

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

Ali Saleh Kahlah Al-Marri,)
)
)
Plaintiff,)
)
v.)
)
Donald H. Rumsfeld,)
Secretary of Defense of the United States,)
Commander C.T. Hanft,)
U.S.N. Commander, Consolidated)
Naval Brig,)
)
Defendants.)
)
)
_____)

C/A No. 2:05-cv-02259-HFF-RSC

ORAL ARGUMENT REQUESTED

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS THE COMPLAINT**

Lawrence S. Lustberg
Mark A. Berman
**GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE,**
A Professional Corporation
One Riverfront Plaza
Newark, NJ 07102-5496
(973) 596-4500

Andrew J. Savage, III
SAVAGE & SAVAGE, P.A.
15 Prioleau Street
Post Office Box 1002
Charleston, SC 29402
(843) 720-7470

Jonathan Hafetz
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas, 12th Fl.
New York, NY 10013
(212) 998-6730

Attorneys for Plaintiff Ali Saleh Kahlah al Marri

PRELIMINARY STATEMENT

Plaintiff Ali Saleh Kahlah al Marri (“Mr. al Marri”) has been subjected by Defendants to inhumane, degrading, and physically and psychologically abusive treatment since he was first designated an “enemy combatant” and confined at the Consolidated Naval Brig (“the Brig”) in South Carolina on June 23, 2003. Mr. al Marri’s isolation from the outside world at the Brig has been virtually complete. He has been confined in a 9 foot by 6 foot cell and denied all social contact, including all personal and telephonic contact with his wife, five children, and closest relatives. Mr. al Marri was long denied all books and news and religious materials with the exception of the Quran, and his observance of Islam has been severely restricted and degraded. Moreover, Mr. al Marri’s immediate environment -- from the lights and supply of water in his cell -- has been deliberately manipulated to torment and degrade him. In short, his treatment flouts the Constitution and laws of the United States and international law, and Mr. al Marri has properly sought declaratory and injunctive relief from this Court.

In moving to dismiss his Complaint, defendants acknowledge that Mr. al Marri’s allegations must be taken as true, but nevertheless invoke disputed facts in an obvious attempt to paint a rosy picture of his life at the Brig. (Mem. at 3-5). Contrary to defendants’ suggestion (Mem. at 4), there is nothing about this confinement that Mr. al Marri “enjoys,” or that any other human being would conceivably enjoy. He has been deprived of all contact with the outside world, including his immediate family and close relatives, for two-and-a-half years, and this prolonged isolation has irreparably harmed his mental health and well-being, and continues to do so. Further, no rules or regulations govern Mr. al Marri’s treatment at the Brig. Instead, those “rules” change with every

new shift, and anything Mr. al Marri does receive is described as a “privilege” that defendants may withdraw at will.

Defendants have moved to dismiss on two grounds. *First*, and principally, defendants argue that the doctrine of sovereign immunity deprives this Court of jurisdiction over the entirety of Mr. al Marri’s fourteen-count complaint, including his claims under the First, Fourth, Fifth, and Eighth Amendments to the Constitution. It has long been established, however, that individuals may sue federal government officials to enjoin ongoing violations of their constitutional rights even without an express waiver of sovereign immunity. Further, the Administrative Procedure Act (“APA”) provides an unequivocal waiver of sovereign immunity for suits against the United States for nonmonetary claims arising from the acts of government officials and government agencies and, therefore, precludes dismissal of any of Mr. al Marri’s claims under the Constitution, the Religious Freedom Restoration Act (“RFRA”), the Alien Tort Statute, Army Regulation 190-8, and international law.

Second, defendants argue that the Complaint should be dismissed for failure to state a claim. That argument is also without merit. Mr. al Marri’s well-pled complaint charges violations of multiple constitutional rights, federal statutes and regulations, and binding international law, to which defendants have not yet responded. Defendants assert, however, that Mr. al Marri’s detention as an “enemy combatant” strips of him of every right except that of challenging his detention by habeas corpus. The upshot of defendants’ argument is that they are free to abuse, mistreat, and even torture Mr. al Marri without any judicial intervention whatsoever. Putting to one side that defendants provide no support for this radical argument, Mr. al Marri has not been adjudicated an

“enemy combatant” and remains an innocent civilian. But even if that were not so, Mr. al Marri would still be entitled to the protections guaranteed to all persons in this country by the Constitution and laws of the United States and by international law.

In short, defendants’ position has no limits. They argue that the government can arrest a person in the United States, detain him for potentially the rest of his life, and deny him all access to the Courts to challenge his mistreatment, abuse, and even torture. That proposition has no place in a Nation that believes in the rule of law. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men.”). Defendants’ motion to dismiss should be denied.

ARGUMENT

I. Standard of Review

A motion to dismiss must be denied unless it appears beyond doubt that the plaintiff can prove no set of facts which would support his claim and entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Lambeth v. Board of Comm’ners*, 407 F.3d 266, 268 (4th Cir. 2005). The Court must accept as true the plaintiff’s well-pled allegations and must view the complaint in the light most favorable to him, drawing all reasonable inferences in his favor. *Venkatraman v. REI Systems, Inc.*, 417 F.3d 418, 420 (4th Cir. 2005).

Defendants argue (Mem. 6) that Mr. al Marri has the burden of showing an unequivocal waiver of sovereign immunity. However, there is no such burden where -- as here -- a person sues government agents for nonmonetary relief in an effort to halt

violations of his constitutional rights. Additionally, the APA provides an unequivocal waiver of sovereign immunity for all of the claims in Mr. al Marri's complaint.

II. Plaintiff's Claims Are Not Barred By The Doctrine of Sovereign Immunity.

Defendants are not immune from suit for nonmonetary relief for the following reasons. *First*, federal courts have long exercised jurisdiction to prevent ongoing violations of constitutional rights without an express waiver of sovereign immunity. *Second*, the APA provides an express waiver of sovereign immunity over all of Mr. al Marri's claims, and was intended to ensure precisely the accountability that defendants here seek to avoid. *Third*, RFRA provides an independent waiver of sovereign immunity for claims brought under that statute.

A. Plaintiff's Constitutional Claims Do Not Require A Waiver of Sovereign Immunity.

Mr. al Marri has sued two federal officials, the Secretary of Defense and Commander of the Consolidated Naval Brig, for violating his constitutional rights. He seeks only declaratory and injunctive relief. Specifically, Mr. al Marri maintains that these defendants have violated his rights under the First (Counts 3-5, 13), Fourth (Count 11), Fifth (Counts 1-2, 4, 12-14), and Eighth (Count 1) Amendments to the Constitution of the United States. Defendants' argument that these claims are barred by the doctrine of sovereign immunity ignores well-established precedent and should be rejected.

Federal courts have long exercised the traditional powers of equity, in cases within their jurisdiction, to prevent violations of constitutional rights by government officials. *See, e.g., United States v. Lee*, 106 U.S. 196, 220-23 (1882) (suits against federal officers alleging unconstitutional takings of property not barred by sovereign

immunity); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738, 857-59, 868-71 (1824) (Marshall, C.J.) (upholding injunction against unconstitutional action by state officer and rejecting claim of sovereign immunity on ground suit was against officer rather than sovereign). As the Supreme Court made clear a century ago in *Ex parte Young*, 209 U.S. 123 (1908), government officials may be sued for acting unconstitutionally or outside their allotted powers. *Ex parte Young* involved state officials, but its principle has always permitted courts to grant injunctive relief to restrain unconstitutional action by federal officials as well, even if the suit is one against the sovereign. See, e.g., *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619-21 (1912) (collecting cases); *id.* at 620 (“[I]n the case of an injury threatened by [a federal officer’s] illegal action, the officer cannot claim immunity from injunction process.”); *Shields v. Utah Idaho Cent. R. Co.*, 305 U.S. 177, 183 (1938) (“Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted . . .”).

The use of injunctive relief suits against federal officials was reaffirmed in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). The suit there sought to enjoin the sale by the War Assets Administrator of certain surplus coal to any person other than the plaintiff. While the Court found that this claim -- a nonconstitutional claim for specific performance on a contract -- was barred by sovereign immunity, it nevertheless confirmed that suits alleging unconstitutional action do not require an express waiver of sovereign immunity. See *Larson*, 337 U.S. at 689-90; see also *id.* at 690-91 (reaffirming application of principle of *Ex parte Young* to federal officer suits). Indeed, the *Larson* Court specifically underscored that there was “no claim made that the

Administrator and his agents, etc., were acting unconstitutionally or pursuant to an unconstitutional grant of power.” *Id.* at 691 (emphasis added).

