**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF SOUTH CAROLINA**

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| JOSE PADILLA, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | Case No. 2:07-410-HFF-RSC |
| | ) | |
| v. | ) | |
| | ) | |
| DONALD H. RUMSFELD, et al., | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

**INDIVIDUAL FEDERAL DEFENDANTS' MOTION TO DISMISS**
**PLAINTIFFS' FIRST AMENDED COMPLAINT**

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## INTRODUCTION

This lawsuit is something of an anomaly. The Plaintiffs – Jose Padilla and Estela Lebron, Padilla's mother – have sued ten current and former federal officers, soldiers, and officials solely in their individual capacity. *See* First Amended Complaint ("Am. Compl.") ¶ 6. But Plaintiffs seek only nominal damages – in the amount of one dollar – from nine of the ten named defendants. *See id.* ¶ 88.c.[1] The thrust of Plaintiffs' suit is their request for equitable relief. *See id.* ¶¶ 88.a., b., & .d. Yet equitable relief is not available against federal officials in their individual capacity. Moreover, even if Plaintiffs had properly named official capacity defendants, their equitable relief claims would still fail. Plaintiffs seek equitable relief to prevent Padilla's redetention in military custody as an enemy combatant. Padilla, however, is no longer in military custody but rather is in the custody of the Federal Bureau of Prisons, where he is awaiting sentencing for his recent conviction on three counts of terrorism-related federal crimes.[2] The mere possibility that Padilla may again be detained as an enemy combatant sometime in the distant future is insufficient to give Plaintiffs standing for the equitable relief they seek.

Although Plaintiffs may have standing to pursue their claim for $9 in monetary damages, all of Plaintiffs' damages claims fail as a matter of law. Plaintiffs' constitutional claims should be dismissed because there are special factors counseling hesitation that preclude the Court from

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[1] Plaintiffs seek only equitable relief from Defendant Robert M. Gates. *See* Am. Compl. ¶ 16.

[2] Because of its clear import to Plaintiffs' claims in this case – and in particular, Plaintiffs' claims for equitable and injunctive relief – after Padilla's conviction was announced, counsel for the Defendants contacted Plaintiffs' counsel to see if Plaintiffs intended to amend their complaint. The undersigned were advised on September 5, 2007, that Plaintiffs did not intend to do so.

creating a damages remedy for an enemy combatant against the federal officers, soldiers and officials responsible for his designation, detention, and interrogation. In the alternative, even if creating a non-statutory constitutional tort remedy were permissible under these extraordinary and sensitive circumstances, the Defendants are entitled to qualified immunity as a matter of law for the constitutional claims that question Padilla's designation and detention as an enemy combatant, including his being held in isolation and incommunicado (Claims 1-3 and 8-10, *see id.* ¶¶ 86.1-.3, .6-.10). In addition, to the extent that Plaintiffs assert claims related to Padilla's alleged interrogation and conditions of confinement during his detention as an enemy combatant (Claims 4, 5, 6, and 7, *see id.* ¶¶ 86.4-.7) that are premised on Padilla's being interrogated in isolation, without access to counsel, family, or outside information, the Defendants are also entitled to qualified immunity on those claims. Plaintiffs also fail to allege, as they must, that each of the Defendants personally participated in these supposed constitutional violations.

Plaintiffs' non-constitutional claims fail as well. Padilla's claim under the Religious Freedom Restoration Act ("RFRA") should be dismissed because RFRA does not provide for a cause of action against the Defendants in their individual capacity. Moreover, to the extent that Padilla has stated a claim under RFRA, the Defendants are entitled to qualified immunity.

Padilla's claims for alleged violations of international law fail as a matter of law because the instruments of international law cited by Padilla do not create private causes of action. Moreover, even if any of these instruments provided Padilla with a cognizable private cause of action, the claims would nonetheless fail because the Defendants would be entitled to absolute immunity under the Westfall Act.

Finally, Plaintiffs fail to establish that the Court has personal jurisdiction over Defendants

Rumsfeld, Wolfowitz, and Gates.

## BACKGROUND

In the Authorization for Use of Military Force Joint Resolution ("AUMF") of September 18, 2001, the 107th Congress of the United States specifically authorized the President of the United States to

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). On June 9, 2002, specifically and explicitly relying upon the AUMF, the President directed the Secretary of Defense to detain Jose Padilla in military custody as an enemy combatant. The basis for Padilla's detention was the President's determination that:

- Padilla is and was, at the time he entered the United States in May 2002, an enemy combatant;
- Padilla is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;
- Padilla engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States;
- Padilla possesses intelligence, including intelligence about personnel and activities of al Qaeda, that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States or its armed forces, other governmental personnel, or citizens;
- Padilla represents a continuing, present and grave danger to the national security of the United States, and detention of Padilla is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens; and

- it is in the interest of the United States that the Secretary of Defense detain Padilla as an enemy combatant.

*See* Letter from President George W. Bush to the Secretary of Defense of June 9, 2002 ("June 9, 2002 Bush Letter"), *reprinted in Padilla v. Hanft* ("*Padilla II*"), 423 F.3d 386, 389 (4th Cir. 2005), *cert. denied*, 547 U.S. 1062 (2006).

On January 5, 2006, Padilla was transferred from military custody to a federal detention center in Miami, Florida, to face federal criminal charges related to his terrorist activities. Am. Compl. ¶ 9. On August 16, 2007, Padilla was convicted of three federal criminal offenses: conspiracy to kill, kidnap, maim, or injure persons in a foreign country, *see* 18 U.S.C. § 956; providing material support to terrorists, *see* 18 U.S.C. § 2339A; and conspiracy to provide material support to terrorists, *see* 18 U.S.C. § 371. *See generally* Criminal Docket for Case #: 0:04-cr-60001-MGC, *United States of America v. Adham Amin Assoun, Kifah Wael Jayyousi, and Jose Padilla*, at Number 1193 - Verdict. Padilla is scheduled to be sentenced on December 5, 2007. *See id.* at Number 1195 - Notice of Sentencing.

Plaintiffs bring this suit to challenge the constitutionality of Padilla's designation and subsequent military detention as an enemy combatant. Padilla alleges that his designation, detention, interrogation, and treatment as an enemy combatant violated numerous constitutional rights, specifically:

Claim 1. The right of access to legal counsel under the First, Fifth, and Sixth Amendments;

Claim 2. The right of access to courts under the First and Fifth Amendments;

Claim 3. The right not to be deprived of life, liberty or property without

due process under the Fifth Amendment;

Claim 4. The right to be free from coercive and involuntary custodial interrogation under the Fifth Amendment;

Claim 5. The right to be free from cruel or unusual punishment under the Eighth Amendment;

Claim 6. The right not to be subject to torture or humiliating and degrading treatment under the Fifth and Eighth Amendments;

Claims 7-9. The right to free exercise of religion (7), the right to information (8), and the right to association with family and others (9) under the First Amendment;

Claim 10. The right not to be subject to illegal and arbitrary detention under the Fourth and Fifth Amendments.

*See* Am. Compl. ¶¶ 86.1-.10. Embedded within these constitutional claims are statutory and international law claims. Padilla alleges a violation of his right to the free exercise of his religion as guaranteed by the Religious Freedom Restoration Act. *Id.* ¶ 86.7. Padilla claims further that his detention and treatment as an enemy combatant violated Article 3 of the Geneva Conventions, the "Torture Convention,"[3] and the International Covenant on Civil and Political Rights. *Id.* ¶ 86.6.

Plaintiff Lebron alleges that she was "deprived of virtually all contact with her son" for the duration of his detention as an enemy combatant. *See id.* ¶ 87. She alleges that Padilla's detention violated her constitutional right to familial association. *See id.*[4]

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[3] Padilla does not specify what "Torture Convention" he is relying upon, but the Defendants assume that he is referring to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, a United Nations Treaty. The text of the Convention can be found at http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

[4] In addition to asserting claims on her own behalf, Plaintiff Lebron purports to bring this suit as "next friend" for Padilla on the asserted basis that although Padilla was found competent

The defendants in this matter are: Donald H. Rumsfeld, former Secretary of Defense; John Ashcroft, former Attorney General; Robert M. Gates, Secretary of Defense; Paul Wolfowitz, former Deputy Secretary of Defense; Vice Admiral Lowell E. Jacoby, Director, Defense Intelligence Agency; Michael H. Mobbs, Special Advisor to the Undersecretary of Defense for Policy; Naval Captain Catherine T. Hanft; retired Naval Commander Melanie A. Marr; Chief Petty Officer Mack Keen;[5] and Dr. Craig Noble (collectively, the "Defendants"). Plaintiffs assert their claims against the Defendants in their individual capacity. *See id.* ¶¶ 12-16, 18-20. With two exceptions, all of the Defendants are named in each of the Claims. The two exceptions are Defendant Ashcroft, who is named as a defendant only on Claims 1-3, and 10; and Defendant Noble, who is named as a defendant only on Claims 3-6, and 8-9. *See id.* ¶¶ 86.1-.10.

## ARGUMENT

### I. PLAINTIFFS' CLAIMS FOR EQUITABLE RELIEF AGAINST THE DEFENDANTS IN THEIR INDIVIDUAL CAPACITY MUST BE DISMISSED.

Plaintiffs seek declaratory and injunctive relief from the Defendants in their individual capacity. *See* Am. Compl. ¶¶ 12-16, 18-20, 88.[6] Specifically, they seek a declaration that the

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to face criminal charges in the U.S. District Court for the Southern District of Florida, his competence may yet be the subject of appeal. *See* Am. Compl. ¶ 10. However, any claims asserted by Lebron as "next friend" for Padilla will rise or fall with Padilla's claims.

[5] The Complaint in this matter was filed on February 9, 2007. *See* Docket for Case No. 2:07-cv-00410-HFF-RSC at Number 1. However, Defendant Keen was not served until August 28, 2007, well beyond the 120-day limit prescribed by Fed. R. Civ. P. 4(m). *See* Docket for Case No. 2:07-cv-00410-HFF-RSC at Number 43. Therefore, all claims against Defendant Keen should be dismissed pursuant to Rule 4(m) as well as for all of the other reasons discussed herein.

[6] Plaintiffs seek only equitable relief from Defendant Gates. Thus, if the Court determines that such relief is unavailable against Defendant Gates in his individual capacity, he should be dismissed from this suit.

Defendants' acts, as well as their alleged "policies, practices, and patterns," violated the Constitution, and they seek an injunction against Padilla's redetention as an enemy combatant. *See id.* ¶ 88 a, b and d. This request for equitable relief fails as a matter of law because Defendants are not the proper parties from whom the requested equitable relief can be sought or obtained. Moreover, Plaintiffs lack standing to seek such relief.

### A. The Defendants May Not Be Sued For Equitable Relief In Their Individual Capacity Because The United States Is The Real Party In Interest For These Claims.

