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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, OBAID ULLAH (AS PERSONAL REPRESENTATIVE OF GUL RAHMAN), Plaintiffs, v. JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN Defendants.	No. 2:15-CV-286-JLQ PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS Note On Motion Calendar: April 22, 2016, 9:00 a.m., at Spokane, Washington

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INTRODUCTION

This case concerns war crimes committed by Defendants James Mitchell and Bruce Jessen, two psychologists who designed an experimental torture program aimed at psychologically destroying prisoners through the deliberate and methodical infliction of severe pain and suffering. Defendants helped convince the CIA and other government agencies to adopt their methods and, as independent contractors, profited from personally administering, evaluating, and refining the torture of CIA prisoners.

Plaintiffs Suleiman Abdullah Salim, Mohamed Ben Soud, and Gul Rahman are victims of Defendants' torture program. After enduring extensive abuse in accordance with Defendants' protocols—including water torture, excruciating stress positions, prolonged standing sleep deprivation, and confinement in coffin-like boxes—Plaintiffs Salim and Ben Soud were released without charge; Mr. Rahman died during his torture.

Plaintiffs seek accountability from Defendants under the Alien Tort Statute (ATS), through which the First Congress vested federal courts with jurisdiction over tort claims arising from violations of customary international law. In response, Defendants ask this Court to replace carefully limited jurisdictional and immunity doctrines with sweeping new rules of impunity, and urge a reading of the ATS that would nullify Congressional intent. Contrary to Defendants'

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arguments, however, whether American citizens personally violated the prohibitions against torturing, cruelly treating, and experimenting on prisoners is not a nonjusticiable political question. Nor are Defendants—independent contractors who profited enormously from their torture program—entitled to blanket immunity. Finally, the ATS provides jurisdiction over Plaintiffs' claims, which are closely connected to the United States and allege violations of universally accepted international norms. Defendants' arguments are meritless.

LEGAL STANDARD

In considering a motion to dismiss, except where Defendants submit factual evidence attacking jurisdiction, "[a]ll factual allegations in the complaint are accepted as true, and the pleadings construed in the light most favorable to the nonmoving party." *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1018 (9th Cir. 2014) (quotation marks omitted).

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE JUSTICIABLE.

Defendants argue that Plaintiffs' claims are nonjusticiable because they "are inherently entangled with (and predicated upon) decisions reserved for the political branches of the U.S. government." ECF No. 27 at 1. Their argument boils down to two basic propositions: That prisoner abuse and torture are political decisions reserved for the executive branch, and that no judicially manageable

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standards exist to adjudicate Plaintiffs' claims. Defendants misunderstand the political question doctrine, ignore the Supreme Court's most recent guidance, and misread a Ninth Circuit decision that is directly on point.

A. Prisoner abuse and torture are not unreviewable political decisions.

According to Defendants, decisions about prisoner treatment in wartime are constitutionally committed to the executive branch, ECF No. 27 at 5–6 (citing the first factor identified in *Baker v. Carr*, 369 U.S. 186 (1962)), and any case implicating "U.S. policy on the war against al-Qa'ida" is nonjusticiable, *id.* at 8–10 (citing the third through sixth *Baker* factors). These arguments are foreclosed by Ninth Circuit and Supreme Court precedent.

As a matter of Circuit law, Defendants' arguments are barred by the very decision they rely on. The Ninth Circuit has already determined, in *Padilla v. Yoo*, that claims arising from U.S. government torture of an alleged "enemy combatant" are justiciable. 678 F.3d 748, 757 (9th Cir. 2012). There, the plaintiff's claims arose from a Presidential order that he be detained and interrogated "as a source of intelligence about personnel and activities of al Qaeda." *Id.* at 762 n.8 (quotation marks omitted). The Ninth Circuit did not decline jurisdiction; it considered Mr. Padilla's allegations that he was tortured.

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Yoo makes clear that the subject matter of this suit is well within the judiciary's purview.

Defendants argue that "decisions the U.S. government made in response to the threat posed by al-Qa'ida," are either solely committed to the Executive, ECF No. 27 at 5–6, or are so entangled with "political decisions," *id.* at 8–10, as to be beyond judicial competence. But if this is true, the Ninth Circuit could not have decided *Yoo*—yet the court found that case justiciable. Indeed, Plaintiffs' case for justiciability is even stronger. Unlike the plaintiff in *Yoo*, there are no allegations that Plaintiffs were members of al-Qa'ida or designated "enemy combatants." *See, e.g.*, ECF No. 1 at 52 (¶ 119). And in any event, a decade of precedent directly contradicts Defendants' claim that government decisions and policies "made in response to the threat posed by al-Qai'ida" are beyond judicial review. Courts have routinely evaluated—and frequently rejected—the government's decisions in this area. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008) (rejecting effort by political branches to strip federal court jurisdiction over detention of alleged al-Qa'ida fighters at Guantánamo); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (rejecting government decision to deprive alleged al-Qa'ida members of Geneva Convention protections and establish unlawful military commissions); *Rasul v. Bush*, 542 U.S. 466 (2004) (rejecting executive branch effort to deny habeas rights to prisoners alleged to be al Qa'ida members); *Al*

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Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury, 686 F.3d 965 (9th Cir. 2012) (claim arising from government sanction of charity alleged to support al Qaida was justiciable); *see also Am. Civil Liberties Union v. Clapper*, 785 F.3d 787 (2d Cir. 2015) (rejecting executive branch decision to create post-9/11 surveillance program).

