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**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON  
AT SPOKANE**

SULEIMAN ABDULLAH SALIM,  
MOHAMED AHMED BEN SOUD,  
OBAID ULLAH (as personal  
representative of GUL RAHMAN),

Plaintiffs,

vs.

JAMES ELMER MITCHELL and  
JOHN "BRUCE" JESSEN,

Defendants.

NO. 2:15-CV-286-JLQ

**DEFENDANTS' REPLY IN  
SUPPORT OF MOTION TO  
DISMISS PURSUANT TO  
RULES 12(b)(1) AND 12(b)(6)  
OF THE FEDERAL RULES OF  
CIVIL PROCEDURE**

Note On Motion Calendar:  
April 22, 2016, 9:00 AM at  
Spokane, Washington

REPLY IN SUPPORT OF MOTION  
TO DISMISS PURSUANT TO FRCP

12(b)(1) AND 12(b)(6)

NO. 2:15-CV-286-JLQ

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**INTRODUCTION**

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2 Plaintiffs ask this Court to do two things it should not do: (1) second-guess  
3 real-time decisions by the Executive Branch in the theater of war almost 15 years  
4 ago; and (2) hold private government contractors liable for alleged conduct  
5 authorized by the government's own attorneys who were themselves later held to  
6 be immune. Should this Court indulge either of Plaintiffs' unfounded requests, it  
7 would generate untenable, practical dilemmas—hamstringing our government's  
8 ability to combat the ongoing War on Terror.

9 Plaintiffs' alleged treatment while detained by the CIA abroad inescapably  
10 implicates the Political Question Doctrine. In seeking to revisit the almost 15-  
11 year-old foreign policy decisions made by the Executive Branch, Plaintiffs  
12 willfully ignore precedent from various courts—as recent as June 2015—holding  
13 that decisions involving the use of interrogation measures on foreign detainees  
14 should be left to the military and the Executive Branch, as a co-equal branch of  
15 government, and are not susceptible to judicially-cognizable standards. Plaintiffs  
16 would have this Court disregard case law directly on point. Rather than interject  
17 itself into this political arena, this Court should instead heed the guidance of its  
18 sister courts and dismiss Plaintiffs' claims under the Political Question Doctrine.

19 Equally troubling is Plaintiffs' attempt to strip immunity from private  
20 contractors acting within authority validly conferred by the government.  
21 Withholding the protections of Derivative Sovereign Immunity here would  
22

1 impermissibly result in Defendants being left “holding the bag” for conduct for  
 2 which their public counterparts are immune; the very result the Supreme Court has  
 3 counseled against. Denying immunity would also impose an impossible burden  
 4 requiring all contractors to independently test the legality of the government’s  
 5 authority—lest they alone be held liable for carrying out the government’s work.

## 6 ARGUMENT

### 7 I. PLAINTIFFS’ CLAIMS ARE NON-JUSTICIABLE.

8 Plaintiffs mischaracterize Defendants’ arguments as calling upon this Court  
 9 to decide whether “prisoner abuse and torture are political decisions reserved for  
 10 the executive branch,” ECF No. 28 at 2, and wrongly assert that case law precludes  
 11 application of the Political Question Doctrine. But *Al Shimari v. CACI Premier*  
 12 *Tech., Inc.* 2015 U.S. Dist. LEXIS 107511 (E.D. Va. June 18, 2015), recognizes  
 13 that Plaintiffs’ claims raise non-justiciable political questions that lack any  
 14 judicially-manageable standards. This action must be dismissed as non-justiciable.

#### 15 A. The Political Question Doctrine Precludes This Court from 16 Second-Guessing Decisions Made by the Executive Branch.

17 Addressing Plaintiffs’ claims would require reexamination of policy  
 18 decisions by the Executive Branch; the separation of powers “prevents the judicial  
 19 branch from hearing” such a case. *Al Shimari*, 2015 U.S. Dist. LEXIS 107511, at  
 20 \*32 (citing *Wu Tien Li Shou v. United States*, 777 F.3d 175, 180 (4th Cir. 2015)).



