UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN, et al., Plaintiffs, - against - JOHN ASHCROFT, et al, Defendants.	02 CV 2307 (JG) (SMG)

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE FOURTH AMENDED COMPLAINT

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Turkmen Plaintiffs are non-citizens who were deported (or permitted to depart voluntarily) for violating the terms of their visas. While held in civil immigration custody, they were placed in a super-maximum security wing of a federal prison, subjected to uniquely harsh restrictions, harassed, and abused for three to eight months. This treatment was based not on evidence they were dangerous, or had committed crimes, but rather on a policy, created at the highest levels of government, to treat harshly Muslim non-citizens of Arab and South Asian descent in the hope that such treatment would result in disclosure of information about terrorists or terrorism.

The eight individual Defendants named in Plaintiffs' Fourth Amended Complaint have moved for dismissal on grounds of qualified immunity. For the reasons set forth below, each motion should be denied in its entirety.

STATEMENT OF FACTS

The basic facts that gave rise to the Fourth Amended Complaint are described in this Court's 2006 opinion, *Turkmen v. Ashcroft*, No. 02-cv-2307, 2006 U.S. Dist. LEXIS 39170, *2-66 (E.D.N.Y. June 14, 2006) (granting in part and denying in part Defendants' motions to dismiss the Third Amended Complaint) (hereafter "*Turkmen I*"), *aff'd in part, vacated in part*, 589 F.3d 542 (2d Cir. 2009). Thus, we focus this brief summary of facts on what has changed since that opinion.

Most important for purposes of the present motions, Plaintiffs' new complaint provides a clear and detailed explanation of how each Defendant was personally, and separately, involved in violating Plaintiffs' rights.

Defendants' constitutional violations began shortly after September 11, 2001, when Defendant Ashcroft 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. Fourth Amended Complaint ("FAC") ¶¶ 39, 48. Both Ashcroft and Defendant Mueller 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. *Id.* ¶ 41. Because they received daily reports regarding the arrests and detentions, Ashcroft, Mueller and Defendant Ziglar were made aware that this did, in fact, occur. *Id.* ¶¶ 47, 63- 64.

Ashcroft ordered Mueller and Ziglar to hold these "9/11 detainees," whom they knew were accused solely of civil immigration violations, until affirmatively cleared of any connection to terrorism. *Id.* ¶¶ 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 individuals in question. *Id.* ¶ 61. They made a plan to restrict the 9/11 detainees' access to the outside world and to spread word 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 was at many of these meetings. *Id.* ¶ 62.

Ashcroft, Mueller and Ziglar's plan to restrict the 9/11 detainees' access to the outside world, and to urge others to treat them harshly, directly resulted in unlawfully punitive conditions of confinement at the Metropolitan Detention Center ("MDC") in Brooklyn, New York. *Id.* ¶¶ 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 hopes this suffering would lead to their cooperation with law enforcement. *Id.* ¶ 65, 103. As there was not enough room at MDC (or other similarly secure federal facilities) to hold all the 9/11 detainees, some were sent to local facilities, like Passaic County Jail, in

New Jersey. *Id.* ¶ 66. While detainees at Passaic were not placed in super-maximum security confinement, they too were treated harshly. *Id.* Tellingly, officers at both the MDC and at Passaic interrupted Muslim Plaintiffs' prayers with taunts and other disruptions. *Id.* ¶¶ 131-39.

As one might expect from a hierarchal government agency, it does not appear that Ashcroft's small group personally designed the details of every restrictive condition; rather the MDC warden, Defendant Hasty, ordered his subordinates (Defendants Cuciti and LoPresti) 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. *Id.* ¶¶ 24, 27, 68, 75-76, 79, 98, 132. These conditions are described in detail in paragraphs 79-140 of the Complaint.

The restrictive conditions included 23-24 hour-a-day lockdown in an Administrative Maximum Special Housing Unit ("ADMAX SHU") cell; handcuffs, shackles, a waist chain, and the physical grip of a four-man team whenever Plaintiffs left their cells; frequent and redundant 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; extremes of temperature; and failure to provide information about internal complaint policies. *Id.* ¶¶ 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. *Id.* ¶¶ 25, 75.

As required by the Washington D.C. Defendants' policy of maximum pressure, Hasty facilitated additional abuse of the detainees by referring to them among the MDC staff as "terrorists," barring them from normal grievance and oversight procedures, and

purposely avoiding the unit. *Id.* ¶¶ 24, 77, 78, 109, 140. Videotapes likely to show this abuse were destroyed. *Id.* ¶ 107. As a result, Plaintiffs were subjected to systematic verbal and physical abuse. *Id.* ¶¶ 60d, 109-10, 147, 162, 166, 218, 222, 241 (verbal abuse); *id.* ¶¶ 104-08, 162, 166, 177, 182, 201, 205, 218, 221, 234 (physical abuse). They were deprived of sleep by loud banging throughout the night, and subjected to harassment and humiliation when strip-searched. *Id.* ¶¶ 111-21. Though Hasty struggled to avoid being confronted with the results of his policy, he was made aware of the abuse nonetheless. *Id.* ¶¶ 24, 77-78, 97, 107, 114, 123, 126, 137. The other MDC Defendants were frequently present on the ADMAX unit, yet failed to correct the abuses they witnessed or learned of. *Id.* ¶¶ 25-28, 77, 97, 114, 121, 126, 137.

Many of these factual allegations linking Defendants to the unconstitutional conditions are new to the Fourth Amended Complaint.

Also new to the Fourth Amended Complaint are six Plaintiffs, who joined the case following five former Plaintiffs' settlements with the United States.[1] Ahmer Iqbal Abbasi and Anser Mehmood are Pakistani Muslims related by marriage; Mehmood is married to Abbasi's sister. *Id.* ¶¶ 13, 14. The two 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. *Id.* ¶¶ 143, 158. Abbasi was arrested as a result and held for over four

[1] In August of 2009, former Plaintiffs Shakir Baloch, Asif Saffi, Yasser Ebrahim, Hany Ibrahim, and Ashraf Ibrahim settled all claims against the United States for 1.26 million dollars, and voluntarily dismissed the remaining claims against the individual Defendants. The new MDC Plaintiffs were granted leave to intervene and to amend the complaint by recommendation of Magistrate Judge Gold (Docket No. 714), adopted by this Court on August 26, 2010 (Docket No. 724).

months in the ADMAX SHU. *Id.* ¶¶ 143, 152. During Abbasi's arrest, the FBI came across the name of his sister (Mehmood's wife), and thus went to Mehmood's house to investigate her. *Id.* ¶ 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. *Id.* ¶ 159. Instead, he too was detained for four months in the ADMAX SHU. *Id.* ¶¶ 162, 170.

Benamar Benatta is an Algerian Muslim. *Id.* ¶ 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). *Id.* ¶¶ 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. *Id.* ¶ 173. He was initially placed in INS custody and ordered to appear in immigration court in Batavia, New York, but then was spirited away to MDC, where he was detained in the ADMAX SHU for over seven months. *Id.* ¶¶ 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 he twice made serious attempts to injure himself while in custody. *Id.* ¶¶ 179-82.

Ahmed Khalifa is a Muslim from Egypt, who came to the United States for a short vacation from his medical studies. *Id.* ¶¶ 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. *Id.* ¶ 195. He was arrested along with his roommates,[2] and detained in the ADMAX SHU for close to four months. *Id.* ¶¶ 197, 211.

[2] Including former Plaintiffs Yasser Ebrahim and Hany Ibrahim.

Saeed Hammouda is also an Egyptian Muslim, and the only Plaintiff who has not yet been able to discover the tip that led to his arrest and detention. *Id.* ¶ 17. Hammouda was held in the ADMAX SHU for eight months, longer than any other Plaintiff. *Id.* ¶¶ 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. *Id.* ¶¶ 18, 229. He planned to return home to Katmandu in fall or winter 2001, and came to the attention of the FBI when filming the New York streets he had come to know, to show his wife and children. *Id.* ¶ 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 that DA's office, and an FBI office. *Id.* Mr. Bajracharya was arrested as a result, and detained for three months in the ADMAX SHU. *Id.* ¶¶ 232, 234, 244. The relative shortness of his detention was most likely 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. *Id.* ¶¶ 235, 236, 238.

Finally, two Plaintiffs who were held at Passaic County Jail are familiar to the Court from the last round of briefing: Ibrahim Turkmen advances Claims Two (equal protection), Three (interference with religious practice), and Seven (conspiracy); Akhil Sachdeva advances Claims Two and Seven. These claims are brought only against the Washington D.C. Defendants.

In this Complaint, Passaic Plaintiffs describe for the first time the information that led to their treatment as "suspected terrorists." Turkmen 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. *Id.* ¶¶ 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." *Id.* ¶ 251. She reported that the men were good tenants, and paid their rent on time. *Id.* Sachdeva 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 the English included some discussion of flight simulators. *Id.* ¶ 270. Both men were detained at Passaic County Jail for approximately four months. *Id.* ¶¶ 255, 272-73.

All Plaintiffs were charged with civil immigration violations. *Id.* ¶¶ 144, 161, 174, 199, 217, 231-32, 256, 273. Months later, several were also charged with minor criminal offenses. *Id.* ¶ 153 (Abbasi), ¶ 170 (Mehmood), ¶¶ 190-91 (Benatta).

While the new complaint does not allege treatment or conditions that differ in any fundamental way from those asserted in the Third Amended Complaint (Docket No. 109), discovery undertaken over the past few years has enabled Plaintiffs to present to the Court more specific details of their mistreatment and harassment. *See, e.g., id.* ¶ 85 (providing exact date Plaintiffs were first able to make a legal call), ¶ 86 (same for social calls), ¶¶ 112-13 (providing detailed examples of repetitive and unnecessary strip-searches); ¶¶ 123-24 (providing details of *de facto* denial of recreation).

The Fourth Amended Complaint also includes new allegations disclosing the information provided to each Defendant regarding the lack of any evidence tying Plaintiffs to terrorism. *See, e.g., id.* ¶¶ 47, 63, 64, 67 (information provided to

Washington D.C. Defendants); ¶¶ 69-74 (information provided to MDC Defendants); ¶¶ 185-89 (example of information sharing between New York FBI and FBI Headquarters regarding lack of any information linking Plaintiffs to terrorism).

This new detail, made available to Plaintiffs through discovery, explains the current complaint's fewer citations to the reports by the Office of the Inspector General.[3] Plaintiffs do not "distance themselves" (*see* Hasty Br. at 8 n.4) from these relevant and well-documented reports. Rather, they have access now to more detail than was reported by the OIG, and need not cite the reports so heavily.

ARGUMENT

Our opposition to Defendants' motions is divided into five sections. In Section I, we set forth the current law of pleading, primarily through a detailed analysis of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). In Section II, we apply this law to the allegations of the Fourth Amended Complaint, and respond to Defendants' arguments disavowing personal involvement in the unconstitutional policies and practices Plaintiffs complain of. In Section III, we respond to Defendants Hasty and Sherman's argument that their actions were objectively reasonable, and thus they are entitled to qualified immunity. In Section IV, we show that the majority of Plaintiffs' claims require no extension of the *Bivens* doctrine, and for

[3] The 9/11 detentions were documented in two reports released by the Office of the Inspector General of the U.S. Department of Justice: "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," available at http:/www.usdoj.gov/oig/special/0306/full.pdf; and "The Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York," available at http://www.usdoj.gov/oig/special/0312/final.pdf. Both reports were appended as exhibits to earlier complaints, and are incorporated by reference in the Fourth Amended Complaint. *See* FAC p. 3 n.1, p. 4 n.2.

those that do, a *Bivens* remedy should be implied. Finally, in Section V, we demonstrate that each of Plaintiffs' seven claims states a violation of clearly established rights.

In an appendix, we present a chart showing which claims are asserted by each Plaintiff against each Defendant.

I. THE LAW ACCORDING TO *TWOMBLY* AND *IQBAL*

Almost all of the issues presented by Defendants' motions to dismiss have already been decided once by this Court, in *Turkmen I*. They arise again because of two intervening decisions by the United States Supreme Court, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), which modified the law on pleading.[4] We therefore begin with a discussion of these cases, and then take up their application to the Fourth Amended Complaint.

The pleading standard of *Twombly* and *Iqbal* has two components: first, that a court need not accept "legal conclusions" as true, and second, that a complaint must state "a plausible claim for relief." *Iqbal*, 129 S. Ct. at 1949-50 (citing *Twombly*, 550 U.S. at 555-56). Everything therefore turns on the meanings of "conclusory" and "plausible," and we begin with these points.

In addition, *Iqbal* holds that because a claim of unconstitutional discrimination requires discriminatory intent, such a claim against a supervisor depends on the supervisor's own intent, not that of subordinates. 129 S. Ct. at 1948-49. Consequently, a complaint must make such intent "plausible." *Id.* at 1951-52. Defendants, however, seek

[4] As we have described, the complaint has also been newly amended, which provides an occasion for new motions to dismiss, but not for reconsideration of any issues already decided. *See below*, at 61-62. The revisions in the complaint reflect (a) new allegations to meet the standards of *Twombly* and *Iqbal*; (b) the deletion of claims dismissed by this Court in 2006; (c) the deletion of allegations relating to Plaintiffs who have settled their claims; (d) the addition of allegations relating to newly intervening Plaintiffs; and (e) the addition of a new claim for damages.

to extract a broader reading from *Iqbal*: namely, that even where the standard of intent for a constitutional violation is deliberate indifference, *Iqbal* frees government supervisors from any liability for such indifference to a subordinate's unconstitutional conduct, or for failure to rectify a constitutional violation of which they are aware. *See, e.g.*, Ashcroft Br. at 13-14, Hasty Br. at 15-17. As we demonstrate below, this conclusion has no support in *Iqbal*.

A. "Conclusory" Allegations Under *Twombly* and *Iqbal*

In explaining its use of the term "conclusory," the Court in both *Twombly* and *Iqbal* reiterated the principle that courts "are not bound to accept as true *a legal conclusion couched as a factual allegation*." *Twombly*, 550 U.S. at 555; *Iqbal*, 129 S. Ct. at 1949-50 (emphasis added; quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "[A] *formulaic recitation* of the elements of a cause of action will not do. . . ." 550 U.S. at 555 (emphasis added).

The cases illustrate what this means in practice. In *Twombly*, the Court said that "a conclusory allegation of agreement *at some unidentified point*" required the support of some subordinate facts if it was to be taken as true at the motion to dismiss stage. *Id.* at 557 (emphasis added). The Court did not say that every allegation of an agreement is conclusory, but the absence of detail made Twombly's claim conclusory.

Likewise in *Papasan*, the allegation that plaintiffs "have been deprived of a minimally adequate education" was conclusory:

> The petitioners do not allege that schoolchildren in the Chickasaw Counties are not taught to read or write; they do not allege that they receive no instruction on even the educational basics; they allege no actual facts in support of their assertion that they have been deprived of a minimally adequate education.

478 U.S. at 286. Again, the absence of any supporting fact made the allegation conclusory.

Similarly, in *Iqbal* the Court held that the claim "that petitioners adopted a policy 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group" was "a formulaic recitation of the elements of a constitutional discrimination claim," and thus "conclusory and not entitled to be assumed true." 129 S. Ct. at 1951 (internal quotation marks and citation deleted). The problem with such a complaint is not that it alleges the elements of a claim; a complaint must do that. Rather, the critical term "formulaic" suggests that the plaintiff could have drawn these allegations from a statute, treatise, or other general description of such claims, without knowing any facts to suggest that those elements actually existed in his particular case.

