06-3745-cv(L)

06-3785-CV (CON); 06-3789-CV (CON); 06-3800-CV (CON); 06-4187-CV (XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IBRAHIM TURKMEN, ASIF-UR-REHMAN SAFFI, SYED AMJAD ALI JAFFRI, YASSER EBRAHIM, HANY IBRAHIM, SHAKIR BALOCH, AKHIL SACHDEVA AND ASHRAF IBRAHIM,

Plaintiff–Appellee–Cross-Appellants,

v.

JOHN ASHCROFT, ROBERT MUELLER, JAMES ZIGLAR, DENNIS HASTY, AND JAMES SHERMAN,

Defendant–Appellant–Cross-Appellees,

UNITED STATES OF AMERICA,

Defendant–Cross-Appellee,

JOHN DOES 1-20, MDC CORRECTIONS OFFICERS, MICHAEL ZENK, WARDEN OF MDC, CHRISTOPHER WITSCHEL, CLEMETT SHACKS, BRIAN RODRIGUEZ, JON OSTEEN, RAYMOND COTTON, WILLIAM BECK, SALVATORE LOPRESTI, STEVEN BARRERE, LINDSEY BLEDSOE, JOSEPH CUCITI, HOWARD GUSSAK, MARCIAL MUNDO, DANIEL ORTIZ, STUART PRAY, ELIZABETH TORRES, PHILLIP BARNES, SYDNEY CHASE, MICHAEL DEFRANCISCO, RICHARD DIAZ, KEVIN LOPEZ, MARIO MACHADO, MICHAEL MCCABE, RAYMOND MICKENS, SCOTT ROSEBERY, UNITED STATES,

Defendants.

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

BRIEF FOR AMICI CURIAE FORMER WARDENS AND SENIOR PRISON OFFICIALS IN SUPPORT OF APPELLEES/CROSS-APPELLANTS

Sital Kalantry*
Assistant Clinical Professor of Law
Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853
607-255-3736
*Petition for Admission pending

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STATEMENT OF INTEREST

Amici are former prison wardens with more than a century of combined experience in prison management. Through their expertise in managing high security facilities, they have gained significant insight into the standards, practices, and principles that guide high-level prison administrators. Accepting as true the facts alleged by the plaintiff, *amici* believe that the detention and segregation policies adopted and implemented against Plaintiffs and other September 11 detainees violated commonly accepted norms of prison management and led to the abuse suffered by Plaintiffs while they were detained at the Metropolitan Detention Center in Brooklyn. *Amici* have based their opinions on the facts as alleged by the plaintiff in the complaint, Joint Appendix 90-210 [hereinafter "JA"], and without having conducted an independent review of the facts.

Amici Curiae[1]

Leonard Barbieri, who has over thirty years experience in the field of corrections and criminal justice, served as Chief of Parole of the State of Connecticut and Warden of several adult, youth and juvenile high security correctional institutions. He also served for seven years as Deputy Commissioner for the Connecticut Department of Correction, the agency responsible for the operation of all jails and prisons in the State of Connecticut. He has taught

[1] Affiliations of *amici* are listed for identification purposes only.

correction and criminal justice courses in many universities, including the University of New Haven, Eastern Connecticut State University and Gateway Community College. He is currently on the faculty of Yale University at the Yale Child Study Center where he serves as a specialist in matters of criminal justice.

Allen F. Breed, who has more than thirty years of experience in prison management, served as Director of the California Youth Authority and Chairman of the Youthful Offender Parole Board for ten years. He was also Director of the National Institute of Corrections for ten years and was a Special Master for federal and state courts on adult conditions of confinement issues for twenty years.

Steve J. Martin, who has more than 30 years of experience in the corrections field, served as the Executive Assistant to the Director of the Texas Department of Corrections, an operations position that placed him as the third highest official in the department. He was also general counsel of the Texas Department of Corrections and has taught as an adjunct faculty. He has served on numerous occasions as a federal court monitor in both prison and jail cases, including a class action lawsuit involving an administrative segregation unit of the New York City jails. He has also served as a corrections expert on many occasions for the U. S. Department of Justice, Civil Rights Division. Currently, he is a prison consultant and attorney in private practice.

Ronald McAndrew, who has more than twenty years of experience in

prison management, served as Interim Director of Corrections for Orange County, Florida and as warden for three state prison facilities in Florida. He is currently a prison and jail consultant.

Patrick McManus, who has more than forty years of experience in prison management, served as Assistant Commissioner of Corrections for the State of Minnesota from 1974 to 1979 and as Secretary of Corrections in Kansas from 1979 to 1982. For the past twenty-five years he has served as a special master or court monitor for federal and state courts in matters relating to conditions of confinement in jails and prisons throughout the country.

INTRODUCTION AND SUMMARY OF ARGUMENT

Well-established norms of prison management forbid segregating and subjecting detainees and inmates to severe conditions of confinement on the basis of race, religion or national origin. These anti-discrimination norms are supported by penological and criminological research, and they conform to the practical experience of wardens. Put simply, the always-present risk of prisoner abuse grows considerably when, on the basis of their race, religion or national origin, prisoners are segregated, treated more harshly and stigmatized as a matter of governmental policy.

