No. 08-15969

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. TONY SERRA, JEANINE SANTIAGO, VICTOR J. CORDERO, and all others similarly situated,
Plaintiffs-Appellants

v.

HARLEY LAPPIN, Director of the Bureau of Prisons, BG COMPTON, Warden of Lompoc Prison, and ROBERT McFADDEN, Head of the Western Regional Office of the Bureau of Prisons,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES

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STATEMENT OF JURISDICTION

The complaint invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1343, and raised claims under the Fifth and Thirteenth Amendments of the United States Constitution, International law, and the Sherman Act, 15 U.S.C. § 1, *et seq*. Excerpts of Record ("ER") 1-13. On April 3, 2008, the district court entered a final order and judgment dismissing the complaint. ER 24-35, 61. Appellants timely filed a notice of appeal on April 17, 2008. *See* Fed. R. App. P. 4(a)(1)(B); ER 17-19. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the level of compensation awarded to plaintiffs for their work as federal prisoners violates the Fifth Amendment or international law.

2. Whether the district court properly denied plaintiffs' request for leave to amend their complaint as futile.

STATEMENT OF THE CASE

Plaintiffs—one current and two former federal prisoners—challenge the amount of pay provided to federal inmates for work in federal prisons while incarcerated pursuant to criminal sentences. Recognizing that the Fair Labor Standards Act is inapplicable, *see Hale v. Arizona*, 993 F.2d 1387, 1393-95 (9th Cir.) (en banc), *cert. denied*, 510 U.S. 946 (1993), appellants argued in the district court that low prisoner pay violates the Thirteenth and Fifth Amendments to the United States Constitution, international law, and the Sherman Act. Plaintiffs sought monetary damages or equitable relief from various Bureau of Prisons officials in their official and/or individual capacities. ER 1-13. The district court dismissed the complaint for failure to state a claim. The court held that sovereign immunity barred money damages claims brought against federal officials in their official capacity and that, as to individual capacity claims or claims for injunctive relief, plaintiffs stated no valid claim under the Fifth or Thirteenth Amendments, international law, or federal antitrust statutes. The court also denied plaintiffs' request for leave to amend their complaint, holding that any attempted amendment would be futile.

STATEMENT OF FACTS

A. STATUTORY AND REGULATORY AUTHORITIES GOVERNING INMATE WORK PROGRAMS AT UNITED STATES PRISONS

"It is the policy of the Federal Government that convicted inmates confined in Federal prisons, jails, and other detention facilities shall work," subject to security, health-related, and other limited exceptions. Crime Control Act of 1990, Pub. L. No. 101-647, § 2905, 104 Stat. 4789, 4914 (reprinted at 18 U.S.C. § 4121 note). To this end, "[s]uch forms of employment shall be provided as will give the inmates of all Federal penal and correctional institutions a maximum opportunity to acquire a knowledge and skill in trades and occupations which will provide them with a means of earning a livelihood upon release." 18 U.S.C. § 4123. In general, there are two distinct programs, governed by different authorities, under which United States inmates work: (1) Federal Prison Industries; and (2) institutional assignments.

1. **Federal Prison Industries.**

In 1934, Congress authorized, and President Franklin D. Roosevelt created by executive order, Federal Prison Industries (sometimes known by its trade name "UNICOR"), a government corporation now administered by a board of six directors appointed by the President. *See* Act of June 23, 1934, ch. 736, 48 Stat. 1211 (codified as amended at 18 U.S.C. §§ 4121-4129); Exec. Order 6,917 (Dec. 11, 1934). Federal Prison Industries conducts and oversees industrial operations in federal penal and correctional institutions for the production of commodities for consumption in the institutions or sales to other departments or agencies of the United States government, and is directed to provide employment for as many inmates who are eligible to work as is reasonably possible. 18 U.S.C. § 4122(a), (b). Proceeds from the sale of products manufactured by Federal Prison Industries go into a Prison Industries Fund, out of which the corporation is authorized, *inter alia*, to "pay[], under rules and regulations promulgated by the Attorney General, compensation to inmates employed in any industry." 18 U.S.C. § 4126(c)(4).