The requirement of some supporting facts is based on the requirement of Fed. R. Civ. P. 8—that a complaint "give the defendant fair notice of what the claim is, and the grounds upon which it rests." *Twombly,* 550 U.S. at 555 (internal quotation marks and citation omitted); *see also* 556 n.3 ("Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests.") (citing Rule 8). These two concerns underlie the treatment given "conclusory" allegations, and the way in which "conclusory" must be understood. Many—perhaps most—allegations are *conclusions* strictly speaking; for example, the allegation in Official Form 15, Complaint for the Conversion of Property, that "On *date*, at *place*, the defendant converted to the defendant's own use property owned by the plaintiff," is a conclusion based on events that must have occurred at the time and place referred to; nevertheless,

this officially sanctioned allegation is plainly not "conclusory" for pleading purposes (*see* Fed. R. Civ. P. 84). That is because the allegation (a) indicates a factual basis, and (b) gives notice to the defendant. The Court classed key allegations in *Twombly* and *Iqbal* as "conclusory" because it found that they failed to meet these criteria.

Nevertheless, "[s]pecific facts are not necessary; the statement need only "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (ellipsis in the original; quoting *Twombly*, 550 U.S. at 555, quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)) (holding that it was sufficient for the plaintiff to allege that a prison doctor's termination of his treatment for hepatitis endangered his life, without further specification of the basis for that allegation).

B. "Plausible" Claims Under *Twombly* and *Iqbal*

There are two key points about the meaning of "plausible" under *Twombly* and *Iqbal*: one about what "plausible" does not mean, and one about what it does.

First, "plausible" does not mean "likely"; a claim need not be *likely* in order to withstand a motion to dismiss:

> 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 omitted; emphasis added); *see also Iqbal*, 129 S. Ct. at 1949.

Second, the key to plausibility is inference: has the plaintiff alleged facts from which liability might be *inferred*? *Iqbal* sums this up:

> 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, 129 S. Ct. at 1949 (emphasis added) (citing *Twombly*, 550 U.S. at 556).[5] As with their analysis of what is "conclusory," *Twombly* and *Iqbal* base their treatment of "plausibility" on Rule 8(a). "The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 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; *see also Iqbal*, 129 S. Ct. at 1950-51.

Twombly and *Iqbal* illustrate how this works. In *Twombly*, 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 agreement; without an agreement, self-interest would drive them to compete with one another. From defendants' conduct, said plaintiffs, we can infer an agreement. But plaintiffs' argument failed, because their inference was invalid; defendants were in fact acting as one would

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[5] Similarly: "But where the well-pleaded facts do not permit the court *to infer* more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Iqbal*, 129 S. Ct. at 1950 (emphasis added) (citing Fed. R. Civ. P. 8(a)(2)).

"As to the ILECs' supposed agreement against competing with each other, the District Court found that the complaint does not 'alleg[e] facts ... suggesting that refraining from competing in other territories as CLECs was contrary to [the ILECs'] apparent economic interests, and consequently [does] not *rais[e] an inference* that [the ILECs'] actions were the result of a conspiracy.'" *Twombly*, 550 U.S. at 552 (emphasis added) (citing *Twombly v. Bell Atlantic,* 313 F. Supp. 2d 174, 188 (S.D.N.Y. 2003)).

"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. . . ." *Id.* at 566 (emphasis added; record citation omitted).

expect them to act in their own self-interest, without any agreement. *Twombly*, 550 U.S. at 554. The Court said:

> In identifying facts that are suggestive enough to render a § 1 conspiracy plausible, we have the benefit of the prior rulings and considered views of leading commentators, already quoted, *that lawful parallel conduct fails to bespeak unlawful agreement*.

Twombly, 550 U.S. at 556 (emphasis added).

In short, "parallel conduct does not suggest conspiracy." *Id.* at 557. Without any basis for inferring conspiracy, the *Twombly* plaintiffs' claim of conspiracy was not plausible.

The same kind of analysis reached 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 129 S. Ct. at 1951), Iqbal alleged that this would not have happened if defendants were not motivated by prejudice. As in *Twombly*, the Court rejected the inference, concluding that 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.

129 S. Ct. at 1951.

Because "potential connections to those who committed terrorist acts" explained defendants' conduct, there was no basis for inferring that defendants were motivated by prejudice. While the Court said that these potential connections provided a "more likely

explanation[]" of what defendants did (*id.*), the problem was not simply that this explanation was more likely than the one 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 1949 (quoting *Twombly*, 550 U.S. at 556). The critical question is whether or not one can infer illegality from a plaintiff's factual allegations, and the Court held that, in *Iqbal* as in *Twombly*, this inference could not be drawn. But it remains the case, as the Second Circuit has held, 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).

A complaint may not be dismissed on the pleadings merely because there is a "more likely" explanation than the plaintiff's for the facts alleged. "Plausibility" depends on inference, and if the plaintiff's factual allegations provide a basis for inferring liability, that is sufficient. They need not exclude innocent explanations, or even make them unlikely. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007) (holding that under the heightened pleading standard required by the Private Securities Litigation Reform Act, an inference of scienter must be "*more than merely plausible* or reasonable—it must be cogent and *at least as compelling as any opposing inference* of nonfraudulent intent") (emphasis added). The term "plausible" thus does not imply something *more compelling* than the alternatives. Outside the PSLRA realm, "even when the story in a pleading's factual allegations is marginally *less* plausible, but still plausible, it should be sufficient for purposes of Rules 8 and 12." *Escuadra v. GeoVera Specialty Ins. Co.*, No. 09-cv-974, 2010 U.S. Dist. LEXIS 94301, at *27 (E.D. Tex. Sep. 9, 2010); *see also Swanson v. Citibank*, 614 F.3d 400, 404 (7th Cir. 2010) ("the

court will ask itself *could* these things have happened, not *did* they happen . . . it 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"); *Chao v. Ballista,* 630 F. Supp. 2d 170, 177 (D. Mass. 2009) (defendant's alternative explanation must be "so overwhelming, that the claims no longer appear plausible").

But it is critical that, although a "more likely" explanation is not *sufficient* to show that a complaint is implausible, it is *necessary* to such a showing. Plainly, if the innocent explanations of a defendant's conduct are *less* likely than the one alleged by the plaintiff, then the plaintiff has offered a plausible basis for inferring liability.

C. Supervisory Liability Under *Iqbal*

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*." 129 S. Ct. at 1948. Rather, "a federal official's liability 'will only result from 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)). Consistent with this, since a claim of "invidious discrimination" requires "that the plaintiff must plead and prove that the defendant acted with discriminatory purpose," the required purpose is that of the defendant, not the defendant's subordinates. 129 S. Ct. at 1948.

But *Iqbal* neither holds nor hints—as Defendants now claim—that superior officials are free from any *Bivens* liability in connection with their subordinates' acts or their own omissions; to the contrary, the Court expressly recognized, following *Dunlop*, that an official may be "charged with violations arising from his or her superintendent responsibilities." *Id.* at 1949. Every official's *Bivens* liability depends upon "his or her

own misconduct" (*id.*), but that includes an official's conduct *as a supervisor*. Supervision is what supervisors do; if they could never be liable for how they do it, the Court's references to "properly superintending" and "superintendent responsibilities" would make no sense.[6]

Apart from the sole question of intent to discriminate, there was no issue in *Iqbal* of what constitutes a failure to exercise superintendent responsibilities, and accordingly the Court did not set out, or even discuss, any general standards for that question. There is nothing in *Iqbal* to suggest revisiting *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995), setting forth the law of this Circuit on that issue, except to add the requirement of intent in discrimination claims.

Indeed, revising the *Colon* criteria as Defendants suggest would run afoul of other binding Supreme Court precedent. For instance, the fifth *Colon* criterion is "exhibit[ing] deliberate indifference to the rights of inmates." 58 F.3d at 873. Deliberate indifference is the accepted standard for liability on an Eighth Amendment challenge to conditions of confinement. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (deliberate indifference the standard for a prisoner's *Bivens* claim against the Director of the Bureau of Prisons North Central Region). Under *Farmer*, a supervisor can be held liable for deliberate indifference to the risk that one prisoner will attack another. 511 U.S. at 828.

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[6] While the Court said that in *Bivens* actions "supervisory liability" is "a misnomer," the immediately following sentence shows that this means simply that there is no vicarious liability in such actions ("Absent vicarious liability, each Government official . . . is only liable for his or her own misconduct."). 129 S.Ct. at 1949. Decisively, the next sentence allows that such misconduct may include "violations arising from . . . superintendant responsibilities." *Id.* Defendants rely on Justice Souter's dissent, remarking that the Court "does away with supervisory liability. . . ." *Id.* at 1957. But "Cassandra-like predictions in dissent are not a sure guide to the breadth of the majority's ruling." *Lee v. Kemna*, 534 U.S. 362, 386 (2002) (internal quotation marks and citation omitted).

Yet under Defendants' reading of *Iqbal*, the same supervisor cannot be held liable for deliberate indifference to an equally obvious risk that a corrections officer will attack a prisoner. This makes no sense. Does *Iqbal* overrule *Farmer*, and similar Supreme Court decisions such as *Wilson v. Seiter*, 501 U.S. 294 (1991), *Whitley v. Albers*, 475 U.S. 312 (1986) and *Estelle v. Gamble*, 429 U.S. 97 (1976)? *Iqbal* does not mention any of these decisions, or even "deliberate indifference."

All that can be drawn from *Iqbal* is that, where the constitutional standard is one of deliberate indifference, a supervisor is liable for the supervisor's own deliberate indifference, and not that of subordinates. But this was not in doubt, and is certainly not inconsistent with *Colon*. Failure to remedy a constitutional violation, another prong of the *Colon* test, was also not mentioned in *Iqbal*, and also survives intact. A supervisor will not be liable under *Bivens* for a subordinate's failure to remedy a constitutional violation, but *Iqbal* does not indemnify a supervisor against the supervisor's own failure to remedy a constitutional violation of which he is aware, whether the violation is of his subordinate's or his own creation.

While lower courts in the Second Circuit have divided on the application of *Iqbal* to supervisory liability, we submit that the best view is expressed in *Qasem v. Toro*, 09 Civ. 8361, 2010 U.S. Dist. Lexis 80455, at *10-11 (S.D.N.Y. Aug. 10, 2010):

> As *Iqbal* noted, the degree of personal involvement required to overcome a Rule 12(b)(6) motion varies depending on the constitutional provision alleged to have been violated. Invidious discrimination claims require a showing of discriminatory purpose, but there is no analogous requirement applicable to Qasem's allegations of repeated sexual assaults. *Colon's* bases for liability are not founded on a theory of respondeat superior, but rather on a recognition that personal involvement of defendants in

> alleged constitutional deprivations can be shown by nonfeasance as well as misfeasance.
>
> Thus, 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. . . . Where the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth and Eighth Amendments, the personal involvement analysis set forth in *Colon v. Coughlin* may still apply.

Id. (citations and internal quotation marks omitted). Other Circuits have come to a similar conclusion, recognizing that supervisors may be liable in circumstances that do not amount to direct participation in subordinates' misconduct or direct contact with the plaintiff. *See Dodds v. Richardson*, 614 F.3d 1185, 1199-2201 (10th Cir. 2010); *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 48-51 (1st Cir. 2009); *Wright v. Leis*, No. 08-3037, 335 Fed. Appx. 552, 2009 U.S. App. LEXIS 14080, at *7-8 (6th Cir. June 30, 2009) (per curiam); *Langford v. Norris*, 614 F.3d 445, 459-60, 463-64 (8th Cir. 2010); *al-Kidd v. Ashcroft,* 580 F.3d 949, 965 (9th Cir. 2009) *cert. granted on other issues,* 131 S. Ct. 415 (2010); *Doe v. Sch. Bd. Of Broward County, Fla.,* 604 F.3d 1248, 1266-67 (11th Cir. 2010); *but see* contrary decisions discussed in *D'Olimpio v. Crisafi*, 718 F. Supp. 2d 340, 2010 U.S. Dist. Lexis 59563, at *13-18 (S.D.N.Y. June 15, 2010).

II. APPLICATION OF THE *TWOMBLY* AND *IQBAL* STANDARD TO PLAINTIFFS' COMPLAINT

Each Defendant moves for dismissal on grounds of qualified immunity, and for failure to plead personal involvement. Below, we show first that Plaintiffs have adequately alleged the Washington D.C. Defendants' involvement in unlawful conditions of confinement (Claims One, Three, Four and Five), and in violations of equal protection

(Claim Two). Next, we explain Plaintiffs' allegations regarding the MDC Defendants' involvement in, first, the conditions imposed as a matter of policy at the MDC; second, the abuses to which Plaintiffs were systematically subjected; and third, the equal protection violations. We then discuss each Defendant's involvement in Claim Seven, the conspiracy to violate civil rights, and conclude with the issue of personal jurisdiction.

A. Washington D.C. Defendants' Involvement in Conditions of Confinement

In 2006, this Court found that Plaintiffs' Third Amended Complaint adequately alleged the Washington D.C. Defendants' personal involvement in a policy that the time served by those rounded up after 9/11 would be "hard time," and that their Muslim faith would not be respected while in custody. *Turkmen I*, 2006 U.S. Dist. LEXIS 39170, at *110. Both before and after *Iqbal*, "[t]he personal involvement of a supervisory defendant may be shown by evidence that: the defendant created a policy or custom under which unconstitutional practices occurred. . . ." *Scott v. Fischer*, 616 F.3d 100, 101 (2d Cir. 2010).[7] In the Fourth Amended Complaint, Plaintiffs provide factual content to flesh out the "hard time" policy, and to chart its impact on Plaintiffs and class members.

In arguing that Plaintiffs have failed to adequately plead personal involvement, Defendants ignore this detailed story. *Iqbal* and *Twombly* are central to Defendants' memoranda in support of their motions; but Defendants' treatment of these cases is cursory, and they fail to analyze their key terms, or to show how those terms apply to this case.

[7] Even if *Iqbal* did substantially narrow supervisory liability, this basis for liability would survive. *See, e.g., Bellamy v. Mount Vernon Hosp.*, No. 07-Civ-1801, 2009 U.S. Dist. LEXIS 54141, at *27-28 (S.D.N.Y. June 26, 2009) (while *Iqbal* bars some categories of supervisory liability, a plaintiff can still adequately plead personal involvement based on a supervisor's creation of a policy under which unconstitutional practices occur).

We begin with Defendant Ashcroft. Twenty-six paragraphs in the Fourth Amended Complaint identify Ashcroft by name. FAC ¶¶ 6, 7, 21-23, 39, 41, 47, 48, 51, 53, 55-56, 60-68, 75, 79, 96, 305. Eight of these paragraphs identify actions taken by Ashcroft alone (*id.* ¶¶ 21, 39, 41, 47, 53, 55, 60d – f, 63), while others identify actions he took in concert with Mueller and Ziglar, along with actions others took at Ashcroft's direction. Yet of all the detailed allegations involving Defendant Ashcroft, he discusses only three, which he urges the Court to ignore as conclusory. *See* Ashcroft Br. at 3 (citing FAC ¶¶ 21, 61), and at 15-17 (citing FAC ¶¶ 7, 21, 61).

As a preliminary matter, paragraphs 21 and 61 are not conclusory; they are not "formulaic recitation[s] of the elements of a cause of action," or indeed "legal conclusions" at all, nor are they bare of supporting fact. For instance, paragraph 21 not only alleges that Ashcroft "is the principle architect of the [challenged] policies and practices," but adds:

> Along with a small group of high-level government employees, Ashcroft created the hold-until-cleared policy and directed the application of that policy to persons in the circumstances of Plaintiffs and the other class members. With that same group, he also created many of the unreasonable and excessively harsh conditions under which Plaintiffs and other class members were detained, and authorized others of those conditions.

FAC ¶ 21. Likewise, paragraph 61 provides further facts regarding the work of this small group in setting conditions of confinement for the 9/11 detainees:

> 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.

