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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees-Cross-Appellants,

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants-Cross-Appellees,

(Additional Caption On the Reverse)

On Appeal from the United States District Court for the Eastern District of New York

REPLY BRIEF FOR DEFENDANT-APPELLANT-CROSS-APPELLEE WARDEN DENNIS HASTY, FORMER WARDEN OF THE METROPOLITAN DETENTION CENTER (MDC)

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Defendants-Cross-Appellees,

and

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

Intervenors.

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PRELIMINARY STATEMENT

In the wake of the unprecedented terrorists attacks on September 11, 2001, the country collectively faced uncertain and challenging times. That was particularly true for the government officials who were responsible for investigating the attacks, bringing those responsible to justice, and protecting the country from additional acts of aggression. It is against this backdrop that Plaintiffs seek money damages from Mr. Hasty and other MDC officials related to their detention at the MDC in New York.

In pursuit of their claims against Mr. Hasty, Plaintiffs ask this Court to accept, as the district court did, unsupported extensions of the law and unsupportable interpretations of their own allegations. First, Plaintiffs' claims require the extension of the judicially-fashioned remedy under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), to new claims and new contexts. But the required extensions cannot be reconciled with prevailing law, including the Supreme Court's consistent reticence to expand the doctrine beyond its current and limited application.

Second, Plaintiffs' claims seek to hold Mr. Hasty personally liable for the alleged actions of others, specifically: (i) policy decisions made by government officials far senior than Mr. Hasty, and (ii) acts by rogue, low-level prison guards with whom Plaintiffs do not even plead Mr. Hasty ever interacted. Permitting

these claims to proceed against Mr. Hasty requires a suspension of disbelief. Plaintiffs would have this Court believe that decisions regarding whether and how to detain individuals – whom the FBI and INS arrested and identified as having ties to terrorism – were relegated to a pre-trial detention center warden. They would also have this Court ignore the requirement that an individual personally commit a constitutional tort to be liable for it. Plaintiffs simply have not adequately or plausibly pled viable claims against Mr. Hasty.

In any event, Mr. Hasty is entitled to qualified immunity. Qualified immunity protects government officials from suit, not just liability, and calls for the earliest disposition of a case. Plaintiffs' pleadings, and the context in which their claims arise, demonstrate that Mr. Hasty was neither plainly incompetent nor knowingly violating established law. Rather, he acted reasonably under the circumstances. Qualified immunity asks for nothing more.

Plaintiffs' opposition is largely not responsive to Defendants' arguments. Instead, Plaintiffs attempt to diminish the dispositive effect of the applicable legal doctrines, and the inadequacy of their pleading, by recasting the issues, misconstruing the controlling standards, and ignoring the import of their own pleadings. Their tactics are to no avail. This Court should reverse the district court's decision permitting Plaintiffs' claims to proceed against Mr. Hasty.

I. PLAINTIFFS' CLAIM UNDER THE FREE EXERCISE CLAUSE SHOULD NOT PROCEED AGAINST MR. HASTY.

Bivens is a limited remedy, and the Supreme Court repeatedly cautions against extending it to new claims and contexts. *Minneci v. Pollard*, 132 S. Ct. 617, 622 (2012) ("Since [1980] the Court has had to decide in several different instances whether to imply a *Bivens* action. And in each instance it has decided against the existence of such an action."); *see also Vance v. Rumsfeld*, 701 F.3d 193, 198 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2796 (2013) ("[The Supreme Court] has reversed more than a dozen appellate decisions that had created new actions for damages. Whatever presumption in favor of a *Bivens*-like remedy may once have existed has long since been abrogated."). Although both the district court and Plaintiffs acknowledge that the First Amendment free exercise claim requires an extension of *Bivens*, they contend such an extension is warranted. Pls.' Br. at 59; SPA at 51-55; *see also Reichle v. Howards*, 132 S. Ct. 2088, 2093 n.4 (2012) ("We have never held that *Bivens* extends to First Amendment claims."). It is not. And even if a claim existed, Plaintiffs have not proffered sufficient allegations for it to lie against Mr. Hasty.

A. *Bivens* Should Not Be Extended to the Free Exercise Clause.

Despite recognizing that the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009), suggested that no *Bivens* cause of action should lie for "intentional religiously-based mistreatment," SPA at 54-55, the district court

permitted the claim to proceed. In doing so, it considered, but rejected, the various national security-based "special factors" that counseled against extending the remedy. Instead, the district court reasoned that, "if the world knew that those officers were held liable for the damages they caused," our national security would likely be "enhanced." SPA at 54. In their opposition, Plaintiffs echo this finding, noting that a judgment against "executive misconduct" would enhance our status among "other nation states." Pls.' Br. at 65-66. *Amici* make the same misguided argument. Brief of the National Immigration Project of the National Lawyers Guild and the American Immigration Council as *Amici Curiae* in Support of the Plaintiffs-Appellees-Cross-Appellants at 2, *Turkmen v. Ashcroft*, No. 13-0981 (2d Cir. Oct. 4, 2013) (Dkt. No. 150-2) ("*Amici* Br.").

This deference to speculative gains in international relations should give pause. As this Court has noted, the threshold for finding a special factor is "remarkably low," existing "*whenever* thoughtful discretion would pause *even to consider*." *Arar v. Ashcroft*, 585 F.3d 559, 573-74 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010) (emphasis added). The very suggestion that a new *Bivens* action could have an effect – positive or negative – on national security is *itself* enough of a special factor to preclude extending *Bivens*. *See* Brief for Defendant-Appellant James Sherman at 32, *Turkmen v. Ashcroft*, No. 13-0981 (2d Cir. June 28, 2013) (Dkt. No. 121) ("Sherman Br.").