More generally, both the Ninth Circuit and the Supreme Court have made clear that the political question doctrine does not place every question touching on the Executive's war and foreign policy decisions beyond the reach of the courts—and torturing and experimenting on prisoners is not the type of core policy determination or strategic judgment that the Constitution insulates from judicial review. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 531, 535–36 (2004) (emphasizing distinction between questioning "core strategic matters of warmaking," and questions involving "individual liberties," for which the Constitution "most assuredly envisions a role for all three branches"); *Koohi v. United States*, 976 F.2d 1328, 1331-32 (9th Cir. 1992) ("The Supreme Court has made clear that the federal courts are capable of reviewing military decisions"). Indeed, over the course of two centuries, the Supreme Court has repeatedly found that claims arising from the unlawful treatment of foreign nationals in wartime are justiciable. *See, e.g.*, *The Paquete Habana*, 175 U.S. 677, 708 (1900) (ordering restitution to enemy noncitizen for seizure of his fishing boats during

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Spanish-American war because "an established rule of international law" exempted civilian vessels from capture as war prizes); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (U.S. Navy Captain liable for illegally seizing a ship during wartime even though the Captain had acted on a Presidential order); *cf. Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 553 (9th Cir. 2014) (distinguishing between torts arising from "the on-the-ground execution of military-related operations," which are justiciable, and the "underlying foreign-policy choices such as the very decision to engage in military activity," which are not); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007) (decisions on allocation of foreign aid are constitutionally committed to the political branches).

Defendants' argument is also impossible to square with the Supreme Court's recent decision in *Zivotofsky v. Clinton*. In that case, which involved a plaintiff seeking to enforce Congress's decision that Americans born in Jerusalem be allowed to have "Israel" recorded as their birthplace on passports, the Court made clear that the political question doctrine is a "narrow exception" to the judiciary's "duty" to decide cases. *Zivotofsky*, 132 S. Ct. 1421, 1427–28 (2012). Although the dispute was at the heart of a foreign relations controversy, the Court found the case justiciable, stating that "courts cannot avoid their responsibility merely 'because the issues have political implications.'" *Id.* at 1428 (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983)).

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Zivotofsky teaches that political question dismissals are particularly inappropriate when plaintiffs seek to give effect to Congressional enactments. *See id.* at 1427 ("[t]he existence of a statutory right. . . is certainly relevant to the Judiciary's power to decide" a claim). Of course, this is what Plaintiffs ask the Court to do here. Congress enacted the ATS to confer jurisdiction over tort claims based on violations of the law of nations, 28 U.S.C. § 1350, and it has repeatedly enacted laws prohibiting the conduct Plaintiffs allege, *see, e.g.*, War Crimes Act, 18 U.S.C. § 2441; Torture Act, 18 U.S.C. § 2340. As in *Zivotofsky*, here "the federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy . . . should be." *Id.* at 1427. Instead, Plaintiffs ask this Court to enforce legal prohibitions through a vehicle that Congress has created for exactly this purpose. This is a "familiar judicial exercise." *Id.*; *see also, e.g.*, *Kaplan v. Cent. Bank of Islamic Republic of Iran*, 961 F. Supp. 2d 185, 192–93 (D.D.C. 2013) (courts have responsibility to determine whether particular conduct is actionable in accordance with statute, even if answer implicates foreign policy).

B. Plaintiffs' claims are judicially manageable.

Defendants similarly miss the mark in arguing that no "judicially discoverable and manageable standards" exist for resolving Plaintiffs' claims. ECF No. 27 at 4 (quoting *Baker*, 369 U.S. at 217). As the Ninth Circuit has

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emphasized, "Damage actions are particularly judicially manageable." *Koohi*, 976 F.2d at 1331. This is especially true of ATS suits, where "universally recognized norms of international law provide judicially discoverable and manageable standards . . . which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion." *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995). And while certain claims may require "careful examination of the textual, structural, and historical evidence put forward by the parties," that task is uniquely assigned to and manageable by the judiciary. *Zivotofsky*, 132 S. Ct. at 1430. In other words, "[t]his is what courts do." *Id; see also United States v. Munoz-Flores*, 495 U.S. 385, 396 (1990) (finding claims justiciable and observing that the judiciary is "capable of determining when punishment is 'cruel and unusual,' when bail is '[e]xcessive,' when searches are 'unreasonable,' and when congressional action is 'necessary and proper'").

