11-6480

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ESTELA LEBRON, for herself and as Mother and Next Friend of Jose Padilla; JOSE PADILLA,

Plaintiffs–Appellants,

v.

DONALD H. RUMSFELD, Former Secretary of Defense; CATHERINE T. HANFT, Former Commander Consolidated Brig; MELANIE A. MARR, Former Commander Consolidated Brig; LOWELL E. JACOBY, Vice Admiral, Former Director Defense Intelligence Agency; PAUL WOLFOWITZ, Former Deputy Secretary of Defense; WILLIAM HAYNES, Former General Counsel Department of Defense; ROBERT M. GATES, Secretary of Defense in his official and individual capacities,

Defendants–Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Brief of Plaintiffs–Appellants

Ben Wizner
Alexander A. Abdo
American Civil Liberties Union Foundation
125 Broad St., 18th Floor
New York, NY 10004
(212) 519-7860

Jonathan Freiman
Hope R. Metcalf
Tahlia Townsend
National Litigation Project
Allard K. Lowenstein International Human Rights Clinic
Yale Law School
P.O. Box 208215
New Haven, CT 06520
(203) 498-4584

Michael P. O'Connell
Stirling & O'Connell, PA
P.O. Box 882
Charleston, SC 29402
(843) 577-9890

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each corporate Appellant certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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Jurisdictional Statement

The district court had jurisdiction pursuant to 28 U.S.C. § 1331, 42 U.S.C. § 2000bb, 5 U.S.C. § 702, and the Constitution, as interpreted by *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). JA-68–69 (3d Am. Compl. ("3AC") ¶ 10). On February 18, 2011, the district court entered final judgment. JA-1538. Plaintiffs filed a timely notice of appeal on April 5, 2011. JA-1539. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

Issues Presented for Review

The issues presented by this appeal are:

(1) Whether "special factors" preclude a *Bivens* remedy for the unconstitutional seizure, detention, abuse, and torture of a U.S. citizen on U.S. soil.

(2) Whether U.S. officials have qualified immunity against claims that they unconstitutionally and unlawfully seized, detained, abused, and tortured a U.S. citizen on U.S. soil.

(3) Whether the district court erred in holding that Plaintiffs lack standing to contest Jose Padilla's ongoing designation as an "enemy combatant."

Statement of the Case

Jose Padilla and his mother, Estela Lebron, filed this action against former Secretary of Defense Donald H. Rumsfeld and other government officials seeking monetary, injunctive, and declaratory relief for Padilla's unlawful designation as

an "enemy combatant," seizure, and subsequent abuse and torture. Padilla and Lebron alleged violations of the First, Fourth, Fifth, Sixth, and Eighth Amendments, of Article III, of the Habeas Suspension and Treason Clauses, and of the Religious Freedom Restoration Act. Defendants moved to dismiss the action, principally contending that "special factors" counseled against allowing Padilla a *Bivens* remedy for his seizure and abuse, and that they were entitled to qualified immunity. The district court held oral argument on Defendants' motions on February 14, 2011. Three days later, it granted the motions to dismiss. This appeal followed.

Statement of Facts

Jose Padilla is an American citizen. JA-69 (3AC ¶ 12). He is not, and never has been, an enemy combatant. JA-78 (3AC ¶ 44). On June 9, 2002, Padilla was detained in a civilian jail in New York as a material witness. JA-76 (3AC ¶ 35). Court-appointed counsel moved to vacate the material witness warrant, but two days before the motion could be heard, the government, without presenting evidence to any judicial officer, declared Padilla an "enemy combatant," seized him from the civilian jail, and transported him to the Consolidated Naval Brig in Charleston, South Carolina ("the Brig"). JA-66, 76–78 (3AC ¶¶ 2, 36–43).

It would be almost two years before anyone beyond the Brig's doors heard from Padilla again. JA-91 (3AC ¶ 82). Padilla was placed in solitary confinement

and held completely incommunicado, permitted no contact with counsel, courts, or family for almost two years—aside from a single short message to his mother, Estela Lebron, after ten months informing her that he was alive. JA-91, 93 (3AC ¶¶ 82, 91). 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. JA-93 (3AC ¶ 90). Night and day merged—the windows blackened, artificial light glaring frequently and at any hour, no way of reckoning time—so that Padilla did not know even how to fulfill his religious obligation to pray five times a day. JA-90, 93–95 (3AC ¶¶ 94–95, 81b–c, 98, 100). Removal from his cell meant additional sensory deprivation, with black-out goggles and sound-blocking earphones. JA-93–94 (3AC ¶ 94). All outside information—papers, radio, television—was prohibited, and even his Koran was confiscated. JA-94 (3AC ¶¶ 96, 99). Padilla was denied a mattress, blanket, sheet, and pillow, and left with only a cold, steel slab. JA-91 (3AC ¶ 81p). Whatever sleep he could manage was "adjusted" by deliberate banging, constant artificial light, noxious odors, and extreme temperature variations. JA-90–91 (3AC ¶ 81o, c, m, q). Interrogators injected Padilla with substances represented to be truth serums, left him shackled for hours in "stress" positions, and threatened to kill him. JA-90, 95–96 (3AC ¶¶ 81g, i–k, 101–03).

Though his counsel could not communicate with him, she immediately petitioned for a writ of habeas corpus in the Southern District of New York. In response, the government asserted that any American citizen declared to be 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. Nevertheless, a mid-level advisor in the Department of Defense, Michael H. Mobbs, provided a short declaration. The declaration admitted that the government's "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. JA-116 (3AC Ex. 2 at 2 n.1).

Each of the six remaining individual-capacity defendants personally participated in Padilla's unlawful seizure, unlawful abuse, or both.[1] They are Donald H. Rumsfeld, former Secretary of Defense; William J. Haynes, former General Counsel to the Department of Defense; Paul Wolfowitz, former Deputy Secretary of Defense and the former head of Detainee Affairs; Vice Admiral Lowell E. Jacoby, former Director of the Defense Intelligence Agency; and

[1] On December 14, 2010, Plaintiffs voluntarily dismissed all claims against John Ashcroft, Mack D. Keen, Michael H. Mobbs, Dr. Craig Noble, Sandy Seymour, Stephanie Wright, and John Does 1–48. JA-27 (No. 236, Pls.' Notice of Voluntary Dismissal).

Catherine T. Hanft and Melanie A. Marr, former Commanders of the Brig. JA-69–72 (3AC ¶¶ 14–17, 22–23).

As the former Secretary of Defense, Rumsfeld directly oversaw the military's detention and interrogation of suspected "enemy combatants." Along with his high-level subordinates—Haynes, Wolfowitz, and Jacoby—Rumsfeld developed the unprecedented "enemy combatant" status to remove individuals from judicial review and other constitutional protections, including protections against brutal interrogation methods. JA-76 (3AC ¶ 36). Those methods—originally developed for use at Guantánamo Bay—were designed, approved, or ordered by Rumsfeld, Jacoby, Wolfowitz, and Haynes for use against suspected enemy combatants, including Padilla. JA-78–79, 84 (3AC ¶¶ 46, 56). Aiming to give interrogators free rein, Rumsfeld and Haynes directed Deputy Assistant Attorney General John Yoo to draft legal memoranda, purportedly on behalf of the Office of Legal Counsel ("OLC"), that would release the Executive from virtually any legal constraint. JA-79–83 (3AC ¶¶ 48–54). By so doing, they hoped to create a veneer of legality for the new detention and interrogation regime, with the aim of immunizing from prosecution those who designed or implemented it. *Id.*

Rumsfeld, Haynes, Jacoby, and Wolfowitz involved themselves in the details of the methods of interrogation, approving or designing an overall interrogation regime and the use of that regime against particular detainees. JA-

78–79, 84 (3AC ¶¶ 46, 56). The new interrogation techniques included forcing detainees into painful stress positions, use of isolation facilities, sensory deprivation (including deprivation of light and sound), hooding, and "sleep adjustment." JA-86–87 (3AC ¶ 69). These techniques were developed in consultation with the Office of the Secretary of Defense, JA-85 (3AC ¶ 64), and Rumsfeld personally approved Haynes' recommendations on December 2, 2002, despite warnings from the FBI that the new techniques could result in criminal liability for interrogators. JA-85–87 (3AC ¶¶ 65–69). Facing further internal criticism, Haynes and Rumsfeld rescinded the December 2, 2002 memo, only to ensure that many of the same techniques would be reapproved by a separate Working Group. JA-87–89, 97 (3AC ¶¶ 72–78, 107).

The approval of these harsh techniques for use at Guantánamo Bay led predictably to Padilla's abuse. JA-96–97 (3AC ¶ 105). Officials detaining Padilla were under orders to follow the standard operating procedures governing Guantánamo Bay, JA-97 (3AC ¶ 107), and, under the supervision of Marr and Hanft, JA-71–73, 89 (3AC ¶¶ 22–26, 80), Padilla was subjected to a systematic program of extreme interrogation strikingly similar to the program designed or approved by Rumsfeld, Haynes, Jacoby, and Wolfowitz, JA-89–90 (3AC ¶¶ 79, 81). Indeed, Rumsfeld and his high-level subordinates expressly authorized the harsh interrogation and abuse of Padilla. JA-96–97 (3AC ¶ 105).