Nothing Plaintiffs offer in response is sufficient to defend the district court's contrary conclusion.[1] Plaintiffs attempt to narrow the effect of "special factors," and distinguish this case from *Arar*, by arguing that their claims have nothing to do with immigration policies, foreign affairs, or national security concerns. Pls.' Br. at 62-65. But this Court in *Arar* made clear that "special factors" are not reserved for only the most exceptional cases. To the contrary, if the contemplated *Bivens* action "would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation," a special factor exists and the cause of action should be rejected. *Arar*, 585 F.3d at 574.[2] The district court's recognition of the new action's possible effect is dispositive.

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[1] Plaintiffs' cases are inapposite. Pls.' Br. at 59-60 n.11. They either do not consider special factors or they are free speech cases. *See*, *e.g.*, *Skurdal v. Fed. Det. Ctr.*, C12-706 RSM, 2013 WL 3897772, at *1 (W.D. Wash. July 29, 2013) ("[T]he Supreme Court considers each type of First Amendment claim on its own merits, rather than the Amendment as a whole when determining whether a *Bivens* action can be brought.").

[2] *See also United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-74 (1990) (foreign policy considerations are special factor to preclude *Bivens*); *Doe v. Rumsfeld*, 683 F.3d 390, 394 (D.C. Cir. 2012) ("The Supreme Court has never implied a *Bivens* remedy in a case involving the military, national security, or intelligence."); *Ali v. Rumsfeld*, 649 F.3d 762, 773 (D.C. Cir. 2011) ("[T]he danger of obstructing U.S. national security policy is one such factor that counsels against allowing a *Bivens* claim to proceed") (internal quotation omitted); *Beattie v. Boeing Co.*, 43 F.3d 559, 563 (10th Cir. 1994), *cert. denied*, 514 U.S. 1127 (1995) (barring *Bivens* with national security concerns); *El Badrawi v. Dep't of Homeland Sec.*, 579 F. Supp. 2d 249, 262-63 (D. Conn. 2008) ("immigration and national security context" is a 'special factor' precluding *Bivens*.).

Mr. Sherman's reply brief further expounds on why it is inappropriate to extend *Bivens* to permit Plaintiffs' free exercise claim. *See* Reply Brief for Defendant-Appellant James Sherman at Part I.A, *Turkmen v. Ashcroft*, No. 13-0981 (2d Cir. Nov. 26, 2013) (Dkt. No. 187) ("Sherman Reply Br."). To avoid repetitive briefing, Mr. Hasty adopts those arguments.

B. In Any Event, Plaintiffs Do Not Adequately Plead Their Claim Against Mr. Hasty.

Even if this Court were to allow the extension of *Bivens* to a free exercise claim, Plaintiffs' allegations are insufficient to proceed against Mr. Hasty.

As Plaintiffs concede, any temporary denial of Korans was incident to the ADMAX SHU policy that prohibited *any* materials in Plaintiffs' cells. Pls.' Br. at 92-93. Such a facially neutral policy does not objectively aim to suppress religious freedom. *See, e.g., Employment Division v. Smith,* 494 U.S. 872, 878 (1990) (noting that a facially neutral policy that only "incidental[ly] [a]ffect[s]" religious exercise does not impinge on that right). Plaintiffs further concede that all but one Plaintiff received Korans within "weeks" or "one month" of their detention.[3] It is not plausible to assume, as Plaintiffs suggest, that Mr. Hasty set out to suppress Plaintiffs' free exercise and then had a change of heart. In fact, the OIG Reports indicate that the ADMAX SHU was not fully operational until October 15, 2001,

[3] Plaintiffs offer no facts to suggest this lone failure to issue a Koran was intentional, let alone that Mr. Hasty knew about it. Pls.' Br. at 94.

which plausibly explains incidental delays. A. ___ (Dkt. No. 589-2 at 119) (OIG Report).[4]

And Plaintiffs' attempt to bootstrap the necessary intent – by contending that Mr. Hasty *knew* the delayed distribution of Korans would burden their religious practices – fails. Pls.' Br. at 94. The relevant question is whether Mr. Hasty *intended* to suppress Plaintiffs' practices, not whether he was aware that a neutral policy could hinder them. *See* SPA at 55.

Plaintiffs' alternate suggestion that they need not plead intent because the no-items policy was "an exaggerated response to a legitimate concern" does not survive scrutiny. Pls.' Br. at 96-97 (citing and quoting *Turner v. Safley*, 482 U.S. 78, 89-91, 97-99 (1987)). Plaintiffs' reliance on *Turner* is misplaced. There, the Supreme Court held that a prison regulation prohibiting marriage between inmates and civilians was an exaggerated response to security objectives, including preventing "love triangles" that may lead to violence. *Id.* at 97-98.

Turner and this case are not comparable. As an initial matter, a facially neutral no-items policy cannot itself be construed as impinging on Plaintiffs' constitutional rights. *Smith*, 494 U.S. at 878. Even if it were so construed, it must

[4] The OIG Reports refer to two government investigations by the Office of Inspector General. *See* Brief for Defendant-Appellant Dennis Hasty at 4 n.2, *Turkmen v. Ashcroft*, No. 13-0981 (2d Cir. June 28, 2013) (Dkt. No. 123) ("Hasty Br.") ("OIG Report" or, collectively, the "OIG Reports" or "Reports").

be "judged under a 'reasonableness' test less restrictive than that ordinarily applied[.]" *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349 (1987). In applying this standard, the Second Circuit requires the plaintiff to demonstrate that any professed legitimate penological interests "'were irrational.'" *Salahuddin v. Goord*, 467 F.3d 263, 274-75 (2d Cir. 2006).[5] Plaintiffs do not meet this burden. There is no reasonable basis to conclude that, in the immediate aftermath of 9/11, it was "exaggerated" – let alone irrational – to implement a policy prohibiting personal items in the cells of those detainees that the most senior national security authorities suspected of having connections to terrorism.

