

THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

MANUEL GUDIEL GARCIA, *et al.*

Plaintiffs,

v.

Civil Action No. 1:11-cv-527-RBW

KATHLEEN SEBELIUS, *et al.*

Defendants.

**INDIVIDUAL FEDERAL DEFENDANTS' MOTION TO DISMISS
AND MEMORANDUM OF POINTS AND AUTHORITIES**

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), the individual federal defendants respectfully move this Court for dismissal of the claims against them.

In support of this motion, the Court is referred to the memorandum immediately following.

Date: January 9, 2012

Respectfully submitted,

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This lawsuit arises out of a deeply troubling chapter in our nation’s history, studies of sexually transmitted diseases (STDs) conducted by United States Public Health Service (PHS) employees in Guatemala between 1946 and 1948 without informed consent. First Amended Complaint (FAC) ¶ 2; Ex. 1 (“*Ethically Impossible*”: *STD Research in Guatemala from 1946 to 1948*, Presidential Commission for the Study of Bioethical Issues, Sept. 2011 (Comm. Rpt.), p. 2).¹ As a result of these unethical studies, a terrible wrong has occurred. The United States is committed to taking appropriate steps to address that wrong. For reasons set forth below, however, this lawsuit is not the proper vehicle – and this Court is not the proper forum – through which the consequences of this shameful conduct may be resolved.

FACTS²

The studies giving rise to this lawsuit “encompassed research on three STDs – syphilis, gonorrhea, and chancroid – and involved the intentional exposure to STDs of 1,308 research subjects from three populations: prisoners, soldiers, and psychiatric patients.” Comm. Rpt. at p. 6. Researchers also “conducted diagnostic testing” that “did not involve intentional exposure to infection” on “5,128 subjects including soldiers, prisoners, psychiatric patients, children, leprosy patients, and Air Force personnel at the

¹ “In ruling on a Rule 12(b)(6) motion to dismiss, the Court may consider ‘any documents either attached to or incorporated in the complaint ... without converting the motion to dismiss into one for summary judgment.’” *Earle v. Holder*, Civ. No. 10–0422, 2011 WL 4526039, *1 n.2 (D.D.C. Sept. 30, 2011) (quoting *Baker v. Henderson*, 150 Supp. 2d 13, 15 (D.D.C. 2001)). Plaintiffs’ complaint incorporates several excerpts from the Presidential Commission’s report as well as general discussion of the Commission’s findings and recommendations. *See, e.g.*, FAC ¶¶ 6-12.

² For the limited purposes of ruling on a motion to dismiss for failure to state a claim, courts “accept[] as true” all “factual matter” set out in a complaint. *Jones v. Horne*, 634 F.3d 588, 595 (D.C. Cir. 2011) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)).

U.S. base in Guatemala.” *Id.* at pp. 2, 6. This diagnostic testing “continued through 1953.” *Id.* at p. 6. Although “local authorities in Guatemala [had] made their institutions available to the U.S. researchers,” and these experiments were carried out with the “cooperation” of “Guatemalan health authorities and government officials,” “there is no evidence that consent was sought or obtained from the individual subjects who were the subjects of the research.” *Id.* at pp. 92, 106.

Dr. John Cutler, who is now deceased, was a senior PHS surgeon and the director of STD research in Guatemala. *Id.* at p. 112. Other former U.S. officials were also involved, including the chief of PHS’s Venereal Disease Division and the Surgeon General. *Id.* at pp. 112-15. However, it is undisputed that the defendants named in this lawsuit played no role in the experiments. *Id.* These high-ranking public health officials, including the current Secretary of Health and Human Services and the current Surgeon General, took office decades later. *Id.*; see FAC ¶¶ 36-43.

When the Guatemalan research became public in late 2010, “the U.S. government registered . . . outrage.” Comm. Rpt. at p. 2. “Kathleen Sebelius, Secretary of the U.S. Department of Health and Human Services . . . and Hillary Rodham Clinton, Secretary of the Department of State, immediately issued a joint apology to the government of Guatemala and the survivors and descendants of those affected.” *Id.* President Obama personally “telephoned President Álvaro Colom of Guatemala to extend an apology to the people of Guatemala.” *Id.* He also directed his Presidential Commission on the Study of Bioethical Issues to “oversee a thorough fact-finding investigation into the specifics of the Guatemala research.” *Id.* at p. 3 (internal citation and quotation omitted). The Commission issued an over 200-page report based on “more than 125,000 pages of

original records,” “tens of thousands of pages of relevant archival records,” and “more than 550 published sources.” *Id.* at p. 5.

