06-3745-cv (L)

06-3785-cv (CON); 06-3789-cv (CON); 06-3800-cv (CON); 06-4187 (CON)

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,

Plaintiffs-Appellees,

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

*Cross-Appellant*s,

V.

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

*Defendants-Appellant*s*-Cross-Appellees*,

MICHAEL ZENK, SALVATORE LOPRESTI, STEVEN BARRERE, WILLIAM BECK, LINDSEY BLEDSOE, JOSEPH CUCITI, HOWARD GUSSAK, MARCIAL MUNDO, DANIEL ORTIZ, ELIZABETH TORRES, PHILLIP BARNES, SYDNEY CHASE, MICHAEL DEFRANCISCO, RICHARD DIAZ, KEVIN LOPEZ, MARIO MACHADO, MICHAEL MCCABE, RAYMOND MICKENS, JOHN OSTEEN, BRIAN RODRIGUEZ, SCOTT ROSEBERY, CHRISTOPHER WITSCHEL, RAYMOND COTTON, JAMES CUFFEE, CLEMMET SHACKS, JOHN DOES 1-20,

Defendants,

STUART PRAY

Defendant-Cross Claimant,

UNITED STATES OF AMERICA

Defendant-Cross Defendant-Cross Appellee.

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

RESPONSE AND REPLY BRIEF OF APPELLANTS DENNIS HASTY AND JAMES SHERMAN

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SUMMARY OF THE ARGUMENT

The district court erred in denying qualified immunity to Defendants Dennis Hasty and James Sherman (collectively, the "Wardens"). All of Plaintiffs' claims subject to the instant Appeal can be divided into two categories: (1) claims based on policies created by high-ranking officials in the Executive Branch; and (2) claims based on individual acts by low-level personnel at the Metropolitan Detention Center ("MDC"). The record in this appeal – which consists of Plaintiffs' voluminous Third Amended Complaint and the exhaustive findings by the Department of Justice's Office of Inspector General ("OIG") (incorporated into the Complaint by the Plaintiffs) – affirmatively establishes that neither category of claims is sufficiently attributable to the Wardens to permit a *Bivens* claim for damages.

As to the first category of claims, the Wardens were responsible for *implementing* the policies at issue at the MDC; yet any alleged unconstitutionality in such policies could not have been known to the Wardens at that time. As the OIG Report demonstrates, the federal Bureau of Prisons ("BOP") *directed* the Wardens to implement these policies under a cloak of legitimacy – that the September 11 detainees were highly dangerous and probably connected to terrorism. The Wardens had no reasonable basis to question the validity of these policy determinations, particularly in the exigent circumstances during the

aftermath of a wide-scale terrorist attack in the United States, which was declared a national emergency. Thus, even were this Court to determine now that these policies violated the Plaintiffs' constitutional rights in some way, the Wardens are entitled to qualified immunity because their actions in following "facially valid" orders were objectively reasonable under the circumstances. Plaintiffs' attempts to muddy the record as to these claims lack merit.

The second category of Plaintiffs' claims should be dismissed for the inverse reason – *no* policy existed by which to connect the specific acts of low-ranking MDC personnel to create a basis for individual liability against the Wardens. Plaintiffs' attempt to dragoon the Wardens into this case by manufacturing general allegations of their "involvement" by merely borrowing the language of the operative legal standard must fail. As the Supreme Court has just explained, the Federal Rules of Civil Procedure do not permit such boilerplate pleadings that make no connection between the facts alleged (or in this context not alleged) and the liability asserted. *See Bell Atlantic Corp. v. Twombly,* No. 05-1126, 550 U.S. ___, 2007 WL 1461066 (May 21, 2007). Nor do the findings of the OIG support the imputation of liability against the Wardens. In fact, they only serve to undermine further Plaintiffs' theory that these alleged abuses occurred as part of a "policy and practice" at the MDC. The Wardens are entitled to qualified immunity on these claims as well.

Finally, as to the claims raised by the Plaintiffs in their cross-appeal, this Court should affirm the district court for the reasons stated by that court in its opinion below, and for the reasons set forth in the Response and Reply Brief Of Appellants John Ashcroft and Robert Mueller.

ARGUMENT

I. The District Court Erred In Denying The Wardens' Motions to Dismiss as to Claims Arising From Policies Created By The Wardens' Superiors.

As the Wardens explained in the Brief of Appellants Dennis Hasty and James Sherman ("Opening Brief" or "Br."), the district court erred in denying the Wardens qualified immunity as to claims that arise from policies and directives from supervisors above the warden level. Specifically, these consist of Plaintiffs' claims: (1) that their assignment to the ADMAX SHU was in violation of the Due Process clause (Claim 20); (2) that they were subjected to harsh treatment in violation of the Equal Protection clause (Claim 5); and that (3) a "communications blackout" was imposed on them in violation of the First and Fifth Amendments (Claims 21 and 22). The Court erred because the Wardens' actions were objectively reasonable under the circumstances. *See* Br. at 16-29.

A natural outgrowth of the objectively reasonable prong of the Supreme Court's qualified immunity jurisprudence is the rule – well established in this Circuit – that a subordinate official is entitled to qualified immunity if he or she

acts pursuant to "facially valid" orders of his or her superiors. Br. at 16-19. Here, as demonstrated by Plaintiffs' Third Amended Complaint ("Complaint" or "Compl.") and the OIG Report that Plaintiffs themselves fully incorporated into their Complaint,[1] Claims 5 and 20-22 are based entirely on policies created by the Wardens' superiors at BOP. The Wardens' only "involvement" in the actions and policies underlying these claims was – and could only be – to perform the orders of their superiors. *Id.* at 19-29. The OIG Report further establishes that in the specific context of the events at issue – namely, in the immediate aftermath of the September 11 attacks – plausible, indeed compelling, grounds for the policies at issue existed. Thus, even at the pleadings stage, the record is clear that the Wardens were objectively reasonable in their belief that the challenged policies were facially valid, and they are entitled to qualified immunity as a matter of law for these claims.[2] *Id.*

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[1] *See* "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks" (April 2003) ("OIG Report").