Larson has consistently been interpreted as reaffirming the long settled principle that the unconstitutional action of federal officers can be enjoined. *See, e.g., Dalton v. Specter*, 511 U.S. 462, 472-73 (1994) (sovereign immunity does not shield officer from suit if he acts unconstitutionally); *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963) (under *Larson*, federal officers are subject to suit where they act within scope of their authority but where “the powers themselves or the manner in which they are exercised are constitutionally void”); *Malone v. Bowdoin*, 369 U.S. 643, 647-48 (1962) (*Larson* preserves “the constitutional exception to the doctrine of sovereign immunity”) (internal quotation marks omitted); *Taylor v. Cohen*, 405 F.2d 277, 281 n.6 (4th Cr. 1968) (“*Larson* also interdicts unconstitutional action by an official”); *Wyoming v. United States*, 279 F.3d 1214, 1225 (10th Cir. 2002) (*Larson* preserves exception for constitutional violations); *Kozera v. Spirito*, 723 F.2d 1003, 1008 (1st Cir. 1983) (“The exceptions recognized in *Larson*, *Malone*, and *Dugan* remain good law.”); *see also* Louis L. Jaffe, “Suits Against Governments and Officers: Sovereign Immunity,” 77 Harv. L. Rev. 1, 38-39 (1963) (claims of constitutional violations by federal officers not barred by sovereign immunity). A well-pled claim for equitable relief to remedy unconstitutional action by federal officials is all that is required to trigger this exception to the doctrine of sovereign immunity. *See, e.g., Kelley v. United States*, 69 F.3d 1503, 1507 (10th Cir. 1995) (Commerce Clause and Tenth Amendment); *Clark v. Library of Congress*, 750 F.2d 89, 102 (D.C. Cir. 1984) (First Amendment); *Kozera*, 723 F.2d at 1008 (due process).

This Court, therefore, unquestionably has jurisdiction over Mr. al Marri's claims for declaratory and injunctive relief under the First, Fourth, Fifth, and Eighth Amendments even without the express waiver of sovereign immunity that the APA provides. *See infra* Point II.B. “[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.” *Bell v. Hood*, 327 U.S. 678, 684 (1946); *see also Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (“injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally”); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 400 (1971) (Harlan, J., concurring) (distinguishing claims for money damages and emphasizing “the presumed availability of federal equitable relief” to remedy violations of constitutional rights). Indeed, it would be absurd for the courts to recognize a *Bivens* cause of action for damages, but bar the immediately corrective remedy of injunctive relief. *See Farmer v. Brennan*, 511 U.S. 825, 845 (1994) (limiting Eighth Amendment claims to monetary damages would defy “common sense” by requiring prisoners to suffer injury and life-threatening conditions before obtaining a remedy). Indeed, to accept defendants’ argument that they are immune from suit would destroy the most fundamental principle of our constitutional system of government: that no person is above the law. *See* Erwin Chemerinsky, *Federal Jurisdiction* 611 (4th ed. 2003) (doctrine of sovereign immunity originally derives from notion that “the King can do no wrong”).

Defendants (Mem. 7 n.2) nevertheless assert that Mr. al Marri “cannot rely on the exception to sovereign immunity discussed in *Larson* . . . for ultra vires acts by a federal

official.” They are wrong. Mr. al Marri’s constitutional claims fall squarely within this exception. *See Larson*, 337 U.S. at 690 (exception, *e.g.*, for “the threatened enforcement of unconstitutional statutes”); *id.* at 691 (exception for unconstitutional action). Indeed, Mr. al Marri’s constitutional claims are, by definition, claims that defendants acted *ultra vires*, for when an officer acts unconstitutionally he *a fortiori* exceeds his delegated powers. *Id.* at 690 (officer exceeds delegated powers when he acts unconstitutionally and his acts, therefore, are “not the conduct of the sovereign”); *see also Ex parte Young*, 209 U.S. at 159-60 (when an officer “comes into conflict with the superior authority of th[e] Constitution . . . he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct”); *Wisconsin v. Baker*, 698 F.2d 1323, 1332 (7th Cir. 1983) (“When a federal officer . . . violates the federal Constitution, he exercises a power that his sovereign does not enjoy. . . . [H]e has exercised a power that his sovereign was powerless to convey to him.”).¹

Defendants provide no support for the radical departure from black letter law that they seek to advance. For example, *Food Town Stores, Inc. v. EEOC*, 708 F.2d 920 (4th Cir. 1983), did not involve any claim that a federal official violated the Constitution; rather, it addressed the enforcement of a federal statute, Title VII of the Civil Rights Act of 1964, and its implementing regulations. *Id.* at 921; *see also Hawaii v. Gordon*, 373

¹ Nor can defendants rely upon *Larson*’s statement that “a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally . . . if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign.” 337 U.S. at 691 n.11. Since *Larson*, the Supreme Court has made clear that suits against government officials seeking affirmative injunctive relief are not barred by the doctrine of sovereign immunity. *See, e.g., Malone*, 369 U.S. at 647-48 (reaffirming holding of *United States v. Lee* and exception to sovereign immunity to remedy constitutional violations through affirmative action, such as ejection of government from property to remedy unconstitutional taking); *see also Jaffe, supra*, at 34 (rejecting notion that *Larson* intended to bar equitable relief even if it required affirmative government action). In any event, however, Mr. al Marri’s suit does not seek affirmative government action but merely requests that defendants cease to deny him the protections he is guaranteed under the Constitution and laws of the United States and international law.

U.S. 57 (1963) (suit by Hawaii to recover U.S. property under Hawaii Statehood Act). Similarly, *United States v. Testan*, 424 U.S. 392 (1976), was a damages suit by government officials under the Tucker Act seeking reclassification of their positions and backpay, *id.* at 394-95; it did not involve a request for injunctive relief to remedy ongoing constitutional violations. See also, e.g., *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999) (suit by creditor to enforce commercial lien on government property).

Those cases cited by defendants (Mem. at 8-9) which assert constitutional violations sought *monetary* -- not prospective injunctive -- relief for those violations. See, e.g., *Reinbold v. Evers*, 187 F.3d 348, 355 & n.7 (4th Cir. 1999) (Fourth Amendment damages claim for unlawful search and seizure); *Randall v. United States*, 95 F.3d 339, 344-45 (4th Cir. 1996) (Fifth Amendment damages claim for denial of promotion); *Gonsalves v. IRS*, 975 F.2d 13, 14-15 (1st Cir. 1992) (constitutional damages claim against IRS); *Radin v. United States*, 699 F.2d 681, 684-85 (4th Cir. 1983) (Fifth Amendment damages claim for unlawful termination). Thus, these cases adhere to the traditional rule that an individual can obtain injunctive relief to prevent future violations of constitutional rights even without an explicit waiver of sovereign immunity.

In sum, this Court has jurisdiction to remedy ongoing violations of constitutional rights even without an express waiver of sovereign immunity. Defendants' assertion that they are completely immune from suit would insulate them from any judicial review for even the most egregious constitutional violations, and undermine the Judiciary's essential role in our constitutional system. *Marbury*, 5 U.S. (1 Cranch) at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."). Defendants' argument is without merit, and should be rejected by this Court.

B. The Administrative Procedure Act Provides A Waiver Of Sovereign Immunity.

While Mr. al Marri's constitutional claims do not require an express waiver of sovereign immunity, *all* of his claims fall squarely within the APA's waiver of sovereign immunity for suits seeking nonmonetary relief against government officials and agencies, including declaratory and injunctive relief. Thus, this Court has jurisdiction over the entirety of Mr. al Marri's Complaint, and it should reject defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(1).

The APA provides in relevant part:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702. The APA specifically "waived the defense of sovereign immunity in . . . nonstatutory review cases in which nonmonetary relief is sought." *Hostetter v. United States*, 739 F.2d 983, 985 (4th Cir. 1984); Chemerinsky, *supra*, at 616 ("The [APA] is clear: The United States has waived its sovereign immunity in suits requesting other than monetary relief."). Indeed, the APA was specifically amended in 1976 "to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity in cases [covered by section 702]." *Bowen v. Massachusetts*, 487 U.S. 879, 891-92 (1988); *see also* David A. Webster, "Beyond Federal Sovereign Immunity: 5 U.S.C. § 702 Spells Relief," 49 Ohio L.J. 725, 729 (1988) (amendments to section 702 intended "to scuttle the sovereign immunity defense as to relief other than

money damages”) (citing legislative history). Congress thus made plain its rejection of a government beyond the law and sought to “strengthen” government accountability. H.R. Rep. No. 94-1656, at 4, 10 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6124, 6130. This waiver of sovereign immunity is not limited to suits under the APA, but extends to all actions alleging violations of the Constitution and of federal law. *See, e.g., Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (“The APA’s waiver of sovereign immunity applies to any suit whether under the APA or not.”); *see also Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) (legislative history of the APA “manifests a congressional intention that it cover a broad spectrum of administrative actions”).

