# 13-0981-cv(L),

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

# United States Court of Appeals

*for the*

# Second Circuit

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

*Plaintiffs-Appellees-Cross-Appellants,*

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

*Plaintiffs-Appellees,*

*(For Continuation of Caption See Inside Cover)*

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

## PROOF REPLY BRIEF FOR PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

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– v. –

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

*Defendants-Appellants-Cross-Appellees,*

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

*Defendants-Cross-Appellees,*

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

*Intervenors.*

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This cross-appeal concerns Plaintiffs' allegations that they were rounded up after the September 11, 2001 terrorist attacks, on the basis of their race, religion, ethnicity, and national origin, and were then abused for months in detention. Though they were arrested for civil immigration violations, and the FBI never had any information connecting them to terrorism, Defendants Ashcroft, Mueller and Ziglar ("DOJ Defendants") ordered that misinformation be spread to law enforcement that Plaintiffs were suspected terrorists who should be subjected to maximum pressure, isolated from the outside world, and encouraged "in any way" possible to cooperate. The "MDC Defendants," supervisors at the Metropolitan Detention Center in Brooklyn, together with corrections officers under their command, carried out this program.[1]

DOJ Defendants argue that they cannot be held accountable for Plaintiffs' mistreatment resulting from this policy because Plaintiffs have not alleged DOJ Defendants' involvement in setting the *specific* conditions of their confinement, or dictating the details of their abuse;

[1] Plaintiffs' claims against MDC Defendants are the subject of separate appeals, consolidated with this cross-appeal.

they also claim that Plaintiffs have failed to allege discriminatory intent. Plaintiffs address these arguments in Sections I and II below.

Defendant Ziglar writes separately, primarily to distinguish his role in the detentions from that of his co-defendants. For support, he cites extensively to the report on the 9/11 detentions issued in April 2003 by the Office of the Inspector General of the Department of Justice ("OIG"), which he believes conflicts with Plaintiffs' allegations regarding his behavior. But there is no conflict. As Plaintiffs demonstrate in Section III, the allegations of the Fourth Amended Complaint, considered in conjunction with the OIG Report upon which Ziglar relies, support Defendant Ziglar's culpability for Plaintiffs' mistreatment.

Since Claims One, Two and Three must be reinstated against the DOJ Defendants, Claim Seven, for conspiracy among DOJ and MDC Defendants to deprive Plaintiffs of their constitutional rights, must be reinstated as well.

Neither of the DOJ Defendants' briefs disputes the availability of a *Bivens* remedy for Plaintiffs' claims. DOJ Defendants argued against such a remedy below, but abandon that argument on appeal.

## ARGUMENT

### I. PLAINTIFFS' SUBSTANTIVE DUE PROCESS AND FREE EXERCISE CLAIMS AGAINST DOJ DEFENDANTS ARE PLAUSIBLE.

As explained in Plaintiffs' opening brief, the District Court erred by dismissing Plaintiffs' substantive due process and religious interference claims in the face of Plaintiffs' plausible allegations that DOJ Defendants caused Plaintiffs to be abused by formulating a policy of maximum pressure and isolation, and spreading false information about Plaintiffs' status as suspected terrorists. *See generally* Proof Brief for Plaintiffs-Appellees-Cross-Appellants ("Plaintiffs' Opening Br.") at 30–42.

Defendants Ashcroft and Mueller defend themselves on the ground that they did not specify *how* the 9/11 detainees were to be mistreated, and thus they cannot be held liable for Plaintiffs' mistreatment. *See* Proof Brief for Defendants-Cross-Appellees John Ashcroft and Robert Mueller, ("Ashcroft-Mueller Br.") at 5 ("The complaint does not allege that the former Attorney General and FBI Director directed or intended that plaintiffs be held in the *particular* conditions they complain about") (emphasis added); *see also*, *id.* at 6, 10,

14. Defendant Ziglar joins this argument. *See* Proof Brief for Defendant-Cross-Appellee James W. Ziglar ("Ziglar Br.") at 23.

