted that this Court had "'consistently refused to extend *Bivens* liability to any new context or new categories of defendants,'" Pet. App. 15a (quoting *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001)), and held that this Court's precedents otherwise barred "imply[ing] a new cause of action for money damages against top Defense Department officials for a range of policy judgments pertaining to the designation and treatment of enemy combatants." *Id.* at 13a.

This conclusion rested on three, related grounds. *First*, canvassing how Congress had actively legislated regarding the treatment of detainees without providing them an express cause of action, the court of appeals "refuse[d] to imply a *Bivens* remedy where, as in this case, Congress's pronouncements in the relevant context signal that it would not support such a damages claim." Pet. App. 15a; see *id.* at 22a-24a (overview of legislation). *Second*, the court held that Padilla "had extensive opportunities to challenge the legal basis for his detention" through years of habeas litigation "before five different courts," and that this constituted an "'alternative, existing process for protecting [his] interest [that] amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.'" *Id.* at 31a (quoting *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007)).

Third, and most extensively, the court of appeals concluded that there were "many" special "factors counseling hesitation" in implying a *Bivens* cause of action for damages "in the absence of affirmative action by Congress." Pet. App. 31a. Applying *United States* v. *Stanley* and *Chappell* v. *Wallace*, 462 U.S. 296 (1983), the court held that "[p]reserving the constitutionally prescribed balance of powers is . . . the first special factor," and "[w]hen, as here, [the executive and legislative] branches exercise their military responsibilities in concert . . . the need to hesitate before using *Bivens* actions to stake out a role for the judicial branch seems clear." Pet. App. 16a, 17a. The court also pointed to special factors related to "the departure from core areas of judicial competence that such a civil action might entail." *Id.* at 24a. Applying *Stanley, Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977), and

United States v. *Shearer*, 473 U.S. 52, 58 (1985), the court emphasized the risk of "the interruption of the established chains of military command" and described how "Padilla's proposed litigation risks interference with military and intelligence operations on a wide scale." Pet. App. 25a, 27a-30a (also applying *CIA* v. *Sims*, 471 U.S. 159 (1985), *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), and *Tenet* v. *Doe*, 544 U.S. 1 (2005)).

The panel upheld the district court's conclusions that Padilla had failed to state a claim under RFRA and lacked standing to secure an injunction against the Secretary of Defense (Secretary Panetta had been substituted for former Secretary Gates).

4. Petitioners seek this Court's review of only whether they can pursue an implied *Bivens* action addressing conditions of Padilla's military detention. They do not challenge the Fourth Circuit's holdings regarding RFRA, the absence of a *Bivens* action to challenge Padilla's designation and detention as an enemy combatant, or petitioners' lack of standing to seek an injunction against Secretary Panetta (and thus the United States is not now a respondent). Indeed, they seek review of no issue related to the President's and the military's authority to designate and detain Padilla as an enemy combatant.

REASONS FOR DENYING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR THE COURTS OF APPEALS.

The Court should deny the petition because there is no conflict between the Fourth Circuit's decision and the decisions of this Court or any court of appeals.

a. The Fourth Circuit's decision reflects a straightforward application of this Court's decisions in *United States* v. *Stanley*, *Chappell* v. *Wallace*, and related cases that clearly bar implying *Bivens* actions and other congressionally uninvited intrusion by the judiciary into military affairs and operations. Petitioners claim that the Fourth Circuit's decision conflicts with a single decision of this Court, *Carlson* v. *Green*, 446 U.S. 14 (1980), see Pet. 6-9, but that claim is clearly wrong. *Carlson* involved a *Bivens* action directed against civilian officials of a federal criminal prison, based on allegations that the officials were "deliberately indifferent to [the prisoner's] serious medical needs, and that their indifference was in part attributable to racial prejudice." 446 U.S. at 16 n.1. A *Bivens* remedy was implied only because there were no "special factors counseling hesitation in the absence of affirmative action by Congress" and particularly no defendant that "enjoy[ed] such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Id.* at 18-19. The decision in this respect cited to a portion of *Davis* v. *Passman*, 442 U.S. 228, 246 (1979), which instructed that separation of powers concerns could amount to just such a special factor. *Carlson*, 446 U.S. at 19.