More facts follow in paragraph 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 C.I.A. to be utilized for interrogation of "high value detainees."

These paragraphs are not "conclusory."[8] They provide more detail than a similar allegation found to be factual by the Supreme Court in *Iqbal*. *See* 129 S. Ct. at 1951 (considering as "factual" the allegation that "the policy of holding post-September-11th detainees in highly restrictive conditions of confinement . . . was approved by Defendants Ashcroft and Mueller in discussions in the weeks after September 11, 2001.") In substance, Plaintiffs' allegations mirror this factual allegation of Iqbal's; the only difference is that Plaintiffs provide more subordinate facts. Of course, *Iqbal's* factual allegation as to Ashcroft and Mueller's involvement in setting conditions at the MDC did not aid him in his complaint, as he did not bring a conditions claim against those Defendants. 129 S. Ct. at 1944; *see also id.* at 1955 (Souter, J., dissenting).

[8] Even Defendant Ashcroft seems ambivalent as to whether paragraph 61 is conclusory: on page 15 of his brief, he characterizes Plaintiffs' allegation that Ashcroft desired to "exert maximum pressure" on the detainees as factual; a page later, he argues this same phrase is conclusory. *Compare* Ashcroft Br. at 15, 16.

According to Ashcroft, Plaintiffs' complaint here says "virtually nothing" about his role in establishing the conditions at the MDC; but paragraph 61, along with paragraphs 65, 68, 79 and 96 explain that role precisely: Ashcroft and Mueller decided that the detainees would be isolated from the outside world; thus they were put in the ADMAX SHU at MDC and denied telephone calls, letters, and visits. *Id.* ¶¶ 61, 79-97. Ashcroft ordered that law enforcement be told the men were suspected terrorists, who needed to be encouraged to cooperate in any way possible; thus Hasty obligingly called the detainees "terrorists" in MDC memoranda, confined them in ultra-restrictive conditions, and allowed them to be mistreated. *Id.* ¶¶ 24, 61, 68, 75-78, 107, 109. This is plausible cause and effect, and no more is needed to properly allege personal involvement based on creation of a policy under which unconstitutional acts occur.

Ashcroft ignores the factual allegations that link him to the specific conditions at MDC, instead arguing that, even if Plaintiffs adequately pleaded Ashcroft's creation of a policy to exert maximum pressure on the detainees, this policy is "fully consistent with lawful behavior" because it is possible to put lawful pressure on a detainee. Ashcroft Br. at 16. Perhaps; but that is not the policy Plaintiffs allege. *See* FAC ¶ 61 (alleging a policy to spread the word among law enforcement personnel that the 9/11 detainees "needed to be encouraged *in any way possible* to cooperate") (emphasis added). And it ignores Plaintiffs' factual allegations that Ashcroft's small group did not just set a goal; it "mapped out ways to exert maximum pressure" that directly resulted in the punitive conditions in which Plaintiffs were placed. *Id.* ¶¶ 61, 65.

Ashcroft suggests that he directed that Plaintiffs be placed in the most restrictive conditions authorized by the Bureau of Prisons, but not treated more harshly than is

authorized by the BOP. Ashcroft Br. at 15-16 (citing statement by BOP official that she was directed to remain "within the reasonable bounds of [the BOP's] lawful discretion.").[9] But as this Court held in 2006, detention conditions must be considered in context, and the context here is "plaintiffs [who] were not accused of any crime and were detained for significant periods of time. . . ." *Turkmen I*, 2006 U.S. Dist. LEXIS 39170, at *102. Plaintiffs have alleged that Ashcroft and Mueller knew that the detainees they sought to pressure had no connection to terrorism: this was the direct result of their policy. FAC ¶ 40-47, 56-57, 60a, 63, 67. There is no legitimate justification for holding civil immigration detainees, not accused of crimes or terrorism, for whom there is no evidence of dangerousness, in the most restrictive conditions authorized within the federal prison system, even in those conditions might lawfully be imposed in other situations, upon other prisoners.

Some of the conditions and mistreatment Plaintiffs allege, like interference with religious practice, went beyond what the BOP authorizes for *any* prisoner. But even here, Ashcroft's alternative explanation—that he intended Plaintiffs placed in conditions that are harsh but lawful—does not make Plaintiffs' theory of liability implausible. Taking as true Plaintiffs' allegations that (1) Ashcroft ordered detainees held in a way to "exert maximum pressure" upon them, and (2) immediately thereafter, that same group of detainees was placed in unconstitutional conditions, it is plausible to infer that (1) led to (2). *See Iqbal*, 129 S. Ct. at 1949 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

[9] Ashcroft takes the quoted phrase from the June OIG Report, at 113; but the words are not the OIG's—rather, they are the self-serving claim of a BOP official, not adopted by the OIG. (For the OIG's list of "serious questions about the treatment of the September 11 detainees housed at the MDC," June OIG Rep. at 158, *see id.* at 158-64.)

defendant is liable for the misconduct alleged.") Other explanations are *possible*, such as Ashcroft's suggestion that the unconstitutionality of the actual conditions might have been the accidental, rather than purposeful, result of his orders. But this alternative explanation is not *more* plausible than Plaintiffs', and certainly not so obvious as to defeat an inference of liability. Both *Iqbal* and *Twombly* are clear that a complaint need not rule out alternative explanations, or even provide the most probable explanation. *Twombly*, 550 U.S. at 555; *Iqbal* 129 S. Ct. at 1949. To do so would impose precisely the heightened pleading standard that *Iqbal* and *Twombly* disavow. 129 S. Ct. at 1949 (*citing Twombly*, 550 U.S. at 556-57).

At root, Ashcroft identifies a factual dispute that cannot be resolved on the pleadings. Discovery can be expected to lead to evidence which will further illuminate the details of Ashcroft's policy and his subsequent involvement in its implementation, perhaps decisively enough for summary judgment, perhaps leaving a question for a jury. There is no occasion for rushing to judgment now. *See, e.g., Brock v. Wright*, 315 F.3d 158, 165-66 (2d Cir. 2003) (where a prison commissioner created a policy alleged to have resulted in deliberate indifference to serious medical needs, and some evidence suggested that the policy was susceptible to both constitutional and unconstitutional interpretations, jury must decide whether the policy resulted in the alleged harm).

That Plaintiffs have not yet *proved* causation does not render their allegations implausible.

> None of this is to deny the wisdom of the old maxim that after the fact does not necessarily mean caused by the fact, but its teaching here is not that the inference of causation is implausible (taking the facts as true), but that it is possible that other, undisclosed facts may explain the sequence better. Such a possibility does not negate plausibility,

> however; it is simply a reminder that plausibility of allegations may not be matched by adequacy of evidence. A plausible but inconclusive inference from pleaded facts will survive a motion to dismiss . . .

Sepulveda-Villarini v. Dept. of Ed. of Puerto Rico, No. 08-cv-2283, 09-cv-1801, 2010 U.S. App. LEXIS 25228, at *12 (1st Cir. Dec. 10, 2010) (Souter, J., sitting by designation).

Finally, Ashcroft points to the differences in conditions between MDC and Passaic County Jail, arguing that if conditions were really set by him, they would not differ according to location. *See* Ashcroft Br. at 17-18. But Plaintiffs explain this difference in the complaint:

> There were not enough secure beds in federal jails like MDC to hold all the 9/11 detainees, so Ashcroft, Mueller and Ziglar's orders to encourage the 9/11 detainees to cooperate were implemented differently for the Passaic Plaintiffs and class members. Passaic Plaintiffs were denied the ability to practice their religion, were held in overcrowded general population units with convicted felons, and were subjected to physical and verbal abuse, including being menaced by dogs. However, they were not held in isolation or otherwise placed in restrictive confinement.

FAC ¶ 66. Only MDC Plaintiffs broadly challenge their conditions of confinement. If Ashcroft's orders led to their detention in unconstitutional conditions, it is no defense that other detainees escaped some of this harsh treatment due to the federal prison system's lack of capacity.

Next, Defendants Mueller and Ziglar: they worked with Ashcroft to create and implement the policy described above, and thus cannot escape liability based on their secondary roles. *See* FAC ¶¶ 22, 23, 41, 47, 55-57, 61-68. Indeed, that both expressed

concern about Ashcroft's policies, yet carried them forward regardless, underscores their knowing involvement with the illegal actions. *Id.* ¶¶ 41, 55.

Mueller also made specific decisions that impacted the duration of Plaintiffs' detention in harsh conditions. Contrary to normal FBI practice, he ordered the 9/11 investigation run out of FBI Headquarters, down to the details of whether each detainee was cleared or remained in the ADMAX SHU. *Id.* ¶¶ 56-57. This change meant that many Plaintiffs and class members who were quickly cleared of any possible connection to terrorism by the FBI field office assigned to their case lingered in the ADMAX SHU for months awaiting FBI headquarters sign-off. *Id.* ¶¶ 57, 67, 148-52, 167-69, 210-11, 224-27, 235-38, 262-64, 272. Mueller himself was personally involved in the implementation of this process with respect to individual Plaintiffs. *Id.* ¶¶ 168, 262. At the same time, he knew that the FBI had developed no information to tie the detainees to terrorism (*id.* ¶¶ 47, 67), and that these non-suspects were being held in harsh conditions until proven innocent. *Id.* ¶¶ 61, 65.

Ziglar joins Ashcroft's arguments, and adds that Plaintiffs have not adequately alleged his involvement in the challenged conditions of confinement because they have not detailed the "methods" the Washington D.C. Defendants mapped out to exert maximum pressure on Plaintiffs. Further, he complains that Plaintiffs have not adequately identified the ways in which he acted separately from Ashcroft and Mueller. *See* Ziglar Br. at 3-4.

First, the level of detail Ziglar seeks is not required by the law, nor is it reasonable to expect of civil rights plaintiffs as a matter of pleading. A plaintiff need not "set out *in detail* the facts upon which he bases his claim." *Twombly*, 550 U.S. at 556 n.3 (internal

quotation marks and citation omitted) (emphasis in the original); *see also Erickson v. Pardus,* 551 U.S. 89, 93 (2007) ("specific facts are not necessary"). Rather, a plaintiff must provide "enough fact set out (however set out, whether in detail or in a generalized fashion) to raise a right to relief above the speculative level to a plausible level." *Scaccia v. County of Onondaga*, 5:07-cv-0207, 2009 U.S. Dist. LEXIS 117080, at *14 (N.D.N.Y. Dec. 15, 2009). While Plaintiffs here, unlike most civil rights litigants, have by now received some discovery, and have the benefit of a detailed governmental report, they have not been allowed to depose or seek documents from anyone who attended the meetings at which the plan to exert maximum pressure was hatched. The exact contours of those discussions remain unknown.

For the same reason, the Court should not countenance, on a motion to dismiss, Ziglar's argument that he is not adequately distinguished from the other Defendants. Regardless, this is incorrect, as Plaintiffs indicate where their information suggests different roles played by the different Washington D.C. Defendants. *See, e.g.,* FAC ¶¶ 61-62 (implying that Ziglar was at many of the meetings during which maximum pressure was discussed, but did not play a leadership role in that process); ¶¶ 63-64 (describing the role Ziglar played in providing Ashcroft with detailed information about who was being arrested and other developments); *see also* ¶¶ 41, 47, 53, 55, 57 (summarizing other differences in Washington D.C. Defendants' involvement).

Along with Plaintiffs' claim that their conditions of confinement deprived them of substantive due process, they also allege that they were cut off from communication with the outside world and burdened in their ability to practice their religion at both MDC and Passaic. FAC ¶¶ 79-102, 131-39. While these allegations state separate constitutional

claims (*id.* ¶¶ 284-96), they are a part of the same policy of harsh treatment explained at length above, and are thus equally attributable to the Washington D.C. Defendants. Indeed, the Washington D.C. Defendants' responsibility for the communications blackout is exceptionally clear. FAC ¶¶ 61-62 (noting Washington D.C. Defendants' strategy to restrict 9/11 detainees' ability to contact the outside world and delay their immigration hearings).

B. Washington D.C. Defendants' Involvement in Equal Protection Violations

Plaintiffs also allege that they were selected for placement in ultra-restrictive confinement and treated harshly based on their race, religion, national origin, and ethnicity. FAC ¶ 282. *Iqbal* shows how to analyze this type of claim, instructing the Court to first separate Plaintiffs' factual allegations from those that are conclusory, and next to determine, in context, whether the well-pleaded factual allegations plausibly give rise to an entitlement to relief. 129 S. Ct. at 1950.

Here, as in *Iqbal*, Plaintiffs have asserted that their "race, religion, ethnicity, and national origin played a decisive role in Defendants' decision to detain them initially and to subject them to punitive and dangerous conditions of confinement." FAC ¶ 7. This conclusory allegation provides "the framework of a complaint" and depends on underlying factual allegations.[10] 129 S. Ct. at 1950.

The Supreme Court identified two factual allegations in *Iqbal* supporting his assertion of discrimination: that thousands of Arab and Muslim men were arrested and detained under Mueller's direction; and that the hold-until-cleared policy was approved

[10] Paragraph 282 is similar. Many, although not all, of the allegations in Plaintiffs' statements of their separate claims, ¶¶ 276-306, are likewise conclusory; they depend on the detailed factual allegations elsewhere in the Fourth Amended Complaint.

by Mueller and Ashcroft. *Id.* at 1951. Taken as true, the Supreme Court found these allegations "consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin." *Id.* But as we have noted, the Court found an "obvious alternative explanation" for Iqbal's treatment: that "a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the [9/11] attacks would produce a disparate, incidental impact on Arab Muslims *even though the purpose of the policy was to target neither Arabs nor Muslims* . . . ." *Id.* (emphasis added). Given this obvious explanation, the Court could not infer discrimination.

But here, in contrast to *Iqbal*, Plaintiffs make factual allegations inconsistent with a legitimate and neutral law-enforcement policy to investigate and detain suspected terrorists. 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." FAC ¶ 21, *see also* ¶ 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.

FAC ¶ 41 (emphasis added); *see also* ¶¶ 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. *Id.* ¶¶ 47, 60, 67. These are factual allegations, which must be treated as true.

Purposeful discrimination can also be inferred from Ashcroft's own statements displaying animus towards Muslims (*id.* ¶ 60d), other DOJ policies targeting Muslims, South Asians and Arabs (*id.* ¶ 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 (*id.* ¶¶ 42-47), and the impact of Ashcroft's policy on treatment of similarly situated detainees from other backgrounds. *Id.* ¶ 43 (alleging that 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); *see also ¶* 60c.

Moreover, unlike the plaintiff in *Iqbal*, Plaintiffs do not allege they were placed in restrictive confinement based on some law enforcement officer's determination that they were of "high interest" to the terrorism investigation. *Iqbal,* 129 S. Ct. at 1952. Our investigation has shown that no such determinations were made for many detainees held at the ADMAX SHU. FAC ¶¶ 1, 4 (alleging that four Plaintiffs were placed in the

ADMAX SHU without being classified as "high interest").[11] Rather, Plaintiffs allege that Ashcroft sought that *all* non-citizens who could be held under the immigration law, and who fit a certain profile, be placed in restrictive confinement, and encouraged "in any way possible" to cooperate. *Id.* ¶¶ 21, 41, 47, 53, 60e, 61. That some ended up at Passaic, in less restrictive confinement, was based only on lack of bed space at secure facilities like MDC. *Id.* ¶ 66.

