13-0981-cv(L),

13-0999-cv(CON), 13-1002-cv(CON), 13-1003-cv(CON), 13-1662-cv(XAP)

United States Court of Appeals

for the

Second Circuit

IBRAHIM TURKMEN, AKIL SACHVEDA, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, PURNA BAJRACHARYA, AHMER ABBASI,

Plaintiffs-Appellees-Cross-Appellants,

ASIF-UR-REHMAN SAFFI, SYED AMJAD ALI JAFFRI, on behalf of themselves and all others similarly situated, SHAKIR BALOCH, HANY IBRAHIM, YASSER EBRAHIM, ASHRAF IBRAHIM, AKHIL SACHDEVA,

Plaintiffs-Appellees,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

FINAL BRIEF FOR PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

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– v. –

WARDEN DENNIS HASTY, former Warden of the Metropolitan Detention Center (MDC), MICHAEL ZENK, Warden of the Metropolitan Detention Center, JAMES SHERMAN, SALVATORE LOPRESTI, MDC Captain,

Defendants-Appellants-Cross-Appellees,

JOHN ASHCROFT, Attorney General of the United States, ROBERT MUELLER, Director, Federal Bureau of Investigations, JAMES W. ZIGLAR, Commissioner, Immigration and Naturalization Service, JOHN DOES 1-20, MDC Corrections Officers, JOHN ROES, 1-20, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents, CHRISTOPHER WITSCHEL, MDC Correctional Officer, UNIT MANAGER CLEMETT SHACKS, MDC Counselor, BRIAN RODRIGUEZ, MDC Correctional Officer, JON OSTEEN, MDC Correctional Officer, RAYMOND COTTON, MDC Counselor, WILLIAM BECK, MDC Lieutenant, STEVEN BARRERE, MDC Lieutenant, LINDSEY BLEDSOE, MDC Lieutenant, JOSEPH CUCITI, MDC Lieutenant, LIEUTENANT HOWARD GUSSAK, MDC Lieutenant, LIEUTENANT MARCIAL MUNDO, MDC Lieutenant, STUART PRAY, MDC Lieutenant, ELIZABETH TORRES, MDC Lieutenant, SYDNEY CHASE, MDC Correctional Officer, MICHAEL DEFRANCISCO, MDC Correctional Officer, RICHARD DIAZ, MDC Correctional Officer, KEVIN LOPEZ, MDC Correctional Officer, MARIO MACHADO, MDC Correctional Officer, MICHAEL MCCABE, MDC Correctional Officer, RAYMOND MICKENS, MDC Correctional Officer, SCOTT ROSEBERY, MDC Correctional Officer, DANIEL ORTIZ, MDC Lieutenant, PHILLIP BARNES, MDC Correctional Officer, UNITED STATES OF AMERICA, JAMES CUFFEE,

Defendants-Cross-Appellees,

OMER GAVRIEL MARMARI, YARON SHMUEL, PAUL KURZBERG, SILVAN KURZBERG, JAVAID IQBAL, EHAB ELMAGHRABY, IRUM E. SHIEKH,

Intervenors.

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Plaintiffs–Appellees–Cross-Appellants ("Plaintiffs") were arrested on civil immigration charges shortly after the September 11, 2001 terrorist attacks. With the laudable goal of disrupting future attacks, Defendants–Cross-Appellees John Ashcroft, Robert Mueller, and James Ziglar ("DOJ Defendants") cast aside fundamental Constitutional guarantees, and created a policy to detain Arab and Muslim non-citizens and subject them to harsh treatment, designed to coerce cooperation. DOJ Defendants' orders were carried out by federal prison officials, including Defendants-Appellants[1] Dennis Hasty, Michael Zenk and James Sherman ("MDC Defendants"), who caused Plaintiffs to be abused and deprived of their rights in custody.

The detentions lasted long past the first few terrifying weeks after 9/11; Plaintiffs, and dozens of others like them, were subjected to extraordinarily harsh restrictions and abused for up to eight months at the Metropolitan Detention Center ("MDC"), a federal prison facility in Brooklyn. This treatment was not based on evidence that Plaintiffs

[1] Although MDC Defendants identify themselves as "Defendants-Appellants-Cross-Appellees," Plaintiffs have cross-appealed only the dismissal of claims against DOJ Defendants; MDC Defendants are therefore not Cross-Appellees.

were dangerous, or terrorists, or connected to terrorism, but rather on Defendants' discriminatory notion that harsh treatment of Arab or South Asian Muslim non-citizens might lead such individuals to disclose information about terrorism.

Defendants' policies and actions violated Plaintiffs' clearly established rights to be free from punishment, unreasonable search, discrimination, and religious interference. This Cross-Appeal arises from a decision by the Honorable John Gleeson, United States District Judge, Eastern District of New York, on Defendants' motions to dismiss Plaintiffs' Fourth Amended Complaint. The District Court denied qualified immunity to MDC Defendants but dismissed all claims against DOJ Defendants.

Jurisdictional Statement

Plaintiffs assert claims against officers and employees of the United States under 28 U.S.C. § 1331 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Plaintiffs sought and received Fed. R. Civ. P. 54(b) certification on certain claims, and final judgment on those claims was entered by the District Court on April 11, 2013. A-215. Jurisdiction over Plaintiffs'

cross-appeal is based on 28 U.S.C. § 1291. Plaintiffs filed their Notice of Appeal on April 24, 2013. A-217–22.

Statement of the Issues Presented on Plaintiffs' Cross-Appeal

1. Did Plaintiffs plead facts sufficient to make it plausible that DOJ Defendants deprived Plaintiffs of due process of law?

2. Did Plaintiffs plead facts sufficient to make it plausible that DOJ Defendants deprived Plaintiffs of freedom of religious practice?

3. Did Plaintiffs plead facts sufficient to make it plausible that DOJ Defendants deprived Plaintiffs of equal protection of the laws?

Statement of the Issues Presented on Defendants' Appeals

1. Do claims based on the Constitutional guarantees of due process of law and equal protection of the laws, long recognized under *Bivens*, present a "new context" simply because they are raised by non-citizens held in civil detention; and if the context is new, is a *Bivens* remedy available in that context?

2. Is a *Bivens* remedy available for the violation of Plaintiffs' right to practice their religion under the First Amendment?

3. Do Plaintiffs adequately allege that MDC Defendants violated their rights to due process of law, equal protection of the laws, freedom from unreasonable search and seizure, and freedom of religion?

4. Have MDC Defendants met their burden of showing that the facts alleged in the Fourth Amended Complaint establish that their conduct was objectively reasonable?

5. Do Plaintiffs adequately allege a conspiracy among Defendants in violation of 42 U.S.C. § 1985(3)?

Statement of the Case

The original complaint in this matter was filed in April 2002, and then amended three times through 2004, primarily to add defendants whom plaintiffs could not identify prior to Doe discovery and to supplement plaintiffs' allegations with information disclosed by two investigations into the 9/11 detentions by the Office of the Inspector General of the Department of Justice. The Third Amended Complaint alleged 31 claims by plaintiffs who had been confined at the MDC or at Passaic County Jail ("Passaic") against 31 individual defendants, as well as federal tort claims against the United States. Many of the

claims asserted against individual defendants were asserted on behalf of a class of similarly situated persons, treated as plaintiffs had been.[2]

On June 14, 2006 Judge Gleeson ruled on a series of motions to dismiss, denying those motions for all defendants with respect to conditions of confinement claims similar to the claims at issue here, but dismissing Constitutional challenges to the nature and duration of plaintiffs' detention. *See Turkmen v. Ashcroft*, No. 02-cv-2307, 2006 U.S. Dist. LEXIS 39170 (E.D.N.Y. June 14, 2006) ("*Turkmen I*"). Plaintiffs and defendants each appealed various aspects of that ruling to this Court. While those appeals were pending, this Court issued a ruling in *Iqbal v. Hasty,* 490 F.3d 143 (2d Cir. 2007), a case challenging the same conditions of confinement challenged in *Turkmen I*. Although *Iqbal* was reversed in part by the Supreme Court, *Ashcroft v. Iqbal,* 566 U.S. 662 (2009), it otherwise remains the law of this Circuit, and as it involves many of the same defendants, claims, and defenses raised here, it should guide this Court's consideration of the present appeals.

[2] Though Plaintiffs served an opening class certification brief in 2005, consideration of that issue was stayed pending the first appeals in this matter. Consequently, the District Court has not yet ruled on certifying the proposed class.

In August 2009, also prior to this Court's decision in *Turkmen I,* five plaintiffs settled their tort claims against the United States for $1.26 million, and withdrew their other claims as a part of that settlement; six new plaintiffs then sought leave to intervene to continue to prosecute the class claims. On December 18, 2009, this Court affirmed the District Court's decision dismissing the unlawful detention claims, and it remanded the conditions claims to the District Court to consider Plaintiffs' motion for leave to amend their complaint in light of the new pleading standards announced in *Iqbal*. *Turkmen v. Ashcroft*, 589 F.3d 542 (2d Cir. 2009).

On August 30, 2010, Judge Gleeson granted Plaintiffs' motion for leave to amend and to add new plaintiffs to replace those who settled their claims. Plaintiffs filed the Fourth Amended Complaint on September 13, 2010. It narrows the controversy considerably, and asserts class claims on behalf of the hundreds of non-citizens profiled and rounded up after 9/11, and then abused while in custody. Defendants moved, once again, to dismiss.

The present appeals and cross-appeal stem from Judge Gleeson's January 15, 2013 decision dismissing all claims against DOJ

Defendants, and denying MDC Defendants' motions to dismiss five of Plaintiffs' seven claims. SPA-1–62. The District Court granted all Defendants' motions to dismiss Claims Four and Five (challenging a communications blackout at MDC), and Plaintiffs do not appeal that dismissal here. SPA-41–49.

MDC Defendants filed their Notices of Appeal in mid-March 2013. On March 20, 2013, Plaintiffs moved for an order directing entry of final judgment under Fed. R. Civ. P. 54(b), dismissing Claims One (Substantive Due Process challenge to conditions of confinement), Two (Equal Protection challenge to conditions of confinement), Three (First Amendment challenge to interference with religious practice) and Seven (42 U.S.C. § 1985(3) conspiracy challenge) against Defendants Ashcroft, Mueller and Ziglar, on the ground that justice and efficiency would be served by allowing this Court to rule on the merits of the claims against those Defendants at the same time it was ruling on the merits of the same claims against the other Defendants.[3] Judge Gleeson granted the

[3] Plaintiffs' Rule 54(b) motion also asked for final judgment dismissing Claim 6 against the same three Defendants, but that was an error; Claim 6 was never asserted against those Defendants. To that extent, Judge Gleeson denied the motion.

motion on April 8, 2013, and final judgment was entered on April 11, 2013. A-215.

Five claims are now before this Court, as set forth in the following table, showing the parties involved, the District Court's disposition, and the status on appeal.

Table of Parties and Claims

By:	*Asserted against Ashcroft, Mueller and Ziglar*	*Disposition in the District Court*	*Status on Appeal*
Abbasi, Benatta, Hammouda, Khalifa and Mehmood	Claims 1–3, 7	Motions to dismiss granted	Appealed by Plaintiffs
	Claims 4, 5	Motions to dismiss granted	Not appealed
Bajracharya	Claims 1, 2, 7	Motions to dismiss granted	Appealed by Plaintiffs
	Claims 4, 5	Motions to dismiss granted	Not appealed

By:	*Asserted against Ashcroft, Mueller and Ziglar*	*Disposition in the District Court*	*Status on Appeal*
Sachdeva	Claims 2, 7	Motions to dismiss granted	Appealed by Plaintiffs
Turkmen	Claims 2, 3, 7	Motions to dismiss granted	Appealed by Plaintiffs

By:	*Asserted against Hasty and Sherman*	*Asserted against Zenk*	*Disposition in the District Court*	*Status on Appeal*
Abbasi, Khalifa and Mehmood	Claims 1–3, 6, 7		Motions to dismiss denied	Appealed by Defendants
	Claims 4, 5		Motions to dismiss granted	Not appealed
Benatta, Hammouda	Claims 1–3, 6, 7	Claims 1 (but only official policy abuse), 2, 3, 6, 7	Motions to dismiss denied	Appealed by Defendants
	Claims 4, 5	Claims 4, 5	Motions to dismiss granted	Not appealed

By:	*Asserted against Hasty and Sherman*	*Asserted against Zenk*	*Disposition in the District Court*	*Status on Appeal*
Bajracharya	Claims 1, 2, 6, 7 Claims 4, 5		Motions to dismiss denied Motions to dismiss granted	Appealed by Defendants Not appealed
Sachdeva, Turkmen				

Statement of Facts

Plaintiffs are eight non-citizens of Arab and South Asian descent who were encountered during the 9/11 investigation, arrested for violating the terms of their visas, and then kept in jail and abused for months while their deportation was intentionally delayed so that the FBI could decide whether they were terrorists, or had any value to the 9/11 investigation. A-122 (¶1). Plaintiffs seek to represent a class of similarly situated foreign nationals who suffered the same treatment. *Id.*

Shortly after September 11, 2001, Defendant Ashcroft (then Attorney General of the United States) devised a plan to round up and

detain as many Arab and South Asian Muslims as possible, based on his discriminatory notion that such individuals are likely to be connected to terrorism or terrorists. A-133, 136 (¶¶39, 48). Both Ashcroft and Defendant Mueller (then Director of the FBI) knew that Ashcroft's plan would result in the arrest and detention of many individuals in these targeted groups without any non-discriminatory reason to suspect them of terrorism. A-133 (¶41). Because they received daily reports regarding the arrests and detentions, Ashcroft, Mueller and Defendant Ziglar (former Commissioner of the Immigration and Naturalization Service) were made aware that this did, in fact, occur. A-135–36, 142 (¶¶47, 63–64).

Ashcroft ordered Mueller and Ziglar to hold these "9/11 detainees," whom DOJ Defendants knew were accused only of civil immigration violations, until the FBI affirmatively cleared the detainees of any connection to terrorism. A-135–38 (¶¶47, 53, 55). As the round-ups began, Ashcroft and Mueller met regularly with a small group of government officials in Washington, D.C., and mapped out ways to exert maximum pressure on the detainees. A-141–42 (¶61). They made a plan to restrict the detainees' access to the outside world, and to

spread misinformation among law enforcement personnel that the 9/11 detainees were suspected terrorists who "needed to be encouraged *in any way possible* to cooperate." *Id.* (emphasis added). Ziglar attended many of these meetings. A-142 (¶62).

Ashcroft, Mueller and Ziglar's plan to urge others to treat the 9/11 detainees harshly directly resulted in unlawfully punitive conditions of confinement at MDC. A-142–43, 146–47, 152–53 (¶¶65, 68, 75–76, 79, 96). The conditions were designed in consultation with the FBI to aid interrogation, and to make the detainees suffer, in the hope that this suffering would lead to cooperation with law enforcement. A-142, 154 (¶¶65, 103).

Ashcroft's small group did not directly design every detail of the restrictive conditions. Rather, the MDC Warden, Defendant Hasty, ordered his subordinates (Defendants Cuciti and LoPresti)[4] to develop uniquely harsh conditions in line with Ashcroft's mandate, and then Hasty and Defendant Sherman, MDC's Associate Warden for Custody, approved those conditions. A-128–29, 143, 146–47, 153, 163 (¶¶24, 27,

[4] Cuciti, a former Lieutenant at MDC, has not appealed Judge Gleeson's decision. LoPresti, the former MDC Captain, filed a notice of appeal but did not file a brief before this Court.