Pursuant to a delegation of authority from the Attorney General, 28 C.F.R. § 0.99, Federal Prison Industries has promulgated regulations governing inmate work programs. *See* 28 C.F.R. Part 345. Under these regulations, pay rates for inmate work are set by the Board of Directors of Federal Prison Industries. *See* 28

C.F.R. § 345.10 ("All pay rates under this part are established at the discretion of Federal Prison Industries, Inc. Any alteration or termination of the rates shall require the approval of the Federal Prison Industries' Board of Directors.").[1] The current rates are between $0.23 and $1.15 per hour, depending on grade. *See* Bureau of Prisons Program Statement 8120.02, at 5-1 (7/15/99), *available at* www.bop.gov/policy/progstat/8120_002.pdf (last visited Sept. 3, 2008). Wardens and other local and regional officials have no authority to change the pay system. *See* 28 C.F.R. § 345.10 ("While the Warden is responsible for the local administration of Inmate Industrial Payroll regulations, no pay system is initiated or changed without the prior approval of the Assistant Director, Industries, Education and Vocational Training."). In addition to basic hourly pay, inmates may receive premium pay, special piecework rates, overtime compensation, longevity pay, vacation pay, administrative pay, holiday pay, and training pay. *See* 28 C.F.R. §§ 345.52-345.60. Inmates can also receive "incentive awards" for "special achievements in their work, scholarship, suggestions, for inventions

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[1] This Court, and others, have held that pay rates for inmate work in prison industries are not subject to the minimum-wage and other provisions of the Fair Labor Standards Act because prisoners are not "employees" within the meaning of that Act. *See Hale*, 993 F.2d at 1393-95; *Danneskjold v. Hausrath*, 82 F.3d 37, 43 (2d Cir. 1996) ("[N]o Court of Appeals has ever questioned the power of a correctional institution to compel inmates to perform services for the institution without paying the minimum wage.").

which improve industry processes or safety or which conserve energy or materials consumed in FPI operations, and for outstanding levels of self-development." 28 C.F.R. § 345.70. Inmates receive monthly earnings statements reporting their earnings from Federal Prison Industries. *See* 28 C.F.R. § 345.61.

2. Institutional Assignments.

Outside of the auspices of Federal Prison Industries, some inmates work in work assignments that help to maintain the "day-to-day operation of the institution," *e.g.*, food service, carpentry, plumbing, groundskeeping, under a program known as "Performance Pay." *See* 28 C.F.R. § 545.20. This type of employment is authorized by 18 U.S.C. § 4125(d), which permits the Attorney General, "[a]s part of the expense of operating such camps[,] . . . to provide for the payment to the inmates or their dependents such pecuniary earnings as he may deem proper, under such rules and regulations as he may prescribe." The Bureau of Prisons has promulgated regulations governing the Inmate Work and Performance Pay Program, which are published at 28 C.F.R. §§ 545.20 – 545.31. Under the Performance Pay program, hourly pay rates are determined by the Assistant Director, Correctional Programs. *See* Bureau of Prisons Program Statement 5251.05, at ¶ 12 (12/31/98), *available at* www.bop.gov/policy/progstat/5251_005.pdf (last visited Sept. 3, 2008). "An inmate is eligible for performance pay from the date of work or program assignment," and "for each month that the inmate's performance justifies such payment." 28 C.F.R. § 545.25(b). Inmates may receive bonus pay "[w]hen the supervisor of an inmate worker or program participant believes the inmate has made exceptional accomplishments or appreciably contributed to the work assignment," 28 C.F.R. § 545.26(f), and "special bonus pay" for "exceptional work in a temporary job assignment" previously identified "as critical to the institution," 28 C.F.R. § 545.26(g). "An inmate's performance pay, once earned, becomes vested." 28 C.F.R. § 545.26(h). Inmates receive notification of monthly earnings. 28 C.F.R. § 545.26(i).

B. FACTUAL BACKGROUND

The operative complaint alleged that two appellants (Serra and Cordero) are former federal prisoners and the third (Santiago) is currently a federal prisoner. *See* ER 3-4 (First Am. Compl. ¶¶ 5-7). Cordero alleged that he worked, and Santiago alleges that she currently works, for UNICOR, *i.e.*, Federal Prison Industries. *See* ER 4 (First Am. Compl. ¶¶ 6, 7). In contrast, Serra appears to have alleged that he worked in an institutional assignment in the Performance Pay program, rather than for Federal Prison Industries. *See* ER 3 (First Am. Compl. ¶ 5) ("Plaintiff Serra works [sic] on the camp grounds as a camp waterer and in effort [sic] supports the work at Federal Prison Industries UNICOR) [sic] making cable and also making dairy products."). Appellants Serra, Cordero, and Santiago alleged various levels of pay, ranging from "as low as $19.00 per month for working twenty days a month at five hours per day" to "$145/month." ER 3-4.