During Padilla's years of incommunicado detention, his counsel litigated the habeas petition without client contact. Then-Chief Judge Mukasey of the Southern District of New York held that the 2001 Authorization for the Use of Military Force ("AUMF") permitted the detention without charge of citizens as enemy combatants, but held that Padilla had the right to counsel and to an opportunity to challenge the factual basis for his military detention. *Padilla v. Bush* (*Padilla I*), 233 F. Supp. 2d 564 (S.D.N.Y. 2002). 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* (*Padilla II*), 352 F.3d 695 (2d Cir. 2003).

The Supreme Court granted certiorari. Days before its merits brief was due (and nearly two years after seizing Padilla), the Executive announced it would permit Padilla limited access to attorneys. That access, however, was severely impaired. Attorney-client meetings were recorded with agents present and cameras on. JA-92, 112–13 (3AC ¶ 84, Ex. 1 at 3–4). Padilla was told not to trust his lawyers and warned against revealing his mistreatment. JA-92 (3AC ¶¶ 86–87).

When Padilla finally was able to meet with lawyers, his captors relaxed some of the harshest conditions of his confinement, lifting his sensory deprivation, returning his Koran, permitting limited access to information, and, over the next

two years, allowing three twenty-minute telephone calls and one visit from his mother. JA-93–94 (3AC ¶¶ 92, 99).

The Supreme Court heard argument in Padilla's case 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 he 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, however, holding that the petition should have been filed where Padilla was imprisoned, not where he had been seized. *Rumsfeld v. Padilla* (*Padilla III*), 542 U.S. 426, 451 (2004). 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.[2] *Id.* at 465, 464 n.8.

Days later, Padilla filed a habeas petition in the District of South Carolina. The Executive responded, alleging 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. (Before making this allegation, the Executive had alleged a "dirty bomb" plot and, when it abandoned that, a gas heat explosion plot.) With the pleadings closed, Padilla moved for summary judgment, arguing that even if the government's factual averments were true, his seizure and detention were unconstitutional. Like the Second Circuit before it, the district court agreed. *Padilla v. Hanft* (*Padilla IV*), 389 F. Supp. 2d 678, 690–91 (D.S.C. 2005).

The Fourth Circuit reversed the grant of summary judgment, concluding that the Executive could constitutionally detain citizens, even if seized in the United States, if they had actually carried arms for hostile forces on a foreign battlefield. It remanded for a hearing on the factual basis for the designation. *Padilla v. Hanft* (*Padilla V*), 423 F.3d 386 (4th Cir. 2005); *Padilla v. Hanft* (*Padilla VI*), 432 F.3d 582, 584 (4th Cir. 2005). Padilla petitioned for a writ of certiorari. Judge Luttig

[2] Taking the opinions in *Hamdi* and *Padilla III* together, it is clear that at least five of the justices considered the military detention of citizens seized in civilian settings in the United States to be unconstitutional, regardless of process: the four dissenters in *Padilla III* (who alone addressed the merits) and Justice Scalia, who dissented in *Hamdi* stating that citizens could never be militarily detained absent a suspension of habeas corpus. *Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting).

has 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 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 on appeal. Following Padilla's transfer, the Supreme Court denied certiorari.

Padilla v. Hanft (*Padilla VII*), 547 U.S. 1062 (2006). The district court did not issue a final judgment on the remanded question "whether Padilla had been properly designated an enemy combatant." *Padilla VI*, 432 F.3d at 584.

Several months later, Padilla filed this lawsuit, seeking monetary, injunctive, and declaratory relief for his unlawful designation, seizure, and abuse. JA-31–34 (Compl.). Padilla seeks one dollar in compensation from each of the individual-capacity defendants, an injunction against the current Secretary of Defense prohibiting his re-detention as an enemy combatant, and declaratory and other appropriate relief. JA-107 (3AC ¶ 139).

Defendants moved to dismiss Plaintiffs' lawsuit, contending that "special factors" counseled against allowing a *Bivens* remedy for Padilla, and, alternatively, that they were entitled to qualified immunity. The district court held oral argument on Defendants' motions on February 14, 2011. JA-1418–505. Three days later, it granted the motions to dismiss. JA-1506–38. This appeal followed. JA-1539.

Summary of the Argument

Jose Padilla is an American citizen who was seized by agents of the U.S. military from a civilian setting in the United States—a New York jail—and secretly transported to a military prison in South Carolina. Charged with no crime, he was imprisoned for years, prevented from talking with lawyers or even his mother. His captors used the abusive interrogation regime developed for detainees

at Guantánamo Bay, subjecting Padilla to vicious interrogations, chilling sensory deprivation, and total isolation. 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 brought this suit against the architects and implementers of his sufferings. They asserted the most classic of *Bivens* claims: illegal seizure, cruel and inhuman treatment, and unlawful imprisonment. During his nearly four years in severe isolation, Padilla suffered extreme abuse that is directly attributable to the detention and interrogation policies designed, approved, or implemented by Defendants. Under strict orders from the highest levels of government to comply with the interrogation regime developed for Guantánamo, officials at his military prison denied Padilla all human contact, deprived him of basic necessities such as a mattress or the Koran, forced him to endure extreme temperatures and continual disruption of his sleep, and disoriented him by flooding his cell with total light or darkness for days on end. Under the noses of prison officials and on orders from senior government officials, interrogators subjected Padilla to a set of abhorrent techniques, including forcing him into stress positions for hours on end, threatening him with torture and death, punching him, and administering drugs to him against his will. And when he

predictably and obviously broke down due to that mistreatment, Defendants denied him even basic medical care. In short, he was systematically subjected to a vicious program of interrogation that shocks the conscience.

In holding that "special factors" precluded any *Bivens* remedy for these gross abuses and that qualified immunity shielded Defendants from any liability, the district court effectively held that Defendants were above the law and Plaintiffs were beneath it. Both holdings require reversal.

Plaintiffs' claims are plainly cognizable under *Bivens*. Plaintiffs seek to hold individual federal officials accountable for grave deprivations of the most basic rights: the right to be free from torture and arbitrary punishment; the right to practice religion; and the right to seek judicial redress. The district court employed a fundamentally incorrect legal analysis in concluding that it must "hesitate" from adjudicating Plaintiffs' classic claims of unlawfulness. The court ignored clear evidence that Congress had not intended to foreclose a *Bivens* remedy in these circumstances, and it applied a test that would effectively eliminate *Bivens* in all circumstances. And the court invoked "special factors" that have never been recognized by the Supreme Court or this Court and that turn on speculative and case-specific concerns that have no place in a *Bivens* analysis and are properly addressed through qualified immunity or evidentiary privileges.

The district court did not dispute that Defendants, and all government officials, are squarely on notice that subjecting American citizens to conditions of confinement and interrogation techniques that amount to torture and cruelty is unconstitutional in all circumstances, and that wholly preventing a prisoner from practicing his religion constitutes a brazen violation of the Religious Freedom Restoration Act. Rather, the court held that a unilateral Executive Branch designation of a citizen as an "enemy combatant" works to unsettle clearly established judicial precedent governing treatment of prisoners. But changing a label does not change the law. Plaintiffs alleged that Defendants devised the unprecedented extra-judicial "enemy combatant" designation precisely to keep the courts at bay. By depriving Plaintiffs of any possibility of a remedy, the district court permitted Defendants to take shelter in the legal confusion they deliberately sought to create. In so holding, the court simply ignored the leading Supreme Court authority that makes clear 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).

Finally, the district court erred in holding that Padilla lacked standing to challenge his continuing designation as an "enemy combatant." That label—a modern-day scarlet letter—injures Padilla in two ways. First, it carries with it a continuing threat of military detention. After Padilla's transfer to civilian custody

for trial, the Deputy Solicitor General of the United States personally advised Padilla's counsel that Padilla remained an "enemy combatant" and could be detained once again by the military. That threat was not made moot by Padilla's criminal conviction. The government has neither rescinded Padilla's designation nor disclaimed its authority to detain him militarily if he prevails on his criminal appeal or when his criminal sentence concludes. To the contrary, it explained in 2008 that enemy combatants could still be detained after serving criminal sentences.

The government's designation of Padilla as an "enemy combatant" also injures him by stigmatizing him as a traitor. There is perhaps no greater governmental smear than to be labeled an enemy of the state. In rejecting this basis for standing, the district court ignored controlling law and conflated the degree of reputational harm necessary to demonstrate standing with the heightened showing required to establish a due-process liberty interest. It also sweepingly suggested that prisoners convicted of serious crimes have no reputation worth protecting. That is not the law.