Every court of appeals to address the issue of whether a plaintiff alleging the violation of federal rights can sue a government official in an individual capacity for equitable relief, including the Court of Appeals for the Fourth Circuit, has concluded that there is no basis for such a suit. *See Kirby v. City of Elizabeth, North Carolina*, 388 F.3d 440, 452 n.10 (4th Cir. 2004), *cert. denied*, 126 S. Ct. 2350 (2006) (concluding that injunctive relief can only be awarded against a government employee in his or her official capacity).[7] These cases recognize

[7] *See*, *e.g.*, *Wolfe v. Strankman*, 392 F.3d 358, 360 n.2 (9th Cir. 2004) ("[T]he declaratory and injunctive relief Wolfe seeks is only available in an official capacity suit."); *Community Mental Health Servs. of Belmont v. Mental Health and Recovery Bd. Serving Belmont, Harrison & Monroe Counties*, 150 Fed. Appx. 389, 401 (6th Cir. 2005) ("Just as a plaintiff cannot sue a defendant in his official capacity for money damages, a plaintiff should not be able to sue a defendant in his individual capacity for an injunction in situations in which the injunction relates only to the official's job, *i.e.,* his official capacity."); *Frank v. Relin*, 1 F.3d 1317, 1327 (2d Cir. 1993) ("[S]uch equitable relief [reinstatement] could be obtained against Relin only in his official, not his individual, capacity."); *Scott v. Flowers*, 910 F.2d 201, 213 (5th Cir. 1990) ("[T]he injunctive relief sought and won by Scott can be obtained from the defendants only in their official capacity as commissioners."); *Feit v. Ward*, 886 F.2d 848, 858 (7th Cir. 1989) ("[T]he equitable relief Feit requests – a declaration that the policy is unconstitutional and an injunction barring the defendants from implementing the policy in the future – can be obtained only from the defendants in their official capacities, not as private individuals."); *Del Raine v. Carlson*, 826 F.2d 698, 703 (7th Cir. 1987) (noting that suit would have to be against federal officers in their official capacity to the extent that it sought types of relief that only officials and not private individuals can provide). *See also Hatfill v. Gonzales*, No. 03-1793, 2007 WL

that the government is the real party in interest in a suit for non-monetary relief and that a government employee's personal interest in the litigation does not extend beyond whether or not the employee is required to pay damages out of his or her own pocket. While an injunction or declaratory judgment may affect how the employee performs his or her official duties in the future, a public servant has no legally cognizable *personal* interest in performing official duties in one fashion versus another.

On the other hand, the government's interest in a suit seeking equitable relief based on an employee's performance of official duties is apparent because "relief is sought that would require [the employees] to exercise their official powers in certain ways." *Libby v. Marshall*, 833 F.2d 402, 405 (1st Cir. 1987). That vital government interest is evident, for example, in the classic formulation of sovereign immunity:

> The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, *or interfere with the public administration*,' *Land v. Dollar*, 330 U.S. 731, 738, 67 S. Ct. 1009, 1012, 91 L. Ed. 1209 (1947), or if the effect of the judgment would be '*to restrain the Government from acting, or to compel it to act*.' *Larson v. Domestic & Foreign Corp.* [337 U.S. 682, 704 (1949)].

*Dugan v. Rank*, 372 U.S. 609, 620 (1963) (emphasis added). Thus courts consistently look past language in pleadings naming employees in their individual capacity where the government's

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842967, at *8 (D.D.C. March 16, 2007) (dismissing plaintiff's claim for injunctive relief against current and former government officials in their individual capacity); *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 118-19 (D.D.C. 2007) ("Because the challenged policies were carried out by the defendants in their capacities as military officials, however, the plaintiffs must seek declaratory relief against them in their official capacities, which they have failed to do here."), *appeal docketed sub. nom*, *Ali v. Rumsfeld*, No. 07-5178 (D.C. Cir. May 31, 2007).

own interests are at stake.[8]

In light of the real party-in-interest distinction between individual and official capacity suits, an individual capacity claim for equitable relief is not legally viable because it names "improper defendants." *Feit*, 886 F.2d at 858. Only by acting as a government official (not as an individual), can a defendant employee comply with a court decree by altering government policy or practice. A defendant employee who stands before the court in his or her capacity as an individual has no such ability. *See Kirby*, 388 F.3d at 452 n.10 ("The other injunctive relief Kirby seeks could only be awarded against the officers in their official capacities."); *Ameritech v. McCann*, 297 F.3d 582, 586 (7th Cir. 2002) (noting that goals of "vindicating federal rights and holding state officials responsible to federal law – cannot be achieved by a lawsuit against a state official in his or her individual capacity" because such suits "do not seek to conform the State's conduct to federal law; rather such suits seek recovery from the defendant personally").[9] Therefore the equitable relief Plaintiffs seek here "can be obtained only from the defendants in their official capacities, not as private individuals." *Feit*, 886 F.2d at 858 (citing *Del Raine*, 826 F.2d at 703). Here, Plaintiffs clearly and deliberately sued the Defendants in their individual

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[8] *See, e.g., Howe v. Bank for Intern. Settlements*, 194 F. Supp. 2d 6, 19 (D. Mass. 2002) ("Regardless of the manner by which a plaintiff designates the action, a suit should be regarded as an official-capacity suit, subject to the defense of sovereign immunity, when a 'judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act'") (quoting *Dugan*, 372 U.S. at 620 (internal quotation marks and citations omitted)); *Newhouse v. Probert*, 608 F. Supp. 978, 981 (W.D. Mich. 1985) ("Plaintiff, however, cannot avoid the doctrine of sovereign immunity by naming individual employees as defendants if the United States remains the real party in interest. The court must go beyond the nominal defendants to determine whether the suit is in effect one against the sovereign").

[9] *See also Community Mental Health Servs. of Belmont*, 150 Fed. Appx. at 401; *Frank*, 1 F.3d at 1327; *Scott*, 910 F.2d at 213; *Wolfe*, 392 F.3d at 360 n.2.

capacity. As such, Plaintiffs' "attempt to obtain declaratory and injunctive relief from the Defendants in their personal capacities fails to state a claim upon which relief may be granted," and their claims are "properly dismissed." *Id.*

### B. In The Alternative, Plaintiffs Lack Standing To Pursue Their Claims For Equitable Relief.

An Article III court only has jurisdiction over a "case or controversy." U.S. Const. Art. III, § 2, cl. 1. As the Supreme Court observed in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), "[a]bstract injury is not enough. The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Id.* at 101-02; *see also Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (noting that threatened injury must be "certainly impending" to constitute an injury-in-fact sufficient to satisfy Article III standing requirements). Past injury alone is insufficient to provide a plaintiff with standing to seek declaratory or injunctive relief because declaratory or injunctive relief cannot redress past injury. *See Lyons*, 461 U.S. at 103-04 (finding that plaintiff lacked standing to seek injunction against Los Angeles police officers use of "chokeholds" because he failed to show that he was likely to suffer future injury from the use of the "chokeholds" by police officers); *id.* at 104 (finding plaintiffs' assertion that he might again be subject to an illegal "chokehold" did not create the "actual controversy" that must exist for a declaratory judgment to be entered). "The constitutional question . . . must be presented in the context of a specific live grievance." *Golden v. Zwickler*, 394 U.S. 103, 110 (1969).

This court lacks subject matter jurisdiction over Plaintiffs' claims for equitable relief

because Plaintiffs have failed to allege a threat of injury that is "real and immediate," not "conjectural" or "hypothetical." *See Lyons*, 461 U.S. at 101-02. All of Plaintiffs' claims, including those for equitable relief, are premised upon Padilla's past detention as an enemy combatant. *See* Am. Compl. ¶ 1. On January 5, 2006, however, Padilla was transferred from military custody to the Justice Department for trial on a variety of terrorism-related offenses. *See Hanft v. Padilla*, 546 U.S. 1084 (2006); Am. Compl.¶ 9. Padilla was subsequently tried and convicted of three federal criminal offenses, one of which — conspiring to murder, kidnap, and maim persons outside the United States — carries a maximum penalty of life imprisonment, *see* 18 U.S.C. § 956(a)(2). There is thus no reason to believe that Padilla is likely to be re-transferred to the military for "re-detention as an enemy combatant," *see* Am. Compl. ¶ 88.d, and Plaintiffs lack standing to seek equitable relief against such "conjectural" or "hypothetical" "re-detention." *See Lyons*, 461 U.S. at 101-02.[10]

## II. THE COURT LACKS PERSONAL JURISDICTION OVER DEFENDANTS RUMSFELD, WOLFOWITZ, AND GATES.

When, as here, a challenge to personal jurisdiction is made at the pre-trial stage, the

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[10] Federal courts of appeal have consistently applied the standing requirements set forth in *Lyons* to reject claims by prisoners, pretrial detainees, and immigration detainees seeking equitable relief to challenge the conditions of their confinement following their release from custody or even after a transfer to a different facility. *See Prins v. Coughlin*, 76 F.3d 504, 506 (2d Cir. 1996) (stating that "it is settled in this Circuit that a transfer from a prison facility moots an action for injunctive relief against the transferring facility"); *Nelsen v. King County*, 895 F.2d 1248, 1249-54 (9th Cir. 1990) (rejecting the argument that the allegation that plaintiffs' alcoholism made it very likely that they would re-offend and be treated in the same facility constituted a sufficient threat of future injury to support standing for equitable relief claims challenging sanitary conditions in a treatment facility from which plaintiffs had been released); *Muhammad v. New York Dept. of Corr.*, 126 F.3d 119, 123-24 (2d Cir. 1997) (finding that former prisoner lacked standing for injunctive relief relating to alleged interference with his religious practices during his confinement because prisoner had been paroled).

Plaintiffs must make a prima facie showing of a sufficient jurisdictional basis to survive the jurisdictional challenge. *See Carefirst of Md. v. Carefirst Pregnancy Ctrs.*, 334 F.3d 390, 396 (4th Cir. 2003). The Court may exercise personal jurisdiction over the Defendants in this case if (1) the applicable state long-arm statute confers jurisdiction and (2) the assertion of that jurisdiction is consistent with constitutional due process. *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195, 1199 (4th Cir. 1993). In South Carolina, personal jurisdiction is governed by the state's long-arm statute, S.C. Code Ann. § 36-2-803 (2005). Because the South Carolina Supreme Court has interpreted the long-arm statute to extend to the outer limits of constitutional due process, *see Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005), federal courts normally conduct a single inquiry under the due process clause, *Fed. Ins. Co. v. Lake Shore Inc.*, 886 F.2d 654, 657 n.2 (4th Cir. 1989). When the appropriate standards are applied to Plaintiffs' First Amended Complaint, it is clear that the Plaintiffs have not met their burden of establishing a prima facie basis for personal jurisdiction over non-resident defendants Rumsfeld, Wolfowitz, and Gates.

There are two types of personal jurisdiction: specific and general. A court has specific jurisdiction over a cause of action which directly arises out of or relates to the defendant's forum state activities. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). When the cause of action does not arise from the defendant's contacts with the forum state, general jurisdiction may be exercised upon a showing that the defendant's contacts are of a "continuous and systematic" nature. *See id.* at 416. In this case, the Plaintiffs have not alleged let alone established that Defendants Rumsfeld, Wolfowitz, and Gates have continuous and systematic contacts with the State of South Carolina such that general personal jurisdiction would

be proper. Therefore, the Plaintiffs must demonstrate specific personal jurisdiction. *Carefirst*, 334 F.3d at 397.

The Fourth Circuit has "synthesized the requirements of the Due Process Clause for asserting specific [personal] jurisdiction into a three-part test." *New Wellington Financial Corp. v. Flagship Resort Development Corp.*, 416 F.3d 290, 295 (4th Cir. 2005). First, the defendant must have "purposefully availed [him]self of the privilege of conducting activities in the [forum] State." *Id.* To satisfy this requirement, "a defendant's actions must have been 'directed at the forum state in more than a random, fortuitous, or attenuated way.'" *Mitrano v. Hawes*, 377 F.3d 402, 406-07 (4th Cir. 2004) (*quoting ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 625 (4th Cir. 1997)). Second, the plaintiffs' claims must "arise out of those activities directed at the [forum] State." *New Wellington*, 416 F.3d at 295. Third, the exercise of jurisdiction must be "constitutionally reasonable." *Id.* Personal jurisdiction is proper only if all three requirements are met. *Carefirst*, 334 F.3d at 397.