C. PROCEDURAL HISTORY

Plaintiffs filed this action in 2007 against Harley Lappin, Director of the Bureau of Prisons; B.G. Compton, former Warden of Lompoc Prison; and Robert E. McFadden, Regional Director of the Bureau of Prisons' Western Regional Office. The complaint stated that Director Lappin was "being sued in his official capacity," but was silent on the capacity in which Regional Director McFadden was sued. ER 4-5 (*Compare* First Am. Compl. ¶ 10, *with* First Am. Compl. ¶ 12). Appellants effected service on the some of the federal defendants on or about August 15, 2007.[2] The gravamen of the complaint was that the rate of prisoner pay was so low as to violate the Fifth and Thirteenth Amendments to the United

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[2] The complaint described Mr. Compton as Warden of Lompoc Prison. However, Compton retired from government service and ceased to be Warden on February 28, 2007, before the Complaint was filed. The district court dismissed the claims against defendant Compton for failure to effect service, *Serra v. Lappin*, 2008 WL 929525, *8 (N.D. Cal. 2008), a ruling not challenged in appellants' brief and therefore waived. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir.1999) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived.").

States Constitution, international law, and federal anti-trust law. ER 7-11. The complaint sought both money damages and injunctive relief. ER 11-12.

On October 15, 2007, the federal officials sought to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim, ER 15, and, in light of the complaint's silence, treated the complaint as alleging both official-capacity and individual-capacity claims against defendant McFadden out of an abundance of caution. Appellants opposed the motion and argued, among other things, in their opposition, that they should be permitted to amend to add a claim under the Federal Tort Claims Act. ER 34. The district court heard argument on the motion, ER 36-55, and dismissed without leave to amend on April 3, 2008. ER 24-35. Appellants timely appealed. ER 17-19.

SUMMARY OF ARGUMENT

Plaintiffs challenge the level of pay they received while legally incarcerated in federal prison. As the district court correctly recognized, plaintiffs have no legally cognizable claim under the Constitution or international law for a prisoner to be paid at a particular rate. Plaintiffs' Fifth Amendment claims fail because they lack any constitutionally protected property interest in the level of pay they receive for prison work. Indeed, federal law grants federal officials complete discretion in setting such payment levels. Nor does international law provide plaintiffs with any judicially enforceable right to particular levels of prison pay. The international law provisions that plaintiffs invoke are not self-executing and do not otherwise create any legally enforceable right to relief.

The district court also correctly denied plaintiffs' request to amend their complaint. As explained below, the proposed amendments would not have survived a motion to dismiss and thus were futile. Plaintiffs' attempt to raise individual capacity claims was fatally flawed given the failure to state any legally cognizable claim and the defendants' entitlement to qualified immunity. And plaintiffs' proposed FTCA claim for false imprisonment fails because they have not exhausted their administrative remedies. It also fails because plaintiffs, who concede that they were properly convicted, cannot establish they were held without lawful process. And a grievance about a prisoner's amount of payment cannot properly be equated with false imprisonment where federal law leaves that level of payment wholly to the discretion of federal officials.

ARGUMENT

I. STANDARD OF REVIEW

A dismissal for failure to state a claim is reviewed de novo, *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005), as is a dismissal without leave to amend. *See Smith v. Pacific Props. & Dev. Corp.*, 358 F.3d 1097, 1100 (9th Cir.

2004) (noting underlying legal determinations require *de novo* review); *Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768, 772 (9th Cir. 2002). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Knievel*, 393 F.3d at 1072. Dismissal of a complaint without leave to amend is improper unless it is clear that the complaint could not be saved by any amendment. *See Thinket Ink Information Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004). "A district court does not err in denying leave to amend where the amendment would be futile." *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991).

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE COMPLAINT FAILED TO STATE A CLAIM.

Appellants originally asserted three categories claims in the operative complaint—constitutional claims under the Fifth and Thirteenth Amendments, international law claims, and Sherman Act claims. Appellants now expressly disclaim reliance on the Sherman Act. *See* Appellants' Br. at 4. In addition, although plaintiffs include a passing reference to the Thirteenth Amendment claim, *see id.* at 3, they make no effort to challenge the district court's order concerning the legal insufficiency of that claim and it is therefore waived. *See Smith*, 194 F.3d at 1052 ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived.").[3] The central issue on appeal is therefore whether the Fifth Amendment or the international law cited by appellants provides a basis for this suit. As explained below, whether plaintiffs seek money damages or equitable relief and whether they sue the defendants in their individual or official capacities, all permutations of their claims fail because there is no legally cognizable claim under the Constitution or International law.

A. Appellants Cannot State a Claim under The Fifth Amendment.

In order to state a due process claim under the Fifth Amendment, plaintiffs must identify a liberty or property interest protected by the Constitution. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *Ky. Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). A constitutionally protected property interest arises only where there is a reasonable expectation of entitlement deriving from "existing rules or understandings that stem from an independent source," such as statutes or regulations. *Roth*, 408 U.S. at 577.