[11] The OIG reported some fluidity in housing assignments: "'high interest detainees' were sent to BOP high-security facilities, while 'of interest' and 'interest unknown' detainees *generally* were housed in less restrictive facilities. . . ." June 2003 OIG Rep. at 25 (emphasis added). Even if this conflicted with Plaintiffs' allegation that some detainees were sent to MDC without being classed "high interest," Plaintiffs' incorporation of the OIG report has an exception "where contradicted by the allegations of this Fourth Amended Complaint." FAC at p. 3 n.1. Defendants maintain that partial incorporation is impossible. *See* Ashcroft Br. at 1 n.1, Hasty Br. at 8-9 n.4, Sherman Br. at 9 n.2. But that is not the law; a plaintiff is not required to adopt as true the full contents of any document attached to a complaint or incorporated by reference. *See Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 674 (2d Cir. 1995) (an "appended document will be read to evidence *what it incontestably shows* once one assumes that it is what the complaint says it is (or, in the absence of a descriptive allegation, that it is what it appears to be.)") (emphasis added); *In re Rickel & Assocs.*, 272 B.R. 74, 92 (S.D.N.Y. 2002) (attachment of Examiner's report to complaint foreclosed plaintiffs from arguing the Examiner "did not render a report, that the attachment is not the report he rendered, or that he reached conclusions that contradict the conclusions the Report says he reached . . . . On the other hand, the plaintiffs did not automatically adopt every statement in the Report . . . as true simply by attaching it to their Complaint.") Defendants' authorities do not support their argument otherwise. Two involve exhibits which were the basis of the plaintiffs' claim, in one case a contract and performance bond (*Fayetteville Inves. v. Comm'l Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cit. 1991)), and the other a securities prospectus (*I. Meyer Pincus & Assoc. v. Oppenheimer 7 Co.*, 936 F.2d 759, 762 (2d Cir. 1991)). One involves inconsistent allegations within the complaint itself. *Barberan v. Nationpoint*, 706 F. Supp. 2d 408, 424 (S.D.N.Y. 2010) (on the one hand, there was no loan, on the other, the loan was kept current). One offers only a general statement about what to do when pleadings conflict (*In re Livent Noteholders Sec. Lit.*, 151 F. Supp. 2d 371, 405-6 (S.D.N.Y. 2001)). Finally, one court allowed use of documents not referred to in the complaint, but which the *defendants* said were the basis of the plaintiffs' allegations (*Sturm v. Marriott Marquis Corp.*, 85 F. Supp. 2d 1356, 1366 (N.D. Ga. 2000)).

While Ashcroft was in charge, 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. FAC ¶ 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. *Id.* ¶¶ 45, 46. Mueller ignored this advice, as that was precisely what his and Ashcroft's policy required. *Id.* ¶¶ 42-44; *see also* ¶ 143 (Abbasi came to attention of FBI based on tip that a "male, possibly Arab" left a false social security card bearing Abbasi's address at the DMV); ¶ 158 (Mehmood's arrest arose from same tip); ¶ 195 (Khalifa came to attention of FBI based on tip that several Arabs at his address were renting a post-office box and possibly sending out large quantities of money); ¶ 230 (Bajracharya came to attention of FBI based on tip that "Arab male" was videotaping outside a Queens office building that contained the DAs office and an FBI office); ¶ 251 (Turkmen came to the attention of the FBI based on 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"); ¶ 270 (Sachveda came to the attention of FBI through a 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 June 2003 report of the Office of the Inspector General, at 16-17.[12]

[12] All references to "OIG Rep." in this memorandum are to this first report.

Ziglar argues that he cannot be held responsible for this discriminatory targeting, because Plaintiffs have not alleged that he acted "from any improper bias." Ziglar Br. at 5. But the policy he helped create, to target Arabs, Muslims, and South Asians for investigation and maximum pressure, was discriminatory on its face. FAC ¶¶ 23, 47, 56, 60-66. Plaintiffs' factual allegations rule out a good-faith desire to pressure those legitimately suspected of ties to terrorism. *Id.* ¶¶ 47, 60.

C. MDC Defendants' Involvement in MDC Policy

Like the Washington D.C. Defendants, those Defendants who ran the ADMAX SHU at MDC also claim Plaintiffs have not plausibly alleged their involvement in conditions and mistreatment on the unit they oversaw.

First, MDC Defendants contest their responsibility for the restrictive and abusive conditions put in place *as a matter of policy* on the ADMAX SHU, including 23-24 hour-a-day lockdown in an isolation unit; transportation in handcuffs, shackles, and a waist chain, pursuant to a four-man hold; frequent and redundant strip-searches; heavy restrictions on all forms of communication; denial of recreation; inadequate provision of hygiene and religious items; sleep deprivation; extremes of temperature; and failure to provide information about internal complaint policies. But factual allegations tie each Defendant to each policy.

Defendant Hasty appears to concede involvement in the communications blackout and subsequent communications restrictions (Claims Four and Five), and in those aspects of Claims One and Two involving placement of the detainees in isolation in the ADMAX SHU (Hasty Br. at 16); he argues, however, that Plaintiffs have not plausibly alleged his involvement in other abusive policies at his institution. *Id.* at 17-25. But Hasty directly caused these violations by ordering his subordinates to design uniquely restrictive

conditions of confinement (FAC ¶ 75), and then approving those conditions as official MDC policy.

> 76. . . . The ADMAX SHU at MDC was established after September 11, 2001 to make available more restrictive confinement. Unlike the regular SHU, in the ADMAX SHU detainees were handcuffed, shackled, chained, and accompanied by four guards whenever they left their cell, which was only permitted for extremely limited purposes. Two cameras were placed in each cell to monitor each inmate 24 hours a day, hand-held cameras recorded their movements whenever they left their cells, and the lights were left on 24 hours a day. Unlike detainees in the general population at MDC, detainees in the ADMAX SHU were detained in their cell for at least 23 hours a day, and were not allowed to move around the unit, use the telephone freely, or keep any property, even toilet paper, in their cell. MDC Plaintiffs and class members were subjected to these restrictive conditions in the ADMAX SHU for between three and eight months *pursuant to a written policy drafted by Cuciti, signed by LoPresti, and approved by Sherman and Hasty, and subsequently by Zenk.*
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> * * *
>
> 126. . . . Despite receiving many complaints about the cold, Hasty decided not to issue warmer clothing to the 9/11 detainees, and decided that recreation would continue to be offered only in the chilly early morning.
>
> * * *
>
> 130. MDC Plaintiffs and class members were also denied access to basic hygiene items like toilet paper, soap, towels, toothpaste, eating utensils, personal reading glasses, and a cup for drinking water, *pursuant to a written MDC policy created by Cuciti and LoPresti, and approved by Sherman and Hasty.* Under the policy, hygiene items were passed out and then retrieved daily. Thus for the first several months of their detention, the MDC Plaintiffs and class members were not allowed to keep toilet paper, a towel, soap, a toothbrush, a cup, or other personal hygiene items in their cells, making it difficult to maintain proper health and hygiene, contrary to religious dictates and personal dignity. This policy was created for the 9/11

> detainees, and had never been imposed on inmates in administrative or disciplinary segregation at MDC before.
>
> * * *
>
> 132. Soon after their arrival at MDC, Plaintiffs requested copies of the Koran, but did not receive them until weeks or even months later, *pursuant to a written MDC policy (created by Cuciti and LoPresti, and approved by Hasty and Sherman)* that prohibited the 9/11 detainees from keeping anything, including a Koran, in their cell. . . .

Id. (emphasis added); *see also* ¶ 104 (restraint policy), ¶ 111 (strip-search policy), ¶ 119 (sleep deprivation policy).

Defendant Hasty does not contend that these detailed allegations are conclusory; rather, he denies fault because he was just the man in the middle: merely "implementing" policies "directed" by his superiors, while "approving" policies "created" by his subordinates. *See* Hasty Br. at 24.

But more than one Defendant can be liable for the development of an unconstitutional policy. Plaintiffs do not allege that Defendants Ashcroft, Mueller, and Ziglar set the details of how many guards would escort each handcuffed, shackled detainee as he was shuffled to an interrogation, or the best way to "offer" recreation, while making sure it would be too unpleasant to accept. Rather, the Washington D.C. Defendants created a policy to isolate Plaintiffs from the outside world, exert pressure upon them, and ensure they were urged to cooperate. FAC ¶ 61. It is reasonable to infer that it was left to others, like Warden Hasty, to determine exactly how that policy would be implemented at a given institution. And this Hasty did. *See, e.g., id.* ¶ 76 (ordering lights kept on 24 hours a day); ¶ 126 (providing recreation only in the freezing early hours, without appropriate apparel); ¶130 (denying hygiene supplies); ¶ 132 (barring

Plaintiffs from retaining a *Koran* in their cell). That Hasty's detailed decision-making can also be referred to as "implementing" another's orders is important for purposes of the Washington D.C. Defendants' liability, but it does not insulate Hasty's own role from review. *See, e.g., McClary v. Coughlin*, 87 F. Supp. 2d 205, 215 (W.D.N.Y. 2000) *aff'd* 237 F.3d 185 (2d Cir. 2001) ("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").

Nor can Hasty avoid personal responsibility by hiding behind his subordinates. There is nothing "passive" (Hasty Br. at 24), about ordering another to create an unlawful policy, and then approving the details of that creation. Even under the most restrictive view of *Iqbal*, a supervisor may still be held liable for "creation" of an unconstitutional policy, whether or not he types it himself. *See, e.g., McNair v. Kirby Forensic Psychiatric Ctr.*, 09 Civ. 6660, 2010 U.S. Dist. LEXIS 118156, at *23-24 (S.D.N.Y. Nov. 5, 2010) (liability for creating a policy under which unconstitutional practices occur survives *Iqbal*); *see also, McClary*, 87 F. Supp. 2d at 215 ("The requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or should reasonably have known would cause others to deprive the plaintiff of her constitutional rights.")

Defendant Sherman, who served as MDC's Associate Warden for Custody during the detentions (FAC ¶ 26), also seeks dismissal for failure to plead personal involvement. Plaintiffs' allegations against Sherman largely mirror their allegations against Hasty, with one important difference: Plaintiffs do not allege that Sherman ordered others at the MDC to create the unlawful policies. As far as Plaintiffs now know, Hasty played this

role alone. Rather, Sherman worked with Hasty to review the draft policies, and approve them for implementation at the ADMAX. *Id.* ¶¶ 75, 76, 79, 126, 130, 132.

In the face of these factual allegations, Defendant Sherman's first defense is numerical. *See* Sherman Br. at 7 ("Of the 306 paragraphs that comprise Plaintiffs' Complaint, Sherman is named in only 13 of them, and one of them is where he is identified as a party.") But pleading is a matter of quality, not quantity.

Sherman also objects to Plaintiffs' allegations as "conclusory" and "boiler-plate" (Sherman Br. at 8), but far from it, the paragraphs about Sherman are replete with specific facts—including details of the challenged conditions, and the minutia of what official MDC documents reported about individual Plaintiffs—and distinguish each Defendant's role. FAC ¶¶ 69-76, 79, 126, 130, 132.

Defendants LoPresti and Cuciti adopt Hasty and Sherman's arguments without alteration, ignoring Plaintiffs' allegations that, unlike the Warden and Associate Warden, LoPresti and Cuciti actually drafted or signed the challenged policies. *Id.* ¶ 27 (LoPresti was responsible for overseeing the ADMAX unit and took part in creating the unreasonable and punitive conditions on the ADMAX unit at the request of Hasty); ¶ 28, (Cuciti drafted MDC's policy regarding conditions at the ADMAX and created strip-search policy); ¶ 76 (policy drafted by Cuciti and signed by LoPresti imposed heavy use of restraints, 24 hour videotaping and lights, detention in cell 23 hours a day, and prohibition of hygiene items or any other property); *see also ¶¶* 75, 79, 97, 111, 130, 132 (alleging LoPresti's and Cuciti's roles in creating other challenged policies).

Because Warden Zenk arrived at MDC in the spring of 2002, Plaintiffs do not allege that he played any role in creating the unlawful policies in question; rather, he inherited them, learned what they were, and ordered that they continue.

Plaintiffs agree that only those Plaintiffs who were held in the ADMAX SHU during Zenk's tenure have claims against Zenk. Thus Zenk's potential liability runs only to Plaintiffs Benatta and Hammouda (as well as any members of the class, if one is certified, held at the ADMAX SHU past April 22, 2002). Plaintiff Benatta was held eight days in the ADMAX SHU under Warden Zenk's tenure; Plaintiff Hammouda suffered almost two additional months in restrictive conditions under Warden Zenk's watch. *Turkmen I*, 2006 U.S. Dist. LEXIS 39170, at *69 n.21; *see also* FAC ¶¶ 188, 227.

Plaintiffs allege that Zenk was aware of the challenged conditions; unlike Hasty, Zenk actually made rounds on the ADMAX, and thus could not fail to notice a category of detainee being held in the ultra-restrictive conditions previously reserved by the BOP for dangerous, repeat rule-breakers. *Id.* ¶¶ 25, 75, 76, 97. Indeed, it is implausible to imagine that Zenk inherited the extremely high-profile 9/11 detainees, by then the source of a class-action lawsuit, countless newspaper articles, public protests and internal investigations, and yet remained unaware of the conditions and restrictions under which they were held.[13] *Id.* ¶¶ 91, 107, 164.

When Zenk was confronted with the unlawful conditions on the ADMAX, he not only failed to take corrective measures, but also ordered the violation of BOP policy that

[13] The Complaint in this matter was filed on April 17, 2002. It was brought against Warden Hasty and the Washington D.C. Defendants, and included allegations of unreasonable and excessively harsh conditions of confinement, verbal and physical abuse, sleep deprivation, denial of recreation, unnecessary strip-searches, and interference with religious practice. *See* Docket No. 1.

allowed these conditions to continue. *Id.* ¶ 68 (Zenk ordered his subordinates to violate BOP regulations limiting circumstances in which detainees may be placed in SHU and requiring regular reviews of such placement). This allegation, which Zenk acknowledges is factual, establishes Zenk's awareness that the 9/11 detainees were being held in the ADMAX SHU in violation of BOP policy, and his affirmative steps to continue the unlawful and unprecedented segregation. No more is needed to tie Zenk to the conditions of the ADMAX.

D. MDC Defendants' Involvement in Abuse at MDC

Above, we have detailed MDC Defendants' personal involvement in the restrictions imposed on Plaintiffs as a matter of policy; other abuses endemic to the ADMAX had a separate genesis. Some practices, like verbal abuse (*id.* ¶¶ 60d, 109-10, 147, 162, 166, 218, 222, 241), physical abuse (*id.* ¶¶ 104-8, 162, 166, 177, 182, 201, 205, 218, 221, 234), aspects of sleep deprivation (including bar taps and jeers throughout the night, *id.* ¶ 120), and religious abuse (including taunts during prayer, *id.* ¶ 136), were caused not by the creation of official policy, but rather by Defendant Hasty's creation of an atmosphere affirmatively designed for abuse, and his subordinates' complicity in that abuse.