The district court's dismissal of Plaintiffs' claims vindicated Defendants' deliberate attempt to circumvent binding legal authority by "designating" an American citizen as outside the protections of the law. The court insisted that the "most profound and sensitive issues of national security" rendered it improper for

an Article III judge, "sitting comfortably in a federal courthouse," to "assess whether the policy was wise." JA-1522. But it is emphatically the role of the judiciary to determine whether Defendants' conduct was *legal*, and claims of national security do not render it otherwise. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). "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). Defendants knowingly violated clearly established law—freedom's first principles—and their motion to dismiss should have been denied. If the law does not protect Jose Padilla—an American citizen arrested on American soil and tortured in an American prison—it protects no one.

ARGUMENT

I. The District Court Erred in Holding that "Special Factors" Preclude a *Bivens* Remedy.

In *Bivens v. Six Unknown Named 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 (1980) (*Bivens* claim for Eighth Amendment cruel and unusual punishment violation proper); *Davis v. Passman*, 442 U.S. 228 (1979) (*Bivens* claim for Fifth Amendment due process violation proper). *Bivens* has two

purposes. First, as Chief Justice Rehnquist explained in *Correctional Services Corp. v. Malesko*, "*Bivens* from its inception has been based … on the deterrence of individual officers who commit unconstitutional acts." 534 U.S. 61, 71 (2001). 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*, 472 U.S. at 524 (emphasis in original; quotations omitted) (rejecting argument that national security requires dismissal of *Bivens* suit against Attorney General for illegal wiretaps directed at suspected terrorists). Second, *Bivens* "provide[s] 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 (emphasis omitted). Only where "such circumstances are not present" has the Court "consistently rejected invitations to extend *Bivens*." *Id.*

The traditional circumstances for permitting *Bivens* relief are squarely presented by Plaintiffs' case. Plaintiffs seek to hold individual federal officers accountable for setting in motion grave deprivations of what the Supreme Court has called "freedom's first principles"—the "freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers." *Boumediene v. Bush*, 553 U.S. 723, 797 (2008). And there is no adequate alternative remedy. This case is thus in the heartland of *Bivens*.

But even if Plaintiffs' claims could be described as an extension, a *Bivens* remedy would be available. A court considering claims for an extension of *Bivens* asks first "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). If the court concludes that "[i]t would be hard to infer that Congress expected the Judiciary to stay its *Bivens* hand," the court then engages in the common-law process of "weighing reasons for and against the creation of a new cause of action," including the consideration of any "special factors counseling hesitation." *Id*. at 554, 550.

The Supreme Court and Fourth Circuit have together identified only three factors that justify denying a *Bivens* remedy: (1) congressional preclusion, whether expressly by creation of an alternative remedy, or implicitly through intentional omission of a damages remedy in an otherwise comprehensive regulatory scheme, *Schweiker v. Chilicky*, 487 U.S. 412, 421–23 (1988); (2) intrusion on "'the unique disciplinary structure of the Military Establishment and Congress' activity in the field,'" *United States v. Stanley*, 483 U.S. 669, 683 (1987) (quoting *Chappell v. Wallace*, 462 U.S. 296, 304 (1983)); and (3) "difficulty in defining a workable cause of action," *Wilkie*, 551 U.S. at 555. Those factors are not present here.

In holding to the contrary, the district court erred at every step of the *Bivens* analysis. The court held that Plaintiffs were without a cause of action under *Bivens*, because Plaintiffs' claims of arbitrary detention and inhumane interrogation would "by necessity entangle[] the Court in issues normally reserved for the Executive Branch, such as those issues related to national security and intelligence." JA-1522. This was "particularly true," the court elaborated, "where Congress, fully aware of the body of litigation arising out of the detention of persons following September 11, 2001, ha[d] not seen fit to fashion a statutory cause of action to provide for a remedy of money damages in these circumstances." *Id.*

But the district court's analysis turns the *Bivens* inquiry on its head. That Congress has not "fashion[ed] a cause of action" is not a "factor counseling hesitation" but rather a truism: in *every* special factors inquiry, it will *always* be the case that Congress has not legislated a cause of action. The district court's reasoning would overrule *Bivens* in the name of limiting its reach. Moreover, as set forth below, the district court wholly ignored that Congress has in fact quite recently spoken to these issues in a manner that makes plain that a *Bivens* remedy remains available here. Finally, the district court identified as "special factors" speculative "burdens" that Plaintiffs' litigation would purportedly impose on the Executive Branch, even though those putative burdens have never been recognized

as special factors by the Supreme Court or this Court and, to the extent they exist at all, are properly addressed through evidentiary privileges and immunity doctrines.

A. Congress has not precluded a *Bivens* remedy.

Under *Wilkie*, the first step in the *Bivens* analysis is to ask if an existing remedy adequately protects the constitutional interest. 551 U.S. at 550. It is beyond dispute that Padilla has no alternative means of redress for the illegal detention and interrogations that Defendants caused him to suffer; the district court did not hold otherwise. As in *Bivens*, "it is damages or nothing." 403 U.S. at 410 (Harlan, J., concurring). The question is thus whether Congress has implicitly precluded a damages remedy for these Plaintiffs through other means. In fact, the opposite is true.

Congress has expressly legislated to foreclose civil actions for *non-citizens* designated by the Executive as "enemy combatants," but it has never questioned the availability of such remedies for U.S. citizens. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36 (2006) ("[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)).[3] That Congress saw the need to eliminate causes of action relating to the treatment and conditions of confinement for enemy combatants demonstrates that it presumed the availability of such remedies; that Congress expressly limited the preclusion to *non-citizens* demonstrates that it did not intend to interfere with *Bivens* for citizens. *See Abuelhawa v. United States*, 129 S. Ct. 2102, 2106 (2009) (“we presume legislatures act with case law in mind”). Thus, contrary to the district court’s illogical formulation, the salient fact is not that Congress neglected to *create* a cause of action for U.S. citizen “enemy combatants” subjected to cruel and inhumane treatment, but that it neglected to *eliminate* such a cause of action, even as it did precisely that for other current and former detainees.[4]

B. No “special factors” counsel hesitation.

Having both misconstrued and misapplied the initial *Bivens* inquiry into congressional intent, the district court compounded its errors by holding that “special factors” precluded a *Bivens* remedy in these circumstances. The court adopted wholesale a laundry list of putative factors put forward by the Defendants, none of them recognized by the Supreme Court or this Court, “includ[ing] the

[3] *See also* Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2), 119 Stat. 2740, 2741–42 (2005).

[4] Remarkably, the district court failed even to acknowledge section 7 of the Military Commissions Act, even though Plaintiffs briefed this issue below and argued it prominently during the motion hearing. JA-1448–50.

potential impact of a *Bivens* claim on the Nation's military affairs, foreign affairs, intelligence, and national security, and the likely burden of such litigation on the government's resources in these essential areas." JA-1525. Indeed, while incorrectly insisting that the Plaintiffs were seeking to extend *Bivens* to previously unrecognized claims, the district court extended the special factors doctrine beyond its established reach and purpose.

The suggestion that Plaintiffs' claims might somehow intrude upon the functioning of the nation's military and intelligence agencies is both fanciful and, in the context of special factors analysis, immaterial. In a distinct circumstance not remotely applicable here, the Supreme Court has 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*, 462 U.S. at 304). That risk arises where a *servicemember* sues for "injuries that arise out of or are in the course of activity incident to service." *Id.* at 684 (quotations omitted).

Padilla is not a servicemember and is not subject to "the unique disciplinary structure" that *Stanley* and *Chappell* protect, so his suit does not disturb it. Where, as here, military officials have violated the rights of civilians, the courts have not hesitated to recognize *Bivens* claims. *See, e.g.*, *Dunbar Corp. v. Lindsey*, 905 F.2d 754, 761–62 (4th Cir. 1990) (recognizing *Bivens* claim by a civilian against

military officers for violation of due process rights). Moreover, unlike Padilla, servicemembers 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 [but that] authorizes recovery of significant consequential damages." *Schweiker*, 487 U.S. at 436 (citing *Chappell*, 462 U.S. at 302–03). Those distinctions are dispositive.

The district court appeared to rest its holding on a speculative assumption that litigation of Plaintiffs' claims would entail a "massive discovery assault" that "would require the devotion of massive governmental resources" and "would … distract the affected officials from their normal security and intelligence related duties." JA-1523. But there is no plausible basis for the contention that discovery in this civil suit would interfere with military or intelligence operations. Padilla was not captured on a foreign battlefield, he carried no arms when seized, and he was seized from the civilian justice system. The district court did not, because it could not, explain how a suit by an American citizen seized, imprisoned, and brutally interrogated in the United States nine years ago would divert military or intelligence officials from their current duties. It would not require haling

commanders into court from combat operations or require review of decisions made in battle or undercover operations abroad.[5]

Even more fundamentally, declining to recognize a cause of action on the ground that civil discovery might one day burden the Executive puts the cart before the horse. Courts have ample tools at their disposal to address discovery matters, including the possible disclosure of government secrets. The state secrets privilege, not *Bivens* "special factors," is the doctrine by which a district court considers allegations that a deposition or particular piece of evidence would reveal information damaging to national security. That 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 by an affidavit from the head of the relevant government department. *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953). The government has not intervened to assert the privilege, and no cabinet-level official has put his name and reputation behind an affidavit swearing that a

[5] For the same reason, the district court's unexplained holding that litigation of Plaintiffs' claims would interfere with the nation's "foreign affairs" is entirely without basis. This case involves claims about what American officials did to an American citizen in America. There is no credible foreign relations concern; the cases cited by the district court make that clear. *Sanchez-Espinoza v. Reagan* involved claims by Nicaraguans about activities that took place in Nicaragua, and the decision was expressly predicated on the fact that the plaintiffs alleged "unconstitutional treatment of foreign subjects causing injury abroad." 770 F.2d 202, 209 (D.C. Cir. 1985). *Arar v. Ashcroft* involved claims by a dual Syrian–Canadian citizen for torts inflicted by Syrian officials in Syria. 532 F.3d 157, 181–84 (2d Cir. 2008).

particular sort of information is secret and that national security would be undermined by its disclosure.[6] The government is free to do so when the case proceeds to discovery.