First, this is wrong as a factual matter: DOJ Defendants ordered Plaintiffs' to be isolated without cause; arbitrary isolation states a substantive due process claim. Moreover, with respect to the other conditions and abuse, a plaintiff need not plead details, nor prove causation, to meet the pleading requirements of Rule 8 of the Federal Rules of Civil Procedure. It is plausible that DOJ Defendants' maximum pressure policy and campaign of misinformation was intended to cause, and did cause, all the restrictions and abuse imposed upon Plaintiffs; no more is needed to survive a motion to dismiss. [2]

[2] Defendants Ashcroft and Mueller err in citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) against Plaintiffs' substantive due process claim. Mr. Iqbal did not bring such a claim against DOJ Defendants for the conditions of his confinement; his challenge was based on equal protection. *Compare* Ashcroft-Mueller Br. at 12 ("The similarities between this case and *Iqbal* are striking. Plaintiffs in both cases seek to hold the former Attorney General and FBI Director individually liable for the conditions of plaintiffs' confinement") *with Iqbal,* 556 U.S. at 688 n.1 (Souter, J. dissenting) ("Iqbal makes no claim against Ashcroft and Mueller based simply on his right, as a pretrial detainee, to be free from punishment prior to an adjudication of guilt on the fraud charges. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979).") While *Iqbal* is relevant to the case at hand, it has not predetermined the issues before this Court.

### A. DOJ Defendants Ordered the 9/11 Detainees Placed in Isolation.

DOJ Defendants' premise—that Plaintiffs do not allege their involvement in setting the specific conditions of Plaintiffs' confinement—is wrong. Plaintiffs allege that DOJ Defendants directed for the 9/11 detainees to be isolated from the outside world. A__ (FAC ¶¶ 61, 62); *see also* SPA-6 (DOJ Defendants' policy "mandated that the Detainees' ability to contact the outside world be limited"). This is enough to support a substantive due process claim.

Isolation is a specific condition of confinement, and like any other condition of confinement imposed upon a non-criminal detainee, its constitutionality depends on the circumstances. Under *Bell v. Wolfish*, 441 U.S. 520, 539 (1979), isolation is lawful when reasonably related to a legitimate governmental objective, but arbitrary isolation violates due process. *See* Plaintiffs' Opening Br. at 31, 41.

Defendants ignore *Bell v. Wolfish* completely, although it is the "seminal case on the substantive due process claims of pretrial detainees." *Iqbal v. Hasty*, 490 F.3d 143, 168 (2d Cir. 2007), *rev'd on other grds by Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Instead, DOJ Defendants claim that Plaintiffs have failed to marshal authority

"suggesting that administrative housing segregation by itself would violate due process." Ashcroft-Mueller Br. at 20 n.5. But *Wolfish* suggests exactly that, as it requires an inquiry into the intent behind any potentially punitive condition of confinement, and its reasonableness under the circumstances. *Wolfish*, 441 U.S. at 538–39; *Iqbal v. Hasty*, 490 F.3d at 168–69.

If a plaintiff pleads facts plausibly suggesting isolation imposed for a punitive purpose, or excessive in relation to a legitimate governmental purpose, he has stated a claim and is entitled to discovery. *Id.*; *see also Stevenson v. Carroll*, 495 F.3d 62, 67–69 (3d Cir. 2007) (reversing 12(b)(6) dismissal of substantive due process challenge to arbitrary placement in SHU as improper at motion to dismiss stage); *Magluta v. Samples*, 375 F.3d 1269, 1274–76 (11th Cir. 2004) (reversing dismissal of challenge to SHU placement because district court failed to properly consider reasonable inference that placement was punitive); *Brown-El v. Delo*, 969 F.2d 644, 648 (8th Cir. 1992) (reversing summary judgment and remanding for evidentiary hearing on reasons for a detainee's placement in segregation). Plaintiffs have alleged isolation imposed without legitimate security or penological basis, but rather

based only on race, religion, ethnicity and national origin. A__ (FAC ¶¶ 41, 61, 62, 67). These allegations state a plausible substantive due process claim.