The APA provides an express waiver of sovereign immunity over all of Mr. al Marri’s claims. The Department of Defense, as well as its subdivisions, is an ‘agency’ under the APA. *See* 5 U.S.C. § 701(b); *Local 2855, AFGE (AFL-CIO) v. United States*, 602 F.2d 574, 578 n.5 (3d Cir. 1979). Neither of section 701’s exceptions for action by the Department of Defense -- “courts martial and military commissions,” 5 U.S.C § 701(b)(1)(F), or “military authority exercised in the field in time of war or in occupied territory,” *id.* § 701(b)(1)(G); *see infra* at 12-15 -- applies here. Mr. al Marri’s action against defendants is thus subject to the APA’s waiver of sovereign immunity. *See, e.g., Stehney v. Perry*, 101 F.3d 925, 933-34 (3d Cir. 1996) (APA waives sovereign immunity in suit against Secretary of Defense and agencies within Defense Department); *Sharp v. Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986) (Scalia, J.) (actions against Defense Department and/or its officials for equitable relief subject to APA’s waiver of

sovereign immunity); *Andrean v. Secretary of U.S. Army*, 840 F. Supp. 1414, 1421-22 (D. Ka. 1993).

Further, the APA's presumption of judicial review, anchored in its waiver of sovereign immunity, may be overcome "only upon a showing of clear and convincing evidence of a contrary legislative intent." *Abbott Laboratories*, 387 U.S. at 141 (citation omitted). Here, there is no statute which even remotely precludes judicial review of Mr. al Marri's claims, 5 U.S.C. § 701(a)(1), let alone one that provides the clear congressional intent required to overcome this presumption. Further, this presumptive entitlement to judicial review applies to agency action "for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *see, e.g., Bowen*, 487 U.S. at 904-05 (alternative remedy must be available and adequate); *Mitchell v. United States*, 930 F.2d 893, 895-96 (4th Cir. 1991) (same). Here, Mr. al Marri's suit constitutes his *only* remedy -- let alone his only adequate remedy -- for defendants' continuing violations of his rights under the Constitution and federal and international law. The notion that this suit is barred by the doctrine of sovereign immunity flouts the fundamental language and purpose of the APA.

Defendants advance three arguments why the APA does not waive sovereign immunity. Those arguments are not only fundamentally misguided but would impermissibly place defendants' mistreatment and abuse of Mr. al Marri entirely beyond judicial review.

First, defendants (Mem. at 11-12) assert that this suit falls within the APA's exception for challenges to "military authority exercised in the field in time of war or in occupied territory." 5 U.S.C. § 701(b)(1)(G). That is absurd. Mr. al Marri was not

captured on a battlefield; he was arrested at home in Peoria, Illinois. And he is being detained at a naval brig in North Charleston, South Carolina, far from any “field” of battle or “occupied territory.” Congress did not preclude judicial review of the non-battlefield arrest and non-battlefield detention of a civilian at a military prison in the United States.

Defendants rely principally on *Doe v. Sullivan*, 938 F.2d 1370 (D.C. Cir. 1991), but that case only supports Mr. al Marri’s argument that section 701(b)(1)(G) does not apply here. In *Doe*, a class of plaintiffs challenged an interim regulation of the Food and Drug Administration permitting the Defense Department to use unapproved, investigational drugs on military personnel in certain *combat-related situations*, without obtaining a service member’s informed consent. 938 F.2d at 1371; *id.* at 1373 (assertion of Defense Department that obtaining consent “*in the heat of imminent or ongoing combat* would not be practicable”) (emphasis added). And, even there, the court rejected the government’s argument that section 701(b)(1)(G) precluded judicial review. *Id.* at 1380-81. As the court explained, the plaintiffs did not seek review of “military commands made in combat zones or in preparation for, or in the aftermath of, battle,” or “judicial interference with the relationship between soldiers and their military superiors.” *Id.* at 1380. Similarly, Mr. al Marri’s daily mistreatment at a military prison in South Carolina has nothing to do with military commands in combat zones, battlefield operations, or relations between soldiers and their superiors. It likewise does not even remotely involve “the existence of a military exigency.” *Id.* at 1381; *see also Jaffee v. United States*, 592 F.2d 712, 719-20 (3d Cir. 1979) (section 701(b)(1)(G) does not apply to suit seeking to require military to provide medical warning when conducting atomic

blasts during Cold War); *Kam Koon Wan v. E.E. Black, Ltd.*, 75 F. Supp. 553, 562 (D. Hawaii 1948) (army in Hawaii was not “in the field” or “in occupied territory” even though “it acted in that manner” in case involving martial law in Hawaii during World War II).

In *Rasul v. Bush*, 215 F. Supp. 2d 64 (D.D.C. 2002), the district court applied the exception for “military authority exercised in the field” where “[t]here [wa]s no dispute that Plaintiffs were captured [by the military] in areas where the United States was (and is) engaged in military hostilities.” *Id.* at 64 n.11; *see also Al Odah v. United States*, 321 F.3d 1134, 1149-50 (D.C. Cir. 2003) (affirming district court’s application of section 701(B)(1)(G) exception on ground that plaintiffs were “taken into custody by American armed forces in the field in time of war”) (internal quotation marks omitted). Mr. al Marri, however, was not captured by the military on or near any battlefield; he was arrested by civilian law enforcement officials, at home, in the middle of the United States, far from any combat operations or war zone. The naval brig where he is now detained is utterly unlike “organized camps stationed in remote places where civil courts d[o] not exist.” *Al Odah*, 321 F.3d at 1150. Furthermore, the lower court decisions in *Rasul* and *Al Odah* were reversed by the Supreme Court, which concluded that even aliens captured and detained *outside* the United States have the right to pursue nonhabeas statutory claims in federal court. *Rasul v. Bush*, 542 U.S. 466, 484-85 (2004).

Defendants further contend that “allowing this action to proceed under the APA would lead to a ‘bizarre anomaly’” because “United States soldiers would be precluded from bringing suit under the APA with regard to military events, while aliens could sue their United States military captors.” Mem. at 12 (quoting *Rasul*, 215 F. Supp. 2d at 64

n.11). To begin with, the government conflates a claim *under* the APA with the APA's waiver of sovereign immunity over non-APA claims. Mr. al Marri has "brought suit under the APA" in only one count of his fourteen count complaint -- *i.e.*, defendants' failure to adhere to the standards contained in Army Regulation 190-8, which governs the treatment of all individuals in U.S. military custody. Compl. ¶¶ 152-54; *see also infra* Point III.D. As to the other 13 counts of the Complaint, the APA provides a waiver of sovereign immunity, not a cause of action. *See* 5 U.S.C. § 702. Moreover, Mr. al Marri's claim to enforce the military's own regulations would hardly create a "bizarre anomaly" - those regulations were specifically designed to govern the treatment of individuals in military custody during wartime. American soldiers, on the other hand, enjoy the full benefits of the military justice system under the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.*; *Chappell v. Wallace*, 462 U.S. 296, 302 (1983) (describing "comprehensive internal justice system to regulate military life"), as well as the rules and regulations governing the treatment of U.S. military prisoners and detainees in facilities in the United States, and thus have ample protections and opportunities for redress.² Indeed, the only "bizarre anomaly" would be the one created by this Court's acceptance of defendants' argument that a civilian lawfully present in this country may be stripped of his rights and access to the courts if the President unilaterally declares him an "enemy combatant."³

² American soldiers, moreover, have not been barred from suing military officials for nonmonetary relief for violations of their constitutional rights. *Chappell*, 462 U.S. at 304-05 (citing actions for injunctive relief against military officials); *Walden v. Bartlett*, 840 F.2d 771 774-75 (10th Cir. 1988).

³ Defendants suggest (Mem. at 11) that Mr. al Marri is being detained not merely to prevent his "return to the battlefield" but also to enable military authorities to gather intelligence. The Supreme Court, however, has rejected the government's argument that individuals may be detained indefinitely for the purpose of interrogation. *Hamdi*, 542 U.S. at 521 (plurality op.). Mr. al Marri, moreover, has not been interrogated for more than a year, Compl. ¶ 73, and the government has repeatedly emphasized that the purpose of his detention is merely to "prevent [him] from returning to the field of battle and taking up arms once again."

