No. 09-16478

IN THE UNTIED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE PADILLA and ESTELA LEBRON,

Plaintiffs-Appellees,

v.

JOHN YOO,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of California

BRIEF OF PLAINTIFFS-APPELLEES

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(2) Does the complaint sufficiently allege Yoo's personal responsibility for the torture and unlawful detention?

(3) Did the system of brutal interrogations and military detention to which Padilla was subjected violate Plaintiffs' constitutional rights—and were those rights clearly established?

INTRODUCTION

Jose Padilla, an American citizen, was seized from a New York jail and secretly transported to a military prison in South Carolina. Charged with no crime, he was imprisoned for years, unable to talk with lawyers or even his mother. His captors, hidden from the outside world, used the interrogation-driven standard operating procedure initially designed for detainees at Guantanamo Bay, subjecting Padilla to vicious interrogations, sensory deprivation and total isolation—in short, to torture. As federal courts began to ask questions about what was happening to Padilla and other detainees, the justification for his detention started shifting, with

new stories told at each new litigation posture. But Jose Padilla, utterly alone in a blacked-out room, had no chance to tell his story.

Along with his mother, Estela Lebron, Padilla brings this suit against John Yoo, a key architect of the enemy combatant program, without whose transgressions none of this could have happened. Plaintiffs assert the most classic *Bivens* claims: illegal seizure, cruel and inhuman treatment, and unlawful imprisonment. Yoo casts himself here as a mere lawyer, but he was much more (and much less). He was a member of the War Council, a select group of policymakers that set operational policy regarding the treatment and detention of suspected "enemy combatants." Christened "Dr. Yes" by the Attorney General, Yoo was the "go-to" man on questions like how to justify extreme interrogations, willingly sacrificing his role as an attorney—and the proud traditions of his office—to participate directly in policymaking and to provide legal cover for pre-determined and patently illegal policies.

Yoo knew exactly what the natural consequences of his actions would be—because he intended them, because they were obvious, and because he was warned by others. Padilla was the only American citizen seized in the United States and one of only three people interrogated at the Charleston Brig, and Yoo along with the rest of the War Council knew and intended that their policies would be applied

to him. Though Yoo claims not to have been sufficiently involved to deserve liability, he set Padilla's mistreatment in motion.

Yoo meant to keep the courts at bay. Warrants were dispensed with, as was judicial approval of probable cause for seizure, to keep courts from assessing the propriety of the military's seizure of Padilla from a civilian jail cell. However much time might pass, courts would have no role whatsoever in assessing the Executive's factual assertion that Padilla was an enemy of the state. And Padilla would be imprisoned incommunicado, unable to communicate with his lawyers (or anyone else), rendering the courts unable even to know about the brutal methods of interrogation taking place behind the blacked-out windows at the Charleston Brig.

It comes as no surprise, then, that Yoo now seeks to keep this Court too at bay. He tries again to draw the shade of "national security" over his part in the shameful abrogation of that most fundamental of American values: freedom from punishment without trial at the whim of an unconstrained Executive. Yoo insists that "war powers" and "national security" constitute "special factors" that should make this court "hesitate"—he means forebear—from adjudicating Padilla's classic claims of unlawfulness. But the Supreme Court long ago rejected the argument that efforts to promote national security (even when undertaken by a cabinet-level official) are free from constitutional scrutiny. Taken together, Yoo's

special factors arguments amount to no more than another demand that the courts look away from what Yoo so long fought to keep dark.

There is no reason to look away, and every reason not to. "National security tasks…are carried out in secret; open conflict and overt winners and losers are rare. Under such circumstances, it is far more likely that actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 522 (1985) (rejecting argument that national security required dismissal of *Bivens* suit against the Attorney General for wiretaps against suspected terrorists). Yoo argues that liability would chill government officials from providing frank advice, but "[w]here an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate." *Id.* at 524 (emphasis in original; quotation marks omitted). The Supreme Court "do[es] not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law," *id.*, and the same is true of former Deputy Assistant Attorney General Yoo. Yoo knowingly violated clearly established law—freedom's first principles—and the district court's denial of his motion to dismiss should be affirmed.

STATEMENT OF FACTS

Jose Padilla is an American citizen. He is not, and never has been, an enemy

combatant. ER236 ¶43. On June 9, 2002, Padilla was detained in a civilian jail in New York as a material witness. ER235 ¶35. Court-appointed counsel moved to vacate the material witness warrant, but two days before the motion could be heard, the Executive, without presenting evidence to any judicial officer, decreed Padilla an "enemy combatant," seized him from the civilian jail, and transported him to the Consolidated Naval Brig in Charleston, South Carolina ("the Brig"). ER236 ¶40.

It would be almost two years until anyone beyond the Brig's doors heard from Padilla again. Though she could not communicate with him, Padilla's counsel immediately petitioned for a writ of habeas corpus in the Southern District of New York. The Executive responded that any American citizen declared an enemy combatant could be imprisoned indefinitely, without charge, and that the court had no authority to evaluate the supposed factual basis for that decision. It nonetheless provided a short declaration admitting that its "sources ha[d] not been completely candid," and that some of their statements "may be part of an effort to mislead or confuse U.S. officials," but purported, on the basis of that unreliable multiple hearsay, to justify Padilla's designation, seizure and indefinite imprisonment. ER507 n.1.

For nearly two years, Padilla was denied all contact with counsel, courts, or family, aside from a single short message after ten months informing his mother

that he was alive. ER240 ¶¶56,58. His only human contact during this period was with interrogators, or with guards delivering food through a slot in the door or standing watch when he was allowed to shower. ER240 ¶57. Interrogators forcibly injected Padilla with substances represented to be truth serum, left him shackled for hours in "stress" positions, threatened him with death and harm to his family, and denied him adequate medical care for severe medical conditions foreseeably resulting from this mistreatment. ER239 ¶55, ER242 ¶¶71,72.

In between interrogation sessions, night and day dissolved—the windows blackened, artificial light glaring at all hours—so that Padilla could not fulfill his religious obligation of five-times daily prayer. ER239-42 ¶¶55,64-70. Removal from his cell meant black-out goggles and sound-blocking earphones. ER239 ¶55, ER241 ¶65. All outside information—papers, radio, television—was prohibited and even his Koran was swiftly confiscated. ER241 ¶66. Padilla was denied a mattress, blanket, sheet, or pillow, and left only a steel slab. ER239-40 ¶55p. Whatever sleep he could muster was "adjusted" by deliberate banging, constant artificial light, noxious odors, and extreme temperature variations. ER239-40 ¶55o,c,m,q.

Padilla suffered these conditions as part of a systematic program of extra-judicial detention and extreme interrogation designed by Yoo, a member of a secretive policy-making group known as the War Council. ER229 ¶15, ER235

¶36. Once designed, Yoo provided the legal cover necessary for its implementation, manufacturing memoranda asserting that the Fourth and Fifth Amendments do not apply to "military" operations in the United States (defined to include the seizure of an unarmed citizen in a civilian setting) and redefining—and making up fictitious defenses to—torture. ER232-34 ¶¶21- 31, ER238-39 ¶53. And Yoo applied the program to Padilla, stating in writing that he "qualified" as an "enemy." ER235 ¶38. He did all this knowing it was unconstitutional and knowing—or willfully blind to—what would happen to Padilla. ER235 ¶37.

Throughout Padilla's years of incommunicado detention, his counsel litigated the habeas petition. Though Judge Mukasey held that the Authorization for the Use of Military Force ("AUMF") permitted the detention without charge of citizens as enemy combatants, he rebuffed the Executive's efforts to continue the program without judicial oversight, ruling that Padilla had the right to access to counsel and to challenge the factual basis for his military detention. *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) [*Padilla I*]. The Second Circuit went further, holding that only a clear congressional statement could authorize the detention without charge of an American citizen. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) [*Padilla II*].

The Supreme Court granted certiorari. Days before its merits brief was due (and nearly two years after he was seized), the Executive announced it would

permit Padilla limited access to attorneys (in recorded meetings with agents present and cameras on). ER240 ¶59. It eventually lessened some of the harsh conditions, returning Padilla's Koran, permitting limited access to information and, over the next two years, allowing three twenty-minute telephone calls and one visit from Padilla's mother. ER241 ¶¶66,62.

The Supreme Court heard argument alongside *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which involved the detention of an American citizen seized on a foreign battlefield. The cases were decided the same day. In *Hamdi*, the Court held that the AUMF permitted the military seizure of a citizen found on a foreign battlefield bearing arms for the enemy, but ruled that Hamdi had the right to challenge his detention in proceedings that provided him due process. *Id.* Detention was constitutional only if Hamdi was an actual "enemy combatant," and only for the limited purpose of preventing return to the battlefield. *Id.* at 521-22 & n.1. "Certainly," the Court held, "detention for the purpose of interrogation is not authorized." *Id.* at 521. Two dissenters (Justices Scalia and Stevens) went further, holding that no citizen could be detained without charge absent a congressional suspension of habeas corpus. *Id.* at 554 (Scalia, J., dissenting).

The Court dismissed Padilla's habeas petition on the ground that the petition should have been filed where Padilla was imprisoned, not where he had been seized. *Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004) [*Padilla III*]. Four justices

believed jurisdiction was proper and addressed the merits. "At stake in this case is nothing less than the essence of a free society," they wrote, concluding that "the protracted, incommunicado detention of American citizens arrested in the United States" was unconstitutional.[1] *Id.* at 465, 464 n.8.

Days later, Padilla filed a new habeas petition in South Carolina. In response, the Executive alleged for the first time that Padilla had been in Afghanistan during a U.S. attack on the Taliban, armed with an assault weapon and fleeing. (Previously, the Executive had alleged a "dirty bomb" plot and then a gas heat explosion plot.) Padilla moved for summary judgment, arguing that even if the government's newly-minted allegations were true, Padilla's seizure and detention were unconstitutional. Like the Second Circuit before it, the district court agreed. *Padilla v. Hanft*, 389 F. Supp. 2d 678 (D.S.C. 2005) [*Padilla IV*].

The Fourth Circuit reversed, concluding the Executive could detain citizens, even if seized in the United States, if they had carried arms for hostile forces on a foreign battlefield. It remanded for a hearing on the factual basis for the designation of Padilla as an enemy combatant. *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005) [*Padilla V*]; *Padilla v. Hanft*, 432 F.3d 582, 584 (4th Cir. 2005) [*Padilla*

[1] Taking the opinions in *Hamdi* and *Padilla* together, it is clear that at least five of the justices considered the military detention of citizens seized in civilian settings in the U.S. to be unconstitutional, regardless of process: the four dissenters in *Padilla* (who alone addressed the merits) and Justice Scalia, who dissenting in *Hamdi* concluded that citizens could never be military detained absent suspension of habeas corpus.

VI]. Padilla petitioned for certiorari. Judge Luttig eloquently described what happened next: "A short time after our decision issued on the government's representation that Padilla's military custody was indeed necessary…the government determined that it was no longer necessary…Instead, it announced, Padilla would be…criminally prosecuted in Florida." *Padilla VI*, 432 F.3d at 584. "The indictment," Judge Luttig noted, "made no mention of the acts upon which the government purported to base its military detention of Padilla." *Id.* Its timing was also suspicious: it "came only two business days before the government's brief in response to Padilla's petition for certiorari was due to be filed in the Supreme Court" and only days before the District Court "pursuant to our remand, was to accept briefing on the question whether Padilla had been properly designated an enemy combatant." *Id.* The Executive's actions with regard to Padilla had "given rise to at least an appearance that the purpose…may be to avoid consideration of our decision by the Supreme Court" and that the principles that had been offered to justify Padilla's detention were so disposable that they could "yield to expediency with little or no cost." *Id.* at 585, 587.

Padilla was ultimately transferred and "criminally prosecuted in Florida for alleged offenses considerably different from, and less serious than, those acts for which the government had militarily detained Padilla." *Id.* at 584. His convictions of those offenses, involving activities in the 1990s directed at non-U.S. interests

abroad, are currently on appeal. ER228-29 ¶11. Following Padilla's transfer, the Supreme Court denied certiorari. *Padilla v. Hanft*, 547 U.S. 1062 (2006) [*Padilla VII*]. No final judgment issued in the District Court, to which the Fourth Circuit had remanded "on the question whether Padilla had been properly designated an enemy combatant." *Padilla VI*, 432 F.3d at 584.

The answer to that question is no. ER236 ¶43. Yoo asserts otherwise, of course. But on a motion to dismiss, "[a]ll allegations of material fact are taken as true and construed in the light most favorable to Plaintiffs." *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996). Yoo cannot deny Padilla's innocence any more than he can deny his own guilt.

SUMMARY OF ARGUMENT

The district court's order should be affirmed.

First, the court properly concluded that an American citizen seized from a civilian jail and subjected to years of military detention and torture has a remedy under *Bivens*. The habeas statute does not extinguish a damages remedy: while habeas can stop an unconstitutional detention from continuing, it cannot remedy an unlawful detention that has already occurred—and provides no relief to a torture victim. *Bivens* deters unconstitutional conduct, and the Supreme Court long ago affirmed that this deterrence is, if anything, *more* important when a defendant—even the Attorney General—invokes national security in an effort to preclude

judicial review. The need to deter the military imprisonment and torture of Americans in America strongly counsels providing Padilla with a remedy for the serious, systematic and willful constitutional violations.

Second, the district court properly rejected Yoo's claim to lack causal responsibility. He set the constitutional violations in motion: as a member of the War Council, he formulated policies of extra-judicial detention and brutal interrogation visited upon Padilla; then, as a government attorney, he provided interrogators with the legal cover they demanded before implementing those policies.

Third, it has long been clearly established that military agents cannot seize a citizen from a civilian jail, transport him to a military prison, detain him there indefinitely and incommunicado without criminal charge or conviction, and subject him to a program of brutal interrogations, sensory deprivation, and inhuman conditions. Yoo contends that all those rights became unclear when the Executive labeled Padilla an "enemy combatant," but no reasonable official could have believed that the Executive's unilateral labeling of a citizen would allow it to transgress core freedoms long recognized by the Supreme Court.

ARGUMENT

I. *Bivens* provides a remedy for an American citizen unconstitutionally tortured and imprisoned in America.

In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the

Supreme Court held that an individual alleging a Fourth Amendment violation by federal officers could sue those officers directly under the Constitution. *See also Carlson v. Green*, 446 U.S. 14, 18 (1980) (*Bivens* claim for Eighth Amendment cruel and unusual punishment); *Davis v. Passman*, 442 U.S. 228, 249 (1979) (*Bivens* claim for Fifth Amendment due process). *Bivens* has two purposes.

As Chief Justice Rehnquist explained in *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61 (2001), "*Bivens* from its inception has been based...on the deterrence of individual officers who commit unconstitutional acts." *Id.* at 71. The reason for that deterrence is simple: "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate." *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (emphasis in original; quotation marks omitted) (rejecting argument that national security requires dismissal of *Bivens* suit against Attorney General for illegal wiretaps directed at suspected terrorists); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 809 (1982) (rejecting argument that *Bivens* suit against senior White House aides should be dismissed on basis of asserted need for frank advice and reiterating that the "greater power of high officials...affords a greater potential for a regime of lawless conduct") (brackets and quotation marks omitted).

Its second purpose is to "provide a cause of action for a plaintiff who lack[s] *any alternative remedy* for harms caused by an individual officer's unconstitutional

conduct." *Malesko*, 534 U.S. at 70.

Ultimately, whether to provide "a *Bivens* remedy is a subject of judgment," in which courts weigh the need for deterrence and remedy against any congressional directives or other special factors. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). Although a *Bivens* remedy is "not an automatic entitlement," the lack of an alternative remedy can be an important factor weighing in favor of a *Bivens* remedy. *Id.* at 550, 554. Here, the district court correctly found that a remedy for Plaintiffs' claims was warranted under the Supreme Court's two-part test.