Ashcroft and Mueller object that they did not specify that Plaintiffs were to be isolated *by means of segregation*. Ashcroft-Mueller Br. at 20. But isolation requires segregation; the concepts are coterminous. *See* Plaintiffs' Opening Br. at 35–36 (collecting cases and other material). Defendants imply that there are alternative means of isolation, but do not identify what those could be, nor do they marshal any factual, legal, or even logical support for this assertion. *See* Ashcroft-Mueller Br. at 20.

That Passaic Plaintiffs were not also isolated is explained in Plaintiffs' Fourth Amended Complaint, and does not change this analysis. "There were not enough secure beds in federal jails like MDC to hold all the 9/11 detainees, so Ashcroft, Mueller and Ziglar's orders . . . were implemented differently for the Passaic Plaintiffs and class members. Passaic Plaintiffs were denied the ability to practice their religion, were held in overcrowded general population units with convicted felons, and were subjected to physical and verbal abuse . . . .

However, they were not held in isolation," A__ (FAC ¶ 66), and they assert no claim on this basis. This does not alter the MDC Plaintiffs' experience. Nor must a defendant's policy be successfully implemented against all plaintiffs for it to have plausibly caused the injuries of some.

Because MDC Plaintiffs have alleged that DOJ Defendants ordered them held in isolation, and arbitrary isolation violates due process, MDC Plaintiffs' substantive due process claim must be reinstated.

### B. DOJ Defendants Ordered the 9/11 Detainees Subjected to Maximum Pressure, and Spread Misinformation About Their Ties to Terrorism.

Apart from their isolation, Plaintiffs also allege that DOJ Defendants "mapped out ways to exert maximum pressure" on the 9/11 detainees, and "decided to spread the word among law enforcement that the 9/11 detainees were suspected terrorists, or people who knew who the terrorists were, and that they needed to be encouraged in any way possible to cooperate." A__ (FAC ¶¶ 61–62).

This is a specific policy to coerce detainee cooperation by use of restrictive conditions and mistreatment (*see* SPA-6), in violation of substantive due process. While Plaintiffs have not alleged that DOJ

Defendants specified that the 9/11 detainees should be placed in the MDC ADMAX SHU, subjected to sleep deprivation, beaten, or denied recreational and religious outlets, a policy need not set forth detailed components to be unconstitutional.

To illustrate, imagine a sheriff who, when a certain individual is arrested, orders his deputy to "show that perp who's boss." The deputy proceeds to beat the detainee. Does the detainee have a plausible claim against the sheriff? Of course; the beating is the foreseeable result of the sheriff's instruction. The deputy could have implemented the instruction in many different ways: simple battery, threats, austere conditions, food deprivation, etc. This does not change the plausible inference that the sheriff's order caused the foreseeable abuse that occurred.

To be sure, the above hypothetical only works to the extent that the sheriff's instruction is suggestive of *improper* implementation. This is where the District Court parted ways with Plaintiffs (*see* SPA-31), and DOJ Defendants adopt the court's analysis, arguing that the maximum pressure policy is lawful on its face, and thus DOJ Defendants had the right to assume that their subordinates would

implement it constitutionally. Ashcroft-Mueller Br. at 15–16, Ziglar Br. at 22–23.

DOJ Defendants (and the District Court) are incorrect in identifying the policy as facially lawful. Starting with the most innocent possible explanation of the DOJ Defendants' policy—that it was merely an order to impose upon the 9/11 detainees the strictest limitations that can be *lawfully authorized* by the BOP (*see* Ashcroft-Mueller Br. at 21, citing April OIG Rep. at 19–20), this is nevertheless unconstitutional, because imposing such conditions on Plaintiffs was excessive in light of their status as *civil* immigration detainees, about whom DOJ Defendants had no individualized suspicion of violent tendencies or security threat. *Wolfish,* 441 U.S. at 539, A__ (FAC ¶¶ 1, 3, 40–41, 44, 47–49).