Significantly, federal prisoners have no reasonable expectation, stemming from an independent source, of any particular level of pay. Plaintiffs identify no

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[3] In any event, it is beyond question that the Thirteenth Amendment has no application here and does not bar even unpaid prison labor. *See Draper v. Rhay*, 315 F.2d 193, 197 (9th Cir. 1963); *accord United States v. Reynolds*, 235 U.S. 133, 149 (1914) ("There can be no doubt that the state has authority to impose involuntary servitude as a punishment for crime. This fact is recognized in the 13th Amendment, and such punishment expressly excepted from its terms.").

statute setting a particular rate of pay for prisoners, let alone the particular quantum of pay plaintiffs desire. To the contrary, the pay rates for Federal Prison Industries are committed entirely to "the discretion of Federal Prison Industries, Inc," 28 C.F.R. § 345.10. A regulation granting complete discretion to a federal official concerning the quantum of pay could not possibly create any expectation, let alone a reasonable one, on the part of plaintiffs to some other level of pay that they would find satisfactory. *See McMaster v. Minnesota*, 819 F. Supp. 1429, 1442 (D. Minn. 1993) (agreeing that "plaintiffs' due process claim must fail because neither state nor federal law gives plaintiffs a protected property interest in receiving minimum or prevailing wages for work performed in the prison industries"), *aff'd*, 30 F.3d 976 (8th Cir. 1994); *cf. Hrbek v. Farrier*, 787 F.2d 414, 415-17 (8th Cir. 1986) (rejecting due process challenge to practice of deducting court costs from wages earned by prisoner in prison labor because there "is no constitutional right to prison wages and any such compensation is by the grace of the state"). And, as this Court has recognized in other contexts, while prison officials may not retaliate against prisoners, prisoners do not have a constitutional right to prison employment. *See Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997) (agreeing with the "premise" that a prisoner had "no constitutional right to prison employment" but concluding in the context of that case that he could state a retaliation claim); *Toussaint v. McCarthy*, 801 F.2d 1080, 1094-95 (9th Cir. 1986) (noting that California law does not create a constitutionally protected liberty interest in prison employment, even though there may be an interest in good time credits); *Rizzo v. Dawson*, 778 F.2d 527, 531 (9th Cir. 1985) ("If the plaintiff's due process claim hinges on a property interest in the vocational instruction course, his claim similarly lacks substance in law and fact"). This is not a retaliation case, and the absence of any constitutional right in prison employment or to a particular level of pay is dispositive.

Appellants present no serious argument to the contrary. Instead, they simply repeat conclusory statements and a series of citations listing purported applications of the Due Process Clause in the settings of "constitutionally protected right on [sic] entitlement to welfare, public assistance, food stamps, housing, genuine entitlement in leasehold interest, tenancy rights," Appellants Br. at 14 (internal citations omitted). Even if the descriptions of these cases were accurate,[4] they say nothing about whether the Due Process Clause applies here.

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[4] Plaintiffs' reliance on *Maine v. Thiboutot*, 448 U.S. 1 (1980), for example, is entirely misplaced. That case did not involve a due process claim—or, for that matter, any constitutional claim. Rather, the issue was whether an action would lie under 42 U.S.C. § 1983 for "purely *statutory* violations of federal law" (there, the Social Security Act). *See id.* at 3 (emphasis added). And, in any event, section 1983 provides no right of action against federal officials acting under federal law. *See Gibson v. United States*, 781 F.2d 1334, 1343 (9th Cir. 1986) ("Federal officers acting under federal authority are immune from suit under section 1983").

And cases concerning loss of liberty (for rules violations, inadequate hearings resulting in loss of good-time credits, unconstitutional conditions of confinement, and solitary confinement) are also inapposite. Here, there is no constitutionally protected liberty or property interest.