As alleged in Claim 20 the complaint, JA 195, shortly after September 11, 2001, the appealing defendants ("Defendants") created, implemented or failed to remedy a policy that singled out Muslim or South Asian men for investigation into alleged terrorist ties, labeling them "of interest" or "of high interest" and incarcerating them on the basis of their race, religion, and national origin. At the Metropolitan Detention Center, detainees labeled "of high interest" were segregated from the general prison population and subjected to far harsher treatment. JA 112-18. Correctional officers were given enormous discretion at a time when anger against Muslims—let alone Muslims presumed (wrongly in this case) connected to terrorism—was widespread. As a direct result of these policies and oversight failures, Plaintiffs were targeted for beatings, grotesque body-cavity

searches, inhumane conditions, and religious harassment by prison guards. JA 124-34. The connection between discrimination and abuse is not coincidental. Rather, the cruelty of correctional officers was the predictable product of the profiling and detention policies created and implemented by Defendants.

Prison regulations and policy prohibiting discrimination are not only consistent with good prison administration but also protect core constitutional values. As this brief shows, ignoring anti-discrimination prison regulations and policies can lead to gross constitutional violations with appalling human consequences. Those tragic results, long known and foreseeable to any competent warden or policymaker, make clear why it is so critically important to protect our Constitution's anti-discrimination norms.

RELEVANT BACKGROUND

Two days after the September 11 attacks, President Bush spoke by way of a televised telephone call to New York Governor George Pataki and New York City Mayor Rudy Giuliani. Appealing for restraint, his public message counseled a special regard for America's Muslim population:

> I know I don't need to tell you all this, but our nation should be mindful that there are thousands of Arab Americans who live in New York City, who love their flag just as much as the three of us do, and *we must be mindful that as we seek to win the war, that we treat Arab Americans and Muslims with the respect they deserve*. I know that is your attitude as well, certainly the attitude of this government, *that we should not hold one who is a Muslim responsible for an act of terror*. We will hold those who are responsible for the terrorist acts accountable, and those who harbor them.

George W. Bush, Televised telephone call to New York Governor George Pataki and New York City Mayor Rudy Giuliani, Sept. 13, 2001, *transcript available at* http://www.aaiusa.org/sept11_%20text.htm (emphasis added). The named plaintiffs were all Muslims living in New York City on the day President Bush delivered these remarks. Neither then, nor subsequently, were they ever charged with terrorism-related crimes. And yet by January 2002, they had become victims of a discriminatory detention policy formulated and put into force by the government itself—precisely the kind of policy President Bush cautioned against in his message. Together with hundreds of other Muslim men, the named plaintiffs were detained by the FBI on the basis of race, religion, and national origin, and labeled "of interest" to the agency's post-September 11 terrorism investigation. JA

109. A subclass, including plaintiffs Saffi, Jaffri, H. Ibrahim, Baloch, A. Ibrahim, and Ebrahim were arbitrarily labeled "of high interest," JA 336, and were subsequently confined under the strictest conditions available in a unit of the Metropolitan Detention Center ("MDC"), the Administrative Maximum ("ADMAX") Special Housing Unit, which was created specifically to house terrorism suspects. *Id.*

The same day that President Bush spoke to Governor Pataki and Mayor Giuliani, Defendant Ashcroft echoed the President's appeal in statements before the press:

> [O]ur nation calls on us to be at our best in order to prevail in these very difficult times. Since Tuesday, the Justice Department has received reports of violence and threats of violence against Arab-Americans and other Americans of Middle Eastern and South Asian descents [sic]. We must not descend to the level of those who perpetrated Tuesday's violence by targeting individuals based on their race, their religion, or their national origin. Such reports of violence and threats are in direct opposition to the very principles and laws of the United States and will not be tolerated.

John Ashcroft, Prepared Remarks (Sept. 13, 2001), *transcript available at* http://permanent.access.gpo.gov/websites/usdojgov/www.usdoj.gov/ag/speeches/2001/0913pressconference.htm. Yet FBI policy and practice after September 11 used race, religion, and national origin as proxies for actual evidence of terrorist involvement. JA 112. Nearly fifty percent of the September 11 detainees were citizens of Pakistan or Egypt, which are predominately Muslim countries. JA 287. Most of the remaining September 11 detainees were citizens of countries where

Muslims make up almost all or a significant majority of the population. *Id.* Under the terms of this vast law enforcement sweep, all Arab and Muslim men arrested in New York City on immigration or criminal charges were automatically classified "of interest" to the terrorist investigation. JA 109-10.

Within this "indiscriminate and haphazard" classification scheme, nearly one hundred detainees were groundlessly labeled "of high interest" and confined under the most restrictive conditions available. JA 336. The Department of Justice's Office of the Inspector General ("OIG") has "criticize[d] the indiscriminate and haphazard manner in which the labels 'of high interest,' 'of interest,' or 'of undetermined interest' were applied to many aliens who had no connection to terrorism" and further noted that

> [e]ven in the hectic aftermath of the September 11 attacks, we believe the FBI should have taken more care to distinguish between aliens who it actually suspected of having a connection to terrorism as opposed to aliens who, while possibly guilty of violating federal immigration law, had no connection to terrorism.

Id.

