Nos. 06-3745-cv, 06-3785-cv, 06-3789-cv, 06-3800-cv, 06-4187

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IBRAHIM TURKMEN, ASIF-UR-REHMAN SAFFI, SYED AMJAD ALI JAFFRI, AKIL SACHVEDA, SHAKIR BALOCH, HANY IBRAHIM, YASSER EBRAHIM, ASHRAF IBRAHIM,
Plaintiffs-Appellees/Cross-Appellants,

v.

JOHN ASHCROFT, Former U.S. Attorney General, DENNIS HASTY, Former Warden of MDC, JAMES W. ZIGLAR, Commissioner, Immigration and Naturalization Service, JAMES SHERMAN, ROBERT MUELLER,
Defendants-Appellants/Cross-Appellees,

UNITED STATES,
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,
Defendants. .

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

REPLY/CROSS APPELLEES' BRIEF FOR JOHN ASHCROFT, ROBERT MUELLER AND THE UNITED STATES

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REPLY/CROSS APPELLEES' BRIEF FOR JOHN ASHCROFT, ROBERT MUELLER AND THE UNITED STATES

INTRODUCTION AND SUMMARY OF ARGUMENT

On September 11, 2001, the United States suffered the most devastating attack in our Nation's history. An enemy that was hiding within our borders and motivated by hate reemerged that morning to destroy the World Trade Center, strike the Pentagon, and murder thousands of innocent civilians, prompting a national emergency.[1] Duty bound to respond to this unprecedented assault, "to ferret out the persons responsible for [it,] and to prevent additional acts of terrorism," SA 2, our government was forced to make a number of exceptionally difficult judgments with limited guidance from past practice and without the luxury of hindsight.

1. One of these judgments was to use the government's authority in the Immigration and Nationality Act (INA) to arrest and detain illegal aliens. 8 U.S.C. §§ 1226(a), 1231. Section 241 of the INA, 8 U.S.C. § 1231, expressly permits the government to detain illegal aliens who have been ordered removed. And just a few months before September 11, the Supreme Court confirmed that the United States has the authority to detain illegal aliens for up to six months after the entry of a removal order and for an additional period of time if the alien is likely to be removed in the

[1] *See* September 14, 2001 Proclamation of National Emergency by Certain Terrorist Attacks, No. 7453, 50 U.S.C. § 1621 (2003); Pub. L. No. 107-40, 115 Stat. 240 (2001).

reasonably foreseeable future. *See Zadvydas v. Davis,* 533 U.S. 678 (2001). The government relied on this authority and detained plaintiffs, all of whom were illegal aliens, for a brief period well within *Zadvydas*'s temporal bounds.

In their cross-appeal, plaintiffs challenge this decision. They contend that, notwithstanding the text of the statute and the Supreme Court's decision in *Zadvydas*, the government was required to release or remove them as soon as "removal could * * * be[] effectuated," Pl. Br. at 26 (citation omitted), regardless of how long they were detained, and even though they were the subjects of an ongoing terrorism investigation. According to plaintiffs, once removal could be effectuated, the "purpose" of the detention changed, and the INA no longer permitted it. *See, e.g.*, Pl. Br. at 35, 40.

But plaintiffs cite no case law for this narrow view of the INA, and no court has ever adopted it. Indeed, nothing in the INA or the United States Constitution imposes a duty of "reasonable dispatch" in removing aliens ordered removed, SA 43, or otherwise requires the government to have an "immigration purpose" for the detention. Pl. Br. at 23. Plaintiffs invent their "purpose" limitation out of whole cloth. Even worse, they seek to impose an unreasonable restriction on the government's authority to detain illegal aliens suspected of links to terrorism. Thus, irrespective of whether plaintiffs package their argument as a Fifth Amendment

claim, a Fourth Amendment claim, or a state tort claim, this Court should reject it and sustain this aspect of the decision below.

At the very least, the Court should affirm the district court's judgment that former-Attorney General Ashcroft and FBI Director Mueller are entitled to qualified immunity. Under that doctrine, if a court finds a violation of a constitutional right, the court must then address whether such right was "clearly established" at the time of the alleged conduct. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). To be clearly established, a defendant must have notice that his conduct would violate the Constitution in the specific situation that he confronted. *See Brosseau v. Haugen*, 543 U.S. 194, 198-199 (2004) (per curiam). Because there is no authority supporting plaintiffs' novel claim (much less any authority addressing the extraordinary circumstances that defendants confronted in the wake of September 11), plaintiffs have failed to allege a violation of clearly established rights, and defendants Ashcroft and Mueller are entitled to qualified immunity.