68, 75–76, 79, 98, 132). The conditions are described in detail in paragraphs 79–140 of the Complaint, and include 23 to 24 hour-a-day lockdown in a cell in an Administrative Maximum Special Housing Unit ("ADMAX SHU"); handcuffs, shackles, a waist chain, and the physical grip of at least three guards whenever Plaintiffs were taken from their cells; redundant and humiliating strip searches; heavy restrictions on all forms of communication; denial of recreation; inadequate provision of hygiene and religious items; constant light in their cells; sleep deprivation; exposure to temperature extremes; interference with religious practice; and failure to provide information about internal complaint policies. A-147–65 (¶¶79–140). These punitive conditions became policy at MDC in September 2001, and most were continued by Defendant Zenk after he replaced Hasty as Warden the following April. A-129, 146 (¶¶25, 75).

As encouraged by DOJ Defendants' policy of maximum pressure, Hasty facilitated additional abuse of the detainees by referring to Plaintiffs as "terrorists" among MDC staff, barring them from normal grievance and oversight procedures, and purposely avoiding the unit. A-128–29, 147, 157, 165 (¶¶24, 77, 78, 109, 140). As a result,

correctional officers at MDC engaged in widespread and patterned physical, verbal and religious abuse of the detainees. A-155–57, 164, 167, 170–71, 181 (¶¶104–105, 109–110, 136, 147, 162, 200). This abuse included slamming the handcuffed and shackled detainees into the wall during transports (with enough force to break one Plaintiff's hand, *see* A-170–71 (¶162)), stepping on their shackles and twisting their hands and fingers, calling the detainees "terrorists," "fucking Muslims" and "camels," and shouting to interrupt their prayer. *Id.* Though Hasty tried to avoid being confronted with these results of his policies and actions, he was made aware of the abuse nonetheless. A-128–29, 147, 153, 156, 158, 161, 162, 164 (¶¶24, 77–78, 97, 107, 114, 123, 126, 137). The other MDC Defendants were frequently present on the ADMAX unit, yet they also failed to correct the abuses they witnessed or learned of. A-129–30, 147, 153, 158, 160, 162, 164 (¶¶25–28, 77, 97, 114, 121, 126, 137). Videotapes likely to show this abuse were destroyed. A-156 (¶107).

Complaints about the detentions and the abuse prompted two in-depth investigations by the Office of the Inspector General. *See* U.S. Dep't of Justice, Office of Inspector General, "The September 11

Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks" (April 2003), *available at* http:/www.usdoj.gov/oig/special/0306/full.pdf ("April OIG Report"); and U.S. Dep't of Justice, Office of Inspector General, "The Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York" (Dec. 2003), *available at* http://www.usdoj.gov/oig/special/0312/final.pdf ("Dec. OIG Report"). These reports were appended as exhibits to, respectively, the Second Amended Complaint and the Third Amended Complaint, and are incorporated by reference in the Fourth Amended Complaint. *See* A-123, 124 (¶3 n.1, ¶5 n.2). The reports corroborate Plaintiffs' allegations and detail the discriminatory nature of the 9/11 detentions and the abuse at MDC.

Each Plaintiff was rounded up in the Ashcroft raids. Ahmer Iqbal Abbasi and Anser Mehmood are Pakistani Muslims related by marriage. A-125–26 (¶¶13, 14). They came to the attention of the FBI through the same anonymous tip: a houseguest of Abbasi presented a false social security card at the New Jersey Department of Motor Vehicles, and an employee there reported to the FBI that the card, and

a passport, had been left by a "male, possibly Arab" using Abbasi's address. A-165–66, 169–70 (¶¶143, 158). Abbasi was arrested as a result, and held for over four months in the ADMAX SHU. A-165–66, 168 (¶¶143, 152). During Abbasi's arrest, the FBI came across the name of his sister, who is Mehmood's wife, and went to Mehmood's house to investigate her. A-169–70 (¶158). Since she was caring for their infant son, Mehmood requested that he be arrested in her place, and the FBI agreed, indicating he faced only minor immigration charges and would be released shortly. A-170 (¶159). Instead, he too was detained for four months in the ADMAX SHU. A-170–73 (¶¶162, 170).

Benamar Benatta is an Algerian Muslim. A-126 (¶15). He was detained by Canadian officials prior to 9/11 while trying to enter Canada from the United States to seek refugee status (later granted). A-126, 173–74 (¶¶15, 172–73). On September 12, 2001, Canadian officials alerted the FBI as to Benatta's profile and presence in Canada, and transported him to the United States. A-173–74 (¶173). He was initially placed in INS custody and ordered to appear in immigration court in Batavia, New York, but he was instead spirited away to MDC, where he was detained in the ADMAX SHU for over seven months. A-

174, 178 (¶¶174–75, 188). The sleep deprivation and harsh conditions imposed upon all the 9/11 detainees at MDC had a profound effect on Benatta's mental health, and while in custody he twice made serious attempts to injure himself. A-175–76 (¶¶179–82).

Ahmed Khalifa is a Muslim from Egypt who came to the United States for a vacation from his medical studies. A-126, 180 (¶¶16, 194). He was brought to the attention of the FBI when the husband of a postal service worker reported to the FBI hotline that several Arabs who lived at Khalifa's address were renting a post-office box, and possibly sending out large quantities of money. A-180 (¶195). He was arrested along with his roommates, and detained in the ADMAX SHU for close to four months. A-180–81, 183–84 (¶¶197, 211).

Saeed Hammouda is also an Egyptian Muslim. He is the only Plaintiff who still does not know what led to his arrest and detention. A-126 (¶17). He was held in the ADMAX SHU for eight months, longer than any other Plaintiff. A-185, 188 (¶¶217, 227).

Purna Raj Bajracharya is a Nepalese Buddhist who overstayed a visitor visa to work in the United States and send money home to his wife and sons in Nepal. A-126, 188 (¶¶18, 229). He planned to return

home to Katmandu in fall or winter 2001, but came to the attention of the FBI when filming the New York streets he had come to know, to show his wife and children. A-188–89(¶230). A Queens County District Attorney's office employee saw Bajracharya filming, and told the FBI that an "Arab male" was videotaping outside a building that contained the DA's office and an FBI office. *Id.* Bajracharya was arrested as a result, and detained for three months in the ADMAX SHU. A-189, 192 (¶¶232, 234, 244). The relatively short length of his detention was probably the result of intervention on his behalf by the FBI agent assigned to investigate his case, who repeatedly questioned his supervisors as to why Bajracharya remained in the ADMAX SHU after having been quickly cleared of any connection to terrorism. A-189–91 (¶¶235–36, 238).

Finally, two Plaintiffs were held at Passaic County Jail. Ibrahim Turkmen is a Turkish Muslim who was working at a Long Island service station, sending money home to his wife and four daughters in Turkey, when he came to the attention of the FBI. A-126, 193 (¶¶19, 246–47). His landlady called the FBI hotline to report that she rented her apartment to several Middle Eastern men, and she "would feel

awful if her tenants were involved in terrorism and she didn't call." A-194 (¶251). She reported that the men were good tenants, and paid their rent on time. *Id.* Akhil Sachdeva is a South Asian Hindu, who came to the attention of the FBI when a New York City fireman called the FBI hotline and reported that he had overheard two gas station employees "of Arab descent" having a conversation in Arabic and English, and that the English included some discussion of flight simulators. A-127, 199 (¶¶20, 270). Both Turkmen and Sachdeva were detained at Passaic County Jail for approximately four months. A-195, 199–200 (¶¶255, 272–73).

All Plaintiffs were charged with civil immigration violations. A-166, 170, 174, 181, 185, 189, 195, 200 (¶¶144, 161, 174, 199, 217, 231–32, 256, 273). Months later, several were also charged with minor criminal offenses. A-168, 172–73, 178–79 (¶153 (Abbasi), ¶170 (Mehmood), ¶¶190–91 (Benatta)).

Summary of the Argument

Plaintiffs' brief is divided into three sections. Section I addresses Plaintiffs' cross-appeal of the dismissal of DOJ Defendants. Sections II and III address MDC Defendants' appeal; Section II explains that a

Bivens remedy is available to Plaintiffs for each of their claims, and Section III shows that the District Court was correct to deny MDC Defendants' motions to dismiss.

In Section I, Plaintiffs first demonstrate that the District Court erred when it held that Plaintiffs have not plausibly alleged DOJ Defendants' involvement in the Due Process and Free Exercise violations described herein. The District Court found that DOJ Defendants could not be held liable for abusive conditions and interference with religious practice at MDC because their role was limited to creating a policy that was facially legal, and they were not responsible for the unlawful conduct of those carrying out the policy; therefore their punitive intent was not pleaded plausibly. SPA-29–31. But DOJ Defendants' policy was not lawful on its face; Defendants ordered the 9/11 detainees isolated from the outside world, and isolation required placement in a SHU, which violated due process. Moreover, DOJ Defendants hatched a plan to tell law enforcement that the 9/11 detainees were "suspected terrorists" who needed to be encouraged "in any way possible" to cooperate. But Plaintiffs were not suspected terrorists, they were merely immigration detainees; DOJ Defendants'

mislabeling suggests that they wanted others to treat Plaintiffs harshly, including by interfering with their religious observance.

With respect to Plaintiffs' Equal Protection claim, the District Court acknowledged that Plaintiffs made allegations suggestive of DOJ Defendants' discriminatory intent. SPA-37–40. The Court concluded, "I find the issue to be a close one, but after applying the *Iqbal* pleading standard I conclude that these allegations, viewed together with all the allegations in the Complaint, do not plausibly suggest" discriminatory animus. SPA-39–40. But unlike in *Iqbal*, Plaintiffs' allegations suggest discriminatory intent without any obvious, alternative explanation to defeat that inference. Plaintiffs allege that DOJ Defendants rounded up non-citizens knowing there was no evidence to connect them to terrorism. Plaintiffs' allegations thus raise the inference that DOJ Defendants intentionally singled out the 9/11 detainees for punitive treatment based on their religion, race, ethnicity and national origin.

The District Court correctly held that Plaintiffs possess a *Bivens* remedy for each of their constitutional claims. SPA-26 n.10, 49–55. Section II defends this conclusion. *Bivens* remedies have long been recognized for the type of Fourth Amendment, Equal Protection and

Substantive Due Process claims that Plaintiffs assert. Contrary to MDC Defendants' unsubstantiated assertion, Plaintiffs' status as non-citizens does not place these claims in a "new context" or otherwise deprive Plaintiffs of a remedy available to identically situated citizen-plaintiffs. And though Plaintiffs' Free Exercise claim does require an extension of *Bivens*, the extension is warranted, as Plaintiffs would otherwise have no available remedy for Defendants' intentional interference with their religious practice, and no special factors counsel hesitation.

Section III defends against MDC Defendants' appeal from the District Court's denial of qualified immunity. The District Court held that Plaintiffs' Complaint plausibly alleges the responsibility and punitive intent of MDC Defendants in subjecting Plaintiffs to unduly harsh conditions, violating clearly established law. SPA-34–35. Defendants' arguments to the contrary are based upon a misreading of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and an overly expansive view of the qualified immunity doctrine. Supervisory government officials may still be held directly liable for their deliberate indifference to conditions that pose a substantial risk of harm; Plaintiffs need not plead "active

conduct" by each Defendant. And because MDC Defendants' actions were clearly unlawful, they cannot hide behind the facially invalid orders of their superiors.

The District Court also found plausible Plaintiffs' Equal Protection Claim against MDC Defendants. The Court relied on Plaintiffs' factual allegations that MDC Defendants held Plaintiffs in punitive conditions, knowing no evidence connected Plaintiffs to terrorism, and that MDC Defendants allowed Plaintiffs to be abused and prevented from practicing their religion. SPA-40. MDC Defendants assert as an "obvious alternative" that they were merely acting on the FBI's instructions, but this contradicts Plaintiffs' factual allegations.

With respect to Plaintiffs' Free Exercise claim, the Complaint alleges that MDC Defendants implemented unlawful policies and were deliberately indifferent to abuse by their subordinates. Because the policies and abusive conduct were clearly unconstitutional, the District Court correctly found Plaintiffs' Free Exercise claim adequately pleaded against MDC defendants. SPA-56–58.

On Claim Six, for strip searches (asserted only against MDC Defendants), the District Court held that the Complaint pleads a claim for such searches beyond any legitimate penological purpose, and that this was clearly unconstitutional. SPA-58–60. MDC Defendants' only argument to the contrary is that they had no role in the strip searches. But this ignores Plaintiffs' factual allegations regarding MDC Defendants' unwritten policy of redundant and unnecessary strip searches, and their deliberate indifference to the abusive way in which that policy was implemented by their subordinates.

Finally, Plaintiffs show that the District Court was correct in finding that they have plausibly alleged an agreement and understanding among Defendants sufficient to state a claim for conspiracy to deprive Plaintiffs of the equal protection of the law, in violation of 42 U.S.C. § 1985(3).

Standard of Review

Defendants' appeals and Plaintiffs' cross-appeal are to be reviewed *de novo*. *Allaire Corp. v. Okumus*, 433 F.3d 248, 249–50 (2d Cir. 2006), *McGarry v. Pallito*, 687 F.3d 505, 510, 514 (2d Cir. 2012). The Court

must "draw[] all reasonable inferences in the plaintiff's favor." *Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009).

Argument

I. PLAINTIFFS' CLAIMS AGAINST DOJ DEFENDANTS ARE PLAUSIBLE.

The District Court dismissed Plaintiffs' claims that DOJ Defendants violated Constitutional guarantees to due process of law, freedom of religious practice, and equal protection of the laws on the ground that the complaint does not show those claims to be "plausible," as required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009).

Judge Gleeson correctly interpreted "plausible" to mean that Plaintiffs must plead facts from which the validity of their claims *could be inferred*, SPA-19; but, as we show below, he erred in concluding that Plaintiffs' claims against DOJ Defendants failed that test.

The centrality of inference is established by *Twombly* and *Iqbal*:

> 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.

Iqbal, 556 U.S. at 678 (emphasis added) (citing *Twombly*, 550 U.S. at 556).

But a plausible inference need not be convincing, or persuasive, or even probable:

> Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.

Twombly, 550 U.S. at 556 (internal quotation marks and citation omitted); *see also Iqbal*, 556 U.S. at 678. As Judge Posner has put it:

> [T]he court will ask itself could these things have happened, not did they happen. . . . [I]t is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences.

Swanson v. Citibank, N.A., 614 F.3d 400, 404 (7th Cir. 2010) (Posner, J.). Rather, the test is: do the plaintiff's allegations *suggest* liability?

> The need at the pleading stage for allegations plausibly *suggesting* (not merely consistent with) agreement reflects the threshold requirement of [Fed. R. Civ. P.] 8(a)(2) that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief."

Twombly, 550 U.S. at 557 (emphasis added).

Twombly and *Iqbal* illustrate how this works. In *Twombly*, in support of their anti-trust collusion claim, the plaintiffs pointed to the parallel conduct of the defendant telephone companies, and said in substance: defendants would surely not be acting in this non-competitive way except by unlawful agreement; without an agreement, self-interest would drive them to compete with one another. The defendants' conduct, said plaintiffs, suggests an agreement. 550 U.S. at 551–552. But the plaintiffs' argument failed, because their inference was invalid, rather than merely unlikely to be proved at trial. In fact, the nature and history of the relevant market demonstrated the defendants were acting as one would expect them to act in their own self-interest, without any agreement:

> The economic incentive to resist was powerful, but resisting competition is routine market conduct, and even if the ILECs flouted the 1996 Act in all the ways the plaintiffs allege, there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway . . . .

Twombly, 550 U.S. at 566 (record citation omitted). In short, "parallel conduct *does not suggest conspiracy*," *id.* at 557 (emphasis added); there may have been a "possibility of misconduct," *Iqbal*, 556 U.S. at 679, but

"possibility" is always present and is not sufficient. Because the *Twombly* complaint failed to provide a basis for inferring conspiracy, its claim of conspiracy was not plausible.

The same kind of analysis produced the same result in *Iqbal*. As in *Twombly*, the issue was: why did the defendants do what they were alleged to have done? Pointing to the incarceration of "thousands of Arab Muslim men . . . in highly restrictive conditions of confinement" (*Iqbal* complaint, quoted at 556 U.S. at 681), Iqbal alleged that this would not have happened if the defendants were not motivated by prejudice. As in *Twombly*, the Court rejected the inference, concluding that the defendants could have been expected to act in the same way without any prejudice:

> On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts.

556 U.S. at 682.

Since "potential connections to those who committed terrorist acts" explained defendants' conduct, that conduct did not suggest that the defendants were motivated by prejudice. Although the Court said

that these potential connections provided a "more likely explanation[]" of what the defendants did (*id.* at 681–82), the problem was not simply that this explanation was more likely than the explanation proffered by plaintiff, for—as we have noted—the Court was careful to say also that "[t]he plausibility standard is not akin to a 'probability requirement' . . . ." *Id.* at 678 (quoting *Twombly*, 550 U.S. at 556). The critical question is whether or not a plaintiff's factual allegations suggest illegality, and the Court held, in *Iqbal* as in *Twombly*, that this inference could not be drawn. But it remains the case that a court judging the legal sufficiency of a complaint must "draw[] all reasonable inferences in the plaintiff's favor." *Harris v. Mills*, 572 F.3d 66, 71 (2d Cir. 2009).

Here, Plaintiffs advance three claims against DOJ Defendants: Claim One challenges those Defendants' violation of Plaintiffs' substantive Due Process rights by creating a policy calling for Plaintiffs' detention as suspected terrorists in punitive and ultra-restrictive conditions of confinement; Claim Two challenges Defendants' violation of the Equal Protection clause by singling out Plaintiffs for detention in harsh conditions based on their race, religion, ethnicity and national

origin; and Claim Three challenges Defendants' interference with Plaintiffs freedom of religious practice. We now show that each of these three claims is plausibly alleged against DOJ Defendants. They should be reinstated, and with them, Claim Seven, for conspiracy.

A. DOJ Defendants' Involvement in Substantive Due Process and Free Exercise Violations

Plaintiffs, though civil detainees, were held between three and eight months in conditions designed for the most dangerous convicted criminals in the federal prison system. This punitive detention was orchestrated by DOJ Defendants in violation of Plaintiffs' substantive Due Process rights. Although the District Court allowed Plaintiffs' claim to proceed against officials at MDC, it dismissed DOJ Defendants despite Plaintiffs' allegations describing those Defendants' role in the abuse, on the theory that Plaintiffs failed to plausibly allege DOJ Defendants' punitive intent. This was error.

As the District Court correctly explained, conditions of confinement claims by detainees (as opposed to convicted prisoners) require a showing that, "(1) with the intent to punish (mens reas) (2) [a defendant] engaged in conduct that caused the conditions or restrictions that injured the plaintiff (causation)." SPA-27, citing *Iqbal v. Hasty*,

490 F.3d 143, 169 (2d Cir. 2007), *rev'd on other grounds, Ashcroft v. Iqbal,* 556 U.S. 662 (2009). Punitive intent may be shown directly, by verbal expression, or "inferred from the nature of the conditions or restraints allegedly imposed." SPA-27. This allows a court to consider "whether an alternative purpose to which [the condition] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose." SPA-27*; see also, Bell v. Wolfish,* 441 U.S. 520, 538 (1979). When a "restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." SPA-27–28, quoting *Wolfish*, 441 U.S. at 539.

In considering Plaintiffs' allegations, the District Court left undisturbed its 2006 ruling that the conditions at issue evinced intent to punish, but held nonetheless that Plaintiffs failed to plausibly allege DOJ Defendants' personal involvement in imposing those conditions. SPA-29–32.

Plaintiffs' factual allegations include:

21. [Ashcroft was] the principle architect of the policies and practices challenged here . . . . Along with a small group of high-level government employees, Ashcroft created the hold-until-cleared policy . . . . With that same group, he also created many of the unreasonably and excessively harsh conditions under which Plaintiffs and other class members were detained, and authorized others of those conditions. (A-127)

22, 23. [Mueller and Ziglar were] part of the small group of government employees who, under Ashcroft's direction . . . decided Plaintiffs would be held in unreasonable and excessively harsh conditions of confinement. (A-127–28)

* * *

61. In the first few months after 9/11, Ashcroft and Mueller met regularly with a small group of government officials in Washington and mapped out ways to exert maximum pressure on the individuals arrested in connection with the terrorism investigation, including Plaintiffs and class members. The group discussed and decided upon a strategy to restrict the 9/11 detainees' ability to contact the outside world and delay their immigration hearings. The group also decided to spread the word among law enforcement personnel that the 9/11 detainees were suspected terrorists, or people who knew who the terrorists were, and that they needed to be encouraged in any way possible to cooperate. (A-141–42)

62. Commissioner Ziglar was at many of these meetings, and he discussed the entire process of interviewing and incarcerating out-of-status individuals with Ashcroft and others. (A-142)

* * *

> 65. The punitive conditions in which MDC Plaintiffs and class members were placed were the direct result of the strategy mapped out by Ashcroft and Mueller's small working group. These conditions were formulated in consultation with the FBI, and designed to aid interrogation. Indeed, sleep deprivation, extremes of temperature, religious interference, physical and verbal abuse, strip-searches and isolation are consistent with techniques developed by the CIA to be utilized for interrogation of "high value detainees." (A-142)

Plaintiffs' Complaint goes on to detail the restrictive and abusive conditions to which they were subjected. *See* A-155–192 (¶¶104–244). The District Court accurately recounted most of these abusive conditions, including constructive denial of the opportunity to exercise; sleep deprivation; over-use of handcuffs and shackles; deprivation of hygienic supplies such as soap and toilet paper; exposure to the cold; deprivation of food; frequent and patterned physical and verbal abuse; and repeated and unnecessary strip searches. SPA-28. But Judge Gleeson ignored one fundamental aspect of Plaintiffs' substantive Due Process claim: placement in the ADMAX SHU, where Plaintiffs were locked in their cells for 23 to 24 hours a day. The import of this omission is made clear below.

Plaintiffs allege that these conditions were the "direct result" of DOJ Defendants' policy of maximum pressure. A-142 (¶65). Nevertheless, the District Court concluded that the Complaint does not permit the inference that Defendants *intended* this result. SPA-31. Specifically, the Court found that the "maximum-pressure" policy was facially constitutional, and reasoned that "a supervisory official is entitled to assume that his subordinates will pursue their responsibilities in a constitutional manner." *Id.,* quoting *Smiley by Smiley v. Westby,* No. 87 Civ. 6047, 1994 WL 519973, at *8 (S.D.N.Y. Sept. 22, 1994). Accordingly, DOJ Defendants could not be held liable for their underlings' misfeasance.

The District Court's analysis is wrong in two respects. First, DOJ Defendants' policy was less innocent than Judge Gleeson thought; it required Plaintiffs to be kept in segregated housing, and by misidentifying them as suspected terrorists it ensured their harsh treatment. In each of these respects the policy deprived Plaintiffs of the due process of law. Second, even if DOJ Defendants' policy was capable of either constitutional or unconstitutional applications, Plaintiffs' allegations render it plausible that DOJ Defendants intended their

subordinates to carry out their orders exactly as they did, in actuality, carry out the orders: through mistreatment and abuse.

First, it is clear that DOJ Defendants intended Plaintiffs to be placed in isolation.[5] This is because Ashcroft and his small working group instructed that Plaintiffs be restricted from contacting the outside world, A-141–42 (¶61), and such restriction required that Plaintiffs be placed in a SHU. SHU placement was necessary to prevent contact with prisoners who had access to telephone calls and visits, which might allow them to pass messages to the outside world. *See, e.g.*, *Mohammed v. Holder*, No.07-cv-02697, 2011 U.S. Dist. LEXIS 111571, at *6, *20–21 (D. Colo. Sep. 29, 2011) (noting that inmates subject to Special Administrative Measures are housed in isolation to ensure they do not have contact with other inmates, and thus find a

[5] Judge Gleeson did not discuss the impact of this allegation on Plaintiffs' substantive due process claim; instead, he analyzed ADMAX SHU placement solely in the context of Plaintiffs' communications claims, which he dismissed against all Defendants on qualified immunity grounds. SPA-41–49. But there can be no dispute that Plaintiffs' detention in the ADMAX SHU is an aspect of their substantive due process claim. See A-123, 141–42, 143–44, 145–46, 154, 166, 171, 174, 182, 186, 191, 201 (¶¶4, 61, 65, 67-9, 74–76, 103, 146, 165, 176, 204, 220, 239, 276–79); *see also,* Brief for Defendant-Appellant-Cross-Appellee Warden Dennis Hasty, Former Warden of the Metropolitan Detention Center (MDC), "Hasty Appeal Br." 17.

way around their communications restrictions); *Saleh v. Fed. Bureau of Prisons,* No. 05-cv-02467, 2010 U.S. Dist. LEXIS 138642, at *13–14 (D. Colo. Dec. 29, 2010) (accepting Government's legitimate interest in 2001 in placing certain convicted terrorists in isolation to ensure they could not contact the outside world), *aff'd*, *Rezaq v. Nalley*, 677 F.3d 1001 (10th Cir. 2012); *see also Communication Management Units*, 75 Fed. Reg. 17,324, 17,325 (proposed Apr. 6, 2010) ("It is difficult to police inmate communication in the 'open' context of a general population setting because it is harder to detect activity such as inmates sending mail under another inmate's name, or using another's PIN number, without constant monitoring.")

The April OIG report confirms this practical reality at the time of the 9/11 detentions. *See* A-248–49 (BOP Director Hawk Sawyer reporting that "the Department [of Justice] wanted the BOP to limit, as much as possible within their lawful discretion, the detainees' ability to communicate with other inmates and with people outside the MDC"), *see also* A-341–42:

> Hawk Sawyer informed the OIG that the Department [of Justice] did not initially give the BOP any guidance on how to confine the detainees. However, she said the Deputy

> Attorney General's Chief of Staff, David Laufman, and the Principal Associate Deputy Attorney General, Christopher Wray, called her during the weeks after September 11 with concerns about detainees' ability to communicate both with those outside the facility and with other inmates. Hawk Sawyer stated that [these concerns] . . . confirmed for her that the BOP's initial decision to restrict detainee communications with persons outside the facility and to isolate them from the general population and from each other was appropriate.

Because Plaintiffs sufficiently allege that DOJ Defendants intended to restrict communications, and because government officials routinely accomplish such restrictions through placement in administrative segregation, it is reasonable to infer that DOJ Defendants intended for Plaintiffs to be placed in a SHU.

Second, Plaintiffs' allegations also suggest that DOJ Defendants intended for Plaintiffs to be treated harshly. As set forth above, DOJ Defendants "decided to spread the word among law enforcement personnel that the 9/11 detainees were *suspected terrorists, or people who knew who the terrorists were,* and that they needed to be encouraged in any way possible to cooperate." A-141–42 (¶61) (emphasis added). This description of Plaintiffs was false, and DOJ Defendants knew it to be false. *See* A-133, 135–36 (¶¶41, 47):

> 41. . . . Ashcroft told Mueller to vigorously question any male between 18 and 40 from a Middle Eastern country whom the FBI learned about, and to tell the INS to round up every immigration violator who fit that profile. . . . *Both men were aware that this would result in the arrest of many individuals about whom they had no information to connect to terrorism*.
>
> * * *
>
> 47. *Ashcroft, Mueller and Ziglar received daily detailed reports of the arrests and detentions and were aware that the FBI had no information tying Plaintiffs and others to terrorism prior to treating them as "of interest" to the PENTTBOM investigation.* Indeed, in October 2001 all three learned that the New York field office of the FBI was keeping a separate list of non-citizens, including many Plaintiffs and class members, for whom the FBI had not asserted any interest (or lack of interest). Against significant internal criticism from INS agents and other federal employees involved in the sweeps, *Ashcroft ordered that, despite a complete lack of any information or a statement of FBI interest, all such Plaintiffs and class members be detained until cleared and otherwise treated as "of interest."*

(emphasis added)

Plaintiffs, and the others swept up in the Ashcroft raids, were not "suspected terrorists;" they were simply Muslim non-citizens encountered during the terrorism investigation, and detained for civil immigration violations; there was no evidence or even indication that

any of them were terrorists or connected in any way to terrorism. A-122 (¶1).

By misrepresenting Plaintiffs' status to subordinates, and calling them "suspected terrorists," DOJ Defendants ensured that Plaintiffs would be detained in the harshest conditions that exist in the federal system. It is plausible that Defendants anticipated and intended this natural result of their actions, and this is all that *Iqbal* requires for pleading intent. *See e.g.*, *Surprenant v. Rivas*, 424 F.3d 5, 14 (1st Cir. 2005) (finding substantive due process violation when correctional officer "wrongfully engineered [a pre-trial detainee's] punishment by fabricating a serious charge knowing that the falsehood would lead to the plaintiff's immediate placement in the hole without any intervening hearing"); *Morrison v. Lefevre*, 592 F. Supp. 1052, 1075 (S.D.N.Y. 1984) (transfer is a foreseeable consequence of false allegations).[6]

[6] This fabrication of "terrorist" connections does not excuse MDC Defendants for their role in placing the detainees in the ADMAX SHU. Wardens of federal correctional facilities frequently receive pretrial detainees charged with the most serious of crimes; federal regulations and the Constitution disallow placement of such prisoners in SHU based merely on their charges, but rather require an individualized and evidence-based assessment of dangerousness. *See United States v. Gotti*, 755 F. Supp. 1159, 1164 (E.D.N.Y. 1991) (holding prison officials cannot place a "pretrial detainee in administrative detention for a

The District Court did not consider these inferences. Rather, the court reasoned that an individual's punitive intent cannot generally be inferred from his failure to specify that a subordinate must act lawfully. SPA-31. But that general principle does not resolve the question here. On the allegations of this complaint, DOJ Defendants explicitly stated that detainees should be pressured in "any way possible" to cooperate. A-141–42 (¶61). It is *possible* that there is an innocent explanation for this command, but DOJ Defendants' purposeful misrepresentation of Plaintiffs' status, coupled with the directive to encourage cooperation *in any way possible*, suggests punitive intent, and this is all that Rule 8 requires. *Cf. Snider v. Dylag*, 188 F.3d 51, 55 (2d Cir. 1999) (holding guard liable for declaring "open season" on a prisoner, thus inviting abuse). And though Plaintiffs bear no burden to show the *implausibility* of some other innocent explanation, it is worth asking—given Plaintiffs' status as civil immigration detainees, without any evidence of ties to terrorism or dangerousness—what type of lawful pressure or "encouragement to cooperate" could Defendants' plausibly

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stated reason without providing any basis for the reason . . ."). "Prison authorities are not afforded unbridled discretion because the detainee is either notorious or newsworthy or both." *Id.* (internal citations omitted).

have intended? The maximum-pressure policy was explicitly tied to conditions of confinement, *see* A-141–42 (¶61), so DOJ Defendants could not have been referring to the traditional, lawful ways in which police and prosecutors "encourage cooperation." Subjecting a detainee to harsh conditions for the purpose of gaining his cooperation is punitive, and thus unlawful. *United States v. Fricke*, 53 M.J. 149, 155 (C.A.A.F. 2000).