At the FBI's direction, the Bureau of Prisons ("BOP") unlawfully segregated these Muslim men from the general prison population in the ADMAX Special Housing Unit, subjecting them to prolonged solitary confinement, a communications blackout, shackling, constant video surveillance, and repeated, punitive body-cavity searches. JA 119-34. Such extreme security measures were

authorized by Defendants at the highest reaches of our government and, in the eleven months that followed, were applied to "many detainees for whom there was *no affirmative evidence* of a connection to terrorism." JA 336 (emphasis added). Muslim men designated "of high interest" were confined in these conditions under a "hold until cleared" policy also approved by Defendants. JA 110, 115-17. In keeping with this FBI directive, BOP officials discarded the seven-day review and monthly hearings required by the BOP's own guidelines for any detainee held under such extreme restraints. JA 115-17. Therefore, as a matter of DOJ policy, detainees could be held under these severe conditions indefinitely, with neither a right of review nor a clear standard of expediency for FBI clearance.

Indeed, the discriminatory policies adopted at the highest levels of government gave way, in turn, to the graphic abuses that color the complaint. On Defendants' watch, guards heaped verbal attacks, baseless accusations of terrorism, and physical attacks on Plaintiffs—plain failures of custodial duty.

What emerged in this setting was a pattern of gross mistreatment that no competent prison administrator could have—or should have—overlooked. Abuses were neither isolated nor committed covertly by guards but occurred in plain view over nearly a year. Indeed the OIG, which conducted a thorough investigation of the treatment of September 11 detainees in response to widespread reports of abuse found "[b]ased on interview[s] of 19 September 11 detainees and [its]

investigations of allegations of abuse raised by several detainees . . . [that] the evidence indicate[d] a pattern of physical and verbal abuse . . . ." JA 408. Altogether, Plaintiffs and other September 11 detainees were subjected to a regimen of abuse that the Defendants did nothing to prevent or stop.

ARGUMENT

I. SEGREGATION AND HARSH TREATMENT ON THE BASIS OF RACE, RELIGION, OR NATIONAL ORIGIN VIOLATE WELL-ESTABLISHED PRISON POLICY

A. *Discriminatory Segregation.* Both Federal and state prison and jail regulations forbid discrimination on the basis of race, religion and national origin. Federal BOP regulations provide that "staff shall not discriminate against inmates on the basis of race, religion, national origin . . . . This includes the making of administrative decisions and providing access to work, housing, and programs." 28 C.F.R. § 551.90.[2] State regulations provide similar or stricter protection against discriminatory segregation. Not only do they prohibit such discrimination broadly,[3] states explicitly forbid discrimination in inmate classification and

[2] Post-removal order detainees are of course entitled to even greater protection than convicted prisoners, *see Bell v. Wolfish*, 441 U.S. 520, 537 n.16 (1979); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) , but even policies applicable to post-conviction prisoners forbid the type of discrimination alleged in the complaint. Because post-conviction regulations are relevant as a minimum floor for all inmates, *amici* discuss regulations that apply to both pre-trial detainees and convicted prisoners.

[3] *E.g.* Ariz. Dep't Corr. Order § 908.01.1.2 (Sept. 1, 1996) ("Supervisors shall investigate reports of discrimination and take appropriate action to prevent and/or correct discriminatory acts against inmates."); Fla. Corr. Officer Conduct Pol'y, rule 3.3. (1998) ("Correctional Officers shall not allow their decisions regarding an arrestee, inmate, or the family and friends of an inmate to be influenced by race, color, creed, religion, national origin . . . ."); Md. Comm'n on Corr. Stds., *Standards for Adult Detention Centers*, para. .05(A) (n.d.) (requiring "a written policy which states that an inmate is not discriminated against with regard to programs, services, or activities on the basis of race, religion, national origin . . . ."); Iowa Admin. R. 201—51.2(5) (Feb. 28, 2005) ("Each facility administrator

housing assignments,[4] and in areas such as discipline and work assignments.[5] For

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shall ensure that staff and detainees are not subject to discriminatory treatment based upon race, religion, [or] nationality, . . . absent compelling reason for said discriminatory treatment."); Okla. Corr. Pol'y & Oper. Manual, P-030100 (Aug. 1, 2004) ("No inmate under the jurisdiction of the department will be subject to discrimination based on . . . race, religion, national origin . . . ."); Mass. Dept. Corr. Pol'y, 103 DOC 400, § 400.01(3) (Nov. 17, 2005) ("Inmates shall not be subjected to discriminatory treatment on the basis of race, color, national origin . . . or religion."); Minn. Dept. Corr. Pol'y 202.055(C) (Sept. 1, 2005) ("The department prohibits discrimination, including but not limited to administrative decisions and access to programs based on an offender's race, religion, national origin . . . .").