THIS LAWSUIT

This lawsuit is brought to redress harms allegedly suffered by Guatemalans as a result of the PHS experiments in Guatemala.³ Though not all alleged victims are named plaintiffs,⁴ those allegedly injured include:

1. **Manuel Gudiel Garcia**, “a soldier ... between 1948 and 1950.” FAC ¶ 19. The complaint alleges that U.S. researchers “inoculated” Garcia with multiple unspecified “venereal diseases” “over the course of 18 months.” *Id.* Garcia is now deceased.⁵ *Id.*
2. **Celso Ramirez Reyes**, a member of “the Guatemalan military between 1948 and 1950.” *Id.* ¶ 20. According to the complaint, Reyes “was inoculated with venereal diseases ... during six months of that service and suffered many diseases.” *Id.* Upon leaving the military, Reyes allegedly suffered from “sores, poor sight, gonorrhea, and ... letharg[y].” *Id.* Reyes is now deceased. *Id.*⁶

³ Plaintiffs assert that they “bring this action individually” and as a “class action” on behalf of “[a]ll individuals who were subjected to non-consensual human medical experimentation in Guatemala ... or were themselves infected to be used as vehicles for infecting the test subjects ... and all children, domestic partners, and spouses of the test subjects who suffered serious, negative health conditions as a result of Defendants’ non-consensual human medical experimentation.” FAC ¶ 28. Defendants reserve the right to oppose certification of such a class but will not address the issue unless and until Plaintiffs properly move for certification.

⁴ The complaint recites a number of allegations regarding injuries not personally suffered by the named plaintiffs. With respect to those allegations, plaintiffs have no standing to pursue relief. *See Vietnam Veterans of America v. Shinseki*, 599 F.3d 654, 662 (D.C. Cir. 2010) (“one cannot have standing in federal court by asserting an injury to someone else”).

⁵ Garcia’s “surviving child and legal heir,” Mateo Gudiel Pinto, sues on his behalf. FAC ¶ 19.

⁶ Reyes’ “surviving children and legal heirs,” Gonzalo Ramirez Tista, Victoria Ramirez Tista, and Celso Ramirez Tista, sue on his behalf. FAC ¶ 20.

3. **Victoria Ramirez Tista**, the daughter and “second child” of Celso Ramirez Reyes and “has suffered many health problems since she was born, including losing her vision at age 15.” *Id.*
4. **Gonzalo Ramirez Tista**, “the daughter of Celso Reyes’s oldest child.” *Id.* ¶ 20. She “has canker sores on her head which have caused her to lose her hair.” *Id.*
5. **Frederico Ramos Mesa**, “a soldier from 1948 through 1950 in the Guatemalan air force.” *Id.* ¶ 21. He was allegedly “inoculated with venereal diseases ... every 15 days” “[o]ver a course of approximately 6 months during his service.” *Id.* He reports that “these inoculations gave him uncomfortable feelings in the genital area along with secretions and hives” and caused him to “stay in bed for one to three days, due to pain and fatigue.” *Id.* Mesa continued to experience “genital secretions,” “difficulty urinating,” “pain in his bones,” “headaches,” and “fatigue” after leaving the military. *Id.*
6. **Odilia Ramos Ruano**,⁷ the “youngest” of Mesa’s “three children.” *Id.* She “was born with cankers on her head, which caused total hair loss.” *Id.*
7. **Oscar Perez Ruiz**,⁸ who “was abandoned at a young age and lived on the streets.” *Id.* ¶ 22. The complaint alleges that “[i]n approximately 1960, Oscar was picked up by unknown persons ... and inoculated with syphilis.” *Id.* “In 1980, Oscar had a blood test and learned he had syphilis.” *Id.* He was successfully treated with penicillin. *Id.*
8. **Marta Cesarea Perez Ruiz**, the wife of Oscar Perez Ruiz, married him “years” after he was allegedly “inoculated with syphilis.” *Id.* She also tested positive for syphilis in 1980 and was successfully treated with penicillin. *Id.* According to the complaint, Marta experienced a stillbirth before her syphilis diagnosis. *Id.*
9. An unnamed **daughter of Oscar and Marta Ruiz**, born on or before November 10, 1984, who “has been severely disabled her entire life.” *See id.* (as of November 10, 2011, daughter was “now 27 years old”).⁹
10. **Victor Manuel Tecu Florian**, “a soldier ... from 1969 through 1971.” *Id.* ¶ 23. He alleges that he “received injections ... every 15 days” of his “18 months of service” and “thus contracted syphilis.” *Id.* He was “ultimately cured” but “is unable to walk properly to this day.” *Id.*

⁷ Ruano is not a named plaintiff.

⁸ Oscar himself is also not a named Plaintiff, but rather discussed in the paragraph about his wife. It is not clear whether Oscar is still living.

⁹ This alleged victim is also not a named plaintiff.

11. **Marta Lidia Orellana Guerra**, a resident of “the Rafael Ayau orphanage” during unspecified years. *Id.* at ¶ 24. She alleges that when she was nine years old, doctors “took her blood, performed a minor procedure on her arm, and ... began a series of injections” that were “initially ... placed in [her] arm, but later given directly into her spine.” *Id.* She reports that she “has suffered various ailments in the decades following the injections,” but that she “believes that the physical impacts [*sic*] of the experiments may have subsided in her old age.” *Id.*

The complaint alludes to “additional people [who] have come forward” since “realizing that they or their loved ones were likely among the victims.” *Id.* ¶ 25. However, it does not name or otherwise identify anyone else harmed directly or indirectly by the experiments.