1 In arguing against the application of the Political Question Doctrine,  
2 Plaintiffs fail to address *Al Shimari*—a strikingly similar situation in which an ATS  
3 claim against a government contractor involved in interrogating U.S. detainees  
4 abroad was dismissed as non-justiciable. *Al Shimari* reasoned that consideration of  
5 the plaintiffs’ claims would raise a “broad array of interferences by the judiciary  
6 into the military functions textually committed by our Constitution to Congress,  
7 the President and the Executive Branch.” *Id.* at \*26 (internal citations omitted).

8 Per the court’s opinion:

9 During the period of war relevant to Plaintiffs’ allegations,  
10 there was, to be sure, a debate within the Executive Branch  
11 about what were morally appropriate techniques and what could  
12 be justified by military necessity. *These questions, like so*  
13 *many others asked during the aftermath of September 11,*  
14 *2001, were not addressed by applying standards that were*  
15 *judicially cognizable; they were difficult judgments that*  
16 *involved a delicate weighing of public policy, the public sense*  
17 *of morality, public decency, the customs of war, international*  
18 *treaties, and military necessity. There could hardly be a*  
19 *question more unsuited for the judiciary.*

20 *Id.* at \*26-27 (emphasis added; citations omitted).

21 Plaintiffs’ failure to acknowledge and address *Al Shimari* is remarkable,  
22 given their extensive discussion of an earlier Fourth Circuit decision in the same  
matter. ECF No. 28 at 21-24 (citing *Al Shimari v. CACI Premier Tech., Inc.*, 758  
F.3d 516 (4th Cir. 2014)). This omission is even more striking in that Plaintiffs’  
attorneys have filed an amicus brief supporting the pending appeal of *Al Shimari* to

1 the Fourth Circuit, raising many of the same arguments they do here. *See Brief of*  
 2 *Amici Curiae ACLU Foundation, Amnesty International, and Human Rights Watch*  
 3 *in Support of Plaintiffs-Appellants*, No. 15-1831 (4th Cir.), filed Sept. 28, 2015  
 4 (Doc. 22). Indeed, Plaintiffs’ ATS claims present *precisely* the same issues and  
 5 dilemmas seen in *Al Shimari*. For instance, as *Al Shimari* holds, courts are simply  
 6 “unequipped to second-guess the military judgments in the application or use of  
 7 extreme interrogation measures in the theatre of war[, or] whether the techniques  
 8 approved by the military were appropriate[.]” *Id.* at \*31. And Defendants would  
 9 also “likely defend against the allegations [in Plaintiffs’ Complaint] by asserting  
 10 that their actions were ordered by the military.” *Id.* at \*32. As a result, this Court  
 11 would similarly have “to consider whether military judgments were proper.” *Id.*

12 **B. *The Paquete Habana and Koohi v. United States Are Inapplicable.***

13 Plaintiffs rely upon *The Paquete Habana*, 175 U.S. 677 (1900), and *Koohi v.*  
 14 *United States*, 976 F.2d 1328 (9th Cir. 1992), contending that the Supreme Court  
 15 “has made clear that the federal courts are capable of reviewing military  
 16 decisions,” and that “[d]amage actions are particularly judicially manageable.”  
 17 ECF No. 28 at 5, 8. But these cases are inapposite.<sup>1</sup> *See Tarros S.p.A. v. United*

18 \_\_\_\_\_  
 19 <sup>1</sup> Plaintiffs claim that, per *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995),  
 20 ATS suits are especially judicially manageable. ECF No. 28 at 8. *Kadic*, however,  
 21 is inapposite, as there both the U.S. Department of State and Solicitor General  
 22 expressly requested that the Political Question Doctrine *not* be invoked. *Id.* at 250.