First, Congress has not provided an alternative process for the remediation of past acts of torture and unlawful imprisonment suffered by an American citizen. *See id.* at 550.[2] Second, this case does not involve any special factors counseling hesitation: "a lawsuit against a federal agency or private corporation; the unique disciplinary structure of the Military Establishment; or a constitutional claim that cannot be defined into a workable cause of action." *Castaneda v. U.S.*, 546 F.3d 682, 701 n.25 (9th Cir. 2008) (citations and quotation marks omitted). The need to deter the torture and unlawful imprisonment of Americans in America, along with the lack of any alternative means to remedy victims' injuries, strongly counsel providing Plaintiffs with a remedy for the serious, systematic, and willful

[2] The Supreme Court has already rejected amici United States' erroneous suggestion that the possibility that Yoo faces professional reprimand in non-adversarial and non-public proceedings obviates Plaintiffs' *Bivens* remedy. *Mitchell*, 472 U.S. at 523 n.7.

constitutional violations that Yoo set in motion.

A. Habeas does not eradicate *Bivens*.

Yoo contends that a remedy is precluded under the first step of the *Bivens* analysis because Congress has provided an alternative remedy through habeas corpus. Br.23,26; *accord* Amicus Br. of U.S. at 22-23.

The contention makes no sense as applied to the torture claims. While "[c]hallenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus," *Muhammed v. Close*, 540 U.S. 749, 750 (2004), "constitutional claims that merely challenge the conditions of a prisoner's confinement...fall outside of that core" and are properly raised in damages actions. *Nelson v. Campbell*, 541 U.S. 637, 643-44 (2004) (damages action challenging particular method of lethal injection); *see also Muhammed,* 540 U.S. at 750 (damages action for retaliatory imposition of administrative segregation); *Carlson*, 446 U.S. at 14 (1980) (*Bivens* action for inadequate medical care); *Castaneda*, 546 F.3d at 682 (same); *Resnick v. Adams*, 348 F.3d 763, 766 (9th Cir. 2003) (*Bivens* action for violation of prisoner's right to free exercise of religion); *Rhoden v. U.S.*, 55 F.3d 428, 431-32 (9th Cir. 1995) (*Bivens* action for detention without probable cause and denial of bail hearing). Accordingly, the existence of the habeas statute provides no basis for dismissing the claims of

severe mistreatment while detained. *See* ER244-45 ¶82 (a)–(g). Yoo does not seriously contend otherwise.[3]

Yoo's argument makes no more sense when applied to the unlawful detention *vel non* claims. Br.24.[4] Like other injunctive relief, habeas can only *stop* ongoing illegality: the unconstitutionally detained citizen must be freed. It does nothing to *remedy* illegality that has already occurred. Habeas does not deter unlawful conduct; while ordering that the illegality cease, the writ does not hold the violator responsible in any way, and provides no remedy for the past wrong. *See Mitchell*, 472 U.S. at 523 n.7 (possibility of injunctive relief does not foreclose *Bivens* action).

Nothing in the doctrine set forth in *Heck v. Humphrey*, 512 U.S. 477 (1994), addresses the fatal flaw in Yoo's argument. No court has ever held that detention *vel non* claims cannot be brought under *Bivens* because the second step of the *Bivens* analysis incorporates the *Heck* doctrine. *Heck* simply is not relevant to the analysis: it holds that a damages suit must be dismissed if the plaintiff's success "would necessarily imply the invalidity of [plaintiff's] conviction or

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[3] Yoo states without further explanation that Plaintiffs' claims "rest on the proposition that he was improperly detained," Br.24, but that is untrue: even someone properly detained has the right to be free of torture.

[4] Yoo conflates detention and seizure claims. A seizure claim can be brought under *Heck* so long as it does not collaterally attack a conviction or sentence. *Wallace v. Kato*, 549 U.S. 384 (2007).

sentence…unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Heck*, 512 U.S. at 487. *Heck* allows damages suits that would not necessarily impugn a conviction or sentence, and it allows damages suits after a conviction or sentence has been invalidated. *Id.* Nothing about the doctrine compels the conclusion that Congress understands habeas to be the *exclusive* remedy for unconstitutional detention. *See Hartman v. Moore*, 547 U.S. 250, 252 (2006) (*Bivens* action for malicious prosecution by acquittee in federal fraud prosecution); *Gray v. DOJ*, 275 Fed. Appx. 679, 680 (9th Cir. 2008) (similar).

Yoo attempts to cram *Heck's* rule about *when* to bring a damages action into the *Bivens* analysis about *whether* to allow a damages action because he knows he cannot argue *Heck* directly. Below, he argued that Padilla's claims were collaterally estopped, relegating *Heck* to a short footnote supplementing the losing estoppel argument. SER23, n.34. The district court disagreed, and neither estoppel nor *Heck* can be reviewed on this interlocutory appeal. *Cunningham v. Gates*, 229 F.3d 1271, 1283-84 (9th Cir. 2000) (*Heck* cannot be considered on interlocutory appeal under pendant appellate jurisdiction).

Even if Yoo could directly argue *Heck*, it would be inapplicable here. "[T]he *Heck* rule…is called into play only where there exists *a conviction or sentence* that has not been invalidated." *Wallace*, 549 U.S. at 393 (emphasis added); *see also id.* at 393 (discussing rule's applicability in context "*of an extant*

conviction") (emphasis original). Yoo's own actions led to the circumvention of the criminal process, so there is no conviction or sentence to be invalidated. His radical invitation to extend the doctrine to *any* "federal detention," Br.22, including extrajudicial military seizure, cannot be squared with *Wallace*.

Heck precludes collateral attacks on extant convictions. It does not preclude damages actions targeting executive seizures or detentions that may never result in any charge or conviction. In *Wallace*, the Supreme Court was urged to adopt "a principle going well beyond *Heck*: that an action which would impugn [a non-existent] conviction cannot be brought until that conviction occurs and is set aside." *Wallace*, 549 U.S. at 393. The Court rejected that "bizarre extension of *Heck*," holding that a damages action challenging the constitutionality of an arrest—as opposed to conviction—could be made even before any conviction was obtained. *Id.* There, as here --where Padilla has never been charged with any crimes related to the accusations that supposedly justified his military detention—there is no *Heck* bar.

Before *Wallace*, this Circuit concluded in *Huftile v. Miccio-Fonesca*, 410 F.3d 1136 (9th Cir. 2005), that *Heck* precluded damages actions collaterally attacking a judgment of civil commitment under the California Sexually Violent Predators Act. *Id.* at 1141. To the extent it survives *Wallace*, *Huftile* is limited to that context, which shares many of the procedural safeguards that are a prerequisite

to the finality of criminal convictions. The unilateral executive detention at issue here bears no relation to either criminal trial or civil commitment proceedings. Nor do Yoo's other cases rescue his argument. Though Yoo mischaracterizes them, *Edwards v. Balisok*, 520 U.S. 641 (1997) and *Preiser v. Rodriguez*, 411 U.S. 475 (1971), merely applied the *Heck* rule to protect the finality of underlying criminal convictions and sentences. *See Muhammad*, 540 U.S. at 754 & 751 n.1.

Even if *Heck* could be untethered from its mooring in "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments," and applied to detentions without charge, it would not bar the damages action here. *Wallace*, 549 U.S. at 392. The government's unilateral decision to abandon military detention and prosecute Padilla for "offenses considerably different from, and less serious than, those acts for which the government had militarily detained [him]," *Padilla VI*, 432 F.3d 582, 584 (4th Cir. 2005), was a "favorable termination" sufficient to satisfy *Heck*. *Uboh v. Reno*, 141 F.3d 1000, 1005 (11th Cir. 1998) (prosecutor's unilateral decision to dismiss certain counts of indictment constitutes termination in favor of accused for purposes of *Bivens* action for malicious prosecution even where plaintiff had been convicted on other counts of same indictment); *see also Hilfirty v. Shipman*, 91 F.3d 573, 584-85 (3rd Cir. 1996) (prosecutor's unilateral "grant of

nolle prosequi was sufficient to satisfy the requisite element of favorable termination of the criminal action" for malicious prosecution damages action).

In short, Yoo asks this Court to extend *Heck* in a manner that would allow the Executive to preempt judicial review of disappearances and torture simply by holding suspects incommunicado, and then releasing them before a habeas petition filed on their behalf could be fully litigated on appeal.[5] Given the ordinary pace of federal litigation, that would amount to a years-long license to torture and unlawfully detain any citizen suspected of being an enemy combatant.

[5] Yoo argues for the first time that Padilla retains a live habeas action. Br.25-28. The argument was not raised before the district court and is waived. *See A-1 Ambulance Serv., Inc. v. County of Monterey*, 90 F.3d 333, 338-39 (9th Cir. 1996) ("[F]or an argument to be considered on appeal, the argument must have been raised sufficiently for the trial court to rule on it."); *see also* Circuit Rule 28-2.5 (requiring citations to record, which Yoo does not provide). In fact, he took the opposite position below, arguing that Padilla lacked standing to pursue declaratory relief because any threat of re-detention was "conjectural." SER20. Yoo cannot flip-flop now, and this Court need not determine whether Padilla remains "in custody" or subject to collateral consequences sufficient to justify a successive petition. Having switched sides and never cited below "the line of cases supporting" his argument that Padilla remains "in custody" under his military detention, Yoo "is responsible for failing to raise both adequately and timely this argument." *A-1*, 90 F.3d at 338. Even if *Heck* applied, and if Yoo had not waived the argument that Padilla remains in military custody, there would be no risk of "circumvent[ing] the more stringent requirements for habeas corpus," *Huftile*, 410 F.3d at 1139, and therefore no reason to apply *Heck*. Padilla was held incommunicado for years, with no access to counsel, making any effort to mount a factual challenge impossible. On the brink of Supreme Court review of the legal authority for Padilla's detention, the government abruptly derailed the habeas proceedings by transferring Padilla to civilian custody.

B. No "special factors" bar a *Bivens* remedy.

Plaintiffs seek to hold Yoo responsible in two capacities: as a policymaker who established unlawful torture and detention policies in his role on the secretive "War Council," and as a lawyer who scripted legal cover to eliminate deterrence and to shield those very policies from judicial review. ER227,229,232-35 ¶¶3,15,22,23,29,30,31,34,53. Yoo contends that three factors outweigh the need for deterring torture and unlawful detention—and for compensating the victims of such acts.

1. Yoo argues that he cannot be accountable as a policymaker because policymakers are categorically exempt from *Bivens* actions. Br.30,19. The argument contradicts controlling authority. *See Al-Kidd v. Ashcroft*, 580 F.3d 949, 957 (9th Cir. 2009) (*Bivens* liability against defendant "responsible for a policy or practice" of misuse of material witness statute); *Harris v. Roderick,* 126 F.3d 1189, 1204 (9th Cir. 1997) (*Bivens* liability against FBI officials who formulated "Special Rules of Engagement" encouraging unconstitutional shootings); *Nurse v. U.S.*, 226 F.3d 996, 1004 (9th Cir. 2000) (*Bivens* liability against "policy-making defendants" who established racial profiling).

2. Yoo also argues that he is not accountable as a lawyer. At bottom, he argues that lawyers are special—they should be held to a lower standard of conduct than other government officials. The district court noted the "irony" of Yoo's

argument: while the complaint alleges that Yoo violated the Constitution in part by "draft[ing] legal cover to shield review of the conduct of federal officials who allegedly deprived Padilla of his constitutional rights," "Yoo argues that the very drafting itself should be shielded from judicial review." ER22.

Yoo offers two reasons why government lawyers should get special treatment: liability would "chill" government lawyers, Br.33-34, and it would be "virtually impossible" for courts to distinguish between constitutional and unconstitutional conduct, Br.31-32.

a. Those concerns have no applicability on the pleaded facts. Plaintiffs do not allege simple bad lawyering–they allege intentional illegality and cover-up. ER227,232-34 ¶¶3,22,23,29-31; *see also* ER233 ¶28 (Yoo met secretly with other executive officials and "'discussed in great detail how to legally justify' 'pressure techniques proposed by the CIA,' including waterboarding, mock burial, and open-handed slapping of suspects."). While *Bivens* should not deter candid legal advice, neither can it tolerate intentionally unconstitutional conduct. One of the very purposes of *Bivens* is to "chill" unconstitutional actions. "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate." *Mitchell*, at 524 (emphasis in original; quotation marks omitted).

In *Mitchell*, federal officials—believing that suspected terrorists intended to

blow up buildings and kidnap the National Security Advisor—authorized warrantless wiretaps. One wiretap captured conversations involving Forsyth, who discovered the wiretaps and sued the Attorney General under *Bivens*. Mitchell claimed that his "actions in furtherance of the national security should be shielded from scrutiny in civil damages actions." *Id.* at 520. Like Yoo, he argued that the possibility of liability would chill essential national security functions. *Id.* Although the Supreme Court recognized the "importance of those activities to the safety of our Nation," *id.* at 523, it refused to create a "blanket immunization of [the] performance of the 'national security function.'" *Id.* at 521. The reason was simple: "The danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity." *Mitchell*, at 523. Though Yoo puts his "national security prerogative" under the "special factors counseling hesitation" heading, and Mitchell put his under the "absolute immunity" heading, the concerns are the same.

The Supreme Court in *Mitchell* recognized that eliminating constitutional tort suits would lead to too much "zeal." Balance is the key, and the Court concluded that qualified immunity achieved that balance:

> [T]he standard of [qualified immunity]...will not allow the Attorney General to carry out his national security functions wholly free from concern for his personal liability; he may on occasion have to pause to consider whether a proposed course of action can be squared with the

> Constitution and laws of the United States. But this is precisely the point…

Mitchell, 472 U.S. at 524 (quotation marks omitted); *accord Al-Kidd*, 580 F.3d at 957.

Yoo claims that if he were held accountable for what he did, the floodgates would open, with superiors and lawyers sued willy-nilly. Br.33. In so arguing, he ignores the extreme and specific allegations at issue in this case, which have no bearing on government lawyers acting within the broad zone of discretion afforded by the qualified immunity doctrine.

If anything, the parade of horribles marches the other way. If merely being a government lawyer insulates Yoo's conduct from liability, then there is no limit to what government lawyers fired up with personal "zeal" can counsel: the construction of secret and lawless interrogation sites in American cities, dragnets based entirely on race or religion, the summary execution of American citizens on American streets.

b. Courts have had not found it "virtually impossible" to draw lines between legitimate legal work and actions by a lawyer intended to shield or promote illegal ends.[6] This Circuit has long held that government attorneys

[6] The line-drawing problem in *Wilkie* was entirely different. There, the plaintiff did not object to the federal agents' purpose or means; he argued that in the aggregate the agents "simply demanded too much and went too far." *Wilkie*, 551 U.S. at 557. "But as soon as Robbins's claim is framed this way, the line-drawing

alleged to have willfully disregarded the law in giving legal advice can be sued for constitutional torts. *See Donovan v. Reinbold*, 433 F.2d 738, 744-45 (9th Cir. 1970) (city attorneys sued for constitutional tort for legal advice given to city that it could disregard administrative order compelling reinstatement); *see also Lippoldt v. Cole*, 468 F.3d 1204, 1217 (10th Cir. 2006) (assistant city attorney sued for constitutional tort for legal advice given to city police who relied on advice and caused injury); *Anoushiravani v. Fishel*, 2004 WL 1630240, at *5 (D. Or. 2004) (homeland security lawyers sued for constitutional tort for legal advice given to federal customs officers who relied on advice and caused injury); *Smith v. Montgomery County*, 573 F. Supp. 604, 609 (D. Md. 1983) (county attorney liable in constitutional tort for giving legal advice to officials who relied on advice and caused injury). In *Burns v. Reed*, 500 U.S. 478, 492-96 (1991), the Supreme Court identified no hindrance to a constitutional tort action proceeding against a government lawyer for legal advice given to police officers about the conduct of interrogations. *See also Ewing v. City of Stockton*, 2009 WL 4641736, at *14 (9th Cir. Dec. 9, 2009) (no absolute immunity for district attorney sued for constitutional tort for advising police they had probable cause to arrest).

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difficulties it creates are immediately apparent." *Id.* Here, Yoo's alleged purpose (legitimating torture and illegal military detention) and means (creating illegal policies and providing legal cover for those illegal policies) were illegitimate. *See Hamdi*, 542 U.S. at 521 ("Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized.").

Yoo does not cite any case holding that lawyers cannot be held liable for giving knowingly false advice. Instead, he protests that a case cited by Plaintiffs involved "claims against government lawyers for providing intentionally incorrect legal advice." Br.32 (citing *Donovan*, 433 F.2d at 744-45). Padilla alleges exactly that—that Yoo intentionally misrepresented the law to shield policies that he helped formulate and set in motion, providing legal cover for unconstitutional policies. Like Yoo, the government lawyers in *Donovan* claimed that they had provided advice "in good faith" and that their opinion was based on a reasonable legal belief. But the defendants' assertions of good faith were factual issues for the jury, not matters for the court even on summary judgment. *Donovan*, 433 F.2d at 744.