Plaintiffs' other free exercise allegations, such as alleged denials or delays in the receipt of Halal food, A___ (Dkt. No. 726 ¶133) (Fourth Amended Complaint or "FAC"), or MDC staff's alleged anti-Muslim behavior, *id.* ¶¶136, 138, fail to implicate Mr. Hasty's personal involvement or intentional suppression. Nor does Plaintiffs' assertion that one plaintiff brought his religion to the attention of *MDC staff* get Plaintiffs past this threshold. *Id.* ¶133. A simple profession of one's religion cannot establish the necessary intent to suppress the free exercise of it. Plaintiffs do not allege, for example, that Mr. Hasty knew of that statement, acted

[5] In *Salahuddin*, a panel of this Court declined to decide what effect the Supreme Court's decision in *Smith* had on the *O'Lone* standards for judging prisoner free-exercise claims. 467 F.3d at 274, n.3. To the extent that *Smith* overrides the *O'Lone* standard, Mr. Hasty adopts the arguments expressed in Mr. Sherman's Reply Brief at 9-10.

on it or took steps to interfere with that (or any) plaintiff's attempt to pray or engage in other religious practices. Plaintiffs do not even allege that Mr. Hasty knew of their religious concerns, nor that he refused to act on them.

Moreover, Mr. Hasty is entitled to qualified immunity for this claim. To avoid repetitive briefing, Mr. Hasty adopts the qualified immunity arguments set forth by Mr. Sherman. *See* Sherman Reply Br. at Part I.B.

II. PLAINTIFFS' OTHER CONSTITUTIONAL CLAIMS ARE SIMILARLY DEFECTIVE.

A. *Bivens* Should Not Extend To Claims One, Two, and Six Because They Arise In A New Factual Context.

It is hard to accept that the unprecedented attacks on 9/11, and the federal government's response to them, did not present a new factual context under *Bivens*. *See*, *e.g.*, *Iqbal v. Hasty*, 490 F.3d 143, 179 (2d Cir. 2007) (describing the 9/11 attacks as "a national and international security emergency unprecedented in the history of the American Republic") (Cabranes, J., concurring).[6] Plaintiffs nonetheless attempt to diminish the legal effect of this new context by arguing that "[n]ot all factual variations raise[] legal issues." Pls.' Br. at 54-56. Although true

[6] *Cert. granted, cause remanded,* 556 U.S. 1256 (2009) and *cert. granted, cause remanded sub nom. Sawyer v. Iqbal*, 556 U.S. 1256 (2009) and *rev'd and remanded sub nom. Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

as a general matter, that cannot disguise the profound and legally significant differences in the factual context at issue here.[7]

As this Court stated in *Arar*, "[w]e construe the word '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 572 (emphasis added). Facts matter. So while discrete factual distinctions might not give rise to a "new context," significant factual distinctions related to the purported claims, such as those at issue here, do.

This is not, as Plaintiffs suggest, a routine prisoners' rights lawsuit. Pls.' Br. at 53. Plaintiffs' claims arise not only in the wake of the most significant terrorist attack on U.S. soil, but also from the federal government's response to it. Orchestrated by Attorney General John Ashcroft, FBI Director Robert Mueller, and other senior U.S. government officials, the investigation involved many levels of the government and several different agencies. Information was shared sparingly and selectively for national security reasons, and judgments were made based on the unique circumstances and all the uncertainty surrounding them.

[7] Plaintiffs urge this Court to use *Iqbal v. Hasty* to guide its consideration of the present appeals. Pls.' Br. at 5. However, *Hasty* concerned only the question of qualified immunity – it did not assess whether the immediate response to 9/11 was a "new context" for a *Bivens* cause of action. 490 F.3d at 159, 169.

The facts and circumstances that undergird Plaintiffs' claims cannot – as Plaintiffs urge – simply be likened to *Carlson v. Green*, the only *Bivens* prisoner rights case that the Supreme Court ever affirmed. *See*, *e.g.*, Pls.' Br. at 53 (citing *Carlson v. Green*, 446 U.S. 14 (1980)). In *Carlson*, the issue was whether a federal inmate who died from lack of medical attention had his Eighth Amendment rights violated. *Id*. at 16. *Carlson* did not involve orders and judgments by the highest level of government officials or the kinds of questions on national security and immigration policy that are present here. The context here is materially and legally different from that in *Carlson.*

Because these claims arise in a new context, an extension of *Bivens* requires its full analysis. Hasty Br. at 19. Under that analysis, the same special factors that counsel against extending *Bivens* under the First Amendment apply to bar these claims as well. *See* Part I.A, and cases cited *supra* at n.2. Any argument that treatment at the MDC is not linked to national security misses the point. *See*, *e.g.*, *Amici* Br. at 27. Plaintiffs' claims revolve around actions taken in response to 9/11, including determinations regarding who would be detained in the ADMAX SHU and what its "official conditions" would be. Treatment, therefore, "during detention" was a function of these national security-driven executive decisions.