As laid out at length in Section II, A above, Ashcroft and his team ordered word spread among law enforcement that the 9/11 detainees were "suspected terrorists" who needed to be urged to cooperate "in any way possible." FAC ¶ 61. Hasty went one step further, announcing to MDC staff that the detainees were "terrorists," without acknowledging they had not been accused (much less convicted) of such crimes. *Id.* ¶¶ 77, 109. He placed them in isolation (*id.* ¶¶ 68, 76), and denied them access to the outside world (*id.* ¶¶ 79-102), as well as the means to file an internal complaint. *Id.*

¶ 140. In an attempt to remain blind to the abuse this facilitated, he then changed his own behavior, violating BOP policy by failing to make rounds on the ADMAX. *Id.* ¶ 24. Nevertheless, he was repeatedly informed of the resulting abuse by staff, detainees, official documents, logs, videos, and investigations. *Id.* ¶¶ 24, 77-78, 97, 107, 114, 123, 126, 137. MDC staff who brought allegations of abuse to Hasty's attention were harassed and isolated. *Id.* ¶ 78. Far from a mere failure to correct unlawful action, or a failure to train, Plaintiffs' allegations detail a proactive policy by Hasty to encourage abuse, and then ignore it.[14]

Unlike Hasty, Defendants Sherman, LoPresti, and Cuciti made regular rounds on the ADMAX unit, thus witnessing inhumane conditions and positioning themselves to directly hear Plaintiffs' complaints of mistreatment.[15] *Id.* ¶ 26 (Sherman made rounds on the ADMAX, was aware of conditions there, and allowed his subordinates to abuse Plaintiffs with impunity), ¶ 27 (LoPresti had responsibility for supervising all MDC officers, and overseeing the ADMAX unit; he was frequently present on the ADMAX, received numerous complaints of abuse from 9/11 detainees, and failed to correct these abuses); ¶¶ 28, 104-105 (Cuciti was responsible for escorts of 9/11 detainees, during which much abuse occurred; he made rounds on the ADMAX and heard complaints from Plaintiffs of abuse, yet failed to rectify that abuse); *see also* ¶¶ 77, 110, 121, 226.

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[14] Hasty argues that any allegation against more than one Defendant is "conclusory." This is groundless. As with an allegation against a single defendant, the test is whether a given allegation is merely formulaic, or incorporates facts. Moreover, the allegations Defendant Hasty seeks to discount in this manner repeat more specific allegations, and thus are not necessary for Plaintiffs' theory of liability. *See* Hasty Br. at 18 (discounting as "conclusory" FAC ¶¶ 146, 165, 176, 204, and 220).

[15] Plaintiffs do not seek to hold Defendant Zenk responsible for the abuses that occurred on the ADMAX beyond those imposed as a matter of policy, and discussed in section II, C, above.

Knowing of abuse and failing to correct it, Defendants Sherman, LoPresti and Cuciti exhibited deliberate indifference to substantive due process and First Amendment violations. While Defendants are each "supervisors" at one level or another, Plaintiffs' theory of liability here is not supervisory in nature; it is not based on the failures of their subordinates, or on improper training and supervision (though Defendants failed in that regard as well), but on Defendants' personal failure to act when confronted with direct evidence of constitutional violations. Even *Bellamy*, on which Defendants rely, allows liability for a supervisor who personally exhibits deliberate indifference to a challenged practice (2009 U.S. Dist. LEXIS 3787, at *28); *see also Shomo v. New York*, No. 07-cv-1208, 2009 U.S. App. LEXIS 23076, at *17 (2d Cir. April 1, 2009) (granting plaintiffs leave to re-plead to allege that supervisors were made aware of or failed to act to correct unconstitutional deprivations).

E. MDC Defendants' Involvement in Discrimination

Plaintiffs allege that MDC Defendants singled them out for placement in the harsh and abusive conditions described above because of their race, religion, ethnicity and national origin. FAC ¶ 7; *cf. Iqbal,* 129 S. Ct. at 1952 (to survive motion to dismiss, "complaint must contain facts plausibly showing petitioners purposefully adopted a policy of classifying post-September-11 detainees as 'of high interest' because of their race, religion, or national origin").

According to MDC Defendants, Plaintiffs' allegations describing Defendants' discriminatory purpose are conclusory (Hasty Br. at 24), and contradicted by "facts [which] demonstrate otherwise—that [MDC Defendants] were carrying out orders implemented by higher-federal level officials because of national security concerns after

the September 11 attacks." Sherman Br. at 13. But even if Defendants' acts were partially motivated by instructions from their superiors, that would not render implausible Plaintiffs' allegations of Defendants' own discriminatory purpose. *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 prove that the 'challenged action rested solely on racially discriminatory purposes.'") (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)).

Moreover, here, as above, Defendants have no "obvious, alternative explanation" for mistreatment based on a suspected link to terrorism, rather than discriminatory animus. *Iqbal,* 129 S. Ct. at 1951. That alternative explanation is directly contradicted by Plaintiffs' factual allegations that Defendants Hasty, Zenk, Sherman, LoPresti and Cuciti singled out Plaintiffs and class members for restrictive confinement without the individualized assessment the BOP requires for all other similarly situated detainees (FAC ¶ 68), and then continued this restrictive confinement after learning that the FBI could find *no* information to connect Plaintiffs to terrorism or raise a concern that they might be dangerous. *Id.* ¶¶ 69-74.

That MDC Defendants affirmatively lied about this process, falsely claiming that individualized assessments had been carried out to justify the restrictive conditions, further suggests improper motive. *Id.* ¶ 74. *Cf. Henry v. Daytop Vill.*, 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").

Defendant Hasty's repeated and unjustified references to Plaintiffs as "terrorists" provides further support for Plaintiffs' claim of discrimination (FAC ¶¶ 77, 109), as does all the MDC Defendants' acceptance of their subordinates' slurs and religious abuse. *Id.* ¶¶ 60d, 109-10, 136, 147, 162, 166, 218, 222, 241.

F. All Defendants' Involvement in Conspiracy

Claim 7, Conspiracy to Violate Civil Rights, rests upon the allegations supporting the other claims. As Plaintiffs adequately allege Defendants' personal involvement in those claims, so too are the allegations of Defendants' involvement in the alleged conspiracy adequate. The legal sufficiency of Plaintiffs' conspiracy claim is set out in Section V, F below.

G. The Court Has Personal Jurisdiction Over All Defendants

Defendant Ashcroft states in his motion that Plaintiffs have failed to demonstrate that the Court has personal jurisdiction. He does not support this argument with citation or precedent, nor even mention it in his legal brief.

This defense was waived in 2002, when the Washington D.C. Defendants moved to dismiss the First Amended Complaint without asserting a lack of personal jurisdiction. *See* Docket No. 9 (Letter from Timothy Garren to Judge Gleeson, dated July 29, 2002, setting forth grounds for dismissal of First Amended Complaint); *see also* Defendants' Joint Motion to Dismiss and supporting memorandum, dated Aug. 26, 2002; *Gilmore v. Shearson. Am. Express Inc.,* 811 F.2d 108, 112 (2d Cir. 1987); *see also Santos v. State Farm Fire & Cas. Co.*, 902 F.2d 1092, 1095-96 (2d Cir. 1990). Regardless, Plaintiffs' pleadings of personal involvement suffice to establish personal jurisdiction. *Iqbal v.*

Hasty, 490 F.3d 143, 177 (2d Cir. 2007) *rev'd on other grounds*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

III. DEFENDANT HASTY'S AND SHERMAN'S ACTIONS WERE NOT OBJECTIVELY REASONABLE.

While Washington D.C. Defendants insist on the distance between themselves in Washington and everything that happened at MDC in Brooklyn, Defendants Hasty and Sherman insist that what happened in Brooklyn was dictated from Washington, and consequently that their own conduct was "objectively reasonable" under the circumstances. Hasty Br. at 5-13; Sherman Br. at 11-14. This defense rests on a mischaracterization of the OIG reports, complete avoidance of Plaintiffs' well-pleaded allegations, and misstatements of law.

Hasty and Sherman ask this Court to rule that it was reasonable to confine Plaintiffs under maximum security in the ADMAX SHU for up to eight months without any notice or hearing, for weeks at the outset denying them all access to the outside world, and then allowing only the most restricted access, taping their attorney-client communications, and moreover doing all of this based on Plaintiffs' race, religion and ethnicity, because they undertook these actions under orders from their superiors. On this basis, Defendant Hasty seeks qualified immunity with respect to those parts of Claims One and Two that involve placement in the ADMAX SHU, and all of Claims Four and Five. Hasty Br. at 13. Defendant Sherman advances this argument with respect to Claims One, Three, Four and Five. Sherman Br. at 11-12, 13, 15-16.

To obtain qualified immunity Defendants must show that their challenged acts were objectively reasonable in light of the law existing at that time and the information they possessed. *Varrone v. Bilotti*, 123 F.3d 75, 78 (2d Cir. 1997). Due to the "factual

nature of this qualified immunity inquiry . . . it is rarely appropriate to recognize the defense on a motion to dismiss." *Meserole St. Recycling, Inc. v. New York*, No. 06 Civ. 1773, 2007 U.S. Dist. LEXIS 4580, at *24 (S.D.N.Y. Jan. 23, 2007); *see also Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 191-92 (2d Cir. 2006) ("A qualified immunity defense can be presented in a Rule 12(b)(6) motion, but the defense faces a formidable hurdle when advanced on such a motion and is usually not successful.") (internal quotation marks and ellipsis omitted). Even with the help of the OIG reports, Hasty and Sherman do not make the required showing.

Principally, Defendants argue that their actions were based on "facially valid orders" from their superiors that were objectively reasonable given the context of 9/11. This argument fails for three independent reasons. First, Hasty and Sherman offer no support for their claim of a purely passive role, and the Complaint alleges otherwise. Second, the orders they claim to have relied on were not facially valid. Third, the 9/11 attacks did not make their illegal actions reasonable.

A. Plaintiffs Allege Hasty's and Sherman's Active Involvement in Setting MDC Policy.

Hasty and Sherman claim a defense available to those who follow, but do not create, plausible though unlawful policy. *See Varrone*, 123 F.3d at 81-82. Because Plaintiffs allege Hasty and Sherman's involvement in setting policy, not just implementing it, this defense is unavailable.

The Fourth Amended Complaint includes well-pled, factual allegations that both Hasty and Sherman participated in creating the policies that resulted in Plaintiffs' prolonged detention in the ADMAX SHU, the communications blackout and other restrictions. *See* FAC ¶ 24 (Hasty ordered the creation of the ADMAX SHU); ¶ 68

(Hasty ordered his subordinates to ignore BOP regulations regarding detention conditions); ¶ 74 (Hasty conspired with Sherman and others to hide their failure to undertake an individualized determination as to Plaintiffs' potential dangerousness); ¶¶ 76, 79, 83-102, 126, 130, 132 (Hasty ordered creation of restrictive conditions which Sherman approved).

Hasty and Sherman insist that they are exonerated from any role in setting policy by the OIG reports; but this is not the case. For example, Defendant Hasty relies on statements in the June OIG Report that "the BOP" made the decision to detain Plaintiffs in the ADMAX SHU at MDC and bar all communications. Hasty Br. at 8 (citing June OIG Rep. at 19-20, 112); *see also* Sherman Br. at 12 (citing June OIG Rep. at 19, 113, 115 n.91, 116). But Hasty and Sherman were the BOP employees in charge of conditions at MDC, and the OIG report neither affirms nor denies their role in setting policy. Silence in the OIG report as to Hasty and Sherman's role in setting policy does not contradict Plaintiffs' express allegations.

And while Hasty and Sherman make much of the OIG's finding that the BOP "ordered" the communications blackout challenged in Claims Four and Five (Hasty Br. at 9, citing June OIG Rep. at 112), they fail to acknowledge evidence cited by the OIG, along with Plaintiffs' allegations, that the communications restrictions at MDC lasted longer and were more extensive than those ordered by BOP supervisors. *See* June OIG Rep. at 113-14; FAC ¶¶ 79-102. Hasty and Sherman similarly state that BOP officials instructed them to keep Plaintiffs in the ADMAX SHU until cleared of any connection to terrorism (Hasty Br. at 9), but ignore Plaintiffs' allegations that Hasty declined to follow BOP policy that would have led to an individualized assessment of the propriety of

keeping Plaintiffs in the SHU (FAC ¶ 68), and that several Plaintiffs were held in the ADMAX long past the time that they were cleared of any connection to terrorism. *Id.* ¶ 188 (Benatta held in ADMAX SHU five and half months after cleared of any connection to terrorism by FBI headquarters); ¶ 211 (Khalifa held in ADMAX SHU one month after cleared of any connection to terrorism by FBI Headquarters).

B. If Hasty and Sherman Followed Orders, the Orders Were Facially Invalid and Unreasonable.

Even if Defendants Hasty and Sherman merely carried out their supervisors' orders to hold Plaintiffs in the ADMAX SHU and restrict their ability to contact the outside world, they remain liable because these actions violate clear constitutional rights.

The claim that an official is "[a]cting under the advice or order of a superior does not ipso facto immunize [that official] from suit." *Zieper v. Metzinger*, 392 F. Supp. 2d 516, 537 (S.D.N.Y. 2005) (citation omitted). A government officer who violates constitutional rights while following the order of a superior is not entitled to qualified immunity unless that order is "apparently valid." *Anthony v. City of New York*, 339 F.3d 129, 138 (2d Cir. 2003). Qualified immunity is not available to an officer who relies on an invalid order. *Diamondstone v. Macaluso*, 148 F.3d 113, 126 (2d Cir. 1998) (finding that the defendant was not entitled to qualified immunity, and noting that he was prohibited from violating the plaintiff's constitutional rights "regardless of what his superior officers told him").

As Plaintiffs show below, the illegality of Defendants' actions was clearly established in 2001. *See* Section V. Neither the events of September 11, nor Defendants' discriminatory notions of the dangers posed by Muslim immigration violators of Arab or South Asian descent changed that clearly established law. *Iqbal*, 490 F.3d at 169 (The

context of 9/11 "does not lessen Plaintiff[]s right[s] … to be free of punitive conditions of confinement"). Indeed, this defense borders on offensive with respect to some of Plaintiffs' allegations. *See* Sherman Br. at 15 (arguing Sherman acted in good faith in approving a policy to deny Plaintiffs access to the *Koran.*)

According to Hasty, the BOP had "many legitimate reasons" for Plaintiffs' assignment to the ADMAX SHU, including the FBI's high interest designation, "reserved for those believed to have the greatest likelihood of being connected to terrorism," and the BOP's resulting "belief" that the September 11 detainees were associated with terrorism and thus a danger to prison employees. Hasty Br. at 11, 8. Defendants claim that, for this reason, the BOP reasonably decided to "err on the side of caution," and treat Plaintiffs as high security. Hasty Br. at 8 (citing June OIG Rep. at 19).

But the portions of the June OIG report cited by Hasty indicate that the FBI's interest designation was based on "little or no concrete information" tying the detainees to terrorism, and the BOP's housing determinations were based on ignorance: "the BOP did not know who the detainees were or what security risk they might present." June OIG Rep. at 18, 112. There is no mention in the cited pages of any belief by BOP officials that the detainees were associated with terrorism or dangerous in any way.

Relying on the unsubstantiated advice of others does not support a finding of objectively reasonable conduct or qualified immunity. *See Cardiello v. Sexton*, No. 08-cv-4610, 2010 U.S. App. LEXIS 17106, at *15-16 (3d Cir. Aug. 13, 2010) ("[W]here the arresting officer never received a clear statement from a fellow law enforcement officer . . . and instead relied on vague or irrelevant statements by other officers, the arresting officer is not entitled to qualified immunity."); *Barham v. Salazar*, 556 F.3d 844, 849

(9th Cir. 2009) (reliance on statement of fellow officer not sufficient to demonstrate an objectively reasonable basis for participating in mass arrest).

Moreover, Hasty and Sherman knew that the FBI had no information linking Plaintiffs to terrorism. An MDC intelligence officer updated Hasty and Sherman regularly about the FBI's investigation of Plaintiffs, with information on the reason for each detainee's arrest and any potential danger a detainee might pose to the institution. FAC ¶ 69. These reports included information indicating that some Plaintiffs were "encountered" by the INS or other federal agents, but nothing in the reports indicated that Plaintiffs were linked to terrorist activities. *Id.* ¶¶ 70-72. "The exact language of these updates was repeated weekly." *Id.* ¶ 73. Although Hasty and Sherman were regularly informed about the extent of the FBI investigation of Plaintiffs, both Defendants continued to hold Plaintiffs in punitive confinement. *Id.* ¶ 73. Defendants' personal knowledge of the reasons for Plaintiffs' confinement, through weekly written reports, and their decision to disregard the clear lack of information connecting Plaintiffs to any kind of terrorist activity, belie their claim of reasonable reliance on the FBI's assessment. *Id.* ¶ 74. Similarly, the OIG reports a statement by one government official that, upon review of detainees' files, it was "obvious" that the "overwhelming majority" were simply visa violators and had no connection to the terrorism investigation. June OIG Rep. at 65 n.50.