[2] As Plaintiffs emphasize, the Wardens do not dispute their personal involvement in these claims. The claims discussed in this Section concern policies created by high-ranking BOP officials. The Wardens, as administrators of the MDC, do not dispute that these general policies were *implemented* at the MDC by the Wardens. The OIG Report plainly evidences this fact. In contrast, the remaining claims (as explained in Section II, *infra*) on appeal concern only specific and independent acts by correctional officers and other low-ranking MDC personnel that did not occur as a result of a policy at the MDC set by the Wardens,

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A. The Wardens' Only Role In The Events Related To These Claims Was To Follow The Orders Of Their Superiors.

Plaintiffs first take issue with the Wardens' assertion that the OIG Report unequivocally establishes the fact that the policies at issue were created by their superiors, and not the Wardens, even though it was the Plaintiffs who attached the OIG Report to their Complaint and incorporated it fully into their case. Plaintiffs retort that the OIG Report "establish[es] nothing" because it "neither affirm[s] nor den[ies] the wardens' involvement in setting policies." Brief for Plaintiff-Appellee-Cross-Appellants ("Plfs. Br.") at 142. Plaintiffs say this because they are unable to deny that the OIG Report completely and unequivocally attributes the formation of these policies to government officials above the Wardens. Indeed, Plaintiffs' argument lacks merit and ignores the context of the OIG Report. The OIG conducted an exhaustive investigation to determine the reasons for the September 11 detainees' confinement and treatment at the MDC. As clearly explained in the OIG Report, the investigation "focused on the treatment of aliens who were held on federal immigration charges in connection with the September 11 investigation," which included a detailed investigation into issues relating to

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or any other supervisory official for that matter. Thus, Plaintiffs' remaining claims must be dismissed for a different reason – they fail to allege the Wardens' personal involvement.

Plaintiffs' alleged violations based on the policy decisions concerning Plaintiffs' assignment to the ADMAX SHU, the conditions of confinement they experienced during their incarceration, the length of their detention, and the "communications blackout." OIG Report at 4; JA at 270. For each of these challenged policies, the OIG made explicit findings as to how – and by whom – the policy was created. *See* Br. at 19-29. This investigation, among other things, encompassed the role of supervisory officials at the MDC, including the Wardens.[3]

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[3] As the OIG Report details, the OIG "conducted more than 50 interviews of officials at the FBI, INS, BOP, and the Department of Justice regarding their involvement in developing and implementing the policies concerning the apprehension, detainment, investigation, and adjudication of September 11 detainee cases. Among the officials we interviewed were the Attorney General, the Deputy Attorney General (DAG), the Associate Deputy Attorney General responsible for immigration issues, and various officials in their offices; the Assistant Attorney General for the Criminal Division and attorneys from the Criminal Division involved in the September 11 investigation; the INS Commissioner; the INS Executive Associate Commissioner for Field Operations, the INS General Counsel, and a variety of other INS attorneys and staff; the FBI Director, the former Deputy Director, General Counsel, and other FBI officials; the BOP Director, the BOP's Assistant Director for Correctional Programs, and other BOP attorneys and staff; and officials in the Department's Executive Office for Immigration Review (EOIR). During our fieldwork at the MDC and Passaic, *we interviewed the wardens, supervisors, correctional officers, medical staff, and other employees who had contact with or oversight of September 11 detainees.* In addition, we interviewed managers and employees in the FBI's New York Field Office and Newark Field Office, the INS's New York and Newark District Offices, and the U.S. Attorney's Office for the Southern District of New York." OIG Report at 7; JA at 273 (emphasis added).

The OIG Report *does* contain specific findings demonstrating the Wardens' role in the policies. It found that on September 12, 2001, Northeast Region Director David Rardin "*directed wardens in his region* [which included the MDC] not to release inmates classified by the BOP as 'terrorist related' from restrictive detention in SHUs 'until further notice.'" OIG Report at 113; JA at 379 (emphasis added); *see also id.* at 116; JA at 382 ("Cooksey's [the BOP's Assistant Director for Correctional Programs] October 1 memorandum directed all BOP staff, *including staff at the MDC*, 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* and cleared of any involvement or knowledge of on-going terrorist activities.'") (emphases added). Similarly, the OIG Report found that "*Rardin also ordered* a communications blackout for September 11 detainees during a telephone conference call with *all Northeast Region Wardens* on September 17, 2001." *Id.* at 113; JA at 379 (emphases added).

Thus, the OIG was specific about the level of involvement of the different federal officials and agencies involved in the formulation of these policies. These findings by the OIG – again, which were incorporated into the Complaint by Plaintiffs – affirmatively demonstrate that the Wardens had no involvement in the *creation* of these policies, but instead were only following the orders of their superiors. Those superiors, in turn, were making decisions about the MDC, its

inmates, and a whole array of other issues, in the broader context of the national emergency created by the terrorist attacks of September 11, 2001. It is therefore astounding for Plaintiffs to claim that the absence of any specific findings in the OIG Report as to the Wardens' involvement "establish[es] nothing." In fact, the OIG Report establishes *everything* by fatally contradicting Plaintiffs' claims for individual liability and monetary damages against the Wardens.

Indeed, Plaintiffs' assertions amply demonstrate the fatal flaws in their scattershot approach to this case. They have sued every federal official with *any* connection to Plaintiffs' confinement at the MDC's ADMAX SHU facility without developing an actual theory of liability as to each defendant. Of course, although Plaintiffs are not required to have all the facts developed at this early stage in the litigation, they should not be permitted to use the OIG Report as both a sword and a shield – relying on the OIG's findings when it aids their cause, yet claiming that the it "establish[es] nothing" when it undermines their theory of this case. Plfs. Br. at 142.