Courts have consistently found the types of claims Plaintiffs bring to be judicially manageable. Courts in ATS suits evaluate on a case-by-case-basis whether specific conduct violated the torture prohibition. *See, e.g.*, *In re Estate of Ferdinand Marcos Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994). Federal courts also routinely apply the U.S. regulatory definition of torture, based on article 1 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 1, P 1, Dec. 10, 1984, S. Treaty Doc.

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No. 100-20 (1988), 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984) ["CAT"]. Courts apply this definition in hundreds of cases involving immigration relief for individuals who seek protection from torture. *See, e.g.*, *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015); *Tchemkou v. Gonzales*, 495 F.3d 785, 795 (7th Cir. 2007) (torture definition satisfied by conduct including "a beating and a detention under deplorable conditions," and an "abduction and beating" that "only could be described as the intentional infliction of severe pain or suffering"). Again, *Yoo* is not to the contrary. *Cf.* ECF No. 27 at 7 (arguing that *Yoo* shows that torture claims are nonjusticiable). The Ninth Circuit found the torture claim there *justiciable*, but held that the particular conduct alleged did not clearly constitute torture in 2003.

Courts also regularly determine whether specific conduct constitutes cruel, inhuman, or degrading treatment. "[N]early every case addressing the question . . . has held that conduct sufficiently egregious may be found to constitute cruel, inhuman or degrading treatment under the [ATS]." *Doe v. Qi*, 349 F. Supp. 2d 1258, 1322 (N.D. Cal. 2004); *see, e.g.*, *Tachiona v. Mugabe*, 216 F.Supp.2d 262, 281 (S.D.N.Y. 2002); *Jama v. I.N.S.*, 22 F.Supp.2d 353, 363 (D.N.J.1998); *Xuncax v. Gramajo*, 886 F.Supp. 162, 187 (D. Mass.1995). Defendants' own authorities confirm that these claims are judicially manageable. For example, in *Bowoto v. Chevron Corp.*, 557 F.Supp.2d 1080, 1094 (N.D. Cal. 2008), *aff'd*, 621

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F.3d 1116 (9th Cir. 2010), the court found the standard met where the plaintiffs were beaten, held in inhuman conditions, and subjected to stress positions.

At bottom, Defendants fundamentally misunderstand the meaning of the "judicially discoverable and manageable standards" requirement. They argue that the prohibition against nonconsensual human experimentation is beyond judicial competence because "non-consensual human medical experimentation was substantively addressed only once," and they find the "parameters" supplied by that case inadequate. ECF No. 27 at 8. But whether a claim is *capable* of judicial review in no way turns on whether that claim *has been* previously addressed. Defendants' proposed rule is nonsensical: no new claim would ever be justiciable if courts required *prior* decisions to establish its "parameters." Of course, that is not the law.

II. DEFENDANTS ARE NOT ENTITLED TO IMMUNITY.

Defendants maintain that they are entitled to "derivative sovereign immunity" because "the CIA has not waived its sovereign immunity." ECF No. 27 at 13. But as the Supreme Court recently affirmed, federal contractors do not "share the Government's unqualified immunity from liability and litigation." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016). There is "no authority for the notion that private persons performing Government work acquire the Government's embracive immunity." *Id.* Congress has likewise explicitly refused

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to provide contractors the immunity from tort liability it provided to federal employees under the Federal Tort Claims Act (FTCA). *See* 28 U.S.C. §§ 2679 (immunizing employees); 2671 (excluding contractors from statute).[1]

The law treats independent contractors differently in part because, unlike federal employees, they face a different set of incentives and restrictions. Contractors are not subject to civil service laws or administrative discipline, and can reap profits far in excess of any public servant. *See Richardson v. McKnight*, 521 U.S. 399, 411 (1997) ("unlike a government department," contractor could "offset any increased employee liability risk with higher pay or extra benefits"). The potential for profit and the absence of accountability mechanisms poses unique risks. Here, Defendants peddled pseudoscientific and unlawful torture methods from which they could—and did—profit enormously. *See* ECF No. 1 at 31 (¶¶ 66–68) (Defendants were personally paid millions of dollars, and the corporation they formed was paid $81 million). And once the details of Defendants' torture program became public, the CIA itself acknowledged

[1] Defendants' reliance on *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011), which addresses FTCA immunity for federal employees, is particularly inapt. *See* ECF No. 27 at 16–17. Defendant cannot claim for themselves the statutory immunity that Congress denied them.