Moreover, a policy to use restrictive conditions of confinement, even conditions that are lawful when imposed for a proper purpose, violates due process when imposed for the purpose of coercing a detainee's cooperation with law enforcement, because such coercion is implicitly punitive: the conditions are chosen precisely because they are sufficiently punishing so as to cause a suspect to breakdown and

cooperate. *See* A__ (FAC ¶ 65: "The punitive conditions in which MDC Plaintiffs and class members were placed were the direct result of the strategy mapped out by Ashcroft and Mueller's small working group. These conditions were formulated in consultation with the FBI, and designed to aid interrogation. Indeed, sleep deprivation, extremes of temperature, religious interference, physical and verbal abuse, strip-searches and isolation are consistent with techniques developed by the C.I.A. to be utilized for interrogation of high value detainees.") Thus DOJ Defendants' policy was not lawful on its face.

Moreover, even if DOJ Defendants' maximum pressure policy were open to both lawful and unlawful implementation, Plaintiffs' allegations render it plausible that the policy was intended to cause, and did cause, the unlawful treatment that indeed resulted. To hold otherwise, the Court would have to find it *implausible* that DOJ Defendants' *knowing* misidentification of Plaintiffs as suspected terrorists, and the instruction to coerce them to cooperate "in any way possible," led to Plaintiffs' placement in excessively restrictive conditions and abuse; or, the Court would have to find it implausible that DOJ Defendants—men with extensive familiarity with both law

enforcement and prisons—would have anticipated or intended this result.[3] As suggested by the cases Plaintiffs cite (and Defendants ignore), a law enforcement officer cannot intentionally misidentify a prisoner as dangerous, and then disclaim responsibility for the foreseeable results of that false statement. *See* Plaintiffs' Opening Br. at 37–39, citing *Surprenant v. Rivas*, 424 F.3d 5, 14 (1st Cir. 2005), *Morrison v. Lefevre*, 592 F. Supp. 1052, 1075 (S.D.N.Y. 1984).

DOJ Defendants attempt to avoid the impact of their misinformation campaign by asserting that the false attribution of

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[3] In the course of their arguments, Defendants slip from referring to Judge Gleeson's conclusion that Defendants could *presume* that their instructions would be followed lawfully (*e.g.*, Ashcroft-Mueller Br. at 7) to asserting that they actually *directed* lawful compliance (*id.* at 25) (describing alleged policy as designed to encourage the 9/11 detainees' "cooperation in any *(lawful)* way possible") (emphasis added); *see also, id.* at 24. The word "lawful" does not appear in Plaintiffs' allegations. If the policy as Plaintiffs' allege it were not suggestive of unlawful means, one wonders why it is necessary to add this modification. Defendants' argument also begs the question: what lawful means did DOJ Defendants intend their subordinates to utilize? None have been suggested. Defendant Ziglar's bland assertion that "the government exerts pressure on *defendants* every day, often maximum pressure, and can plausibly do so in a way consistent with all the requirements of the Constitution," without any indication of what "maximum pressure" might consist of, is more ominous than reassuring. It is especially ominous when applied not to criminal defendants, but to the civil detainees for whom Ziglar, as Commissioner of the INS, was responsible. *See* Ziglar Br. at 23 (emphasis added).

terrorist connections "does not itself state a violation of due process." Ashcroft-Mueller Br. at 22. It does, however, provide evidence of Defendants' intent.

However, Plaintiffs' arguments are not "alleg[ations] of intent alone . . . in conjunction with the conduct of their subordinates," Ashcroft-Mueller Br. at 18. This characterization ignores the alleged policy of maximum pressure. Plaintiffs do not seek to hold DOJ Defendants accountable for illicit intent that fortuitously coincided with someone else's illegal actions. Rather, the coexistence of supervisors' illicit intent, supervisors' policy, and subordinates' illegal actions renders plausible a connection between the three.