On these inferences, the District Court's decision must be reversed; a civil detainee, for whom there is no evidence of any security concern, may not be placed in isolation, subjected to restrictive conditions, or abused. Such harsh confinement is "not reasonably related to a legitimate goal," but rather is "arbitrary," and thus the Court "permissibly may infer that the purpose of [DOJ Defendants' actions was] punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Wolfish*, 441 U.S. at 539, *see also Iqbal v. Hasty,* 490 F.3d at 168–69.

Along with Plaintiffs' claim that their conditions of confinement deprived them of substantive due process, they also allege that they were burdened in their ability to practice their religion at both MDC

and Passaic. A-147–54, 163–64 (¶¶79–102, 131–39). Although these allegations state a separate constitutional claim, A-202–4 (¶¶284–96), they are a part of the same policy of harsh treatment explained at length above, resulting naturally from DOJ Defendants' instruction to encourage cooperation by 9/11 Detainees "in any way possible." A-141–42(¶61). (Details of these violations are discussed below, in Section III.C.)

B. DOJ Defendants' Involvement in Equal Protection Violations and Conspiracy

Plaintiffs' Equal Protection claim is that they were subjected to harsh treatment because of their race, religion, ethnicity, and national origin; that all Defendants were prejudiced against them on these grounds; and that the prejudice of each Defendant, including each DOJ Defendant, contributed to the harsh treatment Plaintiffs received.

Judge Gleeson dismissed this claim as to DOJ Defendants, finding Plaintiffs' intent allegation implausible. SPA-40. He recognized that the Complaint has more factual allegations than the complaint in *Iqbal*, which was dismissed on the same ground, but he missed a number of key allegations—discussed below—and he evidently missed the significance of one of the key allegations he did mention: that non-

Arabs and non-Muslims, swept up in the 9/11 investigation just like Plaintiffs, were nevertheless treated differently than Plaintiffs and other Muslims. A-134 (¶43); compare SPA-39. That allegation rules out the conclusion reached in *Iqbal* that "the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts," 556 U.S. at 682, which was the basis there for rejecting an inference of discriminatory intent. Neutral investigative intent cannot explain the difference between treatment of Muslims and non-Muslims alleged here.

Judge Gleeson may have recognized this difficulty, for he acknowledged "the issue to be a close one" (SPA-39); nevertheless, he continued,

> [B]ut after applying the *Iqbal* pleading standard I conclude that these allegations, viewed together with all the allegations in the Complaint, do not plausibly suggest that the DOJ Defendants purposefully directed the detention of plaintiffs in harsh conditions of confinement due to their race, religion or national origin.

Id.

This abrupt, essentially unexplained conclusion illustrates the difficulty that can arise in interpreting the term "plausible," and the importance of holding strictly to the test that if a factual allegation suggests wrongdoing—even though the suggestion is subject to doubt (as suggestions always are)—then wrongdoing is adequately pleaded. The factual allegation that Muslims and Arabs were treated differently than similarly situated non-Muslims and non-Arabs suggests discrimination, and that is all that is required by Federal Rule 8, as interpreted in *Twombly* and *Iqbal*. If a judge cannot articulate a failure of inference, as the Supreme Court did in *Iqbal,* but Judge Gleeson did not here, then the inference is adequate to sustain the complaint.[7]

While Judge Gleeson plainly wrestled with this issue, whether a complaint is adequate cannot be left to depend on the subjective impressions of the judge to whom the action is assigned, however experienced and conscientious. As the Supreme Court declared in

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[7] Judge Gleeson's acknowledgement that "the issue [is] a close one" is suggestive. That the issue is close surely implies that deciding it *either way* is *plausible*; why then was the claim dismissed? To be sure, what Judge Gleeson called "close" was *whether or not* this claim is plausible; but his conclusion sounds very much like saying, it is *plausible* that the claim is plausible, but it's not *actually* plausible. This attempts too fine a distinction. The claim should have been sustained.

Twombly, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." 550 U.S. at 556 (internal quotation marks and citation omitted).

A fuller examination of the Complaint confirms this. First, Plaintiffs allege that Ashcroft "ordered the targeting of Muslims and Arabs based on his discriminatory belief that individuals with those characteristics who are unlawfully present in the United States are likely to be dangerous, or terrorists, or have information about terrorism." A-127 (¶21); *see also* A-133 (¶39) (immediately after September 11, Ashcroft created and implemented a policy of rounding up and detaining Arab and South Asian Muslims to question about terrorism; under Ashcroft's orders, the round-up and detentions were undertaken without a written policy, to avoid creating a paper trail).

Instead of a neutral policy with a disparate impact, Plaintiffs allege:

> While every tip was to be investigated, Ashcroft told Mueller to vigorously question any male between 18 and 40 from a Middle Eastern country whom the FBI learned about, and to tell the INS to round up every immigration violator who fit that profile. FBI field offices were thus

> encouraged to focus their attention on Muslims of Arab or South Asian descent. Both men were aware that this would result in the arrest of many individuals about whom they had no information to connect to terrorism. Mueller expressed reservations about this result, but nevertheless knowingly joined Ashcroft in creating and implementing a policy that targeted innocent Muslims and Arabs.

A-133 (¶41); *see also* A-136 (¶¶48–51). Ashcroft ordered that the individuals identified in this manner be detained, treated as "of interest" to the terrorism investigation, and held in restrictive confinement, despite the absence of any information tying them to terrorism. A-135–36, 139–41, 143 (¶¶47, 60, 67). DOJ Defendants received detailed daily reports of arrests and detentions of Plaintiffs and other members of the class, and they were aware that there was no basis other than religion, race and ethnicity for treating them as they were treated. A-135–36, 142 (¶¶47, 63, 64).

Purposeful discrimination is also suggested by Ashcroft's own statements displaying animus towards Muslims—for instance, characterizing Christianity by its central theological belief that Jesus is divine, but Islam by the views of extremists who uphold suicide attacks. A-139–40 (¶60d). Other bases for inferring discrimination include DOJ

policies targeting Muslims, South Asians and Arabs, A-140–41 (¶60f) (collecting official DOJ policies targeting this group, and reporting evidence that Ashcroft ordered the INS and FBI to investigate individuals with Muslim-sounding names from vast sources of data, including the telephone book), information about the discriminatory way in which the policy was actually implemented, A-133–36 (¶¶42–47), and the impact of Ashcroft's policy on treatment of similarly situated detainees from other backgrounds, A-134 (¶43) (alleging that non-Muslims, including five Israelis arrested after 9/11 and held at the MDC, were treated differently than Arab and Muslim detainees, and moved quickly out of the ADMAX SHU).

Moreover, unlike the plaintiff in *Iqbal*, Plaintiffs do not allege that they were placed in restrictive confinement based on a law enforcement officer's determination that they were of "high interest" to the terrorism investigation. *Iqbal,* 556 U.S. at 682. To the contrary, no such determination was made for many detainees held in the ADMAX SHU. A-122, 123 (¶¶1, 4) (alleging that four Plaintiffs were placed in the ADMAX SHU without being classified as "high interest"). Rather, Plaintiffs allege that Ashcroft wanted *all* non-citizens who could be held under

the immigration law, and who fit a religious and ethnic profile, to be placed in restrictive confinement, and encouraged "in any way possible" to cooperate. A-127, 133, 135–36, 137, 140, 141–42 (¶¶21, 41, 47, 53, 60e, 61). That some, like plaintiffs Turkmen and Sachdeva, ended up in less restrictive confinement at Passaic County Jail was based only on lack of bed space at secure facilities like MDC. A-142–43 (¶66).

Under Ashcroft, Mueller played an important role in creating and implementing the discriminatory policy. He broke with prior FBI practice after 9/11 by ordering that every tip that came into the FBI's hotline be investigated, however implausible, and even if based solely on race and religion. A-133 (¶40). High level officials in the DOJ and the FBI expressed their disagreement with this policy change, fearing that it would result in detention of non-citizens based only on ethnicity. A-135 (¶¶45, 46). Mueller ignored this advice, since detention based on ethnicity was precisely what his and Ashcroft's policy required, A-133–35 (¶¶42–44), and produced, as the tips which led to Plaintiffs' detention illustrate: *see* A-165–66 (¶143) (Abbasi, tip that a "male, possibly Arab" left a false social security card bearing Abbasi's address at the DMV); A-169–70 (¶158) (Mehmood, the same tip); A-180 (¶195)

(Khalifa, tip that several Arabs at his address were renting a post-office box and possibly sending out large quantities of money); A-188–89 (¶230) (Bajracharya, tip that an "Arab male" was videotaping outside a Queens office building that contained offices of the FBI and the Queens District Attorney); A-194 (¶251) (Turkmen, tip from his landlady that she rented her apartment to several Middle Eastern men, and she "would feel awful if her tenants were involved in terrorism and she didn't call"); A-199 (¶270) (Sachveda, tip that that two gas station employees of "Arab descent" were speaking in Arabic and English and mentioned flying and flight simulators). Similar examples of implausible tips reflecting only racial or religious animus are described in the April OIG Report at 16–17. A-245–46.

Ziglar's discriminatory intent is also plausibly pleaded. Like the others, he was part of the small group that mapped out Plaintiffs' conditions of confinement, A-128, 142 (¶¶23, 62), despite receiving daily reports indicating a lack of evidence connecting these individuals to terrorism. A-135–36 (¶47). That he voiced some concerns about this process only corroborates his knowing violation of the law. A-137–38 (¶55). Finally, Ziglar's discriminatory intent is also suggested by his

discriminatory application of the immigration law. A-139–41 (¶¶58–60).

These factual allegations support the inference that DOJ Defendants' instructions to hold Plaintiffs under harsh conditions were based on religious and ethnic prejudice. Those Defendants' motions to dismiss Plaintiffs' Equal Protection claim should have been denied. For the same reason, the District Court should not have dismissed Claim Seven, alleging a conspiracy to deprive Plaintiffs of the equal protection of the laws. *See* SPA-61, holding that Claim Seven is adequately pleaded against MDC Defendants through the allegations supporting the other claims, and Section III.E, below.

II. THE DISTRICT COURT CORRECTLY HELD THAT A *BIVENS* REMEDY IS AVAILABLE FOR VIOLATIONS OF PLAINTIFFS' RIGHTS UNDER THE SUBSTANTIVE DUE PROCESS CLAUSE, THE EQUAL PROTECTION CLAUSE, AND THE FREE EXERCISE CLAUSE.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 389 (1971), the Supreme Court held that the Fourth Amendment implicitly authorizes a court to order federal agents to pay damages to a person injured by the agents' violation of that Amendment. The Court noted that "where federally protected rights

have been invaded . . . the courts will be alert to adjust their remedies so as to grant the necessary relief." *Id.* at 392 (quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)). "[T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.* at 397 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

Since *Bivens*, the Supreme Court has made a remedy available for a former congressional employee's Fifth Amendment Equal Protection claim for unlawful gender discrimination, *Davis v. Passman*, 442 U.S. 228 (1979), and for a federal prisoner's Eighth Amendment claim for deliberate indifference to serious medical needs. *Carlson v. Green*, 446 U.S. 14 (1980). Where a *Bivens* remedy is available, the mechanism operates as a federal corollary to 42 U.S.C. § 1983, allowing for the victims of governmental misconduct to seek damages from federal officers in their individual capacities. *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). If a plaintiff seeks to bring a *Bivens* claim in a new context, however, the court must consider whether an alternative remedial scheme is available to that plaintiff, and whether special factors counsel

hesitation in allowing a *Bivens* remedy. *Arar v. Ashcroft,* 585 F.3d 559, 563 (2d Cir. 2009) (en banc).

The District Court correctly held that a *Bivens* remedy is already available for Claims One (Substantive Due Process) and Two (Equal Protection). SPA-26 n.10, 35 n.15, 49–55. For the only claim requiring an extension of *Bivens*—Claim Three (Free Exercise)—the District Court found that such an extension is warranted. SPA-55. The District Court was correct on both of these holdings.

A. Plaintiffs' Substantive Due Process and Equal Protection Claims Do Not Arise in a "New Context."

As the District Court observed, this Circuit recognizes that federal pretrial detainees enjoy a *Bivens* remedy under the Fifth Amendment's substantive Due Process Clause for unlawful treatment and conditions of confinement. SPA-26 n.10; *see also Iqbal v. Hasty*, 490 F.3d at 177–78 (assuming that substantive due process claim existed for pretrial detainees' claims of physical mistreatment and humiliation); *Thomas v. Ashcroft,* 470 F.3d 491, 497 (2d Cir. 2006) (allowing pretrial detainee to proceed with substantive due process *Bivens* claims against prison

officials).[8] This is unsurprising given the Supreme Court's holding in *Carlson v. Green*, 446 U.S. 14 (1980), recognizing an Eighth Amendment *Bivens* claim for federal officials' deliberate indifference to a prisoner's medical needs.

Defendants do not dispute this doctrine. Instead, they claim that several narrow factual variations presented in this case place Plaintiffs' claims in a "new context," which should trigger "a strong presumption" against application of the *Bivens* remedy. *See* Opening Brief for Defendant-Appellant-Cross-Appellee James Sherman ("Sherman Br.") 26–27. Specifically, Defendants state that Plaintiffs' status as "detained foreign nationals illegally present on U.S. soil" constitutes a "new context," depriving them of a *Bivens* remedy.

Some factual variations are relevant to the *Bivens* inquiry. For example, "the nature of the defendant" can present a material factual difference, requiring consideration of whether to recognize a *Bivens*

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[8] The Second Circuit also allows *Bivens* claims under the Fifth Amendment for deprivations of property in violation of the Due Process Clause. *See, e.g.*, *Hallock v. Bonner*, 343 F. App'x 633, 635 (2d Cir. 2009); *Polanco v. U.S. Drug Enforcement Admin.*, 158 F.3d 647, 650 (2d Cir. 1998); *Roseboro v. Gillespie*, 791 F. Supp. 2d 353, 380 (S.D.N.Y. 2011); *Nwaokocha v. Sadowski*, 369 F. Supp. 2d 362, 370 (E.D.N.Y. 2005).

remedy. *Minneci v. Pollard*, 132 S. Ct. 617, 623–34 (2012). Thus, the Supreme Court has declined to extend prisoners' Eighth Amendment *Bivens* claims to private corporate defendants, as plaintiffs in such cases have access to state tort remedies. *Id.* at 623–24. Plaintiffs here have no alternative remedies. Similarly, the Court declined to permit a *Bivens* remedy against a federal *agency* or a corporate entity because "the purpose of *Bivens* is to deter *the officer*" from infringing individuals' constitutional rights. *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 485 (1994); *see also Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001). Here Plaintiffs advance the core purpose of *Bivens*—deterring individual misconduct by federal officials.

