06-3745-cv(L)

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiff–Appellee–Cross-Appellants,

v.

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

Defendant–Appellant–Cross-Appellees,

UNITED STATES OF AMERICA,

Defendant–Cross-Appellee,

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

Defendants.

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

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Preliminary Statement

The decision appealed from was rendered by the Honorable John Gleeson, United States District Judge for the Eastern District of New York. SPA 1-64.

Jurisdictional Statement

As here pertinent, Plaintiffs assert claims (a) against the individual defendant officers and employees of the United States, under 28 U.S.C. § 1331 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violation of their constitutional rights in connection with their arrest and detention by Defendants, and (b) against the United States, under 28 U.S.C. § 1346(b), for wrongful acts and omissions in connection with the same facts.

Jurisdiction over Plaintiffs' Cross-Appeal is based on Fed.R.Civ.P. 54(b), the district court's order directing the entry of final judgment (SPA 65-67), and the final judgment entered thereon filed August 30, 2006 (SPA 68).

Plaintiffs filed their Notice of Appeal on September 8, 2006. JA 519-24.

Statement of the Issues Presented on Plaintiffs' Cross-Appeal

1. Did the Fifth Amendment Due Process Clause permit the extended detention of Plaintiffs without probable cause, where detention was not necessary to effectuate removal, and Defendants intentionally delayed removal in order to keep Plaintiffs detained for criminal investigation?

2. Did the Fourth Amendment permit Plaintiffs' detention for criminal investigation without probable cause and a timely judicial hearing, where their detention was not carried out to effectuate their removal?

3. Did the Fifth Amendment's guarantee of equal protection permit the government to select Plaintiffs for detention on the sole bases of their race, national origin, religion, and ethnicity?

4. May the United States be liable under the Federal Tort Claims Act for detaining non-citizens in maximum security for a criminal investigation, without any procedural or substantive protections, notwithstanding final deportation orders or departure agreements?

Statement of the Issues Presented on Defendants' Appeals

1. Did Defendants Ashcroft, Mueller, and Ziglar waive their defense of personal jurisdiction; and if it is not waived, does this Court have supplemental interlocutory jurisdiction over that defense; and if this Court does have jurisdiction, did the district court err in denying Defendants Ashcroft, Mueller, and Ziglar's motion to dismiss for lack of personal jurisdiction?

2. Have Defendants met their burden of showing that the law prohibiting their conduct was not clearly established, where Plaintiffs' claims are based on settled constitutional principles of due process, freedom of speech, and access to counsel?

3. Did the district court properly conclude that Plaintiffs' Complaint adequately alleges the personal involvement of Defendants in the policies and practices under which Plaintiffs' constitutional rights were violated by:

- punitive conditions of confinement without process?
- discrimination on the basis of race and religion?
- interference with religious practice?
- seizure of property?

- a communications blackout?
- repeated strip searches?

4. Have Defendants Hasty and Sherman met their burden of showing that the facts alleged in Plaintiffs' Complaint establish that their conduct was objectively reasonable in light of clearly established law?

Statement of the Case

The Statement of the Case appearing in Defendant Hasty's Brief at pages 2 through 5 is substantially accurate. After the events described in that brief, Plaintiffs moved on July 19, 2006, for an order directing entry of final judgment under Fed.R.Civ.P. 54(b), dismissing claims 1, 2, 24, 25, and, to the extent dismissed by the Order of June 14, 2006, claim 5.[1] JA 73. Judge Gleeson granted the motion on August 18, 2006 (SPA 65-67), and final judgment was entered on August 30, 2006 (SPA 68). Discovery on the claims which have not been dismissed continues.

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[1] Claim 5 (equal protection) was dismissed so far as it challenges Defendants' hold-until-cleared policy, but remains so far as it challenges their treatment of Plaintiffs while detained. SPA 47-49.

Plaintiffs do not pursue their appeal of the dismissal of claim 25.

Statement of Facts

Plaintiffs are seven non-citizens deported (or permitted to depart voluntarily) for violating the term of their visas, who were kept in jail and abused for months, as their departure was delayed so that the FBI could decide whether they were terrorists or had any value to the 9/11 investigation.[2] JA 91-92 ¶ 1. Plaintiffs seek to represent a class of similarly situated foreign nationals subject to the same policy and treatment. *Id.*

There was never any basis for suspecting Plaintiffs of terrorism. JA 92-93 ¶ 2. Rather, they were selected for this treatment—in the aftermath of September 11, 2001—because they are (or were perceived to be) Muslims of Middle Eastern or South Asian origin, who happened to have violated visa requirements at a sensitive time. JA 112 ¶ 74. They fell under an official policy, the "hold-until-cleared" policy, under which immigration authorities held visa violators like Plaintiffs until the FBI affirmatively declared

[2] Plaintiff Jaffri has withdrawn his claims. JA 71 (Docket 509).

that it had no interest in them. JA 92-93 ¶ 2. Under the hold-until-cleared policy it was irrelevant that the FBI had no basis for suspicion in the first place; affirmative clearance was required.

Although Plaintiffs and others subjected to the hold-until-cleared policy had no connection to the events of September 11, they became known as "September 11 detainees" (JA 261 and *passim*), or "9/11 detainees" for short, and were subjected to a presumption of guilt for 9/11 until they were determined to be innocent. JA 93 ¶ 2.

The government's treatment of 9/11 detainees is described in detail in two reports of the Office of the Inspector General of the Department of Justice ("OIG"): one, dated April 2003 (JA 260-477), describing the hold-until-cleared policy and the restrictive conditions of confinement at the Metropolitan Detention Center, a federal facility in Brooklyn, New York ("MDC"), and a second, dated December 2003 (JA 211-259), describing the abuse

which 9/11 detainees (including five Plaintiffs) suffered while in the MDC.[3]

The OIG determined that many 9/11 detainees were arrested incidentally, based on as little as "anonymous tips called in by members of the public suspicious of Arab and Muslim neighbors who kept odd schedules." JA 282. "Some appear to have been arrested more by virtue of chance encounters or tenuous connections to a PENTTBOM lead rather than by any genuine indications of a possible connection with or possession of information about terrorist activity."[4] JA 307-8. In one instance people were arrested solely because of a tip that there were "too many [Middle Eastern men]" working in a grocery store. JA 283.

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[3] Plaintiffs Sachdeva and Turkmen were incarcerated in Passaic County Jail rather than MDC. They appeal the dismissal of claims 1, 2 and 5 along with the MDC Plaintiffs, and they assert claims 7 and 8 along with the other Plaintiffs. Their abuse claims were dismissed on the ground that Defendants here bear no responsibility for them (SPA 41), and Plaintiffs have not appealed from that ruling.

[4] PENTTBOM refers to the FBI investigation of the September 11 attacks. JA 267.

The common thread underlying the arrest and treatment of Plaintiffs was the impermissible use of race and religion.

Plaintiffs were arrested shortly after September 11, 2001. JA 91 ¶ 1. Each Plaintiff was eventually charged with a civil violation of the immigration law, but did not receive notice of these charges for days or even weeks. JA 114 ¶¶ 78. Plaintiffs did not dispute their removal, and received final removal orders by November, 2001. JA 144 ¶ 160, 151-52 ¶ 188, 158 ¶ 208, 170 ¶ 248.

According to the OIG, "A variety of INS, FBI and [Justice] Department officials who worked on these September 11 detainee cases told the OIG that it soon became evident that many of the people arrested during the PENTTBOM investigation might not have a nexus to terrorism," and that this concern was recognized as early as September 22, 2001. JA 311. On October 22, 2001, the INS Deputy General Counsel told INS and FBI attorneys "that the Department might be subject to '*Bivens* liability' if it did not release the New York detainees in a timely manner," JA 321, and a formal opinion was issued by the INS General Counsel's Office on January 28, 2002, declaring "case law provides that detention must be

related to removal and cannot be solely for the purpose of pursuing criminal prosecution." JA 367. Nevertheless, Plaintiffs were not released until dates ranging from February 25 to June 6, 2002, after they were cleared by the FBI of any connection to terrorism. JA 145 ¶ 166, 156 ¶ 199, 160 ¶ 213, 170 ¶ 249, 174 ¶ 265, 180 ¶ 284.

Without any standardized criteria or evidence, about one quarter of the 9/11 detainees, including five of the Plaintiffs, were labeled "high interest" by the FBI. JA 119 ¶ 86; JA 283-84. According to the OIG, this designation was "indiscriminate and haphazard." JA 336 The rest of the 9/11 detainees were labeled "of interest" or "interest undetermined" by the FBI, and detained in county jails. JA 431-32. Two Plaintiffs were held in Passaic County Jail in New Jersey. JA 93 ¶ 3. Detainees at Passaic were prohibited from practicing their religion in a manner similar to the MDC detainees, described below. JA 175 ¶ 268. The other conditions of their confinement are not at issue in this appeal.

The "high-interest" Plaintiffs were confined and treated as though they were terrorists throughout their detention. They were arrested by a team of NYPD, INS and FBI officers (JA 150 ¶¶ 182-

83), and transported to MDC by armed convoy (JA 215). Entering the facility, they were slammed face first into a wall on which an American flag T-shirt was hung. JA 153 ¶ 194; JA 223-24. Although Plaintiffs arrived at different times and were received by different officers, all were beaten before being placed in solitary confinement in the Administrative Maximum Special Housing Unit ("ADMAX SHU") at MDC. JA 142 ¶ 154, 153 ¶¶ 194-95, 157 ¶ 205, 163-65 ¶¶ 226-28. As they were transported to the unit, the guards called them "terrorists" and "fucking Muslims," and threatened that they would be held forever at MDC, or else executed. *Id.*

The abuse of Plaintiffs continued throughout their detention and ranged from violent physical assaults (JA 142 ¶ 154, 153-55 ¶¶ 194-97, 158 ¶ 205, 164-65 ¶¶ 226-28) to constant physical and verbal harassment. JA 144 ¶ 159, 151 ¶ 186, 155 ¶¶ 197-98, 160-61 ¶¶ 214-18, 166-67 ¶¶ 232-38. They received no medical treatment for the injuries they received from their guards. JA 132 ¶ 126.

MDC did not have an ADMAX SHU prior to Plaintiffs' arrival; the restrictive conditions and policies of the regular SHU were enhanced specifically for Plaintiffs and the other 9/11

detainees. JA 384-86. Plaintiffs were placed and retained in the ADMAX SHU without any procedures, in violation of BOP regulations. JA 115 ¶ 80. In the ADMAX SHU Plaintiffs were locked in cells at least 23 hours a day (JA 283) and placed in handcuffs, leg irons, and a 4-foot heavy chain under the supervision of three guards and a lieutenant whenever they were taken from their cells (JA 391). They were not allowed to keep any personal property, even soap or toilet paper. JA 131 ¶ 123. They were subjected to repeated strip searches—sometimes videotaped or with female guards present—though they had no opportunity to receive contraband while at MDC. JA 128-29 ¶¶ 115-16. Although they were supposed to be permitted recreation five times a week, the recreation cells were exposed to the elements and Plaintiffs—who were imprisoned throughout the winter—were given no warm clothing for recreation. JA 130-31 ¶ 120-21; JA 418.

Plaintiffs were kept from practicing Islam by guards who refused to tell them the time so that they would not know when to pray, refused to provide them with copies of the Koran, refused to give them food acceptable for Muslims, and interrupted their prayers by banging on their cell doors and screaming insults.

JA 134 ¶ 128. Religious and ethnic slurs such as "religious fanatic" and "fucking Muslim" showed the bias behind this treatment. JA 144 ¶ 159, 154 ¶ 195, 158 ¶ 205; JA 410. Plaintiffs were also kept from sleeping, as the lights were left on in their cells for 24-hours a day until late February 2002 and guards banged on their cell doors through the night. JA 129-30 ¶ 117.

Within the ADMAX Plaintiffs were completely cut off from the outside world. For up to two months they were allowed no phone calls, visits, or mail. JA 119-120 ¶¶ 87, 90. Family members and lawyers who sought them out at MDC were told that they were not in custody. *Id.* Under these conditions it was impossible for them to retain counsel for their immigration proceedings. JA 119-20 ¶¶ 88-89. When they finally were allowed contact with the outside world, that contact was extremely restricted. Although promised one social call per month and one legal call per week, they were systematically denied even that. JA 120 ¶¶ 90-91.

Plaintiffs were also denied contact visits; their only direct contact with individuals outside of MDC were interrogations by FBI officers. JA 144 ¶ 161, 159 ¶ 209, 160 ¶ 245. These interrogations

ended by late October of 2001, presumably the time at which the FBI ceased to suspect that Plaintiffs had any value to the terrorism investigation. *Id.* They were held in the conditions described above for months longer.

Plaintiffs' Complaint names the twenty-seven MDC employees directly responsible for their confinement and abuse, including Defendant Hasty, the warden at MDC on September 11, and Sherman, then the associate warden for custody at MDC. Plaintiffs have also sued former Attorney General John Ashcroft, FBI Director Robert Mueller, and former INS Commissioner James Ziglar for their direct involvement in creating and implementing the polices and practices described above and analyzed in detail below.

Summary of the Argument

In a public statement on October 25, 2001, Attorney General John Ashcroft described the blueprint for the conduct alleged in this action:

> Let the terrorists among us be warned: If you overstay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible. We will use every available statute. We will seek every prosecutorial advantage. . . .

JA 278.

In the weeks after 9/11, Plaintiffs and others were singled out because of their race, ethnicity, and religion. No evidence tied them to terrorism or any other criminal conduct. Nonetheless, Plaintiffs were swept up for visa violations and held for criminal investigation under the most onerous conditions. A multitude of constitutional violations resulted, as well as the tort of false imprisonment. The district court erred in holding otherwise.

More specifically, as we show in *Point I*, the district court erred in holding that 8 U.S.C. § 1231(a)(6) authorized Plaintiffs' post-removal order detention. Because Plaintiffs were detained for criminal investigation rather than removal, their detention was not authorized by statute, nor was it consistent with substantive due process. Two Plaintiffs were not even covered under the statutory scheme and consequently could not have been detained under the authority of 8 U.S.C. § 1231(a)(6) even for removal. In addition, the detention of Plaintiffs past the 90-day removal period without the custody reviews required by 8 C.F.R. § 241 violated Plaintiffs' right to procedural due process.

Even if this Court were to hold that Plaintiffs' detention was authorized by immigration law, Plaintiffs' detention violated the Fourth Amendment because they were detained for criminal investigation without a finding of probable cause. Immigration detention is not a shortcut around the probable cause requirement of the Fourth Amendment. That Plaintiffs do not challenge their initial arrest is immaterial; Plaintiffs' post-arrest detention is a separate seizure requiring its own justification.

Nor does the deference owed to the executive branch on immigration justify the district court's finding that Plaintiffs could, consistent with equal protection guarantees, be discriminated against on the basis of their religion, race, and ethnicity. Even in immigration, religious, racial, and ethnic classifications must satisfy strict scrutiny. Defendants' decision to detain Plaintiffs, without any basis for suspicion beyond Plaintiffs' religion, race, and ethnicity, does not satisfy rational basis review, let alone strict scrutiny.

The district court also erred in dismissing Plaintiffs' claims under the Federal Tort Claims Act (*Point II*). Plaintiffs' detention was not authorized under immigration law and was not

carried out in a reasonable manner; it thus amounted to false imprisonment under New York and Federal law. Defendants' failure to release Plaintiffs after they were cleared of any connection to terrorism is a further tort.

In *Point III*, we outline and frame our response to Defendants' appeal. Specifically, we address Defendants' assertion that they are entitled to qualified immunity at this stage of the litigation. The myriad violations of Plaintiffs' constitutional rights directly resulted from an official and high-level policy to detain Plaintiffs in the most restrictive conditions of confinement available. Isolated from the larger facility and the outside world, overzealous guards and supervisors systematically abused Plaintiffs. When, shortly after 9/11, men marked by their appearance and manner as Muslims from the Middle East or Pakistan arrived at the Metropolitan Detention Center with the official label "terrorist," it should have been obvious to every supervisor, from bottom to top, that assuring proper treatment of men so labeled required the most diligent supervision. Defendants uniformly failed in that obligation. It is against this backdrop that Defendants' demand for immunity must be evaluated.

As shown in *Point IV*, Defendants Ashcroft, Mueller, and Ziglar are not entitled to dismissal for lack of personal jurisdiction. Defendants waived this defense under Federal Rules of Civil Procedure 12(g) and (h)(1) by failing to raise it when they moved to dismiss Plaintiffs' First Amended Complaint. Even if this Court holds that the defense is not waived, the Court lacks supplemental interlocutory jurisdiction over the issue because it requires a different legal analysis than that posed by Defendants' defense of lack of personal involvement. In any case, Defendants Ashcroft, Mueller, and Ziglar are all subject to this Court's jurisdiction under N.Y.C.P.L.R. § 302(a)(1) because each purposefully directed action toward the State of New York.

Next, as shown in *Point V*, Defendants' contention that no clearly established law governed their conduct because they acted in the aftermath of 9/11 is unavailing. The terrorist attacks did not extinguish Plaintiffs' rights, clearly established before September 11, 2001, to freedom from atypically restrictive and punitive confinement, to communicate with the outside world, and to access counsel. Nor does the INA bar Plaintiffs' claims.

Neither can Defendants escape liability by blaming the policies and practices challenged here on their subordinates (*Point VI*). Plaintiffs have properly alleged Defendants' involvement in creating and implementing the unlawful practices. That Plaintiffs seek to hold more than one individual responsible does not require dismissal, since Plaintiffs have properly asserted liability against each individual.

Finally, the wardens cannot show that they acted objectively reasonably, under established law, when they detained Plaintiffs in punitive conditions without the procedural protections required by due process (*Point VII*). The wardens assert that their actions were objectively reasonable because they followed the orders of their superiors, but the wardens fail to cite any facts on the face of the Complaint or the OIG Report that show that they lacked personal involvement in the challenged policies or that those policies were reasonable. Even if they could, the wardens' defense must still fail, because the orders they claim to have followed were themselves facially invalid.

ARGUMENT

Standard of Review

Defendants' appeal and Plaintiffs' cross-appeal are to be reviewed *de novo*. *Allaire Corp. v. Okumus*, 433 F.3d 248, 249-50 (2d Cir. 2006). On a motion to dismiss, all allegations in the complaint must be taken as true and all inferences drawn in the plaintiff's favor. *Caiola v. Citibank, N.A.,* 295 F.3d 312, 321 (2d Cir. 2002). Dismissal is appropriate only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

I. Holding Plaintiffs for Criminal Investigation Violated Their Clearly Established Constitutional Rights.

The district court called Plaintiffs' challenges to Defendants' hold-until-cleared policy "length of detention claims," and believed that these claims depend on the theory "that the Attorney General had a duty of reasonable dispatch to remove [Plaintiffs] as soon as possible." SPA 42-43, 47, 57. Relying on *Zadvydas v. Davis*, 533 U.S. 678 (2001), the court concluded that Plaintiffs could not challenge the length of their detention so long as

they were either released within six months, or their release after six months was "reasonably foreseeable." SPA 45.