[4] *E.g.* Ariz. Dep't Corr. Order § 908.02.1.5 (Sept. 1, 1996) (Administrators must "[b]ase inmate housing assignments on sound correctional classification practices and not discriminate against any individual or group of inmates."); Colo. Corr. Reg. § 850-15(I) (Dec. 1, 2005) ("It is the policy of the department of corrections (DOC) to ensure that offender program access, work assignments, and administrative assignments are made without regard to offenders' race, religion, ethnic, national origin . . . ."); 210 Ind. Admin. Code 3-1-15(b) & 3-1-18(d) (Nov. 15, 2001) ("Inmates shall not be subject to discrimination based on race, national origin, color, creed [and] shall not be segregated by race, color, creed, or national origin in living area assignments."); Mont. Dept. Corr. Pol'y & Procs. 4.2.1(IV) (May 1, 1997) ("Offenders will not be classified or housed by race, color, creed, or national origin . . . ."); Neb. Dept. Corr. Svcs. Admin. Reg. 201.02, at 1 (Mar. 1, 1980) ("Program access, work assignments and administrative decisions will be made without regard to inmates' race, religion, natural origin . . . ."); Okla. Corr. Pol'y & Oper. Manual, OP-030102, para I.B. (Sept. 16, 2004) ("Under no circumstances will race, color, or ethnic origin be the sole basis for making housing assignments."); Tenn. Corr. Reg. § 506.14(VI)(A)(4) (Aug. 15, 2003) (Housing assignments "shall not be made on the basis of race, color, national origin, religion, or political views unless it is justified by legitimate and documented security concerns (i.e., opposing or rival security threat group affiliation). In those instances, a specific written justification shall be prepared and filed . . . .").

[5] *E.g.* Ark. Corr. Reg. § 801 (May 12, 1989) (Job assignments "cannot be made on the basis of race."); Ark. Corr. Reg. § 832 (Feb. 1, 1980) (prohibiting "discrimination with regard to inmate disciplinary action, transfers, institutional program assignments and other such matters on the basis of race, creed, color or national origin."); Vt. Dept. Corr. Pol'y 391 para. 1.1 (Jan. 27, 1986) ("No

example, New York provides:

> Each local correctional facility shall employ policies and procedures designed to ensure that prisoners are not subject to unlawful discriminatory treatment in any facility decision making process, including but not limited to work assignment, *classification*, disciplinary or grievance decisions or when being considered for any available facility program, including but not limited to educational, religious, vocational or temporary release programs, based upon . . . race, religion, nationality . . . .

N.Y. Corr. Reg. § 7030.1 (Apr. 11, 2001) (emphasis added).

Many states go even further, requiring prisons to monitor the racial balance in their facilities. *See, e.g.,* Ark. Corr. Reg. § 801 (May 12, 1989) (Prison officials "are responsible for reviewing the racial balance in these job categories at their unit each month."). Other states require that inmate housing reflect the racial composition of the rest of the inmate population. *See, e.g.,* Ariz. Corr. Reg. § 908.02.1.5.1 (Sept. 1, 1996) ("To the extent possible, inmate housing areas shall have a racial composition that approximates the entire inmate population."). Moreover, sound prison policy dictates that prison administrators be trained to recognize and counter their own biases in interpreting and applying prison policies to diverse populations. For example Arkansas requires that:

> All pre-service training, in-service training and staff development shall include extensive programs in human relations. All employees shall be informed of their obligation to treat all inmates with equal dignity and courtesy. As a significant number of inmates in our

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discrimination in work assignments shall be permitted on the basis of race, creed, color . . . .").

> institutions and facilities have cultural or linguistic behavioral patterns differing from those of many of the staff, all personnel should be familiar with these patterns.

Ark. Corr. Reg. § 832 (Nov. 29, 1979).

Finally, the largest professional association of correctional officers concurs that prison staff should not discriminate on the basis of an inmate's race, religion, or national origin. Am. Corr. Ass'n, *Standards for Adult Correctional Institutions* 76 (4th ed. 2003) (Standard 4-4277) (requiring "[w]ritten policy, procedure, and practice prohibit[ing] discrimination based on an inmate's race, religion, national origin . . . in making administrative decisions and in providing access to programs").

B. *Discriminatory Harsh Treatment.* Federal and state prison rules likewise require prison officials to make an individual determination before subjecting a prisoner to conditions of confinement harsher than the general prison population. Federal regulations do not allow inmates to be singled out for harsher treatment without an individualized determination. 28 C.F.R. §§ 541.22 & 541.23(b) (defining administrative segregation, providing procedures for placement therein, and requiring a hearing within seven days of the placement); *see also* 28 C.F.R. § 541.22 (requiring individualized determinations concerning the appropriateness of

continued segregation).[6] Indeed, Federal regulations require individualized classification even for inmates not assigned to administrative segregation. Inmates must be individually classified within four weeks of arrival and at regular intervals, at least once every 180 days. 28 C.F.R. §§ 524.10, 524.12(a)-(b). The individual classifications cannot occur without individual interviews. 28 C.F.R. § 524.11(b). The inmate must receive notice prior to scheduled appearances before the classification team, and has the right to appeal its decisions. 28 C.F.R. §§ 524.12(c), 524.15. For pretrial detainees, the time periods are even shorter: an individual review must be conducted within twenty-one days of their assignment to the facility and the assessment must be repeated every ninety days. The inmate is entitled to notice, and to be present at the review, and the review must be formally documented. 28 C.F.R. § 551.107.

State regulations establish similar requirements of individualized assessment of treatment. Most states expressly require an individualized assessment based on multiple, objective factors so that the prison official may determine the appropriate conditions of confinement for an inmate.[7] Other states specify that inmates must

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[6] The district court pointed out in its opinion that the Defendants failed to follow regulations specifying procedures for individualized review required to place Plaintiffs in administrative segregation. JA 70.