2. Equally unpersuasive is plaintiffs' opposition to defendants' appeal. As explained in our opening brief (pp. 26-35), the district court should have dismissed plaintiffs' conditions-of-confinement claims against defendants Ashcroft and Mueller, because plaintiffs failed to adequately allege personal involvement. Instead, plaintiffs wholly relied on conclusory allegations and speculative inferences, which are

insufficient to survive dismissal. *See Bell Atlantic v. Twombly*, __ U.S. __, No. 05-1126 (May 21, 2007).

Indeed, the Supreme Court recently rejected the central premise of plaintiffs' argument and the decision below. According to plaintiffs and the district court, the complaint survives because "[d]ismissal 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.'" Pl. Br. at 19 (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *see also* Pl. Br. at 116 (same); SA 28 (quoting "no set of facts" standard); *Elmaghraby v. Ashcroft*, 2005 WL 2375202 at *9, 11, 29, 33 (same). In *Twombly*, however, the Supreme Court expressly disavowed this very language from *Conley* and explained that it "is best forgotten as an incomplete, negative gloss on an accepted pleading standard." Slip op. at 16. A complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 8. Because the district court rested on an erroneous premise, and failed to dismiss a complaint based in pertinent part on "labels and conclusions," this Court should reverse.

Plaintiffs' own brief highlights the fatal defects in their complaint. Plaintiffs candidly acknowledge that a complaint is insufficient if it "simply restate[s] the legal standard for personal involvement, or fail[s] to plead any facts supporting defendants'

involvement." Pl. Br. at 122. Yet plaintiffs' complaint does no more. As plaintiffs note (p. 118), a supervisory official is personally involved if, *inter alia*, he "created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom." *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995). Virtually parroting that language, plaintiffs' complaint merely alleges that "Defendants created the unconstitutional and unlawful policies and customs relating to the manner in which the post-9/11 detainees were detained." JA 136 (¶136). Nowhere does the complaint allege any "actual facts" regarding defendants Ashcroft and Mueller to supplement these bare-bones and conclusory allegations, or otherwise provide the basic notice required by Rule 8. *See Evancho v. Fisher*, 423 F.3d 347, 353-54 (3d Cir. 2005). Accordingly, plaintiffs' conditions claims should be dismissed, and the district court decision reversed.

In any event, even if plaintiffs had adequately alleged personal involvement, their claim challenging their placement in the ADMAX SHU should still be dismissed. As the district court recognized, plaintiffs' initial placement in this facility did not require a formal BOP hearing or violate due process. SA 2, 42 (adopting the rationale of its prior ruling so holding, *Elmaghraby v. Ashcroft*, 2005 WL 2375202 at *17 n.18). And their continued confinement without a formal hearing did not violate due process under *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005), especially

given the unique circumstances presented in the aftermath of September 11. Finally, plaintiffs' challenges to the alleged "communications blackout" fail because the temporary restrictions on communications were reasonably related to the government's legitimate security concerns after September 11, *see Turner v. Safley*, 482 U.S. 78 (1987); *United States v. El-Hage*, 213 F.3d 74, 80-82 (2d Cir. 2000), and because plaintiffs do not allege prejudice. At any rate, plaintiffs failed to state a violation of clearly established law, and thus their claims should be dismissed.

ARGUMENT

The district court dismissed plaintiffs' claims relating to the length of their detention (Claims 1, 2, 5, and 24) but not the claims relating to the conditions of their confinement (Claims 3, 5, 7, 8, and 20-23). In the cross-appeal, plaintiffs challenge the district court's dismissal of the length-of-detention claims. As explained below (pp. 8-46), this challenge is meritless and should be rejected. In the appeal, defendants explain that the district court erred in failing to dismiss the conditions claims. *See* Defs. Opening Br. at 31-57; 46-70, *infra*. Accordingly, this Court should reverse the district court as to these claims.

ISSUES ON PLAINTIFFS' CROSS-APPEAL

I. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS' CLAIMS RELATING TO THE LENGTH OF THEIR DETENTION FAILED TO STATE A VIOLATION OF CONSTITUTIONAL RIGHTS, LET ALONE CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS.