Plaintiffs' approach invariably results in contradictory arguments that underscore the weakness of their allegations regarding the Wardens. For example, in arguing for liability against Defendants Ashcroft, Mueller, and Ziglar, Plaintiffs *readily admit* that the OIG Report found that these Defendants were responsible for creating the policies at issue, and that they ordered their subordinates to

implement them. Plaintiffs argue that those Defendants – and not the Wardens – played a "central role" in creating and ordering the challenged policies (Plfs. Br. at 128), and argue the following points in reliance of the OIG Report:

- "The OIG Report also connects [Defendants Ashcroft and Mueller] to Plaintiffs' conditions of confinement. BOP Director Kathy Hawk Sawyer told the OIG that she was directed by the Deputy Attorney General's office to keep detainees in as restrictive conditions as possible and to curtail their ability to communicate with the outside word." *Id.* at 127 (citing OIG Report at 19-20; JA at 285-86).

- "Ziglar asked the INS Executive Associate Commissioner for Field Operation, Michael Pearson, to issue the order implementing the hold-until-cleared policy (JA 343), and that from September 11-21, 2001, Pearson – who directly reported to Ziglar (JA 304) – decided where to house 9/11 detainees." *Id.* at 128 (citing OIG Report at 18; JA at 284).

- "Under Defendants' [Ashcroft, Mueller, and Ziglar] orders, the FBI clearance process, rather than BOP regulations, dictated the length and conditions of each Plaintiffs' confinement." *Id.* at 129.

- "Plaintiffs allege that all of their abuse at MDC resulted from policies created and directed by [Defendants Ashcroft, Mueller, and Ziglar]." *Id.* at 130.

All of these arguments – as supported by the OIG Report – contradict Plaintiffs' claim that the *Wardens* were involved with the creation of these challenged policies. In choosing to tether their lawsuit to the OIG Report, Plaintiffs must live with its findings, warts and all.[4]

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[4] Plaintiffs' assertions that the Complaint and OIG Report allege practices that extended beyond that authorized by BOP are not persuasive. First, Plaintiffs claim

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Because of these explicit and specific findings by the OIG, this Court cannot credit the contradictory, non-specific allegations in Plaintiffs' Complaint. The only references to the Wardens' alleged "conduct" connecting them to Plaintiffs' claims are general and conclusory "group" allegations that the Wardens (along with other Defendants) were involved in all aspects of the creation and implementation of these policies.[5] Yet these broad allegations are directly

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that "evidence cited by the OIG tend[ed] to show that the communications blackout was implemented at MDC in a manner that went beyond that authorized or ordered by BOP supervisors and/or that MDC retained the policy long after any order was rescinded." Plfs. Br. at 143. As the OIG Report further explains, however, this evidence concerned only specific acts by subordinate MDC employees. *See* OIG Report at 131-34; JA at 397-400 ("MDC unit managers and counselors controlled the process for placing legal telephone calls," and citing specific instances where counselors and unit managers failed to appropriately carry out their duties). The Complaint essentially acknowledges this fact. It alleges that "the officers in charge of inmate phone calls were Raymond Cotton, Cuffee, and Clemmet Shacks," and alleges specific instances in which these MDC employees deprived Plaintiffs of legal phone calls without any mention of any role played by the Wardens. *See* Compl. ¶ 91; JA at 120. Second, Plaintiffs claim that, as alleged in the Complaint, the Wardens were responsible for detaining Plaintiffs "long past the time that they were cleared of any connection to terrorism." Plfs. Br. at 143. However, the OIG Report makes clear that "the process for transferring the detainees from the ADMAX SHU to the general population was centralized to BOP Headquarters in Washington, D.C.," and further delays occurred only as a result in the time it took to follow this process, or in some cases, due to administrative errors. OIG Report at 127-129 & n.109; JA at 393-95.

[5] Plaintiffs assert a similarly hollow characterization of the Wardens' involvement in their Opening Brief by repeatedly claiming that the Wardens had a "policy setting role" at the MDC. *See* Plfs. Br. at 142-44. This characterization misses the mark. The Wardens do not assert that they never set policy at the MDC.

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contradicted by the specific factual findings in the OIG Report. *See* Compl. ¶¶ 136, 309, 391, 396, 401; JA at 136, 183, 195-197. As is well established, this Court must disregard general allegations "that are contradicted . . . by documents upon which [Plaintiffs'] pleadings rely." *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 405-06 (S.D.N.Y. 2001) (collecting cases).

Therefore, contrary to Plaintiffs' assertions, the record – even at this early stage in the proceedings – affirmatively demonstrates that the Wardens were following the orders of their superiors with regard to Plaintiffs' claims as to: (1) the assignment to the SHU in violation of the Due Process clause (Claim 20); (2) being subjected to harsh treatment in violation of the Equal Protection clause (Claim 5); and (3) the "communications blackout" in violation of the First and Fifth Amendments (Claims 21 and 22).[6]

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This does not mean, however, that they were responsible for the *creation* of every policy implemented at the MDC. As is detailed in the OIG Report, the Wardens' superiors at the BOP and elsewhere created the policies *at issue in this case* and then instructed the Wardens to implement them at the MDC. Simply saying the Wardens generally have a "policy setting role" does not support Plaintiffs' assertion that the Wardens created these specific policies at issue, particularly in light of the contradictory findings of the OIG.