Here, a range of special factors, including severe separation of powers concerns, arise from a suit seeking to impose personal liability on senior military officials for the formulation and implementation of military policy and operations. *Carlson* by its own terms does not apply when such factors are present, and the Fourth Circuit carefully distinguished *Carlson* on this basis. See Pet. App. 18a, 28a. *United States* v. *Stanley*, decided seven years after *Carlson*, also noted that *Carlson* acknowledged that *Bivens*

remedies would not be available when special factors were present – even as *Stanley* surveyed the special factors implicated by suits addressing military officials and military operations that preclude *Bivens* claims. See *Stanley*, 483 U.S. at 678-79 (treatment of *Carlson*); *id.* at 680-85 (special factors distinct to military); Pet. App. 17a-30a (Fourth Circuit's application of *Stanley* "special factors"). *Stanley* also directly rejected the argument, repeated by petitioners, that special factors for this purpose are limited to constitutionally expressed immunities. Compare *Stanley*, 483 U.S. at 684-85, with Pet. 8 & n.3. *Chappell* v. *Wallace* is equally fatal to petitioners' assertion about *Carlson*. *Chappell*, decided three years after *Carlson*, also noted that *Carlson* had indicated *Bivens* actions would not be available where special factors existed, and *Chappell* outlined the special factors and separation of powers concerns implicated by suits addressing, as here, the military command structure and military decision-making. See 462 U.S. at 298-304.

More broadly, these and other decisions of this Court reject the premise underlying the petition by distinguishing sharply between the military and civilian contexts and confirming that decisions and principles applicable to suits addressing civilian matters do not extend automatically to suits directed toward military affairs. See, *e.g.*, *Stanley*; *Chappell*; *Ex parte Quirin*, 317 U.S. 1 (1942) (enemy combatants, including U.S. citizen combatant, not entitled in detention and trial to protections afforded civilians); *Feres* v. *United States*, 340 U.S. 135 (1950) (FTCA construed differently when applied in military context); cf. *Munaf* v. *Geren*, 553 U.S. 674 (2008) (habeas relief withheld when implicating military affairs and exercise of war powers).

Similarly, this Court has repeatedly emphasized that courts should hesitate before intruding into matters where "sensitive interests in national security and foreign affairs [are] at stake." *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2728 (2010); see also, *e.g.*, *Dep't of Navy* v. *Egan*, 484 U.S. 518, 529-30 (1988) ("unless Congress has specifically provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs"); *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981); *Stencel*, 431 U.S. at 673; *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953).

These cases also dispose of two of petitioners' ancillary points. Petitioners first argue that limiting a *Bivens* action in this context displaces a determination better left to the doctrine of qualified immunity, invoking *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985). See Pet. 10, 16. This was, however, just the point made in the dissenting opinion in *Stanley*, 483 U.S. at 693-96 (Brennan, J., dissenting) (invoking *Mitchell* v. *Forsyth*), and soundly rejected by the majority of this Court. See *Stanley*, 483 U.S. at 684-86. *Mitchell* v. *Forsyth* in any event focused on the scope of absolute and qualified immunity rather than when a *Bivens* action can be implied, did not address special factors, and of course preceded *Stanley*. See 472 U.S. at 513.

Petitioners also claim that *Bivens* should be limited only where Congressional, not Executive, interests are implicated. Pet. 9, 10. Even if that were true, this Court has made clear that suits implicating the chain of command, military discipline, military policy formulation, and the exercise of war powers – as this case does – directly involve *Congress's* authority over the structure and operation of the military in a

manner that bars a *Bivens* claim. See, *e.g.*, *Stanley*, 483 U.S. at 679, 683; *Chappell*, 462 U.S. at 300, 301. And, as the Fourth Circuit decision set out in detail, Congress *has* legislated repeatedly and recently regarding the matters implicated in this suit without creating a damages action. See Pet. App. 22a-23a. Indeed, the Fourth Circuit expressly based its decision, and its analysis of "special factors," on *Congress's* powers over military affairs. See *id.* at 16a-17a, 29a-31a.

b. Petitioners do not even assert that a conflict exists among the courts of appeals, nor could they.