Based upon the allegations in the First Amended Complaint, the only Defendants who arguably have "purposefully availed themselves of the privileges of conducting activities" in South Carolina are Defendants Hanft, Marr, Keen and Noble. Defendants Hanft, Marr, and Keen are alleged to be residents of South Carolina, *see* Am. Compl. ¶¶ 18-20, and allegedly worked in the State at the time of the events in question. Defendant Noble also allegedly worked in the State at the time of the events in question. *Id.* ¶ 23. However, Plaintiffs do not allege any facts establishing that Defendants Rumsfeld, Wolfowitz, and Gates traveled to South Carolina, or took any actions in South Carolina, or directed any actions at Padilla while he was in custody in South Carolina. Only Defendant Rumsfeld is even arguably alleged to have taken actions that had an

effect on Padilla while he was in South Carolina, *see id.* ¶ 76, but the fact that Padilla happened to be detained in the State at the time of these alleged actions is a mere "fortuity" insufficient to confer personal jurisdiction. *See Mitrano*, 377 F.3d at 406-07. Plaintiffs have alleged no facts that would demonstrate that Defendants Rumsfeld, Wolfowitz, and Gates had the "minimum contacts" with South Carolina that due process requires and that would warrant forcing them to defend themselves against an individual capacity liability claim in this forum. To the extent that these high-ranking defendants are subject to suit, it must be in their home states or the forum where they took any alleged actions related to Padilla.[11]

## III. PLAINTIFFS' CONSTITUTIONAL CLAIMS MUST BE DISMISSED.

Plaintiffs' constitutional claims, *see* Am. Compl. ¶¶ 86-87, against the Defendants should be dismissed for two alternative reasons. First, there are special factors counseling hesitation that preclude the Court from creating a damages remedy for an enemy combatant against the federal officers, soldiers, and other officials responsible for his identification, detention, and interrogation, and thus all of Plaintiffs' constitutional claims must be dismissed. Alternatively, even if it were appropriate for a court to create a non-statutory damages remedy in this

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[11] *See, e.g., Hill v. Pugh*, 75 Fed. Appx. 715, 719 (10th Cir. 2003) ("It [is] not reasonable to suggest that federal prison officials may be hauled into court simply because they have regional and national supervisory responsibilities over facilities within a forum state."); *Doe v. Am. Nat'l Red Cross*, 112 F.3d 1048, 1051 (9th Cir. 1997) (finding no personal jurisdiction over Director of the Food and Drug Administration solely because of his role in the regulatory process that led to the dissemination of blood products in Arizona); *Nwanze v. Philip Morris Inc.*, 100 F. Supp. 2d 215, 220 (S.D.N.Y. 2000) ("Mere supervision over the Bureau of Prisons, the reach of which extends into every state, is insufficient to establish a basis for the exercise of personal jurisdiction."), *aff'd*, 6 Fed. Appx. 98 (2d Cir. 2001); *Wag-Aero, Inc. v. United States*, 837 F. Supp. 1479, 1485 (E.D. Wis. 1993) ("When federal agency heads are not alleged to have been directly and actively involved in activities in the forum state, many courts have refused to exercise personal jurisdiction over them."), *aff'd*, 35 F.3d 569 (7th Cir. 1994).

extraordinary and sensitive context, the Defendants are entitled to qualified immunity as a matter of law on most if not all of Plaintiffs' claims.

### A. Special Factors Counseling Hesitation Foreclose The Creation Of A *Bivens* Remedy For Any Of The Constitutional Harms Alleged By Plaintiffs.

Plaintiffs seek damages from the Defendants from their personal assets for alleged constitutional infirmities in Padilla's designation, detention, and interrogation as an enemy combatant. The "special factors" doctrine developed by the Supreme Court in *Bivens* and its progeny precludes an individual damages remedy for this unprecedented claim. A judicially-created damages remedy for constitutional violations "is not an automatic entitlement." *Wilkie v. Robbins*, 127 S. Ct. 2588, 2597-98 (2007). In *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court held that the victim of an alleged Fourth Amendment violation could bring suit to recover damages in the absence of a statutory cause of action only where there were "no special factors counseling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396. Subsequently, the Court has countenanced an expansion of *Bivens* on just two occasions, and in both instances specifically determined that there were no such "special factors." *See Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980). The Supreme Court has "in most instances . . . found a *Bivens* remedy unjustified," *Wilkie*, 127 S. Ct. at 2597-98, and accordingly, in the nearly three decades since *Carlson*, the Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants," *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001).[12] As a

[12] *See, e.g.*, *Malesko*, 534 U.S. at 68 (refusing to recognize a *Bivens* remedy against private companies performing governmental functions under contract with the United States because doing so would not serve the public policy purposes of the remedy); *FDIC v. Meyer*, 510 U.S. 471, 486 (1994) (refusing to allow a *Bivens* claim against a federal agency because of its

result, "recognizing such a claim is clearly disfavored." *See In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 93-94 (D.D.C. 2007) (refusing to recognize a *Bivens* remedy for military detainees in Iraq and Afghanistan against U.S. military and civilian personnel); *accord Nebraska Beef, Ltd. v. Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005) (recognizing the "presumption against judicial recognition of direct actions for violations of the Constitution by federal officers or employees") (*quoting McIntosh v. Turner*, 861 F.2d 524, 526 (8th Cir. 1988)), *cert. denied*, 547 U.S. 1110 (2006). Moreover, the Court has determined that a wide range of factors may make it inappropriate for federal courts to create a *Bivens* remedy in a particular context, even where the plaintiff has no alternative statutory remedy available. *See Wilkie*, 127 S. Ct. at 2598 ("even in the absence of an alternative [existing process for protecting a constitutionally recognized interest], a *Bivens* remedy is a subject of judgment"); *id.* at 2604-05 (holding that the "serious difficulty of devising a workable cause of action" was a special factor that precluded the creation of a *Bivens* claim).

Plaintiffs seek an unprecedented extension of *Bivens* into a new, previously unrecognized, and highly sensitive context – one that would allow a damages action seeking recovery from the personal assets of current and former members of the President's Cabinet, soldiers, and other federal officials for the wartime actions of the United States military in identifying, capturing, detaining, and interrogating an enemy combatant. This Court should decline Plaintiffs' invitation

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potential impact on federal fiscal policy); *Schweiker v. Chilicky*, 487 U.S. 412, 425-29 (1988) (rejecting a *Bivens* remedy for the denial of Social Security benefits because a statutory procedure already existed to challenge adverse eligibility determinations); *Bush v. Lucas*, 462 U.S. 367 (1983) (refusing to recognize a *Bivens* remedy for the alleged violation of First Amendment rights arising out of federal personnel decisions for fear that the claim might interfere with a statutory scheme regulating the federal workplace).

because the *Bivens* remedy they seek impinges upon the Executive Branch's authority to conduct war, protect national security from terrorist attack, and formulate foreign policy. In fact, no court has ever recognized the *Bivens* remedy Plaintiffs ask this Court to create. Permitting Plaintiffs' claims to proceed in the face of these concerns would violate bedrock separation-of-powers principles and constitute a sharp departure from the Supreme Court's well-settled reluctance to extend *Bivens* liability to new contexts.

The Constitution explicitly delegates authority over decisions related to the conduct of war to the Legislative and Executive branches. *See* U.S. Const. Art. I, § 8 (Legislative Branch); Art. II, § 2 (Executive Branch). For this reason, the Supreme Court has repeatedly recognized that courts should refrain from interfering in the core functions of the political branches, especially during wartime. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality opinion) ("we accord the greatest respect and consideration to the judgments of military authorities in matters related to the actual prosecution of war, and recognize that the scope of that discretion is necessarily wide"); *id.* at 531 ("Without doubt, our Constitution recognizes that core strategic matters of war-making belong in the hands of those who are best positioned and most politically accountable for making them."); *North Dakota v. United States*, 495 U.S. 423, 443 (1990) ("When the Court is confronted with questions relating to . . . military operations, we properly defer to the judgment of those who must lead our Armed Forces in battle.").[13] In keeping with

[13] *See also Department of Navy v. Egan*, 484 U.S. 518, 530 (1988) (noting the reluctance of the courts "to intrude upon the authority of the Executive in military and national security affairs"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 n. 2 (1952) (acknowledging "broad powers in military commanders engaged in day-to-day fighting in a theater of war"); *Van Tu v. Koster*, 364 F.3d 1196, 1198 (10th Cir. 2004) (finding "availability of a *Bivens* remedy" for the conduct of U.S. military officers during the Vietnam War to be "questionable").

this deference, on two occasions the Supreme Court has refused, on the basis of the special factors doctrine, to create a *Bivens* action against military officials. *See Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (refusing a *Bivens* remedy that would allow enlisted military personnel to sue their superior officers because "any action to provide a judicial response by way of such a remedy would be plainly inconsistent with Congress' authority in the field"); *United States v. Stanley*, 483 U.S. 669, 681-82 (1987) (extending *Chappell* to foreclose all *Bivens* claims arising incident to the plaintiff's military service).

The decision to designate, detain, and interrogate Padilla as an enemy combatant was a military decision made pursuant to the AUMF's explicit grant of authority to the President from Congress. *See* June 9, 2002 Bush Letter. Padilla's designation and detention was deemed "necessary to prevent [Padilla] from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens." *Id.* There is nothing more fundamental to the exercise of constitutionally and congressionally delegated war powers than the power to identify, detain, and question individuals like Padilla who have aligned themselves with declared enemies of the United States and have taken up arms against this country. Therefore, deference to the President's decision in that regard is especially warranted. *See Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."). The potential disruption to the coordinate branches caused by recognizing a cause of action by an enemy combatant against his captors in a time of war is *far* greater than that found sufficient to preclude a *Bivens* action in either *Stanley* or *Chappell*.

Not only would recognizing a *Bivens* remedy here impermissibly intrude on Presidential and Congressional primacy in matters of war, it would also impinge on the national security prerogative of the coordinate branches. Even in times of peace, federal courts have broadly deferred to the Executive Branch on national security matters. *See, e.g.*, *Egan*, 484 U.S. at 530 ("courts traditionally have been reluctant to intrude upon the authority of the Executive in . . . national security affairs."); *Halperin v. Kissinger*, 807 F.2d 180, 187 (D.C. Cir. 1986) ("harm produced" by assertion of damages actions against federal officials "is particularly severe in the national security field, since 'no governmental interest is more compelling'"); *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 269 n.27 (D.D.C. 2004) (dismissing claims for equitable relief because they concerned "foreign and national security policy directives of the President"), *aff'd on other grounds*, 412 F.3d 190 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1069 (2006). There are obvious and significant national security concerns inherent in subjecting current and former members of the President's Cabinet, soldiers, and other federal officials to personal liability for their decisions regarding the designation, detention and interrogation of an enemy combatant whom the President has expressly concluded represents a "continuing, present and grave danger to the national security of the Untied States," *see* June 9, 2002 Bush Letter. The prospect of prolonged litigation and personal liability might unduly influence decisions concerning the designation, detention and interrogation of enemy combatants like Padilla, or the release of such enemies from military custody, which could adversely impact the fundamental security of the Nation, enhancing the risks to our military in the field and our citizens at home.

Adjudication of the claims pressed by Plaintiffs in this case would necessarily require an examination of the manner in which the government identifies, captures, detains, and interrogates

enemy combatants. *See In re Iraq*, 479 F. Supp. 2d at 105 ("The discovery process alone risks aiding our enemies by affording them a mechanism to obtain what information they could about military affairs and disrupt command missions by wresting officials from the battlefield to answer compelled deposition and other discovery inquiries about the military's interrogation and detention policies, practices, and procedures."). A public exploration of these extremely sensitive and confidential matters itself raises serious national security concerns. *See Wilson v. Libby*, 498 F. Supp. 2d 74, 83-96 (D.D.C. 2007) (refusing to create a *Bivens* remedy for the alleged retaliatory disclosure of the covert status of a CIA operative because of separation-of-powers and justiciability concerns), *appeal docketed*, No. 07-5257 (D.C. Cir. July 27, 2007); *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 252 (E.D.N.Y. 2006) (refusing, in light of political branches' authority over foreign affairs, to infer *Bivens* remedy for the removal of an alien from the United States allegedly for the express purpose of detention and torture by foreign officials), *appeal docketed*, No. 06-4216 (2d Cir. Oct. 17, 2006); *see also Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005) (noting that even established methods for the protection of sensitive information, whatever they might be, still entail considerable risk" of revealing the information they are invoked to protect), *cert. denied*, 546 U.S. 1093 (2006).