[7] *E.g.* Alaska Corr. Reg. § 701.02(A) & (B)(1) (July 7, 1995); Ariz. Corr. Reg. § 801.03, as modified by Director's Instr. 232 (October 25, 2005); Colo. Corr. Reg. § 600-01 (Dec. 1, 2005); Conn. Corr. Reg. § 9.2 (Mar. 5, 2003); Idaho Dept. Corr. Dir. No. 303.02.01.001; Mass. Dept. Corr. Pol'y, 103 CMR 420 (n.d.); Mont. Dept.

be placed at the lowest security level possible.[8] Many states provide for time limits for initial review, and provisions for semiannual or more frequent periodic review.[9] In addition, assignment to highly restrictive or maximum security conditions of confinement requires notice and a hearing, at least within a few days of the transfer if not before, and an opportunity for higher level administrative appeal.[10] Finally, the most important professional association for correctional officers has suggested that written polices be adopted to provide an "inmate classification plan" that is subject to "regular review" and provides inmates with notice and hearing rights. Am. Corr. Ass'n, *Standards for Adult Correctional Institutions* 82-83 (4th ed.

Corr. Pol'y No. 4.2.1 (May 1, 1997); N.M. Corr. Dept. Pol'y CD-080100 to 02 (Oct. 26, 2005); N.Y. Corr. Reg. §§ 7013.1,.7,.11, 7013.8(b) (Apr. 4, 2006); Neb. Dept. Corr. Svcs. Admin. Reg. No. 201.02, at 4 (Mar. 1, 1980); Nev. Admin. Reg. No. 503 (Apr. 5, 2004), 506 (Aug. 30, 2005); Okla. Corr. Pol'y & Oper. Manual, P-030200 (Oct. 1, 2002), P-060100 (Aug. 1, 2004), OP-060103 (M) (Jan. 19, 2005)..

[8] *E.g.* Ariz. Corr. Reg. § 801, *as modified by* Director's Instr. 232 (Oct. 25, 2005); Idaho Dept. Corr. Dir. No. 303.02.01.001; Vt. Dept. Corr. Pol'y 371, § 4.2 (Dec. 30, 2002).

[9] *E.g.* Conn. Corr. Reg. § 9.2 (Mar. 5, 2003); Idaho Dept. Corr. Dir. no. 303.02.01.001, ¶¶ 05.01.01-.03.00; N.Y. Corr. Reg. § 7013.13 (Apr. 4, 2006); Md. Comm'n on Corr. Stds., Standards for Adult Detention Centers, § .06, at 63; Minn. Dept. Corr. Pol'y 202.100 (Feb. 1, 2004); 28 Vt. Stat. Ann. § 701b(a) (requiring classification within five days).

[10] *E.g.* Alaska Corr. Reg. §§ 735.04 (July 7, 1995), 760.01 (Mar. 31, 1987), 804.01 (July 9, 1995); Ariz. Corr. Reg. §§ 801.05 – 801.06, *as modified by* Director's Instr. 232 (Oct. 25, 2005); Colo. Corr. Reg. § 600-01 (Dec. 1, 2005); Mass. Dept. Corr. Pol'y, 103 CMR 420, §§420.08-.09 (n.d.); Mass. Dept. Corr. Pol'y, 103 CMR 421 (June 3, 1994); N.M. Corr. Dept. Pol'y CD-080100, 02 (Oct. 26, 2005); Nev. Admin. Reg. 507 (Nov. 15, 2004); Penn. Dept. Corr. Pol'y No. DC-ADM 802-2 (July 8, 2005).

2003) (Standards 4-4295, 4-4296, and 4-4302).

*   *   *

More than just legal dictates, the regulations described above show that prison administrators and policymakers overwhelmingly view discriminatory prison conditions as unacceptably and unwise. Assuming Plaintiffs' allegations to be true, the Defendants directly contravened these widely known and accepted prison norms. They "adopted, promulgated and implemented their detention policies . . . based on invidious animus against Arabs and Muslims," JA 113, and classified the Plaintiffs as "of high interest" to the September 11 investigation because of race, religion, and national origin. JA 115-16. In addition, contrary to applicable regulations, Plaintiffs were never provided with individual assessments, but were simply presumed guilty without charge or hearing. Indeed, the OIG "found that the BOP did not review the status of each September 11 detainee on a weekly basis and did not conduct formal hearings to assess detainee status. Rather it relied on FBI's assessment of high interest." JA 384.

II. THE DEFENDANTS' DISCRIMINATORY POLICIES LED TO THE ABUSE SUFFERED BY PLAINTIFFS

The anti-discrimination policies detailed above restrain the urge to give worse treatment to those perceived as different, an urge that in the prison setting frequently becomes a more perverse urge to abuse. When prison administrators abandon or ignore those policies, as they allegedly did here, they sanction abuse

against members of a stigmatized minority. A government program that punitively detained and segregated Plaintiffs and other Muslim men without any known connection to terrorism in the strictest available conditions of confinement invited the abuses that Plaintiffs and the September 11 detainees suffered.

A. The Potential for Abuse Inherent in Prisons

Before considering the effects of discriminatory stigma in prisons, it is important to note the unequal power dynamics inherent in prisons. Without proper oversight and constraints, guards tend to exploit their position of power over prisoners, leading to foreseeable abuse. This is both obvious to prison policy makers and proven by criminologists.