1 *States*, 982 F. Supp. 2d 325, 337-38 (S.D.N.Y. 2013). For one, *Habana* applies  
 2 only to cases in which Congress or the President expressly petition the judiciary to  
 3 review a cause of action that involves a political question. 175 U.S. at 338. And  
 4 the court’s holding in *Koochi*—that damage actions are judicially manageable  
 5 relative to actions seeking equitable relief—applies only to the exercise of military  
 6 discretion related to *domestic* control of civil disorder. 976 F.2d at 1338-39.

7 **C. Judicially Manageable Standards Do Not Exist.**

8 Plaintiffs’ contention that judicially-manageable standards exist to review  
 9 their claims is incorrect. The “lack of clarity as to the definition of torture” at the  
 10 time of the alleged conduct “*creates enough of [a] cloud of ambiguity to conclude*  
 11 *that the court lacks judicially manageable standards to adjudicate the merits of*  
 12 *Plaintiffs’ ATS torture claim.*” *Al Shimari*, 2015 U.S. Dist. LEXIS 107511, at \*38  
 13 (emphasis added) (referring to *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012)).<sup>2</sup>  
 14 Likewise, “the definition of [cruel, inhuman and degrading treatment] is so  
 15 malleable that the Court would have a difficult time instructing a jury on the  
 16 distinction between torture and [cruel, inhuman and degrading treatment].” *Id.* at  
 17 \*39. Finally, a charge of war crimes requires a court to “step into the shoes of the

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 19 <sup>2</sup> Plaintiffs wrongly assert that the Ninth Circuit in *Yoo* “determined” claims  
 20 arising from alleged torture of foreign detainees are justiciable. ECF No. 28 at 3-4.  
 21 *Yoo* involved a motion for failure to state a claim; the defendant did not raise  
 22 justiciability, and neither the district nor appellate court addressed it *sua sponte*.

1 military and question its decisions” and to determine if Plaintiffs were “insurgents,  
2 innocent civilians, or even innocent insurgents.” *Id.* at \*41. This is “anything but  
3 simple.” *Id.* In short, there are no judicially-manageable standards to apply.

## 4 **II. DEFENDANTS ARE ENTITLED TO IMMUNITY.**

### 5 **A. Plaintiffs Misconstrue the Requirements for *Yearsley* Immunity.**

6 Plaintiffs assert that *Yearsley*-based immunity is “available only for conduct  
7 that (1) exercises validly-delegated and lawful government authority, and (2) is  
8 undertaken pursuant to a government plan the contractor had no discretion in  
9 devising.” *Id.* This is not the law. Defendants meet all requirements for *Yearsley*-  
10 based immunity.

11 *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940), teaches that there are  
12 only *two* circumstances in which a contractor performing a delegated government  
13 function may be liable: (1) where the contractor “exceeded his authority”; or (2)  
14 where that authority “was not validly conferred” by the government. *Id.* at 21.

15 Neither circumstance invalidating *Yearsley* immunity is present here. “After  
16 al Qaeda killed over three thousand people in its September 11, 2001 attacks on the  
17 United States, Congress empowered the President to use his warmaking authority  
18 to defeat this terrorist threat to our nation.” *Lebron v. Rumsfeld*, 670 F.3d 540, 544  
19 (4th Cir. 2012). “[C]ommand responsibility in national security and military  
20 affairs” are committed “to the President as Commander in Chief.” *Id.* at 549  
21 (citing U.S. Const. art. II § 2, cl. 1); *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004).

1 So too does the President possess authority to delegate national security affairs to  
 2 the CIA. *Winter v. NRDC, Inc.* 555 U.S. 7, 24, 26 (2008); National Security Act of  
 3 1947, *as amended*, 50 U.S.C. §§ 3035, 3036(c), (d)(1)-(4) (2005). And the CIA  
 4 had authority to contract with Defendants to perform such services. *See* Exec.  
 5 Order 12333, 46 Fed. Reg. 59941, 59951 § 2.7 (Dec. 4, 1981), *amended by*, Exec.  
 6 Order 13470, 73 Fed. Reg. 45325, 45339 (July 30, 2008) (authorizing the  
 7 Intelligence Community to “enter into contracts or arrangements for the provision  
 8 of goods or services with private companies or institutions” in the United States).  
 9 Thus, the operative authority was “validly conferred.”