Public attorney liability is consistent with private attorney liability under the common law. "[W]hile an attorney is privileged to give honest advice, even if erroneous, and generally is not responsible for the motives of his clients, admission to the bar does not create a license to act maliciously, fraudulently, or knowingly to tread upon the legal rights of others." *Green v. Fischbein Olivieri*, 507 N.Y.S.2d 148, 153 (N.Y. App. Div. 1986); *see Panoutsopoulos v. Chambliss*, 68 Cal. Rptr. 3d 647, 654 (Cal. Ct. App. 2007) ("An attorney may be held liable for conspiring with his or her client to commit…the intentional infliction of emotional distress"); *Arledge v. Hendricks*, 715 So. 2d 135, 139 (La. Ct. App. 1998) ("Intentionally

tortious actions, ostensibly performed for a client's benefit, will not shroud an attorney with immunity") (internal quotation marks and citation omitted); *accord* Rest. 2d Torts § 876, com. d, p. 317; *cf. Moore*, 547 U.S. at 258 ("[W]e certainly are ready to look at the elements of common law torts when we think about elements of actions for constitutional violations."). Statutory liability is no different. *See Kimmel v. Goland*, 793 P.2d 524, 531 (Cal. 1990) (upholding damages suit against lawyer for counseling and assisting client's unlawful recording of conversations in violation of Invasion of Privacy Act; stating that "[a]s occupants of a high public trust and officers of the court, [lawyers] are expected to conform their behavior in legal affairs to a higher standard of rectitude and spirit of obedience"); *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1033 (9th Cir. 1989) ("an attorney is not immune from antitrust liability if he becomes an active participant in formulating policy decisions with his client to restrain competition."); *see also* Fed. R. Civ. P. 11(b) (holding attorneys liable for arguments that are not "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law"). All these contexts require line-drawing; none are so hard that courts give up, foregoing deterrence and remedy.

Attorneys can face even criminal prosecution for intentionally misstating the law, as when they knowingly promote illegal tax shelters or advance the goals of

criminal organizations. In fact, federal prosecutors have charged and convicted government lawyers with war crimes on the basis of their legal work. Rudolf Lehmann, the chief lawyer for the German military high command, was convicted of war crimes for his role in drafting orders and decrees that permitted execution and summary deportation. *U.S. v. Wilhem von Leeb et al.*, *in* XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS CONTROL COUNCIL LAW NO. 10, 690-95 (U.S. Gov't Printing Off. 1950); *see also U.S. v. von Weizsaecker*, *in* XIII *id.*, 497-98, 958-59. If distinguishing between ordinary legal work and legal work intended to further illegal ends is not too hard for federal prosecutors to convict a government lawyer of a war crime, then it is not too hard to determine whether a government lawyer committed a constitutional tort.

Although he frames his argument for categorical exclusion of Executive branch attorneys from *Bivens* liability as a "special factor," Yoo essentially attempts to obtain absolute immunity where established law precludes such a claim. (In fact, he later demands absolute immunity, Br.40 n.9, again contravening settled law. *See Burns*, 500 U.S. at 496; *Al-Kidd*, 580 F.3d at 959.) But he cannot immunize himself through the "special factors" doctrine by claiming that government lawyers—unlike cabinet officials, prison administrators, or police officers—should be unaccountable under *Bivens*. "Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government,

are subject to federal law…No officer of the law may set that law at defiance with impunity." *Butz v. Economou*, 438 U.S. 478, 506 (1978) (citations and quotation marks omitted).

3. Yoo argues that liability here would intrude on national security functions. Br.33-35. At times, he broadens his argument by contending that any power textually committed to Congress by the Constitution is "exempt from *Bivens*." Br.35. But that contention is contrary to the very case he cites to support it, *U.S. v. Stanley*, 483 U.S. 669, 682 (1987) (stating it is not true "that all matters within congressional power are exempt from *Bivens*"), and it ignores the fact that *Bivens* claims have regularly been permitted in areas of Congressional power. *See, e.g., Moore,* at 250 (2006) (*Bivens* suit against postal officers); *G.M. Leasing Corp. v. U.S.*, 429 U.S. 338 (1977) (*Bivens* suit against IRS agents); *Meredith v. Erath*, 342 F.3d 1057 (9th Cir. 2003) (IRS agent liable under *Bivens* for excessive force).

So he is left with *Stanley* and its predecessor, *Chappell v. Wallace*, 462 U.S. 296 (1983). Those cases identified the risk of intrusion upon "the unique disciplinary structure of the Military Establishment and Congress' activity in the field" as a special factor counseling hesitation. *Stanley*, 483 U.S. at 679 (citing *Chappell*). The intrusion occurs when a servicemember sues for "injuries that arise out of or are in the course of activity incident to service." *Id.* at 684. Yoo seeks to

extend the special factor beyond the "Military Establishment" for which it was created, but Padilla is not subject to "the unique disciplinary structure" that *Stanley* and *Chappell* protect, so his suit does not disturb it. Moreover, servicemembers -- unlike Padilla—have been provided with a "comprehensive internal system of justice to regulate military life," one that "not only permits aggrieved military personnel to raise constitutional challenges in administrative proceedings, it authorizes recovery of significant consequential damages." *Schweiker v. Chilicky*, 487 U.S. 412, 436 (1988) (citing *Chappell*, 462 U.S. at 302-03).

To gird his desired extension of *Stanley*, Yoo repeatedly invokes war and national security. He implies that a judicial remedy would be at odds here with the political branches' actions, but he has not pointed to any indication that Congress shares his belief that American citizens tortured on American soil cannot seek redress.[7] Congress has criminalized torture, *see* 18 U.S.C. § 2340, the President has signed and the Senate has ratified the Convention Against Torture, 6 U.S.T. 3314, under which "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war…may be invoked as a justification of torture," and the Executive has not only prohibited the use of sensory deprivation, cruel and

[7] *See* Military Commissions Act of 2006, 10 U.S.C. § 948r(c) ("[N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of **an alien** who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant….") (emphasis added).

degrading torture, and physical or mental torture, Army Reg. 190-8 (criminalizing acts "intended to inflict severe physical or mental pain or suffering"), but plainly stated that a *Bivens* remedy is available to domestic torture victims like Padilla, *see* U.S. Written Response to Questions Asked by U.N. Committee Against Torture ¶ 5 (Apr. 28, 2006), *available at* http://www.state.gov/g/drl/rls/68554.htm.[8]

Even if the Executive preferred to block remedies, the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi,* 542 U.S. at 535. That is true even though courts defer to the political branches with respect to "core strategic matters of warmaking" and notwithstanding "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict." *Id.* at 531,536; *see also Boumediene v. Bush,* 128 S. Ct. 2229, 2261 (2008) ("The Government presents no credible arguments that the military mission…would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims."). *Hamdi* and *Boumediene* involved habeas, not *Bivens*, and Yoo argues they are therefore inapposite. Br.37. But if anything, habeas is *more* disruptive of Executive affairs than a retrospective damages action: it demands that the Executive do something *now* that it does not wish to do, rather than declaring

[8] After losing in the district court, Yoo switched from DOJ lawyers to private lawyers, but the DOJ then filed an amicus brief. It conveniently fails to mention the Executive's on-the-record statements regarding the availability of a *Bivens* remedy.

later that what was done was wrong. Habeas is not the only such "disruption," Br.34 n.7, that constitutional adjudication requires.[9] In *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952)—which Yoo avoids—the Supreme Court ordered the President, during wartime, to halt the seizure of a steel mill seized to increase the supply of bullets. *Youngstown*, 343 U.S. at 637; *see also Ex parte Merryman*, 17 F. Cas. 144, 153 (C. C.D. Md. 1861) (Taney, C.J.) (ordering release of suspected Confederate insurgent and declaring President's unilateral suspension of habeas corpus unconstitutional); *Little v. Barreme*, 6 U.S. 170, 179 (1804) (declaring illegal a Presidential order allowing the seizure of ships sailing from France during wartime); *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (denying military jurisdiction to try civilians even under statute authorizing martial law in Hawaii after Pearl Harbor).

There is no reason why the Judiciary may—indeed must—interfere with the Executive through injunctive relief, including habeas, but should not take the less intrusive step of remediating, through a damages action, a wrong already

[9] The *Bivens* cases Yoo cites to support his assertion of disruption involve non-citizens allegedly mistreated outside the U.S. *See In re Iraq*, 479 F. Supp. 2d 85, 88-89 (D.D.C. 2007) (non-citizens captured and detained in Iraq and Afghanistan); *Arar v. Ashcroft*, 585 F.3d 559, 563 (2d Cir. 2009) (en banc) (non-resident non-citizen rendered to Syria); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) (claims by Nicaraguans for actions in Nicaragua); *Rasul v. Myers*, 563 F.3d 527, 528 (D.C. Cir. 2009) (claims of non-citizens detained abroad). He also cites *Lincoln v. Vigil*, 508 U.S. 182 (1993) and *Dep't of Navy v. Egan*, 484 U.S. 518 (1988); neither involved *Bivens*, or constitutional claims, and in both Congress enacted remedial schemes explicitly limiting judicial review.

committed. *See Webster v. Doe*, 486 U.S. 592, 604 (1988) (remanding with instruction to address constitutional claims even though defendant argued that judicial review would "entail extensive 'rummaging around' in the [CIA's] affairs to the detriment of national security"). Nor could he, for "[t]he danger that high federal officials will disregard constitutional rights in their zeal to protect the national security" counsels in favor of recognizing a *Bivens* remedy. *Mitchell*, 462 U.S. at 524. That is because judicial scrutiny—including *Bivens* liability—is especially appropriate where "the label of 'national security' may cover a multitude of sins." *Mitchell*, 472 U.S. at 523; *see also U.S. v. U.S. District Court*, 407 U.S. 297, 314 (1972) ("Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent").

Yoo argues cursorily that litigation would implicate sensitive government information, Br.34 n.7, but the issues relevant to Plaintiffs' claims have been publicly aired. *Padilla*, 633 F. Supp. 2d at 1028 (noting that "all of the documents drafted by Yoo mentioned in the complaint have become public record"). Moreover, "[s]imply saying 'military secret,' 'national security' or 'terrorist threat' or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the [state secrets] privilege." *Al-Haramain v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007). It is likewise insufficient to support creation of a new special factor that would do the same thing. The state secrets doctrine requires the

government, not an individual litigant, to assert the privilege after intervening. And it requires that an invocation of the privilege be supported with an affidavit from the head of the relevant government department. *See generally U.S. v. Reynolds*, 345 U.S. 1, 7-8 (1953). No cabinet-level official here has put his name and reputation behind an affidavit swearing that a particular sort of information is secret and that national security would be undermined by its disclosure. *Arar,* 585 F.3d at 635 (Calabresi, J., dissenting) ("Denying a *Bivens* remedy because state secrets might be revealed is a bit like denying a criminal trial for fear that a juror might be intimidated: it allows a risk, that the law is already at great pains to eliminate, to negate entirely substantial rights and procedures.").

II. Padilla states claims for violations of constitutional rights.

A. Yoo's actions foreseeably caused Padilla to be extra-judicially detained and tortured.

The plaintiff in a constitutional tort suit, like the plaintiff in any tort action, must plead a causal connection between the defendant and the constitutional injury, sometimes referred to as the defendant's "personal participation." Because liability for constitutional torts is interpreted "against the background of tort liability that makes a man responsible for the natural consequences of his actions," *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986), causation sufficient for constitutional tort liability exists whenever a defendant either directly participates in *or* "sets in motion a series of acts by others which the actor knows or reasonably

should know would cause others to inflict the constitutional injury.'" *Kwai Fun Wong v. U.S.*, 373 F.3d 952, 966 (9th Cir. 2004).

Like other facts, facts alleging causation are presumed true on a motion to dismiss, *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1122 (9th Cir. 2008), and need only "raise a reasonable expectation that discovery will reveal evidence" supporting the claims. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). The district court correctly found that the complaint sufficiently pleads both direct participation in and "set in motion" causation of the constitutional violations. *Contra* Br.39-40.[10]

1. Yoo's policymaking caused Plaintiffs' harms.

Participating in creating unconstitutional policies is a species of direct participation sufficient for constitutional tort liability. *See, e.g.*, *al-Kidd*, 580 F.3d at 956 ("direct, personal participation is not necessary to establish liability for a constitutional violation," and an official can himself be liable "for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which [he] knew or reasonably should have known would cause others to inflict constitutional injury.") (citation omitted); *Hydrick*, 500 F.3d at 988 (post-*Twombly*) ("set in motion" standard satisfied by allegations that defendant "played an instrumental role in policymaking" that caused unconstitutional conditions of

[10] Yoo implies (Br.45) that Plaintiffs assert vicarious liability. They do not. *See al-Kidd*, 580 F.3d at 964-65 (citing *Iqbal*, 129 S.Ct. at 1948).

confinement); *Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997). Yoo does not contend otherwise. Instead, he claims that Plaintiffs' allegations concerning Yoo's participation on a policymaking body known as the "War Council"—a role he freely admitted in his own book, ER229 ¶15—are insufficiently "specific [and] nonconclusory," and "perfectly consistent with lawful behavior." Br. 40 (citation omitted). They are not.

First, the complaint specifies that as "*de facto* head of war-on-terrorism legal issues" and "key member of a small, secretive, and highly-influential group of senior administration officials known as the 'War Council,'" Yoo "stepped beyond his role as a lawyer to participate directly in developing policy in the war on terrorism." ER229 ¶15. Those policies included the "extra-judicial, *ex parte* assessment of enemy combatant status followed by indefinite military detention, without notice or opportunity for a hearing of any sort…completely preclud[ing] judicial review of the designation." ER235 ¶36. They also included the "decision to employ unlawfully harsh interrogation tactics," and "pressure techniques proposed by the CIA" against individuals designated as "enemy combatants." ER233 ¶¶27, 28. These policies were applied to Padilla. ER2336-40 ¶¶45-55.

Second, promulgating unconstitutional policies is not "consistent with lawful behavior," Br.40—it is an actionable constitutional tort. *Al-Kidd*, 580 F.3d at 956; *Nurse,* 226 F.3d at 1002. Moreover, the allegations here raise a strong inference

that Yoo and his fellow policymakers knew that the policies were unconstitutional and took steps to ensure their implementation despite their illegality. The War Council was a secretive body. ER229 ¶15. Yoo's participation in it was outside the scope of—and created ethical conflict with—his OLC role. ER229 ¶¶15,16. After the CIA made it clear that line-level officials would not engage in brutal interrogations without legal cover, the members of the War Council, including Yoo, "discussed in great detail how to legally justify" those harsh techniques. ER233 ¶28. Yoo *then* drafted legal memoranda "with the specific intent of immunizing government officials from criminal liability for participating in practices that [he] knew to be unlawful," ER234 ¶31, "remov[ing] legal restraints on interrogators," ER233 ¶29, and "justify[ing] the Executive's already concluded policy decision to employ unlawfully harsh interrogation tactics." ER233 ¶29; *see also* ER232 ¶¶22,23. Violating normal procedures, the memoranda were "deliberately withheld from other agencies in order to control the outcome and minimize resistance." ER232 ¶25.[11]

2. Yoo set in motion Padilla's detention.

[11] Yoo's attempt to avoid personal responsibility by claiming that he merely "provided legal justifications for policy decisions that had 'already been reached,'" Br.41, ignores the allegations that he personally participated in "reaching" those decisions as a policymaker on the War Council, and **only then** set about creating legal cover for them. ER229 ¶15; ER232 ¶23. It also impermissibly attempts to litigate the factual question of intervening causes under guise of challenging the sufficiency of the pleadings.

Yoo has publicly stated that he "personally 'reviewed the material on Padilla to determine whether he could qualify, legally, as an enemy combatant," and "issued an opinion to that effect.'" ER235 ¶38. The foreseeable—indeed recommended—result of that advice was deployment of military forces to seize Padilla from a civilian jail cell and detain him incommunicado for purposes of interrogation. Yoo attempts to avoid liability for his part in Padilla's seizure and detention in three ways, all of which are unavailing.