The named Plaintiffs¹⁰ assert claims under the Alien Tort Statute (ATS) for “Medical Experimentation on Non-Consenting Human Subjects,” *id.* ¶¶ 133-140 (First Claim for Relief), and for “Cruel, Inhuman, or Degrading Treatment,” *id.* ¶¶ 141-147 (Second Claim for Relief). They also bring a Fifth Amendment substantive due process claim, *id.* ¶¶ 148-156 (Third Claim for Relief), and a claim under the Eighth Amendment for “Cruel and Unusual Punishment,” *id.* ¶¶ 157-165 (Fourth Claim for Relief). Plaintiffs seek judgment in their favor, *id.* ¶ 166(a); a “declar[ation] that Defendants have violated Plaintiffs’ human rights and the laws of the District of Columbia and the United States,” *id.* ¶ 166(b); and “compensatory and punitive damages,” *id.* ¶ 166(c).

Defendants are eight *current* federal office-holders. They include: Secretary of Health and Human Services Kathleen Sebelius; Assistant Secretary for Health Howard Koh; Surgeon General Regina M. Benjamin; CDC Director Thomas Frieden; CDC

¹⁰ “Mateo Gudiel Pinto as heir of Manuel Gudiel Garcia; Gonzalo Ramirez Tista, Victoria Ramirez Tista, and Celso Ramirez Tista as heirs of Celso Ramirez Reyes; Frederico Ramos Mesa; Marta Cesarea Perez Ruiz; Victor Manuel Tecu Florian; [and] Marta Lidia Orellana Guerra.”

Director of Office of Infectious Diseases Rima Khabbaz; CDC Director of National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention Kevin Fenton; CDC Director of Division of STD Prevention Gail Bolan; and NIH Director of the National Cancer Institute Harold Varmus.¹¹ Though Plaintiffs distinguish between these defendants and those actually “directly responsible for the unlawful actions alleged,” *id.* ¶ 44,¹² they have nonetheless sued the current office-holders in their individual capacities, citing undefined “principles of successor liability.” *Id.* ¶ 45.

SUMMARY OF THE ARGUMENT

Non-consensual experimentation on human subjects is morally reprehensible. Officials within the highest levels of our federal government – including Secretary of Health and Human Services Kathleen Sebelius, who is sued here in her individual capacity – have condemned the Guatemala studies in no uncertain terms. But the fact remains that Plaintiffs have chosen to seek monetary damages against federal officials in their *personal* capacities who had nothing to do with those studies and, indeed, may not have even been born when they took place.¹³

¹¹ Plaintiffs have also named Dr. Mirta Roses Periago, the current Director of the Pan-American Health Organization. While she is not a federal employee and not represented by the undersigned Department of Justice counsel, Defendants note that she also was not in office during the relevant time period and is sued only as an alleged successor-in-interest.

¹² See FAC ¶ 36 (Sebelius); *id.* ¶ 37 (Koh); *id.* ¶ 38 (Benjamin); *id.* ¶ 39 (Frieden); *id.* ¶ 40 (Khabbaz); *id.* ¶ 41 (Fenton); *id.* ¶ 42 (Bolan); and *id.* ¶ 43 (Varmus).

¹³ *Bivens* permits the implication of a remedy directly under the Constitution in order to “deter *individual* federal officers from committing constitutional violations.” *Correctional. Servcs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001) (emphasis added).

As explained below, Plaintiffs' Alien Tort Statute claims (Counts 1 and 2) are barred by 28 U.S.C. § 2679(b)(1), the *Westfall* Act, which broadly precludes tort claims against federal officials for conduct performed within the scope of federal employment.¹⁴ Qualified immunity defeats Plaintiffs' constitutional claims (Counts 3 and 4), because the very terms of the complaint make clear that any personal involvement in any alleged constitutional violation would have been impossible. *See* FAC ¶ 45 (“Defendants are liable under the principles of *successor* liability for the acts of their *predecessor* office-holders.”) (emphasis added). Additionally, the United States Constitution had no clearly-established extraterritorial application at the time of the studies, and special factors exist to counsel hesitation in implying a *Bivens* remedy. Plaintiffs' claims for equitable relief fail due to lack of standing and because such relief is unavailable against federal officials sued in their individual capacity.

ARGUMENT

I. Statutory absolute immunity bars Plaintiffs' Alien Tort Statute claims (Counts 1 and 2).

Plaintiffs bring their First and Second Claims for Relief under the Alien Tort Statute, which vests district courts with jurisdiction over any claim “by an alien ... for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. “[A]ny claim brought under the ATS alleges a violation of the law

¹⁴ The *Westfall* Act exempts only two types of lawsuits: (1) claims brought “for a violation of the Constitution of the United States;” and (2) claims brought “for a violation of a statute of the United States.” 28 U.S.C. § 2679(b)(2); *see In re Iraq and Afghanistan Detainees*, 479 F. Supp. 2d 85, 111 (D.D.C. 2007), (“[T]here are only two exceptions that preclude [the *Westfall* Act’s] application ... (1) a *Bivens* action ...; or (2) an action under a federal statute that authorizes recovery against a Government employee.”) *aff’d*, 649 F. 3d 762 (D.C. Cir. 2011); *United States v. Smith*, 499 U.S. 160, 166-67 (1991) (refusing to infer any exception beyond the two expressly stated in the Act).