Recognizing the *Bivens* remedy sought by Plaintiffs would also impermissibly intrude upon the primacy of the Executive Branch in matters of foreign policy, including where and when the United States chooses to arrest enemy combatants. Even apart from national security concerns, federal courts have traditionally deferred to the Executive Branch on foreign policy matters. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n. 21 (2004) (recognizing "policy of case-specific deference to the political branches" in foreign affairs and "strong argument that

federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273 (1990) (highlighting "significant and deleterious consequences" that the creation of a damages action would have on "foreign policy operations"); *Johnson v. Eisentrager*, 399 U.S. 763, 779 (1950); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (recognizing that "congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved"). Courts have approached foreign affairs with caution even when Congress has passed a statute contemplating some form of judicial involvement. *See*, *e.g.*, *Sosa*, 542 U.S. at 727-28. The rationale for this deference in general is particularly acute where a suit involves a request to create a private cause of action that implicates foreign policy concerns. As the D.C. Circuit explained in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985), "the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials . . . The foreign affairs implications of suits such as this cannot be ignored . . ." *Id.* at 209 (refusing to recognize a *Bivens* remedy for alleged unconstitutional treatment of foreign citizens resulting from alleged plan by former President Reagan and members of the National Security Council to overthrow the government of Nicaragua).[14]

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[14] While the *Bivens* claims in *Sanchez-Espinoza* related to the alleged "unconstitutional treatment of foreign citizens causing injury abroad," *see* 770 F.2d at 209, the D.C. Circuit's rationale is no less applicable to the private damages remedy Padilla seeks in this case. For different legal consequences to attach when the United States arrests an enemy combatant on domestic soil rather than on foreign soil would necessarily impact on the Executive's decision-making in that regard and, in turn, impact foreign relations.

Interfering with the separation-of-powers concerns outlined above in the areas of military, national security, and foreign relations by recognizing a private right of action would have two very specific consequences in this context. First, the threat of a damages remedy would unduly interfere with military decisionmaking and discipline. Second, such a cause of action would give our enemies a means of interfering with ongoing military operations. *Bivens* actions brought by designated enemy combatants such as Padilla could "hamper the war effort and bring aid and comfort to the enemy and diminish the prestige of our commanders" by "allow[ing] the very enemies [they are fighting] ... to call [them] to account in [their] own civil courts," thereby diverting the time and attention of those officials from the "military offensive" to the "legal defensive." *Eisentrager*, 339 U.S. at 778-79. Indeed, "[i]t would be difficult to devise more effective fettering" of executive branch officials, *see id.*, than to allow an enemy combatant to trade a battlefield in Afghanistan for a battlefield in the U.S. legal system where the primary weapon of choice is a personal liability damages action directed at the federal officials responsible for his designation, detention, and interrogation. *See Stanley*, 483 U.S. at 683 ("Even putting aside the risk of erroneous judicial conclusions (which would becloud military decisionmaking), the mere process of arriving at correct conclusions would disrupt the military regime."); *accord Sanchez-Espinoza*, 770 F.2d at 209 ("[T]he danger of foreign citizens using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that [courts] must leave to Congress the judgment whether a damages remedy should exist."). The District Court for the District of Columbia succintly and accurately identified this concern in *In re Iraq*, a case in which a group of alien detainees in Iraq and Afghanistan brought suit under *Bivens* against military and civilian personnel who were responsible for their detention and the treatment

they allegedly received during that detention. Finding that "considerations of institutional competence" precluded creation of the *Bivens* remedy sought by the detainees, that court stated

> There is no getting around the fact that authorizing 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 and national interests, a prospect the Supreme Court found intolerable in *Eisentrager*.

*In re Iraq*, 479 F. Supp. 2d at 105.[15]

Moreover, implying a damages remedy here would create a paradoxical result: U.S. soldiers fighting al Qaeda abroad are barred from bringing *Bivens* actions for injuries arising out of their military service, *see Stanley*, 483 U.S. at 682-83, while al Qaeda associates such as Padilla who find their way to U.S. soil would be able to sue U.S. military and civilian personnel. Again, a principal reason no damage remedy should be created is because of the impact an implied judicial remedy would have on military decision-making – an impact far greater if a suit is allowed by al Qaeda associates than if such a remedy were given to U.S. military and civilian personnel. It would be paradoxical to provide an implied constitutional tort remedy to an avowed enemy of the United States, who was found to represent a "continuing, present and grave danger to the national security of the United States" and whose detention was found to be necessary "to prevent him

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[15] While the courts in *Sanchez-Espinoza* and *In re Iraq* dealt in particular with the danger of foreigners using the courts to obstruct foreign policy, the nationality of a potential plaintiff does not control the special factors analysis in these circumstances. United States citizens, no less than foreigners, might use litigation against federal officers in their individual capacity rather than the political process to oppose foreign policy initiatives to which those citizens object. And a United States citizen who joins forces with al Qaeda is no less a threat to this country than a non-citizen who does so. *See Hamdi*, 542 U.S. at 519 (plurality opinion) ("There is no bar to this Nation's holding one of its own citizens as an enemy combatant . . . A citizen, no less than an alien, can be 'part of or supporting forces hostile to the United States or coalition partners;' and 'engaged in an armed conflict against the United States.'") (citations and internal quotations omitted).

from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens," *see* June 9, 2002 Bush Letter, when that remedy has been expressly denied to the U.S. military personnel who are fighting al Qaeda. *See Eisentrager*, 339 U.S. at 783 (rejecting an interpretation of the Fifth Amendment that would put "enemy aliens in unlawful hostile action against [the United States] . . . in a more protected position than our own soldiers," and stating that "[i]t would be a paradox indeed if what the Amendment denied to Americans it guaranteed to enemies."); *In re Iraq*, 479 F. Supp. 2d at 106 n.22 ("The Court agrees with the defendants that creating a Bivens remedy for these plaintiffs would result in an absurdity whereby remedies for constitutional violations that are denied our service men and women by the decisions in *Stanley* and *Chappell* would be available to the very enemies against whom those men and women risk their lives to defend our country's sovereignty.").

This Court should decline Plaintiffs' request to confer a cause of action "on all of the world except Americans defending it." *Eisentrager*, 339 U.S. at 784. Given the severe impact of creating a damages action for enemy combatants to use against the individual Cabinet members, soldiers and other federal officials responsible for their designation, detention, interrogation, and treatment as enemy combatants, Congress, not the Judiciary, is the appropriate branch to create any damages action in this context. *Bush*, 462 U.S. at 380; *cf. Sosa*, 542 U.S. at 727-28. Congress, however, has not created any such damages remedy. In fact, with respect to the issue of the interrogation and treatment of military detainees, "Congress has twice issued legislation addressing detainee treatment without creating a private cause of action for detainees injured by military officials." *In re Iraq*, 479 F. Supp. 2d at 107 (citing Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2739 (2005), and Reagan Act, Pub. L. No. 108-375, 118 Stat. 1811, 2068-71

(2004) (codified at 10 U.S.C. § 801, stat. note §§ 1091-92)). As the court explained in *In re Iraq*, the absence of any provision for damages actions in this legislation is "some indication that Congress' inaction in this regard has not been inadvertent." 479 F. Supp. 2d at 107.

In sum, Plaintiffs propose a judicially-created remedy that would strike at the core functions of the political branches, impacting military discipline, aiding our enemies, and making the United States more vulnerable to terrorist attack. There can be little doubt that accepting Plaintiffs' invitation to create a judicial damages remedy for enemy combatants to use against U.S. officials in their individual capacity for alleged constitutional infirmities in their detention and treatment would be "a general *Bivens* cure . . . worse than the disease." *Wilkie*, 127 S. Ct. at 2604. Accordingly, this Court should dismiss all of Plaintiffs' constitutional claims as a matter of law.

### B. The Defendants Are Entitled To Qualified Immunity For Plaintiffs' *Bivens* Claims.

Even if the Court does not find that special factors preclude the creation of the *Bivens* remedy that Plaintiffs seek, Plaintiffs' constitutional claims should nonetheless be dismissed where the Defendants are entitled to qualified immunity.

#### 1. The framework for the qualified immunity defense.

"Qualified immunity shields government officials who perform discretionary governmental functions from civil liability so long as their conduct does not violate any 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475

U.S. 335, 341 (1986)). Qualified immunity is not merely a defense to liability. It is intended to afford sweeping protection to federal officials from the entirety of the litigation process. As the Fourth Circuit has explained,

> The grant of qualified immunity to government officials ensures that these officials can perform their duties free from the specter of endless and debilitating lawsuits. Without such immunity, the operations of government would be immobilized. Permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.

*Torchinsky v. Siwinski*, 942 F.2d 257, 260-61 (4th Cir. 1991) (citations omitted). Accordingly, the Supreme Court has repeatedly emphasized that an official's entitlement to qualified immunity must be resolved at the earliest possible stage of the litigation and that "discovery should not be allowed" until it is determined that the plaintiff has properly stated a claim for the violation of a clearly established right. *Harlow*, 457 U.S. at 818-19; *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998); *Anderson v. Creighton*, 483 U.S. 635, 647 n.6 (1987).

After a defendant asserts entitlement to qualified immunity, the burden shifts to the plaintiff to show that qualified immunity is not appropriate. The Fourth Circuit has recognized that the determination of whether a defendant's actions are shielded by the defense of qualified immunity requires a two-step inquiry that should be made "in proper sequence":

> First, we must determine whether, taken in the light most favorable to the party asserting the injury, the facts alleged show that the defendants' conduct violated a constitutional right. If the facts, so viewed, do not establish a violation of a constitutional right, the plaintiff cannot prevail, and "there is no necessity for further inquiries concerning qualified immunity." If, however, a favorable view of the facts does establish such a violation, the next step is to determine whether the right violated was clearly established at the time of the alleged offense. If the right was not clearly established, the defendants are entitled to qualified immunity.

*Bevis v. Bethune*, 232 Fed. Appx. 212, 214 (4th Cir. 2007) (quoting *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001)).

In addition, in order for Plaintiffs to establish a *Bivens* claim against each of the Defendants, Plaintiffs must specify the acts taken by each defendant which violated Plaintiffs' constitutional rights. *Slakan v. Porter,* 737 F.2d 368, 373 (4th Cir. 1984). This is because liability in a *Bivens* case is "personal, based upon each defendant's own constitutional violations." *Trulock v. Freeh*, 275 F.3d 391, 402 (4th Cir. 2001) (internal citation omitted). There is no respondeat superior liability. *Id.*

All of Plaintiffs' claims against Defendants Gates, Mobbs, Jacoby, Hanft, Marr, and Keen fail as a matter of law because Plaintiffs fail to allege facts that establish these Defendants personally participated in any violation of Plaintiffs' constitutional rights. Moreover, six of Padilla's constitutional claims – Claims 1-3 and 8-10 (*see* Am. Compl. ¶¶ 86.1-.3, .8-.10) – fail as a matter of law with respect to all of the Defendants because these claims are explicitly precluded by the Fourth Circuit's prior rejection of Padilla's petition for a writ of habeas corpus. Claims 4-7 (*see id.* ¶¶ 86.4-.7) are also necessarily precluded to the extent they rely on Padilla being held in isolation and incommunicado because these claims are also encompassed within the Fourth Circuit's decision. Claim 4 (*see id.* ¶ 86.4) also fails to allege a violation of Padilla's rights under the Self-Incrimination Clause of the Fifth Amendment. Claim 2 (*see id.* ¶ 86.2) fails to allege a violation of Padilla's right of access to courts under the First and Fifth Amendment; and Claim 5 (*see id.* ¶ 86.5) fails to allege a violation of any rights under the Eighth Amendment. To the extent that any of the constitutional claims are not precluded by Padilla's failed petition for habeas corpus, the claims fail nonetheless because his constitutional claims were not "clearly

established" at the time Padilla was designated and detained as an enemy combatant.