In his classic study of prison society, Philip Zimbardo, former President of the American Psychological Association and Professor Emeritus of Psychology at Stanford University, constructed a simulated prison and selected twenty-one undergraduate volunteers to participate as guards and prisoners in a two-week experiment.[11] Philip Zimbardo et al., *Interpersonal Dynamics in a Simulated Prison*, 1 Int'l. J. Criminology & Penology 69, 73 (1973) [hereinafter

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[11] Indeed, the results of Professor Philip Zimbardo's Stanford prison experiment, published in 1973, proved so shocking that they have become part of popular consciousness, resurfacing widely in discussions of abuse and culpability at Abu Ghraib. *See, e.g.*, Clarence Page, *U.S. Must End Any Ambiguity About Torture*, Balt. Sun, Oct. 14, 2005, at 13A. *Northwest Voices*, Seattle Times, May 7, 2005, at B7; William Saletan, *Situationist Ethics*, May 12, 2004, Slate.com.

Interpersonal Dynamics]. Guards, working in eight-hour shifts, were responsible for maintaining prison routine—such as meals, prescribed work regimen and recreation time—and for preserving prison security through disciplinary measures when necessary. In a matter of days, the prison became a zone of intense hostility, harassment, petty indignities, and outright aggression. *Id.* at 89. Within the confines of what Zimbardo calls a "total institution," the guards exhibited a disturbing inventiveness in the application of their authority. *Id*. at 72, 94. They developed elaborate ways of humiliating, taunting, and threatening prisoners, forcing them to obey "petty, meaningless, and often inconsistent rules" while increasingly employing "domineering, abusive tactics." Philip Zimbardo, et al., *A Pirandellian Prison: The Mind is a Formidable Jailer*, N.Y. Times Mag., Apr. 8, 1973, at 38. Inmates were regularly cursed and insulted by their custodians, handcuffed and blindfolded unnecessarily, put into a two-foot by two-foot closet used for solitary confinement, force-fed when they refused to eat, and made to do demeaning tasks, including cleaning the cell-block's toilets with their bare hands. *Id*. The exercise of arbitrary power over every aspect of prisoners' daily existence drove some of the prisoners into fits of crying, rage, depression, and anxiety so acute that five of them had to be excused from the study. *Id.*; *Interpersonal Dynamics*, *supra*, at 81. Altogether, the early direction of the experiment challenged ethical standards so plainly that it had to be completely aborted on only

its sixth day. Zimbardo, et al., *A Pirandellian Prison*, *supra*.

Zimbardo's experiment exposed a "[p]athology of power" driven by the very structure of the prison environment. *Interpersonal Dynamics*, *supra*, at 93. Though only participants in a study, the experiment's guards and prisoners quickly internalized their roles, responding to a distribution of power that bore few express or self-imposed limits. *Id.* at 91-92. Inside this total institution, guards possessed enormous discretion, controlling when inmates could eat, sleep, go to the toilet, talk, read, smoke, or merely find a reprieve from constant harassment. *Id.* at 94. They transformed this power into a capricious system of penalties and rewards that denied any notion of rights still vested in the prisoners. *Id.* No regulations—no constraining rules—prevented this manifest abuse. *Id.* at 75.

B. Discrimination Heightens the Inherent Potential for Abuse

As prison policy makers and sociologists know, people who are segregated into "out-groups" become targets of dehumanizing behavior, particularly if such people are already members of stigmatized minority groups. In a series of experiments investigating the force of group identity, social psychologist Dr. Henri Tajfel found that simply by creating groups based on even trivial criteria, he could trigger an impulse among his participants to impute inferiority to members of the other set. "The endpoint of this process," he wrote, "is the 'depersonalization' and

'dehumanization' of the outgroup which often occur in conditions of acute intergroup tensions." Henri Tajfel, *Social Psychology of Intergroup Relations*, 33 Ann. Rev. Psychol. 1, 21 (1982). Those tests accord with everyday experience in and out of prison.

Seeking to highlight the same patterns of human behavior, Jane Elliott, a school teacher, segregated her all-white classroom into two groups, based on their eye color, the day after Martin Luther King's assassination. Students with blue eyes were required to wear a special collar which labeled them as being in the "out-group." On the basis of this manufactured distinction, she shepherded her class through an educational exercise that revealed individuals' willingness to invent animus on the basis of immutable characteristics as trivial as eye color.[12] William Peters, *A Class Divided: Then and Now* (expanded ed. 1987). Indeed, through the course of the day, students in the "out-group" were considered inferior,

[12] Like Zimbardo's prison experiment, these exercises and their insights have been a part of popular consciousness for more than 30 years. In 1970, ABC News broadcast a documentary devoted to Elliott's striking work entitled "The Eye of the Storm." The documentary proved so popular that it was rebroadcast three times in the space of a year, and reproductions were soon being used "as an educational tool by every branch of the armed forces, the National Security Agency, the State Department, and dozens of other federal, state, and local government agencies." William Peters, *A Class Divided: Then and Now* 105-106 (expanded ed. 1987). Fifteen years later, the Public Broadcasting System (PBS) produced and aired "A Class Divided," a *Frontline* documentary that charted the continuing impact of Elliott's work on discrimination in intergroup relations. *See A Class Divided* (PBS television broadcast, Mar. 26, 1985), *available at* www.pbs.org/wgbh/pages/frontline/shows/divided/etc/view.html.

teased by the other students, and verbally abused. *Id.* at 22-26 In subsequent years, Elliott conducted this exercise among prison guards at the invitation of the Iowa Department of Corrections, reproducing comparable experiences of imputed inferiority and resultant discrimination. *Id*. at 141-62.