of nations and the common law, not of the ATS itself.” *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011). In this case, the individual federal defendants are sued for allegedly violating customary international law prohibiting “medical experimentation on non-consenting human subjects,” FAC ¶ 135, and “cruel, inhuman, or degrading treatment,” *id.* ¶ 142. These claims must be dismissed because the defendants enjoy absolute statutory immunity under “[t]he Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the *Westfall Act*,” *Osborn v. Haley*, 549 U.S. 225, 229 (2007) (citing 28 U.S.C. § 2679(b)(1)), which makes “the Federal Tort Claims Act (FTCA) ... the exclusive remedy for a tort committed by a federal official or employee within the scope of his employment.”¹⁵ *Ali*, 649 F.3d at 768 (citing 28 U.S.C. §§ 1346, 2671 *et seq.*).¹⁶ The *Westfall Act* operates by requiring that:

[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States ... and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1). In other words, once the Attorney General certifies that a “defendant employee was acting within the scope of his office or employment,” the federal employee is dismissed and “the United States [is] substituted as the party

¹⁵ Commissioned officers and employees of PHS acting within the scope of their employment enjoy additional immunity under 42 U.S.C. § 233(a), which makes the FTCA the exclusive remedy for “personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the performance of clinical studies or investigation.” This precludes even constitutional claims. *See Hui v. Castaneda*, 130 S. Ct. 1845, 1852 (2010) (“the text of § 233(a) plainly indicates that it precludes a *Bivens* action”).

¹⁶ Because ATS claims “allege[] a violation of the law of nations and the common law, not of the ATS itself,” *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011), they do not fall within the *Westfall Act*’s exception for claims “for a violation of a statute of the United States.” 28 U.S.C. § 2679(b)(2).

defendant.” *Saleh v. Titan Corp.*, 580 F.3d 1, 26 (D.C. Cir. 2009) (quoting 28 U.S.C. § 2679(d)(1)); *see also Bancoult v. McNamara*, 445 F.3d 427, 431 (D.C. Cir. 2006). The suit then proceeds against the government under the FTCA, subject to all of the limits placed on the FTCA’s waiver of sovereign immunity. 28 U.S.C. § 2679(d); *see United States v. Smith*, 499 U.S. 160 (1991).

Here, the Attorney General’s designee has certified that Plaintiffs’ ATS claims arise out of acts within the scope of the named individual federal defendants’ employment. *See* Ex. 1 to *The United States’ Motion for Substitution on Counts 1 and 2 and Memorandum of Points and Authorities*. Indeed, there can be no question of scope of employment in this instance because all of the named federal defendants are sued based solely on the positions they hold in the federal government – a cause of action that Plaintiffs characterize as a “successor liability” theory.¹⁷ The United States must be substituted in place of the individuals, and the ATS claims against the individuals must be dismissed. *See Ali*, 649 F.3d 762 at 775 (“the district court correctly held that the *Westfall* Act applied [to ATS claims based on alleged torture] and correctly substituted the United States as the defendant under the FTCA”) (italics added); *Rasul v. Myers*, 563 F.3d 527, 528 n.1(D.C. Cir. 2009) (*Westfall* Act applied to “Alien Tort Statute and Geneva Convention claims ... premised on alleged tortious conduct within the scope of defendants’ employment”). As the United States’ concurrently-filed motion to dismiss explains, once “the Government becomes the sole party defendant” in this case pursuant

¹⁷ Substitution is proper even when the named federal employees were not actually involved in the alleged misconduct. *See Osborn v. Haley*, 549 U.S. 225, 247 (2007) (“*Westfall* Act certification is proper” even “when a federal officer charged with misconduct asserts, and the Government determines, that the incident or episode in suit never occurred.”) (italics added).

to the *Westfall* Act, “the FTCA’s requirements, exceptions, and defenses” will apply to bar the suit. *Harbury v. Hayden*, 522 F.3d 413, 416 (D.C. Cir. 2008).

II. The Court must reject Plaintiffs’ constitutional claims (Counts 3 and 4) based on qualified immunity and special factors counseling hesitation in implying a *Bivens* remedy.

Plaintiffs bring their Third and Fourth Claims for Relief under the Fifth and Eighth Amendments, pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). *Bivens* allows federal courts discretion to imply a damages remedy directly under the Constitution for alleged violations of constitutional rights. *See Whitacre v. Davey*, 890 F.2d 1168, 1170 n.2 (D.C. Cir. 1989). *Bivens* “actions are for damages” against *individuals* and “cannot be viewed as actions against the government.” *Simpkins v. District of Columbia*, 108 F.3d 366, 369 (D.C. Cir. 1997). The courts have long recognized that such individual-capacity actions can give rise to “substantial social costs,” particularly “the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.” *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (citations omitted). As a result, the Supreme Court has developed the doctrine of qualified immunity, under which “a defendant ... is entitled to dismissal before the commencement of discovery” “[u]nless the plaintiff’s allegations state a claim of violation of clearly established law.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Because Plaintiffs in this case have failed to do so, the Court must dismiss their constitutional claims with prejudice. And, “even if the defendants were not shielded by qualified immunity and the plaintiffs could claim the protections of the Fifth and Eighth Amendments,” the Court should still “decline to sanction a *Bivens* cause of action because special factors counsel against doing so.” *See Ali*, 649 F.3d at 774.

