13-5096
[Consolidated with 13-5097]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SAMI ABDULAZIZ ALLAITHI, et al.,

Plaintiffs-Appellants

v.

DONALD RUMSFELD, et al.,

Defendants-Appellees

On Appeal from the United States District Court for the District of Columbia
Case Nos. 08-CV-1677 (RCL), 06-CV-1996 (RCL)
Hon. Royce C. Lamberth

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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GLOSSARY OF ABBREVIATIONS

ATS	Alien Tort Statute (28 U.S.C. § 1350)
AUMF	Authorization for the Use of Military Force (115 Stat. 224)
CSRT	Combatant Status Review Tribunal
FTCA	Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 2671, *et seq.*)
JA	Joint Appendix
VCCR	Vienna Convention on Consular Relations (21 U.S.T. 77)

STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in the Brief for Appellants and Brief for Appellees. *See* D.C. Cir. Rule 28(a)(5).

SUMMARY OF ARGUMENT

The Government argues that the imprisonment and torture of persons known *not* to be enemy combatants must fall within the scope of employment because the imprisonment and torture of suspected enemy combatants is within the scope.[1] By that logic, the imprisonment of citizens—found not guilty after a trial—by a prison warden is within the scope of employment because a warden is authorized to imprison guilty felons. As a legal matter, and as a matter of common sense, the fact that the United States, through the Authorization for the Use of Military Force ("AUMF"), authorized the detention, interrogation, and possibly even torture of enemies and suspected enemies of the United States is not an unlimited authorization to imprison and torture *anyone* for any reason or no reason at all. Nor can the latter be subsumed as within the scope of the former simply because both involve imprisonment. If the "enemy combatant status" of those imprisoned

[1] Plaintiffs disagree that torture is within the scope of employment even with respect to suspected enemy combatants. However, they recognize that the panel is bound by this Court's holding in *Rasul v. Myers (Rasul I)*, 512 F.3d 644, 661 (D.C. Cir. 2008) (concluding that torture is within scope of employment), *judgment vacated by* 555 U.S. 1083 (2008), *judgment reinstated by Rasul v. Myers (Rasul II)*, 563 F.3d 527 (D.C. Cir. 2009). As stated in their Opening Brief (fn. 4), Plaintiffs reserve the right to supplement their arguments should they seek *en banc* determination or further appellate review.

and tortured in Guantanamo is a distinction without a difference, then so too is the distinction between innocence and guilt—a result this Court must certainly reject.

The Government also asserts that Defendants had the authority "to continue to detain plaintiffs *while seeking their transfer to a suitable country*." (Appellees' Br. at 37) (emphasis added). Although the temporary detention of Plaintiffs for a reasonable amount of time while seeking their transfer to a suitable country may be within the scope of employment, the Complaints nowhere allege that this was the purpose of Defendants' continued detention, which continued for up to two years after Plaintiffs Al Laithi, Hasam and Muhammad were determined not to be enemy combatants by CSRTs. At this stage of the proceedings, the allegations of the Complaints must govern. In any event, the limitless detention of the innocent cannot, as *a matter of law*, fall within the scope of employment. Nor could it justify the additional abuse and torture inflicted on Plaintiffs. Therefore, whether the continued detention was within the scope of employment *in this case* is a factual question that cannot be resolved on a motion to dismiss.

Plaintiffs have met their burden of alleging sufficient facts to rebut the government's certification that Defendants were acting within their scope of employment in detaining and torturing Plaintiffs for up to two years after the executive branch determined that Plaintiffs were *not* enemy combatants. Therefore, the District Court's determination that, as a matter of law, Defendants

were at all relevant times acting within their scope of employment was erroneous. In particular, Plaintiffs have alleged facts negating at least three of the four elements of this Court's scope-of-employment test.