But the court asked the wrong question. The question is not *how long* could Plaintiffs be detained, but *for what reason.* Under both the Fifth and Fourth Amendments, and indeed under *Zadvydas*, the answer is that Plaintiffs could only be held for the purpose of removal from the United States. They could not be detained for a criminal investigation when the constitutional requirements for such detention were not met. None were: not substantive due process, or Fourth Amendment, or equal protection, or procedural due process.

In dismissing Plaintiffs' equal protection claim the district court relied on the executive's plenary power over immigration; but that does not permit discrimination by race or religion. Finally, the court dismissed Plaintiff's procedural due process challenge to their post-removal detention because it believed Plaintiffs had received the reviews required for such detention. They had not; this claim too should proceed.

A. Plaintiffs' Detention Violated Their Right to Substantive Due Process.

Plaintiffs allege that Defendants detained them not for the legitimate purpose of removal from the United States, but for the illegitimate purpose of criminal investigation. JA 109-10 ¶¶ 65, 68, 112-13 ¶¶ 74-75. Indeed, Defendants intentionally *delayed* Plaintiffs' removal in order to keep them incarcerated without probable cause. JA 105 ¶ 55, 109 ¶ 67, 112 ¶ 75. Defendants did so under an explicit policy to hold Plaintiffs and other 9/11 detainees until they were cleared of any connection to terrorism by the FBI. JA 109-110 ¶¶ 65, 68. Defendants maintained this hold-until-cleared policy for months, despite warnings from the INS General Counsel that detention which is unnecessary to effectuate removal is illegal under the INA and relevant case law. JA 367.

As the Justice Department's Inspector General found, the policy was employed in a blanket fashion to hold all persons labeled "of interest" to the September 11 investigation, even where, as with Plaintiffs, the government had no reason to suspect terrorist activities. JA 307-8, 311-13, 335. Eventually all Plaintiffs, and indeed all class members, were "cleared" of involvement in terrorism—but

not before they languished in prison for many months pursuant to the government's official policy.

The due process issue presented by detention for investigation rather than deportation is plain. No citizen may be jailed in this way, without any opportunity to test the reasons for the investigation. "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Cut loose from any relation to their removal, Plaintiffs' detention was just such an arbitrary action.

Because the district court focused on length rather than purpose of detention, it interpreted *Zadvydas* to insulate from judicial review both any detention of less than six months, and any detentions past six month as long as removal remains "reasonably foreseeable." SPA 43-45. But the "reasonably foreseeable" formulation, which *Zadvydas* sets forth as a *limit* to the detention of non-citizens *who cannot be removed,* turns out to be no limit at all in Plaintiffs' situation. Because Plaintiffs' removal from the United States never posed any difficulty, and was thus always "foresee-

able," the district court's formulation allows indefinite detention at the whim of the jailor.

We show in this brief that the correct answer lies, not in the six-month period which the *Zadvydas* court crafted to deal with *unremovable* non-citizens, but in the underlying principle spelled out in *Zadvydas*: that non-citizens awaiting removal may not be subjected to detention that does not "bear[] a reasonable relation to the purpose for which the individual was committed." 533 U.S. at 690 (internal quotation marks and citation omitted).

The district court's dismissal of Plaintiffs' Fifth Amendment claim is reversible on three grounds. First, the court erroneously transformed *Zadvydas*'s limitation on immigration detention authority into an open-ended authorization of indefinite detention in every removal case in which the government faces no difficulty in deporting the non-citizen, even where detention serves no immigration purpose. This conflicts with the Court's explicit holding that the immigration detention statute "does not permit indefinite detention." 533 U.S. at 689.

Second, the district court failed to accept Plaintiffs' allegations as true, as it must in adjudicating a motion to dismiss.

Plaintiffs alleged that they were held without immigration purpose, for criminal investigation. JA 109-10 ¶¶ 65, 68, 112-13 ¶¶ 74-75. The district court rested its decision, however, on its determination that Plaintiffs' claim "ignores legitimate foreign policy considerations and significant administrative burdens involved in enforcing immigration law in general, and, specifically, those concerns immediately following [the September 11, 2001] terrorist attack." SPA 45. That reasoning fails to credit Plaintiffs' allegation that the detentions served "no legitimate immigration purpose," and is an independent ground for reversal.

Third, even if the district court correctly interpreted *Zadvydas*, two Plaintiffs fall entirely outside that case, because their detention was not authorized by the statute construed in *Zadvydas*.

1. Plaintiffs' Detention Violated Both the Statute and Due Process Because It Was Not "Necessary to Secure Removal."

In *Zadvydas*, the Supreme Court considered the detention of non-citizens who were ordered removed but could not be deported because no country would accept them. 533 U.S. at 684-86. Interpreting the immigration detention statute to fulfill its

purpose of removal, while avoiding the substantive due process concerns that would arise if the statute authorized indefinite detention, the Court declared, “Whether a set of particular circumstances amounts to detention within, or beyond, a period reasonably necessary to secure removal is determinative of whether the detention is, or is not, pursuant to statutory authority.” 533 U.S. at 699.

As the Supreme Court explained in *Demore v. Kim*, 538 U.S. 510, 527 (2003), *Zadvydas* rests on the requirement that detention “serve its purported immigration purpose.” The Supreme Court accepted the government’s position that this statute has two regulatory goals: “‘ensuring the appearance of aliens at future immigration proceedings’ and ‘preventing danger to the community.’” *Zadvydas,* 533 U.S. at 690 (quoting from the government’s brief). “[W]here detention’s goal is no longer practically attainable, detention no longer bears a reasonable relationship to the purpose for which the individual was committed.” *Id.* (internal quotation marks and citation omitted). It therefore is “not . . . pursuant to statutory authority.” 533 U.S. at 699.

The INS General Counsel's Office reached the same conclusion in a memorandum dated January 28, 2002, while Plaintiffs were still held in post-removal order detention, stating specifically that "removal could not be delayed for the exclusive purpose of allowing the FBI to conduct an investigation to see if the person is a terrorist." JA 367. As the General Counsel explained to the Inspector General, "the INS has no authority to continue holding [a 9/11] detainee if removal could otherwise be effectuated," because such delay would not be "related to removal." JA 358.

The issue is not limited to interpretation of the detention statute; the Supreme Court interpreted the statute as it did to avoid the due process problem raised by indefinite detention. *Zadvydas*, 533 U.S. at 689-692. As the Court explained, all aliens within the United States are protected by due process, *id.* at 693, and outside criminal process, detention violates due process unless ordered "in certain special and narrow non-punitive circumstances, where a special justification . . . outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Id.* at 690 (internal citations omitted). Thus, detention that violates the immigration statute as interpreted in *Zadvydas* "also violates the

Due Process Clause." *Wang v. Ashcroft*, 320 F.3d 130, 146 (2d Cir. 2003).

While *Zadvydas* considers detention when removal is *impossible*, the present case presents detention *as an alternative to removal*: the exact opposite of what *Zadvydas* allows. Defendants adopted an official policy under which the authority to release Plaintiffs was turned over to the FBI—the criminal investigative service of the Government—in an arrangement unknown to immigration proceedings and not designed "to secure removal," but to incapacitate Plaintiffs during a criminal investigation. JA 109-10 ¶¶ 65, 68, 112-13 ¶¶ 74-75. Here, unlike *Zadvydas*, there never were any barriers to removal; rather, with their "hold-until-cleared" policy, Defendants deliberately *chose* not to remove Plaintiffs, holding them not to "secure [their] removal," and indeed not for any immigration purpose, but solely for criminal investigation. *Zadvydas* prohibits this.

Thus we do not argue, as the district court thought, that *Zadvydas* "should be limited to the facts of that case." SPA 44. When there is no difficulty in removal, and the *Zadvydas* "reasonably foreseeable test" turns out to impose no limit on

detention, turning to the case's underlying principle is not limiting the case; it is applying it.

Zadvydas holds that the statute does not permit immigration detention that does not serve the statutory purpose of removal. In *Zadvydas*, that was because removal *could not* be carried out; here, it is because Defendants *chose* not to carry it out for non-immigration purposes. Under *Zadvydas*, detention is impermissible in either case. The district court missed the point; it transformed a limitation intended to prohibit detention divorced from its statutory purpose into a blank check to detain removable aliens for any purpose or none, so long as the precise situation presented in *Zadvydas*—inability to remove—does not exist. Under the district court's decision, the only non-citizens protected from arbitrary detention are those who cannot be removed. The rest may be detained indefinitely. "The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any [procedural] protection is obvious." *Zadvydas*, 533 U.S. at 692.

In *Zadvydas*, the purpose of detention—removal—was presumed. There was no suggestion that the government had some purpose other than removal, and certainly not that its purpose was, as here, to *avoid* removal. Rather, the issue was whether the detention had a *reasonable* relation to its conceded purpose; thus the test for whether detention is authorized is whether removal is "reasonably foreseeable," 533 U.S. at 699. The six-month period grows out of this issue of reasonableness; indeed, the Court calls it a "presumptively reasonable period." *Id.* at 701. The presumption is a concession both to the presumed good faith of the government, and to its "greater immigration-related expertise," *id.* at 700, expertise which is critical to determining what is reasonable. The court had no occasion to suspect that detention would sometimes lack *any* relation to removal, or to comment on how to deal with that situation.

But that is exactly the situation presented here. When detention is an *alternative* to removal rather than a means to accomplish it, the question of a "reasonable relation" between detention and removal does not arise, and the government cannot be entitled to any presumption of reasonableness.

Wang v. Ashcroft does not hold otherwise. The district court erroneously concluded that this Court's decision in *Wang* established that the six-month presumption applies even where there are no obstacles to removal. In fact, Wang's removal was delayed by his own pursuit of legal remedies. 320 F.2d at 132-33. There is nothing in that case to suggest that the government would have been free to detain Wang after all his appeals were completed, and despite the availability of immediate removal, without probable cause.

Nor is any six-month license to detain necessary for prudential purposes. The district court expressed concern that recognizing Plaintiffs' claim would "flood the courts" and require courts to determine in every case "what is necessary to effectuate an alien's removal and whether the government's efforts to secure removal have been sufficient." SPA 45. This argument fails for three reasons. First, the court misunderstood Plaintiffs' claim. Plaintiffs do not allege a breach of a "duty of reasonable dispatch" (SPA 43), as the district court thought, but a deliberate, explicit, official policy to delay removal for non-immigration purposes. Accepting that allegation as true, as the Court must at this stage,

there is no need to make the determinations the district court described. And given the undisputed existence of Defendants' official policy to this end, the questions the district court feared are simply not presented here.

Second, that it might sometimes (although not here) be difficult to determine whether detention is being maintained for lawful immigration purposes cannot warrant giving immigration authorities a blank check to detain arbitrarily. Even lacking the official policy documented so thoroughly here by the OIG Report (JA 303-337), determining whether removal was deliberately delayed for improper purposes is the kind of factual inquiry that courts regularly pursue. As we show in Point I.B below, courts applying the Fourth Amendment routinely examine the purpose of searches and seizures where they are ostensibly conducted for administrative purposes, without probable cause.[5]

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[5] There is also precedent for this type of inquiry in cases holding that immigration detention cannot be used to avoid the requirements of the Speedy Trial Act and Rule 5(a) of the Federal Rules of Criminal Procedure. *United States v. Garcia-Martinez,* 254 F.3d 16, 20 (1st Cir. 2001); *United States v. Noel*, 231 F.3d 833 (11th Cir. 2000); *United States v. De La Pena-Juarez,* 214 F.3d 594 (5th Cir. (continued…)

Third, the court's concern is entirely speculative. Because immigration authorities in the ordinary course would have no incentive to delay removal, cases of continued detention with no obstacle to removal are likely to be exceedingly rare, and therefore will not flood the courts. While there have been hundreds of post-*Zadvydas* cases, counsel have located none in which a plaintiff complained that immigration authorities sought to defer removal in order to detain, as they did here. That stands to reason; every consideration of cost and efficiency will, in the ordinary course of immigration enforcement, push in the direction of carrying out removal as expeditiously as possible. And while improper delay might be alleged in a case where it had not occurred, the mere possibility of a mistaken claim cannot be invoked to reject every such claim out of hand.

Finally, if this Court adopts the presumption that detention is lawful for six months, here three Plaintiffs were

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2000); *United States v. Cepeda-Luna*, 989 F.2d 353, 357 (9th Cir. 1993).

detained longer than six months.[6] SPA 45. The district court dismissed their due process claims on the ground that their removal was "reasonably foreseeable" (*id.*)—a justification which we have shown *Zadvydas* does not allow for detainees who could be removed at any time.

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[6] For the above reasons, the *Zadvydas* presumption has no application here. However, if this Court does apply the *Zadvydas* six-month presumption to Plaintiffs' detention, Plaintiffs can rebut that presumption. Compare *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), where the Supreme Court created a 48-hour presumptively reasonable period during which an arrestee might be held in police custody prior to a probable cause determination. The Court explained, however, that the presumption could not function as an absolute bar to judicial review:

> This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. *Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake.*

500 U.S. at 56 (emphasis added). The Supreme Court analogized to *McLaughlin* in creating the *Zadvydas* presumption, and gave no indication that the two should operate differently. *Zadvydas*, 533 U.S. at 701 ("We have adopted similar presumptions in other contexts to guide lower court determinations.").

In sum, *Zadvydas* imposed a limitation on the immigration detention of indisputably dangerous non-citizens who are difficult to remove. To interpret this limitation as *allowing* the *indefinite* detention of any alien who faces no barriers to removal is to authorize arbitrary preventive detention, the very evil *Zadvydas* sought to prohibit.

2. The District Court Erred in Failing to Accept as True Plaintiffs' Allegations that They Were Detained for No Immigration Purpose, But for Criminal Investigation.

The district court rested its rejection of Plaintiffs' contention in part on its assertion that the government might have legitimate immigration purposes for delaying a removal that could otherwise be carried out immediately. The Court reasoned that Plaintiffs had ignored "legitimate foreign policy considerations and significant administrative burdens involved in enforcing immigration law in general, and specifically, those concerns immediately following a terrorist attack perpetrated on the United States by non citizens." SPA 45.

This supposition has no place on a motion to dismiss. It fails to accept as true Plaintiffs' allegation that, pursuant to official

policy, they were detained not for any such immigration purposes, but in order to incarcerate them—without probable cause—so they could be investigated for possible criminal involvement in terrorism. JA 109-10 ¶¶ 65, 68, 112-13 ¶¶ 74-75. Plaintiffs have alleged that the government's official policy of "hold-until-cleared" had nothing to do with effectuating removal, but with the desire to *delay* removal in order to extend detention pending a criminal investigation. JA 92-93 ¶ 2.

If the district court had accepted Plaintiffs' allegations as true, as it was required to do under Rule 12(b)(6), the question presented would have been: did Defendants violate Plaintiffs' due process rights by detaining them for non-immigration purposes, in order to investigate them for criminal offenses when they lacked any probable cause to believe that they had committed any criminal offenses? Because it failed to accept Plaintiffs' allegations as true, the district court never answered that question.

3. In Any Event, the Detention Statute Did Not Authorize the Detention of Plaintiffs Turkmen and Ebrahim Beyond the 90-Day Removal Period.

Finally, the district court was wrong to assume the immigration detention statute provided statutory authorization to detain all Plaintiffs beyond the 90-day removal period. *See* SPA 43, *citing* 8 U.S.C. § 1231 (a)(6). With exceptions not applicable here, the Immigration and Naturalization Act authorizes detention beyond the statutory 90-day removal period for specified categories of non-citizens, including inadmissible aliens, criminal aliens, aliens who have violated their nonimmigrant status conditions, aliens removable for certain national security reasons, and aliens "determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. § 1231(a)(6); *see Zadvydas,* 533 U.S. at 688-89.

As explained above, no Plaintiff's detention was authorized by statute, because none was undertaken for the purpose of removal. Plaintiffs Turkmen and Ebrahim, however, do not fit into any of the §1231(a)(6) categories, and thus their detention past 90 days was not even arguably authorized by the

immigration law. They were removed under 8 U.S.C. § 1227(a)(1)(B), which is not one of the sections specified in § 1231(a)(6), and there is nothing in the record to suggest that they were subject to detention on any of the grounds set out in that section—the detention statute on which *Zadvydas* rests.[7]

B. Plaintiffs' Detention Violated Their Right to Freedom From Unreasonable Seizure.

Plaintiffs' prolonged detention also violated their rights under the Fourth Amendment. Plaintiffs allege that their detention for up to eight months was for the sole purpose of facilitating an FBI investigation into their potential connection to criminal acts. JA 112-13 ¶¶ 74-75. The district court dismissed Plaintiffs' Fourth Amendment claim on its view that the post-removal detention statute authorized Plaintiffs' detention, and that the government's purpose in detaining Plaintiffs was irrelevant. SPA 47. This was a two-fold error. We have already shown, in Point A above, that the

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[7] Although these details are not included in the Third Amended Complaint, Plaintiffs allege that their detention was not authorized by statute. JA 109-10 ¶ 67. On a motion to dismiss, they are entitled to "all reasonable inferences from the facts alleged." *McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004).

immigration statute under which Defendants purported to act did not authorize Plaintiffs' detention. But even if it did, Defendants' non-immigration purpose invalidated that detention under clearly established Fourth Amendment jurisprudence.

The Fourth Amendment applies to all seizures of the person. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). Any individual arrested on suspicion of criminal activity, but without a warrant, must receive a prompt judicial determination of probable cause of criminal activity prior to extended pretrial detention. *Gerstein v. Pugh*, 420 U.S. 103 (1975). This requirement balances the state's "strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity" against recognition that "prolonged detention based on incorrect or unfounded suspicion may unjustly imperil a suspect's job, interrupt his source of income, and impair his family relationships." *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (internal quotation marks and citation omitted).

Under the hold-until-cleared policy, Plaintiffs' detention was not imposed for the legitimate immigration purpose of removal,

but was instead carried out for the purpose of criminal investigation. JA 92-93 ¶ 2. Yet, contrary to the rules that govern criminal detention, Plaintiffs did not receive a judicial determination of probable cause of criminal activity. JA 94 ¶ 4. Without a probable cause finding, the purpose, scope, and duration of Plaintiffs' detention render it unlawful under clearly established Fourth Amendment precedent.

1. The Fourth Amendment Prohibits Administrative Detention for Criminal Investigation.

The Fourth Amendment allows for search or seizure absent probable cause of criminal activity in several administrative contexts—for example, administrative inspections of automobile junkyards, *New York v. Burger*, 482 U.S. 691 (1987), and temporary seizures of motorists at permanent border patrol checkpoints, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), and drunk-driving checkpoints, *Michigan v. Sitz*, 496 U.S. 444 (1990). A similar administrative exception allows for immigration detention without probable cause of criminal activity "as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens." *Wong Wing v. United States*, 163 U.S. 228, 235

(1896). However, these exceptions to the warrant and probable cause requirement are predicated on the administrative purpose of the government action. *City of Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000). It is clearly established that administrative seizures or searches cannot be undertaken for the purpose of criminal investigation. *Id.* (seizure); *Michigan v. Clifford*, 464 U.S. 287, 294 (1984) (search); *see also Ferguson v. City of Charleston*, 532 U.S. 67, 81-82 (2001).