Even if a Fifth Amendment claim could be stated here, this Court could affirm because the federal officials would be entitled to qualified immunity from any monetary liability in their individual capacity.[5] *See Forest Guardians v. United States Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003) (district court decision may be affirmed on the basis of any ground supported by the record). Qualified immunity shields government officials "from liability for civil damages

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[5] Similarly, as to any official capacity claim, the district court was clearly correct that appellants failed to identify a waiver of sovereign immunity. ER 27-28. "In sovereign immunity analysis, any lawsuit * * * against an officer of the United States in his or her official capacity is considered an action against the United States." *Balser v. Dep't of Justice, Office of U.S. Trustee*, 327 F.3d 903, 907 (9th Cir. 2003); *see Sierra Club v. Whitman*, 268 F.3d 898, 901 (9th Cir. 2001) ("suits against officials of the United States * * * in their official capacity are barred if there has been no waiver [of sovereign immunity]"). The complaint fails to identify any waiver of sovereign immunity permitting a damages claim against the United States, and none of the sources of law relied upon by appellants contains any such waiver. In addition, plaintiffs cannot pursue this theory as there is no such thing as a *Bivens* claim against the United States, or against a federal official in his or her official capacity. *See Balser*, 327 F.3d at 909 (*Bivens* is "against a federal employee in his individual rather than official capacity," and therefore "does not state a viable cause of action against [a] United States [official] acting in his official capacity"); *Nurse v. United States*, 226 F.3d 996, 1004 (9th Cir. 2000) ("official capacity claims are not cognizable as *Bivens* claims").

insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The qualified immunity analysis is a two-step process. First, the court must determine "the existence or nonexistence of a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.* Second, if a violation could be made out, the court must ask whether the right was "clearly established." *Id.* This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202.

Here, the alleged constitutional appellants seek to vindicate do not exist, let alone are "clearly established." As explained above, plaintiffs pursue only a Fifth Amendment claim on appeal, and that claim is without merit under this Court's precedent. Accordingly, it cannot be seriously argued that "it would be clear to a reasonable officer," *Saucier*, 533 U.S. at 201, that prisoner pay systems expressly authorized by Congress, in place for many decades, and upheld by every court to consider them violate the Constitution.[6] The district court's judgment dismissing the Fifth Amendment claims should therefore be affirmed.

B. The District Court Properly Dismissed Plaintiffs' International-Law Claims.

Plaintiffs also contend that they are entitled to relief under the International Covenant on Civil and Political Rights ("ICCPR"), 999 U.N.T.S. 171, 6 I.L.M. 368 (Dec. 16, 1966), and the "United Nations Covenant of Political and Civil Rights."[7] *See* Appellants' Br. at 19-24. As the district court properly recognized,

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[6] Any individual-capacity claim also fails because the complaint alleges no specific wrongful acts or omissions on the part of the named federal officials. *See, e.g., Bibeau v. Pacific Northwest Research Found., Inc.*, 188 F.3d 1105, 1113-14 (9th Cir. 1999) (rejecting *Bivens* liability where plaintiff failed to show personal participation or that the defendants were more than "peripherally connected" to the matters complained of), *amended on other grounds*, 208 F.3d 831 (9th Cir. 2000); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) ("Liability under section 1983 arises only upon a showing of personal participation by the defendant."). We also note that plaintiffs Serra and Cordero are no longer federal prisoners, *see* ER 3-4, and thus cannot bring claims for prospective injunctive relief in any event. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *see also e.g., Johnson v. Moore*, 948 F.2d 517, 519 (9th Cir. 1991) (where inmate transferred to different facility "demonstrated no reasonable expectation of returning to CBCC, his claims for injunctive relief relating to CBCC's policies are moot"); *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986) (same).

[7] The United Nations Covenant of Political and Civil Rights is also known as the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations Economic and Social Council ("Standard Minimum Rules"), E.S.C. Res. 663C, Annex I, at 11, U.N. ESCOR, 24th Sess., Supp. No. 1, U.N. Doc. A/CONF/611 (July 31, 1957), *amended by* E.S.C. Res. 2076, at 35, U.N. ESCOR, 32nd Sess., Supp. No. 1, U.N. Doc. E/5988 (May 13, 1977), *available at* http://www.ohchr.org/english/law/treatmentprisoners.htm

those provisions are not self-executing and therefore create no judicially enforceable rights and, in any event, furnish no right to relief here.

As this Court has repeatedly explained, "[f]or any treaty to be susceptible to judicial enforcement it must both confer individual rights and be self-executing." *Cornejo v. County of San Diego*, 504 F.3d 853, 856-57 (9th Cir. 2007); *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279, 1283 (9th Cir. 1985) (explaining that a non-self-executing treaty is merely an agreement between nations with no effect on domestic law absent additional governmental action). If a treaty's provisions are not self-executing, they can be enforced only pursuant to legislation to carry them into effect. *See Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Head Money Cases*, 112 U.S. 580, 598 (1884) ("[a] treaty is primarily a compact between independent nations" that "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it"); *Cornejo*, 504 F.3d at 857. Even if a treaty is self-executing, it does not necessarily "create private rights and remedies enforceable in American courts" unless Congress' ratification of the treaty reveals an intent to do so. *See id.*