Another meaningful factual difference was presented in *Arar*, where this Court determined that claims of "extraordinary rendition"—*i.e.*, "the complicity or cooperation of the United States government officials in the delivery of a non-citizen to a foreign country for torture," *Arar*, 585 F.3d at 572—presented a new context. However, both the majority and the dissent in *Arar* agreed that outside the context of extraordinary rendition, a domestic mistreatment claim would not present a new context under *Bivens*, even for a non-citizen detainee.

Compare 585 F.3d at 597 (Sack, J., dissenting) ("Incarceration in the United States without cause, [and] mistreatment while so incarcerated, . . . considered as possible violations of a plaintiff's procedural and substantive due process rights, are hardly novel claims, nor do they present us with a 'new context' in any legally significant sense"), *with* 585 F.3d at 580 (Jacobs, J.) (noting that *Bivens* provides a cause of action where "[t]he guard who beat a prisoner should not have beaten him; the agent who searched without a warrant should have gotten one; *and the immigration officer who subjected an alien to multiple strip searches* without cause should have left the alien in his clothes") (emphasis added). [9]

Not all factual variation raises legal issues. Thus, as this Court explained in *Arar*, while "every case has points of distinction," the term "context" has significance only as it reflects "a potentially recurring

[9] Defendant Sherman takes Judge Gleeson to task for citing to the dissent in *Arar*, *see* Sherman Br. 45 n.8, but this criticism ignores that the *Arar* majority did not consider the availability of a *Bivens* action for Mr. Arar's domestic abuse and mistreatment claims; instead, those claims were dismissed for failure to allege defendants' personal involvement. 585 F.3d at 569. There is thus no indication that the majority and dissent in *Arar* would disagree as to the existence of a *Bivens* remedy here.

scenario that has similar legal and factual components." 585 F.3d at 572. If it were otherwise, courts would re-examine standard Fourth Amendment *Bivens* claims on a case-by-case basis rather than assuming, as courts routinely do, and as all the parties have done here,[10] that a simple factual distinction is not enough to defeat a meritorious *Bivens* claim. *Compare Bivens*, 403 U.S. at 388 (*Bivens* claim for violation for warrantless search by FBI officials) *with Groh v. Ramirez*, 540 U.S. 551 (2004) (*Bivens* claim despite good faith reliance on defective warrant); and *compare Carlson v. Green*, 446 U.S. 14 (1980) (*Bivens* claim by prisoner for Eighth Amendment violations) *with McCarthy v. Madigan*, 503 U.S. 140 (1992) (*Bivens* Eighth Amendment claim by prisoner who failed to exhaust administrative remedies).

As the analysis in *Arar* makes plain, a plaintiff's status as a foreign national does not deprive him of a *Bivens* remedy. 585 F.3d at 580, 597; *see also Sanusi v. INS*, 100 F. App'x 49, 51 n.2 (2d Cir. 2004) (permitting repleading of a conditions of confinement claim and observing that the only open question was availability of *Bivens* remedy

[10] No party has challenged the availability of a *Bivens* remedy for Plaintiffs' Fourth Amendment claim based on unreasonable strip searches.

against a private defendant; the court did not express any concern regarding the plaintiffs' immigrant status); *Martinez–Aguero v. Gonzalez,* 459 F.3d 618 (5th Cir. 2006) (allowing Mexican national's *Bivens* claim against border patrol agents for wrongful arrest and use of excessive force); *Guardado v. United States*, 744 F. Supp. 2d 482, 489 (E.D. Va. 2010) (holding Fourth and Fifth Amendment Due Process claims by non-citizen in immigration proceedings do not present new *Bivens* context).

Defendants do not explain how a non-citizen detainee who is abused by federal officials in custody presents a "fundamentally different" context, *Malesko*, 534 U.S. at 70–71, than a convicted criminal abused by federal officials. Certainly there is no inherent logic to this position. Since immigrant detainees are routinely held in federal detention centers, Defendants' position would mean that a prison guard who beats two detainees would face *Bivens* liability toward his citizen-detainee victim, but could avoid liability from suit brought by an equally injured immigrant-detainee victim.

MDC Defendants rely almost exclusively on the Ninth Circuit's opinion in *Mirmehdi v. United States*, 662 F.3d 1073 (9th Cir. 2011),

cert. denied, 133 S. Ct. 2336 (2013). But in *Mirmehdi* the Court denied a *Bivens* remedy for "wrongful detention" during deportation proceedings—not for conditions of confinement. *Id.* at 1079–80. Reading *Mirmehdi* for the proposition that no "illegal immigrant" has a right to invoke *Bivens* would contradict the Ninth Circuit's explicit statement to the contrary, *id.* at 1079 n.3, and prior precedent. *See Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) (*Bivens* available for alleged due process violations during immigration detention).

Surprisingly, Defendants also rely on Plaintiffs' non-citizen status to dispute the availability of a *Bivens* remedy for Plaintiffs' Equal Protection claim. Sherman Br. 45–46. Defendants' attempt to deprive Plaintiffs of a *Bivens* remedy because of their status as non-citizens underscores the importance of the non-discrimination protections of the Equal Protection Clause. Moreover, "the availability of a *Bivens* remedy for violations of the Equal Protection Clause has been conclusively established," SPA-35 n.15, citing *Davis v. Passman*, 442 U.S. 228 (1979) and there is no basis in law or logic to carve out an exception to the anti-discrimination norm for non-citizens.

B. The District Court Correctly Allowed Plaintiffs a *Bivens* Remedy for Defendants' Violations of Their Free Exercise Rights.

The District Court acknowledged the need to carefully consider application of *Bivens* to Plaintiffs' free exercise claim. *See* SPA-51. After undertaking this inquiry, Judge Gleeson held that *Bivens* should be so extended. *Id.* at 51–55. This Court should affirm that holding.

Plaintiffs retained a clearly established right under the First Amendment to the free exercise of religion during their incarceration. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987). Although this Court has never squarely addressed the question, at least one court has allowed a *Bivens* claim by incarcerated individuals under the Free Exercise clause, *see Yassin v. Corrections Corp. of America*, No. 11-cv-0421, 2011 U.S. Dist. LEXIS 110393, at *9 (S.D. Cal. Sept. 27, 2011), *abrogated on other grounds* sub silentio *by Minneci v. Pollard*, 132 S. Ct. 617 (2012), and others have implicitly endorsed such claims. *See, e.g.*, *Weinberger v. Grimes*, No. 07-6461, 2009 U.S. App. LEXIS 2693 (6th Cir. 2009) (assuming viability of *Bivens* claim); *Caldwell v. Miller*, 790 F.2d 589 (7th Cir. 1986) (reversing summary judgment and

reinstating *Bivens* free exercise claim for further factual development).[11]

In assessing whether to extend *Bivens* to a new context, the court must ask (1) whether there is an "alternative, existing process for protecting the interest" and (2) whether "special factors counsel[] hesitation." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

The District Court correctly observed that "there is no scheme—statutory or regulatory, comprehensive or otherwise—for a person detained in a federal facility to seek *any* remedy from an officer for intentionally and maliciously interfering with his right to practice his religion." SPA-52 (emphasis in the original). MDC Defendants disagree, directing the Court's attention to the Religious Freedom Restoration Act ("RFRA") and Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which prohibit state and federal facilities from

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[11] In addition, several courts allow *Bivens* claims for violations of free speech rights under the First Amendment. *Dellums v. Powell*, 566 F.2d 167, 194–96 (D.C. Cir. 1977); *Bloem v. Unknown Dep't of the Interior Emps.*, 920 F. Supp. 2d 154 (D.D.C. 2013); *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 14 F.3d 457, 464 (9th Cir. 1994); *Panagacos v. Towery*, 501 F. App'x 620, 623 (9th Cir. 2012); *Paton v. La Prade*, 524 F.2d 862, 870 (3d Cir. 1975). *See also Hartman v. Moore*, 547 U.S. 250, 256 (2006) (holding that federal officials who retaliate against individuals exercising First Amendment rights are subject to *Bivens* claim).

burdening religious exercise without compelling need, *see* 42 U.S.C. §2000bb-1(a) (RFRA), 42 U.S.C. § 2000cc-1(a) (RLUIPA).

RLUIPA only applies to state government defendants, and thus provides no remedy for malicious interference with religious practice by federal officers. 42 U.S.C. § 2000cc-5(4)(A)(i). And Judge Gleeson held in *Turkmen I*'s companion case that RFRA was also not available to the 9/11 detainees, because it was not clearly established in 2001 that it applied to federal officials. *Elmaghraby v. Ashcroft,* 04-cv-1809, 2005 U.S. Dist. LEXIS 21434, at *103 (E.D.N.Y. Sep. 27, 2005), *aff'd in part and rev'd in part by Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007). An alternative remedial scheme which was not available to Plaintiffs cannot justify withholding a *Bivens* remedy. *Cf. Arar,* 585 F.3d at 573 (questioning whether the INA could count as an alternative remedial scheme given that it was not available to Mr. Arar due to defendants' interference with his access to court).[12]

[12] Moreover, there is an emerging consensus that RLUIPA's remedial scheme does not permit damages against state government officials, *see Stewart v. Beach*, 701 F.3d 1322, 1334 (10th Cir. 2012) (collecting cases); *Pilgrim v. Artus*, No. 9:07-cv-1001, 2010 WL 3724883, at *15 (N.D.N.Y. Mar. 18, 2010) (observing that "district courts in this Circuit have held that monetary damages are not available under RLUIPA against state defendants in either their official or individual

In an argument that largely replicates their assertion that Plaintiffs' claims present a "new context," MDC Defendants also suggest that Plaintiffs' status as non-citizens detained in the aftermath of 9/11 presents special factors counseling hesitation. Sherman Br. 28–29. There is no legal or logical support for this position. It is true that the political branches have plenary authority over immigration. *See* Sherman Br. 32 (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893)). But Plaintiffs do not challenge any immigration policy choices undertaken by Congress or the Executive. Courts have repeatedly permitted *Bivens* suits to proceed in areas where Congress exercised plenary control over questions not addressed by the subject of the suit. *See Goldstein v. Moatz*, 364 F.3d 205, 215 (4th Cir. 2004) (Patent & Trademark Office officials not immune from *Bivens* suit

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capacities"). Because RFRA contains an identical remedial provision, compare 42 U.S.C. § 2000cc-2(a) (RLUIPA) ("relief against a government") with 42 U.S.C. § 2000bb-1(c) (RFRA) (same), a damages remedy against federal officials is also likely not available. The unavailability of RFRA damages, however, cannot be taken to suggest that Congress intended deprivation of such remedy, as RFRA was undisputedly passed to *expand*, not contract, the options available to those whose religious rights have been burdened. *See* 42 U.S.C. § 2000bb(b) (congressional purpose to offer religious protections more expansive than directly available under the Constitution).

despite Congress' long established plenary power over patents); *Mace v. Skinner*, 34 F.3d 854 (9th Cir. 1994) (*Bivens* claims against Federal Aviation Office officials). Nor can Defendants explain how federal officials' brutal treatment of Plaintiffs and interference with their religious practices implicates foreign policy or "intrude[s] upon the authority of the Executive in military and national security affairs." Sherman Br. 29–30 (quoting *Lebron v. Rumsfeld*, 670 F.3d 540, 549 (4th Cir. 2012), *cert. denied,* 132 S. Ct. 2751 (2012)). This case is utterly unlike *Arar*, upon which Defendants rely, where this Court found that accepting a challenge to extraordinary rendition "would enmesh courts ineluctably in an assessment of the validity and rationale of that policy" and would require inquiry into "the threats to which [the policy] responds, the substance and sources of the intelligence used to formulate it, and the propriety of adopting specific responses to particular threats in light of apparent geopolitical circumstances and our relations with foreign countries." *Arar*, 585 F.3d at 575; *see also id.* at 576 (stressing "foreign affairs implications" of the suit).

Defendants' other scattershot arguments fare no better. The fact that these claims occur in a "detention context," Sherman Br. 30 (citing

Turner v. Safley, 482 U.S. 78, 85 (1987)) merely requires application of well-settled law granting discretion to prison officials to run facilities, and cannot be considered a special factor given the Supreme Court's holding in *Carlson v. Green*, 446 U.S. 14 (1980). Defendants' oblique suggestion that the case could require inquiry into "sensitive information" held by the FBI (*see* Sherman Br. 31 n.4) is pure speculation, nowhere akin to the conceded levels of sensitive information at play in *Arar*. Moreover, this argument is belied by a review of the docket in this case. The parties have already engaged in significant discovery, raising only one issue related to national security concerns, which Judge Gleeson resolved without injury to national security. *See* A-86 (Dist. Ct. Dkt. No. 560) (directing Defendants to submit for *ex parte, in camera* review a declaration stating whether Defendants, witnesses, or attorneys had knowledge of the substance of any intercepted communications between Plaintiffs and their attorneys). Indeed, the parties put in place a mechanism for dealing with any concerns over classified information, *see* A-99 (Minute Entry for 9/12/2008), and that process was never used, despite production of *Turkmen I* plaintiffs' complete FBI files, and the deposition of the heads

of the New York office of the FBI and the national security unit of the INS. The course of proceedings thus confirms the Supreme Court's confidence in a district court's ability to handle sensitive information that might arise in litigation. *See Boumediene v. Bush*, 553 U.S. 723, 795–97 (2008).

Likewise, the broad assertion that challenges to the legality of prison conditions and religious discrimination at MDC implicate national security in light of the events of September 11, 2001, *see* Sherman Br. 29-30, is left unexplained. *See* SPA-54 ("[T]he defendants have not even attempted to explain why the availability of a damages remedy if the plaintiffs prove their claim would adversely impact our national security even in the slightest."). To accept such a broad and undifferentiated assertion would undermine the fundamental principle of our constitutional democracy implicit in the *Bivens* remedy. *See Butz v. Economou*, 438 U.S. 478, 506 (1978) ("No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from highest to the lowest, are creatures of the law, and are bound to obey it.") (internal quotation marks and citation omitted). The District Court

was thus correct to recognize that judicial review of executive misconduct not only strengthens our constitutional system of separation of powers, it strengthens our legitimacy among other nation states as a country that respects the rule of law and human rights. SPA-54.[13]

[13] U.S. treaty law and customary international law mandate judicial remedies for violations of individual rights. For example, Articles 2(3)(a) and 9(5) of the International Covenant on Civil and Political Rights ("ICCPR")—an instrument that prohibits religious discrimination and "cruel, inhuman and degrading treatment"—counsels extreme caution when a court is asked to deprive victims of human rights violations of an opportunity to present their claims. The Human Rights Committee, the supervisory mechanism of the ICCPR, has explained that "Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged." Human Rights Committee, General Comment No.31, ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004). Likewise, Article 8 of the Universal Declaration of Human Rights states that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." G.A. Res. No 217A, art. 5, UN GAOR, 3rd. Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948). The obligation to provide a remedy for a treaty violation is non-derogable, even in times of national emergency. *See* Human Rights Committee, General Comment No. 29, ¶ 14, U.N. Doc. CPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

III. THE DISTRICT COURT CORRECTLY HELD THAT CLAIMS ONE, TWO, THREE, SIX AND SEVEN ARE PROPERLY STATED AGAINST MDC DEFENDANTS.