Second, the government asserts (Mem. at 12-13) that the APA does not waive sovereign immunity because defendants' treatment of Mr. al Marri "is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This, however, "is a very narrow exception," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), and does not apply here. There is no statute committing Mr. al Marri's conditions of confinement to agency discretion. See, e.g., *Webster v. Doe*, 486 U.S. 592, 600-01 (1988) (action expressly committed to agency discretion by statute). Further, if Congress wants to commit action to agency discretion, it must do so expressly and clearly if it is to preclude judicial review of constitutional claims. *Id.* at 603 (statute specifically permitting termination of agency employee whenever the agency director "shall deem such termination necessary or advisable in the interests of the United States" did not exclude review of constitutional claims); see also *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974) (clear statement required where Congress seeks to preclude judicial review of constitutional claims). Here, there is no statute committing *any* action of the Department of Defense to its discretion, let alone the clear statement required to preclude judicial review of Mr. al Marri's multiple constitutional claims.

This is also not a case in which "there is no law to apply." *Citizens to Preserve Overton Park*, 401 U.S. at 410 (citation omitted); see also *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 282 (1987) (agency action committed to agency discretion based upon "the impossibility of devising an adequate standard of review for [the challenged] agency action"); *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (action committed to agency discretion where "a court would have no meaningful standard

Respondent's Opposition to the Motion for Summary Judgment at 13-14 (quoting *Hamdi*, 542 U.S. at 518), filed in *Al-Marri v. Hanft*, 378 F. Supp. 2d 673, 681 (D.S.C. 2005).

against which to judge the agency's exercise of discretion"). Here, there are meaningful standards to apply: those under the Constitution (Compl. ¶¶ 127-30, 135-47, 164-74); federal statutes like the Religious Freedom Restoration Act (Compl. ¶¶ 148-51); international treaties and customary international law (Compl. ¶¶ 155-63); and the military's own regulations (Compl. ¶¶ 152-54). *See also infra* Point III. Indeed, the treatment of all individuals in U.S. custody is extensively regulated, and is intended to prevent exactly what defendants seek here: to indefinitely imprison an individual outside the law.

Defendants (Mem. at 12, 15-16) rely on *Department of Navy v. Egan*, 484 U.S. 518 (1988). But *Egan* is so different as to be completely inapplicable. In *Egan*, the Court addressed the "narrow question" of the scope of review possessed by a merits board over a government agency's decision to deny or revoke a security clearance. 484 U.S. at 520; *see also id.* at 526 (describing narrow question presented). By contrast, Mr. al Marri's suit neither challenges a security clearance determination nor seeks access to classified information; it simply addresses his conditions of confinement at a military prison. Nor did *Egan* involve the APA's waiver of sovereign immunity, and it was certainly not decided on jurisdictional grounds. *See id.* at 526 ("no claim" that merits board lacked jurisdiction to "hear and adjudicate" challenge). And, while it concluded that the standard of review of a denial or revocation of a security clearance was narrow, that was because -- unlike here -- there was no independent constitutional interest to balance against the government's interest. *Id.* at 528 ("no one has a 'right' to a security clearance"); *cf. Reinbold*, 187 F.3d at 358 (suggesting reviewability of underlying security clearance determination that allegedly violates individual's constitutional rights);

Ryan v. Reno, 168 F.3d 520, 524 (D.C. Cir. 1999) (same). Certainly, *Egan* does not support the government's sweeping argument that this Court lacks jurisdiction over Mr. al Marri's suit.

Defendants (Mem. at 12-13) also cite *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir.), *cert granted* ___ S. Ct. ___, 2005 WL 2922488 (Nov. 7, 2005), arguing that Mr. al Marri's conditions of confinement are subject only to international obligations that are not judicially enforceable. *Hamdan*, 415 F.3d at 39-40; *Eisentrager*, 339 U.S. at 789 & n.14. But defendants confuse the issue. Whether those claims are judicially enforceable is a different question from whether they are barred by the doctrine of sovereign immunity, which was not at issue in *Eisentrager* or *Hamdan*. Also, in both *Eisentrager* and *Hamdan* the petitioners were captured and detained *outside* the United States, and the government has consistently argued that it is for this reason that they -- unlike individuals arrested and detained in this country -- had no cognizable rights. So, even if, *arguendo*, Mr. al Marri's two treaty-based international law claims are not judicially enforceable, *but see infra* Point III.F, his multiple claims under the Constitution and laws of the United States unquestionably are. Nor is it germane (Defs.' Mem. at 13) whether or not other "detainees" held in the United States during World War II brought suit to challenge their conditions of confinement: the real lesson of those WWII detentions, which defendants ignore, is that those individuals were treated as prisoners of war and in accordance with the Geneva Conventions. Mr. al Marri, by contrast, is protected by no rules or standards.

Defendants additionally argue (Mem. at 13) that "the APA does not cover any action of the President," and particularly no action that stems from the exercise of the

commander-in-chief power. But this argument misconstrues both the Complaint and the law that governs it. Mr. al Marri has properly challenged his treatment not by the President but by the Department of Defense officials to whose custody he has been expressly committed since he was first designated an “enemy combatant” in June 2003. *See Franklin v. Massachusetts*, 505 U.S. 788, 828-29 (1992) (Scalia, J., concurring) (suits contesting legality of executive branch actions can and should be brought against president’s subordinates); *accord Al-Marri v. Rumsfeld*, 360 F.3d 707, 708 (7th Cir. 2004). The Department of Defense is an agency under the APA, and is subject to its provisions, including its waiver of sovereign immunity. *See* 5 U.S.C. § 701(b) (defining agencies subject to APA); *Steffan v. Perry*, 41 F.3d 677, 694 (D.C. Cir. 1994) (en banc) (reviewability of Defense Department regulations under APA); *Roelofs v. Secretary of the Air Force*, 628 F.2d 594, 599 (D.C. Cir. 1980) (challenge to validity of air force regulation); *Local 2855*, 602 F.2d at 578 n.5 (“For purposes of the APA the Department of Defense as well as its subdivisions is an ‘agency.’”). Thus, just as Mr. al Marri may challenge the lawfulness of his detention without suing the President, *Al-Marri v. Rumsfeld*, 360 F.3d at 708, so may he challenge the conditions of that detention by bringing suit against appropriate agency officials, including the Secretary of Defense, who ordered his transfer to and detention at the Brig, and the commander of the Brig, who oversees his detention there.

In the end, defendants’ argument that this Court lacks jurisdiction over the Complaint lapses into the same assertion of unreviewable executive power that has consistently been advanced by the government and just as consistently rejected by the courts. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality op.) (rejecting

“Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts”); *Rasul*, 542 U.S. at 484-85 (courts open to aliens captured and detained outside United States to pursue their habeas and nonhabeas claims); *Al-Marri v. Hanft*, 378 F. Supp. 2d 673, 681 (D.S.C. 2005) (Court’s door open to petitioner to challenge facts underlying his detention). As the Court has jurisdiction over Mr. al Marri’s challenge to the legal and factual basis of his detention, so does it have jurisdiction over his challenge to the conditions of that detention, including the egregious violations of constitutional and statutory rights asserted in the Complaint.

Third, defendants argue (Mem. at 13-14) that the APA precludes review because it authorizes courts “to dismiss any action or deny relief on any other appropriate legal or equitable ground.” 5 U.S.C. § 702. But there is no “appropriate legal or equitable ground” on which to dismiss this action. Contrary to defendants’ suggestion, Mr. al Marri is not asking this Court to decide a question of “foreign affairs” or “military policy.” He is simply challenging the legality of his treatment and of his conditions of confinement. This Court has already held that Mr. al Marri’s detention -- including the facts on which it is based -- is a proper subject for judicial review. It would be illogical and incorrect for the Court to hold that Mr. al Marri’s challenge to the conditions of that detention is jurisdictionally barred.

Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985), fails to support defendants’ argument. (Mem. at 14). In *Sanchez-Espinoza*, the plaintiffs sued to enjoin U.S. military support for the contras in Nicaragua and to shut down a paramilitary camp located in that country. 770 F.2d at 205, 208. By contrast, Mr. al Marri’s suit does not seek “interjection into so sensitive a foreign affairs matter” as the United States’ decision

to wage war, its military operations overseas, or its diplomatic relations with other foreign states. *Id.* at 208. Nor does it seek to close the facility in which he is held. Rather, Mr. al Marri merely challenges his treatment at a navy brig in South Carolina, and asserts violations of his individual rights that -- unlike those discretionary political decisions -- are squarely within this Court's power under Article III to review and decide. *See generally Marbury*, 5 U.S. (1 Cranch) at 166 (contrasting challenges to discretionary decisions with challenges to violations of individual rights). Defendants' attempt to deny Mr. al Marri access to the courts to bring this challenge must be rejected.