Moreover, real world studies have demonstrated that minorities are more likely to be abused in their interactions with law enforcement officials than non-minorities. Indeed, the U.S. Department of Justice found that minorities are approximately twice as likely to experience force during encounters with law enforcement officials as whites. Patrick A. Langan et al., U.S. Dep't of Justice, *Contacts Between Police and the Public: Findings from the 1999 National Survey* 2, 25 (2000) (NCJ 184957). Other independent analyses have suggested a similar correlation: "[E]ven when the effects of physical resistance and demeanor are statistically controlled, suspects' race has significant effects on the use of force. That officers are more likely to use even reasonable force against blacks might suggest that officers are, on average, more likely to adopt a punitive or coercive approach to black suspects than they are to white suspects." Robert E. Worden, "*The Causes of Police Brutality: Theory and Evidence on Police Use of Force*," in *Police Violence: Understanding and Controlling Police Abuse of Force* 23, 37 (William A. Geller & Hans Toch eds., 1996).

Finally, law enforcement profiling policies increase abuse by fostering a

presumption of guilt that gives way to the disproportionate use of force against minorities. New Jersey, for instance, was criticized in the 1990s for its use of racial profiling in highway stops. *See White v. Williams*, 179 F. Supp. 2d 405 (D. N.J. 2002); *United States v. New Jersey*, No. 99-5970 (D. N.J. Dec. 30, 1999) (consent decree); *Morka v. New Jersey*, No. L-8429-97 (N.J. Super. Ct. Law. Div. Oct. 5, 2000). In at least one case, the New Jersey Superior Court found that "a de facto policy on the part of the State Police . . . of targeting blacks for investigation and arrest." *State v. Soto*, 734 A.2d 350 (N.J. Sup. Ct. Law Div. 1996). Subsequently, New Jersey Attorney General John J. Farmer, Jr. released more than 90,000 documents revealing a state-sanctioned racial profiling policy. David Kocieniewski and Robert Hanley, "Racial Profiling Was the Routine, New Jersey Finds," N.Y. Times, Nov. 28, 2000, at A1. The State's *de facto* policy of racial profiling primed law enforcement officers for the use of force against minorities.

C. The Discriminatory Treatment of September 11 Detainees Made The Abuse of Plaintiffs Likely.

The lessons learned in the scientific studies, investigations and practical experiences detailed above make plain what would happen to Muslim men who were arrested and detained in a New York City jail shortly after September 11 on the basis of discriminatory policies. This discriminatory treatment was linked to what was the most powerful stigma imaginable in New York four months after

September 11—a presumed connection to terrorism. By consigning men to discriminatory treatment and linking that discriminatory treatment to powerful stigma, all in a prison not following the ordinary practices and regulations designed to stop such stigmatic discrimination, Defendants made abuse at the hands of guards disturbingly likely. Indeed, the OIG investigations reveal the grotesque abuse that September 11 detainees suffered. JA 220-255, 377-430. Messrs. Saffi, Jaffri, H. Ibrahim, Baloch, A. Ibrahim and Ebrahim alone were subjected to—among other mistreatment—religious slurs, physical assaults, excessive body cavity searches, and denial of humane conditions. JA 124-34.

First, in violation of the most basic BOP regulations designed to moderate power dynamics in prisons, September 11 detainees were confined based on their race, religion and national origin in the ADMAX Special Housing Unit, a place utterly lacking the guidelines and oversight required to keep the unit from devolving into Zimbardo's experimental prison. The segregation of Muslim men at the MDC followed precisely the patterns predicted by studies conducted by Tajfel and Jane Elliot. Defendants segregated a vulnerable minority in a specially designed housing unit in the prison and singled them out for harsher conditions of confinement. This effectively designated them as an "out-group" and licensed the abuse that they eventually suffered. The problem was compounded by the fact that the ADMAX Special Housing Unit was isolated from the rest of the prison facility.

JA 215-16. In amici's experience, such isolated units provide staff with greater opportunities for abuse because other inmates and staff are less likely to witness or hear about abuse. Insulated from both public scrutiny and vigorous internal oversight by denial of detainee's access to counsel and a general communications blackout, Defendants' abuse of members of the stigmatized minority predictably followed.

Second, September 11 detainees were designated at least "of interest" to the FBI's investigation of terrorism, a brand of profiling that attached a presumption of guilt to the entire class. For those Plaintiffs such as Messrs. Saffi, Jaffri, H. Ibrahim, Baloch, A. Ibrahim who were labeled "of high interest," the presumption of guilt by association was even greater. JA 115-16. By ascribing such labels to Plaintiffs, Defendants strongly signaled to corrections officers that the detainees were terrorists. The Department of Justice itself confirmed that "based on the vague label attached to the detainees by the FBI, the MDC staff was initially led to believe that the detainees could be terrorists or that they may have played a role in the September 11 attacks." JA 216.