Here, Plaintiffs have alleged that Defendants' sole purpose from the outset was criminal investigation. JA 112-13 ¶¶ 74-75. Once Plaintiffs could have been removed, there was no *conceivable* immigration purpose for their detentions. JA 109-10 ¶ 67. Accordingly, the administrative exception is inapplicable, and absent probable cause and a prompt judicial hearing, Plaintiffs' detentions violated the Fourth Amendment.

An immigration detention, like any other administrative seizure, may not be misused for the purpose of conducting a criminal investigation. *See Abel v. United States* 362 U.S. 217 (1960). In *Abel,* the plaintiff claimed that his immigration arrest was a "pretense and sham" undertaken only to permit the

government to place him in custody and search his belongings for evidence of espionage. *Id.* at 225-26. The Court upheld the search based on the lower court's factual finding that Abel's arrest was not directed or supervised by the FBI, and that immigration officials acted in good faith and treated Abel no differently than any other deportable non-citizen. *Id.* at 226-28.

While rejecting Abel's challenge, the Court said:

> For a contrast to the proper cooperation between two branches of a single Department of Justice as revealed in this case, see the story told in Colyer v. Skeffington, D.C., 265 F. 17 [D. Mass. 1920]. That case sets forth in detail the improper use of immigration authorities by the Bureau of Investigation of the Department of Justice when the immigration service was a branch of the Department of Labor and was acting not within its lawful authority but as the cat's paw of another, unrelated branch of the Government.

Id. at 229-230.

Colyer arose out of the infamous Palmer Raids, named for then-Attorney General A. Mitchell Palmer, in which hundreds of non-citizens suspected of membership in the Communist Party were seized, under the supervision of the Bureau of Investigation, on the pretext of immigration charges. *Abel*, 362 U.S. at 229-30;

Colyer, 265 F. at 31-37. Following extensive hearings before the district court on applications for habeas corpus, almost all of the deportation proceedings were "found to be vitiated by lack of due process of law," and those arrested were "therefore entitled to be released from the respondent's custody." 265 F. at 79. The Ashcroft raids were no different. [8]

In distinguishing *Abel* from *Colyer,* the Court took care to "emphasize again that our view of the matter would be totally different had the evidence established . . . that the administrative warrant was here employed as an instrument of criminal law enforcement to circumvent the latter's legal restrictions, rather than as a bona fide preliminary step in a deportation proceeding." *Abel*, 362 U.S. at 229-30. The test to distinguish the two "is whether the

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[8] The factual similarities between the Palmer Raids and the Ashcroft raids are noteworthy. Between 800 to 1200 men were rounded up in the Palmer raids, and subjected to a communications blackout ordered by the Department of Justice. *Colyer*, 265 F. at 37. Many of the non-citizens were transported in hand-cuffs, and chained together "to make it appear that there was great and imminent public danger," though most were in fact "quiet and harmless working people." *Id.* at 44. Denied access to counsel, they received delayed notice of the reason for their arrest. *Id.* at 46. Ultimately, most were found innocent of all charges. *Id.* at 48-49.

decision to proceed administratively toward deportation was influenced by, and was carried out for, a purpose of amassing evidence in the prosecution for crime." *Id.*

Following this clear precedent, the INS General Counsel's Office completed a legal opinion in January of 2002, in the middle of Plaintiffs' detention, laying out concerns regarding its detention authority. JA 367. The INS written opinion concluded that

> case law provides that detention must be related to removal and cannot be solely for the purpose of pursuing criminal prosecution. While there is no bar to the government's continuing a criminal investigation during the removal period for possible persecution of the alien, the INS must also be proceeding with reasonable dispatch to arrange for removal and the investigation for criminal prosecution cannot be the primary or exclusive purpose of detention.

Id. at 367.

The district court ignored the clear precedent set by *Abel*, *Edmond*, and other administrative search and seizure cases and recognized by INS General Counsel. It reasoned that *Whren v. United States*, 517 U.S. 806 (1996), precludes consideration of the motive or purpose behind Defendants' actions. SPA 46-47. But *Whren* carefully distinguished between searches based on probable

cause of criminal activity, as to which motive is irrelevant, and administrative searches and seizures without probable cause, where motive may be determinative. *Whren*, 517 U.S. at 811-12.

In *Whren,* the plaintiff claimed that his traffic stop, ostensibly triggered by a traffic violation, was actually motivated by a search for drugs. *Id.* at 809. The Court held that probable cause to suspect criminal activity makes a seizure objectively reasonable regardless of the officers' subjective motivations (517 U.S. at 814); but it explicitly distinguished and reaffirmed the decisive importance of purpose when administrative action is taken *without* probable cause. *Id.* at 811-12 (citing *Florida v. Wells*, 495 U.S. 1, 4 (1990); *Colorado v. Bertine*, 479 U.S. 367, 372 (1987); *New York v. Burger*, 482 U.S. 691, 716-17, n. 27 (1987).)

As the *Whren* Court explained, purpose is critical for regulatory searches or seizures because "the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes." *Whren*, 517 U.S. at 811-12. Motive, which "play[s] no role in ordinary, probable-cause Fourth Amendment analysis . . .

may be relevant to the validity of Fourth Amendment intrusions" undertaken pursuant to a regulatory scheme without probable cause of criminal activity. *Edmond*, 531 U.S. at 45-46; *Anobile v. Pelligrino*, 303 F.3d 107, 122 (2d Cir. 2002).

Thus, an administrative search or seizure without probable cause that would be valid if undertaken for a regulatory purpose violates the Fourth Amendment if used as a pretext to seek evidence of criminal activity. *Edmond,* 531 U.S. at 48 (roadside checkpoint created to detect narcotics violated the Fourth Amendment as its purpose was "ultimately indistinguishable from the general interest in crime control"); *Clifford*, 464 U.S. at 292 (constitutionality of post-fire inspection depends on whether the search is undertaken to uncover the cause of a fire or to gather evidence of criminal activity); *Michigan v. Tyler*, 436 U.S. 499, 508 (1978) ("[I]f the authorities are seeking evidence to be used in a criminal prosecution, the usual standard of probable cause will apply.").

If it were otherwise, the regulatory law would provide an ignoble shortcut to detain and investigate individuals for criminal purposes without the constitutional protections otherwise afforded

criminal suspects, in complete disregard of the Supreme Court's direction to "prevent violations of the Constitution by circuitous and indirect methods." *Byars v. United States,* 273 U.S. 28, 32 (1927). The Court warned decades ago:

> The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right.

Id at 33-34. The Court echoed this imperative several decades later, holding in *Abel* that "[t]he deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts" because "the preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution . . . ." 362 U.S. at 226.

Thus the district court erred in refusing to consider Plaintiffs' allegations that they were detained not for any legitimate immigration purpose, but to incapacitate them for a criminal

investigation. *See Edmond*, 531 U.S. at 46-47 ("While we recognize the challenges inherent in a purpose inquiry, courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful.").

Plaintiffs do not dispute that when a foreign national is detained for legitimate immigration purposes, the government may also seek to investigate him for possible criminal violations. But here, the hold-until-cleared policy was expressly designed to misuse the expedient of immigration detention as a shortcut around Fourth Amendment protections.

Plaintiffs allege they were detained for the *sole* purpose of criminal investigation, and that the conditions and duration of their detention were improperly dictated by the DOJ and the FBI as part of a criminal investigation. JA 109-10 ¶¶ 65, 67-68; 112-13 ¶¶ 74-75; 114 ¶ 76(e) (citing Defendant Ashcroft as announcing, "Let the terrorists among us be warned. If you overstay your visa even by one day, we will arrest you.").

They also allege that they were detained under DOJ and FBI direction without any chance for removal, until they were

cleared by the FBI of any connection to terrorism. JA 104 ¶ 54, 110 ¶ 68, 115 ¶¶ 79-80. The hold-until-cleared policy blocked their deportation for months after they were ordered to leave the country by the INS, even though there were *no* barriers to their prompt removal. JA 109-10 ¶ 67. The lack of any immigration purpose is further underscored by the INS' failure to perform the 90 day custody reviews required by its own regulations to maintain custody of Plaintiffs. JA 117-18 ¶ 84; *see also* Point I.D below.

The scope and nature of that detention, subject to FBI control, demonstrates that its purpose was criminal investigation from the outset. Plaintiffs were selected by the FBI (JA 115-17 ¶¶ 80, 83) for treatment which included confinement in the ADMAX SHU without procedural protections, sleep-deprivation, repeated interrogation, constant surveillance, a blackout on *all* access to the outside world, and audio-recording of attorney client communications—unprecedented for civil immigration detainees. JA 115-17 ¶¶ 80-83; 119-23 ¶¶ 87-93. Under these circumstances, to insist that they "were detained by the INS for the purpose of conducting removal proceedings would be to join in a charade that has been perpetrated." *United States v. Benatta*, No. 01-CR-247E, 2003 U.S.

Dist. LEXIS 16514, *29 (W.D.N.Y. Sept. 12, 2003) (finding that a 9/11 detainee at MDC was "primarily under the control and custody of the FBI . . . for purposes of investigating whether the defendant was involved in terrorist activity.").

Plaintiffs' detention for criminal investigation, extending well beyond the expiration of any conceivable immigration purpose, and without probable cause or a judicial hearing, violated their clearly established Fourth Amendment rights.

2. The Fourth Amendment Prohibits Regulatory Seizures That are Unnecessary or Unreasonable in the Context of the Administrative Scheme.

Even if the government's purpose were proper, Plaintiffs' detentions were unreasonable in scope and duration. Administrative searches or seizures may be lawfully conducted without a warrant or probable cause, but they are not excused from the "reasonableness" requirement of the Fourth Amendment. *New York v. Burger*, 482 U.S. 691, 702 (1987). The lower court erred in relying solely on its conclusion that "plaintiffs' entire detention was authorized by the post-removal period detention statute" (SPA 47), while failing to consider the constitutionality of that detention. "[N]o act of Congress can authorize a violation of the Constitution."

Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973) (INA provision allowing for warrantless search of automobiles within a reasonable distance of border violates the Fourth Amendment); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (INA provision allowing interrogation of any person believed to be an alien without a warrant or reasonable suspicion violates the Fourth Amendment).

While immigration enforcement may justify searches or seizures of non-citizens, "as with other categories of police action subject to Fourth Amendment constraints, the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Brignoni-Ponce*, 422 U.S. at 878.

Moreover, in an unwarranted search or seizure, the scope of the Fourth Amendment intrusion must be "no broader than necessary to achieve its end." *Clifford*, 464 U.S. at 294-95; *see also, Florida v. Wells*, 495 U.S. 1, 4 (1990) (inventory searches must include standardized criteria or other limits on police discretion to prevent their misuse as a ruse for "general rummaging"); *Burger*, 482 U.S. at 711 (scope of regulatory search must be limited, to place appropriate restraint on discretion of inspecting officers). For

example, this Court held in *Anobile v. Pelligrino*, 303 F.3d 107, 120 (2d Cir. 2000), that because the warrantless search of dormitories at Yonkers Raceway was not necessary to further the substantial governmental interest in the integrity of harness racing, it violated the Fourth Amendment. *Id.* at 120.

As we showed in Point I.A.1 above, the government's interest in detention under 8 U.S.C. § 1231 is limited to ensuring the appearance of foreign nationals at the moment of removal, and preventing danger to the community in the interim. *Zadvydas*, 533 U.S. at 690. Plaintiffs' continued detention under the hold-until-cleared policy was manifestly not "necessary to further the regulatory scheme," *Burger*, 482 U.S. at 702 (internal citation omitted), because they were not held to secure their removal, but long after they could have been removed, for the purpose of a criminal investigation into whether they had ties to terrorism. JA 109-10 ¶¶ 65, 68, 112-113 ¶¶ 74-75. Once Plaintiffs' seizure was no longer tied to effectuating their removal, it exceeded the proper scope of an administrative detention. *Anobile*, 303 F.3d at 120. Moreover, Defendants ignored the procedural protections built in to the immigration regulations, which might otherwise have served to

limit the scope of the detention in accordance with Fourth Amendment guidelines. JA 114-115 ¶ 78; *see also* Point I.D, below.

3. Plaintiffs' Detention, Separate From Their Arrest, Implicated the Fourth Amendment.

Finally, the district court expressed reservations as to whether the Fourth Amendment applies to Plaintiffs' post-arrest detention. SPA 46. Contrary to the district court's analysis, there is clear precedent in this Circuit for the applicability of the Fourth Amendment to post-arrest seizures. In *Lauro v. Charles*, 219 F.3d 202, 212 (2d Cir. 2000), this Court held that the Fourth Amendment shields a lawfully arrested individual from "police conduct that unreasonably aggravates the intrusion on privacy properly occasioned by the initial seizure"—in that case, a post arrest "perp walk" conducted without legitimate penological purpose. It held that, regardless of whether the seizure at issue is considered "(1) a separate seizure that occurred when Lauro was forcibly removed from the station and brought back in, or (2) a continuation and aggravation of the seizure that occurred when he was arrested . . . the Fourth Amendment requires that it have been reasonable." *Id.*; *see also Adams v. United States*, 399 F.2d 574, 577 (D.C. Cir. 1968)

("To continue [the defendants'] custody without presentment for the purpose of trying to connect them to other crimes is to hold in custody for investigation only, and that is illegal; its operative effect is essentially the same as a new arrest and, if not supported by probable cause, it is an illegal detention.").

The propriety of the Government's "first intrusion" on Plaintiffs' liberty, in arresting them for violations of the immigration law, did not "automatically sanction a second" by holding them to investigate possible terrorist connections. *United States v. Birrell,* 470 F.2d 113, 117 (2d Cir. 1972). That second intrusion, Plaintiffs' detention, was primarily motivated by criminal investigative needs, and was unreasonable within the regulatory scheme. For these reasons this Court should reverse the district court, and reinstate Count One of the Third Amended Complaint.

C. Singling Plaintiffs Out for Prolonged Detention Based Upon their Race, Religion, and Ethnicity Violated their Right to Equal Protection of the Law.

Even if the hold-until-cleared policy was lawful in itself, Defendants' selective application of the policy to Plaintiffs because of their race, religion, and ethnic or national origin violated Plaintiffs' right to equal protection of the law. JA 183 ¶ 309. Plaintiffs

allege that they were held pending affirmative FBI clearance because Defendants identified them as "Arab or Muslim men of Middle Eastern or South Asian origin." JA 112 ¶ 74(a).[9] Defendants thus deprived Plaintiffs of "equal justice under law," to which they, like citizens, were entitled "by the Fifth Amendment's guarantee of due process." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976) (addressing claims of resident aliens); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 368-69 (1886) (applying the Equal Protection Clause of the Fourteenth Amendment to non-citizens).

Detention because of race, religion, or ethnicity is a classic equal protection violation, unless it is excused by some "overriding national interest." *Mow Sun Wong*, 426 U.S. at 100. In particular, racial and ethnic classifications are subject to "the strictest judicial scrutiny." *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 224 (1995). Religious classifications must likewise pass "strict scrutiny." *United States v. Brown,* 352 F.3d 654, 668-69 (2d

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[9] The OIG Report shows the role of religion and ethnicity in tips leading to the arrests of non-citizens such as Plaintiffs. JA 282-83. Such private biases violate equal protection when the government acts on them. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Cir. 2003). Under *Hernandez v. Texas*, 347 U.S. 475, 479 (1954), a racial class for equal protection purposes can be shown by demonstrating that "the attitude of the community" treats it as a class (there, persons of Mexican descent). Similarly, *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987), proscribed discrimination against "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics" permitting a claim under 42 U.S.C. § 1981 "[i]f respondent . . . can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab . . . ."[10]

Strict scrutiny prohibits use of a suspect factor unless it is both "necessary to further a compelling government interest," and

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[10] Plaintiffs allege discrimination based on race, religion, and/or ethnic or national origin (JA 183 ¶ 309), claiming that they were singled out because they are Muslim and Arab men of Middle Eastern and South Asian descent (JA 113 ¶ 76). This was their "identifiable class," recognized by "the attitude of the community." Thus Plaintiffs do not allege a separate equal protection claim based on national origin alone, but rather that national origin—which serves as a proxy for race, religion and ethnicity—was used in combination with these other factors to identify the subjects of the hold-until-cleared policy.

"narrow[ly] tailor[ed]" to that end. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

No such scrutiny was applied here. This was clear error; and on these pleadings, Defendants cannot satisfy strict scrutiny.

1. The Government's Authority Over Immigration Is Not Authority for the Discrimination Alleged Here.

The district court avoided strict scrutiny of Defendants' actions on the theory that discrimination against non-citizens is justified by the government's "broad power over naturalization and immigration," set forth in *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976), *Fiallo v. Bell*, 430 U.S. 787 (1977), *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), and *Reno v. American-Arab Anti-Discrimination Committee* (*"AADC"*), 525 U.S. 471 (1999). SPA 47-48. None of these cases considered discrimination based on race, ethnicity, or religion, and none support the district court. At most, they indicate that, as a matter of immigration policy, the government can sometimes treat non-citizens differently than citizens, and non-citizens from one country differently than those from another. But these are not issues in this action.

The plaintiffs in *Fiallo* claimed a right to admission to the United States, those in *AADC* and *Harisiades* claimed a right not to be deported, and those in *Mathews* sought Medicare benefits. Here, Plaintiffs seek no immigration benefit; they claim no right to be in the United States and, *a fortiori*, no right to benefits through being in the United States. Indeed, because Plaintiffs allege that their removal was delayed for reasons unrelated to immigration enforcement—an allegation that must be accepted as true on this motion to dismiss—the government's "power over naturalization and immigration" is entirely beside the point.

The district court relied most heavily on *AADC*, a challenge to deportation. The district court thought Plaintiffs' equal protection claim "closely akin to a selective enforcement claim," and interpreted *AADC* to show that such a claim "in the immigration context, is generally not cognizable." SPA 47. This is true in a sense; but the sense in which it is true has nothing to do with this case. The holding in *AADC* is carefully limited to the declaration that "[a]s a general matter . . . an alien unlawfully in this country has no constitutional right to assert selective enforcement *as a defense against his deportation*." 525 U.S. at 488 (emphasis added).

Plaintiffs' assertion is entirely different, and the Supreme Court's explanation of its holding in *AADC* underlines the difference between that case and this:

> "[T]he decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake."

525 U.S. at 489-490, *quoting Wayte v. United States*, 470 U.S. 598, 607 (1985). In contrast, here Plaintiffs ask the courts to determine whether there was ground to detain them for investigation—a routine matter for judicial analysis and supervision.

Moreover, in *AADC* the Supreme Court was concerned that allowing a selective prosecution defense to deportation would "permit and prolong a continuing violation of United States law," and that "[p]ostponing justifiable deportation . . . is often the principal object of resistance to a deportation proceeding," 525 U.S. at 490; but here, Plaintiffs make exactly the opposite claim: that they should have been released and deported promptly.

None of the cases relied on by the district court permits discriminating among non-citizens—any more than among citizens—based on their race, ethnicity, or religion, or suggests that the reasons for detention are beyond judicial scrutiny, or that foreign policy can justify jailing certain racial, ethnic, or religious groups. This case falls entirely outside what the district court, quoting *Harisiades*, called "policy towards aliens" that is "largely immune from judicial inquiry or interference." SPA 48; 342 U.S. at 588-89. There is no such immunity for detention for criminal investigation. The district court's comment about the need to avoid "judicial intrusion into an area in which courts have little experience and less expertise" (SPA 48) mistakes the issues raised by Plaintiffs' Complaint.