Ex parte Quirin, 317 U.S. 1 (1942), further highlights the flaws in defendants' argument. (Mem. at 12, 16). To begin with, *Quirin* did not involve a challenge to the conditions of detention. But even more importantly, the *Quirin* Court reviewed the petitioners' challenge to the legality of their military custody despite the government's argument that the Court lacked jurisdiction over their claims. 317 U.S. at 24-25. *Quirin*, then, further underscores that the Court has jurisdiction in this case. The government's motion to dismiss should be denied.

C. This Court Has Jurisdiction Over Plaintiff's RFRA Claims.

Defendants (Mem. at 15) argue that the Court lacks jurisdiction over Mr. al Marri's claim under RFRA. (Compl. ¶¶ 148-51). That argument is wrong for two reasons. As noted above, the APA provides a waiver of sovereign immunity over claims that a government agent or entity failed act in accordance with federal law, including RFRA. *See supra* Point II.B; *see also, e.g., United States v. City of Detroit*, 401 F.3d 448, 450 (6th Cir. 2005) ("the waiver of sovereign immunity contained in [APA] applies in cases brought under statutes other than the APA"). Additionally, however, RFRA

provides an independent waiver of sovereign immunity. Specifically, the Act provides that “[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim . . . in a judicial proceeding and obtain appropriate relief against a government.” 42 U.S.C. § 2000bb-1(c). RFRA thus constitutes an unambiguous waiver of sovereign immunity, separate from the waiver provided in the APA, and defendants’ motion to dismiss Mr. al Marri’s RFRA claim should be denied for this reason as well. *See, e.g., Crocker v. Durkin*, 159 F. Supp. 2d 1258, 1269 (D. Kan. 2001) (“RFRA is a statute in which Congress has unequivocally waived sovereign immunity for the United States.”); *see also Veitch v. Danzig*, 135 F. Supp. 2d 32, 35 (D.D.C. 2001) (challenge to RFRA by military personnel); *Rigdon v. Perry*, 962 F. Supp. 150, 161 (D.D.C. 1997) (same).⁴

Defendants (Mem. at 16) argue that Congress must evince a “specific and clear intent” to extend RFRA’s judicial review provision to an “alien enemy.” Mr. al Marri, however, remains an innocent civilian until proven otherwise. But even if he is ultimately found to be an “enemy combatant,” RFRA applies, as it categorically does to all individuals in the United States, including military personnel. It thus provides a separate and independent waiver of sovereign immunity for claims seeking nonmonetary relief under that statute.

⁴ The only two cases defendants cite in arguing that RFRA does not waive sovereign immunity (Mem. at 15 n.4) -- *Meyer v. Federal Bureau of Prisons*, 929 F. Supp. 10, 13-14 (D.D.C. 1996), and *Jama v. INS*, 343 F. Supp. 2d 338, 373 (D.N.J. 2004) -- were *damages* actions. But in contrast to actions seeking injunctive relief, actions seeking damages require an explicit waiver of sovereign immunity as to claims for monetary relief. *See Lane v. Pena*, 518 U.S. 187, 192 (1996).

III. Plaintiff Has Stated A Claim For Relief On Every Count Of His Complaint.

Defendants further argue that Mr. al Marri's Complaint should be dismissed for failure to state a claim on which relief may be granted. The government does not cite a single case to support its cursory, four-page argument that Mr. al Marri's fourteen-count complaint should not be fully considered on its facts. Instead, it relies primarily on the sweeping proposition that defendants can violate Mr. al Marri's constitutional, statutory, and international law rights with impunity simply because the President has unilaterally declared him an "enemy combatant." This contention must be rejected.

The Court must, as noted, accept as true all the allegations in Mr. al Marri's Complaint and view those facts in the light most favorable to him. *Conley*, 355 U.S. at 45-46; *Venkatraman*, 417 F.3d at 420. All reasonable inferences that can be drawn from the Complaint are to be drawn in Mr. al Marri's favor. *See Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 334 (4th Cir. 1996). Indeed, it is "only in the relatively unusual case in which . . . on the face of the complaint . . . there is some insuperable bar to securing relief" that a motion to dismiss for failure to state claim may be granted. Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 701 (3d ed. 2004). Nevertheless, defendants argue that Mr. al Marri can *never*, under *any* circumstances, prevail in challenging the conditions of potentially lifelong detention in which he:

- remains in solitary confinement in a 6 foot by 9 foot cell;
- is never allowed to see or speak to his wife, five children, and other close relatives;
- is denied all books, magazines, and newspapers;
- is denied all religious books or other materials except the Quran;

- is denied adequate medical care and suffers severe pain and irreparable damage as a result;
- is not permitted to seek spiritual advice from a cleric or advisor from his faith;
- is denied even such basic necessities as adequate clothing and bedding; recreation; toilet paper, toothpaste, and soap; and
- is held without any established rules, regulations, or standard governing his treatment.

Under defendants' view, Mr. al Marri cannot even bring a challenge based upon torture -- a chilling proposition, and one that has no basis in law. Moreover, defendants assert this breathtaking power even though they have repeatedly emphasized that Mr. al-Marri's detention is not intended to punish him but is merely "a simple war measure" whose only purpose is to prevent him from "returning to the field of battle." *See Al-Marri v. Hanft*, C/A No. 02:04-2257-HFF-RSC, Answer to Petition for Writ of Habeas Corpus at 8. Their motion to dismiss for failure to state a claim should be denied.

A. Plaintiff Has Stated Claims For Relief Under The Fifth and Eighth Amendments.

The Due Process Clause of the Fifth Amendment protects all persons in the United States, and unquestionably extends to citizens and non-citizens alike. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (protections of due process "are universal in their application" and apply "to all persons" in United States); *see also Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896). Its protections apply "in periods of calm and in times of trouble," in times of war as well as in times of peace. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring). Defendants agree that Mr. al Marri has some rights but argue (Mem. at 20) that the *only* right he has is to challenge the lawfulness of his detention. But defendants provide no

support for this proposition, which would insulate even the most egregious mistreatment by the Executive from judicial review. For the following reasons, this Court should deny defendants' motion to dismiss Mr. al Marri's due process claims.⁵

First, defendants have violated Mr. al Marri's due process rights by subjecting him to prolonged solitary confinement, social isolation, and other inhumane and degrading treatment which is intended as punishment, not reasonably related to a legitimate government purpose, and/or excessive in relation to that purpose. (*E.g.*, Compl. ¶¶ 34-38, 50-64, 88-107, 127-29, 141-42). For example, defendants have kept Mr. al Marri in solitary confinement at the Brig and deprived him of all personal and/or telephonic contact with his wife, five children, and close family members. (Compl. ¶¶ 34-35, 37, 57, 141-42). Further, defendants have denied Mr. al Marri access to books and news (including all access to the library at the Brig) and to religious materials. (Compl. ¶¶ 53-56, 79).

Since he has not been convicted of a crime, Mr. al Marri is entitled to more protection under the Due Process Clause than a post-conviction prisoner. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982) ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."). At a minimum, he is entitled to the same due process protections as a pretrial detainee, and, therefore, may not be subjected to restrictions which are either intended to punish

⁵ The Eighth Amendment applies to convicted prisoners, but Eighth Amendment standards are relevant because prisoners who have not been convicted of any crime are entitled to equal, if not more favorable, protections under the Fifth Amendment's Due Process Clause. *See Slade v. Hampton Roads Regional Jail*, 407 F.3d 243, 250 (4th Cir. 2005) ("The due process rights of a pretrial detainee *are at least as great* as the eighth amendment protections available to the convicted prisoner. . . .") (emphasis added and internal citations omitted).

him or which are not reasonably related to legitimate government objectives. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 538-39 (1979); *Seling v. Young*, 531 U.S. 250, 265 (2001) (“[D]ue process requires that the conditions and duration of confinement under [state statute regarding violent sexual predators] bear some reasonable relation to the purpose for which persons are committed.”); *Slade v. Hampton Roads Regional Jail*, 407 3d 243, 251 (4th Cir. 2005) (even if restriction is not intended to punish, there must be “an alternative purpose” to which that restriction is “rationally . . . connected” and the restriction cannot be “excessive in relation to th[at] alternative purpose”) (quoting *Bell*, 441 U.S. at 538); *see also United States v. James*, 28 M.J. 214, 215 (U.S. Ct. Military App. 1989) (pretrial confinement “may be no more rigorous than is necessary to insure the presence of the detainee for his trial”). Indeed, even if Mr. al Marri had no greater rights than a *convicted prisoner*, there must still be a “valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it.” *Turner v. Safley*, 482 U.S. 78, 89 (1987) (citation omitted). In his complaint, Mr. al Marri alleges that defendants have subjected him to conditions that are either intended as punishment, not reasonably related to a legitimate government purpose, and/or excessive in relation to that purpose. Thus, he has clearly stated a claim upon which relief may be granted.