First, Yoo objects that his opinion that Padilla was as an "enemy combatant" "was *upheld* by the Fourth Circuit." Br.42 (Yoo's emphasis). The merits of Yoo's opinion are irrelevant to the question whether it caused Padilla's harms, but the factual inaccuracy of his claim is misleading and requires a response, because Yoo's opinion did not rely on the same "facts" as the Fourth Circuit. Central to the Fourth Circuit's 2005 opinion were newly-minted allegations (stipulated for the limited purposes of deciding the legal question of authority to detain) that Padilla had been "armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States [in Afghanistan]" and escaped to Pakistan "armed with an assault rifle." *Padilla V*, 423 F.3d at 391-92. But allegations that Padilla took up arms against the U.S. in a foreign combat zone are conspicuously absent from the record on which the Executive purportedly relied in 2002, when Yoo wrote his opinion. *See* ER508.

Second, Yoo claims that the allegations of a causal connection between his opinion and Padilla's detention lack specificity. Br.42. To the contrary, Plaintiffs squarely allege that "Ashcroft relied on Defendant's opinion in recommending to the President that Padilla be taken into military custody," ER235 ¶39, and the President then ordered the detention, which he deemed "consistent with U.S. law and the laws of war," "[b]ased on Defendant's legal opinion and Ashcroft's recommendation." ER236 ¶40.

Third, Yoo claims that his action was merely one of "multiple layers of scrutiny" leading to the President's order. Br.42-43. But under basic principles of tort liability forseeable concurrent or intervening causes "will not supersede the defendant's responsibility." *White v. Roper*, 901 F.2d 1501, 1506 (9th Cir. 1990). What happened here was foreseeable but, in any event, whether a consequence was "foreseeable" or "abnormal" is "to be decided as issues of fact are decided," *i.e.*, by the fact-finder, not on a motion to dismiss. *Id.* at 1506. It makes no difference that "ultimate authority rested at all times with the President," because the mere fact that the intervening third party may exercise independent judgment in determining whether to follow a course of action recommended by the defendant does not make acceptance of the recommendation unforeseeable or relieve the defendant of responsibility. *Malley*, 475 U.S. at 344 n.7; *Kerman v. City of New York*, 374 F.3d 93, 126-27 (2d Cir. 2004).

Yoo cites no authority for the proposition that the normal rules of causation are suspended for constitutional torts, and they are not. *See Malley*, 475 U.S. at 344 n.7; *id.* at 345-46 (police officer who submits application for warrant that he should know fails to make out probable cause cannot hide behind magistrate's mistaken issuance of warrant); *al-Kidd*, 580 F.3d. at 956 (rejecting executive officials' arguments that they were not "directly involved in the decision to detain" plaintiff because "direct, personal participation is not necessary to establish liability for a constitutional violation"); *see also Bateson v. Geisse*, 857 F.2d 1300, 1303-04 (9th Cir. 1988), *rev'd on other grounds, Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996)) (policymakers decision to withhold permit constituted "requisite causal connection…setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.").[12]

3. Yoo set in motion Padilla's brutal detention conditions and torture.

For nearly two years after his military seizure, Padilla was cut off from any human contact other than guards sliding food under his door or escorting him to

[12] The same causation and intervening actor rules apply to the conditions of confinement claims. "Like any other government official, government lawyers are responsible for the foreseeable consequences of their conduct." *Yoo*, 633 F. Supp.2d at 1033 (extensively discussing cases).

the shower in light-and-sound blocking headgear. ER239-42 ¶¶55-58,64-66,70. Interrogators forcibly injected him with unknown substances, shackled him for hours in "stress" positions, threatened his life, and denied him adequate medical care and access to counsel. ER239,242 ¶¶55,71,72. In his windowless, permanently-lit cell, without Koran, mattress, blanket, sheet, or pillow, he could not sleep or pray, and he couldn't tell his attorneys what was happening to him. ER239,241 ¶¶55,66.

These conditions were prescribed by the program of extra-judicial detention and extreme interrogation designed by Yoo as a member of the War Council, and he is liable for them on that basis. ER229 ¶15, ER235 ¶36. Knowing that enemy combatants were subject to those policies, Yoo recommended that Padilla be designated as one, exposing him to the obvious attendant risks, and he is liable on that basis too. *See Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006) (substantive due process prohibits state action that "creates or exposes an individual to a danger he or she would not have otherwise faced.") (citation, punctuation omitted). But Plaintiffs' allegations also raise more than a plausible inference of a third causal link between Yoo's activities and Plaintiffs' harms: line-level officials would not have implemented the unlawful detention and interrogation policies without the legal blessing and promises of immunity from prosecution set out in Yoo's now-infamous (and repudiated) memoranda. ER238

¶53.

Yoo protests that his memoranda redefining torture and inventing fictitious defenses to it could not have caused Padilla's mistreatment because "only one of the memoranda that Padilla cites addressed the treatment of enemy combatants detained in the United States." Br.43-45. That is both inaccurate and immaterial.

Two memoranda applied directly to the United States. They declared that neither the Fourth nor the Fifth Amendment applied to domestic "military" operations, defined to include the seizure of an unarmed citizen in a civilian setting. ER230-32 ¶¶19a,19g,21. Those are the very Amendments that protect citizens from unreasonable seizure, excessive force, illegal detention, and conscience-shocking interrogations. Eviscerating these Amendments these memoranda foreseeably caused Padilla's seizure, detention, and submersion in the rights-free world of the Brig.

Moreover, much of the reasoning in the "Guantanamo" memoranda—including that enemy combatants (not defined to exclude U.S. citizens) have no Fifth Amendment rights and that national "self-defense" and "necessity" could prevent prosecution for torture—applied with equal force to suspected enemy citizens on U.S. soil. Not surprisingly, Brig officials were ordered to apply the same policies developed for Guantanamo Bay to individuals detained at the Brig, including Padilla. ER239 ¶54. Given Yoo's personal involvement in approving

other aspects of Padilla's detention, it is plausible that Yoo provided legal opinions purporting to justify the unlawful interrogation of Padilla himself. ER238 ¶53. At a minimum, it was foreseeable to Yoo that interrogators at the Brig would interpret the memoranda as a green light to torture Padilla. ER238 ¶¶52-53.[13]

B. Substantive rights

Yoo argued below that two of Padilla's substantive constitutional claims failed to state a claim: denial of access to the courts; and cruel and unusual punishment.[14] For the remaining claims, he argued only that the rights were not clearly established. ER34; *accord* SER21-22; ER133:5-19 (conceding he did not challenge sufficiency of other claims). Perhaps recognizing that he has waived challenges to claims he did not contest below, *A-1*, 90 F.3d at 338, he tries to conceal new substantive challenges in his "clearly established" section. *E.g.*, Br.53 (arguing that interrogated person has no right to be free from conscious-shocking treatment), Br.58 (detention was lawful). That he cannot do. *See El Paso v. Am. W. Airlines*, 217 F.3d 1161, 1165 (9th Cir. 2000) (waived arguments cannot be

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[13] Yoo's memoranda led interrogators to believe that "their use of [torture] in conscious disregard of the rights and safety of innocent third parties w[ould] meet with the approval of [federal] policymakers." *Grandstaff v. City of Borger*, 767 F.2d 161, 170 (5th Cir. 1985). Under such circumstances, "the affirmative link/moving force requirement is satisfied," and the policymakers are liable for the consequences. *Id.*

[14] Yoo also argued that Padilla failed to state a claim for self-incrimination. The district court agreed and Padilla filed no cross-appeal.

considered on appeal absent "exceptional circumstances").[15] Only the two previously-raised substantive challenges are proper on appeal. For the Court's convenience, Plaintiffs address the merits of those two claims in the "clearly established" section below, though the merits are analytically distinct from clear establishment.

1. Plaintiffs' rights were clearly established.

Yoo does not dispute that military agents cannot seize a citizen from a civilian jail, transport him to a military prison, detain him there indefinitely and incommunicado without criminal charge or conviction, and subject him to a program of brutal interrogations, sensory deprivation, and inhuman conditions. He does not even dispute that the rights to be free of such Star Chamber tactics were clearly established in 2002. But he contends—and this is the core of his clearly-established argument—that it was not clear whether all these rights could be lost as soon as the Executive labeled someone an "enemy combatant." In other words, Yoo asserts that the very actions for which he is called to account—his creation and justification of the "enemy combatant" detention and interrogation program—shield him from responsibility for those actions.

[15] Plaintiffs set forth below their substantive arguments on the First, Fourth and Fifth Amendment claims. SER6-17. Yoo argued that the claims were not clearly established, but did not challenge their sufficiency. SER2-4. Padilla would rely on his arguments below if Yoo's waiver were disregarded.

The Supreme Court has rejected this argument, holding that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *see also U.S. v. Lanier*, 520 U.S. 259, 271 (1997) ("There has never been…[a] case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages") (citations omitted).

Likewise, in *Hydrick v. Hunter*, this Court considered the constitutional rights of a new type of detainee, the statutorily-defined "sexual violent predator" ("SVP"). 500 F.3d 978, 983 (9th Cir. 2007), *vacated on other grounds*, *Hunter v. Hydrick*, 129 S. Ct. 2431 (2009). Even though "the law applicable to [SVPs was] still evolving," "the rights afforded [convicted] prisoners set a floor for those that must be afforded SVPs." *Id.* at 989. This Court had no difficulty concluding that "surely it is clear that certain actions…transgress the boundary." *Id.* at 990 n.8; *see also Giebel v. Sylvester*, 244 F.3d 1182, 1189 (9th Cir. 2001). Because the abuses suffered by Padilla "would be unconstitutional if directed at any prisoner," they were clearly established. *Hydrick*, 500 F.3d. at 1001.

Yoo asserts that the law was not clear from 2001 to 2003, broadly asserting that even *Hamdi* could not say "whether any specific rights might still be open to American citizens designated as enemy combatants." Br.46. But *Hamdi* emphatically and repeatedly reaffirmed the protections due to those whom the

government suspects of wrongdoing during wartime. The Court made plain it was doing nothing new. It had "**long since** made clear that a state of war is not a blank check for the President when it comes to rights of the Nation's citizens." 542 U.S. at 536 (emphasis added). It "**reaffirm[ed]**...the **fundamental** nature of a citizen's right to be free from involuntary confinement by his own government without due process of law." *Id.* at 531 (emphasis added). It stated that even a citizen seized on a foreign battlefield "**unquestionably** has the right to access to counsel." *Id.* at 539 (emphasis added). "**Plainly**, the 'process' Hamdi has received is not that to which he is entitled under the Due Process Clause." *Id.* at 538 (emphasis added). Nor did the Court retreat an inch from its centuries-old ban on coercive interrogation: "**Certainly**...indefinite detention for the purpose of interrogation is not authorized." *Id.* at 521 (emphasis added); *see also id.* at 518-19 (citing numerous authorities for established proposition that "[c]aptivity in war is neither revenge, nor punishment, but solely protective custody") (citations and punctuation omitted).[16]

[16] The finding in *Padilla V* that the Executive may detain citizens suspected of having carried arms on a foreign battlefield had nothing to do with the *treatment* due to those detained. It is also irrelevant here, as Padilla is not an enemy combatant, ER236 ¶43, and the pleaded facts do not state that Padilla ever carried arms on a foreign battlefield. Even if it were relevant, the decision in 2005 could not have rendered unclear what was clearly established in 2002: that citizens seized in civilian settings in the U.S. cannot be detained without charge on the basis of allegations that they have affiliated with an enemy. *See infra* Pt. II.B.1.d.

Yoo's clearly-established arguments are nearly all variations on the theme that the enemy combatant category unsettled all previously-settled law.

a. Right of access to courts and counsel

It is "established beyond a doubt that prisoners have a constitutional right" to "adequate, effective and meaningful" access to the courts, for habeas corpus and civil rights claims alike. *Bounds v. Smith*, 430 U.S. 817, 821, 822 (1977), *rev'd in part on other grounds, Lewis v. Casey*, 518 U.S. 343, 351 (1996); *see e.g., Wolff v. McDonnell*, 418 U.S. 539, 579 (1974); *Lassiter v. Dep't Soc. Serv.* 452 U.S. 18, 25 (1981). That right includes private and meaningful communication with counsel. *See Procunier v. Martinez*, 416 U.S. 396, 419-20 (1974), *rev'd in part on other grounds, Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989); *Ching v. Lewis*, 895 F.2d 608, 610 (9th Cir. 1990). It is violated when one is "hindered [in] his efforts to pursue a legal claim." *Lewis v. Casey*, 518 U.S. 343, 351 (1996).

For nearly two years, Padilla was detained incommunicado and denied **any** access to counsel, ER240 ¶56, and later permitted only extremely restricted, non-confidential access. ER240-41 ¶¶59,61. Throughout that period, Padilla was restrained from telling his attorneys about the brutal interrogation methods inflicted upon him and from rebutting the Executive's assertions about him. As a result, Padilla was unable to file claims objecting to his unconstitutional conditions of confinement or to pursue a proper, fair, and complete habeas petition. *See*

Christopher v. Harbury, 536 U.S. 403, 415 (2002). Yoo's assertion (Br.51 n.11) that Padilla forfeited any right to access the courts by making a "strategic decision" to mount a legal (rather than factual) challenge to his detention ignores the record. Padilla could not mount a factual challenge because the policies Yoo constructed and justified denied Padilla the ability to meet confidentially with his attorneys, a necessary prerequisite to any factual challenge. ER231,240-41 ¶¶19f,56,59,60,62.

Yoo also asserts that the rights to court and counsel were not clearly established because Yoo's system had deemed Padilla an enemy combatant. That assertion ignores *Hamdi*, which stated that even a citizen seized on a foreign battlefield "**unquestionably** has the right to access to counsel." 542 U.S. at 537 (emphasis added). (Yoo often disregards *Hamdi*'s holdings and the opinions joined by eight justices, choosing instead to focus on Justice Thomas's lone dissent as if it were the law. *See* Br.49,50,51,58,59. Yoo also ignores what the first district court said when confronted—in 2002—with the arguments he now makes: "Padilla's need to consult with a lawyer to help him do what the [habeas] statute permits him to do is obvious." *Padilla I*, 233 F.Supp.2d at 602 (Mukasey, C.J.)).[17]

b. Freedom from conscious-shocking treatment

[17] *Padilla VII* did not consider the question of access to counsel—which had already been granted to Padilla by that point—but only with "confederates." 423 F.3d at 395.

Yoo argues that Padilla had no protection from cruel and unusual punishment because he was not convicted. Br.51-52. That is a convenient argument coming from the man who designed the scheme that ensured Padilla would not be charged with the accusations against him. It is irrelevant in any event, as non-convicts are entitled to "more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982); *Hydrick,* 500 F.3d at 994; *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983) (non-convicts have Fifth Amendment rights "at least as great as the Eighth Amendment protections available to a convicted prisoner").

Padilla's treatment fell far below this "minimum standard of care." *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1120 (9th Cir. 2003). He was interrogated incommunicado for 21 months without access to counsel; subjected to months of sleep deprivation; subjected to continual cold while being denied basic necessities like a mattress or blanket; questioned for hours on end under threat of torture, death, and harm to his family; and forced into painful stress positions. ER239-40 ¶¶55,56. The Supreme Court has repeatedly condemned far less shocking interrogations. *See Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944) (36-hour interrogation "inconceivable" and "inherently coercive"); *Darwin v. Conn.*, 391 U.S. 346, 349 (1968) (30-48 hours of incommunicado questioning); *Clewis v. Tex.*,

386 U.S. 707, 710 (1967) (arrest without probable cause and nine-day interrogation with little sleep).

Yoo contends that the treatment to which Padilla was subjected was not conscience-shocking because its purpose was intelligence-gathering. Br.53. That contention is at odds with the complaint, which nowhere avers that Padilla possessed the actionable intelligence that Yoo asserts. More fundamentally, "indefinite detention for the purpose of interrogation is not authorized," and no Supreme Court case has ever indicated that the right to be free from torture is anything but absolute, even where officials seek to justify the torture on the grounds of public safety. *Hamdi*, 542 U.S. at 521; *see also Rochin v. California*, 342 U.S. 165, 172 (1952) (forcible extraction of Rochin's stomach's contents to gather evidence was a method "too close to the rack and the screw to permit of constitutional differentiation."); *see e.g., Winston v. Lee*, 470 U.S. 753, 760-62 (1985); *Procunier*, 337 F.3d at 1092. To hold otherwise would "interfere[] with rights implicit in the concept of ordered liberty." *Chavez v. Martinez*, 538 U.S. 760, 787 (2003) (quotation marks omitted).