[6] This Court should also lend no weight to Plaintiffs' attempt to avoid qualified immunity by asserting incorrectly that it is rarely granted on a motion to dismiss. *See* Plfs. Br. at 140. The cases cited by Plaintiffs primarily serve only to remind this Court of the well-established standard applicable at the motion to dismiss stage, and *all* acknowledge that a complaint should be dismissed if the

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B. The Orders From The Wardens' Superiors Were Facially Valid.

Because the Wardens were following orders of their superiors, the only remaining question is whether these orders were "facially valid." *See* Br. at 16-19. As demonstrated in the Wardens' Opening Brief, the Wardens had reasonable grounds to believe that the policies created by their superiors were legally valid based on the totality of the circumstances and facts known to them at the time. Br. at 20-29.

Plaintiffs argue that (1) the record does not establish that the Wardens' actions were reasonable, and (2) the policies at issue were not facially valid. Plfs. Br. at 144-51. Plaintiffs are mistaken. In support of their first argument, Plaintiffs cite to several portions of the OIG Report that, in Plaintiffs' view, create a material question of fact as to whether the orders were reasonable. But this argument fails to recognize that the objective reasonableness test focuses *only* on the

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defendant's entitlement to qualified immunity is apparent on the face of the complaint and any attachments thereto. *See id*. Indeed, the federal appellate courts, including this one, have not hesitated to apply the qualified immunity doctrine on a motion to dismiss when the complaint (and any attachments thereto) made clear that the defendant's alleged actions were objectively reasonable. *See* Br. at 17 n.11. That is this case. Moreover, the Supreme Court recently reaffirmed again the principle that the qualified immunity defense should be resolved "at the earliest possible stage in litigation." *Scott v. Harris*, No. 05-1631, 550 U.S. ___, 2007 WL 1237851, at *2 n.2 (April 30, 2007) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)).

circumstances reasonably known to the Wardens at the time they received the orders, not on hindsight or facts that the Wardens could not reasonably have known. *See Anthony v. City of New York*, 339 F.3d 129, 138 (2d Cir. 2003) ("[p]lausible instructions from a superior or fellow officer support qualified immunity where, *viewed objectively in light of the surrounding circumstances*, they could lead a reasonable officer to conclude that the necessary legal justification for his actions exists") (quoting *Bilida v. McCleod*, 211 F.3d 166, 174-75 (1st Cir. 2000)) (emphasis added) (other citation omitted).

None of the OIG's findings cited by Plaintiffs concern information the Wardens knew or reasonably should have known at the time. Specifically, Plaintiffs rely on the OIG's findings that the FBI's "of high interest" determination often "was based on 'little or no concrete information.'" Plfs. Br. at 147 (quoting OIG Report at 18; JA at 284). But this finding – assuming for present purposes that it is true – has no bearing on whether the Wardens were reasonable in their belief at the time that the orders given to them regarding these "of high interest" detainees were facially valid. Indeed, such findings are based entirely on the OIG's hindsight in evaluating information that was only known to the FBI during the relevant time. *Id*. Indeed, the OIG Report acknowledges that, *at the time at issue*, the FBI provided "so little information about the detainees" to the Wardens' superiors at BOP. OIG Report at 19; JA at 285. Thus, the record as framed by the

Plaintiffs' use of the OIG Report, affirmatively establishes that the Wardens also could not reasonably have known that the FBI's determination of the detainees' status was unfounded, if indeed that was the case.[7]

Plaintiffs also flatly misconstrue the OIG Report in claiming that, in making the decisions as to the September 11 detainees, the BOP had no reason to believe that the detainees were associated with terrorism or were otherwise dangerous. Plfs. Br. at 147. The OIG Report makes clear that the BOP *did* believe that the September 11 detainees were suspected terrorists because they took the FBI's "of high interest" designation at face value.[8] OIG Report at 126-27; JA at 392-93. Although the OIG Report may have subsequently found that the FBI's determination was based on incomplete or false information, the critical fact for the qualified immunity analysis is that *at that time* – in the immediate aftermath of the

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7 Similarly, Plaintiffs' reliance on a statement in the OIG Report from a federal official regarding the problems with the FBI's investigation suffers the same flaw – the opinion of one DOJ attorney as to the validity of the FBI's investigation could not reasonably have been known to the Wardens at the time they were implementing the BOP's directives. Plfs. Br. at 148. Of course, neither could the contents of the FBI's files have been known to the Wardens. *See* OIG Report at 19; JA at 285.

8 Because the OIG Report is unequivocal in this regard, all of the cases relied upon by Plaintiffs are distinguishable – here, there are no facts in dispute that require the Court to permit discovery on these issues. *See* Plfs. Br. at 145-46. Rather, accepting Plaintiffs' allegations as true – including the OIG Report – the Wardens reasonably credited the FBI's determination that the detainees were dangerous and had connections to terrorism.

September 11 attacks – both the BOP and the Wardens had a reasonable basis to believe that the September 11 detainees *could* have had terrorist connections *because the lead investigative unit of the federal government, the FBI, had made precisely that determination*. Thus, the Wardens could not have reasonably known about flaws in the U.S. government's investigation at that time, and their reliance on the FBI's assessment was objectively reasonable under the circumstances.