The district court stated that it considered "most helpful" two lower-court cases with materially distinguishable facts, JA-1523, even as it disregarded two lower-court cases with similar or identical facts, JA-1524–25. Both *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc), and *In re Iraq and Afghanistan Detainees*, 479 F. Supp. 2d 85 (D.D.C. 2007), involved constitutional claims by non-citizens concerning alleged abuses overseas, and the plaintiffs' non-citizenship and the location of the alleged abuses were crucial factors in the courts' denial of a *Bivens* remedy. *Arar* additionally involved the alleged cooperation of Canadian and Syrian officials; *In re Iraq and Afghanistan Detainees* additionally involved allegations about alleged misconduct in a war zone. This case, in stark contrast, involves the claims of an American citizen arising from brutal treatment on American soil, without any foreign nexus and far removed from any zone of combat. Prior to the district court's order, no case in any circuit had remotely

[6] The district court's speculation is also wrong on the facts. The Executive Branch itself has publicized, and permitted to be exposed in public court proceedings, the manner of Padilla's seizure and the role of various Executive branch officers. Moreover, the extreme interrogation methods have been exposed through, *inter alia*, declassified government reports, orders, and memoranda.

suggested that no cause of action existed for a U.S. citizen subjected to incommunicado detention and cruel treatment by government officials.

Indeed, in a suit brought by the same Plaintiffs alleging virtually identical claims, Judge Jeffrey S. White of the United States District Court for the Northern District of California rejected the argument that the challenged conduct—Padilla's unlawful detention and brutal treatment in South Carolina—implicated the Nation's military or intelligence functions, because "Padilla's allegations concern the possible constitutional trespass on a detained individual citizen's liberties where the detention was not a necessary removal from the battlefield." *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1028 (N.D. Cal. 2009). The court also rejected concerns about interference with foreign relations, emphasizing Padilla's status as an American citizen and that the challenged actions occurred within the borders of the United States. *Id.* at 1030 ("The treatment of an American citizen on American soil does not raise the same specter of issues relating to foreign relations…. The courts' concerns about the creation of remedies for foreign nationals and … intrusion into the affairs of foreign governments finds no application in the … case of allegations of unconstitutional treatment of an American citizen on American soil.").

Similarly, in *Vance v. Rumsfeld*, 694 F. Supp. 2d 957 (N.D. Ill. 2010), the district court held that a *Bivens* remedy was proper in the case of two U.S. citizens

who were allegedly seized, detained, interrogated, and tortured by U.S. military officials in Iraq. In *Vance*, as here, Secretary of Defense Rumsfeld and other Defendants urged the court to deny a *Bivens* remedy on the basis of three purported "special factors counseling hesitation": "separation of powers; misuse of the courts as a weapon to interfere with the war effort; and other serious adverse consequences for national defense." *Id*. at 973. The *Vance* court rejected those arguments, holding that a damages remedy for past abuse of United States citizens "does not require this court to govern the armed forces … [or] challenge the desirability of military control over core warmaking powers," even where the alleged abuse occurred while plaintiffs were detained by the U.S. military in an active theater of war. *Id*. at 973–74 (citing *Hamdi*, 542 U.S. at 532; *Yoo*, 633 F. Supp. 2d at 1031). This case, which involves claims by U.S. citizens against U.S. officials arising out of unlawful detention and interrogation far from any battlefield, is on even firmer ground.

In sum, a *Bivens* remedy is appropriate. Plaintiffs' constitutional tort claims are classic claims. Even if they were new, whether to provide a *Bivens* remedy would remain the "subject of judgment." *Wilkie*, 551 U.S. at 550. That judgment should be clear here. Defendants' brazen constitutional violations were the product of an overzealousness that Alexander Hamilton recognized as always dangerous, The Federalist No. 1 (Alexander Hamilton), and—as the Supreme

Court has stated—those whose positions put them at risk of "disregard[ing] constitutional rights in their zeal to protect the national security … '*should* be made to hesitate.'" *Mitchell*, 472 U.S. at 523–24 (emphasis in original) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)). Against that backdrop, Defendants' claims of special factors ring hollow: they amount to no more than another plea for the federal judiciary to avert its eyes from the terrible things that have been done in the Nation's name.[7]

II. Defendants Are Not Entitled to Qualified Immunity for the Violations of Plaintiffs' Constitutional and Statutory Rights.

In holding that Defendants were entitled to qualified immunity against all of Plaintiffs' claims—including claims of brutal confinement and torture—the district court did not address whether Defendants' alleged conduct violated the Constitution. There can be no question that it did: threats of death and other forms of mental and physical coercion are undoubtedly unconstitutional. *See, e.g.*,

[7] In a footnote, the district court suggested that, while Padilla would not be permitted to pursue his *Bivens* claims, it was "not as if the American judicial system ha[d] failed to afford him significant opportunities to vindicate his legal rights." JA-1525. In particular, Padilla "was allowed in his criminal proceeding to raise issues of his detention in support of his motion to dismiss the criminal charges [on the basis of outrageous government conduct]." *Id.* (citing *United States v. Padilla*, No. 04-cr-60001, 2007 WL 1079090 (S.D. Fla. Apr. 9, 2007)). What the district court declined to mention was that, in denying Padilla's motion to dismiss, the judge in his criminal case observed that a motion to dismiss the charges was not the appropriate venue for the litigation of Padilla's abuse claims; rather, "Padilla [was] free to institute a *Bivens* action, an action for monetary damages or any other form of redress that he is legally entitled to pursue." 2007 WL 1079090, at *5 n.10.

United States v. Abu Ali, 528 F.3d 210, 232 (4th Cir. 2008) ("the court properly recognized that 'torture, and evidence obtained thereby, have no place in the American system of justice'" (citation omitted)). Rather, the court held that "it was not clearly established at the time of [Padilla's] designation and detention that Padilla's treatment as an enemy combatant, including his interrogations, was a violation of law." JA-1531. Because "[n]o court had specifically and definitely addressed the rights of enemy combatants," JA-1530, the court held that Defendants were not on notice that subjecting Padilla to beatings; depriving him of sleep, heat and light; and threatening him with worse torture and death might violate the Constitution. By this extraordinary logic, Defendants could have beaten Padilla to death and faced no liability, because "no court" had "specifically addressed" the right of "enemy combatants" to be free from extrajudicial murder. In reaching this profoundly erroneous conclusion, the court did not even acknowledge—let alone attempt to distinguish—the most salient Supreme Court and Fourth Circuit authority cited by Plaintiffs.

In fact, each of Plaintiffs' claims states a clear—and clearly established—violation of the Constitution.

A. Padilla's extreme interrogations and punitive treatment shock the conscience.

1. Substantive due process barred coercive interrogation and detention for the purpose of interrogation.

The Fifth Amendment protects against coercive custodial interrogation that "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952). Padilla was interrogated for 21 months while subjected to sleep "adjustment" and sensory deprivation, forced into painful stress positions, denied the most basic necessities, denied any contact with his lawyers and mother, and even threatened with death. JA-90–91 (3AC ¶ 81).[8] Those methods are "too close to the rack and the screw," *Rochin*, 342 U.S. at 172, and the Supreme Court has repeatedly condemned as impermissibly coercive far less shocking conditions. *See, e.g.*, *Ashcraft v. Tennessee*, 322 U.S. 143, 152 n.8, 154 (1944) (36 hours of interrogation "inquisition[al]" and "inherently coercive"); *Darwin v. Connecticut*, 391 U.S. 346 (1968) (48 hours of incommunicado questioning); *Clewis v. Texas*, 386 U.S. 707 (1967) (arrest without probable cause and interrogation for nine days with little sleep); *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960) ("this Court has recognized that coercion can be mental as well as physical, and that the blood of

[8] Even if Padilla *were* an enemy combatant, which he is not, *see* JA-78 (3AC ¶ 44), "indefinite detention for the purpose of interrogation is not authorized." *Hamdi*, 542 U.S. at 521. And regardless of his status, Padilla's brutal interrogation was "intended to injure in some way unjustifiable by any government interest" and therefore shocks the conscience. *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998).