As petitioners acknowledge, other courts of appeals have joined the Fourth Circuit in dismissing *Bivens* actions against U.S. officials in the military and national security contexts, including suits brought by detained enemy combatants. Pet. 17 (citing *Arar* v. *Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc) (special factors related to military and foreign affairs preclude *Bivens* suit challenging treatment of suspected terrorist), *cert. denied*, 130 S. Ct. 3409 (2010); *Ali* v. *Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011) (special factors preclude *Bivens* action brought by enemy combatants held at Guantanamo related to their conditions of confinement); *Rasul* v. *Myers*, 563 F.3d 527 (D.C. Cir. 2009) (same)). The separation of powers concerns underlying the special factors in these cases, like those compelling the results in *Chappell* and *Stanley* (which involved U.S. citizen plaintiffs), are unrelated to the citizenship of the claimant and instead reflect the sensitivities surrounding judicial review of national security and military matters.

After the petition was filed, the Ninth Circuit joined the Fourth Circuit and these other circuits in rejecting a *Bivens* action addressing military

detention – and did so in parallel litigation brought by petitioners against a former Department of Justice official, based on the same allegations that they assert here. See *Padilla* v. *Yoo*, No. 09-16478, 2012 WL 1526156 (9th Cir., May 2, 2012). Unanimously holding that the defendant is entitled to qualified immunity, the Ninth Circuit reversed the district court decision that petitioners point to as one of three cases reflecting "confusion" in the law. See Pet. 17-19. The Ninth Circuit emphasized that defendant Yoo's legal opinions on behalf of the Department of Justice addressed the conduct alleged in this case: the opinions "ultimately authorized" military officials "to designate Padilla as an enemy combatant, take him into military custody . . . and subject him to both coercive interrogation techniques and harsh conditions of confinement." *Yoo*, 2012 WL 1526156, at *9.

Nor is review warranted based on the two other decisions that petitioners cite as reflecting legal "confusion." See Pet. 18-19. One is a district court decision currently on appeal, and the other is a vacated Seventh Circuit decision currently the subject of *en banc* proceedings, making clear that review by this Court is premature. In any event, both involve suits brought by American military contractors detained abroad, which raise issues quite different from those presented here by a Presidentially-designated enemy combatant who pursued years of unsuccessful habeas litigation and who alleges that lawyers from the Department of Justice and the military services reviewed and approved the policies underlying his claims. Nor, finally, is there any "confusion" surrounding suits against military officers involved in routine dealings with the public, see *id.* at 19: the Fourth Circuit also permits such

suits. See *Dunbar Corp.* v. *Lindsey*, 905 F.2d 754 (4th Cir. 1990). If a true circuit conflict eventually arises, it can be addressed on review of later decisions.

II. THE FOURTH CIRCUIT'S DECISION WAS COMPELLED BY, AND WOULD NOT "UPSET," "DECADES OF SETTLED LAW."

Despite petitioners' inability to point to conflicting decisions or to any final award in a *Bivens* action directed against military operations, petitioners argue that the Fourth Circuit's decision would "upset decades of settled law." Pet. 9. Nothing could be further from the truth. In fact, implying a remedy that would create personal, financial liability for senior military officials, resulting from their formulation and implementation of military policy, would be a stark and wholly undesirable departure from settled law.

Settled law clearly shields military officials from personal liability for their execution of the President's and Congress's war powers, as well as more broadly for implementation of military policies and operations. In *Chappell,* the Court barred U.S. citizen servicemen from pursuing damages claims against military officials and set forth a limitation on *Bivens* claims that would clearly apply to claims of detainment abuse. In *Stanley*, the Court barred a U.S. citizen civilian (a former soldier) from pursuing damages claims against military and civilian officials, in circumstances involving the most egregious acts (unwitting administration of LSD) not undertaken as part of military operations. Petitioners seek to provide enemy combatants fighting against the United States with damages remedies that are clearly unavailable to U.S. citizens who are serving or have served their nation.