Plaintiffs next argue that the orders of the Wardens' superiors were "unlawful" and not facially valid. They limit this argument to the BOP's policies (1) to assign Plaintiffs to the ADMAX SHU without providing them with a full hearing; and (2) to institute a communications blackout.[9] Plfs. Br. at 149. Again,

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[9] Here, Plaintiffs' argument does *not* apply to Plaintiffs' Equal Protection claim based on alleged discrimination by subjecting Plaintiffs to harsh conditions of confinement in the MDC's Administrative Maximum Special Housing Unit ("ADMAX SHU"). Thus, this Court must only consider whether the Wardens were following their superiors' directives as to that claim. As demonstrated in the Wardens' Opening Brief and further explained above, they were. Moreover, this fact provides a wholly independent ground for dismissing Plaintiffs' Equal Protection claims against the Wardens. As explained in the Wardens' Opening Brief, it is factually *impossible* for an individual to act with discriminatory intent – an essential element of an Equal Protection claim – by simply following his superior's orders. Br. at 27 n.16. This issue does not present a "factual matter," as Plaintiffs claim (Plfs. Br. at 151), because the *only* reasonable conclusion that can be made based on the OIG Report is that the Wardens did not make the decision to house the September 11 detainees in the ADMAX SHU, and therefore could not have acted with discriminatory animus. *See Gomez v. Rivera-Rodriguez*, 344 F.3d 103, 122 (1st Cir. 2003). Plaintiffs' general and conclusory allegations to the contrary are contradicted by the OIG's specific findings. Thus, the Wardens are

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Plaintiffs are incorrect. First, it is important to note that Plaintiffs do not – and cannot – challenge the *initial* decision to assign Plaintiffs to the ADMAX SHU as authorized by 28 C.F.R. § 541.22. *See Elmaghraby v. Ashcroft*, No. 04-CV-1409, 2005 WL 2375202, *17 n. 18 (E.D.N.Y. Sept. 27, 2005), *appeal docketed*, No 05-5768-CV (2d Cir. Oct. 25, 2005) ("The initial decision to place a prisoner in a SHU is discretionary under BOP regulations, and thus there is no protected liberty interest associated with that decision. To the extent that plaintiffs here are alleging a denial of due process based upon their initial assignment to the ADMAX SHU, that portion of the claim is dismissed") (citing *Tellier v. Fields*, 280 F.3d 69, 82 (2d Cir. 2000)).

The only issue that remains, therefore, is whether the Wardens should have known that the review procedures in place at the time, based on the circumstances reasonably known to the Wardens, were facially invalid. Here, Plaintiffs are simply wrong. To be legally valid, Plaintiffs' procedural protections need only be reasonable in light of the particular circumstances. *See Magluta v. Samples*, 375 F.3d 1269, 1279 n.7 (11th Cir. 2004) (rejecting the proposition that all of the procedures mandated by the BOP regulations were constitutionally required); *see*

(…continued)

also entitled to qualified immunity on this claim because Plaintiffs have failed to allege adequately a cause of action against the Wardens.

also Brief For Appellants John Ashcroft and Robert Mueller ("Ashcroft & Mueller Brief") at 41. Indeed, *Tellier* and the applicable BOP regulations should not have led the Wardens to question the validity of the BOP's orders to hold the Plaintiffs in the ADMAX SHU until cleared by the FBI. Here – unlike in *Tellier* – Plaintiffs' confinement and continued detention in the ADMAX SHU was based on an assessment made by the FBI – who, due to the unique circumstances that existed in the wake of the September 11 attacks, was the appropriate agency to make this determination, and not the BOP. As Plaintiffs admit and the OIG Report evidences, MDC officials did conduct the monthly assessments of Plaintiffs but were required to continue Plaintiffs' confinement in the ADMAX SHU based on the FBI's assessment.[10] *See* Compl. ¶ 80; JA at 115-16 (citing OIG Report at 118; JA at 384).

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[10] Indeed, as is articulated in the Ashcroft & Mueller Opening Brief:

> BOP officials were simply in no position to second-guess the FBI's initial determination that those detainees were "of high interest" to the FBI's ongoing investigation – a determination that was necessarily driven by exceptional national security and foreign threat concerns within the FBI's particular expertise. Nor would it have been appropriate for BOP to require the FBI to produce, in the context of a BOP hearing, evidence supporting the continued detention of the September 11 detainees. Disclosing such evidence to plaintiffs could have seriously compromised the FBI's ongoing investigation, as well as the broader national response to the September 11 attacks.

(continued…)

Even if Plaintiffs could show that the policy violated their constitutional rights, which they cannot, the critical issue *here* is whether it was reasonable for the Wardens to accept the policy dictated at that time – given the circumstances reasonably known to them – as facially valid. As demonstrated above, Plaintiffs overstate both the law and facts applicable to this claim. Viewed in this light, it cannot be said that the Wardens' actions in direct reliance on their superiors' facially valid directives were unreasonable.

The same is true as to Plaintiffs' argument regarding the communications blackout. It was not unreasonable for the Wardens to believe that the directive to institute a temporary communications blackout was lawful in light of the unparalleled security concerns created by the MDC's housing of potentially dangerous individuals who were believed to have ties to the September 11 terrorist attacks. Again, regardless of whether Plaintiffs are correct that this policy ultimately resulted in a violation of constitutional rights, this Court may only

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(…continued)

> Thus, a BOP hearing in this context would have been limited to inquiring as to whether or not a detainee had been cleared by the assigned FBI agents. The hearing would have been a mere formality and a waste of government resources. In this unique context, any alleged violation of BOP's regulations by the failure to provide such a formal hearing caused no real injury, and thus did not, by itself, violate Plaintiffs' due process rights.

Ashcroft & Mueller Br. at 43.

consider the information reasonably available to the Wardens at that time in determining whether their actions were reasonable. *See, e.g., Anthony*, 339 F.3d at 138 (finding that qualified immunity should only be denied if "no officer of reasonable competence could have made the same choice in similar circumstances"). The September 11 detainees presented unique security concerns in extraordinary circumstances, and these circumstances provided reasonable grounds on which to restrict *temporarily* these detainees' communications with the outside word. Under the then-present unique circumstances created by the terrorist attacks, the order to restrict temporarily Plaintiffs' communications with the outside world was not facially invalid.