the accused is not the only hallmark of an unconstitutional inquisition"); *Beecher v. Alabama*, 389 U.S. 35, 36–38 (1967) (threat of death with a gun "inescapabl[y]" unconstitutional); *Ward v. Texas*, 316 U.S. 547, 555 (1942) (holding that moving a prisoner "by night and day to strange towns, telling him of threats of mob violence, and questioning him continuously" was unconstitutionally coercive); *see also Martinez v. City of Oxnard*, 337 F.3d 1091, 1092 (9th Cir. 2003).[9]

2. Substantive due process barred punishment without adjudication of guilt.

Punishment cannot lawfully occur "prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish*, 441 U.S. 520, 535 (1979); *Slade v. Hampton Rds. Regional Jail*, 407 F.3d 243, 250 (4th Cir. 2005). Padilla was condemned to nearly four years in the Brig without any adjudication of guilt and was 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, 322 (1982). As someone convicted of no

[9] *Chavez v. Martinez*, 538 U.S. 760 (2003), held that a self-incrimination clause violation occurs only if a coerced statement is used at trial, but it left intact the substantive due process protections against coercive interrogation and torture. *Id.* at 773 (plurality opinion) ("Our views on the proper scope of the … Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial; it simply means that the Fourteenth Amendment's Due Process Clause, rather than the Fifth Amendment's Self-Incrimination Clause, would govern the inquiry in those cases and provide relief in appropriate circumstances."); *see also id.* at 779 (Souter, J., concurring).

crime, Padilla's rights during his military detention were "*at least as great* as the eighth amendment protections available to the convicted prisoner." *Slade*, 407 F.3d at 250 (emphasis added).[10] Where the conditions of Padilla's confinement constituted cruel and unusual punishment measured by Eighth Amendment standards for convicted prisoners, they *a fortiori* constituted punishment in violation of his Fifth Amendment due process rights.

Padilla endured not just unlawful punishment, but cruel and unusual punishment: prolonged shackling in painful "stress positions," the introduction of noxious fumes into his cell, relentless periods of illumination and intentional interference with sleep through loud noise at all hours of the night. JA-90–94 (3AC ¶¶ 81, 90–96). To further his extreme psychiatric stress, Defendants also denied him necessary medical care. JA-95–96 (3AC ¶¶ 101–03).[11]

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[10] This prohibition applies with equal force here because the detention of supposed "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).

[11] *See, e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (punitive shackling); *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (prolonged isolation); *Iko v. Shreve*, 535 F.3d 225, 239–40 (4th Cir. 2008) (denying qualified immunity for correction officers who forcibly extracted prisoner from cell and excessively used pepper spray); *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977) (right to psychiatric treatment); *Dawson v. Kendrick*, 527 F. Supp. 1252, 1288 (S.D. W. Va. 1981) (recognizing inadequate lighting as Eighth Amendment violation when, absent valid penological goal, "it unnecessarily threatens the physical and mental well being of prisoners"); *Landman v. Royster*, 333 F. Supp. 621, 649 (E.D. Va. 1971) (treating noxious gas as corporal punishment); *Keenan v. Hall*, 83 F.3d 1083,

The conditions of Padilla's confinement were "so egregious, so outrageous, that [they] may fairly be said to shock the contemporary conscience." *Hawkins v. Freeman*, 195 F.3d 732, 738 (4th Cir. 1999) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)).[12] The conditions had no legitimate penological purpose and were intended only to intensify the coerciveness of the interrogations. JA-101 (3AC ¶¶ 122–123). They thus constituted unconstitutional punishment. *Turner v. Safley*, 482 U.S. 78, 89 (1987); *Slade*, 407 F.3d at 250; *Robles v. Prince George's County*, 302 F.3d 262, 269–70 (4th Cir. 2002) (detainee stated due process violation where officers tied him to metal pole in dark parking lot and left him for ten minutes because conduct was unrelated to legitimate penological purpose and mental and emotional injury suffered was more than *de minimis*).[13]

Military court decisions and relevant regulatory codes likewise make clear that the conditions imposed on Padilla were punitive and violated the Fifth Amendment. *See, e.g.*, *United States v. Fricke*, 53 M.J. 149 (C.A.A.F. 2000)

1090–91 (9th Cir. 1996), *partially amended and reh'g denied*, 135 F.3d 1318 (9th Cir. 1998) (noise and constant illumination unconstitutional).

[12] Even if any one condition did not constitute cruel and unusual punishment, together they did. *See Wilson v. Seiter*, 501 U.S. 294, 304–05 (1991); *Rhodes v. Chapman*, 452 U.S. 337, 362–63 (1981) (Brennan, J., concurring).

[13] Because Defendants chose to move to dismiss rather than answer the complaint, no non-punitive justification has been asserted. Nor would any be possible. Passive and docile as a "piece of furniture," Padilla never violated or was accused of violating any Brig rules. JA-101 (3AC ¶ 122).

(pretrial solitary confinement for 23 hours a day for 326 days); 10 U.S.C. § 813 (Uniform Code of Military Justice provision stating that "[n]o person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline").

3. Substantive due process mandated provision of basic necessities.

"[D]ue process also requires the State to provide pretrial detainees with some minimal level of food, living space, and medical care, and the failure to provide that level of necessities violates due process … [when it is] attended by deliberate indifference on the part of the defendants." *Hewlett v. Fox*, No. 4:07-cv-998, 2008 WL 2943257, at *7 (D.S.C. July 30, 2008) (quotations omitted); *accord DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 199–200 (1989). Here, Defendants took Padilla into custody but withheld the most basic necessities, including light, a mattress and blanket, exercise, and adequate psychological and medical care. JA-90–91, 93–96 (3AC ¶¶ 81, 90, 92–104). All Defendants were aware of these deprivations and the serious risks posed by them but failed to take any steps to remedy them, and their deliberate indifference

caused Padilla serious physical and psychological injury. JA-99–100, 101–02 (3AC ¶¶ 111–18, 122, 126, 128).

4. Substantive due process barred a state-created risk of danger.

In addition, "due process … require[s] a state to protect an individual from a danger created or enhanced by the state or its agents." *Sloane v. Kanawha County Sheriff Dep't*, 342 F. Supp. 2d 545, 549 (S.D. W. Va. 2004) (citing *DeShaney*, 489 U.S. at 201); *accord Waybright v. Frederick County*, 528 F.3d 199, 207 (4th Cir. 2008); *Pinder v. Johnson*, 54 F.3d 1169, 1176–77 (4th Cir. 1995). Defendants created such a danger by stripping Padilla of the most fundamental rights, locking him up incommunicado and at the mercy of interrogators whom Defendants had freed even of the minimum civilizing influence of the Fifth Amendment, denying him the most basic necessities of life, and refusing to act even in the face of obvious harm to Padilla. Through their affirmative actions, each Defendant "left [Padilla] in a situation that was more dangerous than the one in which [he] found him." *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1086 (9th Cir. 2000). Padilla "was a member of a limited and specifically definable group[,] … Defendants' conduct put [him] … at substantial risk of serious, immediate and proximate harm[,] … the risk was obvious or known[,] … Defendants acted recklessly in conscious disregard of that risk[,] … and [their] conduct, when viewed in total, is conscience shocking." *Armijo v. Wagon Mound Pub. Sch.*, 159

F.3d 1253, 1262–63 (10th Cir. 1998). In short, Defendants "may not disclaim liability when they themselves thr[e]w [Padilla] to the lions." *Pinder*, 54 F.3d at 1177.

B. Padilla's rights of access to courts and counsel were violated.

Access to courts is "the right conservative of all other rights." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). Grounded in the Due Process Clause, *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974), and the First Amendment right to petition the government, *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983), it encompasses the right to private and meaningful communication with one's attorney. *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). The right is violated not only when a plaintiff is unable to bring a claim, but when he is "hindered [in] his efforts to pursue a legal claim" or when a "nonfrivolous legal claim ha[s] been frustrated or [is] being impeded." *Lewis v. Casey*, 518 U.S. 343, 351, 353 (1996).

For nearly two years, Padilla was detained incommunicado with no access to counsel. JA-91 (3AC ¶ 82). After March 4, 2004, he was permitted extremely restricted access, with attorney-client conversations watched and recorded and all legal correspondence reviewed by government officials. JA-92 (3AC ¶¶ 84–86). The denial of access had no legitimate penological justification. *Cf. Turner*, 482

U.S. at 89. It was intended simply to keep the courts from discovering what was happening behind closed doors. Access to courts is meant as a shield against exactly such abuses. *See Johnson v. Avery*, 393 U.S. 483, 485–86 (1969). Unable to tell his attorneys what was happening to him or to rebut the Executive's factual assertions, Padilla was hindered from bringing his claims. *Christopher v. Harbury*, 536 U.S. 403, 415 (2002); *see also Al Odah v. United States*, 346 F. Supp. 2d 1, 8 (D.D.C. 2004); *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 21–22 (D.D.C. 2005).