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Defendants' conflict of interest. *See* ECF No. 1 at 30 (¶ 64). Tort liability mitigates risks and discourages contractor abuses. As a result, contractors are routinely held liable where the U.S. and its officials might be immune. *See, e.g.*, *infra* 16–17 (citing examples).[2]

In a case denying contractor immunity, the Ninth Circuit has emphasized that "immunity must be extended with the utmost care" because of the great costs it imposes on injured persons and "the basic tenet that individuals be held accountable for their wrongful conduct." *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 882 (9th Cir. 2014), *aff'd*, 136 S. Ct. 663 (quotation marks omitted). Accordingly, contractors are entitled to immunity only in accordance with narrow doctrines. Specifically, certain contractors may acquire immunity under the doctrines of *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 19 (1940), and *Filarsky v. Delia*, 132 S. Ct. 1657 (2012). *See Gomez*, 136 S. Ct. at 673 (explaining contractor immunity doctrines). As Plaintiffs explain below, neither doctrine shields Defendants because they fail to satisfy the carefully-drawn

[2] Particularly with respect to torture, the government has recognized this rationale for treating contractors and federal employees differently. *See* Brief of United States as *Amicus Curiae*, *Al Shimari v. CACI*, 2012 WL 123570 (4th Cir. 2012), at *23 n.8

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requirements imposed by the Ninth Circuit and Supreme Court. Defendants ignore these requirements, relying instead on inapposite out-of-circuit authority to cobble together a theory of immunity broad enough to reach their deplorable acts. But the cases Defendants cite are inapposite, contrary to Circuit law, or both.

A. Defendants are not entitled to *Yearsley* immunity.

Defendants cannot claim immunity under the *Yearsley* doctrine, which protects the government's ability to delegate its lawful powers to agents acting on its behalf. *Yearsley* immunity is available only for conduct that (1) exercises validly-delegated and lawful government authority, and (2) is undertaken pursuant to a government plan the contractor had no discretion in devising. Defendants meet neither of these necessary criteria.[3]

Under the first prong of the *Yearsley* doctrine, immunity extends only to contractually-required actions that are "tortious when done by private parties but

[3] These requirements are confirmed by the Supreme Court's recent affirmance of the Ninth Circuit's denial of contractor immunity in *Gomez*. 136 S. Ct. at 673. The Court made clear that a Navy contractor could not qualify for immunity unless it acted in accordance with lawful government instructions, disagreeing with the Ninth Circuit only "to the extent that" the Ninth Circuit had described *Yearsley* immunity as limited to public works. *Id.* at 673 n.7.

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not wrongful when done by the government." *U.S. ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1146 (9th Cir. 2004). As the Supreme Court has emphasized, the government cannot by contract immunize unlawful acts because that authority is "'not validly conferred.'" *Gomez*, 136 S. Ct. at 673 (quoting *Yearsley*, 309 U.S. at 21); *see also Yearsley*, 309 U.S. at 22 (conferring immunity where contractor was "lawfully acting" on government's behalf).

Because the Executive could not lawfully authorize the torture and abuse of Plaintiffs, *Yearsley* does not shield Defendants from suit. The conduct Plaintiffs allege violates the Convention Against Torture, which Congress made "the law of the land on November 20, 1994." *U.S. v. Belfast*, 611 F.3d 783, 802 (11th Cir. 2010); *see* 18 U.S.C. § 2340. Moreover, Defendants' conduct is explicitly prohibited by the Geneva Conventions, which designate "torture" and "inhuman treatment" as "grave breaches" of the Conventions. *See, e.g.*, Convention Relative to the Treatment of Prisoners of War, art. 130, Aug. 12, 1949, 75 U.N.T.S. 135. Common article 3 also prohibits subjecting any prisoner to "cruel treatment and torture" and "humiliating and degrading treatment." *Id.* art. 3. Congress has criminalized these acts as war crimes. *See* 18 U.S.C. § 2441.

Nonetheless, Defendants argue that they are immune because Office of Legal Counsel ("OLC") memoranda purported to authorize the torture program. ECF No. 27 at 20. But no executive branch official can create immunity by

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"interpreting" statutes to permit unlawful actions. *See Little*, 6 U.S. (2 Cranch) at 178–79 (President's orders purporting to interpret an Act of Congress did not entitle U.S. Naval officer to immunity from suit for unlawful seizure). As Justice Marshall explained in rejecting a Naval officer's claim to immunity in *Little*, executive branch interpretations of law "cannot change the nature of the transaction, or legalize an act." *Id.* at 179. It is solely for this Court—not OLC—to decide whether Defendants acted unlawfully.[4]

Defendants also fail to meet the second prong of *Yearsley*. "[D]erivative sovereign immunity, as discussed in *Yearsley*, is limited to cases in which a contractor 'had no discretion in the design process and completely followed

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[4] Notably, the Department of Justice Office of Professional Responsibility determined that the now-withdrawn OLC guidance consisted of "illogical" and "convoluted" justifications for torture. Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists (2009) at 230; *see also* David Margolis, Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report 67 (Jan. 5, 2010) (withholding discipline but concluding that the torture memos contained "significant flaws").