Plaintiffs' constitutional claims relating to the length of their detention (Claims 1, 2, and 5)[2] must be analyzed under the settled two-step qualified immunity inquiry. As discussed in our opening brief (Br. at 21-25), this Court "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all." *Wilson v. Layne*, 526 U.S. 603, 609 (1999). If the court finds the violation of

[2] Plaintiffs also challenge the length of their detention under the Federal Tort Claims Act (Claim 24). This claim is addressed separately in Part II below.

a constitutional right, it must then address whether that right was "clearly established" at the time of the alleged conduct. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Lombardi v. Whitman*, __F.3d __, 2007 WL 1148709 at *4 (2d Cir. 2007).

This inquiry must be resolved "at the earliest possible stage of the litigation," *Scott v. Harris*, 127 S. Ct. 1769, 1773 n.2 (2007) (internal quotation marks and citations omitted), because qualified immunity is "an *immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). It provides an "entitlement not to stand trial or face the other burdens of litigation." *Id.* Further, qualified immunity applies unless "it would be clear to a reasonable officer that [the] conduct was unlawful *in the situation he confronted*." *Brosseau v. Haugen*, 543 U.S. 194, 198-199 (2004) (per curiam) (quoting *Saucier*, 533 U.S. at 201) (emphasis added). Whether a right is clearly established "must be [determined] in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201.

In any event, plaintiffs' claims regarding the length of detention fail under the first step of the qualified immunity analysis. As the district court held, plaintiffs have not adequately alleged that the length of their detention violated any constitutional rights at all, let alone clearly established rights. Thus, the Court should affirm the decision below on the length of detention.

A. The District Court Properly Held That Plaintiffs' Detention Did Not Violate Substantive Due Process.

Plaintiffs' complaint (Claim 2) does not state a valid substantive due process claim. To violate substantive due process, a government action must be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Lombardi*, 2007 WL 1148709 at *5 (internal quotation marks and citations omitted). Plaintiffs contend that their substantive due process rights were violated because the government lacked *statutory* authority under the INA to detain them once "removal * * * could have been effectuated." JA 96 (complaint at ¶ 8); Pl. Br. at 26. According to plaintiffs, as soon as removal becomes possible, continued detention lacks a "legitimate immigration law enforcement purpose," JA 181 (complaint at ¶ 294), and the INA does not permit the government to delay removal, even for a short period of time, and even during an unprecedented law enforcement crisis like the one the Nation faced in the aftermath of September 11, while the government determines whether the alien is a terrorist or has a connection to terrorism. *See, e.g.*, Pl. Br. at 40 ("Once Plaintiffs could have been removed, there was no *conceivable* immigration purpose for their detentions.") (emphasis in original). Plaintiffs further contend that detention in violation of the INA "also violates the Due Process Clause." Pl. Br. 26-27.

But plaintiffs are mistaken. First, their detention was consistent with the plain language of the INA, and thus there was no statutory violation. Second, even if there was a statutory violation, the detention was not so "outrageous and egregious" and "truly brutal and offensive to human dignity" as to "shock the conscience" in violation of the Due Process Clause. *Lombardi*, 2007 WL 1148709 at *5, 7. In any event, even if plaintiffs could show a constitutional violation, they have not shown the violation of clearly established rights. Defendants address these issues in turn.

1. a. Plaintiffs' detention did not violate the INA. As the district court recognized, the INA does not require removal or release as soon as removal can be effectuated, and nowhere does the statute suggest that the government's "purpose" or motive is relevant to the lawfulness of the detention. SA 42-43. To the contrary, the INA provides an initial 90-day "removal period" in which the alien "shall" be detained, 8 U.S.C. § 1231(a)(1)-(2), and further authorizes the Attorney General to detain the alien longer in a variety of circumstances, including when the Attorney General determines that the alien would be a "risk to the community,"[3] 8 U.S.C. § 1231(a)(6). Neither provision uses the word "purpose" or otherwise purports to

[3] On March 1, 2003, the Department of Homeland Security (DHS) assumed responsibility for the detention and removal program. *See* Homeland Security Act of 2002, §§ 441(2), 442(a), 116 Stat. 2192-2194, 6 U.S.C. §§ 251(2), 252(a) (2000 ed., Supp. II). Because the events at issue occurred prior to that date, this brief refers to the Attorney General and INS instead of the Secretary of Homeland Security and DHS.