That Defendants' conduct was objectively unreasonable is further demonstrated by their willful disregard of agency regulations. *See Groh v. Ramirez*, 540 U.S. 551, 564 (2004) (finding reliance on a Magistrate's assurance unreasonable where, among other things, "the guidelines of petitioner's own department placed him on notice that he might

be liable for executing a manifestly invalid warrant"); *cf. Sec. & Law Enforcement Employees v. Carey*, 737 F.2d 187, 211 (2d Cir. 1984) (granting qualified immunity where conduct was "based upon the defendants' good-faith reliance on the Department's rules and regulations in effect at the time"). Hasty ordered his subordinates to ignore BOP regulations that limit the circumstances in which detainees may be placed in the SHU, and require regular assessments of each inmate's status. FAC ¶ 68.

Finally, Defendants repeatedly emphasize the emotionally-charged events of September 11 as the frame and justification of their actions. Hasty Br. at 9, 11; Sherman Br. at 12, 13, 14. That distorts the issues here.

Certainly, September 11, 2001, was a traumatic day for everyone in America. We all remember when we first learned of the terrorist attacks. But this action puts in issue the conduct of Defendants over the next *eight months*, in which they repeatedly violated Plaintiffs' constitutional rights. FAC ¶¶ 24, 26; *contrast Anthony*, 339 F.3d at 138 (officers responding to 911 call); *Lennon v. Miller*, 66 F.3d 416, 424 (2d Cir. 1995) ("[T]he doctrine of qualified immunity serves to protect police from liability and suit when they are required to make on-the-spot judgments in tense circumstances.") (citing *Calamia v. City of New York*, 879 F.2d 1025, 1034-35 (2d Cir. 1989) (quoting *Graham v. Connor*, 490 U.S. 386 (1989)).

The courts' understandable solicitude for officers caught in a crisis does not apply to Defendants Hasty and Sherman. They had months to consider, and reconsider, their actions toward Plaintiffs. These months, during which Defendants might have corrected their conduct, provide the proper context for evaluating their actions. As we have noted, Defendants' extended opportunity for considering the circumstances was aided by the

written updates they were provided weekly, and could have used to assess any danger Plaintiffs might pose to the institution. FAC ¶¶ 69-74. These concrete facts—rather than the speculation invited by the broad, amorphous invocation of the "terrorist attacks"—are the most appropriate context for evaluating whether Defendants' conduct was "objectively reasonable." In this context, dismissal of Plaintiffs' claims is inappropriate.

IV. PLAINTIFFS ARE ENTITLED TO A *BIVENS* REMEDY.

Defendants also claim that Plaintiffs have no remedy under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), because this case presents a "new context" in which *Bivens* claims should not be recognized. But there is nothing new about Plaintiffs' claims; they seek monetary damages for mistreatment in detention by individual federal officers, an accepted basis for *Bivens* relief. Only Plaintiffs' Third and Fourth Claims present the issue of extending *Bivens*, and a *Bivens* remedy should be allowed for those claims because Plaintiffs have no other means of redress; nor do any "special factors" counsel against a *Bivens* remedy.

A. Most of Plaintiffs' Claims Do Not Present a "New Context" for *Bivens*.

The first question a court must consider when determining the availability of a *Bivens* remedy is "whether allowing this *Bivens* action to proceed would extend *Bivens* to a new 'context.'"[16] *Arar v. Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (*en banc*). If the answer is yes, the court must then determine "whether such extension is advisable." *Id.* Thus, whether a *Bivens* action is foreclosed by an existing comprehensive remedial

[16] Plaintiffs did not raise this issue in response to Defendants' motions to dismiss the Third Amended Complaint and thus the Court did not address it in *Turkmen I*. Indeed, in that round of briefing Defendants did not challenge the availability of a *Bivens* remedy for several of the claims currently before the Court. *See Turkmen I*, 2006 U.S. Dist. LEXIS 39170 at *90-91.

scheme, or "special factors counseling hesitation," "is only implicated where Plaintiffs' *Bivens* claims extend into areas where *Bivens* remedies have not already been realized." *Guardado v. United States*, No. 10-cv-151, 2010 U.S. Dist. LEXIS 104862, at *17 (E.D. Va. Sep. 30, 2010); *see also Bender v. Gen. Servs. Admin.*, 539 F. Supp. 2d 702, 710-11 (S.D.N.Y. 2008).

In *Arar*, the Second Circuit defined "context" "as it is commonly used in law: to reflect a potentially recurring scenario that has similar legal and factual components." 585 F.3d at 571. A close reading of the relevant precedent suggests three ways in which the legal or factual components of a claim may present a new context for *Bivens* purposes: (1) the claim arises under a Constitutional provision previously unrecognized for a *Bivens* remedy; (2) the claim relates to a new subject matter; or (3) the claim is brought against a new category of defendant. The majority of Plaintiffs' claims require no extension of *Bivens* beyond legal and factual contexts already recognized by the Supreme Court and Second Circuit.

The first kind of new context is identified in *Iqbal,* where the Supreme Court distinguished between Iqbal's Fifth Amendment and First Amendment claims, implying that only the latter required an extension of *Bivens*. *See Iqbal*, 129 S. Ct. at 1948 ("while we have allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment, *see Davis v. Passman*, 442 U.S. 228 (1979), we have not found an implied damages remedy under the Free Exercise Clause.")

Viewed thus, there is nothing new in Plaintiffs' First, Second, Fifth and Sixth Claims. The Second and Sixth Claims allege violations of the Fourth and Fifth Amendment, recognized by the Supreme Court as appropriate bases for *Bivens* relief.

See Davis v. Passman, 442 U.S. 228 (1979) (recognizing a Fifth Amendment equal protection claim); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing a Fourth Amendment claim). Moreover, while Plaintiffs' First and Fifth Claims sound in substantive due process, the legal analysis required for these claims is closely related to that conducted under the Eighth Amendment, recognized by the Supreme Court in *Carlson v. Green*, 446 U.S. 14 (1980), as appropriate for a *Bivens* action. *See Caiozzo v. Koreman*, 581 F.3d 63, 71 (2d Cir. 2009) (applying same deliberate indifference standard to substantive due process claim by pretrial detainee as is applied to Eighth Amendment claim by convicted prisoner).

Arar illustrates the second category of new contexts. The subject matter of that case was extraordinary rendition, a "new" context characterized by that court as a "distinct phenomenon under international law." 585 F.3d at 572. Here, the subject matter of Plaintiffs' claims is not new; Plaintiffs allege abuse and mistreatment in prison, subject matter indistinguishable from that recognized by the Supreme Court in *Carlson*, 446 U.S. at 16; *see also Arar*, 585 F.3d at 597 (Sack, J., dissenting) ("Incarceration in the United States without cause, mistreatment while so incarcerated, denial of access to counsel and the courts 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.")[17] Indeed, the Second Circuit has assumed the availability of a *Bivens* remedy in many analogous cases. *Id.* at 597-98 (collecting cases).

[17] The *Arar* majority did not address the availability of a *Bivens* action for Arar's domestic abuse and mistreatment claims (as described by Judge Sack in dissent); those claims were dismissed for a failure to allege Defendants' personal involvement. 585 F.3d at 569.

The third category of new contexts appears in *Correctional Services Corporation v. Malesko*, 534 U.S. 61 (2001) (characterizing former prisoner's claims against a private entity as an extension of *Bivens*) and *FDIC v. Meyer*, 510 U.S. 471, 484 (1994) (characterizing a former employee's attempt to sue the FDIC itself as a proposed extension of the "category of defendants against whom *Bivens*-type actions may be brought to include not only federal *agents* but federal *agencies* as well"). In contrast, Defendants' identities place this case squarely within the "core holding of *Bivens*, recognizing in limited circumstances a claim for money damages against federal officers who abuse their constitutional authority." 510 U.S. at 485-86; *see also Malesko,* 534 U.S. at 69-71.

That the instant claims are asserted by immigration detainees, an arguably "new" category of Plaintiff, is irrelevant, because their claims are subject to legal and factual analysis similar to that given claims by convicted federal inmates, and thus are not "fundamentally different," *Malesko*, 534 U.S. at 70, than a convicted criminal's claim of abuse by a federal employee. *See, e.g., Guardado*, 2010 U.S. Dist. LEXIS 104862, at *16-17 (holding Fourth and Fifth Amendment Due Process claims by non-citizen in immigration proceedings do not present new *Bivens* context); *Vohra v. United States*, 04-cv-00972, 2010 U.S. Dist. LEXIS 34363, at *17 (C.D.Ca. Feb. 4, 2010) (relying on *Bivens* itself when recognizing Fourth Amendment claim brought by immigration detainee). *Iqbal* supports this understanding of context, for the equal protection case cited by the Supreme Court as a precedent for Iqbal's action was brought on behalf of a federal employee, not a pre-trial detainee. 129 S. Ct. at 1948. Also suggestive is *Sanusi v. INS*, 100 Fed. Appx. 49, 52 (2d Cir. 2004), allowing an immigration detainee to re-

plead *Bivens* conditions of confinement claims against private jailors. In so holding, the Second Circuit acknowledged the open question of whether a *Bivens* action was available given defendants' private status, but it made no mention of the plaintiff's status as an immigration detainee. *Id.* at 52 n.3.

Indeed, to hold otherwise would create a strange asymmetry. Immigration detainees are frequently held in federal prisons like MDC, and county jails. A detainee held in a county jail and subjected to repeated illegal strip-searches, or placed in the SHU for years without explanation, may bring a section 1983 claim for money damages against his abuser. There is no logic to denying an immigration detainee, held under the same authority in a federal detention center, the same constitutional protection. Similarly, a convicted prisoner detained in a federal prison may bring a *Bivens* claim for deliberate indifference to a serious medical need. Logic and justice dictate that an immigration detainee abused by the same officer, in the same way, at the same facility, should have access to the same claim for damages, *Cf. Malesko*, 534 U.S. at 71 (noting that a federal prisoner may only bring a *Bivens* claim against an individual federal officer, not the United States or the BOP: "[w]hether it makes sense to impose asymmetrical liability costs in private prison facilities is a question for Congress, not us, to decide"); *Bender*, 539 F. Supp. 2d at 711 (noting asymmetry should *Bivens* availability "turn on the fortuity of whether [an] official was an employee of the federal government or a private contractor . . . nothing in the Supreme Court's case law supports the arbitrary narrowing of Bivens based on the technical terms of one's employment.")

B. Plaintiffs Have No Remedy Except *Bivens*.

Alone of Plaintiffs' claims, the Third and Fourth causes of action arise from the First Amendment, and thus arguably require extension of *Bivens*.[18] To determine the availability of a *Bivens* remedy for those claims, the Court must engage in the "familiar" two-part analysis reiterated in *Wilkie v. Robbins*:

> [O]n the assumption that a constitutionally recognized interest is adversely affected by the actions of federal employees, the decision whether to recognize a *Bivens* remedy may require two steps. In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. But even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation."

551 U.S. 537, 550 (2007) (citations omitted).

In undertaking this analysis, Defendants begin by re-arguing what this Court has already rejected—that the Immigration and Nationality Act (INA) constitutes a "comprehensive remedial scheme" barring *Bivens* liability. Ashcroft Br. at 6-7; Ziglar Br. at 6; Mueller Br. at 1-2. As this Court recognized in 2006, the INA may provide a comprehensive *regulatory* scheme controlling the entry and removal of non-citizens, but "it is by no means a comprehensive remedial scheme for constitutional violations that occur incident to the administration of that regulatory scheme." *Turkmen I,* 2006 U.S. Dist. LEXIS 39170, at * 91. This Court's reasoning has not been weakened by

[18] The arguments in this section apply equally to Plaintiffs' other claims, if the Court thinks any of them present a "new context."

intervening precedent; to the contrary, it has been endorsed in several other districts. *See Argueta v. ICE*, No. 08-cv-1652, 2009 U.S. Dist. LEXIS 38900, at *52 (D.N.J. Jan. 27, 2010); *Turnbull v. United States*, 06-cv-858, 2007 U.S. Dist LEXIS 53054, at *34-35 (N.D. Ohio July 23, 2007); *Khorrami v. Rolince*, 493 F. Supp. 2d 1061, 1074 (N.D. Ill. 2007); *Cesar v. Achim*, 542 F. Supp. 2d 897, 900–01 (E.D. Wis. 2008).

Ignoring this distinction, Defendants argue that immigration has received "careful attention from Congress." *See* Ashcroft Br. at 7. That overstates the matter; many issues related to immigration have received Congressional attention, but not the standards for treating immigration detainees or the means for enforcing those standards. *Bivens* relief is only precluded where Congress creates a comprehensive scheme which addresses the type of violations alleged. Thus in *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988), the design of statutes passed to remedy the Social Security Administration's denial of disability benefits "suggest[ed] that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration." *See also Bush v. Lucas*, 462 U.S. 367, 386 (1983) (*Bivens* relief denied because Congress had created a "comprehensive scheme . . . provid[ing] meaningful remedies"). Likewise, in *Dotson v. Griesa*, 398 F.3d 156, 170-71 (2d Cir. 2005), Congress expressed clear intent in the Civil Service Reform Act to preclude a damage remedy. By contrast, the INA provides neither a remedy for the violations Plaintiffs allege, nor any indication that Congress intended to preclude such a remedy.[19]

[19] Likewise, Congress's failure when promulgating the Air Transportation Safety and System Stabilization Act ("ATSSSA") to provide a damages remedy for non-citizens swept up and abused in connection to the 9/11 investigation, does not imply Congressional intent to preclude such claims. *See* Ashcroft Br. at 7 n.4, citing Pub. L. No. 107-42, 115 Stat. 230; *Benzman v. Whitman*, 523 F.3d 119 (2d Cir. 2008). The

Nor does *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009), work any relevant change to this settled law. There, the Second Circuit considered whether the INA barred Plaintiffs' extraordinary rendition claim, noting in dictum that the INA provides a "substantial, comprehensive, and intricate remedial scheme in the context of immigration." *Id.* at 572. However, the Second Circuit did not hold that the statutory scheme precluded Arar's *Bivens* remedy, and declined to decide whether an alternative remedy was actually available. *Id.* at 573; *see also id.* at 582 ("[W]e welcome the resulting decision . . . not to rely, in the Court's *Bivens* analysis, upon the INA's remedial scheme") (Sack, J., dissenting).

Moreover, even if the INA did bar *Bivens* claims like Arar's, it is relevant that his claim of extraordinary rendition was closely linked to removal. *See id.* at 572 (in describing comprehensive nature of the INA, indentifying provisions for review of removal orders, and designation of countries to which a non-citizen can be removed); *see also Guardado*, 2010 U.S. Dist. LEXIS 104862, at *18-19. Plaintiffs' claims involve mistreatment while detained in a federal prison. This is unrelated to core immigration concerns.