Padilla's alleged status did not change this minimum standard of treatment, because the detention of "enemy combatants" is justified by "neither revenge, nor punishment, but solely protective custody…to prevent the prisoners of war from further participation in the war." *Hamdi*, 542 U.S. at 518 (quotations omitted).

Padilla's abuse—brutal interrogations incorporating sleep "adjustment," sensory deprivation and denial of necessary medical care, ER239-42 ¶¶55-72—fell far below the "minimum standard of care," *Or. Advocacy Ctr.*, 322 F.3d at 1120, and constituted cruel and unusual punishment. *See e.g., Hope*, 536 U.S. at 738 (punitive chaining for seven hours unconstitutional); *Keenan v. Hall*, 83 F.3d 1083, 1090-1091 (9th Cir. 1996) (noise and constant illumination unconstitutional); *City of Canton v. Harris*, 489 U.S. 378, 381-82 (1989); *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002); *Gibson v. County of Washoe*, 290 F.3d 1175, 1192 (9th Cir. 2002).[18]

c. Denial of freedom of religion

Yoo does not contest that Padilla had a First Amendment right to practice his religion without a "substantial burden." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348-49 (1987); *Freeman v. Arpaio*, 125 F.3d 732 (9th Cir. 1997). Nor does he contest that the Supreme Court has held that detainees "**clearly** retain

[18] Even if any one condition did not constitute cruel and unusual punishment, together they do. *See Wilson v. Seiter*, 501 U.S. 294, 304-05 (1991).

Plaintiffs explained below that Yoo's actions caused a state-created risk of danger, violating substantive due process. SER11; *see generally Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1086 (9th Cir. 2000). Yoo makes no response on appeal.

protections afforded by the First Amendment." *O'Lone*, 482 U.S. at 348 (emphasis added).[19]

He claims that because religious rights are "context-sensitive" in prison, they could not be clearly established. Br.54. To be sure, the prison context means that courts defer to legitimate penological decisions made by "those charged with the formidable task of running a prison." *O'Lone*, 482 U.S. at 353. But the religious restrictions were placed on Padilla not by prison administrators but by Yoo, who developed and green-lighted the deprivations for the *per se* illegitimate purpose of coercive interrogation; the record contains no legitimate penological justifications. Yoo's system denied Padilla **all** religious rights—taking from him his Koran and preventing him from praying. ER242-43 ¶¶69,70,73. Yoo's "conduct [was] so

[19] Yoo did not assert below that Plaintiffs failed to state a claim with their First Amendment association and information claims. While he now mischaracterizes them as involving no more than "the right to receive visitors," Br.56, plaintiffs claim they were denied nearly all communication. ER240-41 ¶¶56-59,62,66,68; *see Valdez v. Rosenbaum*, 302 F.3d 1039, 1047-49 (9th Cir. 2002) (recognizing right "to communicate with persons outside prison walls"); *Clement v. Calif. Dept. of Corrections*, 364 F.3d 1148, 1151 (9th Cir. 2004) (right "to receive information while incarcerated"). Even if the outer limits of the rights right to communication and information are unsettled, those rights are clearly violated when denied entirely for two years. *Cf. Thornburgh*, 490 U.S. at 407 (applying balancing test and holding that there was no First Amendment violation where prisoners could send, receive and read other publications); *Mauro v. Arpaio*, 188 F.3d 1054, 1061 (9th Cir. 1999) (applying balancing test and holding that there was no First Amendment violation where prisoners could receive letters and articles but not pictures). Yoo's only clear-establishment argument is that everything is different for citizens whom the Executive labels enemy combatants.

egregious that a reasonable person would know it to be unconstitutional even though it is judged by a balancing test." *Medina v. City of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992); *see Cooper v. Pate*, 378 U.S. 546 (1964) (*per curiam*) (allegations that officials denied prisoner access to religious publications stated First Amendment claim).[20]

d. Unlawful seizure, lack of due process, and unlawful military detention

Padilla did not receive a "fair and reliable determination of probable cause…made by a judicial officer either before or promptly after" his military seizure from a civilian jail. *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975). Nor was he seized on the basis of the "trustworthy information sufficient to warrant a prudent person in believing that the accused had committed or was committing an offense," as the Fourth Amendment requires. *U.S. v. Delgadillo-Velasquez*, 856 F.2d 1292, 1296 (9th Cir. 1988). Yoo did not argue below that Padilla had failed to state a claim for Fourth Amendment violations. On appeal he maintains only

[20] The same is true under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, which describes "free exercise of religion as an unalienable right"; *see Jama v. INS*, 343 F. Supp. 2d 338, 374-75 (D.N.J. 2004) (allegations that officials confiscated detainee's Koran and interfered with prayer stated RFRA claim). RFRA permits only the least restrictive means of furthering a compelling government interest. 42 U.S.C. § 2000bb(b)(1). Yoo also claims that RFRA does not permit a damages suit against an individual officer. Br.54-56. His argument runs against this Court's decision in *Sutton v. Providence St. Joseph Med. Center*, 192 F.3d 826, 834-35 (9th Cir. 1999), and is wrong for that and the other reasons described by the district court. ER41-42; *see also* SER15-17.

that Padilla's Fourth Amendment rights were not clearly established, but he cites no Fourth Amendment cases, merely asserting again that all rights became unsettled when he introduced the enemy combatant category.

Even if Padilla had been lawfully seized, he still had the constitutional right to "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi*, 542 U.S. at 533. Yoo's system denied him that, asserting that Padilla could be imprisoned indefinitely, without charge, and that no court had any authority to evaluate the supposed factual basis for his detention. There was nothing unsettled about the illegality of that. "For more than a century the central meaning of procedural due process has been **clear**...notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." 542 U.S. at 533 (emphasis added; quotation marks omitted). The right to due process is not eviscerated "by the circumstances of war or the accusation of treasonous behavior," because "it is **clear** that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Id.* at 530 (emphasis added; quotations omitted). Moreover, "[t]he imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed **throughout our constitutional history**, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit

governmental action." *Id.* at 532 (emphasis added; quotation marks omitted). "**Plainly**," the Supreme Court found, "the 'process' Hamdi [a battlefield captive] has received is not that to which he is entitled under the Due Process Clause." *Id.* at 537 (emphasis added). Just as plainly, the precedents cited by *Hamdi*—which predate 2002—put Yoo on notice that zero process was not due process. *Id.* at 530.

Finally, Yoo argues that in 2002 it was unclear whether the military could enter a civilian prison, seize a citizen detained there under the authority of the courts, and secret him to an incommunicado cell in a military brig. Neither *Hamdi* nor *Ex parte Quirin*, 317 U.S. 1 (1942), supports Yoo's radical claim. *Hamdi* held that the AUMF authorizes detention of citizens only under the "narrow circumstances" of a "citizen captured in a *foreign* combat zone." *Hamdi*, 542 U.S. at 509, 523 (emphasis original). And *Quirin* merely upheld the criminal trial by military tribunal convened pursuant to congressional act and during a declared war, of defendants who actively asserted their membership in the German army. 317 U.S. at 21, 28. Padilla, by contrast, was seized from a U.S. jail cell without any allegation that he had ever borne arms on a foreign battlefield.[21] On these facts, the governing precedent, which Yoo does not even cite, is *Ex parte Milligan*, 71

[21] Yoo states that the Fourth Circuit relied on "the specific facts" used to justify Padilla's seizure and detention as "an enemy combatant." Br.59. It did not. See supra Pt. II.1.b; *compare* ER508 *with Padilla v. Hanft*, 423 F.3d 386, 391-92 (4th Cir. 2005).

U.S. 2, 130 (1866), in which the Court declared it unconstitutional for the military to seize and detain a U.S. citizen on U.S. soil—even during raging civil war—while civilian courts were open and operating, notwithstanding that the citizen was accused of membership in an insurgent group and actively planning domestic sabotage and kidnapping of government officials.

Yoo tries to render the law unclear by over-reading *U.S. v. Salerno*, 481 U.S. 739 (1987), for the proposition that the government may detain anyone it "believes to be dangerous." *Id.* at 748 (cited in Br.58-59). Nothing in *Salerno* permits unilateral military detention by the Executive. To the contrary, *Salerno* clearly established that the Executive could not unilaterally "incapacitate those who are merely suspected of these serious crimes," holding that the Bail Reform Act satisfied the Fifth Amendment only because "the Government must first of all demonstrate probable cause to believe that the charged crime has been committed by the arrestee," and then "[i]n a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Id.* at 750. Here, of course, the system Yoo helped establish and justify purported to eliminate the need for probable cause, a neutral decisionmaker, an adversary hearing (never mind a "full-blown" one), and any burden of proof that the government would need to establish before secreting a citizen away to a

military prison.

Yoo also asserts that Padilla's unceasing challenges to his unlawful military detention somehow rendered the law unclear. Br.59-60 (quoting 2009 questions asked at motions hearing by magistrate judge; omitting answers). Padilla challenged the legal authority for his military detention precisely **because** it clearly had no legal basis. The challenge did not somehow muddle the illegality of a citizen's military detention. If anything, it reflected the opposite: that just days earlier, a majority of Supreme Court justices had reiterated that the Executive had no authority to militarily detain an American citizen seized in a civilian setting in the United States. *See Padilla III,* 542 U.S. 426, 451 (2004) (Stevens, Souter, Ginsburg, Breyer, JJ., dissenting) ("At stake in this case is nothing less than the essence of a free society"; "the protracted, incommunicado detention of American citizens arrested in the United States" is unconstitutional); *Hamdi*, 542 U.S. at 554, 577 (Scalia, J., dissenting) (going further than the four *Padilla III* dissenters and finding that no citizen—even one seized on a foreign battlefield—could be detained absent congressional suspension of habeas corpus; specifically naming Padilla).[22]

[22] Three justices did not address the issue. Only Justice Thomas disagreed, meaning that five of the six justices to consider the issue had made plain that a re-filed legal challenge to Padilla's military detention would succeed.

CONCLUSION

The district court's order should be affirmed.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13874 words, as determined by the word-count function of Microsoft Word 2003, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman font.

STATEMENT OF RELATED CASES

Plaintiffs-Appellees Jose Padilla and Estela Lebron are aware of no related cases pending before this Court.

/s/Jonathan M. Freiman
Jonathan M. Freiman

ADDENDUM OF STATUTES AND RULES

Except for the following, all applicable constitutional provisions, statutes, and rules are contained in the brief or addendum of Appellant's Brief, dated November 9, 2009 (Docket Entry 7124793):

1. 10 U.S.C. § 948r(c)
2. 18 U.S.C. § 2340
3. 42 U.S.C. § 2000bb
4. Fed. R. Civ. P. 11(b)
5. Circuit Rule 28-2.5

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*** CURRENT THROUGH PL 111-125, APPROVED 12/28/2009 ***

TITLE 10. ARMED FORCES
SUBTITLE A. GENERAL MILITARY LAW
PART II. PERSONNEL
CHAPTER 47A. MILITARY COMMISSIONS
SUBCHAPTER III. PRE-TRIAL PROCEDURE

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10 USCS § 948r

§ 948r. Exclusion of statements obtained by torture or cruel, inhuman, or degrading treatment; prohibition of self-incrimination; admission of other statements of the accused

(a) Exclusion of statements obtain [obtained] by torture or cruel, inhuman, or degrading treatment. No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (*42 U.S.C. 2000dd*)), whether or not under color of law, shall be admissible in a military commission under this chapter [*10 USCS §§ 948a* et seq.], except against a person accused of torture or such treatment as evidence that the statement was made.

(b) Self-incrimination prohibited. No person shall be required to testify against himself or herself at a proceeding of a military commission under this chapter [*10 USCS §§ 948a* et seq.].

(c) Other statements of the accused. A statement of the accused may be admitted in evidence in a military commission under this chapter [*10 USCS §§ 948a* et seq.] only if the military judge finds--
(1) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and
(2) that--
(A) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or
(B) the statement was voluntarily given.

(d) Determination of voluntariness. In determining for purposes of subsection (c)(2)(B) whether a statement was voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the following:
(1) The details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities.
(2) The characteristics of the accused, such as military training, age, and education level.
(3) The lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.

HISTORY:

(Added Oct. 28, 2009, P.L. 111-84, Div A, Title XVIII, § 1802, 123 Stat. 2580.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

The bracketed word "obtained" has been inserted in the heading of subsec. (a) to indicate the word probably intended by Congress.

A prior § 948r (Act Oct. 17, 2006, P.L. 109-366, § 3(a)(1), 120 Stat. 2607; Jan. 28, 2008, P.L. 110-181, Div A, Title X, Subtitle F, § 1063(a)(4), 122 Stat. 321) was omitted in the general revision of Chapter 47A by Act Oct. 28, 2009, P.L. 111-84, Div A, Title XVIII, § 1802. It related to the prohibition of compulsory self-incrimination, and the treatment of statements obtained by torture and other statements

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LEXSTAT 18 U.S.C. 2340

*** CURRENT THROUGH PL 111-125, APPROVED 12/28/2009 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 113C. TORTURE

Go to the United States Code Service Archive Directory

18 USCS § 2340

§ 2340. Definitions

As used in this chapter [*18 USCS §§ 2340* et seq.]--

(1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from--

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and

(3) "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

HISTORY:

(Added April 30, 1994, P.L. 103-236, Title V, Part A, § 506(a), 108 Stat. 463; Oct 25, 1994, P.L. 103-415, § 1(k), 108 Stat. 4301; Oct. 31, 1994, P.L. 103-429, § 2(2), 108 Stat. 4377; Oct. 28, 2004, P.L. 108-375, Div A, Title X, Subtitle I, § 1089, 118 Stat. 2067.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

This section took effect on the later of (1) the date of enactment or (2) the date on which the United States became a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as provided by § 506(c) of Act April 30, 1994, P.L. 103-236, which appears as a note to this section. [The Convention entered into force with respect to the United States on Nov. 20, 1994, Treaty Doc. 100-20.]

Amendments:

1994. Act Oct. 25, 1994, in para. (1), substituted "within his" for "with".

Act Oct. 31, 1994, in para. (3), substituted "section 46501(2) of title 49" for "section 101(38) of the Federal Aviation Act of 1958 *(49 U.S.C. App. 1301*(38))".

2004. Act Oct. 28, 2004, substituted para. (3) for one which read: "(3) 'United States' includes all areas under the jurisdiction of the United States including any of the places described in sections 5 and 7 of this title and section 46501(2) of title 49.".

Other provisions:

Effective date of *18 USCS §§ 2340* et seq. Act April 30, 1994, P.L. 103-236, Title V, Part A, § 506(c), 108 Stat. 463, provides: "The amendments made by this section [adding *18 USCS §§ 2340* et seq.] shall take effect on the later of--

"(1) the date of enactment of this Act; or

"(2) the date on which the United States has become a party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.".

[The Convention entered into force with respect to the United States on Nov. 20, 1994, Treaty Doc. 100-20.]

NOTES:

Related Statutes & Rules:

This section is referred to in *10 USCS § 950v*; *18 USCS §§ 114*, *111*, *2441*.

Research Guide:

Am Jur:

3B Am Jur 2d, Aliens and Citizens § 1431.

Immigration:

3 Immigration Law and Procedure (rev. ed.), ch 33, Refugees, Asylum, Withholding of/Restriction on Removal, and Convention Against Torture Relief § 33.10.

Law Review Articles:

Bekerman. Torture--The Absolute Prohibition of a Relative Term: Does Everyone Know What is in Room 101? *53 Am J Comp L 743*, fall 2005.

Keller. Is Truth Serum Torture? *20 Am U Int'l L Rev 521, 2005.*

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Amann. Current Debates in the Conflict of Laws: Application of the Constitution to Guantanamo Bay: Abu Ghraib. *153 U Pa L Rev 2085,* June 2005.

Ragavan; Mireles. The Status of Detainees from the Iraq and Afghanistan Conflicts. *2005 Utah L Rev 619, 2005.*

Cohan. Torture and the Necessity Doctrine. *41 Val UL Rev 1587,* Summer 2007.