That Plaintiffs have not yet *proven* this connection is no defense. *See, e.g.*, *Brock v. Wright*, 315 F.3d 158, 165–66 (2d Cir. 2003) (where a prison commissioner created a policy alleged to have resulted in deliberate indifference to serious medical needs, and some evidence suggested that the policy was susceptible to both constitutional and unconstitutional interpretations, jury must decide whether the policy caused the alleged harm). As Justice Souter explained in *Sepulveda-*

*Villarini v. Dep't of Ed. of Puerto Rico*, 628 F.3d 25, 30 (1st Cir. 2010) (Souter, J., sitting by designation):

> None of this is to deny the wisdom of the old maxim that after the fact does not necessarily mean caused by the fact, but its teaching here is not that the inference of causation is implausible (taking the facts as true), but that it is possible that other, undisclosed facts may explain the sequence better. Such a possibility does not negate plausibility, however; it is simply a reminder that plausibility of allegations may not be matched by adequacy of evidence. A plausible but inconclusive inference from pleaded facts will survive a motion to dismiss . . . .

In the same way, it is plausible that the abuse of Plaintiffs pleaded in Claim One, and the interference with their religious beliefs pleaded in Claim Three, are the consequences of DOJ Defendants' "maximum pressure" policy.

## II. PLAINTIFFS' EQUAL PROTECTION CLAIM AGAINST DOJ DEFENDANTS IS PLAUSIBLE.

The District Court also erred by dismissing Plaintiffs' Equal Protection Claim against DOJ Defendants. *See generally,* Plaintiffs' Opening Br. at 42–50.

Although Defendants Ashcroft and Mueller draw attention to "the broad powers of the political branches in the areas of immigration and

naturalization" (Ashcroft-Mueller Br. at 24, quoting Judge Gleeson, SPA-38), they evidently concede that these "broad powers" do not permit "more restrictive *conditions of confinement* than [those imposed on] members of other races, ethnic backgrounds or religions." *Id.* at 31, quoting *Iqbal v. Hasty*, 490 F.3d at 175 (emphasis in Ashcroft-Mueller Br.). Rather, their defenses to Plaintiffs' Equal Protection claim are, first, that they did not do it, and second, that they did not mean it. They are mistaken on both points.

**A. Plaintiffs Have Pleaded Discriminatory Acts.**

Ashcroft and Mueller's primary argument is that they did not design the specific conditions of Plaintiffs' confinement, and thus they could not have discriminated as to those conditions. But Plaintiffs' claim is that DOJ Defendants' maximum pressure policy was itself imposed on Plaintiffs because of their religion, race, national origin and ethnicity (*see* A__ (FAC ¶¶ 7, 21–23, 39, 43, 55, 57, 60, 61–68)); that DOJ Defendants did not detail all the ways in which the individuals in this class were to be abused does not absolve them of discrimination.

Defendants draw a sharp line between immigration arrest, detention and investigation on the one hand, and conditions of

confinement on the other, taking the position that race and religion may be used in deciding to arrest, detain and investigate, and that race and religion were only used in making those decisions, not in setting conditions of confinement.[4] Ashcroft-Mueller Br. at 30. But this is not what Plaintiffs allege. To the contrary, Plaintiffs claim that DOJ Defendants created a single policy to identify a class of individuals based on race, religion, ethnicity and national origin, and to pressure that class to cooperate by ordering their arrest, detention, isolation, and harsh treatment. *See* A__ (FAC ¶¶ 39, 60, 61). This entire policy is discriminatory on its face. *Id*. It is no defense of the unlawful part of the policy to say that other parts were lawful.

Ashcroft and Mueller claim that the difference between the punitive treatment of Plaintiffs and the more favorable treatment of non-Arab, non-Muslims also arrested in the 9/11 investigation (A__(FAC ¶43)), was not their own action, but rather the action of

[4] It is established that the government can, at least to a certain extent, discriminate according to national origin in enforcing the immigration laws. Whether it can discriminate according to race, religion or ethnicity is not established; as Defendants observe, this Court has held in this case that it is not "clearly establish[ed]" that such discrimination is prohibited. *Turkmen v. Ashcroft*, 589 F.3d 542, 550 (2d Cir. 2009); Ashcroft-Mueller Br. at 30. This is not an issue on this appeal.

subordinates. Ashcroft-Mueller Br. at 27. But DOJ Defendants directed the targeting of Muslims and Arabs. A__ (FAC ¶¶ 41–42, 49–51, 60). The different treatment of non-Arabs and non-Muslims is evidence that DOJ Defendants' policy was, in fact, followed.