C. No Special Factors Block Plaintiffs' *Bivens* Remedy.

Defendants' final *Bivens* argument, that national security concerns after September 11th "sternly counsel hesitation," has also been considered and rejected by

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Second Circuit has interpreted ATSSSA to apply to "claims of injuries from inhalation of air rendered toxic by the fires, smoke, and pulverized debris caused by the terrorist-related aircraft crashes of September 11." *In re WTC Disaster Site*, 414 F.3d 352 (2d Cir. 2005). Thus, when former residents and students who inhaled toxic dust brought substantive due process claims in *Benzmen*, ATSSSA's statutory cause of action "weigh[ed] strongly against the judicial creation of a novel *Bivens* action." 523 F.3d at 126. Plaintiffs' claims arise from the 9/11 investigation, not the 9/11 attacks; Congressional action on the latter does not suggest intent to preclude a damages action for the former.

this Court. *Turkmen I,* 2006 U.S. Dist. LEXIS 39170, at *92; *see also Elmaghraby v. Ashcroft,* 04-cv-1409, 2005 U.S. Dist. LEXIS 21434, at *44 (E.D.N.Y. Sep. 27, 2005) ("our Nation's unique and complex law enforcement and security challenges in the wake of the September 11, 2001 attacks do not warrant elimination of remedies for the constitutional violations alleged here"); *Iqbal v. Hasty*, 490 F.3d 143, 159 (2d Cir. 2007) ("[M]ost of the rights that the Plaintiff contends were violated do not vary with surrounding circumstances, such as the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination. The strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times.")

In arguing otherwise, Defendants rely on *El Badrawi v. DHS*, 579 F. Supp. 2d 249 (D. Conn. 2008), where the court considered the availability of a *Bivens* remedy for Fourth and Fifth Amendment claims by a non-citizen challenging his arrest, detention, and a delay in voluntary departure. While those claims resemble the length-of-detention claims dismissed in *Turkmen I*, they are entirely different from the challenges to conditions of confinement at issue now. Claims of mistreatment in prison do not raise national security or foreign relations issues. *Compare* 579 F. Supp. 2d at 263 ("the executive's decision regarding when and how to send a foreign national to a foreign country plainly implicates our country's relationship with both the alien's home country and any potential foreign destination") *and Arar,* 585 F.3d at 575 (identifying intersection of national security and foreign affairs as special factor counseling hesitation), *with*

Padilla v. Yoo, 633 F. Supp. 2d 1005 (N.D. Cal. 2009) (allowing *Bivens* remedy for claims of torture of alleged "enemy combatant" in detention in United States).

Other "special factors" discussed by the Second Circuit in *Arar* are also absent. *See* 585 F.3d at 576, 578 (maintaining the security of classified information); *id*. at 576-77 (preserving the appearance of justice in open courts); *id.* at 577-78 (avoiding potential graymail). As a review of the docket in this case will disclose, the parties have already engaged in significant discovery over eight years, raising only one issue related to national security concerns, which this Court resolved without injury to national security. *See* Docket 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* Docket No. 638; and that process has never been used, despite Plaintiffs' deposition of the head of the New York office of the FBI, and the head of the national security unit of the INS, among many other witnesses.

Finally, since Plaintiffs' Fourth and Fifth Amendment claims can move forward under settled *Bivens* precedent, it would be perverse to deny a *Bivens* remedy for related claims also arising from mistreatment in prison by federal officials, simply because they arise under the First Amendment. As the claims are fundamentally similar, there are no grounds for denying a *Bivens* remedy.

V. PLAINTIFFS ALLEGE VIOLATION OF CLEARLY ESTABLISHED RIGHTS.

Defendants' final set of arguments revisits their motions to dismiss the Third Amended Complaint, in which they argued that Plaintiffs had failed to allege violation of

clearly established Constitutional rights. Except with respect to Claim Seven, each argument was rejected by the Court in *Turkmen I.* 2006 U.S. Dist LEXIS 39170, at *100-11, 112-13, 128-29, 146-53. That decision is the law of the case, and should "continue to govern the same issues at subsequent stages in the same case." *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 148 (2d Cir. 1999).

"[W]here litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Int'l Ore & Fertilizer Corp. v. SGS Control Servs., Inc.*, 38 F.3d 1279, 1287 (2d Cir. 1994) (internal quotation marks and citations omitted). Thus, law of the case governs "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice." *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967). "[M]ere doubt on our part is not enough to open the point for full reconsideration. . . . The law of the case will be disregarded only when the court has a clear conviction of error with respect to a point of law on which its previous decision was based." *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981) (internal quotation marks and citations omitted).

As will be shown below, Defendants cite no controlling and contrary law, nor clear conviction of error. Indeed, much of the analysis relevant to Defendants' arguments here has been affirmed by the Second Circuit. *See Iqbal v. Hasty,* 490 F.3d 143 (2d Cir. 2007), *rev'd on other grounds sub nom. Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Contrary to Defendant Ashcroft's characterization (Ashcroft Br. at 23), the Second Circuit decision in *Iqbal* was not vacated, but reversed (129 S. Ct. at 1954), and

consequently remains binding precedent on issues unrelated to the reversal. *Central Pines Land Co. v. United States*, 274 F.3d 881, 893-94 (5th Cir. 2001); *McLaughlin v. Pernsley*, 876 F.2d 308, 312-13 (3d Cir. 1989); *cf. Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 2001).

Despite this clear precedent, Defendants persist in arguing that Plaintiffs have failed to allege violations of clearly established law. At the heart of their argument is a far-reaching assumption most clearly expressed in Defendant Ashcroft's motion to dismiss: "The national security issues that arose in the wake of the September 11th attacks were *sui generis*, and the nation's law enforcement leadership was operating in a context devoid of clearly established law." Ashcroft Motion to Dismiss at 2. But as the Second Circuit explained in rejecting this argument wholesale, rights "clearly established prior to 9/11 . . . remained clearly established even in the aftermath of the horrific event." 490 F.3d at 160. "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 264 (1967).

A. Claim One: Conditions of Confinement (Due Process)

Defendants Ashcroft and Zenk argue that Claim One fails to allege violation of clearly established rights. As Ashcroft acknowledges (Ashcroft Br. at 22), this argument has already been rejected by the Court. He does not identify any change in the law, or in Plaintiffs' factual allegations, which should lead the Court to reconsider its prior ruling. Moreover, the Court's prior decision is correct. *Iqbal*, 490 F.3d at 168-69.

Plaintiffs' conditions of confinement are described in paragraphs 103-10, 119-30 and 140 of the First Amended Complaint, with additional detail related to individual Plaintiffs in paragraphs 146-47, 162, 165-66, 175-82, 201, 204-9, 218, 220-23, 234 and

239-41. Since Plaintiffs were held in civil immigration detention, their challenges to the conditions of their confinement arise under the Due Process Clause of the Fifth Amendment, rather than the Eighth Amendment. *Turkmen I,* 2006 U.S. Dist. LEXIS 39170, at *98 (citing cases); *see also Foreman v. Lowe*, No. 07-1995, 2008 U.S. App. LEXIS 1011 (3d Cir. Jan. 16, 2008) (applying *Bell* standard to immigration detainees). The Due Process Clause forbids punishment of detainees. *Bell v. Wolfish*, 441 U.S. 520, 535-36 (1979). In considering a detainees' conditions claim, the court must decide whether "the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Bell*, 441 U.S. at 538.

Defendants do not dispute that Plaintiffs have alleged conditions amounting to unconstitutional "punishment." Ashcroft Br. at 23. Nor could they. *See* 490 F.3d at 169; 2006 U.S. Dist. LEXIS 39170, at *103 (collecting cases); *see also United States v. Khan,* 540 F. Supp. 2d 344, 352 (E.D.N.Y. 2007) ("Where administrative detention is imposed based on the nature of the charges against an inmate, such detention is punitive."). Here, as in *Iqbal,* Plaintiffs have "alleged the purposeful infliction of restraints that were punitive in nature. . . . The right of pretrial detainees to be free from punitive restraints was clearly established at the time of the events in question." 490 F.3d 169. This is all that is required as a matter of pleading.

Instead, Ashcroft argues that Plaintiffs have failed to allege they were denied "the minimal civilized measures of life's necessities," or that their deprivations "posed an excessive risk" to their health or safety. Ashcroft Br. at 23. This is the operative language for an Eighth Amendment violation, but it is not self-defining. Regardless of whether there is any content to the difference between the Fifth and Eighth Amendment

standards, conditions similar to those alleged by Plaintiffs have been held to state an Eighth Amendment claim. *See Williams v. Greifinger*, 97 F.3d 699, 704 (2d Cir. 1996) (Eighth Amendment requires that prisoners receive meaningful opportunity for exercise); *Campbell v. Meachum,* No. 96-2300, 1996 U.S. App. LEXIS 29456, at *11 (2d Cir. Nov. 4, 1996) (failure to provide "adequate toiletry items" violates both Eighth and Fourteenth Amendments); *Gaston v. Coughlin*, 249 F.3d 156, 164-65 (2d Cir. 2001) (exposure to the cold states a claim for an Eighth Amendment violation); *Harper v. Showers*, 174 F.3d 716, 720 (5th Cir. 1999) ("sleep undoubtedly counts as one of life's basic needs" and "[c]onditions designed to prevent" it may violate the Eighth Amendment).

Defendant Zenk would avoid this clear precedent by mischaracterizing Claim One as based on procedural, rather than substantive due process. Zenk Br. at 14. But Plaintiffs' challenge to the conditions of their confinement in the ADMAX SHU does not arise from Defendants' failure to provide timely review of that placement as required by the CFR. *Contra* Zenk Br. at 14-16. Plaintiffs challenge their conditions as punitive, and thus unlawful for civil immigration detainees, with or without process. Zenk's failure to provide mandatory reviews (*see* Section I, C above) shows his awareness of the challenged conditions and his responsibility for them; it does not change the nature of Plaintiffs' claim.

B. Claim Two: Conditions of Confinement (Equal Protection)

Defendants Ashcroft and Sherman also argue that Plaintiffs' equal protection claim—alleging they were singled out for placement in harsh conditions based upon their religion, race, ethnicity and national origin—does not state the violation of any clearly established right. Ashcroft Br. at 23-24; Sherman Br. at 13-14.

Facts supporting the Plaintiffs' equal protection claim are set out in paragraphs 39 to 47and 60 to 78 of the Fourth Amended Complaint. As with Claim One, the Court has already ruled on this question, and need not reconsider.[20] Regardless, Defendants' opposition to this claim is easily discarded. *Iqbal*, 490 F.3d at 174 ("Plaintiff also alleges that 'Defendants specifically targeted [him] for mistreatment because of [his] race, religion, and national origin.' These allegations are sufficient to state a claim of animus-based discrimination that any 'reasonably competent officer' would understand to have been illegal under prior case law.") (citations omitted); *see also Brown v. City of Oneonta*, 221 F.3d 329, 338 (2d Cir. 1999) (distinguishing police initiation of an investigation based solely upon race (which violates equal protection), from an investigation based on suspect description (which creates a disparate impact without violating equal protection)); *Powells v. Minnehaha County Sheriff Dep't*, 198 F.3d 711, 712 (8th Cir. 1999) (allegations that black prisoner was placed in solitary confinement while similarly situated white prisoner was not stated equal protection claim).

That Plaintiffs are non-citizens, subject to a removal order, does not alter the analysis. *Zadvydas v. Davis*, 533 U.S. 678, 694 (2001) ("Punitive measures" may not be imposed upon non-citizens, even those ordered removed, because "all persons within the territory of the United States are entitled to the protection of the Constitution.") (quoting *Wong Wing v. United States*, 163 U.S. 228 (1896), *citing Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). That some immigration-related classifications may be based on nationality

[20] Defendant Sherman's argument (Sherman Br. at 14) is directed at Plaintiffs' original equal protection challenge to the *length* of their confinement, which this Court rejected in 2006 (*Turkmen I,* 2006 U.S. Dist LEXIS 39170, at *129-30), and is not in the Fourth Amended Complaint.

(*see* Sherman Br. at 13) does not support harsh treatment in domestic detention that is based on race, religion, and ethnicity *along with* nationality.

Even in the context of adversarial briefing, it is remarkable that the former Attorney General of the United States, among other Defendants, appears to argue that he could not have known that it was unlawful to subject non-citizens of a disfavored race or religion to harsh and punitive treatment in domestic detention, *not* because of any non-discriminatory information connecting them to terrorism or other crimes, but based only upon their religious beliefs and skin color. And to the extent that Defendants can marshal evidence establishing a sufficient factual connection between racial and religious profiling and legitimate national security needs, they will have an opportunity to do so on summary judgment or at trial. No such connection, however, can be drawn from Plaintiffs' pleadings.

C. Claim Three: Interference with Religious Practice

It is difficult to discern whether any Defendant seeks dismissal of Claim Three, interference with religious practice, for failure to allege violation of a clearly established right. Defendant Ashcroft clearly does not advance this argument in his memorandum of law (Ashcroft Br. at ii), but while Defendant Mueller largely rests on Ashcroft's briefing, his brief memorandum can be read to suggest that *none* of Plaintiffs' claims state violations of clearly established law. Mueller Br. at 2. Defendant Ziglar follows suit. Ziglar Br. at 7. LoPresti and Cuciti join wholesale, and Defendant Hasty adds to this confusion by "[a]ssuming *arguendo* that [Plaintiffs' allegations of interference with religious practice] amount to constitutional violations," but indicating in an attached footnote that "[n]othing in the Complaint and OIG reports reflects that Hasty violated

clearly established statutory or constitutional rights of which a reasonable person should have known." Hasty Br. at 18, 18 n.11.

Regardless, Plaintiffs adequately state a violation of clearly established law. In support of Claim Three, Plaintiffs allege that they were prohibited from keeping copies of the Koran in their cells, denied Halal food, and disciplined, harassed, and interrupted during prayer. *See* FAC ¶¶ 131-39. A prisoner's "right to possess religious material not incompatible with prison security," like their right to any other religious practice consistent with prison security, is long established. *Breland v. Goord*, No. 94-cv-3696, 1997 U.S. Dist. LEXIS 3527, at *22 (S.D.N.Y. Mar. 27, 1997); *see also Ford v. McGinnis*, 352 F.3d 582, 597 (2d Cir. 2003) (clearly established in 1975 that "a prisoner has a right to a diet consistent with his or her religious scruples"); *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). If Defendants wish to excuse this conduct as somehow related to legitimate security needs, that will require a factual showing that has not yet been made. *Iqbal,* 490 F.3d at 174.

D. Claims Four and Five: Communications Blackout and Communications Restrictions

Defendants Ashcroft and Sherman argue that Claims Four and Five, for the communications blackout and subsequent restrictions, fail to allege violations of clearly established law. As with the other claims, the Court has already decided these issues, and Defendants cite no authority requiring reconsideration. *Turkmen I,* 2006 U.S. Dist. LEXIS 39170, at *149, 153.

Defendants focus exclusively on the initial communications blackout, under which Plaintiffs were denied *all* verbal, written, and in-person communication with

family, friends, and lawyers for approximately one month to six weeks. *See* Ashcroft Br. at 24-25, Sherman Br. at 16; *see also* FAC ¶¶ 79-82. But Claims Four and Five encompass more, as Plaintiffs also allege post-blackout restrictions on their ability to communicate with family and counsel over the telephone and through visits; and the video and audio-taping of attorney-client communication. FAC ¶¶ 83-102. The claims are brought under the First Amendment for violation of freedom and speech and association, and under the Fifth Amendment for violation of access to counsel.

1. *First Amendment Claim*

Prisoners have a First Amendment right to freedom of speech, even after conviction. *Turner v. Safley*, 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."). In *Turner*, the Supreme Court held that the Constitution prohibits restrictions on prisoners' speech rights unless they are "reasonably related to legitimate penological interests." *Id.* at 89. [21]

Turner sets out four factors for evaluating limitations on prisoners' constitutional rights:

> First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it. . . . A second factor . . . is whether there are alternative means of exercising the right that remain open to prison inmates. . . . A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally. . . . Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation.

[21] That application of *Turner* to civil detainees "is not quite clear," (Ashcroft Br. at 24), matters little, as *Turner*'s standard for convicted prisoners sets a floor, but not a ceiling, for the rights of detainees like Plaintiffs. *Benjamin v. Fraser*, 264 F.3d 175, 187 n.10 (2d Cir. 2001).