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government specifications.'" *Cabalce v. Thomas E. Blanchard & Associates, Inc.*, 797 F.3d 720, 732 (9th Cir. 2015) (quoting *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1001 (9th Cir.2008)). This requirement ensures that immunity insulates only the *government's* lawful discretion, as expressed in specific contracts. Defendants cannot meet this requirement because they personally designed the torture program and its individual techniques. ECF No. 1 at 26 (¶57); *see Cabalce*, 797 F.3d at 732 (holding that "[e]ven if we applied *Yearsley*," the defendant contractor "would not benefit" because it exercised discretion "in devising" tortuous plan).

B. Defendants are not entitled to *Filarsky* immunity.

Independent contractors are not automatically entitled to the qualified immunity provided to government officials. Under *Filarsky*, certain contractors, such as attorneys performing traditional law enforcement functions, may receive qualified immunity if their claim is historically grounded in common law and if they violated no clearly established rights. Defendants satisfy neither requirement.

In *Filarsky* itself, the Court "afforded immunity only after tracing two hundred years of precedent" supporting qualified immunity for private attorneys in law enforcement roles. *Gomez*, 768 F.3d at 882. Defendants, by contrast, provide *no* authority for the proposition that psychologists are entitled to immunity at common law in circumstances even remotely comparable to those

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alleged here. This failure is fatal to their immunity claim. *See Jensen v. Lane Cty.*, 222 F.3d 570, 580 (9th Cir. 2000) (contract psychiatrist "not entitled to qualified immunity" where no common law tradition immunized mental health professionals for civil commitment decisions); *McCullum v. Tepe*, 693 F.3d 696, 702 (6th Cir. 2012) (denying immunity to contractor prison psychiatrist based on lack of common law tradition); *see generally Gomez*, 768 F.3d at 882 (qualified immunity unavailable to Naval contractor that failed to show "decades or centuries of common law recognition of the proffered defense"); *Richardson*, 521 U.S. at 404 (denying immunity where "[h]istory does *not* reveal a 'firmly rooted' tradition of immunity applicable to privately employed prison guards"); *Malinowski v. DeLuca*, 177 F.3d 623, 627 (7th Cir. 1999) (denying immunity in the absence of "any cases or historical evidence to lend support to the notion that private building inspectors have historically enjoyed qualified immunity").

Even if Defendants were able to meet the *Filarsky* test—which they are not—they remain liable because they violated well-established prohibitions against torture, cruel, inhuman, or degrading treatment, nonconsensual experimentation, and war crimes. For over half a century, U.S. officials have known that this conduct is forbidden under the Geneva Conventions, and that "[t]he liability of private individuals for committing war crimes has been

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recognized since World War I and was confirmed at Nuremberg after World War II." *Kadic*, 70 F.3d at 243.

No decision supports Defendants' claim to qualified immunity. Defendants invoke *Yoo*, but in that case the Ninth Circuit did not evaluate all of the torture methods at issue here. In particular, it did not address Defendants' use of a water torture, prolonged and shackled standing sleep deprivation, and confinement boxes, nor the ways in which Plaintiffs were forced to endure these and other methods in combination. *See Yoo*, 678 F.3d at 764 (evaluating whether more limited set of torture methods clearly constituted torture in 2001–03). As the President himself recognized with respect to several of Defendants' methods, "any fair minded person would believe [the techniques] were torture." Press Release, White House, Press Conference by the President (Aug. 1, 2014), http://1.usa.gov/1RHhYUx. Plaintiffs' allegations go far beyond the allegations in *Yoo*, and clearly constitute torture.

There was no ambiguity in 2003 about whether Defendants violated the torture ban, but even if there were, the very cases cited by Defendants demonstrate a *consensus* at that time that their actions violated the well-established prohibitions on cruel, inhuman, or degrading treatment and war crimes. Defendants cite *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978), which evaluated the combined use of "(stress positions), hooding,

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subjection to noise, sleep deprivation, and deprivation of food and drink." *Yoo*, 678 F.3d at 765. But as the Ninth Circuit recognized, *Ireland* concluded that the combined methods "'undoubtedly amounted to inhuman and degrading treatment' in violation of Article 3" of the Geneva Conventions. *Id.* (quoting *Ireland*). Defendants also cite HCJ 5100/94 *Public Committee Against Torture in Israel v. Israel*, 53(4) PD 817 [1999] (Isr.), which likewise found that "hooding, violent shaking, painful stress positions, exposure to loud music and sleep deprivation" *were each illegal*, violating either the prohibition against torture or against other forms of cruel, inhuman, or degrading treatment. *Yoo*, 678 F.3d at 765. Defendants were therefore on notice that their methods "undoubtedly amounted to" cruel, inhuman or degrading treatment.

Defendants were also on notice that nonconsensual experimentation on prisoners has been prohibited since Nuremberg. *See United States v. Stanley*, 483 U.S. 669, 687 (1987) (Brennan, J., concurring in part and dissenting in part) ("The medical trials at Nuremberg in 1947 deeply impressed upon the world that experimentation with unknowing human subjects is morally and legally unacceptable.").

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III. THE COURT HAS JURISDICTION OVER PLAINTIFFS' ATS CLAIMS.