Second, defendants have confined Mr. al Marri under physically and mentally unsafe conditions, deprived him of basic life necessities, and subjected him to treatment that substantially departs from any reasonable standard care or treatment, thus gravely jeopardizing his health and well-being. (Compl. ¶¶ 34-64, 88-111, 130, 133-34). For example, defendants have subjected Mr. al Marri to prolonged isolation (Compl. ¶ 34-36,

38); denied him adequate recreation (Compl. ¶¶ 36-38); and deprived him of adequate medical and psychological care (Compl. ¶¶ 100-07). The Due Process Clause categorically prohibits defendants from confining individuals under conditions that are unsafe or otherwise deprive them of basic life necessities. *Youngberg*, 457 U.S. at 315; *see also DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989) (“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.”). Mr. al Marri has alleged that defendants have violated that fundamental duty, and gravely endangered his health and well-being. This also readily states a claim for relief under the Due Process Clause.

Third, defendants have failed to establish any rules or regulations that provide Mr. al Marri with adequate notice of what constitutes impermissible behavior at the Brig. (Compl. ¶¶ 112-26, 166-68). The sole “rules” that they have provided -- the so-called “Special Housing Unit Rules” -- essentially state that the only rule is to “follow the rules.” In fact, those rules do not exist. (Compl. ¶ 116-17). This lack of adequate notice of what constitutes objectionable behavior, and this prohibition on (or requirement of) doing acts in terms so vague that individuals of common intelligence must necessarily guess at their meaning and differ as to their application violates due process. *See, e.g., United States v. Lanier*, 520 U.S. 259, 266 (1997); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Connally v. General Constr. Corp.*, 269 U.S. 385, 391 (1926). And, in addition to being unconstitutionally vague, the Special Housing Unit Rules are invalid because they sweep unnecessarily broadly and thereby invade the area of protected

freedoms, such as those freedoms protected by the First Amendment (Compl. ¶¶ 169-71). *See, e.g., Zwickler v. Koota*, 389 U.S. 241, 249-50 (1967).

B. Plaintiff Has Stated Claims For Relief Under The First Amendment.

Mr. al Marri's Complaint alleges multiple violations of the First Amendment, including: the right to receive information, resulting from defendants' denying him all access to books, magazines, and news, to the 5,000 volume library at the Brig, and to religious materials and items except the Quran (Compl. ¶¶ 53-55; 76-87; 135-38); the associational right to meaningful contact with his wife, five children, and other close relatives, resulting from his complete isolation from them and others (Compl. ¶¶ 50, 57, 140, 142); and the right to the free exercise of his religion resulting from his denial of, *inter alia*, water to purify himself before he prays, the opportunity to meet with a Muslim scholar or cleric to seek spiritual guidance; and basic religious items such as a head-cover. (Compl. ¶¶ 74-87, 143-147). Defendants (Mem. at 19), without a single citation, provide only this response: "[c]aptured enemy combatants . . . do not have broad First Amendment rights to extensive library materials or to correspondence with family members and others." Whatever the scope of those rights, and whatever the legitimate interests of the government in reasonably limiting them, defendants can prevail on their motion to dismiss only if Mr. al Marri has absolutely *no right* to books and news, *no right* to personal or telephonic contact with family, children, and close relatives, and *no right* to religious materials besides the Quran or to seek the assistance of a spiritual advisor of his faith. But even assuming Mr. al Marri is ultimately found to be an "enemy combatant" (which he has not been), and, even assuming he has no more rights than a convicted prisoner who -- unlike an "enemy combatant" -- is deprived of his liberty as

punishment and not merely as prevention, he has unquestionably stated valid claims for relief under the First Amendment.

First, the First Amendment “right to receive information and ideas . . . is fundamental to our free society.” *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). Even “[p]rison walls do not form a barrier separating . . . inmates from [its] protections.” *Turner*, 482 U.S. at 84; *see also Bell*, 441 U.S. at 545 (recognizing First Amendment rights of pre-trial detainees). The First Amendment right of access to news and books “must be viewed sensibly and expansively,” *Thornburg v. Abbott*, 490 U.S. 401, 417 (1989); *see also Turner*, 482 U.S. at 92 (prison officials cannot “deprive prisoners of *all* means of expression”) (emphasis added); *Shakur v. Selsky*, 391 F.3d 106, 115 (2d Cir. 2004) (“complete ban” on materials of “unauthorized organizations” not reasonably related to prison’s goal of institutional safety), and restrictions must still allow for “a broad range of publications to be sent, received, and read” to accommodate First Amendment rights, *Thornburgh*, 490 U.S. at 418.

Thus, even if Mr. al Marri were entitled only to the constitutional protections guaranteed a convicted prisoner, he has properly stated a claim for relief. A regulation restricting First Amendment rights in the prison context cannot withstand challenge unless there is (1) “a valid, rational connection between the . . . regulation and the legitimate governmental interest put forward to justify it”; (2) an “alternative means of exercising the right”; (3) a sufficient showing of the “impact . . . the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally”; and (4) an “absence of ready alternatives.” *Turner*, 483 U.S. at 89-90 (internal quotation marks and citations omitted); *see also Bell*, 441 U.S. at 539

(pretrial detainee may not be subjected to restrictions on his liberty which are either intended to punish him or which are not reasonably related to legitimate government objectives); *Madison v. Ritter*, 355 F.3d 310, 315 (4th Cir. 2003) (same). Mr. al Marri has alleged that defendants failed to satisfy these requirements (*E.g.*, Compl. ¶¶ 50-64, 79, 85, 135-38), and those allegations must be accepted as true and viewed in the light most favorable to Mr. al Marri. *Conley*, 355 U.S. at 45-46; *Lambeth*, 407 F.3d at 268. Mr. al Marri has thus properly stated a claim for relief.

Second, Mr. al Marri alleges that defendants have violated his First Amendment right to freedom of association by denying him contact with his family. “[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.” *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). Even convicted criminals and pretrial detainees retain limited associational rights, including visitation rights with intimate associates such as family members. *See Feeley v. Sampson*, 570 F.2d 364, 372 (1st Cir. 1978) (“For detainees to receive visits at regular intervals from loved ones and friends is a commonly accepted privilege . . . and implicates, in the case of detainees especially, communicative as well as associational values protected by the first amendment.”). Defendants’ refusal to provide Mr. al-Marri with *any* opportunity for phone calls with and visits from immediate family members and close relatives thus states a claim for relief under the First Amendment. *See Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986) (pretrial detainees have limited First Amendment right to telephone access); *Johnson v.*

Galli, 596 F. Supp. 135, 138 (D. Nev. 1984) (no legitimate governmental purpose in denying pretrial detainees reasonable telephone access).

Third, Mr. al Marri has properly alleged that the restrictions on his exercise of Islam violate the Free Exercise Clause of the First Amendment. The Constitution prohibits the government from stifling or unduly restricting religious beliefs or practices. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993); *Goodall v. Stafford County School Bd.*, 60 F.3d 168, 170 (4th Cir. 1995). In order to justify such an infringement on free exercise rights, the government must prove that it has a compelling interest in doing so and that it has adopted the least restrictive alternative in furthering that interest. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). While a “valid and neutral law of general applicability” that incidentally burdens a religious practice need not be justified by a compelling interest, *Employment Div., Dep’t of Human Resources v. Smith*, 494 U.S. 872, 878-79 (1990), the restrictions on Mr. al-Marri’s free exercise of Islam are the result of no such law. *See Lukumi*, 508 U.S. at 531-32 (“[A] law failing to satisfy these requirements [of neutrality and general applicability] must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”). To the contrary, these restrictions are alleged to constitute a deliberate interference with Mr. al-Marri’s personal religious observance and practice. (Compl. ¶ 145). *See Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (law not neutral if it targets religiously motivated conduct either on its face or as applied in practice”).⁶

⁶ Moreover, because the restrictions on Mr. al-Marri’s exercise of Islam implicate his free speech rights under the First Amendment and due process rights under the Fifth Amendment, they are subject to heightened scrutiny for that reason as well. *See Smith*, 494 U.S. at 881-82 (citing cases invalidating laws under the Free Exercise Clause which implicate other constitutional rights); *Cornerstone Bible Church v.*