**B. Plaintiffs Have Pleaded Discriminatory Intent.**

DOJ Defendants also argue that Plaintiffs have not plausibly alleged discriminatory intent. Here, Defendants seek to excuse themselves by reliance on the Supreme Court's decision in *Iqbal*. *See* Ziglar Br. at 27, Ashcroft-Mueller Br. at 33 (citing 556 U.S. at 682 for the proposition that Ashcroft and Mueller were likely motivated by their nondiscriminatory intent to detain aliens "who had potential connections to those who committed terrorist acts"). But this ignores the Supreme Court's preceding sentence:

> It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals *because of their suspected link to the attacks* would produce a disparate, incidental impact on Arab Muslims, *even though the purpose of the policy was to target neither Arabs nor Muslims*.

556 U.S. at 682 (emphasis added).

In contrast, Plaintiffs here put forth detailed factual allegations describing a policy explicitly designed to single out individuals based on their religion, race, ethnicity and national origin, leading to the detention and harsh treatment of individuals *without* suspected links to terrorism. A__ (FAC ¶¶ 39–41, 43, 45–47); SPA-39. Defendants have failed to recognize the distinctions between the current complaint and that before the Supreme Court in *Iqbal*.

Ashcroft and Mueller offer three objections to Plaintiffs' allegation that DOJ Defendants knew their policies "would result in the arrest of many individuals whom they had no information to connect to terrorism," and thus subject those individuals to harsh confinement without rational basis. Ashcroft-Mueller Br. at 33, quoting A__ (FAC ¶ 41). First, they say this allegation has no "apparent basis," overlooking the supporting allegations at A__ (FAC ¶¶ 40–43).

Second, they draw attention to the distinction between "absence of knowledge" and "knowledge of absence": "[T]he absence of knowledge about a connection to terrorism is not equivalent to knowledge of the absence of such a connection." Ashcroft-Mueller Br. at 33. This is a surprising distinction for senior law enforcement officials to make. The

usual principle of law is that citizens and non-citizens alike are free from the criminal justice system when there is no knowledge that they have a connection to crime; "knowledge of the absence of such a connection" is not required. In effect, 9/11 detainees were treated as guilty until efforts to find evidence of their guilt were exhausted—an extraordinary procedure that demands explanation, which Defendants fail to offer. That Arabs, South Asians and Muslims were specifically targeted for this procedure demonstrates Defendants' discriminatory intent.

Third, Ashcroft and Mueller say that, after all, knowledge about connections to terrorism is "fundamentally irrelevant, as it says nothing about the conditions of [Plaintiffs'] confinement." *Id*. at 34; *cf*. 26. But knowledge illuminates intent. Were Plaintiffs treated harshly because they were dangerous men tied to terrorism, or for another reason? And since Defendants knew of nothing that tied Plaintiffs to terrorism, what other reason was there for the treatment of Plaintiffs, except discrimination based on their race, religion, ethnicity and national origin? Such exceptional treatment suggests unlawful discrimination,

and that meets the pleading standard set by *Iqbal* for an Equal Protection claim.

Finally, Ashcroft and Mueller also object to what they call the "suggest[ion]" that the district court acted "improperly" in finding that a discriminatory intent is not plausible (Ashcroft-Mueller Br. at 28). Plaintiffs do not accuse the court of impropriety, only failure to adequately explain and justify its conclusion. The court's difficulty in giving such an explanation indicates how Plaintiffs' Equal Protection claim is in fact plausible. Plaintiffs' Opening Br. at 43–44.