2. The Discrimination Alleged Cannot Survive Strict Scrutiny.

Failing to apply strict scrutiny, the district court ignored Defendants' use of race and ethnicity, and limited its discussion of discrimination based on religion to the proposition that it was not "irrational or outrageous" for the government to single out "aliens who shared characteristics with the hijackers, such as violating

their visas and national origin and/or religion." SPA 48. This was the wrong standard, and its use was error. Relying on religion—as well as race and ethnicity—with no actual indication of any link between Plaintiffs and any terrorists, is not a "necessary" or "narrowly tailored" means to the end of finding terrorists, or indeed, even a rational one. If these broad characteristics are a sufficient basis to hold foreign nationals in a maximum security prison awaiting "clearance," then tens of thousands of people can be similarly swept up. And if religion and national origin (which in this case could be a proxy for race) are admissible criteria for detention, then even U.S. citizens may be vulnerable.

3. Even If Congress Could Authorize the Discrimination Alleged Here, Defendants Could Not.

This Court has held that the Attorney General's discretion to grant or deny parole to unadmitted aliens "may not be exercised to discriminate invidiously against a particular race or group . . . ." *Bertrand v. Sava*, 684 F.2d 204, 212 (2d Cir. 1982). It distinguished between the broad latitude allowed Congress in setting immigration policies, and the much narrower authority of immigration officials in executing such policies:

> [T]he constitutional authority of the political branches of the federal government to adopt immigration policies based on criteria that are not acceptable elsewhere in our public life would not permit an immigration official, in the absence of such policies, to "apply neutral regulations to discriminate on [the basis of race and national origin]."

Id. at 212 n.12 (quoting the court below; brackets in the original).

These strictures apply to the secretly adopted discriminatory practices challenged here, which not only were unsupported by any statute, but—as we have shown at I.A above— were contrary to statute.

D. Defendants Violated Plaintiffs' Clearly Established Right to Procedural Due Process.

In failing to give Plaintiffs any notice of the reasons for their prolonged detention after their immigration proceedings ended—much less a fair opportunity to contest that detention—Defendants violated Plaintiffs' right to procedural due process. The district court rejected Plaintiffs' procedural due process claim on the authority of *Wang v. Ashcroft*, 320 F.3d 130, 145-46 (2d. Cir. 2003). SPA 46. But Wang's claim was "one of substantive, rather than procedural, due process." 320 F.3d at 145. Plaintiffs' *procedural* due process claim is based on Defendants' failure to

provide them the individualized hearings required for detention beyond the removal period.

Recognizing that administrative custody reviews are required by 8 C.F.R. § 241.4 (2007), the district court thought that Plaintiffs had failed to claim they did not receive custody reviews. SPA 46, n.37. This was error; denial of reviews is alleged at JA 117-18 ¶ 84 and JA 373.

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas*, 533 US. at 690. Procedural due process requires, at a minimum, that the government provide notice and a hearing when it infringes a protected liberty interest. *Fuentes v. Shevin*, 407 U.S. 67, 80, (1972). "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Reno v. Flores*, 507 U.S. 292, 306 (1993).

But the usual device used for due process, the post-order custody review, was denied to Plaintiffs. Post-order custody reviews are required for detainees held in immigration detention for more than 90 days after the issuance of a final order of removal. 8 C.F.R.

§ 241.4(k)(1)(i) (2007). The custody reviews require notice of the review proceedings, the right to assistance from an attorney or personal representative, and the opportunity to submit information in support of release. § 241.4(h)(1). Specific criteria determine whether release or continued detention is appropriate. § 241.4(e)-(f). The detainee is notified in writing of the outcome of the review. § 241.4(h)(4).

Procedural due process allegations of unlawful detention are evaluated under the test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004). The *Mathews* test balances:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

Under this test, Plaintiffs were entitled to some amount of process, whether the post-order custody reviews or a separate

hearing. First, Plaintiffs' private interest is their liberty. Plaintiffs were all held beyond the removal period, some for more than 100 days beyond the removal period.[11] "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana,* 504 U.S. 71, 80 (1992).

Second, the failure to provide a hearing carries an enormous risk of erroneous deprivation of liberty—the very risk the regulations are designed to address. Without the mandated post-order custody reviews, or hearings of any kind, Plaintiffs were left to languish in detention for months without an opportunity to gain their freedom.

Third, Defendants can hardly claim that providing Plaintiffs with the hearings required by their own regulations would

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[11] Plaintiffs were held the following number of days beyond the 90-day removal period: Baloch 115 days (JA 158 ¶ 208, 160 ¶ 213); Ebrahim 107 days (JA 151 ¶ 188, 156 ¶ 199); Hany Ibrahim 99 days (JA 151 ¶ 188, 156 ¶ 199); Saffi 57 days (JA 144 ¶ 160, 145 ¶ 166); Ashraf Ibrahim 51 days (JA 170 ¶¶ 248-49); Turkmen 51 days (JA 173 ¶ 264, 176 ¶ 272); Sachdeva 16 days (JA 178 ¶ 280, 180 ¶ 284).

constitute a significant "fiscal or administrative burden," much less one that would justify dispensing with process altogether.

Given this clear balance, it is unsurprising that courts have repeatedly found procedural due process violations for failure to follow the specific procedures of the post-order custody reviews. *Cholak v. United States*, 98-265 Section N, 1998 U.S. Dist. LEXIS 7424 at *32-*38 (E.D. La. May 15, 1998) (procedural due process violation where INS fails to consider all factors in post-order custody review); *Alafyouny v. Chertoff*, 3:06-CV-2004-M, 2006 U.S. Dist. LEXIS 40854 at *68-*70 (N.D. Tex. May 19, 2006) (failure to follow procedures under 8 C.F.R. § 241.4 is a procedural due process violation); *Chi Thon Ngo v. INS*, 192 F.3d 390, 398 (3d Cir. 1999) (post-order custody review consisting of "rubber-stamp denials" is not due process). Accord, *Hall v. INS*, 253 F. Supp. 2d 244, 250-57 (D.R.I. 2003) (due process violation where detainee not provided individualized hearing on risk of flight or danger to community).

Moreover, Plaintiffs' Fifth Amendment right to post-order custody reviews was clearly established at the time of their detention. *Zadydas v. Davis*, 533 U.S. 678, 692 (2001) (noting that

8 C.F.R. § 241.4 "implicat[es] . . . fundamental rights"); *id.* at 724 (Kennedy, J., dissenting) ("removable aliens held pending deportation have a due process liberty right to have the INS conduct the review procedures in place . . . . Were the INS, in an arbitrary or categorical manner, to deny an alien access to the administrative processes in place to review continued detention, habeas jurisdiction would lie to redress the due process violation caused by the denial of the mandated procedures under 8 CFR § 241.4.").

II. Defendants' Hold-Until-Cleared Policy Was Tortious Under New York Law and the Federal Tort Claims Act.

Plaintiffs also challenge their detention under the Federal Tort Claims Act ("FTCA"). The district court dismissed Plaintiffs' claim for false imprisonment (claim 24), holding that neither Plaintiffs' confinement for criminal investigation nor their detention for months after FBI clearance was tortious. SPA 57-58. This was error.

The FTCA "renders the United States liable for tort claims 'in the same manner and to the same extent as a private individual under like circumstances.'" *Sosa v. Alvarez-Machain*, 542 U.S. 692, 751 (2004) (quoting 28 U.S.C. § 2674). Plaintiffs' detention for

criminal investigation was not authorized by the INA for the reasons already stated under Point I.A above, and even if it was, the negligent continuation of their detention after the investigation, as well as the conditions of their confinement, rendered that detention non-privileged and tortious under both federal and New York law. Accordingly, claim 24 should be reinstated.

A. Plaintiffs' Detention for Criminal Investigation Without Probable Cause Was False Imprisonment.

The United States has expressly waived its sovereign immunity "with regard to acts or omissions of investigative or law enforcement officers of the United States Government . . . [on] any claim arising . . . out of . . . false imprisonment." 28 U.S.C. § 2680(h). Pursuant to 28 U.S.C. § 1346(b), liability is to be determined "in accordance with the law of the place where the act or omission occurred."

Because Plaintiffs were wrongfully detained by federal agents in a federal detention center in New York, this Court must look to New York and federal law to determine whether the initial order of detention and the duration of that detention were legally privileged in evaluating Plaintiffs' false imprisonment claim. *See*

Caban v. United States, 728 F.2d 68, 72-73 (2d Cir. 1984) (in a false imprisonment action, the court should apply the law a state court would apply in the analogous tort action, including federal law in the case of an INS-ordered detention). A claim for false imprisonment is established under New York law where, as here, a plaintiff states that "(1) the defendant intended to confine him, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged." *Broughton v. State*, 373 N.Y.S 2d 87, 93 (N.Y. 1975) (citation omitted).

Below, the district court dismissed Plaintiffs' false imprisonment claim without elaboration, finding that Plaintiffs' "detention was privileged under the post-removal-period detention statute, 8 U.S.C. § 1231(a)(6)." SPA 57. The court erroneously found that the duration of Plaintiffs' confinement was reasonable under the circumstances, and failed adequately to evaluate whether the unconstitutional conditions of Plaintiffs' confinement made the detention unreasonable. *See Parvi v. City of Kingston*, 394 N.Y.S.2d 161, 164 (N.Y. 1977) (for detention to be lawful it must be "reasonable under the circumstances and in time and *manner*")

(emphasis added); *see also Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (government officials may lawfully confine a pretrial detainee so long as conditions of confinement do not "amount to punishment of the detainee").

The district court erred. In *People v. Milaski*, 476 N.Y.S.2d 104 (N.Y. 1984), the New York Court of Appeals recognized that even if detention is initially proper, it must cease once the inquiry justifying the initial detention has been exhausted. 476 N.Y.S.2d at 108-9. Accordingly, in *Caban*, this Court affirmed a district court's dismissal of a false imprisonment claim only after the district court expressly found both that the initial detention was privileged *and* that the six-day duration of the plaintiff's detention "was not unreasonable." *Caban*, 728 F.2d at 75; *see also Rhoden v. United States*, 55 F.3d 428, 432 (9th Cir. 1995) (false imprisonment claim brought by lawful permanent resident detained by the INS for six-days remanded to district court for evaluation of "[w]hether the length of [plaintiff's] detention was reasonable and therefore legally privileged").

For the reasons stated above under Point I.A, the excessive duration of Plaintiffs' detention, "months longer than

necessary to secure their removal from the United States," without either a probable cause hearing or "any legitimate immigration law purpose," JA 180-81 ¶¶ 289, 294, violated Plaintiffs' constitutional rights and consequently was neither legally privileged nor reasonable. *See Zadvydas*, 533 U.S. at 699. The duration of Plaintiffs' detention, moreover, cannot be considered separately from the unconstitutional conditions of Plaintiffs' confinement, the nature of which rendered the extended period of Plaintiffs' detention all the more unreasonable. *See Gittens v. New York*, 504 N.Y.S.2d 969 (Ct. Cl. 1986) (finding that plaintiff stated a claim for wrongful excessive confinement under New York law, a "species of false imprisonment," where "the inmate remained in keeplock for nine days beyond the last day of the penalty imposed, with no reason being given other than for 'investigation'").

The fact that "the BOP officials who detained the plaintiffs were acting pursuant to facially valid INS commitment papers" (SPA 57) does not alter this analysis. The United States is the defendant in this action, and under 28 U.S.C. § 2680(h) it is responsible for the torts of *all* its investigative and law enforcement

officers; it cannot be a defense that one federal employee rather than another was at fault for Plaintiffs' false imprisonment.

The sentence the district court cited (SPA 57) from *Murray v. Goord,* 769 N.Y.S.2d 165, 167 (N.Y. 2003) ("prison officials are *conclusively bound* by the contents of commitment papers accompanying a prisoner") is likewise inapposite since *Murray* did not involve a pre-trial detainee or a claim of false imprisonment, but Department of Correctional Services officials who disregarded the commitment order of a New York court sentencing the petitioner to 4½ to 9 years imprisonment. *Murray* recited only the familiar principle that correctional officers lack the authority under New York law to alter a court-ordered term of imprisonment. Here, by contrast, Plaintiffs are seeking relief under the Federal Tort Claims Act for tortious confinement ordered by a federal agency acting outside the scope of its statutory authority. Because it was the policies and conduct of the United States and its agents that resulted in Plaintiffs' unlawful confinement, Plaintiffs' claim for false imprisonment should be reinstated.

B. The Government's Negligent Failure to Release Plaintiffs Immediately Upon Termination of Its Criminal Investigation Was False Imprisonment.

Even if detaining Plaintiffs while awaiting FBI clearance was not tortious in itself, it became tortious once the FBI cleared Plaintiffs and the United States, through negligence, continued to hold them. Under *Dawoud v. United States*, 92 Civ. 1370, 1993 U.S. Dist. LEXIS 2682 (S.D.N.Y. March 8, 1993), negligent delay in releasing an INS detainee once the justification for his detention ends is false imprisonment under New York law. Dawoud was an INS detainee held in New York pending the investigation of a fugitive warrant issued by Maryland. *Id.* at *1. The New York authorities ultimately determined that Dawoud was not the man named in the warrant and released him to INS custody. *Id.* at *2. Although he had been cleared of any wrongdoing, the INS continued to hold Dawoud for an additional 20 hours, allegedly without cause. *Id.* at *6-7. The government moved to dismiss Dawoud's false imprisonment action, claiming that his lawful initial detention made his continued detention privileged. *Id.* at *7. The Court disagreed, holding that the complaint was sufficient to survive a motion to dismiss because "Dawoud may be able to show that his detention,

after the dismissal of the fugitive case, was attributable to negligence and not otherwise privileged." *Id.* at *7-8.

As the court recognized in *Dawoud*, in New York law enforcement officers must release prisoners promptly when there is no longer justification for their continued detention; if they negligently fail to do so they are liable for false imprisonment. An initially valid detention thus loses its privileged status where the justification for detention ends. *See Dawoud*, 1993 U.S. Dist. LEXIS 2682 at *7-8; *see also Mazzariello v. Town of Cheektowaga*, 758 N.Y.S.2d 564, 564 (4th Dep't 2003) (declining to dismiss false imprisonment claim by plaintiff detained for possession of an unregistered firearm because defendants may have had duty to release plaintiff after presented with a permit for the gun); *Collom v. Vill. of Freeport*, 691 F. Supp. 637, 640 (E.D.N.Y. 1988) (even if initial detention was lawful, officers violated duty to immediately release plaintiff where "the authorities became aware of evidence exonerating the accused"); *cf. Boose v. City of Rochester*, 421 N.Y.S.2d 740, 748 (4th Dep't 1979) (probable cause to detain evaporates upon officer's "failure to make inquiry of plaintiff or

further inquiry about her when a reasonable man would have done so").

The Complaint sets out sufficient facts to find that the United States' continued detention of Plaintiffs following the FBI's completion of its investigation "was attributable to negligence and not otherwise privileged." *Dawoud*, 1993 U.S. Dist. LEXIS 2682 at *7-8. Even if Plaintiffs could be held while awaiting FBI clearance, that justification ended when Plaintiffs were cleared. Plaintiff Saffi was held for four months after FBI clearance, and Plaintiffs Ebrahim and H. Ibrahim for nearly six months. JA 145-46 ¶¶ 163, 166; 152 ¶ 190; 156 ¶ 199. The OIG Report details similar unexplained delays long after the completion of clearance investigations: three-and-a-half months in one case, (JA 328-30), two-and-a-half months in another, (JA 330), and three months "due to an administrative oversight" in another, (JA 330-31), illustrating the negligent fashion in which the investigations and ultimate release of the detainees was carried out (JA 328).

Any privilege the government may have had to detain Plaintiffs evaporated upon FBI clearance, and its negligent failure to release the Plaintiffs immediately was tortious. Claim 24 therefore

states a valid claim for relief under the FTCA and should be reinstated.

III. Defendants' Appeals Should Be Rejected.

In their appeals, Defendant-Appellants seek qualified immunity from claims 3, 5 (in part), 7, 8, 20, 21, 22 and 23; in addition, Defendants Ashcroft, Mueller, and Ziglar claim lack of personal jurisdiction.

The qualified immunity arguments fall into three categories. Defendants argue that claims 20, challenging placement in the ADMAX SHU, and 21-22, challenging the communications blackout, do not state violations of clearly established constitutional rights. They do not dispute that clearly established rights are implicated by claims 3 (punitive conditions of confinement), 5 (discrimination by race, religion, and ethnicity), 7 (interference with religion), 8 (confiscation of property) and 23 (punitive strip searches). Instead, Defendants say either that they were not personally involved in this conduct, or that even if their conduct was unlawful, it was objectively reasonable.

We address these points in sequence below. In Point IV we show that there is personal jurisdiction over Defendants

Ashcroft, Mueller, and Ziglar. In Point V we show that claims 20-22 allege violations of clearly established constitutional rights. In Point VI we show that Plaintiffs have alleged personal involvement, and in Point VII, that Hasty and Sherman's conduct was not objectively reasonable.

IV. Defendants Are Not Entitled to Dismissal for Lack of Personal Jurisdiction.

Defendants Ashcroft, Mueller, and Ziglar moved to dismiss this action in August, 2002, but they did not assert lack of personal jurisdiction until they served their revised motion in November, 2004. JA 23-24 (Docket 10), 36 (Docket 148). The defense was thus waived, and the district court ignored it. Even if it had not been waived, this Court has no jurisdiction over an interlocutory appeal on personal jurisdiction; and if it did, and if there were no waiver, the defense is still without merit.

A. Defendants Waived Any Objections to Personal Jurisdiction.

Federal Rules of Civil Procedure 12(g) and (h)(1) provide that if lack of personal jurisdiction is omitted from a motion to dismiss, it is waived. It is immaterial that Plaintiffs amended their Complaint since Defendants' first motion to dismiss. "[D]istrict

courts in this circuit have determined that the Rule 12 defenses of lack of personal jurisdiction, improper venue, insufficiency of process and insufficiency of service, if waived by defendant's failure to raise those objections in response to the original complaint, may not be resurrected merely because a plaintiff has amended the complaint." *Gilmore v. Shearson /Am. Express Inc.*, 811 F.2d 108, 112 (2d Cir. 1987). "[A]n amendment to the pleadings permits the responding pleader to assert only such of those defenses which may be presented in a motion under Rule 12 as were not available at the time of his response to the initial pleading." *Rowley v. McMillan*, 502 F.2d 1326, 1333 (4th Cir. 1974). *See also* 2 James Wm. Moore, Moore's Federal Practice (2004) § 12.21; Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure (3d ed. 2004) § 1388. Moreover, Defendants' delay in asserting this defense until after expiration of the statute of limitations should estop them from asserting it now, even if Rule 12 did not expressly preclude them. *See Santos v. State Farm Fire & Cas. Co.*, 902 F.2d 1092, 1095-96 (2d Cir. 1990).