prohibit detention once removal becomes possible. Under the plain language of the statute, plaintiffs' claim fails.[4]

b. Further undermining plaintiffs' claim are the removal provisions of the INA, which permit the Executive to delay an alien's removal instead of promptly effectuating it. *See* 8 U.S.C. § 1231(b). Under these provisions, the Executive can choose not to send an alien to the country he designated – even if that country is ready, willing, and able to accept him – when "removing the alien to the country is prejudicial to the United States," or otherwise "inadvisable." 8 U.S.C. § 1231(b)(2)(C)(iv), (b)(2)(E)(vii); *see also* 8 C.F.R. § 215.3(b)-(c) (providing that the Attorney General may also block an alien's departure when such departure would be prejudicial to national security interests). The Executive has discretion to look for another country to which the alien can be removed.

This authority would be virtually useless if the Executive could not investigate before it made its decision on whether removal would be "prejudicial" or

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[4] The authority to detain an alien under section 1231(a)(6) is independent of the authority under the INA to detain certain "terrorist aliens," 8 U.S.C. §§ 1226a, 1537. Those latter provisions, cited by plaintiffs' amici, make it clear that certain categories of aliens can be detained even when removal "is unlikely in the reasonably foreseeable future." 8 U.S.C. § 1226a(a)(6). Those provisions in no way limit the more general authority to detain an alien after the entry of his removal order under sections 1231(a)(2) and (a)(6). The argument that someone with suspected ties to September 11 cannot fall within the scope of section 1231(a)(6) is baseless. The plain text permits such detention where, *inter alia*, the alien is "determined by the Attorney General to be a risk to the community."

"inadvisable." The government would have to make hasty, ill-informed judgments without the benefit of careful study (or be compelled to release a potentially dangerous alien into the United States and run the risk of flight or an attack perpetrated by the alien while the study continues). For instance, under plaintiffs' view, the government would be unable to complete a terrorism investigation before deciding whether to send a potential terrorist on a plane back to his home country, where he might be able to rejoin his terror network and plan additional attacks on the United States or its allies.

Needless to say, such a construction of the INA would have grave foreign policy consequences. Even in the more mundane context of removing aliens who are not "of interest" to a terrorism investigation, the Supreme Court has recognized that "[r]emoval decisions, including the selection of a removed alien's destination, may implicate our relations with foreign powers." *See Jama v. Immigration & Customs Enforcement,* 543 U.S. 335, 348 (2005); *see also Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations"); *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (noting that decision relating to immigration "may implicate our relations with foreign powers"). And when the alien's removal could affect the national security of our allies, the foreign policy considerations are

even more profound. Because plaintiffs' novel and atextual interpretation of the INA would preclude the government from conducting a careful investigation whenever "removal could * * * be[] effectuated," the Court should reject that interpretation.

c. Plaintiffs' argument is also contrary to the history of the INA. Prior to 1996, the INA provided a duty of "reasonable dispatch" to effect an alien's departure from the United States after the entry of a final order of deportation. *See* 8 U.S.C. § 1252(c) (1994). But when Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009- 546, it eliminated that duty. This change further undermines plaintiffs' claim that, at the time of their detention in 2001 and 2002, the INA required the government to effectuate removal as soon as possible after the entry of a removal order.

d. The Supreme Court's ruling in *Zadvydas v. Davis,* 533 U.S. 678 (2001), confirms the lawfulness of plaintiffs' detention. In *Zadvydas*, the Supreme Court examined whether aliens could be detained indefinitely under the INA. Choosing not to resolve the constitutional issues raised by indefinite detention, the Court instead interpreted the detention statute (8 U.S.C. § 1231) as limited by an implied "reasonableness" requirement. *Zadvydas*, 533 U.S. at 700-01. Acknowledging the broad discretion that the Constitution and Congress have afforded the Executive Branch in immigration matters, the Court held that a six-month period of detention

was reasonable and would not give rise to constitutional concerns. *Id.* It is only "*[a]fter* this 6-month" period that the government must be prepared to justify detention by showing that the alien is likely to be removed in the reasonably foreseeable future. *Id.* at 701 (emphasis added). The Court recognized this six-month period "for the sake of uniform administration in the federal courts," to provide the Executive with "necessary * * * leeway," and concomitantly, "to limit the occasions when courts" may intrude into the Executive's core functions of administering the immigration laws and conducting the Nation's foreign policy. *Id.* at 700-01. Accordingly, when an alien is detained for less than the six-month period, a court should defer to the Executive's judgment concerning that detention and should not second-guess whether the Executive's motives served legitimate immigration purposes. *See id.*