**2. Plaintiffs have failed to establish that all of the Defendants personally participated in the violation of Plaintiffs' constitutional rights.**

The Supreme Court has recently clarified the level of specificity necessary for a complaint to survive a motion to dismiss. In *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007), the Court stated that

> a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

*Id.* at 1964-65 (internal citations and quotations omitted); *see* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action").

Plaintiffs' *Bivens* claims can be broadly separated into two categories: 1) claims that challenge Padilla's designation and subsequent detention in military custody as an enemy combatant; and 2) claims that challenge his interrogation and the conditions of confinement during his detention. The allegations of Plaintiffs' First Amended Complaint do not meet the threshold requirement of sufficiently alleging the personal participation of all of the Defendants in conduct attributable to all of the claims.

a. Padilla's designation and detention as an enemy combatant.

Plaintiffs do not allege that any of the Defendants designated Padilla to be an enemy combatant. In fact, Plaintiffs admit that it was the President of the United States who made this

designation and ordered that Padilla be detained in military custody. Am. Compl.¶¶ 28, 71. The only Defendants even alleged to have been involved in the designation are Defendants Ashcroft, Wolfowitz, and Rumsfeld, all of whom are alleged to have "personally recommended" that Padilla be designated an enemy combatant, *id.* ¶ 71. The only Defendant alleged to have had any authority with respect to the decision to hold Padilla in military detention is Defendant Rumsfeld, whom Plaintiffs claim directed "military agents" to take Padilla from a federal detention center and transfer him to the Naval Consolidated Brig in South Carolina. *Id.* ¶ 29.

Plaintiffs do not allege that Defendants Hanft, Marr, Keen, or Noble had any involvement in the decision to detain Padilla. With respect to Defendants Gates, Wolfowitz, Jacoby, and Mobbs, Plaintiffs offer only the conclusory allegation that these defendants were "personally responsible for developing, authorizing, supervising, and/or implementing the policies, patterns and/or practices" governing Padilla's "unlawful detention." *Id.* ¶ 72.[16] Plaintiffs, however, allege no *facts* concerning the involvement of any of these defendants in the development, authorization, supervision, and/or implementation of the alleged policies, patterns and/or practices. Rather, Plaintiffs' claims rest merely on boilerplate legal assertions, wholly devoid of any factual content. Such allegations are unworthy of consideration even for notice pleading purposes, let alone for purposes for overcoming the defense of qualified immunity. *See Twombly*, 127 S. Ct. at 1964-65; Fed. R. Civ. P. 8(a)(2) (requiring "a short plain statement of *facts showing that the pleader is entitled to relief*") (emphasis added); *Harlow*, 457 U.S. at 808, 820 n.35 (cautioning that in the

[16] Defendant Gates did not become Secretary of Defense until December 18, 2006, over four years after Padilla was designated an enemy combatant by the President, and almost a year after Padilla was transferred from military custody to a federal detention center in Miami, Florida. *See* Am. Compl ¶ 9. It is inconceivable then that he could have had personal involvement in the matters alleged by Plaintiffs.

qualified immunity context, federal courts must be "alert to the possibilities of artful pleading" and stressing the need for "firm application of the Federal Rules of Civil Procedure") (*quoting Butz v. Economou*, 438 U.S. 478, 507 (1978)). It is well established that Plaintiffs cannot circumvent the requirement that personal involvement be properly alleged in a constitutional tort complaint by resorting to vague and conclusory assertions.[17] Thus, Plaintiffs fail to sufficiently allege the personal involvement of Defendants Gates, Jacoby, Mobbs, Hanft, Marr, Keen, or Noble in the violation of any rights associated with Padilla's designation and detention as an enemy combatant, and claims 1-3 and 8-10, *see* Am. Compl. ¶¶ 86.1-.4, .8-.10, should be dismissed as to them.

b. Padilla's interrogation and treatment during his detention.

Plaintiffs similarly fail to sufficiently allege personal involvement in Padilla's interrogation and treatment during his detention. *See* Am. Compl. ¶¶ 74-76. Plaintiffs make no allegation that Defendant Ashcroft had any involvement with Padilla's interrogation or treatment during his detention. With respect to Defendants Gates, Wolfowitz, Jacoby, and Mobbs, Plaintiffs again offer only conclusory allegations of their purported but unspecified involvement in

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[17] *See Willis v. Ashcroft*, 92 Fed.Appx. 959 (4th Cir. 2004) (per curiam) (rejecting conclusory allegation of conspiracy); *Montgomery v. Johnson*, No. 7:05CV00131, 2007 WL1960601, at *5 (W.D. Va. July 5, 2007) (finding conclusory allegations against supervisory defendants without specific facts indicating defendants' personal involvement or promulgation of policies on which subordinates acted insufficient to state a *Bivens* claim against the defendants); *see also Patton v. Przybylski*, 822 F.2d 697, 701 (7th Cir. 1987) (finding "boilerplate" allegations of wrongful "custom, practice and policy" fell "far short" of demonstrating defendant's personal involvement in alleged unconstitutional conduct); *Bruns v. Nat'l Credit Union Admin.*, 122 F.3d 1251, 1257 (9th Cir. 1997) (recognizing that "[v]ague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss") (*quoting Ivey v. Bd of Regents*, 673 F.2d 266, 268 (9th Cir. 1982)); *Gonzalez v. Reno*, 325 F.3d 1228 (11th Cir. 2003) (rejecting claims against high-level federal officials for lack of sufficient allegations of personal involvement).

"developing, authorizing, supervising, and/or implementing the policies, patterns and/or practices," and "establishing and/or approving policies" regarding Padilla's interrogation and conditions of confinement. *See id.* ¶¶ 72, 77-79. As shown above, such boilerplate allegations are insufficient to establish that any of these Defendants personally participated in any unconstitutional conduct. *See*, *e.g.*, *Twombly*, 127 S. Ct. at 1964-65; *Patton*, 822 F.2d at 701. With respect to Defendants Hanft, Marr, and Keen, Plaintiffs claim merely that they "personally directed subordinate guards to commit wrongful acts," were "deliberately indifferent" to Padilla's constitutional rights, and "fail[ed] to act on actual or constructive knowledge that wrongful, unlawful and unconstitutional acts were occurring." *See* Am. Compl. ¶ 79.[18] Similarly, with respect to Defendant Noble, Plaintiffs allege collective actions taken by a group of "Medical Professional Defendants" that is defined to include Defendant Noble. *See id.* ¶¶ 23, 61.c. These allegations are nothing more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action" for supervisory or vicarious liability. *Twombly*, 127 S. Ct. at 1964-65. While Plaintiffs claim that Defendant Noble conducted a "wholly inadequate evaluation of Mr. Padilla's mental health," *see* Am. Compl. ¶ 81, Plaintiffs offer nothing – apart from a formulaic recitation of "deliberate indifference," *see id.* – from which it could be inferred that this alleged conduct constituted anything more than ordinary negligence, which is not actionable under the Constitution. *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) ("liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process").

[18] Plaintiffs' claims are akin to allegations that prison wardens are responsible for directing the conduct of prison guards. Courts routinely dismiss such cases on qualified immunity grounds. *See*, *e.g.*, *Jeffers v. Gomez*, 267 F.3d 896, 915-16 (9th Cir. 2001) (dismissing prisoners' constitutional claims against prison director for failure to show any causal connection between supervisor's conduct and the alleged violation)

Thus, Plaintiffs fail to sufficiently allege the personal involvement of Defendants Ashcroft, Gates, Wolfowitz, Jacoby, Mobbs, Hanft, Marr, Keen, and Noble in the violation of any rights associated with Padilla's interrogation or the conditions of confinement during his detention as an enemy combatant, specifically Claims 4, 5, 6, and 7, *see* Am. Compl. ¶¶ 86.4-.7.

**3. Plaintiffs have not alleged a violation of any constitutional rights.**

To the extent that Plaintiffs have sufficiently alleged the personal involvement of any of the Defendants in a violation of any of Plaintiffs' constitutional rights, Plaintiffs' claims still fail as a matter of law.

a. The Fourth Circuit's rejection of Padilla's petition for a writ of habeas corpus precludes all of Plaintiffs' constitutional claims related to Padilla's designation and detention as an enemy combatant, as well as those claims related to his interrogation or treatment that flow from his isolation and being held incommunicado.

Padilla claims that his designation as an enemy combatant and his subsequent detention as such violated various constitutional rights. However, the Fourth Circuit's rejection of Padilla's petition for a writ of habeas corpus necessarily included a determination that six of the constitutional rights claimed by Padilla in this case – Claims 1-3 and 8-10, *see* Am. Comp. ¶¶ 86.1-.3, .6-.10 – were not violated by Padilla's designation and detention as an enemy combatant. In addition, to the extent that Padilla's constitutional claims concerning his interrogation and treatment – Claims 4-7, *see id.* ¶¶ 86.4-.7 – relate to Padilla being held in isolation and incommunicado, those claims must be dismissed as well because they are necessarily encompassed within the Fourth Circuit's decision on Padilla's habeas petition.

On July 2, 2004, Padilla filed a petition for a writ of habeas corpus in this Court. *See Padilla v. Hanft* ("*Padilla I*"), 389 F. Supp. 2d 678, 682 (D. S.C. 2005), *rev'd*, *Padilla II*, 423

F.3d 386 (4th Cir. 2005), *cert. denied*, 547 U.S. 1062 (2006). Padilla claimed that his military detention as an enemy combatant without criminal charge violated the Fourth, Fifth and Sixth Amendments. *Padilla I*, 389 F. Supp. 2d at 692 n.1. Specifically, Padilla alleged that

- he was "incarcerated and unlawfully held" at the Consolidated Naval Brig in South Carolina;
- he had not been given fair notice of the Government's case against him and had been given no opportunity to be heard by a neutral decision maker to contest the factual grounds for his imprisonment;
- he was entitled to an evidentiary hearing on the factual allegations underlying his designation as an "enemy combatant;"
- he "unquestionably ha[d] the right to access to counsel;" and
- his "ongoing interrogation" "throughout two years of incommunicado detention" "violate[d] his rights under the Fifth, Sixth and Eighth Amendments to the U.S. Constitution, including the rights against self-incrimination, the right to counsel, the right not to be subject to cruel or unusual punishment, and substantive and procedural due process."

*See* Petition for Writ of Habeas Corpus at ¶¶ 1, 3, 15, 28-29, 32. Padilla also sought an order requiring the government to cease all interrogation of him while his petition was pending. *Id.* at Prayer For Relief No.4. The district court granted Padilla's petition, finding that the President did not have the authority to detain Padilla as an enemy combatant. *Padilla I*, 389 F. Supp. 2d at 688-692. This decision, however, was reversed by the Fourth Circuit in *Padilla II*.