B. This Court Lacks Jurisdiction Over Defendants' Objections to Personal Jurisdiction.

As Defendants acknowledge (Ashcroft Br. at 58), a district court's decision to exercise personal jurisdiction over a defendant is generally not subject to interlocutory appeal. *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 756 (2d Cir. 1998). Defendants rely on the principle, recognized in *Rein*, that a court of appeals may assert pendent jurisdiction over an issue if "it is inextricably intertwined with, or—what is essentially the same thing—its review is necessary to ensure meaningful review of," an issue over which it has jurisdiction. 162 F.3d at 758. *Rein* does not support Defendants. There, this Court held that a district court's decision on personal jurisdiction is not "inextricably inter-twined" with its decision on foreign sovereign immunity, although the two inquiries were related. *Id.* at 759 ("We can readily decide whether the district court had subject matter jurisdiction over Libya [despite its claims of foreign sovereign immunity] without at all considering whether it would violate due process to subject Libya to personal jurisdiction. Because review of the latter is not necessary for review of the former, we conclude that the issues of subject

matter jurisdiction and personal jurisdiction are not inextricably intertwined in this case.").

Here, Defendants rely on similarities between the issues of personal involvement and personal jurisdiction. But, while there may be some facts relevant to both issues, Defendants fail to show that the legal issues are the same, or that one could not be decided without the other. The court need not consider, for example, whether Defendants acted with the *purpose* of affecting individuals in New York—the jurisdictional issue—to hold that they were personally involved in constitutional violations that occurred in New York. *Hanil Bank v. PT. Bank Negara Indonesia, (Persero),* 148 F.3d 127, 130-32 (2d Cir. 1998), cited by Defendants, is not to the contrary. There, on interlocutory appeal of whether defendant's conduct fell within the "commercial activity exception" to foreign sovereign immunity, the court was willing to decide personal jurisdiction because the test for the "commercial activity exception" was identical to the "minimum contacts" test used for personal jurisdiction. As this Court later explained in *Rein*, "[I]n *Hanil Bank* the issues were more than inextricably intertwined: they were essentially identical." 162 F.3d at 761.

C. The Court Has Personal Jurisdiction Over Defendants.

If this Court reaches the merits of Defendants' personal jurisdiction objections, those arguments should be rejected. It does not help Defendants that they may have been in Washington, D.C. when they took the actions alleged in the Complaint. Under N.Y.C.P.L.R. § 302(a)(1), jurisdiction is proper where a non-domiciliary defendant purposefully directs activity toward the state of New York and the plaintiff's cause of action arises from that purposeful activity. Section 302(a)(1) is a "single act" statute: "proof of one transaction in New York is sufficient to invoke jurisdiction even though the defendant never enters New York, so long as the defendant's activities here were purposeful" and the cause of action arises out of the activity. *Kreutter v. McFadden Oil Corp.*, 527 N.Y.S.2d 195, 198-99 (N.Y. 1988). Further, at the pleading stage, plaintiff "need only make a prima facie showing of jurisdiction"; plaintiff's jurisdictional allegations will be construed "liberally" and uncontroverted factual allegations "take[n] as true." *Robinson v. Overseas Military Corp.*, 21 F.3d 502, 507 (2d Cir. 1994).

Green v. McCall, 710 F.2d 29, 33-34 (2d Cir. 1983), also does not help. *Green* depended on the "fiduciary shield doctrine," which was subsequently rejected by the New York Court of Appeals in *Kreutter*. Moreover, *Green* does not consider personal jurisdiction over an individual federal officer acting on behalf of the government, but the much narrower question, under N.Y.C.P.L.R. § 302(a)(2), of whether a federal official may be subject to personal jurisdiction "in his individual capacity based on an *agent's* tortious act within the state unless the *agent* was representing the defendant in his individual capacity." 710 F.2d at 33 (emphasis added). Plaintiffs here do not rely on agency, and *Green* has no application. *Grove Press, Inc. v. Angleton*, 649 F.2d 121 (2d Cir. 1981), is irrelevant for the same reason.

Plaintiffs have met the requirements of New York's long-arm statute by alleging in their Complaint that Defendants were personally involved in directing purposeful activities in this state which caused the violation of Plaintiffs' statutory and constitutional rights. Plaintiffs allege that Defendants Ashcroft, Mueller, and Ziglar designed the unlawful detention policies described in the Complaint. JA 91-95 ¶¶ 1-6, 8, 100-101 ¶¶ 23-25, 111 ¶ 72, 112-

14 ¶¶ 74-76, 114-18 ¶¶ 78-84. They also allege that Ashcroft was the "principal architect" of this detention and authorized, condoned and/or ratified the unreasonable and excessively harsh conditions under which Plaintiffs and other class members were detained. JA 100 ¶ 23. They allege that Defendants confined Plaintiffs pursuant to this program for no legitimate reason and because of discriminatory animus. JA 95-96 ¶ 8, 112-14 ¶¶ 74-76.

Unquestionably, Defendants knew and intended that their policies would be applied in New York to persons like Plaintiffs, giving rise to jurisdiction under N.Y.C.P.L.R. § 302(a)(1). *Bluestone Capital Partners, L.P., v. MGR Funds Ltd.*, No. 98 Civ. 3128, 1999 WL 322658, * 4 (S.D.N.Y. May 20, 1999); *see also Kreutter*, 527 N.Y.S.2d at 198; *Peekskill Cmty. Hosp. v. Graphic Media Inc.*, 604 N.Y.S.2d 120, 121 (2d Dept. 1993).[12]

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[12] At a minimum, Plaintiffs should be permitted discovery to establish Defendants' contacts with the forum state, separate and apart from the activities alleged in the complaint. *Newbro v. Freed*, 03 Civ. 10308, 2004 WL 691392, *3 (S.D.N.Y. March 31, 2004) (federal court may issue limited discovery if plaintiff has "established that his jurisdictional position is not frivolous").

V. Each of Plaintiffs' Claims States a Violation of Clearly Established Law.

Qualified immunity shields "government officials performing discretionary functions . . . 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." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Since *Harlow*, the Court has adopted a two step sequential analysis to determine whether an official is shielded from liability by qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). First, defendants must show that, after drawing all factual inferences in plaintiffs' favor, plaintiffs have not alleged facts which "show the officer's conduct violated a constitutional right." *Id.* If defendants cannot meet this burden, then they must show that the constitutional right was not "clearly established" at the time of the violation. *Id.*

This Court has a three-part approach to whether a constitutional right was "clearly established" at the time of the violation: "(1) whether the right in question was defined with reasonable specificity; (2) whether the decisional law of the

Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful." *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 129-30 (2d Cir. 2004) (internal quotation marks omitted).

A right may be established with sufficient specificity by a decision based on facts which are not "materially similar" to those at bar. *Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002). Thus, a constitutional right is clearly established if "its contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 739 (internal citation and quotation marks omitted).

In *Pena v. DePrisco*, 432 F.3d 98 (2d Cir. 2005), for example, this Court allowed qualified immunity to police officers who had failed to prevent a fellow officer's habitual drunk driving. This Court first affirmed the finding of the district court that the officers' failure to deter their fellow officer from driving while drunk amounted to tacit approval of that officer's conduct, in violation of the plaintiffs' right to substantive due process. In deciding, how-

ever, that the right had not been clearly established at the time of the alleged violation, the Court noted that precedent "did not address, let alone decide, whether repeated inaction on the part of government officials over a long period of time . . . might effectively constitute such an implicit 'prior assurance' that it rises to the level of an affirmative act." *Pena*, 432 F.3d at 115. The Court did not rely on drunken police cases, but instead on broader principles of government officials' duty to prevent harms.

Thus Plaintiffs here need not demonstrate that "the very action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 251 (2d Cir. 2001) ("absence of legal precedent addressing an identical factual scenario does not necessarily yield a conclusion that the law is not clearly established"). Nor need Plaintiffs identify legal precedent arising from "materially similar" facts to the case at bar. *Hope*, 536 U.S. at 739. Prior decisions may "clearly foreshadow" a ruling that the challenged conduct is unconstitutional, *African Trade & Info. Ctr., Inc. v. Abromaitis*, 294 F.3d 355, 362 (2d Cir. 2002), or a previously announced "general constitutional rule" may apply "with obvious

clarity to the specific conduct in question," *United States v. Lanier*, 520 U.S. 259, 271 (1997). Thus Plaintiffs need only show that prior decisions gave "fair warning" that official conduct depriving someone of that right would be unconstitutional. *Hope*, 536 U.S. at 740. Government officials may have such fair warning "even in novel factual circumstances." *Id.* at 741.

Defendants cannot obtain qualified immunity merely because no pre-9/11 case prohibited holding non-citizen terrorist suspects in an ADMAX SHU without procedural protections or denying them the ability to communicate with the outside world. Rather, the question presented is whether it was clearly established prior to September 11 that detainees have the right to access counsel when consistent with penological needs, and a protected liberty interest in freedom from prolonged detention in extraordinarily restrictive conditions without procedural protections. *See, e.g., Back*, 365 F.3d at 130 (denying defendants qualified immunity because it was "eminently clear by 2001, when the alleged discrimination took place, both that individuals have a constitutional right to be free from sex discrimination, and that adverse actions taken on the basis of gender stereotypes can constitute sex

discrimination" even though "there may not have been any precedents with precisely analogous facts prior the instant case"); *Greenwood v. New York, Office of Mental Health*, 163 F.3d 119, 123 (2d Cir. 1998) (reversing district court's decision on summary judgment which "relied heavily on the lack of any explicit holding in our district" that clinical privileges at a hospital were a property interest).

Framed at the proper level of generality, Defendants' arguments that some of the rights Plaintiffs assert were not clearly established mischaracterize the holdings of this Court as well as those of the Supreme Court. Although Defendants correctly observe that immunity questions should be resolved "at the earliest possible stage in litigation," Hasty Br. at 15; *see also* Ashcroft Br. at 22, resolution of immunity questions prior to discovery is not approp-riate where, as here, Plaintiffs have asserted violations of clearly established rights. *See Mitchell v. Forsyth*, 472 U.S. 511, 526, 528 (1985) (recognizing that a defendant "is entitled to dismissal before the commencement of discovery" only if a plaintiff's allegations do not "state a claim of violation of clearly established law").

Defendants Ashcroft and Muller suggest, without authority, that "high ranking officials" have special protection from suit, and that the "novel contexts presented after the 9/11 attacks" alter the qualified immunity inquiry. Ashcroft Br. at 23-24. These contentions are without merit. In *Mitchell*, the Supreme Court flatly rejected a claim "for blanket immunization of [the Attorney General's] performance of the 'national security function,'" 472 U.S. at 521, and held that judicial oversight is *more* important, not less, when national security is at stake, *id.* at 524 ("We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law.").

The September 11 attacks did not alter or erase the fundamental constitutional guarantees that were clearly established prior to that tragedy. Claiming that September 11 forced them "to determine how the law applies in an unprecedented and unforeseen context," Ashcroft Br. at 47-48, and that in the aftermath of the attacks "[t]here were no clear judicial precedents," *id.* at 19, Defendants ask the Court to hold that law disappeared on September 11, and that mere suspicion of connection to terrorism—even

suspicion based on prejudice unsupported by any evidence—now places a suspect beyond constitutional protection.

As the district court explained, the argument that "constitutional and statutory rights must be suspended during times of crises . . . is supported neither by statute nor the Constitution." SPA 42, *citing Hamdi v. Rumsfeld,* 542 U.S. 507 (2004) ("It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.").

Accordingly, claims 20-22 state violations of clearly established rights not extinguished by the terrorist attacks.

A. Plaintiffs' Prolonged Detention in the ADMAX SHU Without any Procedural Protection Violated Procedural Due Process.

The district court correctly held that Plaintiffs allege a procedural due process violation by their assignment to the MDC's Administrative Maximum Special Housing Unit ('ADMAX SHU'), where they were held for months "without . . . process of any sort." SPA 42, JA 195 ¶ 391.

1. Plaintiffs Had a Protected Liberty Interest in Freedom from ADMAX SHU Confinement.

"Detainees held in the MDC's ADMAX SHU were subjected to the most restrictive conditions of confinement authorized by BOP policy." JA 378. Plaintiffs were locked down in their cells for at least 23 hours a day, with lights and cameras on them at all times, prohibited from contact visits with family or attorneys, and cuffed, shackled, and surrounded by four guards and a supervisor whenever taken from their cells. JA 116-17 ¶¶ 81-82. These conditions are significantly more restrictive than the conditions in the MDC's general population or regular SHU. *Id.* Plaintiffs' were placed in the ADMAX SHU for months with no process—denied notice of the reason for their placement, information about its duration, and the opportunity to contest it. JA 115 ¶ 80, 195 ¶ 391. Their detention and treatment in the ADMAX SHU was not based on evidence of dangerousness or connection to the terrorism investigation, but instead on their status as Muslims of South Asian or Arab descent. JA 96 ¶ 8, 112-14 ¶¶ 74, 76; *see also* JA 282-84.

Based on this Circuit's established precedent, the district court found that Plaintiffs alleged a protected liberty interest in

avoiding prolonged confinement to the ADMAX SHU. SPA 42 (relying on *Tellier v. Fields*, 280 F.3d 69 (2d Cir. 2000)). BOP regulations, codified at 28 C.F.R. § 541.22, set forth the bases of SHU confinement and the processes for continued SHU confinement. 28 C.F.R. § 541.22(c). These regulations require a hearing and a formal status review for anyone detained in the SHU for seven continuous days, with continuing reviews and hearings at least every 30 days. *Id.* In *Tellier*, this Court held that 28 C.F.R. § 541.22 creates a liberty interest in freedom from SHU confinement. 280 F.3d at 81.

Defendants, however, argue that the Supreme Court's decision in *Wilkinson v. Austin*, 545 U.S. 209 (2005), overruled or modified *Tellier*, and the district court's reliance on *Tellier* was therefore improper. Ashcroft Br. at 38-40. *Wilkinson* involved a challenge by inmates at the Ohio State Penitentiary to their continued assignment to a 'Supermax' facility. 545 U.S. at 213. In finding the inmates had a protected liberty interest in freedom from Supermax detention, the Court reaffirmed the approach first articulated in *Sandin v. Conner*, 515 U.S. 472 (1995), that "the touchstone of inquiry into the existence of a protected, state-created

liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves in relation to the ordinary incidents of prison life." *Wilkinson*, 545 U.S. at 223 (internal quotations omitted). Defendants claim that the district court failed to heed this ruling. Ashcroft Br. at 39.

This misconstrues both the case law and the district court's opinion. First, neither *Sandin* nor *Wilkinson* applies to Plaintiffs. Both addressed the due process rights of *convicted, sentenced prisoners*. As immigration detainees, Plaintiffs are more analogous to pretrial detainees than convicted prisoners. *See* 8 C.F.R. § 551.105; *Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000). *Sandin* does not apply to pre-trial detainees. *Benjamin v. Fraser*, 264 F.3d 175, 189-90 (2d Cir. 2001) (noting that *Sandin* "specifically distinguished pretrial detainees from convicted prisoners").

Moreover, *Wilkinson* did not change the law, it only reaffirmed the *Sandin* approach which this Court relied on in *Tellier*. While the Court in *Sandin* did disavow an older approach whereby *all* mandatory prison regulations created a protected

liberty interest, the Court nonetheless held that states "may under certain circumstances create liberty interests which are protected by the Due Process Clause." *Sandin*, 515 U.S. at 484. Such state-created liberty interests are "generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* (internal citations omitted).

Following *Sandin*, this Court in *Tellier* prescribed a two-step approach to determine whether a regulation creates a protected liberty interest: 1) whether the alleged deprivation is atypical and significant, and 2) whether the state has created a liberty interest by statute or regulation. *Tellier*, 280 F.3d at 80. See also *Sealey v. Giltner*, 116 F.3d 47, 51-52 (2d Cir. 1997) (applying the same two-step approach); *Frazier v. Coughlin*, 81 F.3d 313, 317 (2d Cir. 1996) (same). The district court properly applied this test. SPA 42. See also *Elmaghraby v. Ashcroft*, No. 04 CV 1409, 2005 U.S. Dist. LEXIS 21434 at *57-*59 (E.D.N.Y. September 27, 2005).

Wilkinson explicitly recognized that regulations can still give rise to protected liberty interests. *Wilkinson*, 545 at 222 ("We have also held, however, that a liberty interest in avoiding particu-

lar conditions of confinement may arise from state policies or regulations, subject to the important limitations set forth in *Sandin*[.]”). At best, Defendants’ argument is that *Wilkinson* did away with the second step in the *Tellier*. Because the District Court found that Plaintiffs satisfied both requirements, Defendants’ argument that *Wilkinson* eliminated one of the steps does not affect the final determination that Plaintiffs allege a protected liberty interest.

Defendants also argue that even if prolonged detention in the ADMAX SHU gives rise to a liberty interest, Plaintiffs’ initial placement in the ADMAX SHU was not a constitutional violation. Ashcroft Br. at 37-38, *citing Elmaghraby v. Ashcroft*, 2005 WL 2375202 at *17 n. 18. The district court disagreed. SPA 42. Here, unlike *Elmaghraby*, Plaintiffs were civil immigration detainees with a liberty interest in avoiding conditions that are “qualitatively different” than those that characteristically accompany civil immigration detention. *See e.g., Vitek v. Jones*, 445 U.S. 480, 49-94 (1980); *Baxstrom v. Herold*, 383 U.S. 107, 113-14 (1966). The restrictive conditions of the ADMAX SHU are such a departure from civil detention as to implicate a liberty interest arising directly from the due process clause. *See Benjamin v. Fraser*, 264 F.3d 175, 188

(2d Cir. 2001) (holding pretrial detainees have a protected liberty interest in avoiding special personal restraints); *Adnan v. Santa Clara County Dep't of Corr.,* No. 4:02-CV-03451, 2002 WL 32058464, at *7 (N.D. Cal. Aug. 15, 2002).

2. Plaintiffs' Liberty Interest in Freedom from ADMAX SHU Confinement Was Clearly Established in 2001.

The district court found that Plaintiffs' liberty interest in being free from restrictive confinement was clearly established in 2001, and ample Second Circuit precedent supports that conclusion. SPA 42.

Defendants rely on cases involving convicted prisoners, not pretrial detainees, without acknowledging the different levels of protection provided to these different groups. Ashcroft Br. at 44-48. The proper focus is on the established liberty interest of pretrial detainees. At the time of Plaintiffs' detention, the law in this circuit was clear that confinement like that in the ADMAX SHU implicates protected liberty interests of pretrial detainees. *Benjamin*, 264 F.3d at 188.