Moreover, the Supreme Court acknowledged that the Executive Branch is entitled to "heightened deference" in matters involving national security. *Id.* at 696. Far from cabining the Executive in times of crisis, the Court expressly reserved the question of what temporal limits *beyond* the six-month limit might apply when "terrorism or other special circumstances" are present. *Id.* The Court even noted that indefinite detention could pass constitutional muster in such situations. The

September 11 attacks present a paradigmatic example of such "special circumstances" warranting additional leeway on the Executive's part.

Plaintiffs' argument that the Judiciary has a role on a case-by-case basis to assess the Executive's "purpose" and to confirm that the government proceeds with haste to effectuate removal is anathema to *Zadvydas*, its uniform six-month period, and the deference and "leeway" the Court sought to extend to the Executive. Nowhere in *Zadvydas* did the Court seek to limit detention to cases in which the Executive can prove it has an appropriate purpose, and never did the Court say that the only basis for delaying removal is when removal cannot be effectuated. As the district court held, "[n]othing in *Zadvydas* or *Wang* suggests" that it should be so narrowly construed. SA 46 n.37; *see also Wang v. Ashcroft,* 320 F.3d 130, 146 (2d Cir. 2003) (applying the reasonable foreseeability test even though the briefs and record established the government was able to remove Wang to China). Unsurprisingly, the circuit and district courts have consistently rejected claims challenging detention of less than six months, holding that such claims are premature.[5]

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[5] *See, e.g.*, *Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 (11th Cir. 2002) ("This six-month period thus must have expired at the time Akinwale's § 2241 petition was filed in order to state a claim under *Zadvydas*."); *Vasquez v. Immigration and Customs Enforcement*, 160 Fed.Appx. 199, 2005 WL 3481523 (3d Cir., Dec. 21, 2005); *Okpoju v. Ridge*, 115 Fed.Appx. 302, 2004 WL 2943629, (5th Cir., Dec. 20, (continued...)

Accordingly, plaintiffs' detentions fall squarely within the bounds of *Zadvydas*. Four plaintiffs were detained for *less* than six months after the entry of their removal orders.[6] And the remaining three plaintiffs were detained for less than one month beyond the six-month period.[7] Plaintiffs do not dispute that in that month there was

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[5](...continued)
2004) ("The district court properly denied Okpoju's claim regarding his continued detention as premature because, at the time of the district court's ruling, Okpoju had not yet been in custody longer than the presumptively reasonable six-month post removal order period."); *Singh v. Gonzales*, 2007 WL 1108875 (D.Ariz., April 13, 2007); *Diallo v. Gonzales*, 2007 WL 942094, (N.D.Tex., March 28, 2007) ("Even liberally construing the petition to raise a claim challenging his post-order removal detention under § 1231, his claim is premature. Petitioner cannot show that he has been in post-order removal detention for at least six months from the date his removal order became final."); *Kalasho v. U.S. Dept. of Homeland Sec.*, 2007 WL 431023 (W.D.Mich., Feb. 5, 2007); *Sofowora v. Gonzales*, 2006 WL 2785733, *3 (E.D.Cal. 2006); *Flores-Padilla v. Stine*, 2006 WL 3021175, (E.D.Ky., October 18, 2006); *Uyur v. Hogan*, 2006 WL 4498156 (M.D.Pa., July 28, 2006) ("Based on the facts asserted in the Petition, Uyur's presumptively reasonable six-month period of detention has not yet expired. Assuming Uyur's order of removal became final on March 9, 2006, the six-month period will expire on or before September 9, 2006. Therefore, Uyur's petition is premature."); *Daniels v. DHS*, 2006 WL 1540798 (D.N.J. May 31, 2006). Plaintiffs are thus incorrect in asserting (Pl. Br. at 33 n.6) that the six-month period is rebuttable, and that courts can entertain *Zadvydas* claims prior to the expiration of the period.

[6] Turkmen was removed three months and 25 days from the date he accepted a voluntary departure order. Saffi was detained for four months and 18 days after he was ordered removed. Jaffri was detained three months and 12 days after he was ordered removed. Sachdeva was detained for three months and 17 days after he was ordered removed. SA 45 n.35.