Even a citizen enemy combatant seized on a foreign battlefield "unquestionably has the right to access to counsel." *Hamdi*, 542 U.S. at 539. Access to counsel undergirds both due process and the right to petition the courts. *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963). It extends beyond the Sixth Amendment right to criminal counsel to any case where the "interest in personal freedom" is at stake. *Lassiter v. Dep't Soc. Servs.*, 452 U.S. 18, 25 (1981). Denying Padilla *any* access to counsel for nearly two years violated this guarantee.

C. Plaintiffs' First Amendment rights to free exercise of religion, to information and to association were violated.

Detainees "do not forfeit all constitutional protections by reason of their … confinement in prison." *Bell*, 441 U.S. at 545. They "clearly retain protections afforded by the First Amendment," *O'Lone v. Shabazz*, 482 U.S. 342, 348 (1987), including the "directive that no law shall prohibit the free exercise of religion," *id.*, the right to information, *Kirby v. Blackledge*, 530 F.2d 583 (4th Cir. 1976) (right to

reading materials); *Brown v. Peyton*, 437 F.2d 1228 (4th Cir. 1971) (right to possess religious books), and the right to visitation with family members, *see Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) (declining to hold that the "right to intimate association is altogether terminated by incarceration"). Restrictions on these rights of detainees are permissible only when "reasonably related to legitimate penological interests and … not an exaggerated response to such objectives." *Beard v. Banks*, 548 U.S. 521, 528 (2006) (quotations omitted); *see generally Turner*, 482 U.S. at 89–91.

Padilla was deprived of all religious rights (no Koran; denial of knowledge of date and time necessary for time-based prayer; denial of knowledge of direction of Mecca), rights to information (no newspapers, books, radio or television), and rights to intimate association (detained incommunicado) for nearly two years. JA-94–95 (3AC ¶¶ 98–100). These deprivations were inflicted for the *per se* illegitimate purpose of coercive interrogation. The deprivations were nearly total, extremely prolonged, and left Plaintiffs no alternate means of vindicating their rights. *See Turner*, 482 U.S. at 90.

D. Designation, seizure, and detention were unconstitutional.

1. The Fourth Amendment prohibited Padilla's seizure as an "enemy combatant."

The Fourth Amendment broadly protects all Americans on U.S. soil against unreasonable searches and seizures. *United States v. Verdugo-Urquidez*, 494 U.S.

259, 266 (1990). The prohibition applies regardless of governmental purpose, *Soldal v. Cook County*, 506 U.S. 56, 69 (1992), including national security. *United States v. U.S. Dist. Court*, 407 U.S. 297, 316–17 (1972).

No seizure is reasonable under the Fourth Amendment unless there is a "fair and reliable determination of probable cause … made by a judicial officer either before or promptly after" the seizure. *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975); *see also County of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991) (presumption that judicial determination not "prompt" after 48 hours). Here, Padilla was secured in a civilian jail when seized by military agents—so there was no excuse for a warrantless seizure. *Gerstein*, 420 U.S. at 113–14 ("Once the suspect is in custody … the reasons that justify dispensing with the magistrate's neutral judgment evaporate."). In any event, there was never any judicial determination of probable cause after the seizure, let alone a "prompt" determination.

2. The Fifth Amendment barred military detention of citizen seized in America.

In *Padilla V*, this Court held as a matter of law that the Executive could constitutionally detain citizens—even citizens seized in civilian settings in the United States—if they had carried arms for hostile forces on a foreign battlefield. 423 F.3d at 389. The question before the Court was whether the Executive could detain Padilla, *assuming the facts alleged by the Executive were true*. *Padilla V*,

423 F.3d at 390 n.1. Those allegations are not present here. The facts alleged in the complaint differ radically from those allegations, *see* JA-78 (3AC ¶ 44), and this Court must presume the facts alleged in the Complaint to be true. And it is undisputed that there is no legal authority for the detention without charge of a U.S. citizen seized in a civilian setting in the U.S. who is *not* an enemy combatant. *See id.*

3. The Fifth Amendment barred continued detention without due process.

Even if authority to detain Padilla existed, "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi*, 542 U.S. at 533. Padilla received no process at all. *See id.* at 537–38 (finding that unspecified "screening" processes and military interrogations do not provide sufficient process).

E. The constitutional violations were clearly established.

Defendants did not dispute, and the district court did not hold otherwise, that in 2002 it was clearly established that military agents could not enter a civilian jail, seize a man from the civilian justice system, transport him to a military prison, detain him there indefinitely without criminal charge or conviction, deprive him of contact with attorneys or family (indeed, anyone but his captors), take from him his

ability to fulfill the minimum requirements of his religion, and subject him to a program of extreme interrogations, sensory deprivation, and punishment. Defendants contended, and the court held, only that it was not clearly established whether a man lost all these rights as soon as the Executive unilaterally labeled him an "enemy combatant." In other words, the district court held that the very actions for which Defendants were called to account—the creation and implementation of the "enemy combatant" detention and interrogation program—gave them immunity for those actions.

To reach this astonishing conclusion, the district court conspicuously ignored the leading Supreme Court and circuit authority that makes clear that new facts do not unsettle clear law. As the Supreme Court has held, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741 (holding that "clearly established" test does not require that facts be "fundamentally similar" or "materially similar" to an earlier decided case). "'Clearly established' … includes not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle invoked." *Pritchett v. Alford*, 973 F.2d 307, 314 (4th Cir. 1992). The rights that Plaintiffs seek to enforce—including the right to be free from torture, the right to access the courts and counsel, the right to the free exercise of religion—are well-settled in any context, including for all

manner of incarcerated individuals. *Compare* JA-90–91 (3AC ¶ 81) (detailing allegations of prolonged shackling, stress positions, death threats, sensory deprivation, administration of drugs and noxious fumes, exposure to extreme temperatures, and sleep deprivation), *with Hope*, 536 U.S. at 738 (denying qualified immunity for state prison officials who forced plaintiff prisoner into "restricted position of confinement for a 7 hour period," which involved "exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation"). Thus, Defendants had more than "fair warning" that the Constitution barred their actions, *Hope*, 536 U.S. at 741, and their unprecedented efforts to place Padilla outside the Constitution cannot now shield them from accountability.

The district court's holding of factual novelty rests on calling Padilla an "enemy combatant," an assertion at variance with the pleadings. But even if the context were "suspected enemy combatant," it would not avail Defendants. The fact that a new type of detainee classification has come into being does not mean that minimum protections for detainees are not clearly established. In *Hydrick v. Hunter*, the Ninth Circuit found the law to be clearly established for a new type of detainees, statutorily-defined "sexually violent predators" ("SVPs"). 500 F.3d 978 (9th Cir. 2007), *vacated on other grounds*, 129 S. Ct. 2431 (2009). Even though "the law applicable to SVPs [was] still evolving," it was still true that "the rights

afforded [convicted] prisoners set a floor for those that must be afforded SVPs." *Id.* at 989. *Hydrick* held that the rights of this new class of detainees were clearly established "where the SVPs claim a violation of a right that is clearly established *even in the prison context*, and second, where the SVPs claim a violation of a right that is clearly established *for all civilly detained persons*." *Id.* at 990 (emphasis added). That it was not clear exactly how far SVPs' rights extended did not matter: "It may not be clear exactly what due process rights are to be afforded SVPs, but surely it is clear that certain actions … transgress the boundary. Surely it would not require 'law training' or clairvoyance to recognize that these actions, as alleged by the Plaintiffs, do not comport with due process." *Id.* at 990 n.8 (internal punctuation omitted).

Hamdi and *Padilla V*, which hold that detention of U.S. citizens as enemy combatants is permissible in certain circumstances, are not to the contrary. Neither deals with the bulk of the brutal practices alleged here; indeed, *ten* of the eleven claims for relief do not turn on the propriety of Padilla's enemy combatant designation. If anything, *Hamdi* makes plain that minimum due process standards were clearly established. *See* 542 U.S. at 521 ("Certainly … indefinite detention for the purpose of interrogation is not authorized."); *id.* at 531 ("reaffirm[ing] … 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 536 (noting that Court

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" (emphasis added)); *id.* at 538 ("*Plainly*, the 'process' Hamdi has received is not that to which he is entitled under the Due Process Clause." (emphasis added)).[14]

Notwithstanding *Hamdi*, the district court maintained that "a final judicial resolution of the legal rights of enemy combatants would require a 'sophisticated balancing of interests' of the detainee's asserted rights and the government's profound interests in national security and avoiding future terrorist attacks." JA-1531. But there is no support for the contention that absolute rights—like the substantive due process right against brutal interrogation and other abuses that "shock the conscience," or the Fourth Amendment right to prompt judicial determination of probable cause for a seizure—are subject to balancing. Moreover, "conduct may be so 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). As the Supreme Court has made clear, certain governmental actions are self-evidently unconstitutional: "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

[14] 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.

from damages ….” *United States v. Lanier*, 520 U.S. 259, 271 (1997) (citations and quotations omitted). In those cases, “[t]he absence of ‘a prior case directly on all fours’ … speaks not to the unsettledness of the law, but to the brashness of the conduct.” *Bellotte v. Edwards*, 629 F.3d 415, 424 (4th Cir. 2011). Some actions are clearly beyond any limits. That is precisely the case here, where Defendants subjected Padilla to an unprecedented interrogation regime that exceeded all bounds of constitutionally permissible conduct. If Defendants can escape liability merely by fashioning a previously nonexistent label and affixing it to a victim of brutal abuses, nothing will prevent future government officials from claiming shelter in a newer label.[15] That is not the law.