Further, Plaintiffs' ADMAX SHU detention implicates a clearly established liberty interest even when analyzed under the

case law for convicted prisoners. The post-*Sandin* Second Circuit case law on atypical and significant SHU confinement was well developed in 2001. Applying the atypical-and-significant test to SHU confinement requires the court to look to both the duration and conditions of SHU confinement. *Welch v. Bartlett*, 196 F.3d 389, 393 (2d. Cir. 1999); *Sealey v. Giltner*, 197 F.3d 578, 586 (2d Cir. 1999); *Taylor v. Rodriguez*, 238 F.3d 188, 195 (2d Cir. 2000). While explicitly avoiding any bright-line rule, *Colon v. Howard*, 215 F.3d 277, 235-37 (2d. Cir. 2000), this Court recognized that 305 days of "normal SHU confinement" is atypical and significant, *id.* at 231, and between 101 and 305 days may be atypical and significant but requires "development of a detailed [factual] record," *id.* at 232. While, as a general rule, 101 days of normal SHU confinement does not impair a protected liberty interest, *Sealy*, 197 F.3d at 589, this Court has repeatedly noted that with a sufficiently developed record, less than 101 days in the SHU may still constitute atypical and significant confinement. *Colon*, 215 F.3d at 232 n.5; *Sims v. Artuz*, 230 F.3d 14, 23 (2d Cir. 2000). *See also*, *Tellier*, 280 F.3d at 84 (holding plaintiff's procedural due process rights in defendants adhering to [Section 541.22] were clearly established" in 1992).

3. Plaintiffs Were Denied Due Process in Their Assignment to the ADMAX SHU.

Having found a clearly established protected liberty interest, the district court ruled that Plaintiffs' allegations stated a due process violation. Plaintiffs were held for periods ranging from 109 to 249 days,[13] in conditions more restrictive than the normal SHU. JA 116 ¶ 81. Their liberty was infringed "without . . . process of sort." JA 195 ¶ 391.

This Circuit has ruled that pretrial classifications leading to serious deprivations of liberty require, at a minimum, written notice and the opportunity to present witnesses and evidence. *Benjamin*, 264 F.3d at 190. Plaintiffs received neither written notice nor the ability to present evidence with regard to their ADMAX SHU assignment, and were therefore clearly denied due process.

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[13] See JA 141 ¶ 153, 145 ¶ 166, 150 ¶ 184, 153 ¶ 192, 156 ¶ 199, 157 ¶ 205, 159-60 ¶ 210, 163 ¶ 226, 170 ¶ 249. Defendants Ashcroft and Mueller miscalculate Hany Ibrahim's detention at 2½ months. Ashcroft Br. at 40 n.5, citing JA 152-53 ¶ 192. In fact that paragraph asserts that his ADMAX SHU detention lasted for 3½ months, or 109 days.

Similarly, under the *Welch, Sealy, Taylor,* and *Colon* line of cases dealing with convicted prisoners, Plaintiffs have alleged a liberty interest that requires, at a minimum, development of a detailed factual record to determine if Plaintiffs' ADMAX SHU detention was atypical and significant (*Colon*, 215 F.3d at 232), and thus required some level of process.

Defendants' suggestion that Plaintiffs received adequate process from the FBI's investigation of them (Ashcroft Br. at 40-43) is astonishing. Plaintiffs had neither notice of the investigation nor any opportunity to participate in it, and it was the slipshod nature of that investigation from the outset which resulted in their placement in the ADMAX SHU.

This argument also depends on assertions that cannot be considered on a motion to dismiss. Defendants' statements about the relative abilities of the BOP and the FBI to assess Plaintiffs' potential threat level, the "unprecedented security concerns" posed by Plaintiffs, and the national security implications of disclosing evidence "supporting [Plaintiffs'] continued detention," Ashcroft Br. at 37, 43, are not only outside the record, they are directly contradicted by Plaintiffs' allegations that they were singled out for

placement in the ADMAX SHU based on Defendants' animus towards Muslims and Arabs, and not on any evidence of connection to terrorism.

For legal authority, Defendants rely on the *Matthews* balancing test, Ashcroft Br. at 41, but that test shows the absence of due process. It balances: 1) the private interest affected by the official action; 2) the risk of an erroneous deprivation and the value of additional safeguards or substitute procedures; and 3) the government's interest, including fiscal and administrative burdens, of additional procedures. *Mathews*, 424 U.S. at 335. Here, Plaintiffs had a substantial private interest in freedom from SHU confinement. The risk of erroneous deprivation (confirmed by events) was extreme in the absence of process; and the SHU reviews involved negligible fiscal and administrative burdens, especially in light of the fact that the reviews were required by regulations and routinely carried out for SHU detainees not connected to the 9/11 investigation.[14]

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[14] Defendants' contention that "the government unquestionably had a significant interest in detaining high-security suspects that it (continued…)

Defendants' cases do not support them. *Magluta v. Samples*, 375 F.3d 1269, 1279 n.7, 1281-83 (11th Cir. 2004), held, like the district court here, that 28 C.F.R. § 541.22 creates a protected liberty interest, and an allegation that the plaintiff was held in the SHU with virtually no process was sufficient to survive a motion to dismiss. Both *Holcomb v. Lykens*, 337 F.3d 217 (2d Cir. 2003), and *Shakur v. Selsky*, 391 F.3d 106 (2d Cir. 2004), involved the rights of convicted prisoners, not pretrial detainees, and in both the plaintiffs received some process. *Holcomb*, 337 F.3d at 224; *Shakur*, 391 F.3d at 118. Indeed, this Court noted in *Shakur* that while Shakur conceded receiving some process, Tellier received none. *Shakur*, 391 F.3d at 119. Like Tellier, Plaintiffs received no process in connection with their prolonged assignment to the ADMAX SHU.

Finally, Defendants' assertion that provision of BOP-required notice and hearing would have been a "mere formality and

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determined to be 'of high interest' in its ongoing 9/11 investigation," Ashcroft Br. at 42, also misses the point. Claim 20 does not challenge Plaintiffs' detention itself, but their placement in the ADMAX SHU.

a waste of government resources" (Ashcroft Br. at 44) is a curious defense. Properly conducted, the hearings required by law would have uncovered a complete lack of any evidence of dangerousness.

B. Defendants' Interference With Plaintiffs' Ability to Contact the Outside World Violated Their Rights Under the First and Fifth Amendments.

The district court was also correct to hold that the measures Defendants took to prevent Plaintiffs from communicating with the outside world, and to infringe upon the communication that was permitted, stated a violation of freedom of speech (claim 21) and access to counsel (claim 22). Plaintiffs were held incommunicado for periods ranging from two weeks to over two months. JA 110 ¶ 69, 117 ¶ 82, 119 ¶ 87; JA 380. During this time they could not contact attorneys or their families or friends. JA 119 ¶ 87. They could not make or receive telephone calls, send or receive mail, or have visitors. JA 380. Family members, friends and attorneys could not learn whether Plaintiffs had been arrested, or where they were being held. JA 110 ¶ 69.

When the initial blackout ended, Defendants put highly restrictive limits on legal and social phone calls and visits. JA 116 ¶ 81, 120 ¶ 90; JA 379-80, 390-91, 397. These limits were

problematic in part because the Plaintiffs had no lawyers and needed to solicit legal representation—a problem exacerbated by Defendants' failure to provide accurate lists of pro bono attorneys. JA 403-4. While they were eventually allowed one legal call a week and one social call a month, in practice, Plaintiffs were frequently denied even these limited calls. JA 111 ¶ 71, 120 ¶¶ 90, 91 ("Upon information and belief, Cotton, Cuffee, and Shacks would regularly pretend to dial a number or deliberately dial the wrong number and then claim the line was dead or busy."); JA 398 (between September 17, 2001 and April 3, 2002, there were six periods of over seven days in which detainees were given no opportunity to make legal calls; the longest of these periods lasted for 28 days).

In addition, lawyers and family members who came to MDC Brooklyn seeking individual detainees were falsely told that the individuals they sought to visit were not there. *Id.*; JA 382, 402-3. When legal visits did take place, the detainees' privileged attorney-client communications were subjected to surveillance through audio and video taping. JA 122 ¶ 97. Taken together, these restrictions on Plaintiffs' ability to communicate with counsel and with the outside world, a "communications blackout" as the

OIG called it (JA 378-80), violated Plaintiffs' rights to freedom of speech and access to counsel.

1. The Communications Blackout Violated Plaintiffs' Right to Freedom of Speech.

Prisoners have a First Amendment right to freedom of speech, even after conviction. *Turner v. Safley*, 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."). In *Turner*, the Supreme Court held that the Constitution prohibits restrictions on prisoners' speech rights unless they are "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. *Turner*'s standard for convicted prisoners sets a floor, but not a ceiling, for the rights of detainees like the Plaintiffs. *See Benjamin v. Fraser*, 264 F.3d 175, 187 n.10 (2d Cir. 2001). Moreover, as the district court noted, "penological must be taken to mean 'relating to prison management' rather than 'relating to punishment,'" since the Plaintiffs were immigration detainees, not convicted criminals. SPA 53.

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

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

Turner, 482 U.S. at 89-90.

Defendants focus their defense of the communications blackout on the first *Turner* factor, claiming that the blackout was reasonably related to the government's interest in security, because Defendants were concerned about "communications between possible terrorists and potential escape and attack plans." Ashcroft Br. at 49. Defendants argue that just as the security interest in *Turner* justified restrictions on "correspondence between inmates at different institutions," the security interests in this case "support" the communications blackout. *Id.*

Unlike Plaintiffs, however, the prisoners in *Turner* were not "deprive[d] . . . of all means of expression." *Turner*, 482 U.S. at 92. Moreover, Defendants' argument that security interests

justified the communications blackout is fundamentally flawed, because the Complaint alleges that Plaintiffs were not terrorists or connected to terrorism, and that Defendants had no non-discriminatory reason to believe that Plaintiffs were terrorists or connected to terrorism. JA 98-100 ¶ 16-22, 109 ¶ 65, 118 ¶ 86. Taking Plaintiffs' allegations as true, the claimed security interest thus lacks a rational connection to the communications blackout, and fails to justify it under *Turner*.

Defendants note that "several courts have held that national security concerns surrounding September 11th justified restrictions on information." Ashcroft Br. at 50; similarly, Hasty Br. at 28 n.17. But each of the post-9/11 cases cited by Defendants involved different restrictions, and none was decided on the pleadings. *Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 164-66 (D.C. Cir. 2003); *Center for Nat'l Security Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 920-921 (D.C. Cir. 2003); *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 217-218 (3d Cir. 2002); *ACLU v. United States Dep't of Justice*, 265 F.Supp.2d 20, 26-28 (D.D.C. 2003). Likewise, in *United States v. El-Hage*, 213 F.3d 74, 78, 80-81 (2d Cir. 2000), the defendant was

provided with many more opportunities for communication than Plaintiffs here, despite "ample evidence of the defendant's extensive terrorist connections." These cases provide no ground to dismiss Plaintiffs' freedom of speech claim on the pleadings *See e.g. Shakur v. Selsky*, 391 F.3d 106, 115 (2d Cir. 2004) (while confiscation of a prisoner's reading materials might have been reasonable, "we would not reach such a conclusion on 'the face of the complaint' alone.").

2. The Communications Blackout Violated Plaintiffs' Right of Access to Counsel.

As the district court held, Plaintiffs have also adequately alleged that Defendants violated their rights under the Due Process Clause by interfering with their right of access to counsel. SPA 55. S*ee Michel v. I.N.S.*, 206 F.3d 253, 258 (2d Cir. 2000) ("Under the Due Process Clause and the Immigration and Nationality Act, an alien is entitled to representation of his own choice.").

The communications blackout violated Plaintiffs' right to counsel because it prevented them from securing representation in a timely fashion after they were detained and proceedings against them had been initiated, and because it prevented them from

effectively communicating with their lawyers once representation was secured.

Defendants' arguments based on *Christopher v. Harbury*, 536 U.S. 403 (2002), confuse "access to counsel," which was not at issue in *Harbury,* with the separate right of "access to the courts."[15] The two rights are distinct. *Compare Harbury*, 536 U.S. at 415 n.12 (noting that the constitutional basis for the right of access to the courts is "unsettled" and has been variously tied to the Privileges and Immunities Clause, the First Amendment Petition Clause, the Due Process Clause, and the Equal Protection Clause) and *Michel*, 206 F.3d at 258 (locating source of an alien's right to counsel in the Due Process Clause).

Harbury did not address access to counsel, and, as the district court reasoned, the prejudice which *Harbury* requires for an access to court claim would not make sense for an access to counsel claim. SPA 55, *citing Benjamin v. Fraser*, 264 F.3d 175 (2d

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[15] The district court construed claim 22 to complain of interference with both "access to courts" and "access to counsel." SPA 53. Relying on *Harbury*, the court accepted the latter but not the former. SPA 55. Plaintiffs make no "access to courts" argument here.

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

That several Plaintiffs had *some* access to counsel does not alter this analysis, as those individuals were still hampered in their ability to retain and communicate with their counsel of choice. *See* JA 120 ¶¶ 89-91 (alleging Plaintiffs had difficulty retaining counsel and were kept from placing phone calls to counsel they retained), JA 121 ¶ 94 (alleging Plaintiffs were not provided with sufficient information to locate counsel). And when these Plaintiffs finally were able to meet with counsel, they could not speak openly due to the audio- and video-recording of those communications by Defendants. JA 123 ¶ 99.

3. Plaintiffs' Access to Counsel Claim is Not Precluded by the INA Zipper Clause.

Defendants also argue that claim 22 is precluded by the so-called "zipper clause" of the INA, § 242(b)(9), 8 U.S.C. § 1252 (b)(9), which limits judicial review of "all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States" to an appeal from the order of removal. The district court found that this provision does not apply to claim 22 because that claim did not "aris[e] from any action taken . . . to remove an alien from the United States":

> It does not appear, however, even from the defendants' briefs on this motion, that one of the purposes of the communications blackout was "to remove" the plaintiffs; rather, the purposes were to investigate the terrorist attacks of September 11, to prevent further attacks, and to preserve institutional security. . . . I conclude that the defendants did not subject the plaintiffs to the communications blackout for the purpose of removing them, and therefore claim[ ]22 [is] not barred by § 1252(b)(9).

SPA 30.

Defendants argue that claim 22 did arise from a removal proceeding, because the claim "alleged an inability to consult with counsel *in immigration proceedings*." Ashcroft Br. at 55 (original emphasis). This misses the point. The "zipper clause" provision only reaches claims arising from any "action taken or proceeding brought to remove an alien from the United States." 8 U.S.C. § 1252(b)(9). As the district court recognized, the communications blackout was neither an act nor a proceeding taken for the purpose of removing Plaintiffs. SPA 30. Thus claim 22 is completely separate from any challenge to the removal proceeding, or the outcome of that proceeding.

"Where Congress intends to preclude judicial review of constitutional claims [of aliens] its intent to do so must be clear." *Demore v. Kim*, 538 U.S. 510, 517 (2003) (citation omitted). Further, any analysis of § 1252(b)(9) must include "the strong presumption in favor of judicial review of administrative action," *INS v. St. Cyr*, 533 U.S. 289, 298 (2001), and "'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *Id.* at 320 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)).

Defendants' expansive reading of § 1252(b)(9) is not faithful to that provision's placement in § 1252 nor the procedural values of efficiency and substantive accuracy underlying the section. "The title of subsection (b) is 'Requirements for review of orders of removal,' and the text begins with this limiting language: 'With respect to review of an order of removal under subsection (a)(1), the following requirements apply: . . . .'" Hiroshi Motomura, *Judicial Review in Immigration Cases After* AADC*: Lessons from Civil Procedure*, 14 Geo. Immigr. L.J. 385, 417 (2000). Plaintiffs are not seeking review of their removal orders. The title of subsection (b) suggests it has nothing to do with the type of broad constitutional challenge to INS policy that Plaintiffs have raised here. *Id.* at 417.

Neither would barring judicial review of claim 22 promote judicial efficiency and substantive accuracy. A single action addressing the issue as it applies to multiple plaintiffs presents a comprehensive view of the subject that would be lacking in multiple individual claims raised in separate removal proceedings. *Id.* at 438.

These same concerns motivated the Supreme Court to find similar jurisdictional provisions in former versions of the INA

did not limit judicial review of unconstitutional 'policy and practice' claims. *McNary v. Haitian Refugee Center*, 498 U.S. 479 [1991]; *Reno v. Catholic Social Servs.*, 509 U.S. 43, 55-56 (1993). There is no reason to think that the Court has backed off the approach it took in *McNary,* or that the same reasoning should not apply to § 1252(b)(9). To interpret the provision as Defendants suggest would bar judicial review of a policy with only the most indirect relation to an action or proceeding to remove an alien. One could equally argue that the zipper clause bars a non-citizen from challenging physical abuse or torture by an immigration officer. Such a claim might be said to "arise from" a removal proceeding, but, in itself, it is not an action or proceeding *to remove an alien.* Indeed, the correctness of the removal determination would be completely irrelevant in such a proceeding and no purpose would be served by the jurisdictional bar. Contrast *Merritt v. Shuttle, Inc.*, 187 F.3d 263, 270 (2d Cir. 1999) (interpreting jurisdiction stripping provision in the Aviation Act to bar judicial review of FAA officials' actions, because the challenge was "inescapably intertwined" with review of the revocation order itself, such that "advancing such a claim in district court would 'result in new adjudication over the

evidence and testimony adduced in the prior revocation hearing . . . and ultimately the findings made by the ALJ.'").

4. Plaintiffs' Access to Counsel Claim Is Not Precluded by the INA's Remedial Scheme.

Ashcroft and Mueller also claim that, under *Schweiker v. Chilicky*, 487 U.S. 412 (1988), "[t]he detailed and exhaustive remedial scheme of the INA is properly deemed to preclude Claim 22" because it is "well established that a court should not provide a *Bivens* remedy where, as here, Congress has established an elaborate regulatory and remedial scheme to handle a particular category of disputes with the federal government." Ashcroft Br. at 56.

However, *Bivens* relief is only precluded where Congress has created a comprehensive scheme to remedy the violations alleged. In *Schweiker*, the court found such an alternative in a series of statutes passed to remedy Social Security Administration denial of disability benefits to a large number of persons. The Court held that the "elaborate administrative remedies" provided by the expressly remedial legislation foreclosed *Bivens* relief. 487 U.S. at 424. "When the design of a Government program suggests that

Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies." *Id.* at 423. *See also Bush v. Lucas*, 462 U.S. 367, 386 (1983) (*Bivens* relief denied because Congress had created a "comprehensive scheme . . . provid[ing] meaningful remedies"). Likewise, in *Dotson v. Griesa*, 398 F.3d 156, 170-71 (2d Cir. 2005), Congress had expressed clear intent in the Civil Service Reform Act to preclude a damage remedy. By contrast, the INA provides neither a remedy for the violations Plaintiffs allege, nor any indication that it intended to preclude such a remedy.

As the district court noted, while "the INA provides a comprehensive *regulatory* scheme for managing the flow of immigrants in and out of the country, it is by no means a comprehensive *remedial* scheme for constitutional violations that occur incident to the administration of that regulatory scheme." SPA 34 (emphasis in the original). It does not replace *Bivens*.

VI. Plaintiffs Adequately Alleged Defendants' Personal Involvement in the Challenged Policies and Actions.

Defendants' principal claim on their appeal is that they are not responsible for any wrongs committed by their subordinates. Here Defendants Ashcroft and Mueller present an interesting picture. On the one hand, they point to their great responsibilities after September 11, and take credit for the resulting investigation—the "largest investigation in the Bureau's history"—an "important component" of which was the 9/11 detentions (Ashcroft Br. at 46); on the other hand, they disclaim responsibility for the manner in which that same investigation and those detentions were carried out, alluding to the "missteps of . . . subordinates" at a "far remove" from Defendants in policy-making positions (*id.* at 26-35).