The ICCPR claim is fatally flawed because the ICCPR is not self-executing and does not create private rights and remedies enforceable in United States courts. The United States Senate ratified the ICCPR with the express declaration that it is not self-executing. *See* 138 Cong. Rec. S4781 (Apr. 2, 1992) ("[T]he United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing."). In addition, in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court observed that "the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing." *Id.* at 728; *see also id.* at 735 ("although the [ICCPR] does bind the United States as a matter of international law, the United States ratified the [ICCPR] on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts"). Moreover, there is no additional legislation implementing the ICCPR into domestic law. Accordingly, courts routinely dismiss ICCPR claims.[8]

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[8] *See, e.g.*, *Martinez-Lopez v. Gonzales*, 454 F.3d 500, 502 (5th Cir. 2006); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 137 (2d Cir. 2005); *Iguarta-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005). *See also Padilla-Padilla v. Gonzales*, 463 F.3d 972, 979-80 (9th Cir. 2006) (rejecting claims under unspecified "treaties, declarations, and customary international law norms" and citing *Sosa* for the proposition that "the Universal Declaration of Human Rights and [ICCPR] do not impose obligations on the United States because neither is self-executing").

Even if ICCPR could be enforced through private litigation, plaintiffs could not state a claim because it the expressly *permits* governments to require persons convicted of crimes to work. While Article 8(3)(a) of the ICCPR provides that "[n]o one shall be required to perform forced or compulsory labour," a later provision in the same article makes clear that "[f]or the purpose of this paragraph the term 'forced or compulsory labour' shall not include: (i) any work or service, not referred to in subparagraph (b),[9] normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention * * *." ICCPR Article 8(3)(c). Moreover, nothing in the ICCPR purports to regulate the wages, if any, paid for prisoner labor.[10] There is no dispute that, and Appellants conceded at argument, that they were under detention in consequence of lawful orders of courts convicting them of federal crimes. ER 53. Thus, rates paid for labor under in prison industries simply

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[9] Subparagraph (b) creates a separate exception that expressly permits the imposition of "hard labour" as a punishment for a crime.

[10] Plaintiffs also cite Articles 7 and 10 of the ICCPR. Neither is relevant here. Article 7 simply provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." Article 10 provides that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human being" and also addresses segregation of convicted from unconvicted persons.

does not implicate any issue under Article 8 of the ICCPR, even if that treaty provided judicially enforceable rights, which it does not.

The claims under the Standard Minimum Rules also lack merit. The Standard Minimum Rules are not a even treaty, let alone a self-executing one, and thus are not part of domestic law. Rather they are merely United Nations-drafted advisory guidelines that were never intended to have any binding legal effect, let alone create a private right of action in domestic courts. The resolution of the U.N. Economic and Social Council ("ECOSOC") approving them merely "*[d]raws the attention* of governments to [them] and *recommends* * * * [t]hat favourable consideration be given to their adoption and application." E.S.C. Res. 663 C (XXIV), U.N. ESCOR, 24th Sess., Supp. No. 1, at 11, U.N. Doc. E/3048 (1957) (emphasis in original).[11] Although United States courts have occasionally looked to the Standard Minimum Rules as indicia of exemplary practices in correctional institutions, they have never treated those Rules as legally binding or

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[11] *See also* Working Paper Prepared by the Secretariat, United Nations, The Standard Minimum Rules for the Treatment of Prisoners In the Light of Recent Developments in the Correctional Field, Fourth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF.43/3, at 13 (1970) (noting that "acceptance by the United Nations and approval by the Economic and Social Council . . . are still not sufficient to invest the Standard Minimum Rules with the force of international law" and that "[a]s guidelines, the Rules depend for their effect upon their adoption by local, that is national or municipal, law").

actionable. *See, e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 103-04 n.8 (1976) (including the Standard Minimum Rules as one item in a laundry list of "[m]odel correctional legislation and proposed minimum standards" supporting the proposition that failure to provide medical care to prisoners violated "contemporary standards of decency" relevant to Eighth Amendment analysis).

In any event, the compensation practices challenged herein are in no way inconsistent with Standard Minimum Rules, which merely require "a system of equitable remuneration of the work of prisoners." Standard Minimum Rule 76(1). There is highly developed and fair system in place that provides equitable remuneration[12] of the work of prisoners, even going so far as to provide, among other things, vacation pay, holiday pay, longevity pay, and incentive awards. *See supra* at pp. 3-7. Thus, even if a claim for a violation of the Standard Minimum Rules could theoretically be pursued in federal court, which it cannot, it would avail appellants nothing here.