[7] Yasser was detained for six months and 16 days after he was ordered removed. Hany was detained six months and 9 days after he was ordered removed. (continued...)

a significant likelihood of removal in the reasonably foreseeable future; in fact, each of them was actually removed.

Plaintiffs contend that the district court contradicted *Zadvydas* by providing an "open-ended authorization of indefinite detention in every removal case in which the government faces no difficulty in deporting the non-citizen." Pl. Br. at 23. But the district court did no such thing. The district court did not hold that the government can continue to detain an alien whenever it is able to remove him, even if it never will. Rather, the court simply recognized that the three plaintiffs who were detained slightly longer than six months were likely to be removed in the reasonably foreseeable future. Because "removal remain[ed] reasonably forseeable," plaintiffs' "due process rights [we]re not jeopardized by [their] continued detention." *Wang*, 320 F.3d at 146.

e. In any event, even if plaintiffs were correct that the INA permits detention only when the government has a "legitimate immigration law enforcement purpose," JA 181 (complaint ¶ 294), plaintiffs' claim would still fail. They allege that the "purpose" behind their detention was to complete a terrorism investigation. Pl. Br. at 21, 24. As the Office of Legal Counsel has concluded, "there can be no question

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[7](...continued)
Baloch was detained for six months and 27 days after he was ordered removed. SA 45 n.36.

that time spent on such efforts is * * * reasonably related to the enforcement of the immigration laws." *Limitations on the Detention Authority of the Immigration and Naturalization Service,* 2003 WL 21269067 (February 20, 2003) (http://www.usdoj.gov/olc/INSDetention.htm); *see also* SA 47 (recognizing "legitimate foreign policy considerations"). Indeed, as explained above, removal decisions are "intricately interwoven" with foreign affairs, *Harisiades*, 342 U.S. at 588-89; *Jama*, 543 U.S. at 348 ("[r]emoval decisions * * * may implicate our relations with foreign powers"), and a removal undertaken without a thorough investigation would potentially threaten our foreign relations.

Plaintiffs claim that these foreign policy considerations must be ignored because the complaint avers that there was no legitimate immigration purpose supporting their detention. Pl. Br. at 34-36. But plaintiffs cannot unilaterally determine the scope of the Executive's immigration powers in a pleading. Those powers are a matter of statutory and constitutional law, and they cannot be pled away in a complaint. As this Court has held, "[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to [defeat] a motion to dismiss." *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 337 (2d Cir. 2006). Rule 8 "requires more than labels and conclusions." *Twombly*, slip. op. at 8. Were the rule otherwise, aliens could force discovery just by alleging an illegitimate

purpose, as plaintiffs have done here. Burdensome *Bivens* actions and detainee habeas cases would become commonplace.

Moreover, plaintiffs' own complaint supports the foreign policy and national security concerns related to their removals. The complaint notes that plaintiffs were deemed "of interest" to the post-September 11 terrorism investigation. Plaintiffs further cite a newspaper story explaining that the reason for the delay in removal was to permit investigators to evaluate information "pouring in from overseas to ensure that they have no ties to terrorism." JA 105 (quotation marks and citation omitted). And the Office of the Inspector General (OIG) report (which plaintiffs have adopted by reference in their complaint) explains that the former Attorney General believed that "it was in the national interest to find out more about [the detainee] before permitting them to leave." JA 340. The former Attorney General further told the OIG that delay in removal was required because "the United States might want to share the information with the country to which the alien would be removed." JA 340-341.

Plaintiffs cannot disregard these allegations by pleading a false distinction between immigration purposes and foreign policy. The alleged purpose for the detention – completing the terrorism investigation – is a legitimate immigration

purpose.[8] Accordingly, even if the INA required the government to have an immigration "purpose" for post-order detention, detaining plaintiffs to complete a terrorism investigation before removing them to a cooperating foreign nation was consistent with the INA and the foreign policy interests reflected in it.[9]

2. Moreover, even if the detention was not consistent with the INA, plaintiffs have nonetheless failed to state a substantive due process claim. Under circuit precedent, to state a substantive due process claim, a plaintiff "must establish (1) that he has a right to be free from continued detention * * *, (2) that the actions of the officers violated that right, *and* (3) that the officers' conduct '*shocks the*