MDC Defendants base their claim to qualified immunity on the propositions that Plaintiffs' claims are not plausible, that Defendants cannot be liable for failing to stop their subordinates' abuse of Plaintiffs, and that the abuse alleged by Plaintiffs did not violate clearly established constitutional rights. These arguments are no defense to Plaintiffs' Claims One, Two, Three, Six and Seven.

A. The District Court Properly Refused to Dismiss Claim One: Punitive Conditions of Confinement and Abuse Under the Substantive Due Process Clause.

As laid out in the Statement of Facts, MDC Plaintiffs were held under the most restrictive conditions in the federal prison system. The District Court divided Plaintiffs' challenges to conditions into two categories: (1) abuse instituted as part of official policy at MDC; and (2) abuse by subordinates that was tolerated and condoned by MDC Defendants. He correctly concluded that each category properly stated a claim for a violation of Plaintiffs' clearly established constitutional rights.

1. Official Policy Abuse at MDC

First, the District Court considered MDC conditions implemented pursuant to "official policy." This included regular handcuffing and shackling, deprivation of hygienic supplies, repetitive and unnecessary strip searches, and constructive denial of exercise. SPA-32. Placement in the ADMAX SHU also falls within this category. A-143–45, 154 (¶¶68–74, 103). The District Court held that Plaintiffs adequately pled MDC Defendants (1) created these conditions (2) with the intent to punish. SPA-33. The nature of the conditions, and each Defendant's role in promulgating or approving them, demonstrated the existence of a policy designed to punish:

> The plaintiffs allege that Hasty ordered the creation of the ADMAX SHU and ordered two of his subordinates, Lopresti and Cuciti, to design extremely restrictive conditions of confinement for those assigned to it; that Cuciti and Lopresti created the written policy setting forth the official conditions; that Hasty and Sherman then approved and implemented that written policy; and that, when Zenk replaced Hasty, he approved and implemented the conditions created under Hasty's watch. These allegations establish that each defendant was a cause of the official conditions, and the conditions themselves permit an inference of punitive intent with respect to every defendant because every defendant had a

> hand in creating or implementing them. *See Wolfish*, 441 U.S. at 538–39.

SPA-33; *see also,* A-128–130, 146, 162–63 (¶¶24–28, 75–76, 130).

To avoid the District Court's conclusion, Defendant Hasty, who was the warden at MDC throughout most of Plaintiffs' detention, seeks refuge in the OIG Reports, which Plaintiffs have incorporated by reference. But these reports neither contradict Plaintiffs' allegations, nor exonerate Hasty.

For example, Hasty relies on statements in the April OIG Report that "the BOP" made the decision to detain Plaintiffs in the ADMAX SHU at MDC and "combined a series of existing policies and procedures that applied to inmates in other contexts to create highly restrictive conditions of confinement." Hasty Br. 25, 26, citing A-248, 420. But assigning responsibility to "the BOP" does not exculpate Defendants who were part of the BOP, and it does not contradict Plaintiffs' allegations that Hasty, in turn, ordered his subordinates to place Plaintiffs in the ADMAX SHU and to design restrictive conditions for his approval. A-143, 146 (¶¶68, 75). Indeed, other OIG findings, not cited by Hasty, support the role Plaintiffs have alleged. *See e.g.*, A-348 ("[*t*]*he MDC* quickly created an ADMAX SHU" which became operative

when "*MDC Management* distributed operating procedures to staff") (emphasis added).[14]

Defendant Sherman, an associate warden at MDC during the relevant period, takes a similar tack, arguing that he cannot be held responsible for the punitive conditions of confinement that he approved and implemented, because Plaintiffs have not alleged that he "had any role in classifying them as 'of interest' or 'of high interest' or determining the conditions of confinement based on those classifications." Sherman Br. 49. This misses the point, for Plaintiffs allege that their placement in the ADMAX SHU was not based on the FBI's interest/high-interest classification. A-123 (¶4). Moreover, if Defendant Sherman means to argue that Plaintiffs' conditions were

[14] If the OIG Reports and the Complaint do conflict, the Complaint governs; the Fourth Amended Complaint incorporates the OIG Reports "except when contradicted by the allegations of this Fourth Amended Complaint." A-123, 124 (¶3 n.1, ¶5 n.2). The District Court correctly rejected Defendants' view that Plaintiffs must accept either all of the OIG Reports' conclusions or none of them, a position which has no support in logic or the cases Defendants cite. SPA-35 n.14. These are investigative reports, together 245 pages long, the product of "interviews, fieldwork and analysis" conducted over one year. A-234. It would be surprising if the reports contained no mistake, and, like anyone else who has looked into the matter and made independent judgments, Plaintiffs are entitled to disagree with either OIG Report when they believe it is mistaken. None of the cases Defendants cite involves a document of this kind.

justified by the FBI's interest designation, such a contention depends on factual issues that cannot be decided on a motion to dismiss. *Iqbal v. Hasty*, 490 F.3d at 174.

Defendant Zenk, who replaced Hasty as MDC warden in April of 2002, disavows responsibility for all the official abuse, claiming that Plaintiffs' allegations "affirmatively assert that the conditions . . . had been remedied prior to Zenk's arrival at the MDC on April 22, 2002." Brief for Defendant-Appellant Michael Zenk ("Zenk Br.") 18. This assertion misreads Plaintiffs' allegations. For example, Zenk relies on ¶147 ("In early October, MDC staff began video-recording [Abbasi's] transports, and the physical abuse lessened then to some degree.") But all that can be fairly inferred from this allegation is that some *physical abuse* lessened (but did not cease) before Zenk arrived at MDC, and in any event, Plaintiffs do not seek to hold Zenk accountable for this type of unofficial abuse during transports. *See* SPA-32 n.12. Plaintiffs nowhere suggest that the official transport policy of handcuffing, shackling, and subjecting Plaintiffs to a four-man hold changed under Zenk's leadership. *See* A-146 (¶76).

Similarly, although Plaintiffs have included detail about *de facto* denial of recreation during the winter, *see* Zenk Br. 18, citing A-160–61 (¶¶122–23), their allegations are not limited to winter; A-160 (¶122) states that "recreation" cages were open to snow and freezing cold in winter, but also to rain, and sometimes cold, in all seasons. Likewise for sleep deprivation (*see* Zenk Br. 19); while MDC's policy of constant illumination in the 9/11 detainees' cells ended in March of 2002, the Complaint nowhere suggests the noisy bar taps throughout the night ever ceased during the operation of the ADMAX SHU. A-159–160 (¶¶119–121).

Plaintiffs allege that Zenk knew of these policies because he made rounds on the ADMAX SHU, and he allowed the policies to continue. A-129, 146 (¶¶25, 76). Contrary to Zenk's argument, these are factual allegations, and must be taken as true. *Gaston v. Coughlin*, 249 F.3d 156, 166 (2d Cir. 2001) (statement that defendant prison guards had actual knowledge of harsh conditions "not consider[ed] conclusory because it was premised on the assertion that those men 'made daily rounds' of SHU") (citation omitted).

2. Unofficial Abuse at MDC

Second, the District Court considered Plaintiffs' allegations of "unofficial abuse," encouraged or condoned by MDC Defendants. SPA-33. This routine and pervasive abuse included slamming detainees against the walls, pushing their faces into a t-shirt with the slogan "These Colors Don't Run" and the American flag, calling them "terrorists," "camel[s]," and other racist or otherwise offensive names; threats of violence; religious insults or cursing; humiliating sexual comments during strip searches, and constant illumination and noise at night. A-155–56, 157, 158–60 (¶¶105, 109–10, 115–16, 119–20), *see also* A-462–510.

For these unofficial conditions, "[n]o one questions that the abuse constituted a grave risk to plaintiffs' reasonable safety, and the Complaint plausibly alleges that all the defendants were deliberately indifferent to—that is, subjectively aware of—that risk and yet did nothing to mitigate it." SPA-33; *see* A-128–30 (¶¶24–28).

The District Court correctly found that these allegations raise a reasonable inference that MDC Defendants intended to cause Plaintiffs' injuries. SPA-34; *see also* A-147 (¶77) (Hasty purposefully avoided the

ADMAX unit and isolated the detainees from any avenue of complaint or assistance, and all MDC Defendants allowed Plaintiffs to be beaten and abused as a means of punishing, harassing, and "breaking" them), and A-147 (¶78) (when a few MDC staff brought allegations of abuse to Hasty and other manager's attention they were called snitches, threatened, and harassed; one MDC employee estimated that half the facility gave him the silent treatment after he wrote a "confidential" memo about this abuse).

MDC Defendants' primary response to Plaintiffs' allegations of mistreatment is to assert that, under *Iqbal*, civil rights plaintiffs may recover only from those individuals whose "active conduct" intentionally caused their harm. *See* Hasty Br. 30–32, Sherman Br. 51, Zenk Br. 28 n.17. Defendants are incorrect. In *Iqbal*, all parties and the Court agreed that "Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." 556 U.S. at 676. Nevertheless, a federal official remains liable for "'his own neglect in not properly superintending the discharge' of his subordinates' duties." *Id.* (quoting *Dunlop v. Munroe*, 11 U.S. (7 Cranch) 242, 269 (1812)). Having thus affirmed that

supervisors can be liable for "not properly superintending . . . subordinates," the Supreme Court went on to explain that, since a claim of "invidious discrimination" requires "that the plaintiff must plead and prove that the defendant acted with discriminatory purpose," a plaintiff must allege that the defendant himself maintained a discriminatory purpose, rather than attributing a subordinates' discriminatory purpose to the supervisor. 556 U.S. at 676.

In analyzing *Iqbal*, Judge Gleeson differentiated between direct and supervisory liability. SPA-20. An individual is *directly liable* for a constitutional tort when he satisfies each element of that tort; thus, any defendant, whether a supervisor or a subordinate, is liable for an Eighth Amendment violation if his "(1) deliberately indifferent failure to act in the face of a known risk to an inmate's safety (mens rea); (2) causes injury to that inmate (causation)." *Id.* Under Judge Gleeson's analysis, supervisory liability, in contrast, allows for relaxation of the tort's mens rea requirement; a supervisor can be held liable based on "personal involvement" in a subordinate's tort, as defined (prior to *Iqbal*) by the five kinds of personal involvement specified in *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995). SPA-20–21.

Judge Gleeson concluded that *Iqbal* did away with supervisory liability as he defined it, but that Plaintiffs' complaint adequately pleads the direct liability of MDC Defendants. SPA-20–25. MDC Defendants disagree, arguing that, under *Iqbal*, a prison official can no longer be held liable "where he or she knew of an alleged wrong committed by someone else but did not intervene to stop it." Hasty Br. 31. The implication is startling; Hasty's position is that he, as warden, can walk down prison halls, see correctional staff under his command assaulting an inmate, and innocently walk away, doing nothing. That is not the law in this Circuit. *See Vincent v. Yelich*, 718 F.3d 157, 173 (2d Cir. 2013) (holding a "supervisory official may be liable in an action brought under § 1983 if he 'exhibited deliberate indifference to the rights of inmates *by failing to act on information indicating that unconstitutional acts were occurring*'") (internal quotation marks and citation omitted).

This Court need not decide whether Judge Gleeson was correct to believe that *Iqbal* did away with the concept of "supervisory liability"

altogether, thus rendering the *Colon* analysis irrelevant.[15] The Complaint here pleads MDC Defendants' direct liability, as Judge Gleeson used that term; and as he held, "nonfeasance—just like malfeasance—*can* be a basis for liability, and nothing in *Iqbal* changed this rule." SPA-22 (emphasis in original) (citing *D'Olimpio v. Crisafi*, 718 F. Supp. 2d 340, 347 (S.D.N.Y. 2010), *aff'd*, 462 F. App'x 79 (2d Cir. 2012). Other Circuits have come to a similar conclusion (while retaining the label "supervisory liability"), and agree with the District Court that supervisors may be liable in circumstances that do not amount to direct participation in subordinates' misconduct or direct contact with the plaintiff. *See Sanchez v. Pereira-Castillo*, 590 F.3d 31, 48–51 (1st Cir. 2009); *Wright v. Leis*, 335 F. App'x 552, 555 (6th Cir. 2009) (per curiam); *Langford v. Norris*, 614 F.3d 445, 459–60, 463–64 (8th Cir. 2010); *Starr v. Baca*, 652 F.3d 1202 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2101 (2012); *Dodds v. Richardson*, 614 F.3d 1185,

[15] Other district judges have used a different analysis, but come to similar conclusions. *See, for example, Qasem v. Toro*, 737 F. Supp. 2d 147, 152 (S.D.N.Y. 2010) ("the five *Colon* categories supporting personal liability of supervisors still apply as long as they are consistent with the requirements applicable to the particular constitutional provision alleged to have been violated"); *see also Tolliver v. Skinner*, No. 12 Civ. 971, 2013 U.S. Dist. LEXIS 28730, at *64 (S.D.N.Y. Feb. 11, 2013), and cases there cited.

1199–2201 (10th Cir. 2010); *Doe v. Sch. Bd. of Broward Cnty., Fla.*, 604 F.3d 1248, 1266–67 (11th Cir. 2010).

The stray contrary authority cited by Hasty, *Bellamy v. Mount Vernon Hospital,* 07 Civ. 1801, 2009 U.S. Dist. LEXIS 54141 (S.D.N.Y. June 26, 2009), *aff'd*, 387 F. App'x 55 (2d Cir. 2010) and *Brown v. Rhode Island*, 511 F. App'x 4 (1st Cir. 2013), cannot be squared with *Iqbal's* recognition of liability for "not properly superintending . . . subordinates," 556 U.S. at 676 (internal quotation marks and citation omitted), or with decades of Supreme Court precedent untouched by *Iqbal*. *See e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 828 (1994) (supervisor can be held liable for deliberate indifference to the risk that one prisoner will attack another); *Wilson v. Seiter*, 501 U.S. 294, 304–305 (1991) (supervisor can be held liable for deliberate indifference to prison conditions depriving inmates of a fundamental human need).

Sherman cites *Vance v. Rumsfeld,* 701 F.3d 193, 203 (7th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 2796 (2013), for the proposition that "knowledge of a subordinate's misconduct is not enough for liability," rather "[t]he supervisor can be liable only if he wants the unconstitutional or illegal conduct to occur." Sherman Br. 51. But this

principle provides no basis for challenging Plaintiffs' complaint. At this stage, all Plaintiffs need do is plead facts which suggest the requisite wrongful intent. Clearly, when a supervisor knowingly tolerates misconduct that he has the power to halt, the inference that the supervisor wants the misconduct to occur is not difficult. As the court explained in *Vance,* "[d]eliberate indifference to a known risk is a form of intent." 701 F.3d at 204. When a plaintiff shows that a public official knows of a given risk "with sufficient specificity," this "allow[s] an inference that inaction is designed to produce or allow harm." *Id.* Plaintiffs' allegations meet this standard.

Hasty, Zenk, and Sherman also argue that because the Complaint at times refers to the five "MDC Defendants" as a group, instead of listing the five individual names, Plaintiffs have failed to set forth each Defendant's own involvement in the official and unofficial abuse, and rather engaged in "group pleading." Hasty Br. 44–46, Sherman Br. 41, and Zenk Br. 22–23 (describing occasional references to "MDC Defendants" as "group pleading"). The Complaint does not engage in the kind of gross, "group pleading" the law disfavors. The cases Defendants rely upon involve either general allegations unsupported by

allegations of acts by specific individuals, (*Bertuglia v City of New York*, 839 F. Supp. 2d 703, 722 (S.D.N.Y. 2012); *Pearce v. Labella*, 473 F. App'x 16 (2d Cir. 2012)), or involve a district court's failure to distinguish between defendants being sued in their personal and official capacities, (*Community House, Inc. v. City of Boise, Idaho*, 623 F.3d 945 (9th Cir. 2010)), which is not an issue here.