In *Padilla II*, the Fourth Circuit held that the President possessed authority, pursuant to the AUMF, to designate Padilla as an enemy combatant and to detain him in military custody as such. 423 F.3d at 389, 397. After finding that Padilla qualified as an enemy combatant under the definitions adopted by the Supreme Court in *Ex parte Quirin*, 317 U.S. 1 (1942), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Fourth Circuit declared that "[Padilla's] military detention as

an enemy combatant by the President is unquestionably authorized by the AUMF as a fundamental incident to the President's prosecution of the war against al Qaeda in Afghanistan." *Padilla*, 423 F.3d at 392. The Fourth Circuit recognized that the AUMF

> provided the President all powers necessary and appropriate to protect American citizens from terrorist acts by those who attacked the United States on September 11, 2001. As would be expected, and as the Supreme Court has held, those powers include the power to detain identified and committed enemies such as Padilla, who associated with al Qaeda and the Taliban regime, who took up arms against this Nation in its war against these enemies, *and* who entered the United States for the avowed purpose of further prosecuting that war by attacking American citizens and targets on our own soil . . .

*Id.* at 397. While the Fourth Circuit acknowledged that Padilla could not be detained indefinitely, the Court found that his detention had not exceeded the duration authorized by the AUMF because the United States remains engaged in the conflict with al Qaeda in Afghanistan. *Id.* at 393 n.3 (citing *Hamdi*, 542 U.S. at 520-521).

The doctrine of collateral estoppel prevents Padilla from relitigating issues of fact or law that were actually and necessarily decided in prior litigation in which Padilla had a full and fair opportunity to litigate the issues. *Ramsay v. INS*, 14 F.3d 206, 210 (4th Cir. 1994). The doctrine applies where: 1) the issue is identical to one previously litigated; 2) the issue was actually decided in the prior proceeding; 3) determination of the issue was a critical and necessary part of the decision in the prior proceeding; 4) the prior judgment is final and valid; and 5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. *Id.* Under the collateral estoppel doctrine, any claim raised by Padilla in this case that is encompassed by issues of fact or law that were actually litigated and necessarily

decided against Padilla in a prior proceeding is precluded.[19]

There is no question that Padilla has raised, and the Fourth Circuit has rejected, the majority if not the entirety of the claims that are the subject of this litigation. In recognizing that the President had the authority to designate Padilla as an enemy combatant and to detain him in military custody as such, the Fourth Circuit in *Padilla II* decided all of the issues of fact and law raised in Padilla's petition for habeas corpus. *See Padilla I*, 389 F. Supp. 2d at 679 n.1. The issues raised in Padilla's petition for habeas corpus and necessarily decided against Padilla by the Fourth Circuit in *Padilla II* encompass Claims 1, 2, 3, and 10 of the First Amended Complaint, which relate to Padilla's designation and detention as an enemy combatant. *Compare Padilla I*, 389 F. Supp. 2d at 692 n.1 *and* Petition for Writ of Habeas Corpus at ¶¶ 1, 3, 15, 28-29, 32 *with* Am. Compl. ¶¶ 86.1-.3, .10. Therefore, these claims are precluded by *Padilla II*.[20] To the extent that Claims 4, 5, 6, and 7, which relate to Padilla's interrogation, rely upon the alleged coercive effect of his being detained and held incommunicado, these claims are similarly precluded because they were also explicitly raised by Padilla in his habeas petition and necessarily rejected by the Fourth Circuit. *See* Petition for Writ of Habeas Corpus at ¶ 32; Am. Compl. ¶¶ 86.4-.7.

Moreover, *Padilla II* also bars those constitutional claims that Padilla did not explicitly raise in his habeas petition but which flow from the determination that he was properly held in isolation and incommunicado. Padilla specifically alleged in his habeas petition that he was being

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[19] Even if collateral estoppel does not apply, the Fourth Circuit's decision in *Padilla II* is binding precedent.

[20] The only claims asserted against Defendant Ashcroft are Claims 1-3 and 10. Therefore, Padilla's entire case against Defendant Ashcroft is precluded by the Fourth Circuit's decision in *Padilla II*.

held in "incommunicado." *See* Petition for Habeas Corpus at ¶ 32.[21] However, in denying Padilla's habeas petition, the Fourth Circuit recognized that inherent in the authority to detain a designated enemy combatant such as Padilla for the duration of active hostilities is the ability – and the necessity – of detaining the enemy combatant in isolation with limited if any opportunity to communicate with the outside word. In this regard, the Fourth Circuit found that the detention of designated enemy combatants serves three equally important purposes: 1) preventing the detainee from returning to the field of battle; 2) facilitating the process of gathering intelligence from the detainee; and 3) "restrict[ing] the detainee's communications with confederates so as to ensure that the detainee does not pose a continuing threat to national security even as he is confined." *Padilla II*, 423 F.3d at 395. It is these considerations, the Fourth Circuit found, that make military detention "not only an appropriate, but also the necessary, course of action to be taken in the interest of national security." *Id*. Thus *Padilla II* is also dispositive of those constitutional claims asserted by Padilla in Claims 8 and 9, *see* Am. Compl. ¶¶ 86.8-.9, that are based upon his being held incommunicado – i.e., in near or total isolation from his family, *see id.* ¶¶ 1, 29-31, 33, 47-50; and from outside sources of information such as radio, television, and reading materials, *see id*. ¶¶ 57-60 – whether or not they were explicitly relied upon by Padilla in his habeas petition.[22]

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[21] *See also Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 574 (S.D.N.Y. 2002) ("It is not disputed that Padilla is held incommunicado, and specifically that he has not been permitted to consult with Newman or any other counsel"), *remanded*, *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *reversed sub nom.*, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

[22] *Padilla II* is similarly dispositive of Plaintiff Lebron's First Amendment right of association claim, which is premised upon the allegation that Lebron was "denied virtually all contact with her son" during his detention as an enemy combatant. *See* Am. Compl. ¶¶ 87. Moreover, it cannot be said, in light of *Padilla II*, that Lebron had a clearly established right to

b. Padilla has not stated a violation of the right of access to courts.

Whether or not the Fourth Circuit's decision is preclusive, an additional reason why Padilla has not stated a violation of the right of access to the courts in Claim 2 is that Padilla has not identified a claim of any sort that he was unable to bring in the past because of any actions by the Defendants. The Supreme Court has recognized that constitutional claims for denial of the right of access to court generally fall into two categories:

> In the first are claims that systemic official action frustrates a plaintiff or plaintiff class in preparing and filing suits at the present time . . . The second category covers claims not in aid of a class of suits yet to be litigated, but of specific cases that cannot now be tried (or tried with all material evidence), no matter what official action may be in the future.

*Christopher v. Harbury*, 536 U.S. 403, 412-13 (2002). The Court has recognized that the right of access to courts is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court. *Id.* at 414-15. Thus, to state a denial of access to courts claim, a plaintiff must allege both: (1) a "nonfrivolous, arguable" underlying claim, and (2) official acts frustrating litigation of the claim. *Id.* at 415.

Nowhere in Padilla's Amended Complaint does he identify a claim of any sort that he was unable to bring in the past because of the actions of any of the defendants. The only past claim referred to in the Amended Complaint is a petition for a writ of habeas corpus, *see* Am. Compl. at ¶ 50, which Padilla did in fact bring and lose, *see Padilla II*, 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 547 U.S. 1062 (2006). Padilla does not identify any claim that the

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have contact with Padilla during his detention as an enemy combatant.

Defendants' actions prevented or are preventing him from pursuing.[23]

c. Padilla has not stated a violation of any rights under the Eighth Amendment.

Even if the Fourth Circuit's decision is not preclusive of Padilla's Eighth Amendment claims in Claim 5, an additional reason why Padilla has not stated a violation of his Eighth Amendment rights is that it is well established that the Eighth Amendment does not apply unless there has been a criminal conviction. *See Ingraham v. Wright*, 430 U.S. 651, 667-68, 671 n.40 (1977) ("[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law."). Padilla makes no allegation that any of the mistreatment he was allegedly subjected to occurred in connection with any criminal proceedings against him. In fact, Padilla specifically alleges that he was held in military custody "without criminal charge." Am. Compl. ¶ 31.

d. Padilla has not stated a violation of the Fifth Amendment right against self-incrimination.

Whether or not the Fourth Circuit's decision is preclusive, Padilla's allegation that the Defendants violated his right to be free from "coercive and involuntary custodial interrogation," asserted in Claim 4 under the Self-Incrimination Clause of the Fifth Amendment, fails because Padilla does not allege that he made any incriminating statements. *Id.* ¶ 86.4. There can be no violation of the right against self-incrimination unless an incriminating statement has been made. *Riley v. Dorton*, 115 F.3d 1159, 1165 (4th Cir. 1997) (en banc); *Fisher v. United States*, 425 U.S.

[23] Similarly, Padilla cannot premise his right of access claim on the Habeas Suspension Clause, *see* Am. Compl. ¶¶ 1, 86.2., because Padilla has not been denied the opportunity to pursue a writ of habeas corpus. Moreover, that argument was raised in Padilla's petition for habeas corpus, *see* Petition for Habeas Corpus at ¶ 21, and rejected by the Fourth Circuit, *see Padilla II*, 423 F.3d at 386.

391, 408 (1976) (stating that the Fifth Amendment privilege "applies only when the accused is compelled to make a Testimonial Communication that is incriminating"). Moreover, the Fifth Amendment right against self-incrimination is a *trial* right. *Withrow v. Williams*, 507 U.S. 680, 691 (1993). "Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial." *Riley*, 115 F.3d at 1165 (citing *Verdugo-Urquidez*, 494 U.S. at 264)).[24] Nowhere does Padilla allege that an incriminating statement he made while held as an enemy combatant was used against him in a trial.[25]

**4. To the extent that Plaintiffs have alleged the violation of any constitutional rights related to Padilla's designation, detention, and interrogation as an enemy combatant, those rights were not clearly established at the time of the events alleged in the First Amended Complaint.**

A constitutional right is clearly established "if the contours of the right are sufficiently clear so that a reasonable officer would have understood, under the circumstances at hand, that his behavior violated the right." *Campbell v. Galloway*, 483 F.3d 258, 271 (4th Cir. 2007) (quoting *Bailey v. Kennedy*, 349 F.3d 731, 741 (4th Cir. 2003) (internal quotation marks and alteration

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[24] *See also Chavez v. Martinez*, 538 U.S. 760, 767 (2003) (plurality opinion) (finding no violation of the Fifth Amendment's Self-incrimination Clause where the plaintiff's statements were never admitted as testimony against him in a criminal case; stating that "The text of the Self-Incrimination Clause simply cannot support the [] view that the mere use of compulsory questioning, without more, violates the Constitution.") *and Chavez*, 538 U.S. at 778-79 (Souter, J., concurring) (finding that plaintiff could not make the "powerful showing" necessary to expand protection of the privilege against self-incrimination to point of holding that coercive questioning alone was a "completed violation" of the Fifth and Fourteenth Amendments).

[25] Qualified immunity might not preclude a free-standing constitutional claim such as a particular allegation by Padilla of the denial of medical care. However, because Plaintiffs have neither specifically outlined the parameters of such a claim, nor alleged facts to support the personal participation of any individual defendants in such a claim, it would not survive as to any of the named Defendants.

omitted)). The Fourth Circuit does not require officials to "sort out conflicting decisions or to resolve subtle or open issues. Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *McVey v. Stacy,* 157 F.3d 271, 277 (4th Cir. 1998) (internal quotation marks and citation omitted). Accordingly, the constitutional rights that Plaintiffs assert in this case must have been clearly established in a "particularized and relevant sense," at the time of the Defendants' alleged actions. *Pinder v. Johnson*, 54 F.3d 1169, 1173 (4th Cir. 1995) (*quoting Anderson*, 483 U.S. at 640). "[I]n light of the pre-existing law the unlawfulness" of the Defendants' conduct must have been "apparent." *Id.* (*citing Anderson*, 483 U.S. at 640). When Plaintiffs' constitutional claims are considered under this demanding standard, it is evident that Padilla's designation, detention, and interrogation as an enemy combatant did not violate any clearly established constitutional rights.