10 Plaintiffs’ argument, citing *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663  
 11 (2016), and *Yearsley*, that “the government cannot by contract immunize unlawful  
 12 acts because the authority is ‘not validly conferred,’” and that because the  
 13 “Executive could not lawfully authorize . . . torture and abuse . . . , *Yearsley* does  
 14 not shield Defendants,” is incorrect. ECF No. 28 at 14. An act’s legality does not  
 15 impact whether the *authority to act* was validly conferred per *Yearsley/Gomez*.

16 In *Yearsley*, it was “undisputed that the work which the contractor had done  
 17 . . . was all *authorized* and *directed* by the Government . . . for the purpose of  
 18 improving . . . navigation[, was] *authorized* and *directed* by the governmental  
 19 officers [and] was performed pursuant to an Act of Congress[.]” 309 U.S. at 20  
 20 (emphasis added). There was no discussion of whether the act itself was lawful;  
 21 rather, the Court focused on whether the “Government’s representatives [were]  
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1 lawfully acting on its behalf in relation to the taking.” *Id.* at 22. It was thus the  
 2 “lawful acting” on behalf of the government—not the act itself—that resulted in  
 3 immunity. *Id.* (citing *Crozier v. Krupp*, 224 U.S. 290, 305 (1912) (“The adoption  
 4 by the United States of the **wrongful** act of an officer is of course an adoption of  
 5 the act when and as committed, and causes such act of the officer to be, in virtue of  
 6 the statute, a **rightful** appropriation by the Government[.]”) (emphasis added)).

7 In *Gomez*, the Supreme Court “disagree[d]” with the Ninth Circuit’s  
 8 “narrow” reading of *Yearsley*—instead recognizing that the “[c]ritical [issue] in  
 9 *Yearsley* was the . . . contractor’s performance **in compliance with all federal**  
 10 **directions.**” 136 S. Ct. at 673 n.7 (emphasis added). *Gomez* thus establishes that a  
 11 contractor loses “derivative immunity” only when it “violates both federal law **and**  
 12 the Government’s explicit instructions.”<sup>3</sup> *Id.* at 672 (emphasis added).

13 Here, Plaintiffs concede that Defendants acted as contractors “pursuant to  
 14 contracts . . . with the CIA.” *See* ECF No. 28 at 14. And, as in *Yearsley* and  
 15 *Gomez*, Defendants’ authority to perform national security services for the CIA to  
 16 defeat the “terrorist threat to our nation” was “validly conferred.” But unlike

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 18 <sup>3</sup> The Ninth Circuit has also recognized that the proper inquiry is whether a  
 19 contractor performed in accordance with its contractual terms. ECF No. 27 at 12-  
 20 13 (collecting cases). Thus, Plaintiffs’ reliance on *Little v. Barreme*, 6 U.S. (2  
 21 Cranch) 170, 179 (1804)—a case decided 136 years **before** *Yearsley*, and that did  
 22 not involve a private contractor performing work under contract—is misplaced.

1 *Gomez*, Defendants did *not* exceed that authority by not “complying with the  
 2 [government’s] instructions.” 136 S. Ct. at 673. Moreover, Defendants have  
 3 already demonstrated that immunity is appropriate in situations where the alleged  
 4 conduct was within the contemplated scope of employment—even if said conduct  
 5 involved detaining and interrogating enemy aliens. *See* ECF No. 27 at 16-17.

6 Plaintiffs’ argument that *Yearsley* immunity is somehow “limited to cases in  
 7 which a contractor ‘had no discretion in the design process and completely  
 8 followed government specifications’” improperly conflates *Yearsley* immunity  
 9 with the “distinct” “government contractor defense” test under *Boyle v. United*  
 10 *Techs. Corp.*, 487 U.S. 500 (1998)—which held that government contractors  
 11 involved in the design of military equipment should not be held liable for state law  
 12 claims where their design conformed to “reasonably precise” government  
 13 specifications.<sup>4</sup> *See* ECF No. 28 at 15-16 (citing *In re Hanford Nuclear*  
 14 *Reservation Litig.*, 534 F.3d 986, 1001 (9th Cir. 2008); *Boyle*, 487 U.S. at 511-12.