Mr. Sherman's reply brief expounds on the new context in which Plaintiffs' claims arise. *See* Sherman Reply Br. at Part II.A. To avoid repetitive briefing, Mr. Hasty adopts those arguments.

B. Plaintiffs' Allegations of "Official Conditions" Do Not Adequately State A Claim Against Mr. Hasty.

Even if *Bivens* were to apply here, Plaintiffs have not adequately alleged Mr. Hasty's involvement in creating the "official conditions" at the MDC.

The OIG Reports, which Plaintiffs concede constitute part of their pleadings (Pls.' Br. at 69), establish that Mr. Hasty did not make independent decisions regarding the challenged "official conditions." Rather, the "official conditions" flowed from the FBI's designating Plaintiffs as "of interest," and from more senior BOP officials' orders regarding how such designees should be detained.

Plaintiffs attempt to evade the dispositive effect of the OIG Reports by arguing that *only* the facts in the OIG Reports that support their allegations should be considered. *See* Pls.' Br. at 70 n.14 ("[T]he Fourth Amended Complaint incorporates the OIG Reports except when contradicted by allegations of th[e] Fourth Amended Complaint."). But Plaintiffs' approach cannot be reconciled with the law. Their conclusory allegations regarding Mr. Hasty's supposed policy-making role cannot trump the more specific facts outlined in the OIG Reports – the product of years of detailed investigation. *See Lombardi v. Whitman*, 485 F.3d 73,

82-83 (2d Cir. 2007) (crediting OIG Report, which plaintiffs incorporated into their complaint, over plaintiffs' unsupported allegations that contradicted it); *In re Petitioners Seeking Habeas Corpus Relief in Relation to Prior Detentions at Guantanamo Bay*, 700 F. Supp. 2d 119, 132 (D.D.C. 2010) (declining to allow petitioners to "embrace" portions of government declarations that "ostensibly support[ed] their claim" while attacking other portions of the same documents), *aff'd sub. nom. Chaman v. Obama*, No. 10-5130, 2012 WL 3797596 (D.C. Cir. Aug. 10, 2012).

Plaintiffs alternatively argue that the OIG Reports "support the role Plaintiffs have alleged [against Mr. Hasty]." Pls.' Br. at 69. But any fair reading of the Reports directly undermines that position. For example, Plaintiffs argue that Mr. Hasty was "part of the BOP" and thus cannot rely on the Reports' findings that senior BOP officials ordered the creation of the ADMAX SHU and the corollary "official conditions." *Id*.

Plaintiffs' portrayal of Mr. Hasty as part of the BOP, while technically true, does not advance their cause. Low-level prison guards are also part of the BOP, but that does not implicate them in the OIG's references to the BOP. Indeed, in contrast to Plaintiffs' efforts to aggregate all levels of the BOP into a monolith, the OIG carefully distinguishes its references, identifying MDC personnel as, for example, "MDC Management" or "MDC Staff" – not "BOP." *See* A___ (Dkt. No.

589-2 at 159) (OIG Report) ("We understand the *MDC*'s efforts to follow instructions from *BOP* Headquarters"); *id.* at 117 (describing *BOP*'s initial failure to adequately train *MDC staff*); *id*. at 139, 149 (mentioning *MDC management*) (emphases added).

Plaintiffs' additional argument, that the OIG Reports do not contradict their allegations that Mr. Hasty ordered subordinates to design restrictive conditions for his approval, is equally unavailing. Pls.' Br. at 69. The OIG Reports rebut any inferences that Plaintiffs attempt to draw from these unadorned allegations. The Reports establish that Mr. Hasty had nowhere near the level of seniority required to "creat[e]" the "official conditions." Indeed, the Reports demonstrate that senior BOP officials established the "official conditions", and Mr. Hasty had no meaningful discretion in their regard. *See*, *e.g.*, A___(Dkt. No. 589-2 at 112-113) (OIG Report) (describing conversations between BOP Director Kathy Hawk Sawyer and U.S. Attorney General staff members regarding establishing conditions of confinement); *id.* at 116 ("BOP's Assistant Director for Correctional Programs confirmed that any detainee who 'may have some connection to or knowledge of on-going terrorist activities,' must be housed 'in the Special Housing Unit' *in the 'tightest' allowable conditions* until the FBI cleared him of terrorist connections.") (emphasis added); *id.* at 131 (noting that MDC officials were operating "in accordance with BOP Headquarters' instructions to maintain the 'tightest

restrictions possible on the September 11 detainees[.]"); *id.* at 159 ("We understand the MDC's efforts to follow instructions from BOP Headquarters and confine the September 11 detainees under secure conditions[.]")

Fundamentally, Plaintiffs' theory that Mr. Hasty was responsible for the "official conditions" defies common sense. Plaintiffs ask this Court to infer that the U.S. government, in response to an unprecedented terrorist attack, turned to the local warden of a pre-trial detention center in Brooklyn, New York to decide the nature and level of confinement for arrested terror suspects. That contention is inconceivable, and Plaintiffs' claim here should be dismissed. *Iqbal*, 556 U.S. at 678.

C. Plaintiffs' Allegations Regarding "Unofficial Abuse" Do Not Implicate Mr. Hasty.

As for Plaintiffs' "unofficial abuse" allegations, Plaintiffs allege neither that Mr. Hasty encouraged nor witnessed the alleged abuse. Indeed, the FAC indicates that Mr. Hasty had no personal contact whatsoever with Plaintiffs, and never even went to the ADMAX SHU. Against this backdrop, Plaintiffs seek to predicate their claim on Mr. Hasty's alleged knowledge of others' bad acts and his subsequent inaction. A___ (Dkt. No. 726 ¶137) (FAC). But Plaintiffs' own pleading makes this theory implausible. In fact, following its months of investigation of abuse at the MDC, the OIG concluded that "our investigation has

not uncovered *any evidence* that the physical or verbal abuse was engaged in or condoned by anyone other than the correctional officers who committed it." A___ (Dkt. No. 589-2 at 162 n.130) (OIG Report) (emphasis added).