First, Plaintiffs have alleged facts demonstrating that Defendants' continued detention and abuse of Plaintiffs after they were declared non-enemy combatants was not the kind of work Defendants were employed to perform. Defendants' conduct—continuing to hold and abuse Plaintiffs for up to two years after they were declared non-enemy combatants—cannot be "the kind" of conduct Defendants were employed to perform because it was neither incidental to authorized conduct nor of the same general nature as authorized conduct. The AUMF authorized the kind of work Defendants were employed to perform: the detention and interrogation of *suspected enemy combatants*. Although this Court has held that torture is incidental to *authorized* detention and interrogation, Defendants' abuse of Plaintiffs could not have been incidental to any authorized conduct because Defendants were not authorized to continue to indefinitely hold or interrogate non-enemy combatant Plaintiffs.[2]

Second, Plaintiffs have plausibly alleged facts demonstrating that

[2] Likewise, Plaintiffs have alleged facts demonstrating that Defendants' refusal to allow Plaintiffs Sen and Mert their consular access rights under the Vienna Convention was outside Defendants' scope of employment. The United States has a clearly defined policy of complying with the Vienna Convention. Acting in direct contravention of United States policy is not the kind of work Defendants were employed to perform.

Defendants were not motivated by a purpose to serve the interests of the United States in continuing to detain and abuse Plaintiffs, but were instead motivated by personal animus toward Plaintiffs and their religion. The United States did not authorize, nor did it have any interest, in continuing to detain and abuse Plaintiffs for up to two years after they were no longer suspected of being enemy combatants. Furthermore, the nature of the abuse Plaintiffs suffered at the hands of Defendants, such as forced shaving and prevention of practicing the most basic tenets of their religion, suggests that Defendants were not motivated by a purpose to serve the legitimate interests of the United States, but by their own personal animosity toward Plaintiffs and their religion.

Third, Plaintiffs have alleged facts showing that their detention and torture by Defendants after they were no longer suspected enemy combatants was unforeseeable by Defendants' employer.

To accept the Government's position here is to hold that there is no remedy for the intentional and indefinite detention and torture, without valid purpose, of persons *known* not to be enemy combatants. Such a result would give *carte blanche* to the Government's officers and employees to act without limitation and without fear of liability—a result that must be rejected. Because Plaintiffs have met their burden of alleging sufficient facts to rebut the government's scope of employment certification, they should, at a minimum, be allowed limited discovery

on the scope of employment issue. The District Court's Order Granting Defendants' Motion to Dismiss should therefore be vacated, and Plaintiffs should be allowed to proceed to discovery on their claims.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DECIDING THAT, AS A MATTER OF LAW, DEFENDANTS WERE ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT WHILE CONTINUING TO DETAIN AND TORTURE NON-ENEMY COMBATANTS.

To avoid dismissal at this stage and proceed to discovery, Plaintiffs are "merely required to plead sufficient facts that, if true, would rebut" the government's certification that Defendants were acting within their scope of employment while continuing to detain and torture non-enemy combatants. *See Stokes v. Cross*, 327 F.3d 1210, 1216 (D.C. Cir. 2003); *Phillips v. Mabus*, 894 F. Supp. 2d 71, 85-87 (D.D.C. 2012). Plaintiffs are "not required to allege the existence of evidence [they] might obtain through discovery." *Stokes*, 327 F.3d at 1216. Because Plaintiffs have met their burden, the District Court erred in holding that, as a matter of law, Defendants were acting within their scope of employment in continuing to detain and torture the non-enemy combatant Plaintiffs.

There are four elements that must be met in order for an employee's act to be within his scope of employment: (1) the act must be "of the kind he is employed to perform"; (2) the act must "occur substantially within the authorized time and space limits"; (3) the act must be "actuated, at least in part, by a purpose

to serve the master"; and (4) "if force is intentionally used by the servant against another, the use of force" must not be "unexpectable by the master." *Council on Am. Islamic Relations v. Ballenger*, 444 F.3d 659, 663 (D.C. Cir. 2006) (quoting Rest. (Second) of Agency § 228).