A. Plaintiffs' claims sufficiently touch and concern the United States to establish jurisdiction.

Plaintiffs' claims easily meet the "touch and concern" test for ATS jurisdiction established by the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). *Kiobel* requires that courts engage in a fact-based, claims-specific inquiry to determine if extraterritorial injuries sufficiently "touch and concern" the United States to allow for consideration by a U.S. court. *See Nestle USA*, 766 F.3d at 1028; *Mujica v. AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014). Defendants argue that the complaint contains no facts connecting Plaintiffs' ATS claims to the United States. ECF No. 27 at 23. That is incorrect. Although Plaintiffs' injuries were sustained abroad, *virtually every fact* underpinning their claims is connected to the United States.

In determining whether ATS claims sufficiently "touch and concern" the United States, courts examine whether "part of the conduct underlying their claims occurred within the United States," *Nestle USA*, 766 F.3d at 1028, and whether a defendants' U.S. citizenship "in conjunction with other factors, can establish a sufficient connection between an ATS claim and the territory of the United States to satisfy *Kiobel*." *Mujica*, 771 F.3d at 594 & n. 9. Critically, "when plaintiffs allege U.S. based conduct itself constituting a violation of the ATS, the

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presumption against extraterritoriality is no obstacle to consideration of ATS claims." *Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75, 95 (D.D.C. 2014).

Plaintiffs' allegations more than satisfy the "touch and concern" test, as demonstrated by the ATS case most closely analogous to this one, *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014). *Al Shimari* involved claims brought by Iraqi citizens against a U.S. military contractor for the torture and cruel treatment they endured at the U.S.-run Abu Ghraib prison in Iraq. The defendant contractor sought dismissal, arguing that "the ATS does not under any circumstances reach tortious conduct occurring abroad." *Id.* at 528. The Fourth Circuit rejected the contractor's argument, explaining that

> when a *claim's* substantial ties to United States territory include the performance of a contract executed by a United States corporation with the United States government, ... it is not sufficient merely to say that because the actual injuries were inflicted abroad, the claims do not touch and concern United States territory.

Id. After considering "the facts that [gave] rise to the ATS claims, including the parties' identities and their relationship to the causes of action" the court concluded that jurisdiction was proper. *Id*. 527, 530–31. In particular, the *Kiobel* test was satisfied by allegations that U.S. citizens, under contract with the U.S. government, abused detainees in an overseas "facility operated by United States government personnel," *id.* at 528, combined with allegations that the contractor took action in the United States in furtherance of overseas torture, *id.* at 531.

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Jurisdiction was reinforced by Congress's intent to "provide aliens access to United States courts and to hold citizens of the United States accountable for acts of torture committed abroad." *Id.*

All the factors the Fourth Circuit found sufficient to displace the *Kiobel* presumption in *Al Shimari* are present here: Plaintiffs were tortured in facilities under the control of the United States government, ECF No. 1 at 9 (¶ 18), pursuant to the torture program Defendants devised and administered under contract with the U.S. government in the United States, *id.* at 9, 31 (¶¶ 18, 66), and coordinated with U.S. officials located in the United States, *id.* at 21 (¶¶ 43–44). In addition, nearly *all* relevant conduct underlying Plaintiffs' aiding and abetting and conspiracy/joint criminal enterprise-based claims took place in the United States: Plaintiffs allege that Defendants violated customary international law because, in collaboration with U.S. government officials, they conceived of and designed a torture program in the United States, and then implemented, administered and oversaw it in large part from the United States. *See id.* at 9 (¶ 18) (design and supervision of torture program occurred in the United States); 12–14 (¶¶ 24–27); 26–27 (¶¶ 57–59) (detailing design and implementation). These facts are more than sufficient to establish jurisdiction under the ATS. *See Mastafa v. Chevron Corp.*, 770 F 3d 170 (2d. Cir. 2014) (ATS reaches U.S-based acts of aiding and abetting tortious conduct causing injury abroad); *Mwani v. Bin Laden*,

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947 F.Supp.2d 1, 5 (D.D.C. 2013) (ATS claims sufficient because plaintiffs had "presented evidence that . . . overt acts in furtherance of [the defendants'] conspiracy took place in the United States"); *Sexual Minorities Uganda v. Lively*, 960 F.Supp.2d 304, 323 (D. Mass. 2013) (jurisdiction over overseas tort because of "conduct undertaken by Defendant in the United States to provide assistance").