Id. at 89-90.

Defendant Ashcroft argues that the restrictions on Plaintiffs' communication were reasonably related to the government's interest in security, "as officials had strong national security concerns that aliens with *putative terrorist ties* might reveal vital information." Ashcroft Br. at 24 (emphasis added). But "putative" is the key word here: the Complaint alleges that Plaintiffs were not terrorists or connected to terrorism, and that Defendants had no non-discriminatory reason to believe that Plaintiffs were terrorists or connected to terrorism. FAC ¶¶ 41, 47, 48, 67, 69-74. Taking Plaintiffs' allegations as true, the claimed security interest thus lacks a rational connection to the communications blackout, and fails to justify it under *Turner*. *See Turkmen I*, 2006 U.S. Dist. LEXIS 39170, at *148-49.

Ashcroft also notes that "several courts have held that national security concerns surrounding September 11th justified restrictions on information." Ashcroft Br. at 24-25. But the post-9/11 cases cited by Defendants involved different restrictions, and neither case was decided on the pleadings. *See Center for Nat'l Security Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 920-921 (D.C. Cir. 2003); *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 217-218 (3d Cir. 2002). These cases provide no ground to dismiss Plaintiffs' freedom of speech claim at this time. *See e.g. Shakur v. Selsky*, 391 F.3d 106, 115 (2d Cir. 2004) (while confiscation of a prisoner's reading materials might have been reasonable, "we would not reach such a conclusion on 'the face of the complaint' alone").

2. *Access to Counsel Claim*

Plaintiffs have also adequately alleged that Defendants violated their rights under the Due Process Clause by interfering with access to counsel.[22] S*ee Michel v. I.N.S.*, 206 F.3d 253, 258 (2d Cir. 2000) ("Under the Due Process Clause and the Immigration and Nationality Act, an alien is entitled to representation of his own choice."). The communications blackout violated Plaintiffs' right to counsel because it prevented them from securing representation in a timely fashion and from effectively communicating with their lawyers once representation was secured. FAC ¶¶ 79-85, 92-99.

Defendants' arguments based on *Christopher v. Harbury*, 536 U.S. 403 (2002), confuse "access to counsel," which was not at issue in *Harbury,* with the separate right of "access to the courts."[23] These rights are distinct. *Compare Harbury*, 536 U.S. at 415 n.12 (noting that the constitutional basis for the right of access to the courts is "unsettled" and has been variously tied to the Privileges and Immunities Clause, the First Amendment Petition Clause, the Due Process Clause, and the Equal Protection Clause) *with Michel*, 206 F.3d at 258 (locating source of a non-citizen's right to counsel in the Due Process Clause).

Harbury did not address access to counsel, and, as this Court reasoned in 2006, the prejudice which *Harbury* requires for an access-to-court claim would not make sense for an access to counsel claim. *Turkmen I,* 2006 U.S. Dist. LEXIS 39170, at * 153, *citing*

[22] On this claim, Defendants correctly point out that Plaintiffs cannot obtain declaratory relief in this *Bivens* action. Sherman Br. at 17 (*citing* FAC ¶ 295). Plaintiffs seek only damages (*see* FAC Prayer for Relief); the reference to declaratory relief in ¶ 295 was a clerical error.

[23] In 2006, the Court construed claim 22 of the Third Amended Complaint to allege interference with both "access to courts" and "access to counsel." 2006 U.S. Dist. LEXIS 39170 at *153. Relying on *Harbury*, the Court accepted the latter but not the former. *Id*. Plaintiffs advance only this "access to counsel" claim in the Fourth Amended Complaint.

Benjamin v. Fraser, 264 F.3d 175 (2d Cir. 2001). As the Second Circuit explained in *Benjamin*, "[i]t is not clear to us what 'actual injury' would even mean as applied to a pretrial detainee's right to counsel. . . . The reason pretrial detainees need access to the courts and counsel is not to present claims to the courts, but to defend against the charges brought against them." 264 F.3d at 186. Non-citizens facing immigration charges are in a similar defensive posture.

Ashcroft's attempt to impose additional hurdles on Plaintiffs' claims by analogy to the law regarding *ineffective* assistance of counsel finds no support in the Circuit. *See* Ashcroft Br. at 25 (*citing Romero v. INS,* 399 F.3d 109, 112 (2d Cir. 2005)). That retained counsel's ineffective performance may not require reversal unless it prejudices the "fairness" of a proceeding is no novel concept. *Id.; see also United States v. Hinds*, 792 F. Supp. 23, 26 (W.D.N.Y. 1992) (where Plaintiff competently waived assistance of counsel, lack of counsel at immigration hearing did not amount to due process violation without showing of prejudice). That affirmative steps by Defendants to block access to counsel should also be subject to prejudice analysis, however, is not supported by precedent.

Moreover, even if Plaintiffs must allege prejudice, the complaint fulfills this novel requirement. *See, e.g.,* FAC ¶¶ 93, 199 (Khalifa had immigration hearing without benefit of counsel, made un-counseled decision to waive right to appeal removal because he thought he would be deported quickly); ¶¶ 95, 183 (Benatta had immigration hearing without benefit of counsel; he chose to appeal his deportation out of un-counseled fear that he might be deported to Algeria, rather than Canada. Benatta lacked assistance of

counsel, or access to law books, or even a pen, in writing his appeal; that appeal was dismissed).

Finally, this claim is not precluded by 8 U.S.C. § 1252(b)(9), because, as this Court recognized in 2006, the communications restrictions were not imposed "to remove" plaintiffs. *Turkmen I,* 2006 U.S. Dist. LEXIS 39170, at *80.

E. Claim Six: Strip-Searches

Defendant Sherman (and perhaps Defendant Hasty) urge the court to dismiss Claim Six—based on punitive and unnecessary strip-searches—for failure to state a clearly established constitutional violation. Sherman Br. at 18; Hasty Br. at 20 n.14. The Court correctly rejected this argument in 2006, *Turkmen 1,* 2006 U.S. Dist. LEXIS 39170, at *103-104, and need not reconsider that decision today.

Plaintiffs allege they were subjected to repeated and unnecessary strip-searches and that the searches were conducted in a purposefully humiliating and degrading manner. *See* FAC ¶¶ 111-18. Allegations of repeated strip-searches unrelated to legitimate governmental purposes, or conducted in an unreasonable manner, state a claim under the Fourth or Fifth Amendment. *Iqbal,* 490 F.3d at 172; *see also Hodges v. Stanely*, 712 F.2d 34, 35 (2d Cir. 1983) (allegation of second-search shortly after first, and following continuous escort, states a Fourth Amendment claim); *Morgan v. Ward,* 699 F. Supp. 1025, 1052 (N.D.N.Y. 1988) (strip-searches of segregation inmates before and after contact visits violated Fourth Amendment); *Mays v. Springborn*, 575 F.3d 643, 649-50 (7th Cir. 2009) (searches conducted in demeaning manner support a constitutional claim).

To the extent that Defendants would explain Plaintiffs' frequent and demeaning strip-searches based on some legitimate security need, such consideration is inappropriate

on a motion to dismiss. *Jacoby v. County of Oneida*, 05-cv-1254, 2009 U.S. Dist. LEXIS 83235, at *20 (N.D.N.Y. Sep. 11, 2009).

F. Claim Seven: Section 1985 Conspiracy

Finally, Defendants seek to dismiss Claim Seven, by which Plaintiffs allege a conspiracy to violate their civil rights.[24] Defendants argue that Plaintiffs' allegations of conspiracy are "conclusory," and that Plaintiffs have failed to factually allege a "meeting of the minds" between the Defendants.

Defendants focus solely on paragraph 305 of Plaintiffs' complaint. *See, e.g.,* Zenk Br. at 24 ("plaintiffs devote a single paragraph" to support their conspiracy allegations). But although that paragraph sets forth the framework for Plaintiffs' conspiracy claim, it does not stand alone. The facts supporting Plaintiffs' allegations of conspiracy are set forth in the complaint, and incorporated by reference in paragraph 303. These factual allegations include details regarding a series of meetings at which Defendants Ashcroft, Mueller and Ziglar discussed the creation of a discriminatory policy to focus investigative energy on non-citizens who fit a certain profile, and to arrange for their harsh treatment and isolation. *See, e.g.,* FAC ¶¶ 47-48, 60-62, 65. At MDC, Defendants Hasty, Sherman, Cuciti, LoPresti (and later Zenk) conspired to develop and implement the harsh conditions of confinement required by the Washington D.C. Defendants. *Id.* ¶¶ 68, 74-77. As shown above, in Sections II, B & II, E, Plaintiffs have also put forth factual allegations of each Defendants' discriminatory animus.

That Plaintiffs do not allege a physical meeting between the Washington D.C. and MDC Defendants is of no import; nor is the MDC portion of the conspiracy deficient

[24] This claim is new to the Fourth Amended Complaint, and thus was not considered in *Turkmen I.*

because Plaintiffs allege written planning, rather than a verbal agreement. A "meeting of the minds" need not be an explicit agreement, but "may be evidenced circumstantially, through a showing that the parties had a tacit understanding to carry out the prohibited conduct." *Loria v. Butera*, 09-cv-531, 2010 U.S. Dist. LEXIS 102497, at *19 (N.D.N.Y. Sep. 29, 2010) (*citing Leblanc-Stenberg v. Fletcher*, 67 F.3d 412, 427 (2d Cir. 1995) (internal quotation marks omitted); *see also Bibbins v. Nextel Communications, Inc.*, 08-cv-5075, 2010 U.S. Dist LEXIS 119697, at *13 (S.D.N.Y. Nov. 9, 2010) (internal citations omitted) ("evidence of a tacit understanding, rather than explicit agreement, is sufficient to establish a conspiracy"). Or as this Court has put it, "a plaintiff is not required to list the place and date of defendants' meetings and a summary of their conversations when it pleads conspiracy"; rather, the requirement is simply that "the pleadings must present facts tending to show agreement and concerted action." *Seymour's Boatyard, Inc. v. Town of Huntington*, 08-cv-3248, 2009 U.S. Dist. LEXIS 45450, at *38 (E.D.N.Y. June 1, 2009) (internal quotation marks and brackets omitted); *see also Mitchell v. County of Nassau*, 05-cv-4957, 2008 U.S. Dist. LEXIS 32672, at *8 (E.D.N.Y. April 17, 2008) (claim adequately stated by "allegations [which], if proven at trial, could support an inference of a conspiracy motivated by racial animus").

In a footnote, Defendant Hasty argues that none of the Defendants could conspire with one another because all were employees of the Department of Justice, which is a "single entity." Hasty Br. at 23 n.18. But this doctrine is far more limited than Hasty suggests. Under Second Circuit law, this intracorporate conspiracy shield for discriminatory action is limited not only to single entities, but to acts that can fairly be described as the act of such an entity, rather than a diverse pattern of activity by

employees. Thus, in *Herrmann v. Moore*, 576 F.2d 453, 459 (2d Cir. 1978), the court described "the familiar doctrine that there is no conspiracy if the conspiratorial conduct challenged is essentially *a single act by a single corporation* acting exclusively through its own directors, officers, and employees, each acting within the scope of his employment" (emphasis added). It drew this doctrine from *Girard v. 94th and Fifth Avenue Corp.*, 530 F.2d 66 (2d Cir. 1976), which illustrates the point. The *Girard* court affirmed summary judgment against a plaintiff who challenged termination of employment, but it distinguished that situation from *Rackin v. University of Pennsylvania,* 386 F. Supp. 992 (E.D. Pa., 1974), which involved continuing and varied instances of discrimination and harassment:

> [N]ot only was plaintiff [in *Racking*] given tenure in a department other than the one in which it was earned, a decision clearly contrary to normal university policy, but subsequently she had been assigned only freshmen courses outside her area of specialty. The court found that these actions, more than a single decision by one business entity, supported a conspiracy allegation. . . .
>
> Here there is but one single business entity with a managerial policy implemented by the one governing board, while at the University of Pennsylvania, each department had its own disparate responsibilities and functions so that the actions complained of by the plaintiff were clearly not actions of only one policymaking body but of several bodies; thus the court correctly held that the allegations supported a claim of conspiracy among them.

Girard, 530 F.2d at 71 (footnote omitted); *but see, Everson v. New York City Transit Auth.*, 216 F. Supp. 2d 71, 76 (E.D.N.Y. 2002) (applying intracorporate conspiracy shield despite repeated failures to promote the plaintiff).

Likewise, here we do not have a single official act directed at Plaintiffs, but a pattern of activity by the various Defendants. They are not permitted to hide their

misconduct behind a corporate fiction. *See also Bailey v. Pataki*, 08-cv-8563, 2010 U.S. Dist. LEXIS 113766, at *16-17 (S.D.N.Y. Oct. 26, 2010) (denying summary judgment on a § 1985(3) claim; "the law [on intracorporate conspiracies] is far from settled, and the cases involve members of the same state agency, whereas multiple agencies were here involved"). Moreover, Hasty's unsupported claim that the entire Department of Justice is a "single entity" stretches this concept past the breaking point; the FBI, for instance, has more than 35,000 employees (*see* http://www.fbi.gov/about-us/quick-facts) under its own director nominated by the President and confirmed by the Senate (*see* 28 U.S.C. § 532 note).

Finally, whether prior Second Circuit law clearly established section 1985(3)'s applicability to federal officers is irrelevant, for even without such a ruling, "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. . . ." *Iqbal*, 490 F.3d at 95.

CONCLUSION

Defendants ignored clear law and regulations to round up and treat as dangerous terrorists immigration violators whose only "connection" to terrorism was their disfavored religion and ethnicity. As the Fourth Amended Complaint provides factual allegations supporting each Defendant's involvement in these abuses, the motions to dismiss should be denied.

Dated: December 23, 2010
New York, NY

Respectfully submitted,

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APPENDIX

SUMMARY OF CLAIMS

against: / by:	Ashcroft	Mueller	Ziglar
Abbasi	Claims 1-5, 7	Claims 1-5, 7	Claims 1-5, 7
Bajracharya	Claims 1, 2, 4, 5, 7	Claims 1, 2, 4, 5, 7	Claims 1, 2, 4, 5, 7
Benatta	Claims 1-5, 7	Claims 1-5, 7	Claims 1-5, 7
Hammouda	Claims 1-5, 7	Claims 1-5, 7	Claims 1-5, 7
Khalifa	Claims 1-5, 7	Claims 1-5, 7	Claims 1-5, 7
Mehmood	Claims 1-5, 7	Claims 1-5, 7	Claims 1-5, 7
Sachdeva	Claims 2, 7	Claims 2, 7	Claims 2, 7
Turkmen	Claims 2, 3, 7	Claims 2, 3, 7	Claims 2, 3, 7

against: / by:	Hasty	Zenk*	Sherman	LoPresti	Cuciti
Abbasi	Claims 1-7		Claims 1-7	Claims 1-7	Claims 1-7
Bajracharya	Claims 1, 2, 4-7		Claims 1, 2, 4-7	Claims 1, 2, 4-7	Claims 1, 2, 4-7
Benatta	Claims 1-7	Claims 1-7	Claims 1-7	Claims 1-7	Claims 1-7
Hammouda	Claims 1-7	Claims 1-7	Claims 1-7	Claims 1-7	Claims 1-7
Khalifa	Claims 1-7		Claims 1-7	Claims 1-7	Claims 1-7
Mehmood	Claims 1-7		Claims 1-7	Claims 1-7	Claims 1-7
Sachdeva					
Turkmen					

* Only portions of Claim 1 are asserted against Defendant Zenk; *see* Plaintiffs' Brief at 41 n.15.