Plaintiffs have plausibly alleged facts that negate at least three[3] of the four elements necessary for a finding that Defendants were acting within their scope of employment in continuing to detain and torture the non-enemy combatant Plaintiffs. Therefore, Plaintiffs' Alien Torts Statute ("ATS") claims should not have been dismissed. *See Stokes*, 327 F.3d at 1214-16 ("[b]ecause the plaintiff cannot discharge [the burden of rebutting the government's scope of employment certification] without some opportunity for discovery, the district court may permit limited discovery and hold an evidentiary hearing to resolve a material factual dispute regarding the scope of the defendant's employment"); *Majano v. United States*, 469 F.3d 138, 141 (D.C. Cir. 2006) ("[o]n the infrequent occasions when courts have resolved scope of employment questions as a matter of law, . . . it has generally been to hold that the employee's action was *not* within the scope of her employment and thus to absolve the employer of any liability"); *Jordan v. Medley*,

[3] Contrary to Defendants' characterization of Plaintiffs' Opening Brief (*see* Appellees' Br. at 35), Plaintiffs do dispute that the fourth element of the scope of employment test is met here. *See* Appellants' Opening Brief at 34 ("the continued torture of Plaintiffs for nearly two years after being declared non-enemy combatants could not have been foreseeable.").

711 F.2d 211, 215 (D.C. Cir. 1983) (noting that finding an intentional tort was within the scope of employment as a matter of law "would be particularly rare" because such torts "by [their] nature [are] willful and thus more readily suggest[] personal motivation"); *Phillips*, 894 F. Supp. 2d at 85-87.

Furthermore, as this Court has recognized, this District's expansive application of the scope of employment test has been motivated in part by a desire to allow "an injured tort plaintiff a chance to recover from a deep-pocket employer rather than a judgment-proof employee." *Harbury v. Hayden*, 522 F.3d 413, 422 n. 4 (D.C. Cir. 2008); *see also Lyon v. Carey*, 533 F.2d 649, 651 (D.C. Cir. 1976) (noting that the assault at issue "was perhaps at the outer bounds of *respondeat superior*"). Where, as here, a finding that the Defendants' conduct is within the scope of employment would serve to completely bar recovery by the injured Plaintiffs, the test should be applied more narrowly.[4]

A. Plaintiffs Have Plausibly Alleged Facts Demonstrating That Continuing to Hold and Torture Non-Enemy Combatants Was Not the Kind of Work Defendants Were Employed to Perform.

Plaintiffs have plausibly alleged facts that negate the first element of the scope of employment test, *i.e.*, that Defendants' acts were "of the kind [they were]

[4] As a result of this Court's rulings in the *Rasul* cases, this appeal focuses on the post-Combatant Status Review Tribunal determination, detention, and abuse of Plaintiffs Al Laithi, Hasam, and Muhammad. Nevertheless, Appellants reserve the right to supplement their arguments with respect to the remaining Appellants should they seek *en banc* determination or further appellate review.

employed to perform."

An employee's acts are "of the kind he is employed to perform" only if the conduct is "of the same general nature as that authorized, or incidental to the conduct authorized." *Bancoult v. McNamara*, 445 F.3d 427, 437-38 (D.C. Cir. 2006) (quoting Rest. (Second) of Agency § 229(1)). "[I]f the employee's tort did not arise directly from performance of an authorized duty and the job merely provided an opportunity to act, courts have found such conduct to be outside the scope of employment." *Hicks v. Office of the Sergeant at Arms for the U.S. Senate*, 873 F. Supp. 2d 258, 266 (D.D.C. 2012).

Here, the conduct at issue—holding and torturing non-enemy combatants for up to two years—cannot be "the kind" of conduct Defendants were employed to perform because it was neither incidental to authorized conduct nor of the same general nature as authorized conduct.

1. The AUMF authorized Defendants to perform only certain kinds of work: the detention and interrogation of actual or suspected enemy combatants.

Defendants were employed to detain and interrogate suspected enemy combatants in either a supervisory or direct capacity. Defendants' power to detain suspected enemy combatants was derived from the AUMF, which authorized the executive branch to "use all necessary and appropriate force against *those . . . persons [the President] determines planned, authorized, committed, or aided the*

terrorist attacks that occurred on September 11, 2001." 107 P.L. 40, 115 Stat. 224 (2001) (emphasis added); *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (recognizing that "*individuals who fought against the United States* . . . are [the] individuals Congress sought to target in passing the AUMF" and that "detention of individuals falling into t[hat] *limited category*" is acceptable) (emphasis added).