None of the policy considerations identified in *Kiobel* militate against jurisdiction in this case. This case does "not present any potential problems associated with bringing foreign nationals into United States courts to answer for conduct committed abroad." *Al Shimari*, 758 F. 3d at 530. And, because the norms that are the basis of Plaintiffs' claims are all prohibited by U.S. law, policy, and practice, "further litigation of these ATS claims will not require 'unwarranted judicial interference in the conduct of foreign policy.'" *Id*. (quoting *Kiobel*, 133 S. Ct. at 1664). In fact, declining jurisdiction in this case would undermine important U.S. policy objectives and threaten the serious foreign policy consequences that *Kiobel* aimed in part to protect. Foreclosing jurisdiction of these claims would provide U.S.-based torturers with a "safe harbor" in this country, *id*., and undermine government assurances that our courts are capable of providing remedies to victims and survivors of torture by U.S. government contractors, *see e.g.*, U.S. Dep't of State, *United States Response to Questionnaire Concerning the Montreux Document Related to the Operations of*

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Private Military and Security Companies During Armed Conflict (Dec. 19, 2013), ¶16, http://1.usa.gov/20c9iFu (persons harmed by U.S. government contractors can seek ATS remedies (citing *Kiobel*)).

Defendants do not cite—let alone distinguish—*Al-Shimari*, relying instead on inapposite cases that contain no allegations that "human rights abuses were planned, directed, or committed in the U.S." ECF No. 27 at 23 (citing *Doe I v. Cisco Sys., Inc.*, 66 F. Supp. 3d 1239 (N.D. Cal. 2014)). Those cases bear little resemblance to this one: Plaintiffs' claims arise from the torture program that Defendants devised and oversaw from the United States, coordinated with U.S. officials located in the United States, and operated in collaboration with the U.S. government pursuant to contracts with the U.S. government executed and administered in the United States. Jurisdiction under the ATS is proper.

B. Plaintiffs state valid claims under the ATS.

Defendants argue that Plaintiffs have failed to sufficiently plead ATS claims for torture and nonconsensual human experimentation. ECF No. 27at 23–29. Defendants misunderstand the pleading requirements.[5]

[5] Defendants do not challenge the sufficiency of Plaintiffs' ATS claims for cruel, inhuman, and degrading treatment and for war crimes. Defendants' violations of these prohibitions are actionable under the ATS. *See* p. 9, *supra*

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1. Plaintiffs have stated claims for torture under the ATS.

According to Defendants, Plaintiffs cannot plead a claim for torture because "the OLC and CIA authorized Defendants' alleged conduct and because the OLC memoranda specifically concluded that the interrogation techniques purportedly applied by Defendants did not result in the intentional infliction of severe pain or suffering." ECF No. 27 at 26. But, as discussed above, executive branch memoranda cannot preempt this Court's role in determining whether Defendants violated the norm against torture.

Plaintiffs sufficiently allege claim of torture actionable under the ATS. As Defendants concede, customary international law prohibits official torture, and claims of violations are actionable under the ATS. ECF No. 27 at 24–25. The Ninth Circuit has affirmed jury instructions that define torture under the ATS in accordance with Article 1.1 of the CAT. *See Hilao v. Estate of Marcos*, 103 F.3d 789, 792 (9th Cir. 1996). The prohibition against torture extends to "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for purposes including "obtaining from him or a third

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(collecting ATS cases arising from cruel, inhuman and degrading treatment); *see also, e.g.*, *Kadic*, 70 F.3d at 243 (violations of Common Article 3 give rise to ATS claims for war crimes, regardless of state action).

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person information." CAT, art. 1.1. Plaintiffs' allegations meet this definition. The complaint alleges that "Defendants developed a phased program to induce 'learned helplessness" in CIA captives through the infliction of severe physical and mental pain and suffering.'" ECF No. 1 at 26 (¶ 57). Defendants' "very purpose was to induce 'learned helplessness,'" in prisoners by subjecting them to "systematic abuse" modeled on experiments inflicting uncontrollable pain on dogs. *Id.* at 2, 15 (¶¶ 2, 29). Plaintiffs were tortured to Defendants' specifications: "They were subjected to solitary confinement; extreme darkness, cold, and noise; repeated beatings; starvation; excruciatingly painful stress positions; prolonged sleep deprivation; confinement in coffin-like boxes; and water torture." *Id.* at 2–3 (¶ 3). As a result, Plaintiffs endured "severe physical, mental, and emotional pain and suffering." *Id.* at 75 (¶ 172). Neither Defendants' motion nor OLC's memos negate these allegations. Indeed, The OLC memoranda were specifically repudiated for their erroneous and unsupportable interpretations of "severe pain and suffering," and the intent necessary for torture. See n. 4, *supra*; *see also*, Oona Hathaway et. al., *Tortured Reasoning*, 52 Va. J. Int'l L. 791 (2012) (defining intent requirement for torture under U.S. and international law).

Moreover, Defendants acknowledge that ATS claims for "official torture" encompass claims against private individuals who "acted 'together with state officials,' or with 'significant state aid.'" ECF No. 27 at 24–25 n.2 (quoting *Doe*

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v. Saravia, 348 F. Supp. 2d 1112, 1145 (E.D. Cal. 2004)). And they concede that "Plaintiffs allege that Defendants were acting under 'color of law,' and acting alongside the CIA" when they designed and oversaw the torture program that gave rise to this suit. *Id.* Defendants are mistaken, however, that by collaborating with the CIA they acquired sovereign immunity. *See supra* Section II.