Finally, plaintiffs' attempts (*see* Appellants Br. at 22-24) to bootstrap international claims through the Alien Tort Statute, 28 U.S.C. § 1350, ("ATS") are without merit. The ATS creates jurisdiction for "aliens" to bring a limited set of claims in violation of the law of nations in U.S. courts. *See id.*; *Sosa*, 542 U.S. at

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[12] "Equitable remuneration," of course, does not mean that prisoners have to be paid above the minimum wage or at levels prevailing in the outside economy.

732-33. Plaintiffs have not alleged that they are aliens, and the statute is therefore by its terms inapplicable. The district court therefore properly concluded that no claim for injunctive or monetary relief was cognizable under international law.[13]

III. THE DISTRICT COURT CORRECTLY DENIED PLAINTIFFS' FUTILE REQUEST TO AMEND THE PLEADINGS.

Plaintiffs' request to amend the pleadings was properly denied as futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). As this Court has explained, although amendments to pleadings are "commonly granted," "futile amendments should not be permitted." *Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bur.*, 701 F.2d 1276, 1292-93 (9th Cir. 1983). A proposed amendment is futile if the amendment would not survive a motion to dismiss. *See Smith v. Commanding Officer, Air Force Accounting & Fin. Ctr.*, 555 F.2d 234, 235 (9th Cir. 1977) (district court

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[13] Finally, plaintiffs have identified no waiver of sovereign immunity with respect to the proposed international law claims. *Koohi v. United States*, 976 F.2d 1328, 1333 n.4 (9th Cir. 1992) (suit could not be brought against United States under ATS or International Civil Aviation Organization Convention because neither contained waiver of sovereign immunity). Moreover, an attempt to raise an international law claim under the FTCA would fail in any event because the United States would be substituted under the Westfall Act. *See Alvarez-Machain v. United States*, 331 F.3d 604, 631-32 (9th Cir. 2003) (holding that international-law claims against individual federal employees are subject to substitution of the United States as the party defendant), *rev'd on other grounds*, 542 U.S. 692 (2004). The one defendant that plaintiffs clearly attempted to sue in his individual capacity has already been certified under the Act, *see* Exhibit A to Defendants' Motion to Dismiss, District Court Dkt. 18 (Declaration of Robert J. Katerberg).

correctly denied motion to amend as futile due to government's immunity from suit).

Here, plaintiffs sought to amend the complaint to bring claims against the federal officials in their individual capacity under *Bivens* or against the United States under the Federal Tort Claims Act ("FTCA"). *See* ER 40. As explained below, those proposed amendments would not have remedied the material deficiencies in plaintiffs' complaint.

A. Alleging an individual capacity claim would not cure the failure to raise a cognizable claim because, for the reasons explained above, plaintiffs have failed to allege sufficient facts to make out a constitutional violation. *See supra* at 12-15. Moreover, even if they had, the federal officials would have been shielded from liability under the doctrine of qualified immunity for the reasons already identified above. *See id.* at 15-17. Thus, the district court properly recognized that adding such a claim would be futile. *See* ER 31.

B. Plaintiffs' attempt to raise a false imprisonment claim under the FTCA, 28 U.S.C. § 2680(h), is equally flawed. Plaintiffs appear to contend that the employment of duly convicted and sentenced prisoners in prison industries, as opposed to some other activity more to their liking, constitutes "false imprisonment" under the common law of torts.

However, plaintiffs' proposed FTCA claim fails at the outset for failure to exhaust administrative remedies. The FTCA requires claimants to present an administrative claim to the responsible federal agency prior to filing suit, 28 U.S.C. § 2675(a), and the Supreme Court and this Court have made clear that the failure to exhaust administrative remedies in this manner is a jurisdictional bar. *See McNeil v. United States*, 508 U.S. 106, 113 (1993); *McLachlan v. Bell*, 261 F.3d 908, 912 (9th Cir. 2001). As this Court has explained, "section 2675(a) requires the claimant or his legal representative to file (1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum certain damages claim." *Warren v. U.S. Dep't of Interior*, 724 F.2d 776, 780 (9th Cir. 1984) (en banc); *see also Cadwalder v. United States*, 45 F.3d 297, 300-01 (9th Cir. 1995) (each plaintiff must separately satisfy requirement). The complaint does not state that they filed an appropriate administrative claim, *see* ER 1-13, 54, and plaintiffs have not otherwise demonstrated that any such claim has been filed. *See* ER 54.

In any event, even if plaintiffs had properly exhausted their administrative remedies, their FTCA claim would be subject to dismissal. The FTCA waives the United States' sovereign immunity for tort suits, subject to a number of exceptions, "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). In determining liability under the FTCA, courts must therefore look to the law of the state where the act or omission occurred.[14] *See, e.g.*, *FDIC v. Meyer*, 510 U.S. 471, 478 (1994).