Defendants' authority to detain enemies of the United States and suspected enemy combatants does not extend to the detention and torture of those specifically found *not* to be enemy combatants. Defendants were not authorized to continue holding indefinitely those determined to be non-enemy combatants. Defendants' arguments that detaining and mistreating Plaintiffs after they were declared non-enemy combatants was the kind of work Defendants were employed to perform because they were employed to manage or guard a military prison has no limiting principle. It is akin to arguing that imprisoning people found to be not guilty after trial is within the scope of employment simply because the warden or jailors are authorized to imprison those found to be guilty or those who are awaiting trial and have not been released on bail.

Detaining and torturing those who are known to be innocent simply cannot, as a matter of law, be the same kind of work as detaining and interrogating those suspected of terrorism.

2. Defendants' long-term detention and torture of Plaintiffs after they were declared non-enemy combatants was not incidental to authorized conduct.

Unauthorized conduct can be within the scope of employment *if* the employee engages in the unauthorized conduct as a method of carrying out the employee's legitimate job responsibilities. *See, e.g.*, *Rasul I*, 512 F.3d at 658. Here, however, Defendants' detention and abuse of the non-enemy combatant Plaintiffs was not a method of carrying out any of their legitimate job responsibilities because Defendants' only job responsibility concerning Plaintiffs was to expeditiously release or transfer them after their CSRT determinations. *See Parhart v. Gates*, 532 F.3d 834, 854 (D.C. Cir. 2008) (holding that the government must "expeditiously" release or transfer detainees not proven to be enemy combatants). Because abuse and long-term continued detention were not methods for expeditiously releasing or transferring Plaintiffs, these acts were not incidental to authorized conduct.

Although the AUMF authorizes the detention and interrogation of suspected enemy combatants, no court or body has ever concluded that the AUMF, or any other law or provision, authorizes the detention, torture, or abuse of innocent persons who are formally determined not to be enemy combatants or belligerents.

While detaining Plaintiffs for a short time until they could be transferred could arguably be incidental to Defendants' authorized conduct under the AUMF,

Plaintiffs' allegations present a *question of fact* as to how long Defendants could continue to hold Plaintiffs after they were determined to be non-enemy combatants, and what steps they were taking—if any—to release the cleared detainees, before their detention no longer simply remained "incidental" to authorized conduct. Accepting Defendants' position—without any discovery of underlying facts—is to absolve a potentially indefinite and infinite imprisonment merely because imprisonment at some prior point may have been authorized or even justified. Instead, whether Plaintiffs' continued detention *for up to several years* was reasonable in light of the circumstances is a question of fact, not of law. In any event, it could not have been incidental to Defendants' authorized conduct to continue to torture Plaintiffs after they were declared non-enemy combatants because the AUMF did not authorize interrogation of those no longer suspected of being enemy combatants.

On this point, *Rasul I* does not control. *Rasul I* held that the torture of the plaintiffs in the case was incidental to conduct authorized by the AUMF: "detention and interrogation of *suspected enemy combatants*." *Rasul I*, 512 F.3d at 657 n.6 & 658 (emphasis added). *Rasul I* and *II* do not address—or even suggest—that the detention of non-enemy combatants is within the scope of employment.

Likewise, *Al Janko* is distinguishable because the conduct at issue in that case occurred *before* any tribunal had held that the plaintiff was not an enemy

combatant. *See Al Janko v. Gates*, 831 F. Supp. 2d 272, 274 (D.D.C. 2011), *appeal pending*, No. 12-5017 (D.C. Cir.). Here, the conduct occurred during the period continuing up to two years *after* Plaintiffs were declared non-enemy combatants and any authorization for their detention had ended.