Interpretive Notes and Decisions:

Definition of "torture" in *18 USCS § 2340(2)* is limited to use of that word in Chapter 113C and, therefore, does not extend to jury instruction under *18 USCS § 3592(c)(6)*; thus, district court did not err in refusing to instruct jury that mental harm sufficient to establish torture must be prolonged. *United States v Chanthadara (2000, CA10 Kan) 230 F3d 1237, 2000 Colo J C A R 6005,* cert den *(2001) 534 US 992, 122 S Ct 457, 151 L Ed 2d 376* and (criticized in *United States v Purkey (2005, CA8 Mo) 428 F3d 738, 68 Fed Rules Evid Serv 907)* and (criticized in *United States v Quinones (2007, CA2 NY) 511 F3d 289).*

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*** CURRENT THROUGH PL 111-125, APPROVED 12/28/2009 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21B. RELIGIOUS FREEDOM RESTORATION

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42 USCS § 2000bb

Review expert commentary from The National Institute for Trial Advocacy following USCS Constitution, Amendment 1.

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings. The Congress finds that--
(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
(3) governments should not substantially burden religious exercise without compelling justification;
(4) in *Employment Division v. Smith, 494 U.S. 872 (1990)* the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes. The purposes of this Act are--
(1) to restore the compelling interest test as set forth in *Sherbert v. Verner, 374 U.S. 398 (1963)* and *Wisconsin v. Yoder, 406 U.S. 205 (1972)* and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

HISTORY:
(Nov. 16, 1993, P.L. 103-141, § 2, 107 Stat. 1488.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:
"This Act", referred to in this section, is Act Nov. 16, 1993, P.L. 103-141, 107 Stat. 1488, popularly known as the Religious Freedom Restoration Act of 1993, which appears generally as *42 USCS §§ 2000bb* et seq. For full classification of such Act, consult USCS Tables volumes.

Short titles:

Act Nov. 16, 1993, P.L. 103-141, § 1, 107 Stat. 1488, provides: "This Act may be cited as the 'Religious Freedom Restoration Act of 1993'.". For full classification of such Act, consult USCS Tables volumes.

NOTES:

Code of Federal Regulations:

Public Health Service, Department of Health and Human Services--Charitable Choice regulations applicable to States, local governments, and religious organizations receiving substance abuse prevention and treatment block grants and/or projects for assistance in transition from homelessness grants, *42 CFR 54.1* et seq.

Research Guide:

Federal Procedure:

17A Moore's Federal Practice (Matthew Bender 3d ed.), ch 123, Access to Courts: Eleventh Amendment and State Sovereign Immunity § 123.42.

6 Fed Proc L Ed, Civil Rights §§ 11:174, 1007, 1008.

15B Fed Proc L Ed, Government Contracts § 39:1390.

19 Fed Proc L Ed, Indians and Indian Affairs § 46:277.

20A Fed Proc L Ed, Internal Revenue § 48:1021.

21A Fed Proc L Ed, Job Discrimination § 50:1126.

32A Fed Proc L Ed, Transportation § 76:6.

Am Jur:

2 Am Jur 2d, Administrative Law § 392.

7 Am Jur 2d, Attorneys at Law § 239.

16A Am Jur 2d, Constitutional Law § 444.

45A Am Jur 2d, Job Discrimination §§ 27-35.

45C Am Jur 2d, Job Discrimination §§ 2546, 2547, 2680.

Am Jur Proof of Facts:

63 Am Jur Proof of Facts 3d, Interference With the Right to Free Exercise of Religion, p. 195.

Bankruptcy:

5 Collier on Bankruptcy (Matthew Bender 15th ed. rev), ch 544, Trustee as Lien Creditor and as Successor to Certain Creditors and Purchasers P 544.LH.

Labor and Employment:

1 Larson on Employment Discrimination, ch 5, What Is a Covered Employer § 5.06.

3 Larson on Employment Discrimination, ch 54, Statutory Framework and Definition of Religion § 54.01.

3 Larson on Employment Discrimination, ch 55, Practices Constituting Religious Discrimination § 55.08.

3 Larson on Employment Discrimination, ch 56, Reasonable Accommodation § 56.11.
6 Larson on Employment Discrimination, ch 114, State Constitutional and Statutory Law § 114.02.
1 Labor and Employment Law (Matthew Bender), ch 2, NLRB Jurisdiction § 2.05.
3 Labor and Employment Law (Matthew Bender), ch 76, Discrimination Based on Religion §§ 76.01, 76.12.

Annotations:

Validity, construction, and application of Freedom of Access to Clinic Entrances Act (FACE)(*18 USCS § 248*). *134 ALR Fed 507.*

Validity, construction, and application of Religious Freedom Restoration Act (*42 USCS §§ 2000bb* et seq.). *135 ALR Fed 121.*

Validity, Construction, and Operation of Religious Land Use and Institutionalized Persons Act of 2000 (*42 U.S.C.A. §§ 2000cc* et seq. [*42 USCS §§ 2000cc* et seq.]). *181 ALR Fed 247.*

Landlord's Refusal to Rent to Unmarried Couple as Protected by Landlord's Religious Beliefs. *10 ALR6th 513.*

Free Exercise of Religion as Applied to Individual's Objection to Obtaining or Disclosing Social Security Number. *93 ALR5th 1.*

Liability of Church or Religious Organization for Negligent Hiring, Retention, or Supervision of Priest, Minister, or Other Clergy Based on Sexual Misconduct. *101 ALR5th 1.*

Validity, Construction, and Operation of State Religious Freedom Restoration Acts. *116 ALR5th 233.*

Parents' Criminal Liability for Failure to Provide Medical Attention to Their Children. *118 ALR5th 253.*

Texts:

Cohen's Handbook of Federal Indian Law (Matthew Bender), ch 7, Civil Jurisdiction § 7.05.
Cohen's Handbook of Federal Indian Law (Matthew Bender), ch 14, Civil Rights § 14.03.
Cohen's Handbook of Federal Indian Law (Matthew Bender), ch 20, Tribal Cultural Resources § 20.02.
1 Environmental Law Practice Guide (Matthew Bender), ch 2, Historic Preservation §§ 2.02, 2.05.
2A Environmental Law Practice Guide (Matthew Bender), ch 15A, Indian Country Environmental Law § 15A.08.
4 Environmental Law Practice Guide (Matthew Bender), ch 24, Wildlife and Habitat Protection § 24.03.

Law Review Articles:

Blatnik. No RFRAF allowed: the status of the Religious Freedom Restoration Act's federal application in the wake of *City of Boerne v. Flores [117 S. Ct. 2157 (1997)]. 98 Colum L Rev 1410,* October 1998.

Mangrum. The falling star of free exercise: free exercise and substantive due process entitlement claims in *City of Boerne v. Flores [117 S. Ct. 2157 (1997)]. 31 Creighton L Rev 693,* May 1998.

Carpenter. Symposium: Borrowing The Land: Cultures of Ownership in the Western Landscape: Old Ground and New Directions at Sacred Sites on the Western Landscape. *83 Denv UL Rev 981, 2006.*

Buss. Federalism, separation of powers, and the demise of the Religious Freedom Restoration Act. *83 Iowa L Rev 391,* January 1998.

Smolin. The free exercise clause, the Religious Freedom Restoration Act, and the right to active and passive euthanasia. *10 Issues L & Med 3,* Summer 1994.

Williamson. City of Boerne v Flores [117 S. Ct. 2157 (1997)] and the Religious Freedom Restoration Act; the delicate balance between religious freedom and historic preservation. 13 J Land Use & Envtl L 107, Fall 1997.

Brant. Taking the Supreme Court at its own word: the implications for RFRA and separation of powers. *56 Mont L Rev 5,* Winter 1995.

Conkle. The Religious Freedom Restoration Act: the constitutional significance of an unconstitutional statute. *56 Mont L Rev 39,* Winter 1995.

Laycock. RFRA, Congress, and the ratchet. *56 Mont L Rev 145,* Winter 1995.

Lupu, Of time and the RFRA: a lawyer's guide to the Religious Freedom Restoration Act. *56 Mont L Rev 171,* Winter 1995.

Marshall. The Religious Freedom Restoration Act: establishment, equal protection and free speech concerns. *56 Mont L Rev 227,* Winter 1995.

Paulsen. A RFRA runs through it: religious freedom and the U.S. Code. *56 Mont L Rev 249,* Winter 1995.

Fliegel. Free exercise fidelity and the Religious Freedom Restoration Act of 1993: where we are, where we have been, and where we are going. *5 Seton Hall Const LJ 39,* Fall 1994.

Jamar. This article has no footnotes: an essay on RFRA and the limits of logic in the law. *27 Stetson L Rev 559,* Fall 1997.

Interpretive Notes and Decisions:
1. Generally 2. Constitutional issues 3. Construction 4. Applicability 5. Successful claims 6. Unsuccessful claims 7. Preliminary injunction

1. Generally

Where defendant was charged with importing marijuana under Guam's drug statutes, rather than simple possession, Religious Freedom Restoration Act, *42 USCS §§ 2000bb* et seq., provided no defense. *Guam v Guerrero (2002, CA9 Hawaii) 290 F3d 1210, 2002 CDOS 4549, 2002* Daily Journal DAR 5863.

Religious Freedom Restoration Act of 1993 (RFRA) does not afford right to avoid payment of taxes for religious reasons; therefore, RFRA did not support taxpayer's religious objections to use of taxes for military spending. *Jenkins v Comm'r (2007, CA2) 483 F3d 90, 2007-1 USTC P 50391, 99 AFTR 2d 1324,* cert den (2007, US) *128 S Ct 129, 169 L Ed 2d 29.*

Charitable foundation's challenge to its designation as "Specially Designated Global Terrorist" and subsequent blocking of its accounts failed in part because foundation's activities did not fall within protection of Religious Freedom Restoration Act, *42 USCS § 2000bb* et seq. *Holy Land Found. for Relief & Dev. v Ashcroft (2003, App DC) 357 US App DC 35, 333 F3d 156,* reh, en banc, den (2003, App DC) *2003 US App LEXIS 17641* and reh den (2003, App DC) *2003 US App LEXIS 17642* and cert den *(2004) 540 US 1218, 158 L Ed 2d 153, 124 S Ct 1506.*

Religious Freedom Restoration Act (*42 USCS §§ 2000bb* et seq.), by its terms, addresses only free exercise of religion claims, and does not address equal protection claims arising from alleged unequal treatment of religious practices by government; thus, plaintiff can maintain equal protection claim under Fourteenth Amendment independent of Act. *Tyson v Ratelle (1996, CD Cal) 166 FRD 442.*

Religious Freedom Restoration Act (*42 USCS §§ 2000bb* et seq.) affords plaintiff no relief from penalty provisions of Tax Code, where she contends that IRS discriminates against her as religious tax protestor by assessing penalties for her nonpayment instead of using least restrictive means of levying upon her bank account, because income tax system is self-reporting and self-assessment one based on voluntary actions, and government cannot be compelled to resort to cumbersome methods to encourage compliance. *Packard v United States (1998, DC Conn) 7 F Supp 2d 143, 98-2 USTC P 50589, 82 AFTR 2d 5928,* affd, without op (1999, CA2 Conn) *198 F3d 234,* reported in full (1999, CA2 Conn) *99-2 USTC P 50630, 83 AFTR 2d 2874* and cert den *(2000) 529 US 1068, 120 S Ct 1676, 146 L Ed 2d 485.*

District court read Religious Freedom Restoration Act, *42 USCS §§ 2000bb* et seq., to allow for individual capacity suits (as opposed to official capacity suits) against individual defendants as well as individual capacity suits for money damages specifically (as opposed to for injunctive relief only). *Jama v United States INS (2004, DC NJ) 343 F Supp 2d 338,* motion gr, costs/fees proceeding, application gr, settled (2005, DC NJ) *2005 US Dist LEXIS 17042.*

Free exercise claim brought solely pursuant to *42 USCS § 1983* differs from one brought pursuant to Religious Freedom Restoration Act of 1993, *42 USCS §§ 2000bb* et seq., or Religious Land Use and Institutionalized Persons Act of 2000, *42 USCS § 2000cc,* both of which require strict level of scrutiny and thus afford inmates more protection against religious infringement by correctional facilities' regulations than rational basis analysis under *First Amendment. Wares v Simmons (2007, DC Kan) 524 F Supp 2d 1313.*

Where detainee secured nominal damages and favorable judgment on merits of her Religious Freedom Restoration Act, *42 USCS § 2000bb,* claims, and substantial damages and favorable judgment on merits of her related state-law claims, these achievements resulted in both modification of defendants' behavior, and benefit for prevailing party; detainee's attorneys were awarded fees and expenses under *42 USCS § 1988. Abdi Jama v Esmor Corr. Servs. (2008, DC NJ) 549 F Supp 2d 602.*

2. Constitutional issues

Religious Freedom Restoration Act of 1993 (RFRA) (*42 USCS §§ 2000bb* et seq.) exceeds Congress' power, under § 5 of *Federal Constitution's Fourteenth Amendment*, to enact legislation enforcing Constitution's First Amendment clause providing right to free exercise of religion. *City of Boerne v Flores (1997) 521 US 507, 117 S Ct 2157, 138 L Ed 2d 624, 97 CDOS 4904, 97 Daily Journal DAR 7973, 74 BNA FEP Cas 62, 70 CCH EPD P 44785, 1997 Colo J C A R 1329, 11 FLW Fed S 140* (superseded by statute on other grounds as stated in *Fulbright v Evans (2005, WD Okla) 2005 US Dist LEXIS 40240)* and (superseded by statute on other grounds as stated in *Spratt v Wall (2005, DC RI) 2005 US Dist LEXIS 33266)* and (superseded by statute on other grounds as stated in *Rasul v Myers (2008, App DC) 512 F3d 644).*

Religious Freedom Restoration Act, *42 USCS §§ 2000bb* et seq., as applied to federal government is severable from portion of Act declared unconstitutional in *Flores*, and independently remains applicable to federal officials. *Kikumura v Hurley (2001, CA10 Colo) 242 F3d 950, 2001 Colo J C A R 1350.*

Religious Freedom Restoration Act, *42 USCS §§ 2000bb* et seq., is constitutional as applied in federal realm. *Guam v Guerrero (2002, CA9 Hawaii) 290 F3d 1210, 2002 CDOS 4549, 2002* Daily Journal DAR 5863.

Religious Freedom Restoration Act, *42 USCS §§ 2000bb* et seq., is constitutional as applied to *Guam. Guam v Guerrero (2002, CA9 Hawaii) 290 F3d 1210, 2002 CDOS 4549, 2002* Daily Journal DAR 5863.