In the process Ashcroft and Mueller seem to suggest that really, no one was responsible for anything. The same brief argues at one point that as FBI Director, Defendant Mueller was not responsible for Plaintiffs' harsh conditions of confinement because the "Bureau has no responsibility for detainee housing at all," and ten pages later, that the BOP cannot be held responsible for

Plaintiffs' placement in restrictive confinement, because the "FBI was plainly better situated to assess whether plaintiffs and other detainees posed a threat to national security." Ashcroft Br. at 33, 43. This shuffle, unsupported by anything in the record, ignores Plaintiffs' allegations and the OIG reports, and underscores the district court's conclusion that it is too early to bar Plaintiffs from the opportunity to pursue their claims.

Central to each Defendant's argument is the implicit contention that civil rights plaintiffs must meet a heightened pleading standard to overcome the affirmative defense of qualified immunity. The district court correctly rejected this theory, ruling consistently with long-settled doctrine that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim." *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

Specifically, each Defendant claims that the Complaint fails to adequately allege his involvement in discriminating against Plaintiffs on the basis of their race, religion and ethnicity (claim 5), interfering with Plaintiffs' free exercise of religion (claim 7), confiscating Plaintiffs' personal property (claim 8), and subjecting

Plaintiffs to unreasonable strip searches (claim 23). In addition, Defendants Ashcroft, Mueller, and Ziglar argue that Plaintiffs have failed to adequately allege their personal involvement in detaining Plaintiffs in punitive conditions in the ADMAX SHU without procedural protections and restricting their access to the outside world. (Claims 3, 20-22).[16] These arguments founder for two reasons: they ignore settled law establishing what must be pleaded to survive a motion to dismiss, and they disregard the allegations contained in the Complaint and the OIG reports.

A. The Federal Rules Do Not Impose a Heightened Pleading Standard.

A government official's "personal involvement" in a constitutional violation is a prerequisite to that official's personal liability for damages. *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995). In the context of constitutional claims against supervisory officials, the requirement of personal involvement reflects the well-established doctrinal bar on recovering damages under a theory of

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[16] The wardens do not contest that Plaintiffs have adequately alleged their personal involvement in claims 20-22, and did not appeal the district court's order with respect to claim 3.

respondeat superior. *See Board of County Comm'rs v. Brown*, 520 U.S. 397, 415 (1997); *Poe v. Leonard*, 282 F.3d 123, 140 (2d Cir. 2002).

Personal involvement of a supervisory official may be established in any of five alternative forms:

> (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of [others] by failing to act on information indicating that unconstitutional acts were occurring.

Colon, 58 F.3d at 873 (citing *Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir. 1986)). Because civil rights plaintiffs ordinarily do not know, before discovery, the roles of supervisory officials in their subordinates' misconduct, *Alston v. Parker*, 363 F.3d 229, 233 n.6 (3d Cir. 2004), it is "inappropriate to require plaintiffs and their attorneys before commencing suit to obtain the detailed information needed to prove a pattern of supervisory misconduct." *Oliveri v.*

Thompson, 803 F.2d 1265, 1279 (2d Cir. 1986). Thus, a motion to dismiss for lack of personal involvement must be denied where the plaintiff has pleaded one of the several forms of personal involvement recognized by this Circuit as sufficient to support supervisory liability. *See, e.g.*, *McKenna*, 386 F.3d at 437-38; *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 255 (2d Cir. 2001). This Court has accordingly recognized that an allegation of a supervisor's "knowledge is itself a particularized factual allegation, which he will have the opportunity to demonstrate at the appropriate time in the usual ways." *Phelps v. Kapnolas*, 308 F.3d 180, 187 & n. 6 (2d Cir. 2002) (internal quotation marks omitted).

As the district court reasoned, and as we show in detail below, the OIG report "suggests the involvement of Ashcroft, [and Mueller] in creating or implementing a policy under which plaintiffs were confined in restrictive conditions until cleared by the FBI from involvement in terrorist activities." SPA 41, *quoting Elmaghraby* v. *Ashcroft,* 2005 WL 2375202 at *20 & n.20. The district court also relied on Plaintiffs' argument that Defendants Ashcroft, Mueller, and Ziglar created a policy that the time served by those rounded-up would be "hard-time," and their Muslim faith would not be

respected in custody, or, alternatively, that the "widespread and patterned nature of the pleaded violations are themselves evidence of constructive notice to high-ranking officials." *Id.* In a separate opinion denying Wardens Zenk and Hasty's motion to dismiss, the district court explained that Plaintiffs' allegations that Wardens Zenk and Hasty created and allowed Plaintiffs' unlawful treatment at MDC constituted sufficient personal involvement to reject the defense on a motion to dismiss. JA 486-89.

Based on these arguments, the district court correctly concluded that "it is too early to tell whether the plaintiffs will be able to prove such allegations, but it is also too early to fairly conclude that they should not be permitted the opportunity to do so." *Id; see also, Taylor v. Vermont Dept. of Educ.*, 313 F.3d 768 (2d Cir. 2002) (on a motion to dismiss, the court must not "decide whether plaintiff will prevail, but simply whether she is *entitled to offer evidence* to support her claims") (emphasis added).

Rule 8(a) of the Federal Rules of Civil Procedure requires only that the defendant be put on fair notice of a plaintiff's claim, "rel[ying] on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious

claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) *see also Jones v. Bock*, 127 S.Ct. 910, 919-20 (2007) (reaffirming *Swierkiewicz*'s holding that Rule 8(a) sets the pleading standards for all cases absent an explicit exception in the Rules or legislative act). "This pleading requirement does not imply an obligation on the part of Plaintiff[s] to assert such facts regarding personal involvement as would be necessary to conclusively establish liability on the part of Defendants." *Patterson v. Travis*, No. 02 CV 6444, 2004 WL 2851803, at *5 (E.D.N.Y. Dec. 9, 2004).

Plaintiffs do not seek to hold high-level officials responsible for the aberrant and isolated conduct of local officials acting independently in far-away places. The policies and practices complained of here were part and parcel of the September 11 investigation, which, by Defendants' own claim, was their central and all-consuming occupation during the weeks and months after the attacks. Ashcroft Br. at 4; JA 85-89. Indeed, the wardens acknowledge that the practices Plaintiffs challenge were "driven by policy decisions made by officials at the highest levels of the BOP and other high-ranking government officials." Hasty Br. at 12. As the district court held in *Elmaghraby v. Ashcroft*, and reaffirmed

below, “the post-September 11 context provides support for plaintiffs' assertions that defendants were involved in creating and/or implementing the detention policy under which plaintiffs were confined without due process.” 2005 U.S. Dist. LEXIS 21434 at *65-66, 66 n.20, cited at SPA 40-41.

Similarly, in order to dismiss the Complaint against Defendants Hasty and Sherman, the Court would have to believe that these Defendants—who personally oversaw a facility in the shadow of Ground Zero that was dramatically transformed overnight to house men regarded as terrorist suspects—were somehow both completely *and excusably* unaware of what was going on in the ADMAX SHU. The Complaint and the OIG Reports contradict this tale.

The cases Defendants cite are not on point. Each involved a complaint that either simply restated the legal standard for personal involvement, or failed to plead any facts supporting defendants’ involvement. See, e.g., *Tricoles v. Bumpus*, No. 05 CV 3728, 2006 WL 767897 at * 3 (E.D.N.Y. March 23, 2006); *Shomo v. City of New York*, No. 03 Civ. 10213, 2005 WL 756834 at *7 (S.D.N.Y. April 4, 2005); *LM Bus. Assocs. Inc. v. Ross*, No. 04-CV-

6142, 2004 WL 2609182 at *4 (W.D.N.Y. 2004); *Ellis v. Guarino*, No. 03 Civ. 6562, 2004 WL 1879834 at *10 (S.D.N.Y. Aug. 24, 2004). We show in detail below that the Third Amended Complaint, and the OIG Reports which it incorporates, are replete with factual allegations demonstrating Defendants' personal involvement in the violations of Plaintiffs' constitutional rights.

Defendants Hasty and Sherman also cite numerous cases regarding "conclusory allegations" or "boilerplate statements," which, to the extent they require a heightened pleading standard, do not survive *Swierkiewicz*. Hasty Br. at 32-34. For instance, *Patton v. Przybylski*, 822 F.2d 697, 701 (7th Cir. 1987), is repudiated by *Walker v. Thompson*, 288 F.3d 1005, 1008 (7th Cir. 2002) (Posner, J.) ("[those cases] which say 'conclusory allegations'. . . are not enough to withstand a motion to dismiss cannot be squared with . . . *Swierkiewicz*"). *See also Bish v. Aquarion Servs. Co.*, 289 F. Supp. 2d 134, 142 and n.4 (D.Conn. 2003) (noting that the heightened pleading standards in *De Jesus v. Sears, Roebuck & Co., Inc.*, 87 F.3d 65 (2d Cir.1996), and *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996), did not survive *Swierkiewicz*); *Pollack v. Nash*, 58 F.

Supp. 2d 294, 300 (S.D.N.Y. 1999) (relying on pre-*Swierkiewicz* heightened pleading requirements for § 1983 claims).

Swierkiewicz also forecloses any interpretation of *Crawford-El v. Britton*, 523 U.S. 574 (1998) as imposing a higher pleading standard for civil rights cases. In fact, *Crawford-El* was an appeal from denial of summary judgment, not a motion to dismiss, and it addressed "burden[s] of proof," not the level of pleading necessary to withstand a motion to dismiss. 523 U.S. 574, 594 (1998). As *Crawford-El* itself recognized, "questions regarding pleading . . . are most frequently and most effectively resolved either by the rulemaking process or the legislative process." *Id.* at 595. Accordingly, nearly every Circuit to consider the matter has concluded that *Crawford-El* did not establish heightened pleading standards for civil rights cases. See *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002) (collecting cases); *Educadores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61 (1st Cir. 2004) (changing First Circuit law since *Galbraith*).

B. Plaintiffs Adequately Alleged the Personal Involvement of Defendants Ashcroft, Mueller, and Ziglar in Claims 3, 5, 7-8, and 20-23.

Once Defendants' arguments regarding the "cursory" nature of Plaintiffs' pleadings are disposed of, their arguments regarding personal involvement fall to the wayside. Plaintiffs allege that they were subjected to a policy created by Defendant Ashcroft and adopted or implemented by Defendants Mueller and Ziglar whereby they were detained as "of interest" to the terrorism investigation until cleared of any connection to terrorism, without regard to any evidence of dangerousness or flight risk. JA 100 ¶¶ 23-25, 104 ¶ 54(b). Plaintiffs further allege that under this policy each Defendant authorized or condoned the harsh conditions of their detention. JA 100-101 ¶¶ 23-25. In over 200 paragraphs, Plaintiffs provide explicit detail regarding the policies and practices that Plaintiffs allege Defendants Ashcroft, Mueller, and Ziglar created and condoned, along with the injuries Plaintiffs sustained as a result of those polices. JA 100-180.

Defendant Ashcroft's responsibility as the architect of the hold-until-cleared policy is also supported by his own words. JA 114 ¶ 76(e) (quoting Ashcroft's policy statement, "Let the

terrorists among us be warned. If you overstay your visa even by one day, we will arrest you. If you violate a local law we will . . . work to make sure that you are put in jail and . . . kept in custody as long as possible.”).

The Complaint alleges that each Defendant was motivated to create and implement the challenged policies and harsh conditions by animus against Muslims and Arabs. JA 113 ¶ 76. Defendant Ashcroft, as the architect of the discriminatory policies, made his animus particularly clear. JA 113-14 ¶ 76(d) (quoting Ashcroft, “Islam is a religion in which God requires you to send your son to die for him. Christianity is a faith in which God sends his son to die for you.”).

The OIG Reports incorporated in the Complaint provide details regarding each Defendants’ involvement in creation of the hold-until-cleared policy. JA 304 (citing statements by various government officials regarding creation and implementation of the hold-until-cleared policy by James Ziglar, FBI Headquarters, and the Justice Department); JA 305-06 (describing a “continuous meeting” between Ashcroft and Mueller in the months after September 11 during which the DOJ’s policies with regard to the

detainees were discussed); JA 332-33 (describing Defendant Ziglar's attempts to convey his concerns over how long the FBI clearance process was taking to Defendant Mueller, and to the Attorney General's office).

The OIG Report also connects these Defendants 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 world. JA 285-86. The BOP Assistant Director, Michael Cooksey, said that the Justice Department "was aware" that the detainees were being housed in high-security sections of BOP facilities. JA 285. The OIG Report also confirms that the FBI coordinated the terrorism investigation from its Strategic Information and Operations Center ("SIOC") at FBI Headquarters (JA 277), requested that detainees of "high interest" be housed at BOP high security facilities, (JA 284-85, 291), and required that all aspects of the clearance investigation be routed through FBI Headquarters. JA 317. *See also* Ashcroft Br. at 42-43 (attributing responsibility

for "high interest" designation and the resultant restrictive conditions of confinement to the FBI).

According to the OIG Report, Ziglar was at the center of the decision-making process regarding Plaintiffs' detention.[17] The Report recites statements that 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. JA 284. Thereafter, the INS created the Custody Review Unit at INS Headquarters and appointed three INS District Directors to make detainee housing determinations. JA 284-85.

Defendants Ashcroft, Mueller, and Ziglar ignore all these allegations in their attempt to disclaim their central role in ordering, implementing and condoning Plaintiffs' prolonged detention in restrictive confinement. First, the Washington defendants argue that Plaintiffs have failed to adequately allege their personal

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[17] Although Ziglar offers no specific argument concerning his personal involvement, he generally adopts the arguments in Ashcroft's and Mueller's brief.

involvement in detaining Plaintiffs in the ADMAX SHU without procedural protections (claim 20), because Plaintiffs "do not assert . . . that defendants . . . ever ordered BOP to violate its regulations or to deny anyone a hearing" or "had any involvement in how long a particular immigration detainee was kept in the ADMAX SHU." Ashcroft Br. at 29. This argument misses the point. Plaintiffs allege that the Washington Defendants ordered Plaintiffs held in restrictive confinement until cleared of a connection to terrorism (JA 100-1), even though BOP policy prohibits prolonged detention in a special housing unit without evidence to support the placement, s*ee* Point V.A above. By ordering the restrictive detention of individuals swept up in the terrorism investigation, without requiring evidence of terrorism or dangerousness, the Washington Defendants required the violation of BOP policy. Under Defendants' orders, the FBI clearance process, rather than BOP regulations, dictated the length and conditions of each Plaintiffs' confinement. Discovery will disclose whether there was ever an explicit order to dispense with the hearings required by BOP regulations, but Plaintiffs' claim does not require it, and certainly it is not required by notice pleading.

Similarly, the Washington Defendants claim that the Complaint fails to link them to specific instances of abuse, as it does with respect to MDC Defendants. Ashcroft Br. at 32-35. But there is liability for the creation of an unconstitutional policy. *Colon*, 58 F.3d at 873. No Plaintiff alleges that Defendants Ashcroft, Mueller, or Ziglar personally took his Koran, insulted him or his religion, or kept him awake at night. Instead, Plaintiffs allege that all of their abuse at MDC resulted from policies created and directed by the Washington Defendants. Indeed, the nature and the consistency of the harsh conditions and physical and verbal abuse meted out to Plaintiffs reveals a direct link between the perceived reason for their detention, their religion, and their mistreatment. JA 124-26 ¶¶ 102-6 (alleging a pattern of physical abuse, religious and racial slurs). As the district court recognized, Plaintiffs' argument that Defendants ordered a policy of "hard time" is supported by "[t]he widespread and patterned nature of the pleaded violations," and must not be dismissed without opportunity for factual development. SPA 41.

The Complaint also adequately alleges personal involvement in confiscating Plaintiffs' property. Judge Gleeson

found that Plaintiffs' allegations of systematic deprivation of identity documents, which might limit their mobility in their home countries and facilitate the ongoing investigation, provide a possible motive, allowing a reasonable inference that a policy existed. SPA 50. It is also reasonable to infer from the allegations that such a policy must have been set at the highest levels—notwithstanding Ashcroft and Mueller's bold claim that it "defies logic" to suspect them in such a matter (Ashcroft Br. at 34). [18]

C. Plaintiffs Adequately Alleged the Personal Involvement of Defendants Hasty and Sherman in Claims 5, 7, 8, and 23.

The wardens seek dismissal of claims 5 (equal protection), 7 (interference with religious practice), 8 (confiscation of personal property), and 23 (unreasonable and punitive strip searches) for lack of personal involvement. Hasty Br. at 30. As the senior MDC officials at a time when attention was focused on the

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[18] While the Washington Defendants' sole argument for dismissal of claim 8 is made under the personal involvement heading, Ashcroft Br. at 26, 33-34, they also appear to suggest that this claim does not state a constitutional violation. If this argument is intended—and has not been waived—it is wholly unsupported, depending on assertions outside the record (*id.* at 33 n.4).

9/11 investigation, the wardens naturally do not dispute their personal involvement in Plaintiffs' conditions of confinement (claim 3), detention in the ADMAX SHU without procedural protections (claim 20), and the communications blackout (claims 21 and 22). Hasty Br. at 30.[19] Their suggestion that they were not responsible for other aspects of the 9/11 detainees' treatment raised the eyebrows of the court below, and should do so here as well.

According to the OIG Report, "MDC officials placed all incoming September 11 detainees in the ADMAX SHU" and subjected them to "the most restrictive conditions of confinement authorized by BOP policy." JA 378. On September 17, 2001, David Rardin, the BOP's Northeast Region Director, ordered the communications blackout for the detainees during a telephone conference call with the Northeast Region Wardens—including Hasty at the MDC. *Id.* The OIG Report documents that MDC officials barred 9/11 detainees from having inmate handbooks, the

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[19] Defendant Hasty's motion to dismiss based on qualified immunity was denied by the district court with respect to claims 3, 12-16, and 31 (excessive force) on Dec. 3, 2004 (JA 486-489), and he did not appeal. Defendant Sherman appeals "only those claims relating to both him and Defendant Hasty." Hasty Br. at 30.

detainee's only reference to the MDC's grievance process. JA 414-15, 428. By deliberately cutting the detainees off from communication with the outside world and effectively preventing the detainees' use of the prison grievance system, Hasty and Sherman established the atmosphere that permitted the abuses complained of in Claims 5, 7, 8 and 23 to flourish.

As the OIG Report makes clear, abuses did flourish. Following a detainee's complaint of physical abuse to a federal judge, a "senior MDC management official" ordered that detainee transports be videotaped. JA 250. Even if a complaint to a federal judge about physical abuse by their staff, and the policy change then ordered by a "senior MDC management official," somehow escaped the wardens' attention, they were further made aware of mounting detainee complaints when Rardin ordered all wardens in the Northeast Region—including Hasty—to videotape detainee transports to deter complaints of abuse. *Id.* It was these videotapes that the OIG later used to substantiate the detainees' claims of physical and verbal abuse that form the basis of claims 5 and 23. That Hasty was unaware of abuses recorded on the videotapes he ordered his officers to make cannot be credited. Such ignorance in

Sherman, who as Associate Warden for Custody was personally in charge of all aspects of the detainees' custody (JA 384 n.95), is equally incredible.