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16  
 17 <sup>4</sup> The *Boyle* “government contractor defense” is a “distinct doctrine” from  
 18 *Yearsley*-based Derivative Sovereign Immunity. *See, e.g., Cabalce v. VSE Corp.*,  
 19 922 F. Supp. 2d 1113, 1125 (D. Haw. 2013) (“Many federal courts have since  
 20 construed *Yearsley* as creating a distinct doctrine of derivative sovereign  
 21 immunity.”), *aff’d sub. nom Cabalce v. Thomas E. Blanchard & Assocs.*, 797 F.3d  
 22 720 (9th Cir. 2015); *Chesney v. TVA*, 782 F. Supp. 2d 570, 581-82 (E.D. Tenn.

1 Here, Defendants do not rely on *Boyle*. Nor is there is a contractor  
 2 “discretion” requirement under *Yearsley*; in fact, this term does not appear  
 3 anywhere in the Court’s opinion. Rather, *Yearsley* discussed the contractor’s work  
 4 as being done “under the *direction* of the Secretary of War and the *supervision* of  
 5 the Chief of Engineers of the United States.” 309 U.S. at 556 (emphasis added).  
 6 So too all of the challenged conduct here was under the CIA’s “direction” and  
 7 “supervision.” And the CIA had the “ultimate authority” to determine which, if  
 8 any, of Defendants’ recommendations and advice to follow or implement. ECF  
 9 No. 27 at 16, 18. So not only are Plaintiffs wrong about the test for *Yearsley*  
 10 immunity, their authority is distinguishable—as the CIA “direct[ed]” and  
 11 “supervis[ed]” the alleged conduct. *Cf. Cabalce*, 797 F.3d at 732 (“As the district  
 12 court aptly observed, it was undisputed that [defendants] designed the [fireworks]  
 13 destruction plan *without* government control or supervision.”) (emphasis added).<sup>5</sup>

14 \_\_\_\_\_  
 15 2011); *In re KBR, Inc. Burn Pit Litig., Inc.*, 736 F. Supp. 2d 954, 967 n.7 (D. Md.  
 16 2010); *see also Bennett v. MIS Corp.*, 607 F.3d 1076, 1090 (6th Cir. 2010).

17 <sup>5</sup> *In re Hanford* and *Cabalce* conceived of a principle that does not appear to be  
 18 based on Supreme Court jurisprudence. For instance, *In re Hanford* lacked support  
 19 for the proposition that *Yearsley* “limited the applicability of the defense [to] where  
 20 the agent had no discretion in the design process and completely followed  
 21 government specifications.” 534 F.3d at 1001. And it relied on Justice Brennan’s  
 22 *dissent* in *Boyle* for the proposition that “[n]othing in *Yearsley* extended immunity



**B. Defendants are Also Entitled to *Filarsky* Immunity.**

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*Filarsky v. Delia* held that government contractors should not be left “holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity.” 132 S. Ct. 1657, 1666 (2012). Yet Plaintiffs propose that Defendants suffer precisely this fate. See ECF No. 27 at 12-13. And if the government’s *own lawyers* were held immune from liability in *Yoo*, 678 F.3d at 768, how can its contractors be liable for engaging in “the same activity”? Such an unfair result would vitiate *Filarsky*.