While RFRA's constitutionality as applied to federal government is not without doubt, court will assume RFRA is constitutional where parties choose not to dispute its constitutionality. *United States v Israel (2003, CA7 Ind) 317 F3d 768.*

Petitioner aliens failed to show that requirements of qualifying relative requirement for cancellation of removal, *8 USCS § 1229b(b)*, were so restrictive as applied to them, as devout Catholics, as to impinge their free religious exercise under *42 USCS § 2000bb-1(a). Fernandez v Mukasey (2008, CA9) 512 F3d 553,* reh den, reh, en banc, den, amd on other grounds (2008, CA9) *520 F3d 965* and reprinted as amd on other grounds (2008, CA9) *520 F3d 965.*

Religious Freedom Restoration Act (RFRA) (*42 USCS § 2000bb*) is not unconstitutional on separation of powers grounds, where state prison was defending itself against Native-American prisoner's civil rights actions against state prison officials for allegedly violating his constitutional right to free exercise of religion on grounds that Congress had no authority to heightened degree of scrutiny regarding free exercise of certain religions, because Congress has broad authority to interpret Constitution and to expand fundamental rights such as free exercise of religion under § 5 of Fourteenth Amendment even in areas where Supreme Court has already ruled. *Belgard v Hawaii (1995, DC Hawaii) 883 F Supp 510.*

Criminal defendant may not assert Religious Freedom Restoration Act (*42 USCS §§ 2000bb* et seq.) as defense to his prosecution for illegal possession and sale of golden eagle skin and feathers and body parts from various other protected bird species, even though both defendant and U.S. argue that Act is still applicable to federal government, because court finds that Supreme Court found Act wholly unconstitutional. *United States v Sandia (1997, DC NM) 6 F Supp 2d 1278,* affd (1999, CA10 NM) *188 F3d 1215, 1999 Colo J C A R 5382* and (criticized in *Caldwell v Caesar (2001, DC Dist Col) 150 F Supp 2d 50).*

Although case in which District Court had found *42 USCS § 2000bb* unconstitutional may well have become moot when parties which litigated case had settled it, court would not vacate its opinion and order dismissing action, because vacatur would have effect of depriving legal community of one of few reported cases in which statute had been held unconstitutional. *Keeler v Mayor of Cumberland (1997, DC Md) 951 F Supp 83.*

Congress did not intend to abrogate states' Eleventh Amendment immunity from suit with respect to subject matter of *42 USCS § 2000bb* by enactment of statute, where text of statute stated that its (1) sole purpose was to restore application of "compelling interest" test to judicial review of claims alleging violation of free exercise of religion; (2) neither statute nor its declared purpose referred to abrogation, Eleventh Amendment, or sovereign immunity; (3) statutory reference to plaintiffs' ability to obtain "appropriate relief" did not unmistakably evince intent to abrogate immunity; and (4) general statutory authorization to assert free exercise claims in federal court was not unequivocal abrogation of immunity. *Commack Self-Service Kosher Meats v New York (1997, ED NY) 954 F Supp 65.*

Although none of defendants moved for dismissal of state prisoner's claim made under Religious Freedom Restoration Act (RFRA), *42 USCS §§ 2000bb* et seq., court dismissed claim sua sponte pursuant to *28 USCS § 1915(e)(2)*

given U.S. Supreme Court's ruling that state and local government actors cannot be sued for violations of *RFRA*. *Lewis v Mitchell (2005, SD Cal) 416 F Supp 2d 935.*

Atheist's use of currency inscribed with national motto of "In God We Trust" did not, as matter of law, demonstrate government coercion to proselytize or evangelize on behalf of monotheism. *Newdow v Cong. of the United States (2006, ED Cal) 435 F Supp 2d 1066.*

Defendants' motion to dismiss indictment on ground that prosecution violated their rights of free speech and free exercise of religion as protected by First Amendment was denied where (1) defendants were not prosecuted for engaging in those activities, they were prosecuted for concealing those activities; (2) defendants' claim of undue burden on free exercise of religion under Religious Freedom Restoration Act was without merit because there was no reason why providing complete and truthful description of organization's planned activities whether or not those activities were religiously motivated, inhibited or substantially burdened exercise of religious freedom; (3) IRS clearly had statutory and regulatory authority to inquire about entity's proposed activities, and thus, defendants could have been prosecuted under *18 USCS § 1001* and *26 USCS § 7206* for providing false responses regarding those activities; (4) unconstitutional conditions doctrine did not preclude IRS from denying entity *26 USCS § 501(c)(3)* status based on nature of its activities because IRS could have reasonably concluded that entity's efforts to support and promote armed conflict were not charitable or religious in nature and could have denied tax-exempt status on that basis; and (5) because information regarding entity's activities had natural tendency to influence IRS's investigation of entity's *26 USCS § 501(c)(3)* eligibility, it was material. *United States v Mubayyid (2007, DC Mass) 476 F Supp 2d 46, 2007-2 USTC P 50527, 99 AFTR 2d 1362.*

Assertion of jurisdiction by National Labor Relations Board over employer (hospital owned, operated and managed by Seventh Day Adventist Church) did not violate either First Amendment or Religious Freedom Restoration Act (*42 USCS §§ 2000bb* et seq.). *Ukiah Adventist Hosp. (2000) 332 NLRB 602, 165 BNA LRRM 1258, 2000-1* CCH NLRB P 15649.

Religious Freedom Restoration Act (*42 USCS §§ 2000bb* et seq.) was valid exercise of congressional power under *Due Process Clause of Fourteenth Amendment. South Jersey Catholic Sch. Teachers Ass'n v St. Teresa of the Infant Jesus Church Elem. Sch. (1996, App Div) 290 NJ Super 359, 675 A2d 1155, 152 BNA LRRM 2673,* mod, affd, remanded *(1997) 150 NJ 575, 696 A2d 709, 155 BNA LRRM 2972, 135* CCH LC P 58340.

3. Construction

Ruling that organization is not exempt from jurisdiction of National Labor Relations Board (NLRB), as religious educational institution, does not necessarily preclude claim for violation of Religious Freedom Restoration Act (RFRA) (*42 USCS §§ 2000bb* et seq.), alleging that requiring religious educational institution to engage in collective bargaining would substantially burden its exercise of religion. *University of Great Falls v N.L.R.B. (2002, App DC) 349 US App DC 386, 278 F3d 1335, 169 BNA LRRM 2449, 146* CCH LC P 10007.

Court interpreted term "persons," as used in Religious Freedom Restoration Act (RFRA) to generally prohibit government from substantially burdening "person's exercise of religion," in manner consistent with Supreme Court's interpretation of "person" in Fifth Amendment and of "people" in Fourth Amendment as excluding non-resident aliens, and thus RFRA claim of plaintiffs, former Muslim detainees at U.S. Naval Station at Guantanamo Bay, Cuba, had to be dismissed. *Rasul v Myers (2008, App DC) 512 F3d 644.*

Employer, private liberal arts college that was "affiliated" with Presbyterian Church, which expressly conceded that it was employer within meaning of *29 USCS § 152(2)*, was not exempt from application of National Labor Relations Act (NLRA) (*29 USCS § 151* et seq.) by virtue of Religious Freedom Restoration Act (RFRA) (*42 USCS §§ 2000bb* et seq.) because application of NLRA would not substantially burden its ability to freely exercise its sincere religious beliefs in any way; ruling that entity was not exempt from NLRB jurisdiction under Supreme Court's "Catholic Bishop" analysis did not automatically foreclose RFRA claim that requiring such entity to engage in collective bargaining would have substantially burdened its exercise of religion. *Carroll College, Inc. (2005) 345 NLRB 254, 177 BNA LRRM 1353, 2004-5* CCH NLRB P 16961.

4. Applicability

Parties may waive or forfeit Religious Freedom Restoration Act of 1993, *42 USCS §§ 2000bb, 2000bb-1* to *2000bb-4*, defense by failing to argue that law or action substantially burdens party's religion; where party fails to assert substantial burden on religious exercise before district court, therefore, party may not raise that issue for first time on

appeal. *Rweyemamu v Cote (2008, CA2 Conn) 520 F3d 198, 102 BNA FEP Cas 1678, 90* CCH EPD [parmk][thin] 43141.

Religious Freedom Restoration Act of 1993, *42 USCS § 2000bb*, does not apply to states; therefore, inmate failed to state claim under § 2000bb against officials of state department of corrections in their official capacities for alleged violations of his religious rights while incarcerated. *Ibrahim v District of Columbia (2004, DC Dist Col) 357 F Supp 2d 187.*

Religious Freedom Restoration Act of 1993 (RFRA), *42 USCS §§ 2000bb* et seq., did not provide defense to pastor's suit against diocese, another pastor, and others (defendants), alleging hostile environment employment discrimination on basis of gender and retaliation in violation of federal and state laws because defendants waived such defense by expressly stating that they were not relying on *RFRA. Rojas v Roman Catholic Diocese of Rochester (2008, WD NY) 557 F Supp 2d 387, 103 BNA FEP Cas 637.*

Unpublished Opinions

Unpublished: District court erred in granting summary judgment to defendants, state Department of Corrections and its employees, on inmate's claim that they failed to promptly accommodate his religious dietary needs because although inmate's complaint did not cite to Religious Land Use and Institutionalized Persons Act (RLUIPA), inmate, in his opposition to defendants' motion for summary judgment, had invoked Religious Freedom Restoration Act, which could not be applied to states but was substantially identical to RLUIPA, which did apply to states that accepted federal grants, and it was not necessary that inmate's theory be advanced in his complaint as *Fed. R. Civ. P. 8* did not require legal citations or arguments; RLUIPA supplied foundation for inmate's complaint, and he was entitled to decision on merits. *Whitfield v Ill. Dep't of Corr. (2007, CA7 Ill) 237 Fed Appx 93, 67 FR Serv 3d 1226.*

5. Successful claims

Religious Freedom Restoration Act, *42 USCS § 2000bb*, applied to defendants', non-Native American Indians, challenges to their convictions for possession of eagle feathers without permit, as required by Migratory Bird Treaty Act, *16 USCS § 703*, and Bald and Golden Eagle Protection Act, *16 USCS § 668(a)*, for use in Native American religious ceremonies. *United States v Hardman (2002, CA10) 297 F3d 1116, 33 ELR 20018* (criticized in *United States v Antoine (2003, CA9 Wash) 318 F3d 919).*

Government failed to show that Migratory Bird Treaty Act, *16 USCS § 703*, or Bald and Golden Eagle Protection Act, *16 USCS § 668(a)*, were least restrictive means of advancing interests in preserving Native American culture and eagle population under Religious Freedom Restoration Act, *42 USCS § 2000bb*, where record contained no evidence indicating that increased permit applications would place increased pressure on eagle populations or to what degree excluding non-tribal members from permitting scheme advanced preservation of Native American culture. *United States v Hardman (2002, CA10) 297 F3d 1116, 33 ELR 20018* (criticized in *United States v Antoine (2003, CA9 Wash) 318 F3d 919).*

Inmate demonstrated that prison officials substantially burdened his religion in violation of Religious Freedom Restoration Act of 1993 (RFRA) (*42 USCS § 2000bb*), where inmate presented substantial documentation of legitimacy of his religious convictions and proof that prison officials prevented him from following his beliefs, which include maintaining kosher diet, taking vow of poverty, not cutting hair, and wearing headcovering of certain color, because prison officials failed to show that prison policies which precluded inmate from practicing beliefs are premised on legitimate security risk or other compelling state interest and are therefore inconsistent with First Amendment rights and *RFRA. Luckette v Lewis (1995, DC Ariz) 883 F Supp 471,* subsequent app, remanded (2001, CA9 Wash) *15 Fed Appx 451.*

Prison inmate stated claim under *42 USCS § 2000bb(b)(1)*, where inmate alleged that he was prohibited from wearing his religious headgear and that he was transferred after conducting religious services. *Hall v Griego (1995, DC Colo) 896 F Supp 1043.*

Placement of inmate in restricted medical isolation unit with inmates who had tested positive for tuberculosis, owing to inmate's refusal to submit to tuberculosis screening test, was not least-restrictive means of furthering prison's asserted compelling interest in preventing spread of disease among inmates, as required to justify burden on inmate's exercise of religion under *42 USCS § 2000bb*, where prison officials could have treated inmate as at risk of developing disease actively by requiring him to submit to periodic chest X-rays or sputum samples. *Jihad v Wright (1996, ND Ind) 929 F Supp 325.*

Roving border patrol stop of sport utility vehicle likely violated First and Fourth Amendments, as well as Religious Freedom Restoration Act (*42 USCS §§ 2000bb* et seq.) as it applies to federal government, even though agents testified credibly as to their attempt to conduct stop in accordance with constitutional standards, because reliance upon vehicular display of religious symbols and decals as indicative of criminal activity was unreasonable and unacceptable. *United States v Ramon (2000, WD Tex) 86 F Supp 2d 665.*

Inmates may amend complaint to set forth claim under Religious Freedom Restoration Act (*42 USCS §§ 2000bb* et seq.), where they allege, inter alia, that prison officials refused to allow them to participate in Ramadan fast and that all Muslims must participate in that fast, because alleged refusal constrains expression by inmates that manifests central tenet of their religious beliefs, and inmates have alleged substantial interference with free exercise sufficient to justify amending complaint. *Crocker v Durkin (2001, DC Kan) 159 F Supp 2d 1258,* affd (2002, CA10 Kan) *53 Fed Appx 503.*

Where neighbors challenged zoning board's decision to allow diocese to build parish center, defendants were entitled to summary judgment because, inter alia, zoning bylaw violated Religious Land Use and Institutionalized Persons Act of 2000 by imposing "substantial burden" on diocese's religious exercise. *Mintz v Roman Catholic Bishop (2006, DC Mass) 424 F Supp 2d 309, 64 FR Serv 3d 653.*

6. Unsuccessful claims

In prosecution for violation of Bald and Golden Eagle Protection Act, *16 USCS §§ 668-668d,* Native American defendant did not have viable claim under Religious Freedom Restoration Act (RFRA), *42 USCS §§ 2000bb* et seq., because he was not asking government to pursue its eagle-protection goal without burdening religion at all; he wanted it to burden other people's religion more (those who were eligible for religious use permit) and his religion less. *United States v Antoine (2003, CA9 Wash) 318 F3d 919,* subsequent app (2003, CA9 Wash) *59 Fed Appx 178, 2003 CDOS 965, 2003* Daily Journal DAR 1276, cert den *(2004) 540 US 1221, 158 L Ed 2d 157, 124 S Ct 1505.*

There was no Religious Freedom Restoration Act of 1993 (RFRA), *42 USCS §§ 2000bb* et seq., violation because presence of recycled wastewater on mountain did not coerce Tribes to act contrary to their religious beliefs under threat of sanctions, nor did it condition governmental benefit upon conduct that would violate their religious beliefs, as required to establish "substantial burden" on religious exercise under *RFRA. Navajo Nation v United States Forest Serv. (2008, CA9 Ariz) 535 F3d 1058.*

In plaintiff's action against federal, state, and local officials seeking declaratory and injunctive relief from federal and Iowa Controlled Substances Acts (CSAs) for his sacramental use of marijuana, district court properly dismissed plaintiff's Religious Freedom Restoration Act of 1993 (RFRA), *42 USCS § 2000bb,* claim against state officials because application of RFRA to states was unconstitutional as RFRA's definition of "government" had been amended to no longer include state governments under *42 USCS § 2000bb-2,* and Iowa CSA was state law, not subject to *RFRA. Olsen v Mukasey (2008, CA8 Iowa) 541 F3d 827.*

In plaintiff's action against federal, state, and local officials seeking declaratory and injunctive relief from federal and Iowa Controlled Substances Acts (CSAs) for his sacramental use of marijuana, district court properly dismissed plaintiff's federal Religious Freedom Restoration Act of 1993 (RFRA), *42 USCS § 2000bb,* claim on ground that collateral estoppel barred claim because pre-Smith compelling interest standard that was applicable in plaintiff's prior cases was same standard applicable to plaintiff's current claim under *42 USCS § 2000bb-1,* and there was no difference in controlling law. *Olsen v Mukasey (2008, CA8 Iowa) 541 F3d 827.*

Substantial evidence, as required by *16 USCS § 825l(b),* supported Federal Energy Regulatory Commission's finding that decision to relicense hydroelectric project built on waterfall considered sacred to Native American tribe did not substantially burden tribe's free exercise of religion in violation of *42 USCS § 2000bb* of Religious Freedom Restoration Act because tribe members would not lose government benefit or face criminal or civil sanctions for practicing their religion. *Snoqualmie Indian Tribe v FERC (2008, CA9) 545 F3d 1207.*

Inmate's claim that prison regulations restricting practice of "Nahuatli religion" are too severe must fail, where inmate is allowed to possess in cell headband, shell, medicine pouch, 7 sacred stones, feather, and other objects, and to have access to drums, pipes, tobacco, gourd, sage, sweetgrass, and cedar for worship, because restrictions are justified by compelling interest in prison security, and do not amount to substantial burden on inmate's religion but rather reflect substantial effort to meet religious needs of Native American inmates. *Diaz v Collins (1994, ED Tex) 872 F Supp 353,* affd (1997, CA5 Tex) *114 F3d 69* (criticized in *United States v Wilgus (2001, CA10 Utah) 2001 Colo J C A R 3976, 32 ELR 20031).*

Muslim inmates fail to make threshold showing of liability under either *42 USCS §§ 1983* or *2000bb*, where they complain about unfair treatment in comparison to accommodations made for religious practices of Christian inmates, but have been allowed to pray 5 times daily, to maintain weekly worship services, and even to have statewide meetings for their 2 major holidays, because inmates cannot show that any actions by corrections officials placed substantial burden on their exercise of fundamental tenets of their religion. *Woods v Evatt (1995, DC SC) 876 F Supp 756*, affd without op (1995, CA4 SC) *68 F3d 463*, reported in full (1995, CA4 SC) *1995 US App LEXIS 29657*.