In light of the above, the Wardens' roles in these challenged policies become clear: the Wardens were ordered by their superiors to institute certain policies at the MDC to handle the unprecedented, exigent circumstances caused by the September 11 attacks on the United States. The Wardens were informed by their superiors at BOP – who presumably were in a position to judge – that Plaintiffs were high-security detainees suspected of having terrorist ties to these devastating attacks. Based on these unique and unprecedented circumstances, the Wardens were reasonable in their belief that those orders were valid, and they acted reasonably in implementing them at the MDC. Thus, it cannot be said that "no officer of reasonable competence could have made the same choice in similar

circumstances," and, therefore, the Wardens are entitled to qualified immunity. *Anthony*, 339 F.3d at 138 (citations omitted).

II. Plaintiffs Did Not Meet Their Burden Of Alleging The Wardens' Personal Involvement As To Plaintiffs' Remaining Claims.

Plaintiffs – like the district court below – erroneously construe both the law and facts applicable to the Wardens' motion to dismiss for failure to plead the Wardens' personal involvement as to Plaintiffs' claims of (1) harsh treatment based on physical and verbal abuse by correctional officers (Claim 5); (2) interference with their religious practices (Claim 7); (3) unreasonable and punitive strip searches (Claim 23); and (4) confiscation of their personal property (Claim 8).[11] Although the Federal Rules of Civil Procedure do not impose a "heightened" pleading standard applicable to *Bivens* cases, Plaintiffs are nonetheless required to allege some facts that demonstrate a basis for relief against the Wardens for these claims. As explained in the Wardens' Opening Brief, Plaintiffs' Complaint is fatally deficient in this regard, and the OIG Report does not cure the deficiencies in

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[11] As discussed in footnote 2, *supra*, these claims are distinct from the claims in the previous Section because the OIG Report found that these occurred not as a result of wide-spread BOP policies, but by individual acts by low-ranking MDC employees. As explained in this Section, Plaintiffs have failed properly to allege a claim against the Wardens for these claims.

the Complaint. Indeed, in many instances the OIG Report contradicts Plaintiffs' claims. *See* Br. at 29-49.

First, Plaintiffs once again inaccurately characterize the Wardens' argument as advancing a "heightened" pleading standard. This is a tired canard of the Plaintiffs, regularly rolled out to camouflage the fact that they have *no* specific facts to allege. To be clear, the Wardens are *not* advocating a heightened pleading standard. They do not need to when, as here, no facts as to the Wardens' personal involvement are even alleged. And, the Wardens do not dispute that a higher pleading standard is not applicable in this case. Nonetheless, that does not relieve Plaintiffs from satisfying pleading obligations altogether. It is the lack of any specificity that dooms the Plaintiffs. The Federal Rules of Civil Procedure require that a plaintiff "allege personal involvement of defendants in a manner that goes beyond restating the legal standard for liability in conclusory terms." *Patterson v. Travis*, No. 02-CV-6444, 2004 WL 2851803, at *4 (E.D.N.Y. Dec. 9, 2004) (citing *LM Bus. Assocs., Inc. v. Ross*, No. 04-CV-6142, 2004 WL 2609182, at *3 (W.D.N.Y. Nov. 17, 2004)); *see also* Br. at 133-34 (collecting additional cases). But conclusory statements are all Plaintiffs have alleged with respect to the Wardens.

This argument is squarely supported by the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, where the Court clarified a Plaintiffs'

obligations under Rule 8 of the Federal Rules of Civil Procedure in pleading a complaint. *Twombly* is anything but helpful to Plaintiffs in this case. In *Twombly*, the Court held that, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 2007 WL 1461066, at *8 (citation omitted). Rather, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* Importantly, a Plaintiff must make "a 'showing,' rather than a blanket assertion, of entitlement to relief." *Id.* at *8, n.3 (citation omitted).

In so holding, the Court rejected a literal reading of the Court's earlier language in *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957) – on which Plaintiffs here rely (*see* Plfs. Br. at 19, 116) – that "a complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." The Supreme Court explained that this "phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Twombly*, 2007 WL 1461066, at *11. Instead, the Court emphasized that courts should "tak[e] care to require allegations" that meet the Federal Rules' threshold requirements. *Id.* at *9. When the requirements of Rule 8, as clarified by *Twombly* are applied here, it is clear that the Plaintiffs have not satisfied their burden and cannot proceed against the Wardens, and it was error for

the district court to hold otherwise.

The case upon which Plaintiff so heavily rely to excuse their absence of factual allegations, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), does not help their cause. *Swierkiewicz* is an employment discrimination case that simply holds that no "heightened" pleading standard applies above and beyond that established under the Federal Rules of Civil Procedure. But, as is clear from *Patterson* and the other similar cases cited by the Wardens – cases that were decided *after* the Supreme Court's decision in *Swierkiewicz* – the Federal Rules require more than Plaintiffs have offered here. *See* Br. 32-34. Indeed, neither *Swierkiewicz* nor any other case Plaintiffs cite overrides the requirement that a complaint consist of more than a simple restatement of the operative legal standard. *Patterson*, 2004 WL 2851803, at *4 ("Factual allegations of personal involvement must be taken as true for purposes of 12(b)(6) motions, but courts are not required to accept conclusory allegations regarding the legal status of defendants' acts.") (citing *LM Bus. Assocs., Inc.*, 2004 WL 2609182, at *3)).

Although Plaintiffs attempt to distinguish this line of cases by arguing that the complaint in each case "simply restated the legal standard for personal involvement, or failed to plead any facts supporting defendants' involvement," Plfs. Br. at 122, their argument falls short. Plaintiffs fail to explain how their allegations of the Wardens' personal involvement differ in any meaningful way

from these cases. In fact, they do not. Moreover, in *Twombly*, the Supreme Court addressed a similar argument – the claim that the *Twombly* analysis runs contrary to the Court's decision in *Swierkiewicz.* The Court explicitly rejected that argument, noting that *Swierkiewicz* was a case that merely held that specific facts need not be alleged to meet the *prima facie* case standard in employment discrimination cases. Contrary to what Plaintiffs here essentially advocate, *Swierkiewicz* "did not change the law of pleading." 2007 WL 1461066, at *13.