Plaintiffs misapply the *Filarsky* test for immunity. Plaintiffs argue that to obtain such immunity contractors: (1) must have a claim that is “historically grounded in common law”; and (2) must not have “violated . . . clearly established rights.” See ECF No. 28 at 16. As to the first prong, Plaintiffs boldly claim that

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to military contractors exercising a discretionary governmental function.” *Id.* (citing *Boyle*, 487 U.S. at 524-25 (Brennan, J., dissenting)). But courts have observed that “[e]xplicit language” in *Boyle* indicates the limited nature of this defense. *Chesney*, 782 F. Supp. 2d at 582 (citing *Boyle*, 487 U.S. at 505 n.1 (noting that “Justice Brennan’s dissent misreads our discussion” and observing that the issue of immunity for government contractors was “not before us”)). *Cabalce* simply relied on this *In re Hanford* passage in its discussion of Derivative Sovereign Immunity—which, again, is a “distinct doctrine.” 797 F.3d at 731-32.

1 “psychologists” are not “entitled to immunity at common law in circumstances  
2 even remotely comparable to those alleged here.” *Id.* at 16-17. This is incorrect.

3 Notably, the proper focus under the first prong of *Filarsky* is on the  
4 government “function” being delegated—not the position or title of the person who  
5 undertakes the performance. *Butters v. Vance Int’l, Inc.*, 225 F.3d 462, 466 (4th  
6 Cir. 2000); *Al Shimari*, 679 F.3d at 263 (Niemeyer, J., dissenting) (“The Supreme  
7 Court has made clear that immunity attaches to the *function* being performed, and  
8 private actors who are hired by the government to perform public functions are  
9 entitled to the same immunities [as] public officials[.]”) (emphasis in original).

10 What mattered in *Filarsky* was not that the defendant was a private attorney;  
11 it was that he was performing an investigatory function for the local government.  
12 132 S. Ct. at 1667. So too, what matters here is not that Defendants are  
13 psychologists; it is that they were performing national security support functions  
14 for the government. In such situations, military contractors have consistently been  
15 held immune. *See, e.g., Saleh v. Titan Corp.*, 580 F.3d 1, 2 (D.C. Cir. 2009)  
16 (private military contractors providing interpretation/interrogation services to the  
17 U.S. in Iraq immune); *McKay v. Rockwell Int’l Corp.*, 704 F.2d 444, 448-49 (9th  
18 Cir. 1983), *cert denied*, 464 U.S. 1043 (1984) (collecting cases).

19 But even if this Court were to accept Plaintiffs’ premise, psychologists  
20 performing similar reporting/advising “function[s]” for the government of the kind  
21 seen here *have* been held immune under the common law. Washington courts  
22

1 have consistently recognized that “[w]hen psychiatrists or mental health providers  
 2 are appointed by the court and render an advisory opinion . . . on a criminal  
 3 defendant’s mental condition, they are acting as an arm of the court and are  
 4 protected from suit by absolute judicial immunity.” *See Bader v. State*, 43 Wn.  
 5 App. 223, 226, 716 P.2d 925 (1986) (citations omitted); *Tobias v. State*, 52 Wn.  
 6 App. 150, 158-59, 758 P.2d 534 (1988) (mental health professionals reporting on  
 7 defendant’s mental condition immune) (citing RCW 10.77.060); *Taggart v. State*,  
 8 118 Wn.2d 195, 213, 822 P.2d 243 (1992) (parole officer immune when providing  
 9 report); *Reddy v. Karr*, 102 Wn. App. 742, 748-50, 9 P.3d 927 (2000) (private  
 10 person ordered to do an “investigation and prepare an evaluation” to determine  
 11 child’s primary residential parent was “act[ing] as an arm of the court” and was  
 12 immune). Likewise, Washington law offers qualified immunity for mental health  
 13 professionals and others involved in involuntary commitments. *See RCW*  
 14 *71.05.120*; *see also Volk v. Demeerleer*, 184 Wn. App. 389, 422, 337 P.3d 372  
 15 (2014), *review granted*, 183 Wn.2d 1007, 352 P.3d 188 (2015) (“In 1987, the  
 16 legislature enacted a new involuntary treatment act that provides limited immunity  
 17 to mental health professionals in the . . . involuntary commitment. This immunity  
 18 already applied to public and law enforcement officers . . . in 1973.”).<sup>6</sup>