Mr. Hasty's opening brief explained that Plaintiffs' argument is legally insufficient, but Plaintiffs' respond only by labeling his authority as "stray," arguing that it "cannot be squared with *Iqbal*[]." Pls.' Br. at 78. To the contrary, the cases faithfully apply *Iqbal*. *See* Hasty Br. at 30-32. Plaintiffs offer no basis to disregard the courts' holdings that, after *Iqbal*, pleadings must allege that the "official's *own individual actions*" violated the Constitution. *Bellamy v. Mount Vernon Hosp.*, No. 07-cv-1801 (SAS), 2009 WL 1835939 at, **4, 6 (S.D.N.Y. June 26, 2009), *aff'd*, 387 F. App'x 55 (2d Cir. 2010) (emphasis in original); *see also Brown v. Rhode Island,* 511 F. App'x 4, 5 (1st Cir. 2013) (finding that, after *Iqbal*, supervisor not liable because "plaintiff [did] not allege[] any *direct actions* taken by" the defendant) (emphasis added).

Failing to distinguish these cases, Plaintiffs urge this Court to look past *Iqbal*'s "own individual action" requirement to find that Mr. Hasty behaved with "deliberate indifference." They thus reiterate their allegation that Mr. Hasty purposefully avoided the ADMAX SHU and ignored complaints of abuse. Pls.' Br. at 80-81. These statements alone do not support a claim of deliberate indifference, even if that were the standard. Mr. Hasty was, in fact,

administratively far removed from the ADMAX SHU, which was overseen by a Captain with "direct responsibility for custody operations" of the SHU. That Captain reported to an intermediary, who in turn reported to Mr. Hasty. *See* A___ (Dkt. No. 589-2 at 118, n.95) (OIG Report). It is therefore not surprising that Mr. Hasty did not visit the SHU, especially as he was overseeing the entire prison population. *See id.* at 158 ("the influx of high-security detainees stretched MDC resources to their limit * * * during a highly emotional period of time."). No deliberate indifference should be inferred from Mr. Hasty not visiting a SHU that already had managerial oversight.

Plaintiffs still endeavor to prop up a claim of deliberate indifference by accusing Mr. Hasty of staking out an extreme legal position: "Hasty's position is that he, as warden, can walk down prison halls, see correctional staff under his command assaulting an inmate, and innocently walk away, doing nothing." Pls.' Br. at 76. Whether a claim could lie under those allegations is immaterial here. Plaintiffs do not proffer any plausible allegations that Mr. Hasty participated in, aided, abetted, condoned, or even witnessed any of the alleged abuses. There can be no claim against Mr. Hasty for a Fourth or Fifth Amendment violation absent such allegations. *Joseph v. Fischer*, No. 08-civ-2824 (PKC)(AJP), 2009 WL 3321011, at *14 (S.D.N.Y. Oct. 8, 2009) (supervisor's failure to act does not create liability under § 1983 even if that failure denied plaintiff constitutional rights); *see*

also Evans v. Chalmers, 703 F.3d 636, 660 (4th Cir. 2012) ("'[A] supervisor's mere knowledge' that his subordinates are engaged in unconstitutional conduct is insufficient to give rise to liability") (citing *Iqbal*, 556 U.S. at 677).

Plaintiffs' reliance on *Vincent v. Yelich*, 718 F.3d 157 (2d Cir. 2013) to argue that this Court has recognized § 1983 liability through a supervisor's failure to act illustrates the fallacy of their position. In *Vincent*, a panel of this Court determined that the Executive Deputy Commissioner of the New York State Department of Corrections (DOCS) was not entitled to qualified immunity as a supervisor because he "administratively imposed, enforced, or supervised employees who imposed or enforced [unconstitutional] conditions." *Id.* at 160. There, the record showed that the defendant, who was DOCS's "chief legal advisor," *id.* at 172, refused to enforce a new legal requirement regulating certain DOCS conduct, in part, because he disagreed with it. *Id.* at 173. *Vincent* thus involved an official policy and the defendant's refusal to implement it. It said nothing about rogue employees engaging in unofficial misconduct. Moreover, *Vincent* offered the defendant's own admission that he *deliberately violated the law*. *Id.* All that Plaintiffs offer here are allegations showing that Mr. Hasty was "made aware of the abuse." A___ (Dkt. No. 726 ¶24) (FAC).

By contrast, the OIG Reports confirm not only that Mr. Hasty had no personal involvement in the alleged abuse, but that he – unlike the defendant in

Vincent – actively tried to correct MDC staff misdeeds. The Reports praise "MDC management" for taking "affirmative steps to prevent potential staff abuse by installing security cameras in each September 11 detainee's cell in the ADMAX SHU and by requiring MDC staff to videotape all movements of detainees to and from their cells." A___ (Dkt. 589-2 at 149) (OIG Report). Plaintiffs' retort that the videotapes were eventually destroyed cannot implicate Mr. Hasty. The BOP's Northeast Region Director began that policy to stem the accumulation of hundreds of tapes and to "free up storage space at the MDC." *Id.* at 150. According to the OIG Reports, MDC management also sought to resolve the effect of the BOP's WITSEC designations on social visitations by "training reception area staff on proper procedures for granting visitation to detainee family members." *Id.* at 139. These are not the acts of a warden behaving with deliberate indifference.