Despite occasional references to the collective identity of the "MDC Defendants," Plaintiffs' Complaint alleges acts by specific individuals and links violations to individual defendants. For example, ¶77 (A-147) alleges that "MDC Defendants" allowed the plaintiffs to be "beaten and harassed by ignoring direct evidence of such abuse." Numerous other paragraphs make specific allegations as to how each individual MDC Defendant ignored the abuse. For example:

> 24. . . . [Hasty] ignor[ed] evidence of this abuse and avoid[ed] other evidence—for example, by neglecting to make rounds on the ADMAX unit as required by BOP policy . . . . Hasty was made aware of the abuse that occurred through inmate complaints, staff complaints hunger strikes, and suicide attempts . . . . (A-128–29)
>
> 25. . . . [Zenk] made rounds on the ADMAX and was aware of conditions there. . . . (A-129)
>
> 26. . . . [Sherman] made rounds on the ADMAX SHU and was aware of conditions there. . . . (*Id.*)

> 107. . . . Despite his awareness of [detainee] . . . complaints and [the OIG] investigations, Hasty failed to investigate the abuse, punish the abusers, train his staff, or implement any process at MDC to review the tapes for abuse. Many of these tapes were destroyed, disappeared, or were taped over, and others were withheld from the OIG for years before they were "found" by MDC staff. (A-156)

3. Abusing and Punishing Detainees Violates Clearly Established Law.

Defendants Hasty and Sherman do not deny that subjecting *some* detainees to punitive conditions and abuse violates clearly established law protecting such individuals from punishment. Instead, they argue that Plaintiffs' right to be free from punishment was not clearly established because Plaintiffs are non-citizens, without lawful status. Sherman Br. 47–48. There is no support for this novel proposition.

To begin, *Iqbal v. Hasty* also involved a non-citizen, present in this country unlawfully, and this Court found his right to be free from "needlessly harsh conditions of confinement" clearly established. 490 F.3d at 159. Moreover, none of the cases Sherman cites offers any support for the discriminatory principle that the law protecting citizens from punishment and abuse does not apply with equal force to non-

citizens. Sherman Br. 47–48. While those cases indicate that citizens may have more procedural rights than non-citizens under certain circumstances, it does not follow that a non-citizen may be abused when a citizen may not. And although the BOP has discretion to consider a prisoner's alienage in "setting [his] conditions of confinement," Sherman Br. 48, citing *Thye v. United States*, 109 F.3d 127, 130 (2d Cir. 1997), this discretion does not extend to needlessly harsh or abusive treatment.

Separately, Zenk argues that even if he played some part in the restrictive conditions, it was not clearly established in 2001 that placement in restrictive conditions for the short time that he was Warden violates Plaintiffs' due process rights. Zenk Br. 37–40. But the Complaint alleges that Plaintiffs Benatta and Hammouda were held in 23 hour-a-day lock down, handcuffed and shackled whenever moved from their cells, denied adequate sleep and recreation, and subjected to unnecessary strip searches for eight and 53 days under Zenk's leadership, respectively. A-146, 155, 157–58, 159–60, 178, 188 (¶¶76, 104, 112, 119–121, 188, 227); SPA-32 n.12. These conditions, especially as applied to individuals who had already been detained in punitive

conditions within the SHU for over six months without any misconduct, are so exaggerated as to "permit an inference of punitive intent." SPA-33, citing *Wolfish*, 441 U.S. at 538–39. And detainees may not be punished, even for "only" eight or 53 days. *Id.*

To the extent Zenk argues that "the temporary nature of the deprivation by itself warrants dismissal . . . without looking into what was deprived, [he is] incorrect." *Townsend v. Clemons*, 12-CV-03434, 2013 U.S. Dist. LEXIS 30212, at *17 (S.D.N.Y. Jan. 30, 2013) *rep. and rec. adopted*, 12 CIV. 03434, 2013 U.S. Dist. LEXIS 30225 (S.D.N.Y. Mar. 4, 2013). Indeed, the Second Circuit has often found that serious abuse may give rise to a constitutional violation even if the abuse only lasts for a few days. *Walker v. Schult*, 717 F.3d 119, 127 (2d Cir. 2013) ("unsanitary conditions lasting for mere days may constitute an Eighth Amendment violation"); *Gaston v. Coughlin*, 249 F.3d 156, 166 (2d Cir. 2001) (finding that conditions may rise to the level of a constitutional violation because they continued for "days on end"); *cf. Myers v. City of New York*, 11 CIV. 8525, 2012 U.S. Dist. LEXIS 123994, at *22–23 (S.D.N.Y. Aug. 29, 2012) (holding that detention in unsanitary conditions for 16 *hours* did not constitute constitutional violation,

observing that other courts have found a constitutional violation when those conditions continue "at least for multiple days"), *aff'd*, 12-4032, 2013 U.S. App. LEXIS 14315 (2d Cir. July 16, 2013).

4. No Reasonable Law Enforcement Officer Could Think It Lawful to Punish or Abuse a Detainee.

Finally, the District Court rejected MDC Defendants' arguments that they should be entitled to qualified immunity because they placed Plaintiffs in restrictive conditions based on the orders of their superiors. Hasty appears to make this argument with respect to all the official abuse Judge Gleeson considered, but this is hard to tell, for he dances around which of his "superiors' orders" now seem "overly harsh." Hasty Br. 35. He never directly addresses, moreover, how a reasonable officer could have thought it lawful to deliberately interrupt sleep, impose prolonged exposure to the cold, or deny access to adequate clothing and toilet paper.

Nor could a reasonable officer think it lawful to ignore BOP regulations, and instead place civil detainees in isolation for months on end without conducting any inquiry into their individualized dangerousness. A-143 (¶68). Defendants argue that they could not reasonably "second guess" the FBI's assessment, but this is not

responsive to two central sets of allegations. First, MDC Defendants themselves independently recognized "after a few months of interacting" with Plaintiffs and other class members, "that they were not terrorists, but merely immigration detainees." A-145 (¶74). Nevertheless, the MDC Defendants "continued the harsh treatment and restrictive conditions." *Id*. Second, Plaintiffs allege that Hasty and Sherman received "regular written updates [that] included summaries of the reason each detainee was arrested, and *all evidence relevant to the danger he might pose to the institution*." A-144 (¶69) (emphasis added). Based on these reports, Defendants knew, for example, that Khalifa was arrested because he was "encountered by the INS" while following an FBI lead and that "the FBI *may* have an interest in him." *Id.* (emphasis added). *See also*, A-144–45 (¶¶70–73) (recounting similar information about Abbasi and Mehmood). That this FBI interest (to the extent it existed) was minimal, was made obvious by the fact that some detainees were never even interviewed by the FBI, and others were interviewed only once or twice, and only in the early months of their detention. *See e.g.*, A-167–68 (¶150) (Abbasi interviewed once by FBI,

in mid-October); A-172, (¶168) (Mehmood never interviewed by FBI); A-181–82 (¶202) (Khalifa interviewed once by FBI, in early October).

That Defendants could have reasonably believed it lawful to hold these civil detainees in the ADMAX SHU for so long is also belied by the document they prepared, falsely claiming that the executive staff at MDC "had classified the 'suspected terrorists' as 'high security' based on an individualized assessment of their 'precipitating offense, past terrorist behavior, and inability to adapt to incarceration,'" when in reality none of the MDC Defendants saw or considered information in any of these categories in deciding to place or keep the 9/11 detainees in the ADMAX SHU. A-145 (¶74).

Finally, even if one accepted MDC Defendants' defense that they were following orders (which one could not fairly do given Plaintiffs allegations of their independent knowledge and action), following facially invalid orders is no excuse for violating clearly established rights. *Compare Diamondstone v. Macaluso*, 148 F.3d 113, 126 (2d Cir.1998) (holding officer was not entitled to qualified immunity for his reliance on the advice of his superiors because that advice was not plausibly valid) *with Varrone v. Bilotte*, 123 F.3d 75, 81 (2d Cir. 1997)

(holding officers who carry out an "apparently valid" order may be entitled to the same qualified immunity to which the source of the order is entitled, where "[t]here is no claim that the order was facially invalid or obviously illegal"). *See also Sorenson v. City of New York*, 42 F. App'x 507, 511 (2d Cir. 2002) (similar). Qualified immunity is also no defense where there is an expressed intent to punish. *Block v. Rutherford*, 468 U.S. 576, 583 (1984). Instead, qualified immunity only protects officials "who act with a good faith belief that their behavior comports with constitutional and statutory directives." *Tellier v. Fields*, 280 F.3d 69, 85–86 (2d Cir. 2000), citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

B. The District Court Properly Refused to Dismiss Claim Two: Violation of Plaintiffs' Right to Equal Protection of the Laws.

The District Court properly found that Plaintiffs' allegations support a plausible inference that Hasty, Zenk and Sherman are liable for the violations of Plaintiffs' rights under the Equal Protection component of the Fifth Amendment. SPA-40–41 (holding that the Complaint contains allegations sufficient to raise a reasonable inference that these defendants "effectuated the harsh confinement policy and held the Detainees in restrictive conditions because of their race,

religion, and/or national origin"). The supporting allegations, in paragraphs 24–28, 68–74, 77, 109–110, 132–34 and 136 of the Fourth Amended Complaint (A-128–30, 143–45, 147, 157, 163–64), are described in Judge Gleeson's opinion. SPA-40–41.

Despite these allegations, Hasty, Sherman and Zenk claim that Plaintiffs have not sufficiently alleged discriminatory intent.[16] But, as the District Court held, the Complaint alleges that the "harsh confinement policy . . . mandated restrictive conditions specifically for Arab and Muslim individuals. In other words, it was discriminatory on its face." SPA-6. Whether Defendants' acts were (as they now claim) partially motivated by instructions from their superiors, and how this related to Defendants' own intentions, are factual questions that cannot be resolved on the pleadings. *See Hayden v. Paterson*, 594 F.3d 150, 163 (2d Cir. 2010) ("[W]hile a plaintiff must prove that there was a discriminatory purpose behind the course of action, a plaintiff need not

[16] Defendants do not dispute that abusive treatment that targets prisoners on the basis of race, religion, or national origin was unlawful under clearly established law. Nor could they. *See Iqbal v. Hasty*, 490 F.3d at 174 ("animus-based discrimination" is conduct "that any 'reasonably competent officer' would understand to have been illegal under prior case law")(citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986) and *Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999)).

prove that the 'challenged action rested solely on racially discriminatory purposes.'") (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 265 (1977)).

Moreover, MDC Defendants did more than carry out a discriminatory policy dictated by their superiors; they also intentionally developed and approved unconstitutional methods to implement discrimination. A-143–47(¶¶68, 69, 74–77). *See*, *e.g.*, *McClary v. Coughlin*, 87 F. Supp. 2d 205, 215 (W.D.N.Y. 2000) ("Personal involvement does not hinge on who has the ultimate authority for constitutionally offensive decisions. Rather, the proper focus is the defendant's direct participation in, and connection to, the constitutional deprivation"), *aff'd* 237 F.3d 185 (2d Cir. 2001).

MDC Defendants claim as an "obvious alternative explanation" for the abusive treatment that they relied on the FBI's "high interest" designation. Sherman Br. 53. But this contradicts Plaintiffs' allegations that they were placed in the ADMAX SHU without an FBI "high interest" classification. *See* A-123 (¶4). Even if it did not, MDC Defendants subjected Plaintiffs to prolonged placement in the ADMAX SHU without individualized assessments of dangerousness, SPA-40, A-

143–45 (¶¶68–74), and contrary to BOP regulations, A-143 (¶68), *even after* learning that there was no information tying them to terrorism, SPA-40, A-144–45 (¶¶69–74), *see also* A-183–84 (¶211) (Khalifa held in ADMAX SHU for one month after FBI clearance). This restrictive treatment continued even into Defendant Zenk's tenure. A-146 (¶76).

Hasty and Sherman's creation of a fraudulent document, *see supra*, Section III.A.4, also supports an inference of discriminatory intent. A-145 (¶74), *cf. Henry v. Daytop Vill., Inc.*, 42 F.3d 89, 96 (2d Cir. 1994) (jury may reasonably infer discriminatory intent where employer lied about reason for discharge); *Aka v. Wash. Hosp. Ctr.,* 156 F.3d 1284, 1293 (D.C. Cir. 1998) ("The jury can conclude that an employer who fabricates a false explanation has something to hide; that 'something' may well be discriminatory intent. . . . Such an inference is of course in line with how evidence of consciousness of guilt is treated in other cases, criminal or civil."); *George v. Leavitt*, 407 F.3d 405, 413 (D.C. Cir. 2005) ("Usually, proffering evidence from which a jury could find that [the employer's] stated reasons . . . were pretextual . . . will be enough to get a plaintiff's claim to a jury.") (internal quotation marks and citations omitted).

Moreover, that Defendants allowed their subordinates to abuse and racially taunt Plaintiffs (or, in Hasty's case, did so himself),[17] also adds heft to the plausibility of Plaintiffs' claims of discriminatory intent. *See* A-155–57 (¶¶104–110). "Because discriminatory intent is rarely susceptible to direct proof, litigants may make 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Hayden*, 594 F.3d at 163 (quoting *Vill. of Arlington Heights*, 429 U.S. at 266).

Hasty asserts that detainees not perceived to be Arab or Muslim were treated in the same way as Plaintiffs. Hasty Br. 42. This is factually incorrect and legally irrelevant. In fact, the Israeli detainees he refers to were treated differently than Plaintiffs, A-134 (¶43), and Plaintiff Bajracharya, although a Buddhist from Nepal, A-189–90 (¶235), was arrested under the discriminatory policy based on an

[17] Hasty valiantly argues that his use of the word "terrorist" in MDC documents describing Plaintiffs does not suggest any discriminatory intent because "it could be applied indiscriminately to a wide swath of individuals, including American Caucasian Christian men." A-147 (¶77); Hasty Br. 43–44. But in fact, the individuals whom Hasty called "terrorists" were Muslim men, of South Asian descent or from Middle Eastern countries, detained precisely because of these characteristics. Besides animus, there is no other explanation for a warden at a federal pretrial facility to label as "terrorists," civil detainees, not even charged with crimes of terrorism.

anonymous tip claiming that he was Arab, A-188–89 (¶230). As the District Court noted, "[o]ther individuals may have been held in such conditions pursuant to other policies or for other reasons. However, the harsh confinement policy expressly applied to Arab and Muslim individuals . . . not because of any suspected links to terrorism, but because of their race, national origin, and/or religion." SPA-6.

C. The District Court Properly Refused to Dismiss Claim Three: Interference with Free Exercise of Religion Under the First Amendment.