19  
 20 <sup>6</sup> Other courts agree. *See, e.g., Von Staich v. Atwood*, 2011 U.S. Dist. LEXIS  
 21 83705, at \*8 (C.D. Cal. Feb. 22, 2011) (noting that “the Ninth Circuit has held that  
 22 a court-appointed psychologist has quasi-judicial immunity . . . for acts committed

REPLY IN SUPPORT OF MOTION  
 TO DISMISS PURSUANT TO FRCP  
 12(b)(1) AND 12(b)(6)  
 NO. 2:15-CV-286-JLQ  
 139114.00602/102034826v.1

- 13 -

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1 Here, the CIA selected Defendants to prepare a report evaluating effective  
 2 countermeasures to defeat al Qaeda members' resistance to interrogation. Compl.  
 3 ¶¶ 22-24. Defendants were therefore acting as an "arm" of the government in  
 4 preparing reports regarding the appropriate treatment of potentially dangerous  
 5 individuals, just like the foregoing psychologists and mental health professionals.

6 As to the second *Filarsky* prong, Plaintiffs argue that Defendants "remain  
 7 liable" because they "violated well-established prohibitions" against torture, cruel,  
 8 inhuman, or degrading treatment, nonconsensual experimentation, and war crimes.  
 9 ECF No. 28 at 17. But even if this could bar immunity, these "prohibitions" were  
 10 not "well-established." *Al Shimari*, 2015 U.S. Dist. LEXIS 107511, at \*35-42.

### 11 **III. PLAINTIFFS HAVE NOT STATED VALID ATS CLAIMS.**

12 Plaintiffs incorrectly claim that they have sufficiently alleged ATS claims  
 13 for torture and non-consensual human medical experimentation. In making this  
 14 argument, Plaintiffs conclude that they endured "severe pain or suffering" without  
 15 providing supporting authority (or addressing Defendants' contrary authority).

16 \_\_\_\_\_  
 17 'in the performance of an integral part of the judicial process,' such as preparing  
 18 and submitting medical reports[.]' (citations omitted); *Mikhail v. Kahn*, 991 F.  
 19 Supp. 2d 596, 663 (E.D. Pa. 2014) (citing *McArdle v. Tronetti*, 961 F.2d 1083,  
 20 1085 (3d Cir. 1992) (psychiatrist who performed evaluation of prisoner absolutely  
 21 immune); *Morstad v. Dep't of Corr. & Rehab.*, 147 F.3d 741, 744 (8th Cir. 1998)  
 22 (psychologist who performed evaluation of sex offender absolutely immune)).

1 ECF No. 27 at 7. They also accuse Defendants of seeking to improperly narrow  
2 the norm of non-consensual human medical experimentation. But it was *the court*  
3 in *Abdullahi v. Pfizer*, that narrowly-defined the norm as “prohibiting *medical*  
4 experimentation on human subjects without their consent,” and applied it only in  
5 the pharmaceutical context. 562 F.3d 163, 187 (2d Cir. 2009) (emphasis added).  
6 Plaintiffs’ claim thus seeks to expand the application of the ATS under a norm that  
7 no court has relied on in over seven years.<sup>7</sup>

8 **CONCLUSION**

9 For the above reasons, and those contained in Defendants’ Motion to  
10 Dismiss, ECF No. 27, this Court should grant Defendants’ Motion to Dismiss.

11 DATED this 2nd day of March, 2016.

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19 \_\_\_\_\_  
20 <sup>7</sup> Plaintiffs have also not alleged an “international armed conflict” to support their  
21 war crimes claim because the conflict between the U.S. and al Qaeda is “not of an  
22 international character.” *See Hamdan v. Rumsfeld*, 548 U.S. 557, 631-32 (2006).

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**CERTIFICATE OF SERVICE**

1 I hereby certify that on the 2nd day of March, 2016, I electronically filed the  
2 foregoing document with the Clerk of Court using the CM/ECF system which will  
3 send notification of such filing to the following:  
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