As this Court has explained, under California law "the elements of false imprisonment are: '1) the nonconsensual, intentional confinement of a person, 2) without lawful privilege, and 3) for an appreciable period of time * * * .'" *Blaxland v. Commonwealth Director of Pub. Prosecutions*, 323 F.3d 1198, 1205 (9th Cir. 2003) (quoting *Easton v. Sutter Coast Hosp.*, 80 Cal. App.4th 485, 496, 95 Cal. Rptr. 2d 316 (2000)). Plaintiffs cannot plausibly plead an absence of lawful privilege. *See Blaxland*, 323 F.3d at 1205 (noting that absence of legal process is a key aspect of false imprisonment). *See also Mundt v. United States*, 611 F.2d 1257, 1259-60 (9th Cir. 1980) (applying Arizona law). Indeed, the district court confirmed at oral argument in the proceedings below that plaintiffs do not challenge the process by which their conviction and sentencing was obtained. *See* ER 53 ("Are you alleging Mr. Serra was not properly convicted?

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[14] Indeed, a plaintiff cannot bring an FTCA claim against the United States based solely on conduct that violates the Constitution because such conduct may violate only federal, and not state, law. *See Meyer*, 510 U.S. at 478. Here, the inclusion of an FTCA claim would therefore permit appellants to raise only their international law claims, which are meritless for the reasons set forth above.

Same thing with Santiago? [Appellants' Counsel]: No."]. Moreover, the Thirteenth Amendment expressly allows prison labor after a conviction and the pay rates for prison labor are entirely committed by law to "the discretion of Federal Prison Industries, Inc." 28 C.F.R. § 345.10. This Court has concluded both that compulsory prison labor is legitimate and constitutionally permissible, *Draper*, 315 F.2d at 197, and that prison labor need not satisfy minimum wage laws. *Hale*, 993 F.2d at 1393-98.[15]

In sum, not only was there the legal privilege to imprison and require work from plaintiffs, but also the lawful discretion under federal law concerning the quantum of pay while in prison.. Appellants' claim for false imprisonment is thus baseless. "[P]arties should not be allowed to amend their complaint without

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[15] The FTCA does not categorically bar false imprisonment claims against the United States "with regard to acts or omissions of investigative or law enforcement officers." 28 U.S.C. § 2680(h). Section 2680(h) generally bars false imprisonment claims against the United States by excepting them from the Federal Tort Claims Act's waiver of sovereign immunity. However, a proviso within § 2680(h) allows such claims "with regard to acts or omissions of investigative or law enforcement officers," defined for purposes of subsection (h) only as to "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h). This Court has held that the proviso applies "only when the federal official acts in his or her investigative or law enforcement capacity." *Arnsberg v. United States*, 757 F.2d 971, 978 n.5 (9th Cir. 1984). There would be a substantial question whether those responsible for setting prisoner wage rates in the Federal Prison Industries or other programs could be considered "investigative or law enforcement officers" who act in that capacity when setting those rates.

showing how the complaint could be amended to save [a] meritless claim." *Wisdom v. First Midwest Bank, of Poplar Bluff*, 167 F.3d 402, 409 (8th Cir. 1999). Plaintiffs have made no such showing here.[16]

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment.

Respectfully submitted,

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[16] Plaintiffs also challenge the denial of leave to amend as to two other putative claims—a "due process claim" and a claim concerning alleged deprivation of "education[] and training while in prison." Appellants Br. at 25. But plaintiffs fail to explain how these claims would be actionable. As explained above, plaintiffs have no basis for relief under the Due Process Clause. And plaintiffs "provided the [District] Court with no indication that [they] could, or intended to, allege facts to support" their claim concerning education and training. *Serra*, 2008 WL 929525, *5 n.3; *see also* ER 42-48.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached answering brief is:

Proportionately spaced, has a typeface of 14 points or more and contains 6,900 words, excluding this Certificate of Compliance, the cover page, the Table of Contents, the Table of Authorities, the Statement of Related Cases, and the Proof of Service. The number of words was determined through the word-count function of WordPerfect 9.

Alexander K. Haas

ALEXANDER K. HAAS

STATEMENT OF RELATED CASES

Counsel for appellees is not aware of any case pending in this Court that would qualify as a related case under Ninth Circuit Rule 28-2.6.

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2008, I served two copies of the foregoing BRIEF FOR APPELLEES, upon the following counsel for appellants, by Federal Express overnight delivery:

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