Decisions of this Court and the lower courts have consistently warned against enmeshing military officials in litigation or creating the prospect of personal liability that military officials must weigh as they formulate and execute military policy. See Pet. App. 30a, 61a-64a; *supra* pp. 11-12 (collecting cases). As useful as a damages action would prove to opponents of the nation's military policy in this case and future cases, it has been rejected repeatedly in part for just that reason. "[A]uthorizing monetary damages remedies against military officials engaged in an active war would invite enemies to use our own federal courts to obstruct the Armed Forces' ability to act decisively and without hesitation in defense of our liberty," *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 105 (D.D.C. 2007), *aff'd sub nom. Ali* v. *Rumsfeld*, 649 F.3d at 773, and "'[s]uch trials would . . . bring aid and comfort to the enemy.'" *Ali,* 649 F.3d at 773 (quoting *Johnson* v. *Eisentrager*, 339 U.S. 736, 779 (1950)); see *Stanley*, 483 U.S. at 682-83; *Chappell*, 462 U.S. at 303-04; *Stencel*, 431 U.S. at 673; *Eisentrager*, 339 U.S. at 778-79; *Arar*, 585 F.3d at 574-77; Pet. App. 61a-64a (collecting cases). Unsurprisingly, petitioners' argument has been rejected in this case unanimously by four judges appointed by four different Presidents and holding very different views of the scope of counter-terrorism powers. Compare *Al-Marri* v. *Pucciarelli*, 534 F.3d 213, 217 (4th Cir. 2008) (en banc) (Motz, J., concurring in the judgment), with *id.* at 293 (Wilkinson, J., concurring in part and dissenting in part), *vacated as moot*, 555 U.S. 1220 (2009). And the United States, as *amicus curiae*, urged the Fourth Circuit to uphold the dismissal of petitioners' suit because no *Bivens* action should be implied against defendant military officials and because defendants are entitled to qualified immunity. See Br. of United

States as *Amicus Curiae*, *Lebron* v. *Rumsfeld*, No. 11-6480 (4th Cir., July 18, 2011).

For similar reasons, there is no merit to petitioners' claim that a Bivens damages remedy should be implied because otherwise the Executive would be exempt from "[o]ur system of checks and balances" and "beyond judicial review." Pet. 23, 20. This point fails to account for the years of judicial review that Padilla secured from multiple courts through habeas petitions. See *supra*, pp. 4-5; Pet. App. 19a (Padilla "took full advantage of" habeas proceedings prior to his transfer to civilian custody); *id.* at 31a-32a. It also ignores that Congress is empowered to, but has chosen not to, create such a damages action. And, it overlooks the crucial constraints on military actions arising from Congressional oversight and legislative powers, the military discipline system, the military chain of command, review of detention practices by the Department of Justice, the press, and compensation systems created by Congress. See, *e.g.*, Military Claims Act, 10 U.S.C. § 2733; Uniform Code of Military Justice, 10 U.S.C. §§ 801 *et seq*. "Our federal system of checks and balances provides means to consider allegedly unconstitutional executive policy, but a private action for money damages . . . is not one of them." *Arar*, 585 F.3d at 574.

III. THIS CASE PRESENTS AN ESPECIALLY POOR VEHICLE FOR REVIEW OF THE QUESTION PRESENTED.

Even if the question presented in the petition merited this Court's review, this case would provide a particularly poor vehicle for addressing it.