Twombly underscores what the Wardens have consistently argued – that Plaintiffs manifestly have failed to meet their pleading burden as to the Wardens' personal involvement. A review of their Complaint reveals that it contains *only one* specific allegation as to Hasty, and none as to Sherman. And, as to Hasty, Plaintiffs essentially allege only that he was the Warden of the MDC. Specifically, they allege: "[w]hile warden, Defendant Hasty had immediate responsibility for the conditions under which Plaintiffs and other members have been confined at the MDC. While Warden, Defendant Hasty subjected Plaintiffs and other class members confined at the MDC to unreasonable and excessively harsh conditions . . ." Compl. ¶ 26; JA at 101. The only other allegations concerning either of the Wardens are general paragraphs that essentially restate the operative legal standard. In particular, one section labels the Wardens – along with three other named MDC officials and an undetermined number of "John Doe"

Defendants – as "MDC Policy and Implementation Defendants (*see* Compl. ¶ 135; JA at 137), and states:

> The MDC Policy and Implementation Defendants created the unconstitutional and unlawful policies and customs relating to the manner in which the post-9/11 detainees were detained at the MDC that are at issue in this suit. Moreover, they allowed the continuation of these policies and customs, exhibited gross negligence and/or deliberate indifference in the supervision of subordinates who committed unconstitutional acts, and/or participated directly in the implementation of such policies or customs….

Id. ¶ 136; JA at 136. These allegations consist of an almost verbatim rehashing of the personal involvement standard in this Circuit. *See Williams v. Smith*, 781 F.2d 319, 323 (2d Cir. 1986) (stating the personal involvement standard). The Complaint contains additional allegations of the Wardens' alleged "conduct," but these simply mirror the above "allegations" (*i.e.*, a mere recitation of the operative legal standard) as to particular claims. *See, e.g.,* Compl. ¶ 128; JA at 133-34 (alleging that "MDC Defendants", which includes the Wardens, "adopted, promulgated, and implemented policies and customs" that violated the Plaintiffs' First Amendment Rights); *id.* ¶ 408; JA at 198 (alleging that the "MDC Policy and Implementation Defendants" violated Plaintiffs' Fourth Amendment rights "[b]y adopting, promulgating, and implementing the policy and practice" under which the alleged unreasonable strip searches occurred).

These are precisely the types of hollow and meaningless allegations that courts in this Circuit have routinely rejected, *even after* the decision in

Swierkiewicz and before the Court's decision in *Twombly*. For example, in *LM Business Associates, Inc.*, the court dismissed allegations against supervisory officials that consisted entirely of "boilerplate" allegations that mirror Plaintiffs' Complaint, including allegations that the defendants:

- formulated, created or maintained a custom or policy [under which the alleged constitutional violations occurred] . . .
- knew or should have known [of the alleged constitutional violations] but failed to remedy or prevent the harm;
- were "grossly negligent in the management of [their non-profit agency] and the individuals responsible for the [alleged constitutional violations]"; and
- were "deliberately indifferent to the harm caused [to plaintiffs] by failing to act upon information indicating that constitutional violations . . . were taking place."

2004 WL 2609182, at *2, *4 (internal quotations omitted).

Similarly, in *Tricoles v. Bumpus*, No. 05-CV-3728, 2006 WL 767897, at *3 (E.D.N.Y. March 23, 2006), the court dismissed the complaint as to the Commissioner of the New York State Office of Children and Family Services because "the most specific references to the Commissioner are located within the alleged causes of action which group him along with a number of the other defendants, and broadly claim that plaintiff's injuries are the proximate cause of the provision of insufficient medical care, the failure to supervise and train subordinates, and the defendants' policies and customs." *See also Ying Jing Gan*

v. City of New York, 966 F.2d 522, 536 (2d Cir. 1993) (dismissing complaint against senior official because the complaint alleged only "conclusory and speculative assertions" regarding the defendant such as "'[i]t is believed' that 'personnel in the District Attorney's Office' engaged in the alleged conduct 'pursuant to the practice, custom, policy, and particular direction of [the defendant]"). The allegations in these cases closely mirror Plaintiffs' and should similarly be dismissed.[12] And, even if there was doubt about this argument before *Twombly,* there can be no doubt now.

In response, Plaintiffs assert as to each claim that their "policy and practices" allegations are sufficient.[13] *See* Plfs. Br. at 134-38. As demonstrated above and in the Wardens' Opening Brief, however, mere boilerplate "policy and

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[12] Plaintiffs also cannot rely on their sole "specific" allegation as to Hasty because it essentially states that he was in charge of the MDC, *see* Compl. ¶ 26; JA at 101, and it is well established that a complaint should be dismissed "where, as here, the plaintiff 'does no more than allege that [defendant] was in charge of the prison.'" *Ellis v. Guarino*, No. 03-CV-6562, 2004 WL 1879834, at *9 (S.D.N.Y. Aug. 24, 2004) (quoting *Gill v. Mooney*, 824 F.2d 192, 196 (2d Cir. 1987)).