Even assuming *arguendo* that Mr. al-Marri's Free Exercise Clause claim is subject to the same standard as governs free exercise claims of convicted prisoners, he has still stated a claim for relief. The government cannot substantially burden a prisoner's religious freedom unless the measures are reasonably related to a legitimate penological interest. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350-52 (1987); *see also Ford v. McGinnis*, 352 F.3d 582, 594 (2d Cir. 2003) (preventing inmate from participating in Islamic feast would substantially burden his free exercise of religion under the Constitution). The Complaint alleges (Compl. ¶¶ 74-87, 143-47) that defendants have unreasonably restricted Mr. al Marri's free exercise of Islam without *any* legitimate interest, including by preventing him from observing his religion by covering his head or purifying himself with water before he prays, denying him access to religious materials (except the Quran), and denying him access to a spiritual advisor of his faith. *See, e.g., Harris v. Lord*, 957 F. Supp. 471, 475 (S.D.N.Y. 1997) (refusal to allow prisoner to attend religious services states claim under Free Exercise Clause); *Marria v. Broaddus*, No. 97 Civ. 8297, 2003 WL 21782633, at *12 (S.D.N.Y. July 31, 2003) (access to central religious texts entitled to protection under Free Exercise Clause); *see also Manley v. Fordice*, 945 F. Supp. 132, 139 (S.D. Miss. 1996) (statute prohibiting televisions and radios did not violate the Free Exercise Clause by preventing plaintiffs from viewing or hearing religious services where plaintiffs had access to chaplains, to any religious literature they desired, and to church services). Mr. al Marri has thus stated a claim under the Free Exercise Clause of the First Amendment as well.⁷

City of Hastings, 948 F.2d 464, 473 (8th Cir. 2001) (reversing dismissal of hybrid Free Exercise Clause claim that implicated other constitutional rights).

⁷ For substantially the same reasons, defendants' motion to dismiss Mr. al Marri's Fourth Amendment claim should be denied. Specifically, he has alleged that defendants, by exposing him to constant video

C. Plaintiff Has Stated A Claim For Relief Under RFRA.

Defendants (Mem. at 17-19) argue that this Court should dismiss Mr. al Marri's RFRA claim because it fails to allege facts that could establish that the government has substantially burdened his exercise of religion. This argument misconstrues both RFRA and the standard governing motions to dismiss. It should be rejected.

In enacting RFRA, Congress made clear that the government must respect and accommodate the free exercise of religion by all individuals, and extended the statute to every "branch, department, agency, instrumentality, and official . . . of the United States," including the Department of Defense. 42 U.S.C. § 2000bb-2(1). RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). As amended by the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. No. 106-274, 114 Stat. 803, RFRA defines "exercise of religion" broadly to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (emphasis added); *see also Madison*, 355 F.3d at 315. Thus, "[a] religious exercise need not be mandatory for it to be protected under RFRA." *Kikumura v. Hurley*, 242 F.3d 950, 960-61 (10th Cir. 2001) (prisoner's requested pastoral visits need not be required by his religious beliefs to qualify for protection under RFRA); *see also Charles v. Verhagen*, 220 F. Supp. 2d 937, 948 (W.D. Wis. 2002) (inquiry not permitted into whether "a

surveillance, have violated his right to privacy and personal integrity without a reasonable or legitimate governmental interest. (Compl. ¶¶ 164-166). *See Turner*, 482 U.S. at 89-90; *Covino v. Patrissi*, 967 F.2d 73, 78-79 (2d Cir. 1992). That is more than sufficient to state a claim under the Fourth Amendment for a detainee who, like Mr. al Marri, is not charged with, let alone convicted of, a crime.

particular practice is *required* by a prisoner’s faith”) (internal quotation marks and citation omitted) (emphasis in original), *aff’d* 348 F.3d 601 (7th Cir. 2003).⁸

RFRA was enacted to restore the compelling interest test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), to “all cases where free exercise of religion is substantially burdened.” 42 U.S.C. § 2000bb(b)(1); *see also Goodall v. Stafford County School Bd.*, 60 F.3d 168, 171 (4th Cir. 1995). Thus, the government may not substantially burden an individual’s exercise of religion unless it demonstrates that the restriction “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that . . . interest.” 42 U.S.C. § 2000bb-1(b)(2). Mr. al Marri alleges that defendants have substantially burdened his exercise of religion without a compelling governmental interest and/or by means that are not the least restrictive ones of furthering that interest (Compl ¶¶ 148-51), and thus properly states a claim for relief under RFRA.

Defendants rely on *Woods v. Evatt*, 876 F. Supp. 756 (D.S.C.), *aff’d*, 68 F.3d 463 (4th Cir. 1995), but in *Woods*, the district court held on *summary judgment* that the plaintiffs’ exercise of religion was not substantially burdened. Thus, that decision was based on a record that included evidence adduced by both parties during discovery, including affidavits from the defendants and from witnesses regarding the nature and degree of the burden imposed. *See, e.g.*, 876 F. Supp. at 763 (noting “great deal of information” provided by defendants, including affidavit from Islamic chaplain describing burden on plaintiffs); *id.* at 764-65 (describing how registration requirement actually accommodated plaintiffs’ religious practices); *id.* at 769 (evidence showing that few of defendants’ actions, in fact, placed “any burden” on plaintiffs’ exercise of

⁸Although Mr. al-Marri’s free exercise claims are governed by RFRA because he is in federal custody, the substantive standard governing those claims is the same as under RLUIPA. *See, e.g., DeHart v. Horn*, 390 F.3d 262, 273-74 (3d Cir. 2004).

religion) (emphasis in original). Indeed, whether a particular restriction imposes a substantial burden is a fact-intensive question that makes it entirely inappropriate for disposition on a motion to dismiss. *See, e.g., Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183, 186-89 (2d Cir. 2004) (reversing entry of summary judgment because whether restriction imposed substantial burden presented question of fact); *Turner-Bey v. Lee*, 935 F. Supp. 702, 703 (D. Md. 1996) (assessing extent of burden on summary judgment); *Muslim v. Frame*, 891 F. Supp. 226, 231 (E.D. Pa. 1995) (whether restrictions on headgear substantially burden exercise of religion presents “genuine issue of fact” that precludes summary judgment). Mr. al Marri’s well-pled allegations that defendants have substantially burdened his exercise of Islam must be taken as true, and the government’s motion must be denied.

But defendants’ reliance upon *Woods* is misplaced for another, more fundamental reason. *Woods* was decided before RFRA was amended by RLUIPA to prohibit imposing a substantial burden on “any exercise of religion,” even if it is “not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc-5(7)(A) (emphasis added); *see also Madison*, 355 F.3d at 315. Thus, defendants’ contention (Mem. at 19) that a restriction must interfere with a tenet that is “central to religious doctrine” is simply wrong. Additionally, even were that not so, whether the challenged restrictions are central to Mr. al Marri’s religion -- and he maintains they are -- is a question of fact and thus an improper basis for dismissal under Rule 12(b)(6).

It is also incorrect (Defs.’ Mem. at 19) that Mr. al Marri can only establish a violation of RFRA if he alleges and proves that defendants have put “substantial pressure on him by threat of sanctions to modify his behavior and to violate his beliefs.” The

protections provided by RFRA extend well beyond this cribbed and inaccurate description. Thus, a substantial burden is also one that “inhibits or constrains [religious] conduct or expression,” as well as one that “compels conduct or expression that is contrary that is contrary to [religious] beliefs.” *Stuart Circle Parish v. Board of Zoning Appeals of City of Richmond*, 946 F. Supp. 1225, 1238 (E.D. Va. 1996) (citation omitted); accord *Mack v. O’Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996) (broader view of substantial burden intended by Congress); see also H.R. Rep. No. 103-88 (1993) (rejecting limitation of substantial burden to instances where government “coerce[s] individuals into violating their religious beliefs” or “penalize[s] religious activity”); see also *Hicks v. Garner*, 69 F.3d 22, 26 n.22 (5th Cir. 1995) (substantial burden where government curtails prisoners’ ability to express adherence to his faith or denies prisoner reasonable opportunities to exercise his religion); *Coronel v. Paul*, 316 F. Supp. 2d 868, 880 (D. Ariz. 2004) (“state action substantially burdens the exercise of religion . . . when it prevents a [prisoner] from engaging in conduct both important to [him] and motivated by sincere religious belief”); Derek L. Gaubatz, “RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA’s Prisoner Provisions,” 28 Harv. J.L. & Pub. Pol’y 501, 534 (2005) (government substantially burdens free exercise of religion when it prevents individual from “engaging in religious conduct in a way that is greater than a mere inconvenience”) Here, Mr. al Marri alleges that defendants have substantially burdened his exercise of religion by intentionally and impermissibly restricting his practice and observance of Islam, including as a way of punishing, humiliating, and/or degrading him. (Compl. ¶¶ 49, 74-87, 108, 148-50). He has alleged ample and sufficient facts to state a claim under RFRA.