A. Qualified immunity bars Plaintiffs’ constitutional claims.

To overcome a threshold qualified immunity challenge, plaintiffs must allege facts that if proven would show not only that the defendants personally violated a constitutional right (“step one”), but also that the right at issue was clearly established at the time of the wrongdoing (“step two”). *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).¹⁸ Because Plaintiffs can meet neither requirement, this suit must be dismissed.

1. Plaintiffs concede that the individual federal defendants did not personally violate any constitutional right.

Plaintiffs freely admit that the individual federal defendants are merely “successor office-holders” of those “directly responsible for the unlawful acts alleged.” *See* FAC ¶¶ 36-43. This alone is fatal to their constitutional claims. “*Bivens* from its inception has been based not on . . . deterring the conduct of a policymaking entity . . . but on deterrence of *individual* officers who commit unconstitutional acts.” *Correctional Servs. Co. v. Malesko*, 534 U.S. 61, 71 (2001) (emphasis added). The theory of “successor liability,” *see* FAC ¶ 45, cannot apply in this context “[b]ecause vicarious liability is inapplicable to *Bivens* . . . suits.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).¹⁹

¹⁸ A district court has discretion to address the steps in whatever order it considers most appropriate and may elect not to determine whether a constitutional right was violated at all if it determines that the right was insufficiently clearly-established. *Pearson v. Callahan*, 555 U.S. 223, 239 (2009).

¹⁹ We are aware of no case in which any court has imposed or even considered “successor liability” in the constitutional tort context. The concept appears unique to corporate litigation. *See, e.g.,* Canan & Robinson, 2 *Qualified Retirement Plans* § 24:84 (2011) (“a company that purchases assets of another company is not automatically responsible for the seller’s liabilities” except “where successor liability will apply to an asset purchaser”); *Brzozowski v. Correctional Physician Services, Inc.*, 360 F.3d 173, 175 (3d Cir. 2004) (in the Title VII context, “when an insolvent employer sells a substantial portion of its assets to another corporation, that company may be subject to successor liability”); *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 615

“[L]iability for damages under *Bivens* cannot be premised on status or position alone,” *Vietnam Veterans of America v. McNamara*, Civ. No. 1:02- 2123, 2005 WL 485341, at *16 (D.D.C. Feb. 17, 2005), or on a “respondeat superior” theory, *see Cameron v. Thornburgh*, 983 F.2d 253, 258 (D.C. Cir. 1993). Rather, “a plaintiff must plead that each Government-official defendant, through the official’s *own individual actions*, has violated the Constitution.” *Iqbal*, 129 S. Ct. at 1948 (emphasis added).²⁰ In this case, the “total absence of allegations of personal involvement” of these current high-ranking federal officers for acts that took place decades before they took office makes “clear that [Plaintiffs’] claims lack merit” as a matter of law. *Peavey v. Holder*, 657 F. Supp. 2d 180, 192 (D.D.C. 2009).²¹

(7th Cir. 1997) (successor corporations liable for antitrust violations of predecessors “under standard principles of successor liability”).

²⁰ *See also Risley v. Hawk*, 108 F.3d 1396, 1396 (D.C. Cir. 1997) (per curiam) (“Absent allegations concerning personal involvement by those defendants, [plaintiff’s] Eighth Amendment claims against them are nothing more than an allegation of *respondeat superior*, which is not cognizable in a *Bivens* action.”).

²¹ *See also Qian Ibrahim Zhao v. Unknown Agent of CIA*, 411 Fed. Appx. 336, 336 (D.C. Cir. 2010) (per curiam) (plaintiff “failed to state a claim under [*Bivens*] ... against the Secretary of the Department of Homeland Security because she did not allege that the Secretary, through her ‘own individual actions, has violated the Constitution.’”); *Fraternal Order of Police v. Rubin*, 26 F. Supp. 2d 133, 146 n.8 (D.D.C. 1998) (“[P]laintiffs have not even alleged personal involvement of defendant Rubin. Thus, he can have no individual liability.”); *Dacey v. Clapp*, Civ. No. 92–1599, 1993 WL 547467 at *3 (D.D.C. Oct. 23, 1993) (“The failure of the plaintiff even to allege any direct or personal involvement in the conduct ... means that his complaint can not go forward.”) (internal citation and quotation omitted); *Johnson v. Williams*, 699 F. Supp. 2d 159, 170 (D.D.C. 2010) (where plaintiff fails to allege that any individual defendant “personally participated in any . . . event[] alleged in the complaint . . . the plaintiff’s constitutional claims . . . must fail”).