The District Court properly found that the Complaint states a claim that MDC Defendants violated Plaintiffs' First Amendment rights to free exercise of religion by "implement[ing] policies (*e.g.*, forbidding the MDC Detainees from keeping any items, including the Koran, in their cells) that burdened the exercise of their religion" and "fail[ing] to stop MDC guards from engaging in abusive conduct unsanctioned by express policy (*e.g.*, verbal and physical abuse) that further burdened the Detainees' religious practices." SPA-56, *see* A-163–64 (¶¶131–39). The Court concluded that "[MDC] defendants' inaction in the face of such outrageous abuse suffices, at this stage, to render plausible plaintiffs' allegations that the MDC defendants intended to suppress

their religious practices and that the MDC defendants' misconduct caused the plaintiffs' injuries." SPA-56. Whether this burden on religion could be justified as serving some important interest "is not obvious on the face of the Complaint and defendants must await discovery to so prove." SPA-56–57.

1. Plaintiffs' Plausibly Allege that MDC Defendants Intentionally Burdened their Free Exercise Rights.

Hasty and Sherman disagree with the District Court's assessment of Plaintiffs' intent allegations, arguing that "the obvious alternative explanation" for the no-possessions-including-a-Koran policy is national security. Sherman Br. 38. Plaintiffs do not find the security concerns posed by Korans obvious. That the general policy was justified by security concerns is possible, rather than obvious, and mere possibility does not render implausible Plaintiffs' allegations of deliberate religious interference, A-163–64 (¶¶131–39), supported as they are by Plaintiffs' Equal Protection claim (Section B above).

Hasty also argues that if he actually intended to suppress religion, no Plaintiff ever would have received a Koran. Hasty Br. 48. This does not follow, and Hasty does not attempt to explain why one Plaintiff

never received a Koran, or why there were delays in providing Korans to the others. A-163 (¶132). Indeed, that Defendants eventually provided Korans to some Plaintiffs undermines Defendants' contention, discussed below, that denying the Koran served a legitimate objective. Defendants "have failed to establish that the accommodation here has more than a *de minimis* effect on valid penological interests." *Benjamin v. Coughlin*, 905 F.2d 571, 577 (2d Cir. 1990). Rather, the unexplained delays in providing Korans to all Plaintiffs, and the continuing refusal to provide a Koran to one Plaintiff, suggests that Defendants knew that denying Korans substantially burdened Plaintiffs' right to religious exercise. Sherman asserts that delay does not state a religious practice claim (Sherman Br. 39); but temporary deprivation of a constitutional right is still a deprivation. *See McEachin v. McGuinnis*, 357 F.3d 197, 201 (2d Cir. 2004) (reversing dismissal of a First Amendment claim based on a seven-day diet that interfered with prisoner's observance of Ramadan).

Zenk argues that all access to Korans had been addressed by the time he arrived at MDC, Zenk Br. 32, but this ignores Plaintiffs' allegation that Benatta (who was at MDC during Zenk's tenure) never

received a Koran. A-163 (¶132). And the allegation that the others received Koran's "months" after requesting them does not foreclose the possibility that Zenk's arrival also pre-dated Hammouda's access to a Koran.

That Defendants allowed religious-based abuse also supports an inference of intent. These abuses included denial of food that met religious requirements, A-163 (¶132), interference with prayer and religious holidays such as Ramadan by refusing to tell Plaintiffs the time or date, A-164 (¶134), along with cursing and other disruptions of Plaintiffs' prayer, A-164 (¶¶134–36). Prison staff also called Plaintiffs derogatory names based on their religion and apparent race. A-147, 157 (¶¶77, 109, 110).

Each of the MDC Defendants knew of these abuses and was "deliberately indifferent to the risk that their subordinates, MDC prison guards, would violate the Detainees' free exercise rights." SPA-56–57, *see also* A-147, 163–64 (¶¶77–78, 131–39). This includes Zenk. *See* A-129, 164 (¶¶25, 137). "[D]efendants' inaction in the face of such outrageous abuse suffices, at this stage, to render plausible plaintiffs' allegation that the MDC defendants intended to suppress their religious

practices and that the MDC defendants' misconduct caused the plaintiffs' injuries." SPA-57.

In contrast to the cases Sherman cites, these allegations do not plead mere negligence, or isolated incidents of mistakenly failing to provide a religious meal. *See Gallagher v. Shelton*, 587 F.3d 1063 (10th Cir. 2009) (finding that isolated, discrete incidents of delayed fulfillment of requests for religious food items did not violate free exercise rights); *Colvin v. Caruso*, 605 F.3d 282 (6th Cir. 2010) (isolated incidents of mistakenly serving non-kosher food did not violate free exercise rights).

Moreover, even if the Court were to hold that the Complaint fails to allege deliberate intent to burden Plaintiffs' religion, a plaintiff may also challenge a burden on religion practice that is not "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). Hasty and Sherman argue that the ban of Korans was part of a broader policy banning all items from the detainees' cells, and "application of a facially neutral policy to the possession of religious material in a prison setting is not unconstitutional." Sherman Br. 36–37. But a prison regulation that "represents an exaggerated response"

to a legitimate concern violates the Constitution. *Turner*, 482 U.S. at 90–91, 97–99. Defendants have not offered any explanation as to why prison security necessitated denying Plaintiffs access to the Koran (or toilet paper or soap), nor could any such explanation entitle them to immunity on a motion to dismiss. *See Iqbal v. Hasty*, 490 F.3d at 173 (potential security concerns "must await factual discovery so that the Government's asserted security interests can be assessed against a factual record of what restrictions actually existed and what purpose they served"). Thus the District Court correctly held that this claim cannot be resolved on the pleadings. SPA-57.

2. MDC Defendants Are Not Entitled to Qualified Immunity.

Defendants also argue that even if their actions imposed unconstitutional burdens on Plaintiffs' free exercise rights, they are entitled to qualified immunity because the law did not clearly establish that such actions were unconstitutional in 2001. Sherman Br. 22, 25, 37, 39–40. But a prisoner's right to personal religious practice and to receive a copy of a religious text was clearly established long before 2001, and Defendants fail to explain how 9/11 suddenly disestablished this right. *See, e.g.*, *Pierce v. J.E. La Vallee*, 293 F.2d 233, 236 (2d Cir.

1961) (allowing state prisoners to purchase a copy of the Koran addressed the "denial to the plaintiffs of their Korans in violation of any constitutional rights"), *see also Iqbal v. Hasty*, 490 F.3d at 160. Reasonable officials would have known that even general restrictions on prisoner property have to accommodate religious texts such as the Koran, Bible, or Torah. *See, e.g.*, *McEachin*, 357 F.3d at 204 ("[T]he First Amendment protects inmates' free exercise rights even when the infringement results from the imposition of legitimate disciplinary measures."); *see also Nagle v. Marron*, 663 F.3d 100, 115–16 (2d Cir. 2011) ("[A]s the Supreme Court has explained, the very action in question need not have been the subject of a holding in order for a right to be clearly established. If the contours of the right [are] sufficiently clear, then officials can still be on notice that their conduct violates established law even in novel factual circumstances.") (internal quotation marks and citations omitted).

Sherman asserts that even if he were personally involved in denying Halal food and harassing Plaintiffs during prayer, such actions did not violate Plaintiffs' clearly established free exercise rights. Sherman Br. at 40–41. But in 2001 it was clearly established that

"'prison officials must provide a prisoner a diet that is consistent with his religious scruples.'" *Jackson v. Mann*, 196 F.3d 316, 320 (2d Cir. 1999) (quoting *Bass v. Coughlin*, 976 F.2d 98, 99 (2d Cir. 1992)), *see also Arroyo Lopez v. Nuttall*, 25 F. Supp. 2d 407, 409–10 (S.D.N.Y. 1998) (clearly established in 1994 that shoving a prisoner and disrupting his prayer violated the First Amendment).

D. The District Court Properly Refused to Dismiss Claim Six: Excessive Strip Searches in Violation of the Fourth Amendment.

As the District Court correctly concluded, Plaintiffs plausibly pled that MDC Defendants caused Plaintiffs to be strip searched, and that the strip searches were not reasonably related to a legitimate penological interest, in violation of Plaintiffs' Fourth Amendment rights. SPA-58. The Complaint contains factual allegations sufficient to raise a reasonable inference that Hasty, Zenk and Sherman "created a policy that, by its terms, mandated searches that were untethered to any legitimate penological purpose[.]" SPA-59. Under this policy, MDC Plaintiffs were strip-searched every time they were removed from or returned to their cells, including both before and after non-contact legal visits, medical visits, court appearances and non-contact visits with

family members. These strip searches occurred even where they had no opportunity to acquire contraband. A-157–58 (¶112). MDC Plaintiffs were also subject to random strip searches despite never leaving their locked cells. A-158 (¶113).

MDC Defendants' argument here, as in the District Court, is simply that they are not adequately connected to the strip searching. But the strip search policy was among the restrictive conditions of confinement designed at Hasty's request and approved and implemented, first by Hasty and Sherman, and later by Zenk. A-146 (¶75). That Defendant Cuciti declined to put the policy in writing, A-157 (¶111), explains why it was applied inconsistently, but does not make it any less a policy.

Moreover, the Complaint also alleges that Sherman and Zenk each "made rounds on the ADMAX and was aware of conditions there," A-129 (¶¶25–26), and that is sufficient to make it plausible that each was aware of the strip search policy, and the abusive way in which it was implemented, A-158–59 (¶¶115–16), yet declined to correct it. Although Hasty "neglect[ed] to make rounds on the ADMAX as required by BOP policy," he "was made aware of the abuse that occurred through

inmate complaints" and other means, A-128–29 (¶24). All three MDC Defendants had access to a "visual search log" created for their review A-158 (¶114), further making it plausible that they were aware of the policy and approved it.

Nor are MDC Defendants entitled to qualified immunity from this claim. As the District Court held, "It was clearly established at the time that a strip search policy designed to punish and humiliate was not reasonably related to a legitimate penological purpose and thus violated the Fourth Amendment, and no reasonable officer could have believed that the policy alleged was constitutional." SPA-60 (citing *Iqbal v. Hasty*, 490 F.3d at 173; *Hodges v. Stanley*, 712 F.2d 34, 35 (2d Cir. 1983)). It was also clearly established in 2001 that strip searches are unreasonable when a prisoner has had no opportunity to acquire contraband. *Hodges* 712 F.2d at 35–36 (inmate stated a Fourth Amendment violation where he was searched a second time following continuous escort; since he could not have obtained concealed contraband, "the second search appears to have been unnecessary"). Searches conducted "in an abusive fashion . . . cannot be condoned." *Wolfish*, 441 U.S. at 560. Likewise, inmates have a privacy interest in

protecting themselves from "the involuntary viewing of private parts of the body by members of the opposite sex." *Forts v. Ward*, 621 F.2d 1210, 1217 (2d Cir. 1980). And BOP regulations require strip searches to "be made in a manner designed to assure as much privacy to the inmate as practicable." A-159 (¶116).

In light of this law and BOP regulations, no competent officer would have reasonably believed that it was legal to strip search repeatedly, or to videotape strip searches, or to have a female present during strip searches. MDC Defendants are not entitled to qualified immunity.

E. The District Court Properly Refused to Dismiss Claim Seven: Conspiracy to Deprive Plaintiffs of Equal Protection of the Laws.

Finally, the District Court was also correct in allowing Plaintiffs' 42 U.S.C. § 1985 conspiracy claim to proceed. SPA-60–61. MDC Defendants merely repeat the arguments rejected by Judge Gleeson. The first of these arguments, that no meeting of minds has been alleged, is difficult to take seriously; throughout, the Complaint alleges concerted action by MDC Defendants. *See, e.g.*, A-143–46, 162–63 (¶¶68–75, 130, 132). "A plaintiff is not required to list the place and

date of defendants' meetings and the summary of their conversations when he pleads conspiracy, but the pleadings must present facts tending to show agreement and concerted action." *Fisk v. Letterman*, 401 F. Supp. 2d 362, 376 (S.D.N.Y. 2005) (internal citations and quotation marks omitted). *See also Bowen v. Rubin*, 385 F. Supp. 2d 168, 176 (E.D.N.Y. 2005) (upholding § 1985(3) claim because plaintiffs could demonstrate that defendants "conspired to deprive them of their rights by virtue of an official policy or custom").

MDC Defendants' second argument is that it was not clearly established that their conduct violated § 1985. This falls with the conclusion that—as we have shown in this brief—their conduct as alleged clearly violated the Constitution; if Defendants knew or should have known that they were wrong to discriminate, they cannot seriously claim now that they could not have known that it was wrong *to conspire* to discriminate. As this Court held in *Iqbal v. Hasty*, "federal officials could not [have] reasonably believed . . . that it was legally permissible for them to conspire with other federal officials to deprive a person of equal protection of the laws." 490 F.3d at 177.

Finally, MDC Defendants say that they could not have conspired in violation of § 1985 because they were all employees of the same agency, the Bureau of Prisons. This argument must fail if, as Plaintiffs argue in Section I of this brief, the claims against DOJ Defendants should be reinstated; for in that case, Defendants were not all employees of the same agency. But even if DOJ Defendants are not parties, Plaintiffs have properly alleged conspiracy by MDC Defendants.

On this issue, the governing law in this circuit is set out in *Girard v. 94th Street and Fifth Avenue Corp.*, 530 F.2d 66 (2d Cir. 1976), which indeed establishes that under certain circumstances agents of a single entity, acting for that entity, cannot be held to have conspired. But those circumstances are not present here, because MDC Defendants were acting on their own account, and not for a legitimate purpose of the Bureau of Prisons. *Girard* upheld the dismissal of a § 1985 claim against the directors and officers of a single corporation when it was "not allege[d] that the individual defendants were motivated by any independent personal stake in achieving the corporation's objective." 530 F.2d at 71–72.

Here, in contrast, Plaintiffs allege that Defendants acted, in part, to further their own personal bias. Not only was there no legitimate basis for the conditions imposed on Plaintiffs, MDC Defendants deliberately violated BOP regulations governing the treatment of Plaintiffs, A-143 (¶68), thus forfeiting any claim to be acting for the BOP. *See De Litta v. Vill. of Mamaroneck*, 166 F. App'x 497, 499 (2d Cir. 2005) (holding the intra-agency defense does not apply when a plaintiff shows that "employees conspired with each other on the basis of personal animus" rather than some other legitimate interest); *Johnson v. Nyack Hosp.*, 954 F. Supp. 717, 723 (S.D.N.Y. 1997) (dismissing a § 1985 claim against a hospital and its employees when "the action complained of arguably served a legitimate interest of Nyack Hospital"); *Agugliaro v. Brooks Brothers*, 802 F. Supp. 956, 962 (S.D.N.Y. 1992) (denying a motion to dismiss an age discrimination claim under § 1985 against corporate employees alleged "not [to] have been carrying out the corporation's managerial policy but . . . acting upon their own motives"); *Quinn v. Nassau Cnty. Police Dep't*, 53 F. Supp. 2d 347, 360 (E.D.N.Y. 1999) (finding "'personal interest' exception to the intracorporate conspiracy doctrine" when defendant police officer

"was acting not 'under color of state law' or in furtherance of the Police Department's interests when harassing the plaintiff"); *Yeadon v. New York City Transit Auth.*, 719 F. Supp. 204, 212 (S.D.N.Y. 1989) ("because plaintiffs have adequately alleged that each defendant possessed independent, personal conspiratorial purposes, the [intracorporate action] defense does not apply").

Conclusion

For these reasons, Plaintiffs respectfully request that the Court reverse the District Court's dismissal of Claims One, Two, Three, and Seven against DOJ Defendants, and affirm the District Court's opinion with respect to MDC Defendants.

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