The Defendants are aware of no case in which a federal court has afforded the constitutional protections Plaintiffs seek in this case to an enemy combatant. To the contrary, in a recent and closely analogous case, the Supreme Court held that the AUMF authorized the military detention of an American citizen, Yaser Hamdi, who was captured in Afghanistan, designated as an enemy combatant, and subsequently detained in military custody on U.S. soil. *See Hamdi*, 542 U.S. at 518-522 (plurality opinion). The Court specifically recognized that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant." *Id.* at 518. *Hamdi* supports the Defendants' position that Padilla's designation and detention as an enemy combatant did not violate his clearly established constitutional rights. Thus it cannot be said that there were any constitutional "bright lines" applicable to Padilla's case which the Defendants could be held liable for transgressing. *See McVey,* 157 F.3d at 277.

To the extent that Plaintiffs would argue that their claims fall outside the reach of *Hamdi* because Padilla was captured on U.S. soil while Hamdi was captured on foreign soil, this argument has already been expressly rejected by the Fourth Circuit. In *Padilla II*, the Fourth Circuit concluded that the reasoning in *Hamdi* did not support a distinction between Padilla's detention and Hamdi's detention based upon where they captured. The court observed that while the plurality in *Hamdi* limited its opinion, it did not do so

> in a way that leaves room for argument that the President's power to detain one who has associated with the enemy and taken up arms against the United States in a foreign combat zone varies depending upon the geographic location where that enemy combatant happens to be captured.

*Padilla II*, 423 F.3d at 394.

As a matter of law the *Padilla II* decision resolves the Defendants' entitlement to qualified immunity by its specific rejection of Plaintiffs' claims that Padilla's designation, detention, and interrogation as an enemy combatant violated his Fourth, Fifth, and Sixth Amendment rights. 423 F.3d at 389. In light of the Fourth Circuit's decision, it cannot be said that any of these rights was clearly established at the time Padilla was in military custody. Nor can it be said that Plaintiffs had clearly established First Amendment rights of association, or that Padilla had clearly established First Amendment rights of access to information, since the Fourth Circuit recognized that inherent in the authority to detain Padilla as an enemy combatant is the authority to detain him in isolation and incommunicado. *Id.* at 395.

Moreover, the Fourth Circuit has recognized that only infrequently will the law be "clearly established" for purposes of qualified immunity where the relevant inquiry "requires a particularized balancing that is subtle, difficult to apply, and not yet well-defined." *DiMeglio v.*

*Haines*, 45 F.3d 790, 806 (4th Cir. 1995) (internal quotations and citations omitted).[26] The determination of whether the rights Padilla asserts in this case were clearly established at the time of the Defendants' alleged actions requires a careful balancing, considering Padilla's rights as an American citizen and the Executive Branch's authority to conduct war, protect national security, and formulate foreign policy. Such a balance is inherently "subtle" and "difficult to apply." And the most recent and closely analogous cases in which courts have attempted to define this balance – *Hamdi* and *Padilla II* – both make clear that the rights Padilla claims in this case were not clearly established at the time of the Defendants' actions.

## IV. PADILLA HAS NOT STATED A CLAIM UNDER THE RELIGIOUS FREEDOM RESTORATION ACT.

Padilla alleges that he was denied his right to the free exercise of his religion as protected by the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*. *See* Am. Compl. ¶ 86.7 (Claim 7).[27] RFRA provides that the "government shall not 'substantially burden a person's exercise of religion' unless the government demonstrates that the burden furthers a 'compelling governmental interest' by the 'least restrictive means,'" *American Life League, Inc. v. Reno*, 47 F.3d 642, 654 (4th Cir. 1995) (quoting 42 U.S.C. § 2000bb-1). Padilla's purported RFRA claim fails as a matter of law because RFRA does not create a cause of action against the

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[26] *See*, *e.g.*, *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir.1992) ("In determining whether the law was clearly established, we bear in mind that allegations of constitutional violations that require courts to balance competing interests may make it more difficult to find the law 'clearly established' when assessing claims of qualified immunity." ); *Borucki v. Ryan,* 827 F.2d 836, 848 (1st Cir. 1987) ("[W]hen the law requires a balancing of competing interests, . . . it may be unfair to charge an official with knowledge of the law in the absence of a previously decided case with clearly analogous facts." ) (citation omitted).

[27] Padilla's RFRA claim is not asserted against Defendants Ashcroft and Noble. *See* Am. Compl. ¶ 86.7.

Defendants. Moreover, even if such a cause of action is allowed under RFRA, the Defendants are entitled to qualified immunity.

### A. RFRA Does Not Create A Cause Of Action Against The Defendants In Their Individual Capacity.

The threshold inquiry for a RFRA claim is whether the challenged governmental action substantially burdens the exercise of sincerely-held religious beliefs. *Goodall by Goodall v. Stafford County School Bd.*, 60 F.3d 168, 171 (4th Cir. 1995). The burden of proving the existence of a substantial interference with the right of free exercise rests on the religious adherent. *Id.* Only if such a substantial burden is proven must the government demonstrate that the compelling interest test is satisfied. *Id.* RFRA provides that "[a] person whose exercise has been burdened . . . may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief *against a government*." 42 U.S.C. § 2000bb-1(c) (emphasis added). This language does not provide for a cause of action against a government employee in his or her individual capacity.

Any interpretation of a statute begins with the text, *United States v. Simmons*, 247 F.3d 118, 122 (4th Cir. 2001), and the text of RFRA indicates that Congress has authorized suits against government entities, not individual government employees. The phrase "appropriate relief against a government" would be an odd way for Congress to indicate that individual employees must pay money judgments from their personal assets, which is what Padilla seeks from the defendants here. In common usage, the term "government" means an entity, not an individual person employed by the government. *See* Black's Law Dictionary 715 (8th ed. 2004) (noting that the term "government" "refers collectively to the political organs of a country"). And taken as a

whole, the phrase "appropriate relief against a government" would not appear to encompass actions for money damages at all, as sovereign immunity generally prevents money damages from being an "appropriate" form of relief to seek from a government. *See Lane v. Peña*, 518 U.S. 187, 192 (1996).

RFRA's definition of "government," read in proper context, does not change this common sense construction. RFRA defines "government" as "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State." 42 U.S.C. § 2000bb-2(1). In this definition, only the phrase "official (or other person acting under color of law)" could conceivably implicate a government employee in his or her individual capacity. Careful analysis of this phrase, however, indicates that it does not. A plaintiff may seek judicial relief from a government employee in two different capacities: "official capacity" and "individual capacity." The term "official capacity" denotes a suit nominally against an official, but in reality against the government itself, while "individual capacity" denotes a suit against the officer personally. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). RFRA's reference to "official," then, is referring to the prospect of an official-capacity suit – a suit that, consistent with the preceding text, would seek "relief against a government," 42 U.S.C. § 2000bb-1(c).

Nor does the residual phrase "other person acting under color of law" authorize individual capacity suits. When, as in this case, a list of specific terms ends with a reference to "other" such items, the Supreme Court and the Fourth Circuit commonly turn to two canons of statutory construction: *noscitur a sociis* and *ejusdem generis*. *See, e.g.*, *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 383-85 (2003) (using canons to limit

scope of phrase "other legal process"); *Andrews v. U.S.*, 441 F.3d 220, 224 (4th Cir. 2006) (using canons to interpret phrase "any other law enforcement officer"); *U.S. v. Ryan-Webster*, 353 F.3d 353, 366 (4th Cir. 2003) (using *ejusdem generis* canon to interpret the catch-all phrase "other document prescribed by statute for entry into . . . the United States"). According to the *noscitur a sociis* ("known by its associates") canon, the meaning of an undefined word or phrase "should be determined by the words immediately surrounding it." *Andrews*, 441 F.3d at 224 (quoting Black's Law Dictionary 1087 (8th ed. 2004)). The closely related *ejusdem generis* ("of the same class") canon provides that "[a] general word or phrase [that] follows a list of specifics . . . will be interpreted to include only items of the same type as those listed." *Id.* (quoting Black's Law Dictionary 556 (8th ed. 2004)).

As applied to the phrase "branch, department, agency, instrumentality, and official (or other person acting under color of law)," these canons show that the definition of "government" does not include government employees in their individual capacities. Rather, it simply shows that other persons acting under color of law will be considered the "government" with respect to obtaining appropriate relief. *Noscitur a sociis* indicates that the term "official" must be read in context with the other terms on the list, all of which refer to government entities, not to individual employees of such entities. *Ejusdem generis* indicates that "other persons acting under color of law" must be read in light of the specific terms that precede it. All those specific terms contemplate suits against government entities (either in name or by way of an official capacity suit), not individual employees.

This interpretation of "official (or other persons acting under color of law)" finds support in the Supreme Court's prior constructions of similar phrases. *Cf. United States v. Sioux*, 362

F.3d 1241, 1246 (9th Cir. 2004) ("It is an elementary principle of statutory construction that similar language in similar statutes should be interpreted similarly."). For instance, 28 U.S.C. § 1391(e) (2000) provides for expanded venue and nationwide service of process in actions against an "officer or employee" of the United States "acting in his official capacity or under color of legal authority." In *Stafford v. Briggs*, a *Bivens* action, the Court interpreted the terms "officer and employee of the United States . . . acting in his official capacity or under color of legal authority" to apply only to actions brought against federal employees in their official capacity, not actions against employees in their individual capacity. 444 U.S. 527, 535-36 (1980). *See also Micklus v. Carlson*, 632 F.2d 227, 240-41 (3d Cir. 1980). The Court reached this result over the plaintiff's argument that the phrase "official capacity *or under color of legal authority*" (emphasis added) was intended to embrace individual capacity suits in addition to official capacity suits. The Court noted that the phrase "or under color of legal authority" could reasonably be read as describing the character of the defendant at the time of the suit and, so read, limited § 1391(e)'s coverage to actions against a federal official who was, at the time of the events giving rise to the suit, acting in an official way. *See* 444 U.S. at 536.[28]

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[28] The few cases to have addressed this issue to date have not found that RFRA does not provide a cause of action against individual government employees. *See*, *e.g.*, *Jama v. INS*, 343 F. Supp. 2d 338, 371-73 (D.N.J. 2004); *Lepp v. Gonzales*, No. C-05-0566 VRW, 2005 WL 1867723, at *8 (N.D. Cal. Aug. 2, 2005); *cf. Woods v. Evatt*, 876 F. Supp. 756, 771 (D.S.C. 1995) (assuming that RFRA claim could be asserted against state officials in their individual capacity without deciding whether the Act permitted individual capacity claims), *aff'd*, 68 F.3d 463 (4th Cir. 1995(; *Elmaghraby v. Ashcroft*, No. 04-CV-1809, 2005 WL 2375202, at * 30 n.27 (E.D. N.Y. Sept. 27, 2005) (stating without explanation that "RFRA accordingly reaches officials acting in their individual capacities"), *aff'd in part*, *rev'd in part*, *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007). The Fourth Circuit has not addressed this issue. For the reasons cited above, the Defendants respectfully urge that those courts that have suggested a cause of action under RFRA exists against individual government employees are in error. In any event, to the extent that Plaintiffs seek an equitable, non-damages claim under RFRA, such claims are barred

### B. Even If A Cause Of Action Is Allowed, The Defendants Are Entitled To Qualified Immunity.

Even if Padilla has stated a RFRA claim against the Defendants in their individual capacity, the Defendants are entitled to qualified immunity for three distinct reasons. First, as explained *supra*, at the time of the Defendants' alleged actions, it was not clearly established that RFRA allows for the cause of action Padilla asserts in this case because the Fourth Circuit has not addressed the question of whether a cause of action against individual government employees is available under RFRA.