F. Defendants were not entitled to qualified immunity for their violations of RFRA.

The district court concluded that, “because the legal status of persons designated as enemy combatants was in a state of legal uncertainty,” JA-1532, Defendants were entitled to qualified immunity with respect to Plaintiffs’ claims under the Religious Freedom Restoration Act. As with Plaintiffs’ constitutional claims, the court erroneously permitted Defendants to take shelter in the “legal uncertainty” that they had deliberately sought to create.

[15] This concern is not merely hypothetical. Since September 11, 2001, the government has used at least four different definitions of “enemy combatant.” *See, e.g.*, *Gherebi v. Obama*, 609 F. Supp. 2d 43, 46–47, 52–53 (D.D.C. 2009) (describing four executive definitions of “enemy combatant” from 2001, 2002, 2004, and 2009).

RFRA prohibits substantial burdens on the exercise of religion except where those burdens are the least restrictive means of furthering a compelling governmental interest. The district court maintained that the "balancing of interests" compelled by RFRA's strict scrutiny test was "the very type of discretionary decision making that prevents a finding of 'clearly established' federal law on the issue." JA-1533. This was obviously wrong. By the court's reasoning, government officials would be protected by qualified immunity from *any* constitutional claim involving the application of strict scrutiny, because it is *always* the case that those claims require the "balancing" of asserted compelling interests against claimed deprivations of rights. Moreover, whatever allegedly compelling interests the district court had in mind (*e.g.*, "obtaining control over a critical subject during … interrogation," *id.*, or "sustained interrogation over multiple hours to obtain critical information," *id.*), it is hard to imagine how those interests were furthered by the total deprivation of a citizen's religious rights—let alone how that deprivation could conceivably constitute the "least restrictive means of furthering" those interests. *Id.*; *Lovelace v. Lee*, 472 F.3d 174 (4th Cir. 2006) (denying qualified immunity where prison officials denied prisoner opportunity to fast during Ramadan); *Taylor v. Cox*, 912 F. Supp. 140, 145 (E.D. Pa. 1995) (holding that the seizure of a Koran stated a valid claim under RFRA).

III. Padilla Has Standing to Challenge His Continuing Designation as an "Enemy Combatant."

Standing requires three things: "(1) … an actual or threatened injury that is concrete, particularized, and not conjectural; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable decision." *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 99 (4th Cir. 2011). In holding that Padilla lacks standing to seek a declaration that the enemy combatant designation is invalid and an injunction against re-detention by the military, the district court relied entirely on the first prong of the standing test, concluding that Padilla failed to allege any concrete and particularized injury from the unrescinded designation. *See* JA-1534–35.[16] In fact, Padilla suffers at least two continuing injuries-in-fact from the designation: an objectively reasonable fear of military detention and the severe stigma of being branded a traitor. Accordingly, Padilla "has a sufficient personal stake in the [validity of the designation] to render judicial resolution of it appropriate." *Emery v. Roanoke City Sch. Bd.*, 432 F.3d 294, 298 (4th Cir. 2005) (quotations omitted). The district court's judgment must therefore be reversed.

[16] Defendant Gates has never disputed that the designation is fairly traceable to him in his official capacity or that a declaration that the designation is unconstitutional would redress Padilla's harms.

A. Padilla has standing to challenge the designation because it subjects him to a continuing threat of military detention.

In November 2005, on the eve of Supreme Court review of the legal authority for Padilla's military detention and district court review of its factual predicates, the Executive suddenly transferred Padilla to civilian custody to stand trial "for alleged offenses considerably different from, and less serious than, those acts for which the government had militarily detained Padilla." *Padilla VI*, 432 F.3d at 584. Despite that decision, the Executive did not rescind the enemy combatant designation nor renounce its claim of authority to detain Padilla militarily until the end of hostilities with Al Qaida. To the contrary, *after* the transfer order issued, the Deputy Solicitor General instructed Padilla's counsel that the designation had *not* been terminated and that the military could therefore detain Padilla at any time. *See* JA-33, 102 (Compl. ¶ 6, 3AC ¶ 127).

When Padilla filed this suit in February 2007, that threat had not been rescinded, a criminal conviction was far from guaranteed, and it was perfectly plain that if he were acquitted, executive policy would authorize immediate military re-detention until the end of hostilities with Al Qaida. At that time, therefore, there can be no doubt that Padilla faced a reasonable fear of re-detention and had standing to challenge the designation that created it. *See, e.g.*, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (en banc) ("Threats or increased risk … constitutes cognizable harm.").

Indeed, Defendant Gates conceded as much, limiting his argument against standing to the proposition that the threat of a return to military custody "disappeared *upon* [Padilla's] conviction." JA-21, No. 139 (Gates Mot. Dismiss 5 (emphasis added)). The district court apparently agreed, focusing its inquiry on the effect of Padilla's August 2007 conviction on unrelated charges, and the 17-year sentence he received for that conviction in January 2008, and concluding that these events prevented Padilla from establishing a concrete and imminent threat of re-detention. JA-1534–35. That was error.

Standing is assessed as of the time of filing. *Davis v. FEC*, 554 U.S. 724, 734 (2008). Padilla's claims for declaratory and injunctive relief against Defendant Gates were filed in February 2007, many months before the conviction and sentencing upon which the district court relied.[17] Events occurring after filing go to mootness, not injury-in-fact. Dismissal for mootness is "justified only if it

[17] The district court declined to consider the February 2007 claims on the grounds that the complaint did not name Gates in his official capacity. That was also error. The original complaint named Gates as a defendant and requested declaratory and injunctive relief. Under the liberal pleading standards of the Federal Rules, no more was required for the claims against Gates in his official capacity to be considered filed. *Cf. Francis v. Woody*, No. 3:09-cv-235, 2009 WL 2371509, at *4–9 (E.D. Va. July 31, 2009) (claims against officials in their individual capacities relate back to individual capacity claims for purposes of determining whether the claim was filed before the statute of limitations under Federal Rule of Civil Procedure 15). Moreover, the 17-year sentence upon which the district court placed so much weight was not imposed until January 22, 2008, after Plaintiffs sought leave to file the Second Amended Complaint clarifying that Defendant Gates was sued in his official capacity. *See* JA-15, No. 63.

[is] *absolutely clear* that the litigant no longer ha[s] any need of the judicial protection that it sought." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (quotations omitted) (emphasis added). Moreover, the burden of establishing that judicial protection is unnecessary lies on the party asserting mootness. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Accordingly, the district court was entitled to dismiss the claims only if Defendant Gates could show that the conviction and sentence entirely foreclosed military detention on the basis of the existing designation.

Defendant Gates did not, and could not, make such a showing. The Executive claims the authority to detain enemy combatants until the end of hostilities, *including after acquittal or at the termination of civilian imprisonment.* As the Pentagon publicly announced in connection with the trial of alleged enemy combatant Salim Hamdan, "'[h]e will serve his time for the conviction and then he will still be an enemy combatant, and as an enemy combatant the process for potential transfer or release will apply.'" Josh White, *Plea Deal for Hamdan Had Been Discussed*, Wash. Post, Aug. 10, 2008, at A03. Defendant Gates has never disavowed these public statements of Executive authority. Padilla's conviction is on appeal, and there is a real possibility that his conviction could be overturned. Moreover, even if he loses his appeal, Padilla has already served several years of his sentence and, with credit for time served pending trial and good time credit,

may be released in as few as eight years. Accordingly, the conviction and sentence do not make "*absolutely clear* that [Padilla] no longer ha[s] any need of the judicial protection" that he seeks, *Adarand*, 528 U.S. at 224 (emphasis added), and his claims are not moot.[18]

The district court's failure to consider the claims against Gates articulated in the February 2007 complaint caused it to "confuse[] mootness with standing, and as a result place the burden of proof on the wrong party." *Adarand*, 528 U.S. at 221 (citation and quotations omitted). But even if the district court were right to assess standing from the time of the Second Amended Complaint, its conclusion that civilian imprisonment makes the threat of re-detention too speculative for standing would still be wrong.

The district court's reliance on *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983), was misplaced. *See* JA-1534–35. *Lyons* held that an arrestee to whom police had applied a chokehold lacked standing to seek an injunction prohibiting future chokeholds because there was no reason to believe that Lyons was any more likely than anyone else ever to be subjected to the chokehold in the future. *Id.* at 105–07. The Court plainly acknowledged, however, that Lyons would have had standing had he alleged that he would come into contact with the police again and "that the City ordered or authorized police officers to act in such

[18] To the contrary, Padilla's fear is far from fanciful; his original military seizure was from a civilian jail.

manner." *Lyons*, 461 U.S. at 106; *accord Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 136 (2d Cir. 2011).