## III. NONE OF DEFENDANT ZIGLAR'S INDIVIDUAL ARGUMENTS RENDERS PLAINTIFFS' CLAIMS IMPLAUSIBLE.

Defendant Ziglar adopts many of Ashcroft and Mueller's arguments; these are addressed above. He argues additionally that he cannot be held accountable for Plaintiffs' mistreatment given his relatively unimportant role in the 9/11 detentions, compared to the roles played by Ashcroft and Mueller. *See* Ziglar Br. at 5–7. It is true that the Complaint distinguishes among the DOJ Defendants. *See, e.g.*, A__ (FAC ¶¶ 21–23, 55, 61–64). This is no "concession," however (*cf.* Ziglar Br. at 6), and it provides no defense. A defendant need not be the

architect of an illegal policy to play a culpable role in its design and implementation. As shown below, the Complaint includes factual allegations regarding the role Ziglar played in Plaintiffs' mistreatment.

Moreover, despite Ziglar's assertions, the April 2003 OIG Report does not exonerate him. *See* Ziglar Br. at 9–13, 19–22. Rather, that report lends factual support to the allegations in the Complaint.

First, Plaintiffs do not seek to hold Ziglar liable for creation of the hold-until-cleared policy (*see* Ziglar Br. at 9–10), or for the decision to house Plaintiffs in the Metropolitan Detention Center. *Id.* at 11. Rather, he is a defendant in this case because he, along with Ashcroft and Mueller, formulated a discriminatory policy to place maximum pressure on the 9/11 detainees, though he knew there was no evidence to suspect them of a connection to terrorism. *See* A__ (FAC ¶¶ 47, 61–64); *see also*, SPA-6 (in which the district court recognized Plaintiffs' factual allegations that all of the DOJ Defendants created a policy "to hold the Detainees in restrictive conditions under which they would feel the maximum pressure to cooperate with the PENTTBOM investigation.")

Ziglar argues that Plaintiffs' Complaint contains only "scant allegations" against him because, of the "306 paragraphs of averments, only 19 name Mr. Ziglar at all," (Ziglar Br. at 4–5), and this is fewer than name Ashcroft and Mueller. *See id.* at 5–6 (listing examples from the Fourth Amended Complaint of allegations about "Mr. Ashcroft and Mr. Mueller—but not Mr. Ziglar"). But the sufficiency of the allegations against Ziglar cannot be determined by counting paragraphs.

For allegations that do name him, Ziglar argues they provide insufficient specificity because some refer to actions he took in concert with Ashcroft and Mueller. This is also no defense. Each time the Fourth Amended Complaint refers to "Ashcroft, Mueller and Ziglar" (*see, e.g.*, A__ (FAC ¶¶ 47, 48, 55, 56, 60)), the Complaint states a specific allegation as to each of these Defendants, including Ziglar. Such allegations need not "distinguish among the three men as to who did what" (Ziglar Br. at 5), because such allegations state that each of the three men did what the allegation describes.

Ziglar argues that "the most" Plaintiffs allege is that he attended the meetings Ashcroft and Mueller held. *See* Ziglar Br. at 6–7, 23. But the Fourth Amended Complaint includes numerous other factual

allegations linking Ziglar to specific violations of Plaintiffs' constitutional rights. *See* A__ (FAC ¶¶ 23, 47, 61–64). When read together, these paragraphs allege that Ziglar was not only passively "at meetings" (*see* Ziglar Br. at 17, 23) where the strategy to exert maximum pressure on Plaintiffs was developed, but that he "was part of the small group of government employees who, under Ashcroft's direction, created the hold-until-cleared policy, directed the application of that policy to persons in the circumstances of Plaintiffs and the other class members, and decided Plaintiffs would be held in unreasonable and excessively harsh conditions of confinement" (A__ (FAC ¶ 23)), "discussed *the entire process* of interviewing and incarcerating out-of-status individuals with Ashcroft and others" (A__ (FAC ¶ 62)) (emphasis added), "received detailed daily reports of the arrests and detentions" (A__ (FAC ¶ 47)), was aware "that the FBI had no information tying Plaintiffs and class members to terrorism prior to treating them as 'of interest' to the PENTTBOM investigation" (*id.*), and was "fully informed of" and "complied with" Ashcroft's decision to order all such Plaintiffs and class members detained until cleared anyway (*id.*).