Plaintiff's challenge to Florida Midwifery Practices Act under Free Exercise of Religion Clause is dismissed, where Act did not prohibit plaintiff from praying for others to have home childbirths or from sharing her belief that people should have home births, and where plaintiff did not allege that her ability to obtain midwifery license was conditioned on factor relevant to practice of her religion, because statute did not substantially burden her religious freedom. *Dickerson v Stuart (1995, MD Fla) 877 F Supp 1556*.

Inmate's claim against prison officials, alleging civil rights violation arising from his being prevented from attending services of Jewish congregation in prison, is denied summarily, where inmate was disruptive during congregational meetings and interfered with other inmates' rights of worship, because officials' actions served compelling interest in maintaining order and security at facility. *Best v Kelly (1995, WD NY) 879 F Supp 305* (criticized in *Francis v Keane (1995, SD NY) 888 F Supp 568, 66* CCH EPD P 43690).

Inmate did not establish that his exercise of religion had been burdened substantially by fact that prison authorities took from him, for 45-minute period, crown he was wearing because, as he asserted, it was teaching of Moorish Science faith of which he was adherent. *Turner-Bey v Lee (1996, DC Md) 935 F Supp 702*.

Corrections officer's claim under Religious Freedom Restoration Act (*42 USCS §§ 2000bb* et seq.) must fail, where he complains about shop fees being used to support union with which he is religiously and morally at odds due to its positions on abortion and death penalty, because it is solely union, acting privately, which encroaches upon officer's beliefs, and any government action alleged does not infringe upon his religious beliefs. *EEOC v AFSCME (1996, ND NY) 937 F Supp 166, 71 BNA FEP Cas 1151, 68* CCH EPD P 44236.

Regulation at state maximum security prison for men under which all prisoners were required to have their hair cut to prescribed length regardless of their objections or religious beliefs did not violate *42 USCS § 2000bb*, where regulation maintained state's interest in prison safety by making it harder for inmates to hide contraband and weapons in their hair and served health and safety concerns, and no reasonable, less-restrictive alternative to hair length regulation existed. *Abordo v Hawaii (1996, DC Hawaii) 938 F Supp 656*.

Parents' claim against school district under Religious Freedom Restoration Act (*42 USCS §§ 2000bb* et seq.) is dismissed as matter of law, where they provided no evidence that denial of daughter's desire to attend public school part-time amounts to being pressured to commit act forbidden by their religion or prevents them from engaging in conduct that their faith mandates, because they failed to establish prima facie free exercise claim. *Swanson by & Through Swanson v Guthrie Indep. Sch. Dist. No. I-1 (1996, WD Okla) 942 F Supp 511*, affd (1998, CA10 Okla) *135 F3d 694, 1998 Colo J C A R 725* (criticized in *Tenafly Eruv Ass'n v Borough of Tenafly (2002, CA3 NJ) 309 F3d 144)* and (criticized in *Leebaert v Harrington (2003, CA2 Conn) 332 F3d 134)*.

Participants in "full moon gatherings" have no viable claim against town under Religious Freedom Restoration Act (*42 USCS §§ 2000bb* et seq.), even though town passed "no parking" resolution requiring participants to park at least one-half mile from entrance to Magic Meadow and walk distance along road at night to reach gatherings, because, while resolution makes access to gatherings less convenient, it neither prevents full moon gatherers from practicing their religion nor significantly burdens their ability to do so. *Storm v Town of Woodstock (1996, ND NY) 944 F Supp 139*.

Defendant, who was gypsy, was not entitled to be released on bail pursuant to *42 USCS § 2000bb*, where defendant was held pending sentencing on charges arising from fraudulent scheme to which he pleaded guilty, and sought release to perform various religious practices in preparation for "black feast" in honor of his deceased mother, but he failed to show that his religious obligations decreased likelihood that he would flee court's jurisdiction if released on bail, and if court were to adopt his argument, he would be entitled to release at 6 months and at one year after his mother's death for him again to prepare for black feast. *United States v Marks (1996, ED Pa) 947 F Supp 858*.

Postal employee fails to carry his burden to establish prima facie case under Religious Freedom Restoration Act (*42 USCS §§ 2000bb* et seq.), where office employees elected Christian radio station to be played on public address system but, due to previous complaints, officials turned off office radio, because there is no evidence that decision to terminate playing Christian radio station imposes burden on employee's free exercise of his religion, especially since he is still

permitted to listen to radio station of his choice via headphones or other personal listening devices. *Gunning v Runyon (1998, SD Fla) 3 F Supp 2d 1423, 11 FLW Fed D 709.*

Government's subpoena directing Orthodox Jewish children to testify against their parent before federal grand jury did not violate children's rights under *42 USCS § 2000bb*, where government had compelling interest in investigating and successfully prosecuting illegal business ventures, and no less restrictive alternative existed for government to discover relevant information that children possessed from their unique position as parent's employees and children. *In re Three Children (1998, DC NJ) 24 F Supp 2d 389.*

Internal Revenue Service's revocation of church's tax exemption, in response to advertisement placed by church in national newspapers urging votes against candidate for president, did not violate Free Exercise Clause or *42 USCS § 2000bb*, since statute was neutral, applying to nonprofit organizations generally. *Branch Ministries, Inc. v Rossotti (1999, DC Dist Col) 40 F Supp 2d 15, 99-1 USTC P 50410, 83 AFTR 2d 1476*, affd (2000, App DC) *341 US App DC 166, 211 F3d 137, 2000-1 USTC P 50459, 85 AFTR 2d 1767.*

42 USCS § 2000bb did not mandate that federal government employees living abroad not be counted as residents of their home states just as missionaries of particular religious denomination who were stationed abroad were excluded from population of state for purposes of apportioning seats in House of Representatives pursuant to decennial census, where federal government employees were required to be outside country, and as employees were from all 50 states in roughly same proportion as population of each state compared to national population, goal of population apportionment was furthered. *Utah v Evans (2001, DC Utah) 143 F Supp 2d 1290*, affd without op *(2001) 534 US 1038, 151 L Ed 2d 535, 122 S Ct 612, 2001 CDOS 9858, 2001* Daily Journal DAR 12343.

Arrest of minister for unauthorized entry onto U.S military installation was not violation of *42 USCS § 2000bb*, where minister was able to attend religious services, pray, worship, or otherwise fulfill his duties and minister, and to continue advocating his church's positions. *United States v Acevedo-Delgado (2001, DC Puerto Rico) 167 F Supp 2d 477.*

Assuming that unincorporated association did engage in religious practice by delivering medical supplies to Iraq, court concluded that licensing requirement of 31 C.F.R. pt. 575 (1991) did not substantially burden such activities; therefore, it rejected association's defense under Religious Freedom Restoration Act, *42 USCS § 2000bb*. *Office of Foreign Assets Control v Voices in the Wilderness (2004, DC Dist Col) 329 F Supp 2d 71*, motion gr, judgment entered (2005, DC Dist Col) *382 F Supp 2d 54.*

To extent that plaintiffs' accusations referred to specific targeting of plaintiffs, qua non-liturgical Protestants who were applying for commissions in Navy Chaplain Corps, plaintiffs clearly did not plead neutral or generally applicable law or allow any reasonable inference thereof; instead they were attaching what they considered to be intentionally discriminatory policy and, therefore, court dismissed their claim under Religious Freedom Restoration Act, *42 USCS §§ 2000bb* et seq. *Larsen v USN (2004, DC Dist Col) 346 F Supp 2d 122.*

Criminal defendant facing charges under Bald and Golden Eagle Protection Act (BGEPA), *16 USCS § 668(a)*, challenged application of BGEPA pursuant to Religious Freedom Restoration Act (RFRA), *42 USCS §§ 2000bb* et seq.; although defendant had shown that BGEPA substantially burdened his ability to possess eagle feathers, he had not shown that his desire to possess feathers arose from sincere religious belief; furthermore, even if defendant had met his initial burden, U.S. had shown that BGEPA regulations furthered compelling government interest by least restrictive means. *United States v Winddancer (2006, MD Tenn) 435 F Supp 2d 687.*

Defendants who claimed belief in marijuana as deity and sacrament were not entitled to dismissal of indictment brought against them for possession of more than 50 kilograms of marijuana with intent to distribute in violation of Controlled Substances Act (CSA), violation of *21 USCS § 841*, and conspiracy to possess more than 100 kilograms with intent to distribute in violation of CSA, violation of *21 USCS § 846*, on basis that indictment burdened their exercise of religion under Religious Freedom Restoration Act because their beliefs were not religious and were not sincerely held; defendants could not claim that indictment substantially burdened their exercise of religion because court believed that (1) defendants' belief that "the purpose of life was to live good life and to help others" did not address fundamental questions or ultimate ideas, (2) defendants' belief that having good thoughts produced good words and good deeds did not constitute ethical or moral system, and (3) defendants' beliefs that were centered around marijuana did not constitute overreaching array of beliefs; further, defendants' behavior did not suggest religion because they (a) lacked founder, prophet, or teacher, (b) lacked gathering places, (c) lacked clergy, (d) lacked ceremonies and rituals, (e) lacked structure and organization, (f) lacked holidays, (g) did not engage in special diet or fasting, (h) did not prescribe special appear-

ance or clothing, and (i) did not proselytize; it did not suffice that defendants had sacred writings and metaphysical beliefs; additionally, founder of defendants' religion had been committed to marijuana use before he claimed it was sacrament. *United States v Quaintance (2006, DC NM) 471 F Supp 2d 1153*, app dismd (2008, CA10 NM) *523 F3d 1144*.

Unpublished Opinions

Unpublished: District court properly granted summary judgment to defendants, private corrections corporation and officials, in Muslim inmate's *42 USCS § 1983* action alleging that defendants violated Religious Freedom Restoration Act (RFRA), Religious Land Use and Institutionalized Persons Act (RLUIPA), and First, Fifth, and Fourteenth Amendments, by denying him special Halal meals, because (1) inmate's claims for injunctive and declaratory relief were moot because inmate was in federal custody and was no longer subject to corporation's policy; (2) inmate's First Amendment, RFRA, and RLUIPA claims all failed because he did not show that defendants placed "substantial burden" on his ability to practice his religion by failing to provide him with Halal meat; (3) vegetarian diet that was provided did not violate inmate's Eighth Amendment rights as he did not rebut defendants' evidence that meals were nutritionally adequate; and (4) defendants did not breach any contractual duty by failing to provide diet including *Halal meat. Pratt v Corr. Corp. of Am. (2008, CA8 Minn) 2008 US App LEXIS 4977*.

7. Preliminary injunction

Preliminary injunction is granted allowing church to feed homeless persons at its new location, even though zoning officials ruled that feeding program is prohibited use in new zone and requires variance, because church has demonstrated substantial likelihood of success on merits under Constitution and Religious Freedom Restoration Act of 1993 (*42 USCS §§ 2000bb* et seq.), and it seems to this court that blocking church's successful 10-year program to feed poor and homeless would peremptorily discontinue important social welfare and religious program, constituting irreparable injury. *Western Presbyterian Church v Board of Zoning Adjustment (1994, DC Dist Col) 849 F Supp 77*.

State prison inmates are entitled to preliminary injunction requiring department of corrections to return confiscated religious beads and to permit inmates to wear beads under their clothing during pendency of inmates' action challenging prison rule prohibiting wearing of certain religious beads, including those worn by plaintiffs, because inmates showed likelihood of success on their challenge that burden on plaintiffs' exercise of religion is not least restrictive means of furthering state's proffered compelling interest in stemming gang violence at prisons which is furthered by use of beads in prisons as gang membership identification symbols. *Campos v Coughlin (1994, SD NY) 854 F Supp 194*.

Parolee failed to demonstrate likelihood of success on merits of claim that parole conditions violated *42 USCS § 2000bb*, as required for preliminary injunction against enforcement of conditions as to parolee who was leader of recognized religion, where underlying conviction established that parolee/leader used religion as means of exhorting his followers to commit racketeering acts, and that leader ordered followers to commit numerous murders, so that conditions prohibiting leader from worshiping, meeting, or communicating with followers without prior written consent of parole officer advanced compelling government interest by least restrictive means of protecting such interest. *Yahweh v United States Parole Comm'n (2001, SD Fla) 158 F Supp 2d 1332, 14 FLW Fed D 526* (criticized in *Kiderlen v Blunt (2006, ED Mo) 2006 US Dist LEXIS 12431)* and injunction den, motion den (2006, SD Fla) *428 F Supp 2d 1293, 19 FLW Fed D 607* and (criticized in *Cordell v Tilton (2007, SD Cal) 515 F Supp 2d 1114)*.

2009 REVISED EDITION

FEDERAL CIVIL JUDICIAL PROCEDURE and RULES

Rule amendments received to June 11, 2009
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Rule 10. Form of Pleadings

(a) **Caption; Names of Parties.** Every pleading must have a caption with the court's name, a title, a file number, and a Rule 7(a) designation. The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.

(b) **Paragraphs; Separate Statements.** A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—must be stated in a separate count or defense.

(c) **Adoption by Reference; Exhibits.** A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.

(Amended April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

1937 Adoption

The first sentence is derived in part from the opening statement of former Equity Rule 25 (Bill of Complaint—Contents). The remainder of the rule is an expansion in conformity with usual state provisions. For numbered paragraphs and separate statements, see Conn.Gen.Stat., 1930, § 5513; Smith-Hurd Ill.Stats. ch. 110, § 157(2); N.Y.R.C.P., (1937) Rule 90. For incorporation by reference, see N.Y.R.C.P., (1937) Rule 90. For written instruments as exhibits, see Smith-Hurd Ill.Stats. ch. 110, § 160.

2007 Amendment

The language of Rule 10 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

(a) **Signature.** Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) **Representations to the Court.** By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) **Sanctions.**

(1) ***In General.*** If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) ***Motion for Sanctions.*** A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) ***On the Court's Initiative.*** On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically

FEDERAL RULES OF APPELLATE PROCEDURE

NINTH CIRCUIT RULES

CIRCUIT ADVISORY COMMITTEE NOTES

December 1, 2009

CIRCUIT RULE 28-2. CONTENTS OF BRIEFS

In addition to the requirements of FRAP 28, briefs shall comply with the following rules:

28-2.1. Certificate as to Interested Parties *[Abrogated 7/1/90]*

28-2.2. Statement of Jurisdiction

In a statement preceding the statement of the case in its initial brief, each party shall demonstrate the jurisdiction of the district court or agency and of this Court by stating, in the following order:

(a) The statutory basis of subject matter jurisdiction of the district court or agency;

(b) The basis for claiming that the judgment or order appealed from is final or otherwise appealable, and the statutory basis of jurisdiction of this Court. *(Rev. 12/1/09)*

(c) The date of entry of the judgment or order appealed from; the date of filing of the notice of appeal or petition for review; and the statute or rule under which it is claimed the appeal is timely.

If the appellee agrees with appellant's statement of one or more of the foregoing matters, it will be sufficient for the appellee to state such agreement under an appropriate heading.

28-2.3. Attorneys Fees *[Abrogated 7/1/97]*

28-2.4. Bail / Detention Status

(a) The opening brief in a criminal appeal shall contain a statement as to the bail status of the defendant. If the defendant is in custody, the projected release date should be included.

(b) The opening brief in a petition for review of a decision of the Board of Immigration Appeals shall state whether petitioner (1) is detained in the custody of the Department of Homeland Security or at liberty and/or (2) has moved the Board of Immigration Appeals to reopen or applied to the district director for an adjustment of status. *(New 1/1/05; Rev. 12/1/09)*

28-2.5.-Reviewability and Standard of Review

As to each issue, appellant shall state where in the record on appeal the issue was raised and ruled on and identify the applicable standard of review.

In addition, if a ruling complained of on appeal is one to which a party must have objected at trial to preserve a right of review, e.g., a failure to admit or to exclude evidence or the giving of or refusal to give a jury instruction, the party shall state where in the record on appeal the objection and ruling are set forth. *(Rev. 12/1/09)*

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2010, a copy of the foregoing Brief of Plaintiffs-Appellees was served by email in PDF format upon the following counsel:

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An electronic copy of the brief will be filed through the Court's ECF system on January 19, 2010, when the current system outage is scheduled to end.

/s/Jonathan M. Freiman
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