While the "unofficial abuses" Plaintiffs allege are – if true – reprehensible and regrettable, that does not *de facto* entitle them to a claim against Mr. Hasty, who their own allegations establish was not personally involved.[8] The district court's conclusion that the claim should nonetheless proceed against Mr. Hasty should be reversed.

[8] Indeed, even *Amici* appear to recognize that a core purpose of *Bivens* is to target the individual officers who perpetrated the injury. *Amici* Br. at 9 ("It must be remembered that the purpose of *Bivens* is to deter *the officer*.") (citing *FDIC v. Meyer*, 510 U.S. 471, 485 (1994) (emphasis in original).

D. Plaintiffs' Strip Search Claims Are Also Inapplicable To Mr. Hasty.

The same is true for Plaintiffs' Sixth Claim for relief – unconstitutional strip searches. The dearth of allegations that Mr. Hasty was involved in the strip searches is dispositive of the claim.

Plaintiffs maintain that their claim is proper because "the strip search policy was among the restrictive conditions of confinement designed at Hasty's request and approved and implemented, first by Hasty and Sherman, and later by Zenk." Pls.' Br. at 100. In support, Plaintiffs cite to only general allegations about "restrictive conditions" that do not mention the unwritten "policy" of strip searching. *Id*. (citing FAC ¶75).

These summary allegations do not implicate Mr. Hasty in any strip search "policy." Indeed, Plaintiffs' admissions that Mr. Hasty never went to the ADMAX SHU and that the strip search "policy" was unwritten, (citing A___ (Dkt. No. 726 ¶¶24, 111) (FAC)), undermines any basis to credit Plaintiffs' vague claims that Mr. Hasty "approved" or "implemented" the purported "policy" of unconstitutional searches.

To compensate, Plaintiffs contend that Mr. Hasty "'was made aware of the [strip searches] that occurred through inmate complaints' and other means," including access to a "visual search log." Pls.' Br. at 100-01 (citing A___ (Dkt. No. 726 ¶¶24, 114) (FAC)). But Plaintiffs do not allege that Mr. Hasty ever

viewed that search log. And even if Mr. Hasty had *known* about the strip searches, Plaintiffs offer nothing to suggest that he ordered, implemented, or approved of their execution. Against Plaintiffs' cursory allegations, no plausible conclusion that Mr. Hasty was sufficiently involved can be drawn. *See* Part II.C, *supra*; *Iqbal*, 556 U.S. at 678-79.

E. Plaintiffs' Allegations Are Insufficient To State An Equal Protection Claim Against Mr. Hasty.

To prevail on their Fifth Amendment equal protection claim, Plaintiffs must show that (1) Mr. Hasty had a discriminatory animus against them, and (2) that animus caused their injuries. *See* SPA at 35. Plaintiffs fail to posit facts that are more than "merely consistent with" Mr. Hasty's alleged animus. Such facts do not state a claim. *Iqbal*, 556 U.S. at 676, 678; *see also* SPA at 35 (explaining that Plaintiffs' allegations will fail if Mr. Hasty's actions would have occurred regardless of any animus).

Plaintiffs do not address Mr. Hasty's principal argument that their discrimination claims are premised on a flawed inference, specifically that an alleged equal protection violation surrounding their *arrests* may simply be grafted onto other defendants who were associated only with their subsequent *detention*. This argument is illogical.

Plaintiffs' allegation that discriminatory animus prompted *DOJ* Defendants to make certain decisions in no way pleads a similar discriminatory animus against

MDC Defendants. Indeed, Plaintiffs detail at length just how critical those DOJ decisions were to their ultimate conditions of confinement. *See* Pls.' Br. at 20 ("[DOJ] Defendants ordered the 9/11 detainees isolated from the outside world, and isolation *required* placement in a SHU.") (emphasis added); *id*. at 34 ("DOJ Defendants' policy * * * *required* Plaintiffs to be kept in segregated housing, and by misidentifying them as suspected terrorists it *ensured* their harsh treatment.") (emphasis added); *id*. at 39 ("DOJ Defendants *ensured* that Plaintiffs would be detained in the harshest conditions that exist in the federal system.) (emphasis added). Here, as elsewhere, Plaintiffs' pleadings undo their arguments.

Plaintiffs counter that "their placement in the ADMAX SHU was not based on the FBI's interest/high-interest classification." Pls.' Br. at 70 (citing FAC ¶4). But Plaintiffs' allege only that this classification was not based on "any information indicating they were dangerous or involved in terrorism." A___ (Dkt. No. 726 ¶4) (FAC). Whether those classifications were justified is unrelated to whether those classifications *caused* them to be detained in the ADMAX SHU. *See*, *e.g.*, *id.* ¶67 ("[FBI Director] Mueller ordered that [Plaintiffs] be kept on the INS Custody List (*and thus in the ADMAX SHU*).") (emphasis added).

It is implausible to assume – as one must under Plaintiffs' strident theory – that, if the FBI arrested a group of East-Asian Confucians in connection with the

9/11 attacks, then MDC Defendants would have refused to detain them in the same ADMAX SHU or at least under less restrictive conditions.

Plaintiffs contend that it is "factually incorrect and legally irrelevant" that MDC Defendants treated, for example, Israeli detainees the same as Plaintiffs. Pls.' Br. at 91. Here again, the allegations to which Plaintiffs cite undermine their contentions. *See* Hasty Br. at 43-44. Notably, while Plaintiffs do allege that these Israeli detainees "were among the first detainees to be moved from the ADMAX SHU," those same allegations explain that this was because the *INS* dropped them from its custody list, not because of Mr. Hasty's supposed discretion. A___ (Dkt. No. 726 ¶43) (FAC).