Second, it was not clearly established in the Fourth Circuit that a RFRA claim can be premised upon an intentionally discriminatory policy or practice, as opposed to a neutral policy or practice of general applicability. Padilla alleges two deliberate actions directed towards Padilla's ability to practice his religion: 1) a Qu'ran provided to him when he was first detained was subsequently "revoked" until March 2004, when Padilla's counsel provided him with another Qu'ran, *see* Am. Compl. ¶ 56; and 2) Defendants deprived Padilla of any "sense of time" with the intention of interfering with his ability to practice his religion, *see id*. ¶ 58. Padilla further alleges that the actions taken to deny him the ability to practice his religion were taken pursuant to a "policy and practice," which the Defendants "adopt[ed], promulgat[ed], and implement[ed]." *See id.* ¶ 86. It is not clearly established that these allegations state an actionable RFRA violation because courts have held that RFRA covers only "neutral" laws that are "generally applicable" and which adversely impact religious freedom. *See Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995) (holding that "if the regulations are not neutral and generally applicable, [the court] need

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against the Defendants in their individual capacity as they are not proper parties for such a claim. *See supra* §§ I.A-B.

not address the [RFRA]"); *Omar v. Casterline*, 414 F. Supp. 2d 582, 594 (W.D. La. 2006) (finding RFRA did not affect analysis of First Amendment free exercise claim that was not based on any law of neutral applicability); *Larsen v. United States Navy*, 346 F. Supp. 2d 122, 137-38 (D.D.C. 2004) (holding that the plaintiffs' claims were "clearly outside the realm of the RFRA" because the plaintiffs were challenging an "intentionally discriminatory policy" rather than a "neutral law of general applicability"). The Fourth Circuit has not addressed this issue.[29]

Third, numerous circuits, including the Fourth Circuit, have recognized that where the existence of a right or the degree of protection it warrants in a particular context is subject to a balancing test, the right can rarely be considered "clearly established" in particular circumstances in the absence of closely analogous factual and legal precedent that would have given a reasonable official fair warning as to how that balance should have been struck in the particular case at hand. *See*, *e.g.*, *DiMeglio*, 45 F.3d at 806 (recognizing that law applicable to constitutional inquiry which required "a particularized balancing that is subtle, difficult to apply, and not yet well-defined" would "only infrequently" be "clearly established" for purposes of qualified immunity); *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir. 1986) (stating that a constitutional rule that "involv[es] the balancing of competing interests" is "so fact dependent that the 'law' can rarely be considered 'clearly established'"); *Medina*, 960 F.2d at 1498; *Borucki,* 827 F.2d at 848. RFRA was enacted to ensure that after the Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), claims that government action impinged on the free exercise of religion would still be analyzed under the fact-intensive

[29] Claims for such intentional discrimination would generally be cognizable under the First Amendment. However, as explained *supra*, special factors preclude the recognition of such a *Bivens* claim – which in any event would be barred by qualified immunity – here.

balancing test of *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *See* 42 U.S.C. § 2000bb(b)(1). A determination of Padilla's RFRA claims in this setting would require the Court to balance the Executive Branch's authority to conduct war, protect national security, and formulate foreign policy, with the interests set forth in RFRA – the burden imposed upon a particular exercise of religion, the compelling governmental interest that justifies the burden, and the restrictiveness of the means used to further that interest, *see* 42 U.S.C. § 2000bb-1(b)(1)-(2). The most recent and closely analogous cases in which courts have attempted to define the balance between the rights of an American citizen designated to be an enemy combatant and the authority of the Executive Branch in the conduct of war, national security, and foreign policy, make clear that any constitutional claims related to Padilla's designation, detention, and interrogation as an enemy combatant were not clearly established at the time of the Defendants' actions. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion); *Padilla II*, 423 F.3d 386 (4th Cir. 2005). Accordingly, to the extent that Plaintiffs' RFRA claim, which is derived from the First Amendment, is based upon Padilla's designation, detention, or interrogation as an enemy combatant, it cannot be said that the Defendants would have been on notice that their alleged conduct violated Padilla's rights under RFRA.

For all of these reasons, the Defendants are entitled to qualified immunity for Padilla's RFRA claim.

## V. PADILLA HAS NO CLAIM UNDER THE GENEVA CONVENTIONS, THE CONVENTION AGAINST TORTURE, OR THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.

Padilla alleges that his detention and treatment during that detention violated Article 3 of

the Geneva Conventions,[30] the Convention Against Torture, and the International Covenant on Civil and Political Rights.[31] *See* Compl. ¶ 86.6 (Claim 6). However, none of the cited instruments provides Padilla with a cognizable private cause of action. And even if a private cause of action were available, his claims would nonetheless fail because the Defendants would be entitled to absolute immunity.

### A. None Of The Instruments Of International Law That Padilla Cites Provides Him With A Private Cause Of Action To Enforce Its Provisions.

Padilla's international law claims are not actionable. Any private cause of action under the Geneva Convention has been expressly prohibited by Congress. The Military Commissions Act of 2006 specifically states that:

> No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

*See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2631-32 (2006). Even apart from the Military Commissions Act, it is well-settled that international treaties are not presumed to create rights that are privately enforceable. *See Head Money Cases*, 112 U.S. 580, 598-99 (1884). "Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action." *Goldstar (Panama) v. United States,* 967 F.2d 965, 968 (4th Cir. 1992). The Fourth Circuit has held that the Geneva Conventions are not self-executing and do not provide for private rights of action in courts in the United States.

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[30] *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316.

[31] Available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

*Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003), *rev'd on other grounds*, 542 U.S. 507 (2004); *see also Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005) (holding that Geneva Conventions do not confer a private right of action), *rev'd on other grounds*, 126 S. Ct. 2749 (2006);[32] *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978) (holding that the Fourth Geneva Convention does not provide a private right of action); *In re Iraq*, 479 F. Supp. 2d at 115-17 (same). Similarly, with respect to both the Convention Against Torture and the International Covenant on Civil and Political Rights, the United States explicitly declared in ratifying both treaties that they are not self-executing.[33] Therefore, Padilla has no private right of action under any of the instruments of international law he has cited.

### B. In The Alternative, The Defendants Are Entitled To Absolute Immunity For Any International Law Claims.

Even if any of the instruments of international law Padilla relies upon provided him with a cognizable private cause of action, his claims would nonetheless fail because the Defendants would be entitled to absolute immunity. The Federal Employees Liability Reform and Tort

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[32] In *Hamdan*, the Supreme Court assumed that the Geneva Conventions did not themselves provide the petitioner with any enforceable rights but held that the Conventions were part of the law of war and that compliance with the law of war was a condition upon which the military commission authority challenged by the petitioner was granted. 126 S. Ct. at 2794-99.

[33] *See* Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Declarations and Reservations of the United States of America, *available at* http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm (stating "That the United States declares that the provisions of articles 1 through 16 of the Convention [which define the conduct prohibited by the Convention and the obligations of its signatories] are not self-executing."); *Sosa*, 542 U.S. at 728 ("Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.") (*citing* 138 Cong. Rec. 8071 (1992)).

Compensation Act, commonly known as the *Westfall* Act, makes plain that the exclusive remedy for any such claims is a suit against the United States under the Federal Tort Claims Act. *See* 28 U.S.C. § 2679(b)(1), (d)(1).

Under section 2679(b)(1), a plaintiff's sole remedy for a claim for damages arising from any "negligent or wrongful act or omission" of a federal employee acting within the scope of his or her employment is a suit against the United States under the FTCA. 28 U.S.C. § 2679(b)(1). *See also United States v. Smith*, 499 U.S. 160, 163 (1991); *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442, 1447 n.4 (4th Cir. 1996). Upon certification by a designee of the Attorney General that the individual employee acted within the scope of his employment, the United States is substituted in place of the individual defendant. 28 U.S.C. § 2679(d)(1). As a result of the certification and substitution executed for the individual federal defendants in this case, they are absolutely immune from suit for the alleged international law violations asserted by Padilla.[34] *See* 28 U.S.C. § 2679(b)(1) ("civil action[s] or proceeding[s] . . . against the employee or the employee's estate [are] precluded").

The *Westfall* Act provides only two exceptions to the rule that the FTCA is the exclusive remedy and the federal employee is immune. That rule does not apply to: (1) claims brought "for a violation of the Constitution of the United States" – i.e., *Bivens* claims; or (2) claims brought "for a violation of a statute of the United States . . . ." 28 U.S.C. § 2679(b)(2). All other claims

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[34] The Attorney General has delegated his authority under the Westfall Act to certify scope of employment to any Director of the Torts Branch, Civil Division. *See* 28 C.F.R. § 15.4(a). The attached certification specifying that all of the named Defendants were acting within the scope of their federal employment as to their alleged conduct giving rise to the Padilla's claims is signed by Timothy P. Garren, Director of the Constitutional and Specialized Tort Litigation Section in the Torts Branch, Civil Division. *See* Exh. 1.

against federal employees based upon conduct undertaken within the scope of federal employment are barred by the Act. *See, e.g., Smith*, 499 U.S. at 166-67 (refusing to infer another exception beyond the two expressly stated in the *Westfall* Act).

Padilla's claims under the Geneva Conventions, the Convention Against Torture, and the International Covenant on Civil and Political Rights are not claims for a violation of the Constitution or of a statute of the United States, and thus do not fall within either exception to the *Westfall* Act's rule of absolute immunity. The distinction between federal constitutional, statutory, and treaty provisions is expressly recognized in the Constitution. The Supremacy Clause states: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; *and all Treaties* made, or shall be made, under the Authority of the United States, shall be the Supreme Law of the Land . . ." U.S. Const. art. VI, cl. 2 (emphasis added). A claim based for violation of a treaty or other purported statement of international law does not constitute a claim "for a violation of the Constitution . . . or . . . for a violation of a statute of the United States." 28 U.S.C. § 2679(b)(2)(B). *See Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 30-39 (D.D.C. 2006) (holding that a claim alleging violations of the Geneva Conventions was not within either *Westfall* Act exception and substituting the United States in place of the individual defendants), *appeal docketed*, Nos. 06-5209 & 06-5222 (D.C. Cir. July 31, 2006).[35]

In this case, the actions of the Defendants were clearly within the scope of their employment and they have been certified as such. The substitution of the United States on

[35] *See also In re Iraq*, 479 F. Supp. 2d at 112-113 (holding that Geneva Conventions do not fall within Westfall Act's exception for statutes); *Bancoult v. McNamara*, 370 F. Supp. 2d 1, 7-8 (D.D.C. 2004), *aff'd*, 445 F.3d 427 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 1125 (2007); *Schneider*, 310 F. Supp. 2d at 265 ("The Westfall Act explicitly makes an exception for 'a violation of a statute of the United States[,]' not federal common law or the law of nations.").

Padilla's international law claims mandates the dismissal of the resulting FTCA claims. The *Westfall* Act provides that when the United States is substituted for an individual defendant, the resulting claim is "subject to the limitations and exceptions applicable to" FTCA claims. 28 U.S.C. § 2679(d)(4). Padilla has not satisfied the jurisdictional requirements for proceeding on an FTCA claim. An essential prerequisite to the pursuit of an FTCA claim is the exhaustion of all administrative remedies. *See* 28 U.S.C. § 2675(a) ("An action shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claims all have been finally denied by the agency in writing"); *McNeil v. United States*, 508 U.S. 106, 112 (1993). This requirement is jurisdictional. *See* 28 U.S.C. § 2675(a); *Ahmed v. United States*, 30 F.3d 514, 516 (4th Cir. 1994); *Henderson v. United States*, 785 F.2d 121, 123 (4th Cir. 1986). Since Padilla has not exhausted his administrative remedies, this Court lacks subject matter jurisdiction over his FTCA claims. *See* 28 U.S.C. § 2675(a).

## CONCLUSION

For the reasons stated above, all of Plaintiffs' claims should be dismissed.

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Respectfully submitted,

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