Even without the OIG Report, the Complaint clearly alleges the wardens' personal involvement. The Complaint states that as the warden of the MDC, Defendant Hasty "had immediate responsibility for the conditions under which Plaintiffs . . . have been confined at the MDC" and that Hasty "subjected Plaintiffs . . . to unreasonable and excessively harsh conditions." JA 101 ¶ 26. As the Associate Warden for Custody, Defendant Sherman, along with Defendant Hasty, "created the unconstitutional and unlawful policies and customs relating to the manner in which [Plaintiffs] were detained at the MDC" and allowed these policies and practices to continue, either through gross negligence and deliberate indifference to supervision of subordinates who committed unconstitutional acts, or by direct participation. JA 136 ¶¶ 135-36. Under the policies and practices created and condoned by the wardens, Plaintiffs allege that they were systematically denied the ability to practice their Muslim faith (JA 133-34 ¶ 128), repeatedly strip searched without penological purpose and in a punitive

manner (JA 127-29 ¶¶ 111-16), and deprived of their property (JA 135-36 ¶¶ 131-33). The Complaint alleges further that the wardens created and implemented these policies and practices based on invidious discrimination against Arabs and Muslims. JA 113 ¶ 76.[20]

The wardens argue these allegations are insufficient to plead personal involvement, because the Plaintiffs have "lumped the wardens in" with other MDC defendants, without specifying that they individually interrupted Plaintiffs' prayers, screamed derogatory anti-Muslim comments (Hasty Br. at 38), confiscated Plaintiffs' property, or conducted other abusive acts. *Id.* at 43. Plaintiffs do not and need not allege such direct interactions.

As the district court reasoned in denying the wardens qualified immunity with respect to Plaintiffs' conditions of confinement (claim 3) and excessive force (claims 12-16 and 31)

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[20] In a footnote, the wardens claim that the interference with religion alleged here (JA 133-34 ¶ 128) did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Hasty Br. at 37 n. 20. This argument—not advanced below—is refuted by *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990).

> Plaintiffs [need not] establish that the wardens themselves committed beatings, slammed detainees against the walls or inflicted similar physical abuse in order to hold them liable . . . .
>
> [And Plaintiffs] are not required at this stage to "allege *facts* sufficient to establish the wardens' liability . . . . Here, the Plaintiffs have alleged with specificity what they were subjected to at MDC. They have further alleged that the wardens are responsible for those actions. Without discovery, they can hardly be expected to allege the specific facts that establish such responsibility, and the law does not require them to do so.

JA 487-88. In so holding, the district court correctly relied on *McKenna v. Wright*, 386 F.3d 432, 437 (2d Cir. 2004), in which this Court held that "sufficient personal involvement to justify rejection of their immunity defense on a motion to dismiss" was pleaded by allegations that wardens at a prison "had responsibility for enforcing or allowing the continuation of the challenged policies that resulted in" the challenged abuses. JA 488-89.

Ignoring *McKenna*, the wardens suggest that *Wynder v. McMahon*, 360 F.3d 73 (2d Cir. 2004), and *Atuahene v. City of Hartford*, No. 00-7711, 2001 WL 604902 (2d Cir. May 31, 2001) require that a complaint be dismissed when it fails to differentiate

between defendants.[21] Hasty Br. at 39. This is absurd. A plaintiff may assert every claim against every defendant, as long as the plaintiff identifies the theory upon which each defendant will be proven liable. *Wynder*, 360 F.3d at 80.

On Plaintiffs' equal protection claim, the wardens seek a fine line, claiming that they were too subordinate to create a discriminatory policy (Hasty Br. at 27, n. 16), yet too exalted to know about their subordinates' physical and verbal abuse (*id.* at 41-44). This simply ignores Plaintiffs' allegations that the wardens took part in creating and implementing the policy by which Plaintiffs were held in the ADMAX SHU based on their race, religion and ethnicity, and that they condoned, through either explicit policy or grossly negligent supervision, Plaintiffs' abuse in the ADMAX SHU. The systematic and clearly discriminatory nature of the abuse alleged by Plaintiffs bolsters these allegations. JA 124-26, ¶¶ 102-9.

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[21] *Atuahene v. City of Hartford*, a summary order without precedential effect, was filed before Jan. 1, 2007, and its citation is not permitted by Local Rules § 0.23.

Finally, the wardens rely on the OIG's finding that there was no written strip-search policy to refute Plaintiffs' allegations that they were strip-searched without penological purpose, and in a punitive manner, pursuant to a policy or practice. Hasty Br. at 46. A policy not need be written, however, to establish a basis of liability. See *Colon*, 58 F.3d at 873. Indeed, the absence of an explicit written policy to direct subordinates in how to deal with detainees labeled "terrorists" and placed in isolation invites the unnecessary and abusive strip searches Plaintiffs allege and underscores Plaintiffs' alternate allegation that the wardens were grossly negligent in supervising their subordinates.

For all the above reasons, this Court should affirm the decision of the district court, and find that the Complaint adequately alleges the Washington Defendants' personal involvement in claims 3, 5, 7, 8 and 20-23, and the wardens' personal involvement in claims 5, 7, 8, and 23.

VII. The Wardens' Conduct Alleged in Claims 5 and 20-22 Was Not Objectively Reasonable.

While the former Attorney General and FBI Director insist on the distance between themselves in Washington and everything

that happened at MDC in Brooklyn, the wardens insist that what happened in Brooklyn was dictated from Washington, and consequently that their own conduct was "objectively reasonable" under the circumstances. Hasty Br. at 12, 16. This claim cannot be sustained on this motion to dismiss.

The wardens ask this Court to rule that they acted reasonably in confining Plaintiffs under maximum security in the ADMAX SHU for up to eight months without any notice or hearing, first denying them *all* access to the outside world and then allowing only the most restricted access, taping their attorney-client communications, and singling Plaintiffs out for harsh conditions of confinement based on their race, religion, and ethnicity. Hasty Br. at 16–29; *see* JA 118-35 ¶¶ 85-133, 122-23 ¶¶ 97-99, 152 ¶ 192, 156 ¶ 199. On this basis, the wardens seek qualified immunity with respect to claims 20 through 22 and part of claim 5. Hasty Br. at 16–29. As we have noted, they do not dispute that Plaintiffs have properly alleged the wardens' personal involvement in each of these claims.

In seeking qualified immunity for "objectively reasonable" conduct, Defendants bear the burden of showing that a challenged

act was objectively reasonable in light of the law existing at that time and the information possessed by defendants. *Varrone v. Bilotti*, 123 F.3d 75, 78 (2d Cir. 1997). Due to the "factual nature of this qualified immunity inquiry . . . it is rarely appropriate to recognize the defense on a motion to dismiss." *Meserole Street Recycling v. New York*, No. 06 Civ. 1773, 2007 U.S. Dist. LEXIS 4580, *24 (S.D.N.Y. Jan. 23, 2007); *see also, Field Day, LLC v. County of Suffolk*, 463 F.3d 167, 191-92 (2d Cir. 2006) ("A qualified immunity defense can be presented in a Rule 12(b)(6) motion, but the defense faces a formidable hurdle when advanced on such a motion and is usually not successful.") (internal citations and punctuation omitted). "[T]he facts supporting the defense [must] appear on the face of the complaint . . . [and] the motion may be granted only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *McKenna*, 386 F.3d at 436 (2d Cir. 2004) (internal quotations omitted). The plaintiff is "entitled to all reasonable inferences from the facts alleged, not only those that support his claim, but also those that defeat the immunity defense." *Id.*

Even with the help of the OIG reports, the wardens do not come close to the required showing.

Principally, the wardens argue that their actions were based on "facially valid orders" from their superiors and were therefore objectively reasonable. Hasty Br. at 16–29. This argument fails for three independent reasons. First, the wardens offer no support for their claim of a passive role. Indeed, the record belies their argument. Second, Defendants cannot present sufficient facts justifying or explaining their actions. Third, dismissal is inappropriate because the orders the wardens allegedly relied upon were facially invalid.

Finally, their argument for dismissal of claim 5—discrimination based on race, religion and ethnicity—fails because it depends on issues of fact.

A. The Record Does Not Absolve the Wardens of Involvement in Setting Policy at MDC.

The wardens seek a defense available to those who follow, but do not create, plausible though unlawful policy. *See Varrone v. Bilotti*, 123 F.3d 75, 81-82 (2d Cir. 1997). Because neither the Complaint nor the OIG reports establishes their lack of involvement

in creating the challenged policies, this defense is unavailable at this early stage.

None of the "evidence" cited by the wardens to absolve them of a policy setting role withstands scrutiny. The wardens insist that "the decision to assign [the September 11 detainees] to the ADMAX SHU was made by high-level BOP and INS officials at the regional or national headquarters, *and not by officials at the MDC*." Hasty Br. at 20-21 (emphasis added). Defendants provide no citation for this assertion. *Id.* Next, the wardens refer to the OIG report as support for their claims that BOP officials, "not the Wardens," made the decision to detain Plaintiffs in the ADMAX SHU at MDC (Hasty Br. at 21, citing JA 285) and bar all communications (*id.* at 27, citing JA 378-79). But these passages neither affirm nor deny the wardens' involvement in setting policies, and thus establish nothing.[22]

The wardens also ignore allegations from the Complaint and OIG report that contradict the passive role they claim. First,

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[22] Here and elsewhere, the OIG Reports contain both assertions as to what happened, and statements of what OIG investigators were told. The OIG did not adopt every statement it reported.

the wardens' unsworn and unsupported denials contradict Plaintiffs' allegation, which must be taken as true, that the wardens played a policy setting role at the institution, and were involved in creating the challenged policies. JA 136–37.

This role is corroborated by reasonable inferences taken from the OIG report. While the wardens rely on the OIG finding that the BOP "ordered" the communications blackout challenged in claims 21 and 22 (Hasty Br. at 27, citing JA 378-79), they fail to acknowledge evidence cited by the OIG tending 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. JA 379-80; JA 122-23 ¶¶ 97-99.

The wardens similarly state that BOP officials instructed the wardens to keep Plaintiffs in the ADMAX SHU until cleared of any connection to terrorism (Hasty Br. at 22), but ignore the allegations in the Complaint that several Plaintiffs were held in the ADMAX long past the time that they were cleared of any connection to terrorism. JA 145-46 ¶¶ 163 & 166, 152 ¶¶ 190 & 192, 156 ¶ 199. Even the wardens' own brief undercuts their argument, as

they acknowledge their "high position of authority" and status as "policy makers" (Hasty Br. at 30-31) in an attempt to claim qualified immunity based on lack of personal involvement. *See* Point VI.C, above.

Silence in the OIG reports does not refute Plaintiffs' express allegations. Nor does it refute the reasonable inference that a warden and an associate warden played some role in setting policy at MDC. JA 101 ¶ 26, 102 ¶ 28. The wardens fail to cite a single allegation appearing in the Complaint or the OIG reports to substantiate their claimed lack of involvement in setting MDC policy. The following-orders defense is unavailable at this stage.

B. The Record Does Not Establish that Defendants' Actions Were Reasonable.

Second, if the wardens could establish that they were just following orders, the Court must then judge the reasonableness of their actions in the context of the specific orders and the wardens' knowledge at the time. *Anthony v. New York*, 339 F.3d 129, 138 (2d Cir. 2003) ("Plausible 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" his actions were lawful.) (internal quotation marks omitted); *Washington Square Post No. 1212 Am. Legion v. Maduro*, 907 F.2d 1288, 1293 (2d Cir. 1990) ("[Employees are] entitled to rely on the reasonable instructions of their superior in the chain of command, particularly where those instructions were not inconsistent with their personal knowledge and experience.").

If the circumstances surrounding a defendant's actions are absent from the record, or are in dispute, a court cannot make the required determination. In *Hill v. New York,* 45 F.3d 653 (2d Cir. 1995), this Court considered an assistant district attorney's claim of qualified immunity for a decision to remove the plaintiff's children from her custody and order the plaintiff's arrest. This Court held that the record was inadequate to determine the availability of qualified immunity, as the reasonableness of the defendant's actions depended upon the information available to him at the time, including the content of statements by the child, the results of investigations of the child's former foster family, and the plaintiff's history of abusive behavior. *Id.* at 663. *See also, Kaminsky v. Roseblum*, 929 F.2d 922, 925-27 (2d Cir. 1991)

(denying qualified immunity on motion for summary judgment because reasonableness of defendants' actions turned on disputed facts, including content of recommendations made to defendants and defendants' knowledge regarding plaintiffs' condition); *Hickey v. New York*, No. 01 Civ. 6506, 2004 U.S. Dist. LEXIS 23941 (S.D.N.Y. Nov. 29, 2004) ("[T]he fact-intensive question of what the defendants knew or reasonably believed . . . can only be addressed on a fuller factual record."); *Kamara v. New York*, No. CV-03-0337, 2005 U.S. Dist. LEXIS 41754 (E.D.N.Y. Nov. 29, 2005) (denying qualified immunity on motion for summary judgment because the "amount, nature, and reliability of the evidence" in support of plaintiff's arrest were not established, and presented issues of fact for the jury).

The factual context provided by the Complaint and OIG Reports does not allow the wardens to meet their heavy burden. For example, the wardens argue that the BOP had "many legitimate reasons" for Plaintiffs' assignment to the ADMAX SHU, including the FBI's high interest designation, "reserved for those believed to have the greatest likelihood of being connected to terrorism," the BOP's resulting "belief" that the September 11 detainees were

associated with terrorism and thus a danger to prison employees, and the needs of the FBI investigation. Hasty Br. at 24, 21 *citing* JA 378. The wardens claim that, for this reason, the BOP reasonably decided to "err on the side of caution," and treat Plaintiffs as high security. Hasty Br. at 22, *citing* JA 285.

The record fails to show that the unlawful orders were reasonable. In fact, the portion of the OIG report cited by the wardens indicates the FBI's interest designation was based on "little or no concrete information" tying the detainees to terrorism and the BOP's housing determination was largely based on the fact that "the BOP did not know who the detainees were or what security risk they might present". JA 284, 387. There is no mention in the cited pages of any belief by BOP officials that the detainees were associated with terrorism or dangerous in any way, or of any concerns regarding the FBI's investigation. JA 285, 378, 381.[23]

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[23] Careful reading of the OIG Reports gives a picture somewhat different from that suggested by the wardens. For instance, according to the wardens,

> [the] *BOP believed the September 11th detainees were associated with terrorist activity against the United States and, therefore, considered them a danger to prison*

(continued…)

In direct contradiction to the wardens' arguments, the OIG reports a statement by one government official indicating that, upon review of detainees' files it was "obvious" that the "overwhelming majority" were simply visa violators and had no connection to the terrorism investigation. JA 331 n. 50.

In the light of these statements, whether the wardens acted reasonably remains an issue to be resolved after discovery.

> *employees*. Second, BOP considered how the September 11th detainees' detention could affect the FBI's investigation of the September 11th attacks. As such, BOP decided to "err on the side of caution and treat the September 11 detainees as high-security detainees."

(Hasty Br. at 21-22 citing JA 378, 285; emphasis added). This is a surprising description of pages saying:

> [Michael Cooksey] said the BOP made the decision to impose strict security conditions in part because *the FBI provided so little information about the detainees* and because *the BOP did not really know whom the detainees were*. He said the BOP chose to err on the side of caution and treat the September 11 detainees as high security detainees.

(JA 285; emphasis added), and "Hawk Sawyer told the OIG that the detainees were held under these restrictive detention conditions, in part because *the BOP did not know who the detainees were or what security risks they might present to BOP staff and facilities*." (JA 378; emphasis added).

C. The Challenged Policies Are Not Facially Valid.

Finally, an officer is only entitled to qualified immunity for reliance on a supervisor's order if the order is plausibly valid. *Diamondstone v. Macaluso*, 148 F.3d 113, 126 (2d Cir. 1998). Where a practice has previously been declared unconstitutional, or it violates institutional policy, it is not facially valid. *Tellier v. Fields,* 280 F.3d 69, 85-86 (2d Cir. 2000).

The policies at issue—to place and retain Plaintiffs in the ADMAX SHU for 109 to 249 days without any procedural protections, and to bar them from any communication with the outside world and then record the conversations that did occur once they had access to counsel—are unlawful on their face and cannot support a grant of qualified immunity. JA 115-16 ¶ 80, 119-23 ¶¶ 87-99.

First, the wardens argue that the order to place Plaintiffs in the ADMAX was facially valid because BOP procedures allow for administrative detention of inmates who pose security threats and for prolonged administrative detention in "exceptional circumstances." Hasty Br. at 25, citing 28 C.F.R. § 541.22(a) and 28 C.F.R. § 541.22 (c)(1). But of course, and as explained in more

detail under Point V.A above, these regulations require myriad procedural protections, while Plaintiffs allege placement and continued detention in the ADMAX SHU *without any procedural protections*. JA 115-16 ¶ 80. As this Court held in a similar context in *Tellier v. Fields*, "we simply cannot accept that [qualified immunity] would ever confer protections on egregious violations of a federal regulation. This Court will not confer immunity on any official who glaringly disregards the very regulations that he or she is entrusted to discharge dutifully and in good faith." 280 F.3d at 86. Federal regulations and Second Circuit precedent clearly forbid prolonged administrative detention without procedural safeguards. *See* Point V.A above. The order confining Plaintiffs without these safeguards was invalid on its face.

Similarly, with respect to claims 21 and 22, the wardens attempt to rely on precedent establishing that "national security concerns surrounding September 11th justified restrictions on information." Hasty Br. at 28, n.17. But none of the cases cited by the wardens alter the clearly established precedent that prisoners may not be denied all access to the outside world, and that prison officials may not invade the attorney client privilege. *See* Point V.B

above. Qualified immunity does not "confer[] protections . . . where officers may have knowingly violated the law." *Tellier*, 280 F.3d at 85 (internal quotations omitted).

D. The Wardens Are Not Entitled to Qualified Immunity for Violations of Equal Protection.

Finally, the wardens purport to be entitled to qualified immunity on the same grounds with respect to claim 5, alleging that Plaintiffs were singled out for harsh treatment at the MDC based on their religion, race, and ethnicity. Hasty Br. at 19-20. Here the wardens' argument is not that it was objectively reasonable for them to rely on their superiors' orders to discriminate against Plaintiffs, but rather that they "could not have known that the decision could have been made for discriminatory reasons" since they "were not involved in the decision to assign Plaintiffs to the ADMAX SHU." Hasty Br. at 26. They further assert—with no record support—that they "reasonably believed that the assignment decision was for the security reasons noted *supra . . ." Id.*

In other words, the wardens claim that, as factual matter, they based their actions on other, non-discriminatory concerns. This factual dispute has no place in a motion to dismiss.

The district court's order refusing to dismiss claims 5 and 20 through 22 should be affirmed.

Conclusion

Defendants ignored clear law and regulation to round up and confine Plaintiffs as terrorists, based on the color of their skin, the nature of their faith, and the region of their birth. In so doing, they turned their back on fundamental constitutional protections. Clearly established law requires this Court to recognize Plaintiffs' claims, and allow discovery to proceed.

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the district court's dismissal of claims 1, 2, 5 (in part) and 24, and otherwise affirm the district court's decision.

Dated: New York, New York
March 26, 2007

Respectfully submitted,

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