Plaintiffs also allege that Ziglar "had twice daily briefings with his staff about the 9/11 detentions." A__ (FAC ¶ 64). This is not surprising, as the changes in INS procedures for arrest, detention and custody review developed under Ziglar's command were integral to Plaintiffs' prolonged detention in restrictive conditions. *See* A__ (FAC ¶¶ 23, 41, 49–56).[5]

Faced with these allegations, Ziglar's argument that Plaintiffs are bound by every part of the OIG Report is a red herring; Plaintiffs do not contradict the portions of the OIG Report cited by Ziglar.[6] Defendant

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[5] In assessing Plaintiffs' allegations, Ziglar, along with the other DOJ Defendants, makes repeated reference to Plaintiffs' several complaint amendments, as if the earlier complaints were found inadequate. *See e.g.*, Ziglar Br. at 2, 4; Ashcroft-Mueller Br. at 10. In fact, none of the four previous complaints was held to inadequately plead the claims now at issue; to the contrary, those claims were ruled adequate in the Third Amended Complaint, and the pleadings were revised in the present Fourth Amended Complaint only because, as all the parties agree, *Iqbal* changed pleading standards. (Earlier amendments of the complaint added additional plaintiffs; added detail provided by the OIG Reports; and added defendants whose identity was revealed through discovery. There was never a ruling on the adequacy of any version of the complaint before the third amendment.)

[6] The only issue raised in these appeals on which Plaintiffs have identified a possible conflict between the Fourth Amended Complaint and either OIG Report is the role played by "high interest" designations in assigning detainees to the MDC; Plaintiffs allege that four out of the six Plaintiffs placed in the ADMAX SHU were not classified "high

Ziglar implies that the OIG Report contradicts Plaintiffs' allegation that he was made aware of the detention of persons whom the government had no non-discriminatory reason to suspect of terrorism. *See* Ziglar Br. at 18. But Ziglar does not indicate where in the OIG report that allegation is contradicted. The OIG Report does record Ziglar's claim that he voiced concerns that the FBI was not adequately substantiating its "interest" in the detainees in a timely manner (concerns that support Plaintiffs' allegations), but the report also notes that none the people to whom Ziglar says he voiced those concerns recalls such a conversation. *See* A__ (April 2003 OIG Report at 66, 67).

Even if Ziglar did object, he still acted personally to implement the policy. Plaintiffs acknowledge that Ziglar was "concerned that the detentions overstepped the INS's statutory authority" but nevertheless he "complied with [the hold-until-cleared] requirement." A__ (FAC ¶ 55). This is confirmed by the OIG Report. *See* A__ (April OIG Report at 37–38) (Ziglar instructed INS officials that the detainees should be held until they had been cleared by the FBI of any connections to

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interest" (A ___ (FAC ¶ 4), while the April OIG Report says that detainees who were not "high interest" "generally were housed in less restrictive facilities" (A ___ (April OIG Report at 25)).

terrorism); A__ (April OIG Report at 77) (Ziglar directed one of his subordinates to issue an order to all INS field offices that the 9/11 detainees could not be released without written permission from Headquarters.)

Most importantly, Ziglar's role with respect to the hold-until-cleared policy is no longer central to this case, as Plaintiffs do not challenge that policy, but rather challenge their conditions of confinement. On the issues that are central to the current complaint, Defendant Ziglar repeatedly fails to cite to the OIG report when claiming that it contradicts Plaintiffs' allegations. For example, he claims that "the OIG report raises the inference that if Mr. Ziglar did attend a meeting where the participants discussed these [maximum pressure] strategies, he nevertheless took steps to see that the policies at issue were carried out in conformity with the Constitution," but he cites nothing to support this optimistic assessment. Ziglar Br. at 23–24. One page later he asserts that the "OIG Report's conclusions about Mr. Ziglar's conduct flatly contradict the slant plaintiffs try to put on these meetings, at least as far as concerns Mr. Ziglar" (*id.* at 25), but again, nothing is cited.

## CONCLUSION

For the foregoing reasons, the judgment dismissing Claims One, Two, Three and Seven against Defendants Ashcroft, Mueller and Ziglar should be reversed, and the claims reinstated.

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Respectfully submitted,
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Dated: New York, New York
December 10, 2013

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