[13] To the extent Plaintiffs rely on the theory that Defendants were grossly negligent in their supervision of those who committed the alleged abuses at issue, Plaintiffs again fail to allege anything but the operative legal standard, which is not sufficient to withstand the Wardens' motion to dismiss. *See LM Bus. Assoc, Inc.*, 2004 WL 2609182, at *2,*4 (dismissing complaint against supervisory defendants who were alleged, among other things, to have been "grossly negligent in supervising subordinates who committed the wrongful acts").

practices" allegations are insufficient to survive a motion to dismiss. Plaintiffs' and the district court's reliance on this Court's decision in *McKenna v. Wright*, 386 F.3d 432, 437-38 (2d Cir. 2004), is similarly misplaced. The allegations in *McKenna* more than simply restate the legal standard by alleging that a specific and identified policy of the New York Department of Correctional Services was unconstitutional, and that the supervisory Defendants created the policy. *McKenna*, 386 F.3d at 438.[14]

In contrast, Plaintiffs here work backwards. They allege only that they were subjected to specific abuses by subordinate MDC employees and then simply restate the operative supervisory standard as to the Wardens as "facts," claiming that the abuses occurred pursuant to unascertained "policies and practices" that are unsupported by the record – *i.e.*, 245 pages of findings by the OIG that Plaintiffs have incorporated into their prolix 199-page Complaint.[15] Accordingly, the district

[14] Furthermore, even if it could be argued that reliance on *McKenna* was *previously* appropriate, the *Twombly* ruling ends this debate. Plaintiffs cite *McKenna* for the proposition that a motion to dismiss may be granted "only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim . . ." Plfs. Br. at 140 (quoting *McKenna*, 386 F.3d at 436). This standard was expressly abandoned by *Twombly*. *See* discussion at p. 22, *supra*.

[15] Because, as Plaintiffs readily admit, they must "identif[y] the theory upon which each defendant will be proven liable," it is not "absurd" for this Court to apply the reasoning of *Wynder v. McMahon*, 360 F.3d 73 (2d Cir. 2004), *see* Plfs. Br. at 136-37, when, as explained above, Plaintiffs fail to allege properly their theory of relief against the Wardens.

court erred in finding that the Complaint sufficiently alleges the Wardens' personal involvement as to these claims.

Moreover, the OIG Report does not aid Plaintiffs' cause. As noted in Section I, *supra*, the only findings in the OIG Report that relate to the Wardens' involvement demonstrate why the claims addressed in Section I should be dismissed. As to the claims at issue in this Section, however, the OIG Report found only that certain subordinate employees at the MDC perpetrated abuses. *See* Br. at 34-37. Plaintiffs' assertion that the OIG's findings in this respect support the Wardens' personal involvement in these claims is wrong. Most of the findings relied upon by Plaintiffs concern the claims addressed in Section I, which warrant dismissal for other reasons as described in that Section. *See* Plfs. Br. at 132-33 (discussing the OIG's findings regarding the Plaintiffs' assignment to the ADMAX SHU, and communications blackout). Without *any* findings in the OIG Report to support the Wardens' personal involvement in the claims involving acts committed by low-level MDC employees, Plaintiffs instead generally argue that the Wardens "established the atmosphere" in which Plaintiffs' contact with the outside world was restricted and their use of the prison grievance system was curtailed. *Id.* But this general argument does not sufficiently supplement Plaintiffs' claims for relief against the Wardens as to the physical and verbal abuse, unreasonable strip

searches, and confiscation of their personal property they experienced.[16] *Id.* at 132-33 (citing Supplemental OIG Report at 148-49, 162; JA at 414-15, 428).

Accordingly, neither the Complaint nor the OIG Report supports the district court's conclusion that Plaintiffs have sufficiently alleged the Wardens' personal involvement as to Plaintiffs' claims of (1) harsh treatment based on physical and verbal abuse by correctional officers (Claim 5); (2) interference with their religious practices (Claim 7); (3) unreasonable and punitive strip searches (Claim 23); and (4) confiscation of their personal property (Claim 8). Under these circumstances, therefore, the Wardens are entitled to qualified immunity with respect to those claims as well, and thus each should be dismissed insofar as they are asserted against the Wardens.

III. Plaintiffs' Cross-Appeal Should Be Rejected For the Reasons Stated In Other Appellants' Briefs.

This Appeal also consists of Plaintiffs' Cross-Appeal of the district court's dismissal of Plaintiffs' claims against the Wardens concerning alleged violations of

[16] Nor does the fact that the MDC videotaped all detainee movement support the inference that the Wardens should have known about the alleged abuses at issue in this case. It is not alleged that the Wardens ever viewed any such videotapes. *See* Plfs. Br. at 133. In addition, the OIG's findings as to complaints to a "senior MDC management official," *see id.*, are similarly inapposite because the complaint at issue did not concern any of the alleged abuses at issue in this case, but only the existence of a t-shirt that was believed to be inappropriately on display at the MDC. *See* OIG Report at 37-38; JA at 249-50.

(1) Plaintiffs' Fifth Amendment rights due to their alleged prolonged detention without cause (Claim 2); (2) Plaintiffs' Fourth Amendment rights for being detained without probable cause and without receiving a timely judicial hearing (Claim 1); and (3) Plaintiffs' Fifth Amendment rights based on the government's decision to detain Plaintiffs based on their race, national origin, religion, and ethnicity (Claim 5). The district court correctly dismissed each of these claims, and the Wardens submit that the district court's ruling in this regard should be affirmed. The Wardens rely upon, and respectfully urge the Court to adopt, the arguments made on this issue by Defendants Ashcroft and Mueller in their Response and Reply Brief.

CONCLUSION

For each of the foregoing reasons, this Court should reverse the district court's decision below insofar as it denied the Wardens qualified immunity as to Claims 5, 7-8, and 20-22, and grant the Wardens qualified immunity and dismiss those claims against the Wardens. In addition, this Court should affirm the district court's grant of qualified immunity as to Claims 1, 2, and 5.

Respectfully submitted,

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Dated: May 29, 2007

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CERTIFICATE OF SERVICE

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In addition, I certify that that on May 29, 2007, I caused ten copies of the Response and Reply Brief of Appellants Hasty and Sherman to be served via first-class and electronic mail upon the Clerk of the United States Court of Appeals for the Second Circuit.

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