The remaining cases Defendants cite all have a common thread: the conduct at issue in those cases was a "direct outgrowth" of some other specifically authorized conduct that served a legitimate purpose. *See Wilson v. Libby*, 535 F.3d 697, 712 (D.C. Cir. 2008) (a Congressman's defamatory statements made to the press were incidental to his authorized conduct of speaking to the press); *Harbury*, 522 F.3d at 422 (CIA agents' involvement in death of plaintiff's husband, at hands of Guatemalan army officers, was incidental to their authorized conduct of "conducting covert operations [] and gathering intelligence" related to the Guatemalan civil war, in which plaintiff's husband was the commander of Guatemalan rebel forces); *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006) (Defendants' harsh treatment of an island's native people was incidental to their authorized conduct of "removing an entire community from their home islands, transferring them elsewhere, and replacing their community with a military base"). Here, however, Defendants were authorized to hold or interrogate *only* certain classes of people, namely enemy combatants or suspected enemy combatants, and not individuals they *knew* fell outside of that class.

3. Defendants' long-term detention and torture of non-enemy combatants was not of the "same general nature" as their authorized conduct.

Defendants' conduct was not "of the same general nature" as the conduct they were authorized to undertake. Imprisoning someone who has been declared innocent is not "of the same general nature" as imprisoning someone who is suspected of committing a crime. Likewise, torturing someone who is known not to be an enemy combatant (and who has no intelligence value) is not "of the same general nature" as torturing a suspected or known enemy combatant in an attempt to collect information about possible terrorist plots or terrorist organizations. *See Gambling v. Cornish*, 426 F. Supp. 1153, 1155 (N.D. Ill. 1977) (in determining whether an act falls within the scope of employment, "the line must be drawn somewhere").

Here, though Defendants were authorized to detain and interrogate suspected enemy combatants, continuing to detain and torture those who had been affirmatively declared non-enemy combatants is materially different conduct: "the line must be drawn somewhere." *See id.* Even where officers and employees have plenary powers, some conduct falls outside the scope of employment. *See, e.g.*, *Lampkin v. Gappa*, 2012 U.S. Dist. LEXIS 38237, at *6-7 (E.D. Penn. March 21, 2012) (applying Restatement § 228 scope of employment test and holding that an employee who "would be expected to make and did in fact make all decisions

regarding the business" was acting outside his scope of employment when he unlawfully detained the plaintiff to prevent her from taking mail that had arrived at the business).

4. The Restatement (Second) of Agency § 229 factors also support a finding that Defendants' challenged conduct was not the kind of work they were employed to perform.

Based on the Restatement (Second) of Agency § 229 factors, Defendants' conduct toward Plaintiffs was not the kind of work Defendants were employed to perform. Section 229(2) provides the following:

> In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:
>
> (a) whether or not the act is one commonly done by such servants;
>
> (b) the time, place and purpose of the act;
>
> (c) the previous relations between the master and the servant;
>
> (d) the extent to which the business of the master is apportioned between different servants;
>
> (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
>
> (f) whether or not the master has reason to expect that such an act will be done;
>
> (g) the similarity in quality of the act done to the act authorized;

> (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
>
> (i) the extent of departure from the normal method of accomplishing an authorized result; and
>
> (j) whether or not the act is seriously criminal.

Thus, section 229(2)(b) directs courts to consider "the time, place and purpose of the act." Plaintiffs allege that Defendants continued to hold and torture them for up to two years after the authorization for their detainment and interrogation had ended. Thus, the conduct at issue took place at an unauthorized time. *See* Rest. (Second) of Agency § 229, cmt. e ("[t]he fact that the act is done at an unauthorized . . . time . . . indicates that the act is not within the scope of employment"). Further, Plaintiffs have alleged that Defendants continued to hold and torture them, not because they were motivated to serve the master, but because they were motivated by animus against Plaintiffs and their religion. No purpose of the United States could have been served by detaining and torturing those who were declared non-enemy combatants. *See id.* ("[t]he fact that the act is . . . actuated by a purpose not to serve the master indicates that the act is not within the scope of the employment").