2. Plaintiffs have stated claims for non-consensual human experimentation under the ATS.

Defendants argue that the customary international law norm prohibiting nonconsensual human experimentation is insufficiently specific, universal and obligatory to give rise to a claim under the ATS. ECF No. 27 at 27. But the only court to have evaluated this issue found the claim actionable. *See Abdullahi v. Pfizer*, 562 F.3d 163 (2d Cir. 2009). In attempting to distinguish *Pfizer*, Defendants assert that the Second Circuit failed to properly evaluate the law, and that its reasoning should be limited to pharmaceutical testing. ECF No. 27 at 28. But Defendants fail to articulate any deficiency in the Second Circuit's reasoning or its exhaustive examination of relevant sources of international law and practice. As the Second Circuit correctly found, the norm is "sufficiently specific, universally accepted, and obligatory for courts to recognize a cause of action to enforce the norm." *Pfizer*, 562 F.3d at 187 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)). The prohibition is incorporated in numerous ratified

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multilateral treaties, international agreements, declarations, and domestic laws and regulations, *id*. 177, 185–87, and is codified, without significant exception, in "the domestic laws of at least eighty-four" countries—all of which "uniformly and unmistakably prohibit" nonconsensual medical experimentation. *Id*. at 184. Defendants likewise fail to identify a single source that supports the proposition that countries treat non-pharmaceutical experimentation differently for the purposes of this universally accepted prohibition.

Defendants also argue that their torture program was not experimental because its methods were "based on" Defendants' training and were applied to another prisoner, Abu Zubaydah, prior to Plaintiffs' torture. ECF No. 27 at 28–29. But the purpose of and safeguards inherent to Defendants' training were very different from Defendants' torture program, and in any event, Defendants' torture techniques went far beyond those used in their training. ECF No. 1 at 14–15 (¶¶ 28–29). And Defendants' torture experiment began with Abu Zubaydah, but it did not end with him. Defendants continually refined their program, including by assessing whether "certain combinations and sequences of torture techniques were most effective," and "whether detainees became fully compliant with interrogators' demands once they had been reduced to a state of learned helplessness." *Id.* at 75 (¶ 174); *see also id.* at 29–31 (¶¶ 59–65) (describing experiment).

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Finally, Defendants argue that nonconsensual experimentation on humans is not actionable if the experiment is not "medical." ECF No. 27 at 29. But Defendants provide no basis for their conclusion that nonmedical human experimentation is permissible, and none exists. *See, e.g.*, International Covenant on Civil and Political Rights, Art. 7, Dec. 19, 1966, 999 U.N.T.S. 171 ("no one shall be subjected without his free consent to medical *or scientific* experimentation" (emphasis added)); International Committee of the Red Cross Study on Customary International Humanitarian Law (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., 2009), Rule 92: Mutilation and Medical, Scientific or Biological Experiments, http://bit.ly/20jREQe (rule against "scientific" experimentation is "a norm of customary international law" applicable in all conflicts); M. Cheriff Bassiouni et al., *An Appraisal of Human Experimentation in International Law and Practice*, 72 J. Crim. L. & Criminology, 1597, 1597 (1981) (human experimentation is "anything done to an individual to learn how it will affect him"); Christine Byron, War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court 112 (2009) (noting that international prohibitions on "medical," "biological," and "scientific" experiments are interchangeable and that it "would surely be inappropriate" to rely on "the classification given by the defendant" in a war crimes case).

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Plaintiffs sufficiently allege that Defendants experimented on them without their consent —the core elements of the norm. Defendants forced them to be guinea pigs in an experiment aimed at acquiring information through regimented torture. As prisoners, Plaintiffs could not consent. These allegations are sufficient to state claims under the ATS. *See* Cheriff Bassiouni et. al, at 1665 (human experimentation on prisoners "would be a war crime").

IV. DEFENDANTS' ATTEMPT TO DISMISS MR. RAHMAN'S CLAIMS IS GROUNDLESS.

Plaintiffs have plead that Obaid Ullah is "the personal representative of the estate of Gul Rahman." ECF No. 1 at 6 (¶ 11). No more is required. *See* Fed. Rule Civ. P. 9(a); *see also Lang v. Texas & P. Ry. Co.*, 624 F.2d 1275, 1277 (5th Cir. 1980) ("although not requiring a plaintiff to aver capacity," Rule 9(a) "does require a defendant to plead absence of capacity."). Although Defendants' objection is baseless, the Court may take judicial notice of the attached Order of the Superior Court of Washington (Sept. 24, 2015), confirming that Mr. Ullah is indeed the personal representative of Mr. Rahman's estate. *See* Dror Ladin Decl., Exh. A.

CONCLUSION

For the reasons stated above, Defendants' Motion to Dismiss should be denied.

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RESPECTFULLY SUBMITTED this 11th day of February, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of February, 2016, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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