D. Plaintiff States A Claim For Relief Under The APA.

Mr. al Marri also properly alleges that defendants have violated the APA by failing to apply Army Regulation 190-8, which establishes standards for the treatment of all individuals detained by the United States military. *See* Army Regulation 190-8, “Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees,” § 1-1(b) (1997) (“Army Regulation 190-8”), *available at* <http://usmilitary.about.com/library/milinfo/arreg2/blar190-8.htm>; Military Police Manual of Internment/Resettlement Operations, FM 3-19.40 (Aug. 1, 2001) (“FM 3-19.40”), *available at* <http://www.humanunderground.com/archive/pdf/fm3-19-40.pdf>. Army Regulation 190-8, which implements codified and customary international law, provides that “all persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.” Army Regulation 190-8, § 1-5a(1).

This regulation provides standards governing the detention not only of prisoners of war, Army Regulation 190-8, § 3.4e, but also of individuals who do not qualify for prisoner of war status, such as civilian internees -- *i.e.*, persons detained “during armed conflict . . . for security reasons or for protection or because [they have] committed an offense against the detaining power.” *Id.* at Glossary. Civilian internees are entitled, for example, to respect for their family rights, *id.* § 5.1a(2); to visits from close relatives and other persons authorized by the military commander, *id.* § 6.7b(2); FM 3-19.40, § 5-61; to meaningful educational opportunities, Army Regulation 190-8, § 6.7c; FM 3-19.40, § 5-59; to social programs and activities, FM 3-19.40, §§ 5-57, 5-58; to free

exercise of religion, including direct access to a religious cleric from the detainee's faith, Army Regulation 190-8, § 6-7d; FM 3-19.40, § 5-60; to recreational activities, including sports and outdoor games, to promote their health and general welfare and alleviate tension and boredom, Army Regulation 190-8, § 6-7e; FM 3-19.40, § 5-63; and to quarters which "afford every possible safeguard as regards hygiene and health." Army Regulation 190-8, § 6.1b(1). The military's rules also prohibit any "form of physical torture or moral coercion" against detainees, *id.* § 5.1a(1), as well as any measure that causes a detainee's physical suffering, *id.* § 5.1a(6)(a). Further, Army Regulation 190-8 mandates that "[in] all circumstances" and "[a]t all times" detainees must be treated humanely and "with respect for their person, their honor, their family rights, their religious convictions and practices, and their manners and customs." *Id.* § 5.1a(2). Even spies and saboteurs must be "afforded the same human rights treatment as [civilian internees]." *Id.* § 5-1e(2).

As Mr. al Marri has alleged, defendants have unlawfully failed to apply Army Regulation 190-8 to him or to otherwise afford him its guarantees, including by denying him visits with close relatives (Compl. ¶ 57); adequate medical care (Compl. ¶ 100-07); meaningful educational opportunities (Compl. ¶ 53); and direct access to a cleric from his faith (Compl. ¶ 85). He thus states a claim under the APA, which provides a cause of action to any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702. As noted above, *supra* at 12-15, the exception to the APA for suits challenging "military authority exercised in the field in time of war or in occupied territory," 5 U.S.C. § 701(b)(1)(G), does not apply to Mr. al Marri's detention at the naval brig in North Charleston, South Carolina.

Accordingly, Mr. al-Marri has stated a claim for relief under the APA for violation of Army Regulation 190-8.

E. Plaintiff Has Stated Claims Of Violations Of International Law Under The Alien Tort Statute.

Mr. al Marri's claim that defendants have subjected him to torture and/or cruel, inhuman or degrading treatment states a valid claim under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. The ATS provides a remedy for violations of international norms that have "definite content and acceptance among civilized nations" or that rise to the level of "specific, universal and obligatory." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (internal quotation marks and citation omitted). International norms prohibiting torture and cruel, inhuman or degrading treatment or punishment fall squarely within both categories. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876, 884-85 (2d Cir. 1980) (torture); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) (same); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1321-22 (N.D. Cal. 2004) (cruel, inhuman or degrading treatment); *Xuncax v. Gramajo*, 886 F. Supp. 162, 187-88 (D. Mass. 1995) (same); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386, 2002 WL 319887, at *7-*9 (S.D.N.Y. Feb. 28, 2002) (same).

Mr. al-Marri's Complaint alleges that has been confined to a tiny cell at the Brig for over two years in virtual isolation, without any social or familial contact or access to news or books, subjected to religious persecution, denied adequate medical care and other basic necessities, and deliberately harassed and abused. This treatment constitutes torture under the ATS. *See, e.g., Aladana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1252-53 (11th Cir. 2005) (intentional infliction of mental and emotional suffering states claim for torture). It also constitutes cruel, inhuman or degrading treatment -- a

general category of prohibited conduct of which “torture is at the extreme end.” Convention Against Torture, S. Exec. Rep. 30, 101st Cong., 2d Sess. 13 (1990); *see, e.g., Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1348 (N.D. Ga. 2002) (cruel, inhuman or degrading treatment defined as including “acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement”); *Qi*, 349 F. Supp. 2d at 1322 (conduct “sufficiently egregious” can constitute cruel, inhuman or degrading treatment under the ATS). Thus, defendants’ motion to dismiss Mr. al Marri’s ATS claim should be denied.

F. Plaintiff’s Claims Under The Geneva Conventions And Other International Treaties Are Judicially Enforceable.

Mr. al Marri alleges that his inhumane, abusive, and degrading treatment and conditions of confinement violate the Third and Fourth Conventions and the Protocol Additional I to the Geneva Conventions and customary international law. (Compl. ¶¶ 155-60). Defendants argue (Mem. at 9-10) that these treaties do not create privately enforceable rights, relying principally on the Supreme Court’s decision in *Eisentrager*. But *Eisentrager* considered the 1929 Geneva Conventions, not the current conventions, 339 U.S. at 789-90, and therefore does not speak to the intentions of the drafters of those conventions. And the history of the ratification of the current Geneva Conventions demonstrates that the individual rights they guarantee *were* intended to be enforceable in domestic courts without additional implementing legislation. Specifically, the Senate Foreign Relations Committee concluded that all the provisions of the Conventions relevant to this case are self-executing, *Geneva Conventions for the Protection of War Victims: Report of the Senate Comm. on Foreign Relations*, S Rep. No. 9, 84th Cong. 1st Sess. 30-31 (1955), and the Executive Branch concurred in the Senate’s assessment, *Geneva Conventions for the Protection of War Victims: Hearings on Executives D, E, F,*

and G Before the Senate Comm. on Foreign Relations, 84th Cong. 59 (1955); *Restatement (Third) of Foreign Relations Law* § 111 n.5 (1987). Indeed, the drafters of the current Conventions were well aware that the diplomatic measures contained in the 1929 Conventions had failed badly during wartime, *see* Jean de Preux et al., *Geneva Convention III: ICRC Commentary* 632 (1960), and deliberately sought to ensure that protected persons could use whatever means were available, including domestic remedies, to protect their rights, Jean Pictet et al., *Geneva Convention I: ICRC Commentary* 84 (1952) (“It should be possible in States which are parties to the Convention . . . for the rules of the Convention . . . to be evoked before an appropriate national court by the protected person who has suffered the violation.”).

The Fourth Circuit suggested in *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), that the Geneva Conventions are not self-executing. *Id.* at 468-69; *see also Hamdan*, 415 F.3d at 39-40 (Geneva Conventions do not create judicially enforceable rights). The Fourth Circuit’s decision, however, was vacated by the Supreme Court, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and is therefore no longer binding on this Court. Moreover, the plurality in *Hamdi* expressly relied on the Geneva Conventions to determine how long the detention of prisoners was authorized, *id.* at 520-21, thereby suggesting that the Conventions had effect in domestic law. *See also id.* at 549-51 (Souter, J., concurring) (discussing application of Geneva Conventions to alleged unlawful combatant captured in Afghanistan). In any event, the Geneva Conventions have been implemented in domestic law by Army Regulation 190-8. *See Hamdi*, 542 U.S. at 538 (plurality op.) (discussing Army Regulation 190-8); *id.* at 550-51 (Souter, J., concurring) (same).

Moreover, the guarantees of humane treatment, including those contained in Common Article 3 to the 1949 Geneva Conventions, are considered customary international law. *See, e.g.,* Lindsay Moir, *The Law of Internal Armed Conflict* 86-88 (2002); *see also* ICRC, *Customary International Humanitarian Law*, Rule 87 (“Civilians and persons hors de combat must be treated humanely.”). As such, these protections are part of the law of the United States and are binding on defendants. *See, e.g., The Paquete Habana*, 175 U.S. 677, 700 (1900); *see also Sosa*, 542 U.S. at 729 (“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”).

In sum, defendants’ argument that the Conventions are not judicially enforceable is without merit and should be rejected.