Further, the Restatement (Second) of Agency § 229(2)(e) states that "whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant" is relevant to the analysis. The

United States has not authorized the detention, interrogation, or torture of those who are not enemies of the United States. Thus Defendants' torture of Plaintiffs after they were declared non-enemy combatants was outside the "enterprise of the master," which indicates that the conduct was not within Defendants' scope of employment.

Another Section 229 factor considers "whether or not the master has reason to expect that such an act will be done." Restatement § 229(2)(f). Although it may have been foreseeable that Defendants would continue to detain Plaintiffs for a short time until arrangements for their transfer could be made, it should not be decided as a matter of law that it was foreseeable for Defendants to continue to detain and torture Plaintiffs for as long as two years after they were declared non-enemy combatants. Certainly, there is nothing to suggest that the United States (or Congress) ever foresaw the imprisonment and abuse of those who had been cleared of any wrongdoing.

Finally, yet another Section 229 factor weighs against a finding that Defendants' conduct was of the same general nature as their authorized conduct. Section 229(2)(j) asks "whether or not the act is seriously criminal." Torturing those who have been declared non-enemy combatants is criminal conduct that is significantly different in kind from using harsh interrogation methods on those suspected of being enemy combatants. *Cf. Rasul I*, 512 F.3d at 660.

B. Plaintiffs Have Plausibly Alleged Facts Showing That Defendants' Conduct Was Not Actuated by a Purpose to Serve the United States, but Was Instead Motivated by Their Own Animus Toward Plaintiffs.

Plaintiffs have also plausibly alleged facts that negate the third element of the scope of employment test, *i.e.*, that Defendants' acts were "actuated, at least in part, by a purpose to serve the master."

Even where the defendant's employment offers the opportunity for the defendant's challenged conduct, if the defendant is not motivated by a purpose to serve his or her employer in committing the offense, then the defendant's acts are not within his or her scope of employment. *See, e.g.*, *Grimes v. Saul*, 47 F.2d 409 (D.C. Cir. 1931) (employee hired to inspect an apartment building who gained entrance to a tenant's apartment by professing the need to inspect it was not acting within the scope of his employment when he raped the tenant); *Boykin v. District of Columbia*, 484 A.2d 560 (D.C. 1984) (teacher responsible for training blind students how to avoid obstacles was not acting within his scope of employment when he took a student for a walk, ostensibly for training purposes, and sexually assaulted her).

Even where the initial conduct of the defendant fell within the scope of employment, if the defendant was no longer motivated by a purpose to serve the master at the time of the claimed injury, the defendant's injurious acts fall outside his scope of employment. *See, e.g.*, *Majano*, 469 F.3d at 142 (reasonable jury

could find that a defendant who assaulted a fellow employee shortly after the victim asked to see the defendant's identification badge upon entering their place of work was motivated entirely by her own personal animosity, and not by any purpose to serve her master, and thus was acting outside the scope of her employment); *Jordan*, 711 F.2d at 216 (apartment building employee was not necessarily acting within the scope of his employment when he brandished a loaded gun at a tenant during an argument prompted by a rent increase where facts suggested that employee's action may have been motivated by personal animosity toward the tenant rather than a desire to serve his master); *M.J. Uline Co. v. Cashdan*, 171 F.2d 132, 134 (D.C. Cir. 1949) (hockey player who injured a fan in an attempt to strike an opponent was not necessarily acting within the scope of his employment).

Finally, "the fact that the servant acts in an outrageous manner or inflicts a punishment out of all proportion to the necessities of his master's business is evidence indicating that the servant has departed from the scope of employment in performing the act." *See, e.g., Grimes*, 47 F.2d at 563; Rest. (Second) of Agency § 235, cmt. c.

Here, Defendants' employment afforded them an opportunity to continue to hold and mistreat Plaintiffs after Plaintiffs were declared non-enemy combatants. However, Plaintiffs have plausibly alleged specific facts that tend to show that

Defendants were motivated to continue to hold and mistreat Plaintiffs not by a purpose to serve their master (the United States), but by personal animosity toward Plaintiffs and their religion. Thus, it was improper to hold as a matter of law that Defendants were acting within their scope of employment.