Likewise, Plaintiffs argue that MDC Defendants detained Plaintiff Mr. Bajracharya, a Nepalese Buddhist, because he was perceived to be Arab. Pls.' Br. at 91. But, yet again, the allegations on which Plaintiffs rely show only that the *FBI* perceived Mr. Bajracharya as Arab. *Id.* ¶230. Tellingly, Plaintiffs' FAC explains that MDC Defendants *knew* he was neither Arab nor Muslim. *Id.* ¶235. If MDC Defendants' decisions regarding Plaintiffs' detention and treatment were actually based on race or religion, they would not have treated Mr. Bajracharya in the same manner as other Plaintiffs. But as a putative class representative, Mr. Bajracharya does not contend that he received more favorable treatment than his co-Plaintiffs.

Undeterred by this contradiction, Plaintiffs further argue that animus can be inferred from allegations that Messrs. Hasty and Sherman falsified a document to prolong their detention. Pls.' Br. at 90. But Plaintiffs do not even allege that these assessments affected their detention in the ADMAX SHU. Indeed, they allege the opposite. *See* A___ (Dkt. No. 589-2 at 37-38) (OIG Report) (Stuart Levey, Associate Deputy Attorney General, stated that "the idea of detaining September 11 detainees until cleared by the FBI was 'not up for debate.'"); A___ (Dkt. No. 589-2 at 116) (OIG Report) (MDC staff was directed to continue holding September 11 detainees in the most restrictive conditions of confinement possible until the detainees could be "reviewed on a case-by-case basis by the FBI[.]"); A___ (Dkt. No. 589-2 at 135) (OIG Report) (9/11 detainees were not permitted transfers "prior to receiving the FBI clearance notification.").

And, even if one were to accept that Plaintiffs' allegations articulated some animus, it would be race-neutral: "[the] conditions [were] designed * * * not for any legitimate penological reason but *in the belief that* [Plaintiffs] *were probably terrorists who therefore ought to suffer*[.]" A___ (Dkt. No. 726 at ¶103) (FAC) (emphasis added). The only purportedly "racial" slur that Plaintiffs allege Mr. Hasty used is "terrorists." A___ (Dkt. No. 726 at ¶77) (FAC). "Terrorists" is not, as Plaintiffs argue, a "racial[] taunt," (Pls.' Br. at 91), particularly since Mr. Hasty

was instructed that Plaintiffs *were* suspected terrorists. *See* A___ (Dkt. No. 726 at ¶61.)

It is less plausible that a personal bias against Arabs and Muslims motivated Mr. Hasty's actions than the obvious explanation that he was abiding by his superiors' instructions regarding suspected terrorists, whatever their race. *See also* Hasty Br. at 38-39.

F. Plaintiffs' Claims One and Two Are Almost Entirely Defeated by Qualified Immunity.

Though neither Claims One or Two are adequately pled against Mr. Hasty, the "official conditions" portion of Claim One and the entirety of Claim Two are ripe for dismissal under qualified immunity. *Pearson v. Callahan,* 555 U.S. 223, 231 (2009) ("qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known'") (citation omitted).

In a *per curiam* opinion issued just weeks ago, the Supreme Court emphasized that "'[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." *Stanton v. Sims*, No. 12-1217, 2013 WL 5878007, at *2 (U.S. Nov. 4, 2013) (internal quotations omitted). Here, given the unprecedented circumstances thrust upon him, it was reasonable

for Mr. Hasty to follow the instructions of senior government officials regarding both the establishment of "official conditions" and who would be arrested and detained. *See* Hasty Br. at 33-37. Qualified immunity is thus appropriate.

Plaintiffs oppose Mr. Hasty's plea for qualified immunity by advancing "two central sets of allegations." Pls.' Br. at 84. First, Plaintiffs argue that MDC Defendants' continued abidance of the "official conditions" was unreasonable because they learned "after a few months * * * that they were not terrorists, but merely immigration detainees." *Id.* at 85. Second, Plaintiffs argue that Mr. Hasty's receipt of "written updates" and "*all evidence relevant to the danger [a Plaintiff] might pose to the institution*" (*id.* at 85 (emphasis in original)) also suffice to make his maintenance of the "official conditions" grounds to preclude qualified immunity.

These arguments both miss the mark. The "official conditions" were a response to senior government officials' orders to create the "tightest allowable" conditions. *See* Hasty Br. at 26; *see also* Part II.B., *supra*. Even if some MDC officials somehow knew that some detainees were "not terrorists," continued observance of the pre-existing "official conditions" would not be unreasonable. *See Stanton*, 2013 WL 5878007, at *2 (qualified immunity gives government officials have breathing room to make mistakes); *Zalaski v. City of Hartford*, 723 F.3d 382, 389 (2d Cir. 2013) ("qualified immunity employs a deliberately

forgiving standard of review" because it "provides a broad shield * * * to ensure that those who serve the government do so with the decisiveness and the judgment required by the public good") (internal quotations omitted); *DiBlasio v. Novello*, 413 F. App'x 352, 356 (2d Cir. 2011) (the "very purpose" of qualified immunity is to "protect officials when their jobs require them to make difficult on-the-job decisions").