The labeling policy established what Zimbardo calls a "cover story", presenting "an acceptable justification, or rationale, for engaging in the undesirable action" that is otherwise incomprehensible. Philip Zimbardo, *A Situationist Perspective on the Psychology of Evil: Understanding How Good People Are*

Transformed into Perpetrators, in *The Psychology of Good and Evil* 21, 28 (A.G. Miller ed., 2004). In this case, the policy created a dynamic that rationalized and excused mistreatment based on a terrorist threat indiscriminately identified with Muslim male detainees. Indeed, among the many threats and insults directed at detainees by MDC personnel and reported by the OIG, presumption of guilt and retribution was a frequent theme: "'Whatever you did at the World Trade Center, we will do to you.' . . . 'You're going to die here just like the people in the World Trade Center died.' . . . 'Someone thinks you have something to do with the terrorist attacks, so don't expect to be treated well.'" JA 240.

Finally, the propensity for retribution was further heightened in New York City in the aftermath of September 11, 2001, where anger for the attacks was at its peak. In the words of one lieutenant, MDC personnel "had a great deal of anger," and some staff had family, friends, and colleagues who were killed in the attacks. JA 216. This understandable anger fed the desire to punish those presumed responsible for the attacks.

The Defendants provided the MDC personnel with the perfect scapegoats—Muslim men from foreign countries declared to be "of high interest" to an investigation of terrorism and imprisoned in a Brooklyn detention center lacking adequate safeguards. Plaintiffs were never charged with any terrorism-related crime, but they served, foreseeably and tragically, as scapegoats for national anger

and retribution.

CONCLUSION

For the foregoing reasons, the decision below denying Defendants' motion to dismiss Claim 20 should be affirmed.

Respectfully submitted,

Sital Kalantry*
Assistant Clinical Professor of Law
Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853
607-255-3736
Counsel for Amici
April 4, 2007

*Petition for Admission pending

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

The attached *amicus curiae* brief of Former Wardens and Senior Prison Administrators submitted in support of appellants complies with the type-volume limitation of Fed.R.App.32(a)(7)(B) because it contains 6,228 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii). In calculating the number of words, I have relied on the word count of the word-processing system (Microsoft Word) used to prepare the brief.

Dated: April 4, 2007

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Sital Kalantry*
Assistant Clinical Professor of Law
Cornell Law School
Myron Taylor Hall
Ithaca, New York 14853
607-255-3736
Counsel for Amici

*Petition for Admission pending

PROOF OF SERVICE BY OVERNIGHT COURIER

In Re: Brief for Amici Curiae Former Wardens and Senior Prison Officials in Support of Appellees/ Cross-Appellants

Caption: Turkmen v. Ashcroft, U.S., and Does 1-20

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I am a citizen of the United States of America and I am employed in Omaha, Nebraska. I am over the age of 18 and not a party to the within action. My business address is 2311 Douglas Street, Omaha, Nebraska 68102. On this date, I served the above-entitled document, pdf copy by e-mail, and two printed copies on the parties or their counsel shown below, by placing sealed envelopes in the service of an over-night courier for next business day delivery, addressed as follows:

Attorneys For Plaintiffs

Rachel Anne Meeropol, Esquire
Center For Constitutional Rights
666 Broadway
New York, New York 10012
RachelM@ccr-ny.org

Michael Winger, Esquire
Covington & Burling LLP
1330 Avenue Of The Americas
New York, New York 10019
mwinger@cov.com

Attorneys For Defendant John Ashcroft

Richard W. Sponseller, Esquire
Dennis Barghaan, Esquire
Assistant United States Attorneys
2100 Jamieson Avenue
Alexandria, Virginia 22314
Richard.Sponseller@usdoj.gov
Dennis.Barghaan@usdoj.gov

Attorneys For Defendant Robert Mueller

R. Craig Lawrence, Esquire
Assistant United States Attorney
555 Fourth Street, N.W.
Washington, District Of Columbia 20530
Craig.Lawrence@usdoj.gov

Attorneys For The United States Of America

Robert Loeb, Esquire
U.S. Department Of Justice
Ben Franklin Station
P.O. Box 888
Washington, District Of Columbia 20044
Robert.loeb@usdoj.gov

Attorneys For Defendant Dennis Hasty

Michael L. Martinez, Esquire
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, District Of Columbia 20004
MMartinez@crowell.com

Attorneys For Defendant James Sherman

Debra Roth, Esquire
Thomas Sullivan, Esquire
Shaw, Bransford, Veilleux & Roth, PC
1100 Connecticut Avenue, N.W., Suite 900
Washington, District Of Columbia 20036
droth@shawbransford.com
tsullivan@shawbransford.com

Attorneys For Defendant James Ziglar

William Alden McDaniel, Jr., Esquire
Bassel Bakos, Esquire
Law Offices Of William Alden McDaniel, Jr.
118 West Mulberry Street
Baltimore, Maryland 21201
wam@wamcd.com
bb@wamcd.com

I certify under penalty of perjury that the foregoing is true and correct. Service and court filing executed on April 4, 2007, at Omaha, Nebraska.

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