The United States had no interest in continuing to hold and mistreat those declared non-enemy combatants. As soon as the Plaintiffs were cleared, the AUMF no longer authorized their detention and interrogation. The government itself initiated the CSRTs to determine those individuals who were not enemy combatants and who therefore could not be detained pursuant to the AUMF. It certainly did not intend for its employees to continue to detain and abuse innocent persons for years thereafter. Even if the United States had an interest in holding Plaintiffs for a short time until they could be suitably relocated, the question of whether Defendants were intending to serve this interest is a question of fact, and is not appropriate for decision until Plaintiffs have an opportunity to conduct discovery on the issue. *See Stokes*, 327 F.3d at 1214 ("the plaintiff cannot discharge [the burden of rebutting the government's scope of employment certification] without some opportunity for discovery").

The Defendants' long-term detention and alleged mistreatment of Plaintiffs, who were no longer suspected of being enemy combatants, could also be considered "outrageous," even if the detention and abuse of suspected enemy

combatants is not. For example, Plaintiffs were placed in solitary confinement, deprived of sleep for prolonged periods, prevented from praying, forcibly shaved, subjected to sensory deprivation, and even beaten. (JA068-69 at ¶¶ 142-43; JA075 at ¶¶ 166-67; JA112-13 at ¶¶ 58-63). This outrageous conduct is "evidence indicating that the servant has departed from the scope of employment in performing the act." *See Grimes*, 47 F.2d at 563. The motivations of Defendants in either supervising or carrying out cruel and inhumane acts toward individuals who were known not to be enemy combatants are, at a minimum, unresolvable as a matter of law.[5]

Finally, the nature of the religious abuse Plaintiffs' suffered provides a strong indication that at least some of the Defendants were motivated by an animus toward Plaintiffs' religion. Plaintiff Hasam was prevented from praying, forcibly groomed in a manner abhorrent to his religion, and deprived of the Koran. (JA068

[5] Defendants argue that some of Plaintiffs' alleged abuse was the result of disciplinary actions, and thus within the scope of Defendants' employment. (Appellees' Br. at 39 n. 23.) However, the allegations make clear that the punishment inflicted upon Plaintiffs was out of proportion to the minor infractions for which they were allegedly being disciplined. For example, guards would burst into Plaintiff Al Laithi's cell, chain him hand and foot, and sometimes beat him for trivial or nonexistent infractions of camp rules such as the order of his toiletry items in his cell. (JA112 at ¶¶ 58-59.) Defendants' infliction of "punishment out of all proportion to the necessities of [their] master's business is evidence indicating that [they] departed from the scope of employment in performing the act." *Grimes*, 47 F.2d at 563. Additionally, this defense is factual in nature and therefore not appropriate for resolution as a matter of law.

at ¶ 142). Plaintiff Muhammad's prayer was disrupted, his religious practices mocked, and his Koran confiscated. (JA075 at ¶ 167.) Plaintiff Al Laithi's prayer was disrupted and mocked, his beard forcibly shaved, and his Koran confiscated and intentionally desecrated. (JA113 at ¶ 61.)[6]

These specific factual allegations "allow[] the court to draw the reasonable inference" that at least some of the Defendants held and abused Plaintiffs because of their animus toward Plaintiffs and their religion, and not out of any intent to serve the interests of the United States, thus meeting the plausibility requirement. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged"). Plaintiffs should at least be allowed to take discovery on this issue.

C. Plaintiffs Have Plausibly Alleged Facts Showing That Defendants' Torture of Non-Enemy Combatants Was Not Foreseeable.

Finally, Plaintiffs have plausibly alleged facts that negate the fourth element of the scope of employment test, *i.e.*, that "if force is intentionally used by the servant against another, the use of force in not unexpectable by the master."

Generally, "serious crimes are . . . unexpectable." Rest. (Second) of Agency

[6] The United States District Court for the District of Columbia has recognized that the government must reasonably respect the religious preferences of detainees. *See In re Guantanamo Detainee Litig. v. Obama*, 2013 U.S. Dist. LEXIS 96643, at *16-17, 66 (D.D.C. July 11, 2013), *appeal pending*, No. 13-5218 (and consolidated cases) (D.C. Cir.).