Plaintiffs' pleadings establish that the "official conditions" were a combination of *existing and lawful* BOP regulations, stemming from senior BOP officials' instructions on the necessary degree of confinement. A___ (Dkt. No. 589-2 at 157-58) (OIG Report). Written updates or new evidence would not empower Mr. Hasty to unilaterally dismantle the "official conditions" or make private determinations of which FBI arrestees he should release from the ADMAX SHU.

Plaintiffs' response that the orders directing the "official conditions" were not "facially valid" fares no better. Pls.' Br. at 86-87. Ordering legally compliant security parameters in response to a perceived terrorist attack is quintessentially a "facially valid" order. *See* Hasty Br. at 34-35; *see also,* A__ (Dkt. No. 589-2 at 127) (OIG Report) ("The BOP's Northeast Region Counsel explained to the OIG that * * * the BOP normally takes 'at face value' FBI determinations that detainees had a potential nexus to terrorism and therefore were 'high-risk.'"). Under the

circumstances, Mr. Hasty was in no position to make independent judgments and was fully justified in following his orders. And even if the benefit of hindsight deemed those instructions inappropriate, qualified immunity would still apply because Mr. Hasty cannot be found "plainly incompetent" for following them at the time. *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1243 (2012) (granting qualified immunity finding that "even if [instruction police officer received] were invalid, it was not so obviously [invalid] that the officers can be considered plainly incompetent."). To find otherwise would urge individual officers to act on their own assessments of danger in response to a national emergency.

III. PERMITTING PLAINTIFFS' SECTION 1985(3) CLAIM TO PROCEED CONFLICTS WITH THE LAW AND THE PLEADINGS.

In order to adequately plead a 42 U.S.C. § 1985(3) conspiracy claim, Plaintiffs must allege that some discriminatory animus motivated the conspirators. *See Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir. 1999). Plaintiffs fail to meet this threshold, as their own pleadings illustrate that it was *not* some discriminatory animus that motivated MDC Defendants' alleged conduct. *See* Part II.E, *supra*.

Assuming, however, that Plaintiffs did sufficiently plead a discriminatory animus, Plaintiffs' conspiracy claim fails on another front: members of the same entity cannot legally conspire. *Hartline v. Gallo*, 546 F.3d 95, 99 n.3 (2d Cir. 2008); Hasty Br. at 50-51 (citing supporting case law). This doctrine applies just as equally to an alleged conspiracy among DOJ *and* MDC Defendants as it would

to one among MDC Defendants. *See Dickerson v. Alachua Cnty. Comm'n*, 200 F.3d 761, 767 (11th Cir. 2000) (those "acting as agents" of a corporation are incapable of conspiring among themselves or with the corporation). Not only is the MDC within the DOJ, but the pleadings make it clear that MDC Defendants were acting as agents of the DOJ.

Plaintiffs attempt to evade the intra-corporate conspiracy doctrine by arguing that MDC Defendants acted in their *personal capacity*, not as federal officials. This theory is unsupportable. First, there is no way to reconcile Plaintiffs' *post-hoc* personal capacity argument with their simultaneous effort to hold MDC Defendants liable under *Bivens*. Second, Plaintiffs' allegations do not suggest that Mr. Hasty was acting to "further [his] own personal bias." Pls.' Br. at 104-05. *See* Hasty Br. at 27-28. And, most importantly, Plaintiffs' theory is out of step with their own case law. "[P]ersonal bias is not the sort of individual interest that takes a defendant out of the intra-enterprise conspiracy doctrine where * * * the action complained of arguably served a legitimate interest of [the enterprise]." *Johnson v. Nyack Hosp.*, 954 F. Supp. 717, 723 (S.D.N.Y. 1997).

That is, Plaintiffs must allege that MDC Defendants' actions did not *arguably* serve a legitimate governmental purpose. Here, Plaintiffs point only to the conditions "imposed on [them]" and to allegedly falsified documents, which they contend "violated BOP regulations * * * forfeiting any claim to be acting for

the BOP." Pls.' Br. at 105 (citing FAC ¶68). But those allegedly "falsified documents" are irrelevant (*see* Part II.E, *supra*) and, as to the conditions, Plaintiffs have alleged that that the "system of conditions [in the ADMAX SHU]" were "designed" to "lead to [Plaintiffs'] cooperation with law enforcement." A__ (FAC ¶103). Indeed, Plaintiffs alleged that the wrongs they suffered in the ADMAX SHU were "to implement" and "carry out" DOJ policies. A__ (FAC ¶¶68, 75). This clears the "arguably" hurdle by a wide margin.

The district court's decision to allow this conspiracy claim to proceed is contrary to the law and should be reversed. Mr. Sherman's reply brief responds to Plaintiffs' other arguments pertaining to the § 1985(3) claim. *See* Sherman Reply Br., Part III. To avoid repetitive briefing, Mr. Hasty hereby adopts those arguments.

CONCLUSION

For the foregoing reasons, as well as those stated in his initial brief and in Mr. Sherman's opening and reply briefs, Mr. Hasty respectfully requests this Court to reverse the district court's decision denying Mr. Hasty's motion to dismiss Plaintiffs' Claims One, Two, Three, Six, and Seven.

November 26, 2013 Respectfully submitted,

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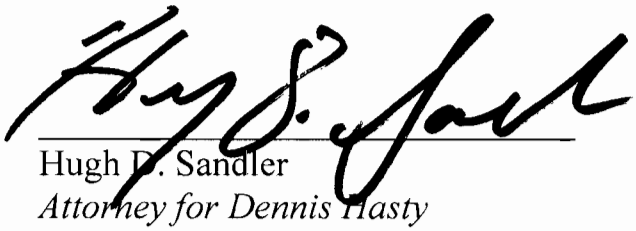

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