2. Plaintiffs allege no clearly-established constitutional violation.

Because the question of qualified immunity is easily resolved in this case for lack of any allegation of personal involvement, the Court need not reach the question of whether Plaintiffs have alleged a clearly-established constitutional violation. *See Pearson v. Callahan*, 555 U.S. 223, 239 (2009) (when “a court [can] rather quickly and easily decide that there was no violation of clearly established law,” it may elect not to “turn[] to the more difficult question whether the relevant facts make out a constitutional question at all”).²² Should this Court nonetheless opt to address the constitutional issue, the controlling case law leaves no doubt that Plaintiffs’ claims should be dismissed on the additional basis that they fail to allege the violation of a constitutional right clearly-established at the time of the alleged misconduct.

The applicability of qualified immunity depends not on whether the alleged conduct is “wrongful” in some generic sense but whether, at the time of the alleged acts, the constitutional provision at issue applied in the *particular* context to prohibit the *particular* type of conduct alleged. *Davis v. Scherer*, 468 U.S. 183, 194-95 (1984).²³ It was not clearly established in the 1940s that foreign citizens living outside the United

²² *See also Bame v. Dillard*, 637 F.3d 380, 384 (D.C. Cir. 2011) (“In this case the principle of constitutional avoidance counsels that we turn directly to the second [qualified immunity] question. . . . ‘There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.’”) (quoting *Pearson*, 555 U.S. at 237).

²³ *See Butera v. District of Columbia*, 235 F.3d 637, 652 (D.C. Cir. 2001) (accepting the state-created danger theory of liability but nonetheless granting qualified immunity to officers allegedly responsible for failing to prevent the beating death of a confidential informant because “in December 1997, [the] constitutional right to protection by the [police department] from third-party violence was not clearly established”); *In re Iraq and Afghanistan Detainees*, 479 F. Supp. 2d 85, 109 (D. D.C. 2007), (“what must be ‘clearly established’ is the constitutional right” and not “whether it was clearly established that torture was unlawful”) *aff’d*, 649 F.3d 762 (D.C. Cir. 2011).

States enjoyed *any* protection under the United States Constitution, much less the specific rights asserted by Plaintiffs. *See United States v. Belmont*, 301 U.S. 324, 332 (1937) (“our Constitution, laws, and policies have no extraterritorial operation, unless in respect of our own citizens”);²⁴ *see also Boumediene v. Bush*, 53 U.S 723, 770 (2008) (“It is true that before today[’s Suspension Clause ruling,] the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution.”); *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *vacated and remanded by* 130 S. Ct. 1235 (2010), *reinstated as modified on remand by* 605 F.3d 1046 (D.C. Cir. 2010). As a result, Plaintiffs’ claims are barred on qualified immunity grounds for multiple, compelling reasons.²⁵

B. Special factors counsel against implying a *Bivens* remedy in this case.

Even if Plaintiffs’ claims could overcome qualified immunity, special factors warrant declining to imply a *Bivens* remedy in this case. A *Bivens* remedy “is not an automatic entitlement . . . and in most instances . . . unjustified.” *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). “Indeed, in its ‘more recent decisions[, the Supreme Court has] responded cautiously to suggestions that *Bivens* remedies be extended into new contexts.” *Wilson v. Libby*, 535 F.3d 697, 705 (D.C. Cir. 2008) (quoting *Schweiker v. Chilicky*, 487

²⁴ Following *Belmont*, other notable cases denying extraterritorial application of asserted constitutional rights included *United States v. Pink*, 315 U.S. 203, 226 (1942); *Johnson v. Eisentrager*, 339 U.S. 763, 781 (1950); and *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990).

²⁵ Plaintiffs’ Eighth Amendment claims would fail even if based on conduct occurring within the United States because the Eighth Amendment has no applicability outside of the criminal context. *See Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (“An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes. . . . [T]he Eighth Amendment does not apply to the paddling of children . . . in public schools.”).

U.S. 412, 421(1988)). When deciding whether to allow a *Bivens* suit to proceed, “courts must ... pay[] particular heed ... to any special factors counseling hesitation.” *Id.* (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)). For example, “[t]he special needs of foreign affairs” require courts to “stay [their] hand[s] in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad.” *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985).²⁶ And, “[w]here ... the issue ‘involves a host of considerations that must be weighed and appraised,’ its resolution ‘is more appropriately for those who write the laws, rather than for those who interpret them.’” *See Sanchez-Espinoza*, 770 F.2d at 208 (quoting *Bush*, 462 U.S. at 380).