§ 231, cmt. a. The torture of those known to be innocent surely must qualify as a "serious crime," and therefore should be held to be "unexpectable." *See Gambling*, 426 F. Supp. at 1155 (holding that the false arrest, false imprisonment, and rape of an innocent woman by police officers was "too outrageous . . . to be considered 'expectable' under the Second Restatement test."); *Boykin*, 484 A.2d at 536 (rejecting argument that teacher's sexual assault on student was foreseeable and noting that "the mere fact that an employee's employment situation may offer an opportunity for tortious activity does not make" the tortious activity foreseeable).

Although the use of force in interrogating suspected enemy combatants may have been foreseeable, the continued harsh treatment of those declared non-enemy combatants for up to two years could not be. As explained above, Defendants were not authorized to continue to detain or interrogate Plaintiffs after they were declared non-enemy combatants. The United States no longer had any interest in interrogating Plaintiffs. Thus, it was not foreseeable that Defendants would continue to detain and torture Plaintiffs for up to two years after the executive branch determined that they were not enemy combatants. At the very least, whether such conduct was "unexpectable" is a question of fact that should entitle the Plaintiffs to survive Defendants' Motion to Dismiss.

II. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS UNDER THE VIENNA CONVENTION.

Plaintiffs' have adequately pled facts showing that Defendants' repeated

refusal to provide Plaintiffs Sen and Mert with consular access in violation of the Vienna Convention on Consular Relations ("VCCR")[7] was outside Defendants' scope of employment. Thus dismissal of Plaintiffs' VCCR claims in connection with the District Court's Westfall Act ruling was erroneous.

Plaintiffs have pled facts negating the first element of the scope of employment test. Plaintiffs Sen and Mert made repeated requests to meet with consular representatives from their home country. (JA053 at ¶ 83; JA063 at ¶ 119). Defendants refused these requests. *Id.* Because Defendants' refusal contravened both the VCCR and United States policy (*see* 21 U.S.T. 77, at 100-01; 28 C.F.R. § 50.5; 8 C.F.R. §236.1(e)), Defendants' refusal was not "the kind" of work Defendants were employed to perform. *See* Rest. (Second) of Agency § 228(a); § 230, cmt. c ("the prohibition by the employer may be a factor in determining whether or not, in an otherwise doubtful case, the act of the employee is incidental to the employment; it accentuates the limits of the servant's permissible action and hence makes it more easy to find that the prohibited act is entirely beyond the scope of employment"); *see also Stokes*, 327 F.3d at 1216

[7] The VCCR, 21 U.S.T. 77, is an international treaty, ratified by the United States, that defines a framework for consular relations. Article 36 of the VCCR requires that the United States inform, "without delay," foreign nationals who are arrested or detained of their right to have their embassy or consulate notified of that arrest. Article 36 also requires the United States to allow consular officers to visit their citizens who are in prison, custody, or detention, to converse and correspond with them, and to arrange for their legal representation.

(holding that malicious action contrary to the employer's interest is outside the scope of employment).

CONCLUSION

For the foregoing reasons, the District Court's Order Granting Defendants' Motion to Dismiss should be vacated. Plaintiffs-Appellants respectfully request that the Court remand this case to allow Plaintiffs to take discovery on their claims, particularly on the question of Defendants' scope of employment.

Dated: December 18, 2013

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the Reply Brief contains 5,733 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1). I hereby certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word 2007 in a proportionally spaced typeface, 14-point Times New Roman font.

/s/ Russell P. Cohen
Russell P. Cohen

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2013, I caused the Plaintiffs-Appellants' Reply Brief, to be electronically filed with the Clerk of the Court for the U.S. Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that pursuant to D.C. Circuit Rule 31, eight copies of this Brief will be filed with the Clerk, and two copies of the Brief were served by mail on December 18, 2013, on counsel for the Defendants-Appellees:

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