a. In cases involving a motion to dismiss, the Court can usually proceed to the core legal issue by accepting the pled facts as true, but here a significant

preliminary issue exists because petitioners failed to allege facts sufficient to establish personal responsibility of any defendant for the alleged acts. See *Iqbal*, 556 U.S. at 676 (no vicarious or respondeat superior liability for *Bivens* claims). The courts below did not reach this issue only because they ruled on other grounds in defendants' favor, but any contrary decision would first have to address the fact-intensive, detailed, and contradictory nature of the complaint and voluminous materials attached to it. Petitioners seek review of when "torture" is actionable, Pet. i, but their own pleadings show that defendants had – and thus this case has – nothing to do with any such alleged acts. The complaint and materials attached to it show that (i) defendants considered but chose not to authorize (and therefore are not responsible for) the most egregious allegations of mistreatment, (ii) the Department of Justice and senior military lawyers of the service branches reviewed and approved the interrogation techniques and conditions of confinement that were allegedly authorized by these defendants (which supported the district court's qualified immunity conclusion, see Pet. App. 76a), and (iii) persons other than defendants were directly responsible for the conditions surrounding Padilla's detention. See, *e.g.*, C.A. App. 85-89, 131-378, 418-32, 437-572, 621-37; see *supra* pp. 5-6 (discussing petitioners' dismissal of most defendants, including those who dealt most directly with Padilla's custody and had personal involvement in his interrogation, medical care, and psychological care).

Furthermore, petitioners' choice to seek only $1 of damages from each defendant undermines their claim that a damages remedy must be implied and underscores the artificial nature of their question

presented. It confirms that this case has little to do with redressing harm to petitioners and everything to do with proceeding against high-level former officials. Petitioners and their counsel seek little more than an advisory opinion on hypothetical facts related to the formulation and implementation of military policy.

b. Two further jurisdictional impediments stand in the way of any ruling in petitioners' favor. First, *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973), and *Heck* v. *Humphrey,* 512 U.S. 477 (1994), bar claims that would effectively bypass habeas review. Padilla chose to forgo the opportunity to press his fact-based, conditions of confinement claims during his multi-year, unsuccessful habeas proceedings, leading the magistrate judge considering his *Bivens* claims to suggest that the remaining legal claims were "an end run around the [habeas] system." C.A. App. 1295. Having proved unsuccessful in his habeas proceedings, Padilla cannot, under *Preiser* and *Heck*, pursue a second round of litigation styled as a *Bivens* action. Second, former Secretary Rumsfeld argued that because the President rather than defendants designated Padilla an enemy combatant, harm to Padilla resulting from the designation cannot be fairly traceable to defendants – and thus petitioners lack standing to challenge acts flowing from that designation (including the conditions of confinement).

c. Finally, even if the Court could reach the question presented by petitioners, consideration of that issue would be largely fruitless due to several alternative grounds for deciding against petitioners. The district court held, as an independent basis for dismissing the complaint, that defendants are entitled to qualified immunity. See Pet. App. 71a-74a. The United States, as *amicus* before the Fourth Circuit, supported dismissal on this alternative

ground as well as dismissal because no *Bivens* action should be implied. See *supra* p. 17. The Fourth Circuit's decision did not reach, and did not challenge, this alternative ground for dismissal. See Pet. App. 33a (because petitioners' *Bivens* action could not be maintained, no need to reach issues of qualified immunity). The Ninth Circuit's recent qualified immunity decision in *Padilla* v. *Yoo*, 2012 WL 1526156, is fully consistent with this alternative ground for dismissal here. See also *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074 (2011).

In addition, defendants argued that the district court's dismissal could be affirmed on the alternative grounds that the allegations in the complaint were insufficient to establish either plausible constitutional violations or each defendant's personal participation in the alleged unconstitutional conduct, as required by this Court in *Iqbal*. See Br. for Defendants-Appellees Hanft, Haynes, Jacoby, Marr, and Wolfowitz at 50-56, *Lebron* v. *Rumsfeld*, No. 11-6480 (4th Cir. July 11, 2011). And, they argued that Padilla's habeas proceedings foreclose a *Bivens* remedy. *Id.* at 24-28. The court of appeals did not address these alternative grounds for affirmance. See Pet. App. 33a. Even if the Court found in favor of petitioners, that would do little more than revive litigation that almost certainly would be resolved in defendants' favor on other grounds.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully yours,

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