The Supreme Court has “consistently refused to extend *Bivens* liability to any new context.” *Malesko*, 534 U.S. at 68; *see Mirmehdi v. United States*, 662 F.3d 1073, 1079 (9th Cir. 2011) (“constru[ing] the word ‘context’ as it is commonly used in law: to reflect a potentially recurring scenario that has similar legal and factual components”) (quoting *Arar v. Ashcroft*, 585 F.3d 559, 572 (2d Cir. 2009)). Here, Plaintiffs invite the Court to create a monetary damages remedy in an entirely new arena: making amends for official actions taken abroad in the distant past in conjunction with officials of a foreign

²⁶ *See also Bush*, 462 U.S. at 390 (refusing to infer a damages remedy for First Amendment violations arising out of a government-personnel decision because Congress was in a better position to balance government efficiency against employee rights and to decide whether such a remedy would be good policy); *Chappell v. Wallace*, 462 U.S. 296, 301, 304 (1983) (refusing a *Bivens* remedy where military personnel sued commanding officers because such a remedy could harm military decision-making and military matters are delegated to the legislative branch); *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (refusing to imply remedy for denial of Social Security benefits because Congress in the best position to decide whether to create such a remedy).

government.²⁷ This judgment implicates serious foreign policy concerns and plainly involves an area clearly committed to the political branches.²⁸ *See Wilson*, 535 F.3d at 709 (“The pertinent inquiry is ‘the question of who should decide whether such a remedy should be provided,’ not whether there is a remedy.”) (quoting *Bush*, 462 U.S. at 380). Thus, this is precisely the kind of case where Congress is best suited to devote “careful attention to conflicting policy considerations” involved in redressing the conduct and reach a conclusion as to “whether or not the public interest would be served” by creation of a private remedy against officials in their individual capacities. *Bush*, 462 U.S. at 388-90. Implying a *Bivens* remedy in this case could lead to judicial opinions at odds with whatever position the legislature ultimately takes. *Cf. Baker v. Carr*, 369 U.S. 186, 217 (1962) (noting “the potentiality of embarrassment from multifarious pronouncements by various departments on one question”).

To the extent that Congress has already legislated in the area of human research subjects, those actions suggest that Congress would consider an individual damages remedy inappropriate. In the 1970s, Congress responded to revelations of “‘experimental surgery, prison research, university-centered research abuses, the Tuskegee Syphilis Study, genetic manipulation,’ and so forth,” with the National Research Act, *Clay v. Martin*, 509 F.2d 109, 113 (2d Cir. 1975) (citing Sen. Rep. No. 93-381, p. 24), which did not authorize lawsuits against individual researchers. Nor did

²⁷ *See* Comm. Rpt. at p. 7 (“Research staff for the Guatemala experiments included leaders and senior medical personnel for the government of Guatemala, for example, directors of the national Public Health Service Venereal Disease Section, the national psychiatric hospital, the national orphanage, and the Army medical department.”).

²⁸ *See Schneider v. Kissinger*, 412 F.3d 190, 191-92, 194, 195 (D.C. Cir. 2005); *In re Iraq and Afghanistan Detainees Litig.*, 479 F. Supp. 2d at 107; *Dep’t of the Navy v. Egan*, 484 U.S. 518, 530 (1988).

Congress create private rights of action after learning about secret government experiments involving administration of LSD without informed consent, even when it became clear that many victims would have no remedy in the courts. *See United States v. Stanley*, 483 U.S. 669, 683 (1987) (rejecting soldier’s constitutional tort claim on special factor grounds due to “the unique disciplinary structure of the Military Establishment”).²⁹ Congress has, however, created a system for recovery *against the United States* for people injured by radiation experiments. *See* Radiation Exposure Compensation Act, 42 U.S.C. § 2210.³⁰ A number of federal statutes immunizing federal doctors in favor of FTCA claims also evince Congress’ general interest in *protecting* federal doctors from *Bivens* suits and preference for compensation from the government itself (to the extent it has waived sovereign immunity). *See* 10 U.S.C. § 1089(a) (armed services doctors); 42 U.S.C. § 2458a(a) (NASA doctors); 22 U.S.C. § 2702(a) (State Department doctors); 38 U.S.C. § 7316(a) (VA medical personnel).

Taken as a whole, the aggregate of factors – the context of experiments conducted sixty years ago involving foreign nationals abroad and Congress’ repeated immunization of health officials in favor of actions (to the extent sovereign immunity is waived) against

²⁹ Congress also took no action to abridge PHS doctors’ immunity after the Supreme Court decided in *Hui v. Castaneda* that not even a claim for deliberate indifference that allegedly resulted in an immigration detainee’s penile amputation could proceed against them. 130 S. Ct. 1845.

³⁰ Congress’ response to the tragedy of hemophiliacs who were infected with HIV by tainted blood products but left with no legal remedy also evinces a preference for large-scale compensation schemes allowing recovery against the federal government. *See* Ricky Ray Hemophilia Relief Fund Act of 1998, Pub. L. 105-369, 112 Stat. 3368 (“provid[ing] compassionate payments with regard to individuals with blood-clotting disorders ... who contracted human immunodeficiency virus due to contaminated antihemophilic factor”).

the United States – indicate that implying a *Bivens* remedy in this suit would be inappropriate.