Padilla has alleged just such a set of facts: He is the only U.S. citizen designated an "enemy combatant" and seized from the civilian justice system to languish in a military prison. His designation as an "enemy combatant" has not been withdrawn. The Executive has publicly proclaimed its authority to subject those it designates as enemy combatants to military detention even after they complete a civilian jail sentence, and he has received, through his counsel, a particularized threat that the re-detention policy applies to him. His civilian imprisonment may end tomorrow if his appeal is granted, or in eight years with good time credit. Under these circumstances, Padilla clearly has standing under *Lyons* to obtain declaratory and injunctive relief.[19]

B. Padilla has standing to challenge the designation because it stigmatizes him as a traitor.

The unretracted designation also injures Padilla by publicly stigmatizing him

[19] The district court's contrary holding ignores not only *Lyons*, but also many decisions of this and other federal courts of appeal finding standing based upon contingent threats of future injury. *See, e.g.*, *N.C. Right to Life v. Bartlett*, 168 F.3d 705, 710–11 (4th Cir. 1999) (non-profit group's fear of prosecution was sufficient injury to challenge election law even though the law had never been interpreted to apply to the plaintiff class); *Nakell v. Att'y Gen.*, 15 F.3d 319, 323 (4th Cir. 1994) (attorney had standing to appeal contempt conviction based on possibility of disciplinary proceedings, even though the State Bar had already dismissed a grievance based on the same conviction); *Johnson v. Allsteel, Inc.*, 259 F.3d 885, 888 (7th Cir. 2001); *Cutshall v. Sundquist*, 193 F.3d 466, 471–72 (6th Cir. 1999).

as a traitor. There is little more that the government could do to tarnish Padilla's reputation than to label him an enemy of the state. The district court did not deny that reputational harm constitutes an injury-in-fact for standing purposes. Nor could it. If reputational injury were insufficient to confer standing, every federal court that has entertained a diversity action for defamation would have done so without jurisdiction. They have not. To the contrary, the Supreme Court and appellate courts have repeatedly recognized that harm to reputation provides the personal stake in a dispute required by Article III. *See Meese v. Keene*, 481 U.S. 465, 473 (1987) (effect on "personal, political, and professional reputation" gave potential distributor of foreign films standing to challenge government characterization of films as "political propaganda"); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 159 (1951) (charities had standing to challenge "Communist" designation because it "work[ed] an immediate substantial harm to the[ir] reputations").[20]

[20] *See also Foretich v. United States*, 351 F.3d 1198, 1214 (D.C. Cir. 2003) (allegations that an Act of Congress "directly damage[d] his reputation and standing in the community by effectively branding him a child abuser and an unfit parent" were "sufficient to satisfy the requirements of Article III"); *Gully v. NCUA Bd.*, 341 F.3d 155, 162 (2d Cir. 2003) (plaintiff had standing to challenge a governmental entity's finding of misconduct because "[i]t is self-evident that [the plaintiff]'s reputation will be blackened by the … finding"); *McBryde v. Comm. to Review Circuit Council Conduct*, 264 F.3d 52, 56–57 (D.C. Cir. 2001) (federal judge had standing to challenge reprimand because "the official characterization of an apparently upstanding federal judge as having engaged … in a pattern of abusive behavior … inflicts, we think, enough injury" (quotations omitted));

Notwithstanding these precedents, the district court held that reputational harm "must seriously damage plaintiff's standing and associations in the community," and that the enemy combatant designation could not so damage Padilla's reputation because of his "conviction on various terrorism related charges." JA-1535 (quotations omitted). Both aspects of that holding were wrong.

First, the "serious damage to standing in the community" standard articulated by the district court conflates two distinct concepts: the minimal injury required to establish standing, and the more rigorous showing necessary to establish a cognizable "liberty" interest. *Zepp v. Rehrmann*, 79 F.3d 381, 388 (4th Cir. 1996), cited by the court, addressed the latter, holding that "*[t]o implicate a constitutionally protected liberty interest*, defamatory statements must at least imply the existence of serious character defects such as dishonesty or immorality … that might seriously damage [plaintiff's] standing and associations in his community." (quotations omitted) (emphasis added). But it is well established that while "mere injury to reputation is not enough of an impingement on a person's liberty or property interest to trigger a requirement of due process … injury to reputation can nonetheless suffice for purposes of constitutional standing." *McBryde*, 264 F.3d at 56–57; *accord Sims v. Young*, 556 F.2d 732, 734 (5th Cir.

United States v. Accra Pac, Inc., 173 F.3d 630, 633 (7th Cir. 1999) ("[B]eing put on a blacklist … is treated as immediately redressible harm because it diminishes (or eliminates) the opportunity to practice one's profession even if the list … does not impose legal obligations").

1977) (holding that while a "blot" on plaintiff's record might "not rise to the level of a liberty interest … certainly it is enough to satisfy the injury-in-fact requirement of standing, a quite different concept"). The district court's holding that harm to reputation must be particularly serious in order to confer standing also violates this Court's instruction that the injury-in-fact requirement "is one of kind and not of degree," and that "the claimed injury need not be large, an identifiable trifle will suffice." *Gaston Copper*, 204 F.3d at 160 (quotations omitted).

Second, even if the district court's articulation of the standard were correct, Padilla clearly meets it. The unretracted enemy combatant designation stigmatizes Padilla as a continuing danger to the national security of the United States—that is, a traitor to his country and community. Accusations of treason necessarily "imply the existence of serious character defects such as dishonesty or immorality … that might seriously damage [the plaintiff's] standing and associations in his community." *Zepp*, 79 F.3d at 388. Indeed, this Court and its sister circuits have repeatedly found protectable liberty interests in defending against reputational attacks less severe than accusations of treason. *See Boston v. Webb*, 783 F.2d 1163, 1165–66 (4th Cir. 1986) (plaintiff's liberty interest "was surely implicated" by public announcement that he was discharged after allegation of receiving bribe); *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 392–93 (4th Cir. 1990) (noting possibility that there is "protectible liberty interest in one's reputation as a child

abuser" because the "stigma of reported child abuse as well as a finding of abuse erodes the family's solidarity internally and impairs the family's ability to function in the community" (quotations omitted)); *Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir. 2005) (designation as a sex offender sufficient to confer standing even absent requirement of state registration); *Neal v. Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997) (same).

Moreover, contrary to the district court's conclusion, Padilla's conviction does not deprive him of standing by negating the reputational injury caused by his designation as an enemy combatant. As noted above, standing is assessed at the time the claim is brought, and the claims for injunctive and declaratory relief against Defendant Gates were first filed on February 9, 2007, many months before Padilla's criminal conviction (August 16, 2007). *See* JA-35, 37–38 (Compl. caption & ¶¶ 6–7). But even if the claims had been filed later, the conviction would not deprive Padilla of standing. The conviction was based on charges that he engaged in activities in the 1990s directed overseas. *See United States v. Padilla*, No. 0:04-cr-60001-MGC, ECF Nos. 141 (superseding indictment), 1333 (judgment). Because, as this Court has held, those offenses were "considerably different from, and less serious than, those acts for which the government had militarily detained Padilla," *Padilla VI*, 432 F.3d at 584, they necessarily have an effect on Padilla's reputation that is different from and less serious than the effect

of branding him as a traitor. The district court's contrary conclusion—which was notably unsupported by any citation to authority—"must be rejected because it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety." *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984), *vacated on other grounds*, 477 U.S. 242 (1986). As then-Judge Scalia explained, "[e]ven the public outcast's remaining good reputation, limited in scope though it may be, is not inconsequential." *Id*.

In sum, here, "as in *Keene* and *McBryde*, [Padilla] contends that the cited government action … directly damages his reputation and standing in the community by effectively branding him a [traitor]. This is sufficient to satisfy the requirements of Article III. This alleged injury to [Padilla's] reputation is a concrete and direct result of the [designation]." *Foretich*, 351 F.3d at 1214. Accordingly, Padilla has standing to seek declaratory and injunctive relief from Defendant Gates and the judgment of the district court must be reversed.

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed and this case remanded for further proceedings.

Oral argument is requested.

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Respectfully submitted,

/s/ Ben Wizner

Ben Wizner
Alexander A. Abdo
American Civil Liberties Union Foundation
125 Broad St., 18th Floor
New York, NY 10004
(212) 519-7860

Jonathan Freiman
Hope R. Metcalf
Tahlia Townsend
National Litigation Project
Allard K. Lowenstein International Human Rights Clinic
Yale Law School
P.O. Box 208215
New Haven, CT 06520
(203) 498-4584

Michael P. O'Connell
Stirling & O'Connell, PA
P.O. Box 882
Charleston, SC 29402
(843) 577-9890

Counsel for Plaintiffs–Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because it contains 13,993 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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/s/ Ben Wizner
Ben Wizner
Counsel for Plaintiffs–Appellants

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I certify that this brief was filed electronically on June 7, 2011. Notice of this filing will be sent by operation of this Court's electronic filing system to all parties.

/s/ Ben Wizner
Ben Wizner
Counsel for Plaintiffs–Appellants

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