III. Plaintiffs bring no cognizable claims for equitable relief.

In this suit, Plaintiffs seek a “declar[ation] that Defendants have violated Plaintiffs’ human rights and the laws of the District of Columbia and the United States,” FAC ¶ 166(b), as well as a permanent injunction against “human rights abuses against Plaintiffs and other inhabitants of Guatemala,” FAC ¶ 166(d). These requests fail as a matter of law. Plaintiffs have no standing to seek equitable relief from the individual defendants.³¹

A. Plaintiffs lack standing to seek anything other than money damages.

This court has no jurisdiction to hear Plaintiffs’ claims for equitable relief, because they have no standing to bring them. *See LaRoque v. Holder*, 650 F.3d 777, 781 (D.C. Cir. 2011) (“standing requirements” are “implicit in Article III’s limitation of the federal judicial power to actual ‘[c]ases’ and ‘[c]ontroversies’”). A “real and immediate threat” of future injury is a jurisdictional prerequisite for such claims. *Barwood v. District of Columbia*, 202 F.3d 290, 295 (D.C. Cir. 2000) (internal citations omitted). The Supreme Court made clear in *Los Angeles v. Lyons* that the mere existence of a prior injury is no basis for equitable relief – which is wholly prospective and intended to

³¹ This is not to say, however, that the federal government has ruled out making changes to policy or regulations pertaining to human subject experimentation. In addition to ordering an extensive fact-finding effort with respect to the Guatemalan experiments, the President has also charged his Bioethics Commission with performing “a thorough review of human subjects protection to determine if Federal regulations and international standards adequately guard the health and well-being of participants in scientific studies supported by the Federal Government.” Comm. Rpt. at p.vi. The Commission issued that report on December 15, 2011.

protect against threatened injury going forward – without a showing that the plaintiff faces a realistic threat of future injury. *See* 461 U.S. 95, 109 (1983) (alleged victim of excessive force could sue for damages but not injunction because he “made no showing that he is realistically threatened by a repetition of his experience”); *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 8 (D.C. Cir. 1988) (to show standing to seek an injunction, “a plaintiff cannot simply allege that he was previously subjected to the defendant’s actions” but rather must show ““a real and immediate threat of repeated injury””) (quoting *O’Shea v. Littleton*, 414 U.S. 488, 496 (1974)); *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (no standing to seek declaratory relief without future threat of injury). Plaintiffs cannot meet that standard, because they fail to make *any* allegations suggesting “that they are threatened with any future illegality.” *Fair Employment Council of Greater Washington, Inc. v. BMC*, 28 F.3d 1268, 405 (D.C. Cir. 1994).

B. Plaintiffs may not sue individual defendants for equitable relief.

Nor are Defendants the proper parties from whom the requested equitable relief could be sought or obtained. *See County Bd. of Arlington, VA v. United States Dept. of Transportation*, 705 F. Supp. 2d 25, 29 (D.D.C. 2010) (dismissing claims against individual-capacity defendants because plaintiffs sought “only declaratory and injunctive relief”). *Bivens* suits are exclusively damages actions that were recognized by the Court to ensure “deterrence of *individual officers* who commit unconstitutional acts,” not for “detering the conduct of a policymaking entity.” *Malesko*, 534 U.S. at 71 (emphasis added). Moreover, to the extent that Plaintiffs seek to restrain institutional misconduct rather than personal misconduct by the named federal defendants – none of whom are

alleged to have committed any – the proper approach would be a claim against the federal agencies involved or against the leadership officials of those agencies solely in their official capacities. Individual capacity claims make no sense in this context. *See Hatfill v. Gonzales*, 519 F. Supp. 2d 13, 26 (D.D.C. 2007) (plaintiff “simply cannot seek [injunctive relief] from the individual defendants in their personal capacities” because it “can only be provided by the government through government employees acting in their official capacities”). Therefore, the claims for equitable relief against the individual federal defendants must be dismissed. *See In re Iraq and Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85, 118-19 (D.D.C. 2007) (“[b]ecause the challenged policies were carried out by the Defendants in their capacities as military officials . . . the plaintiffs must seek declaratory relief against them in their official capacities”), *aff’d*, 649 F.3d 762 (D.C. Cir. 2011).³²

CONCLUSION

For the foregoing reasons, the individual federal defendants respectfully move the Court to dismiss all of Plaintiffs’ claims against them with prejudice.

³² *See also Frank v. Relin*, 1 F.3d 1317, 1327 (2nd Cir. 1993) (“equitable relief could be obtained against Relin only in his official, not his individual, capacity”); *Kirby v. City of Elizabeth City, N.C.*, 388 F.3d 440, 452 n.10 (4th Cir. 2004) (injunctive relief can only be awarded against employee in his or her official capacity); *Cnty. Mental Health Servs. of Belmont v. Mental Health and Recovery Bd.*, 150 Fed. Appx. 389, 401 (6th Cir. 2005) (no individual capacity suit available “for an injunction in situations in which the injunction relates only to the official’s job, *i.e.*, his official capacity”); *Feit v. Ward*, 886 F.2d 848, 858 (7th Cir. 1989) (equitable relief “can be obtained only from the defendants in their official capacities”); *Del Raine v. Carlson*, 826 F.2d 698, 703 (7th Cir. 1987) (suit for equitable relief only available against officers in their official capacity); *Wolfe v. Strankman*, 392 F.3d 358, 360 n.2 (9th Cir. 2004) (declaratory and injunctive relief “only available in an official capacity suit”).

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Respectfully submitted,

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