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[8] Plaintiffs contend (Pl. Br. at 31 n.6) that decisions addressing the impact of INS detention on Speedy Trial Act rights are precedent for an inquiry into the purpose of detention under 8 U.S.C. § 1231. The cases that plaintiffs cite, however, establish only that, when an alien is prosecuted for the same conduct that formed the basis for the immigration violation on which he was held, and the INS has prolonged detention to permit the criminal investigation to proceed, the detention may trigger the deadlines of the Speedy Trial Act, and may thus lead to a Speedy Trial Act violation that may be raised *in the criminal trial*. That consequence for the criminal trial does not mean that the INS lacks power to detain an alien or that the INS has a general obligation to act with dispatch once an order of removal has been entered. *Limitations on the Detention Authority of The Immigration and Naturalization Service*, *supra*, 2003 WL 21269067.

[9] As the Supreme Court recognized in *Abel*, the interests of immigration and crime control are similarly linked. *See Abel*, 362 U.S. at 229. For this reasons as well, this Court should reject the distinction that plaintiffs attempt to draw between law enforcement purposes and immigration purposes.

conscience.'"[10] *Russo v. City of Bridgeport*, 479 F.3d 196, 205 (2d Cir. 2007) (emphasis added); *see also Wilkinson*, 545 U.S. at 224 (recognizing that not every violation of a regulation violates the Due Process Clause). For government action to "shock the conscience," it must be "outrageous and egregious" and "truly brutal and offensive to human dignity." *Lombardi*, 2007 WL 1148709 at *5.

Plaintiffs never even attempt to meet this standard, and for good reason. Their relatively short detentions in the immediate aftermath of September 11, while government investigators "used all available law enforcement tools to ferret out the persons responsible for those atrocities and to prevent additional acts of terrorism," SA 2, hardly shocks the contemporary conscience. The government did exactly what it was supposed to do, and as the district court recognized, "[w]e should expect nothing less" from it. *Ibid.* Indeed, in light of the foreign policy and national security consequences of removing a terrorist alien, *see supra* at 12-14, it would have been a dereliction of duty for the government to send potential terrorists on a plane back to their home countries, where they might be able to regroup with their terrorist

[10] Plaintiffs erroneously suggest that, under *Wang*, any violation of the statute, 8 U.S.C. § 1231, INA § 241, would also be a violation of Due Process. Pl. Br. at 26-27. In fact, *Wang* held only that "detention of an alien '*once removal is no longer reasonably foreseeable*' not only violates § 241, it also violates the Due Process Clause." *Wang*, 320 F.3d at at 146 (emphasis added). Here, as noted, there is no dispute that removal was reasonably foreseeable.

networks and plan additional assaults against the United States and our allies. Plaintiffs have failed to state a substantive due process claim.

3. Recognizing the infirmities of their arguments, plaintiffs seek to raise a new claim on appeal. Specifically, they argue that two plaintiffs, Turkmen and Ebrahim, did not fall within the scope of § 1231(a)(6) and thus were not properly detained under that statute, irrespective of the government's purpose. Pl. Br. at 36-37. Because plaintiffs never raised this argument in the district court proceedings, it has been waived. *See Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal").

In any event, this argument misconstrues Section 1231(a)(6), which expressly permits the government to detain aliens "determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal." Although plaintiffs allege that they did not "pose[ ] a danger or flight risk," JA 92, they admit the immigration judge found to the contrary. JA 151-152. Plaintiffs did not appeal that ruling, and thus they failed to exhaust their claim. *See Thomas v. Holmes*, 77 Fed.Appx. 538 (2d Cir. 2003); *see also Wilson v. Gonzales*, 471 F.3d 111 (2d Cir. 2006). Additionally, Turkmen and Ebrahim never filed a habeas petition challenging the lawfulness of their detention under Section 1231(a)(6), which should preclude

them from seeking *Bivens* relief. *Cf. Heck v. Humphrey*, 512 U.S. 477 (1994). Further, even if the decisions to detain Turkmen and Ebrahim were erroneous, plaintiffs do not explain – and certainly did not adequately plead – how those specific errors are attributable to defendants Ashcroft and Mueller, who had no opportunity to review the immigration judge's decision. Finally, plaintiffs do not even attempt to show that any factual error regarding their flight risk or dangerousness was so egregious as to be conscience shocking. Thus, even if plaintiffs' waiver could be overlooked, their newest claim still fails on the merits.

4. At the very least, the alleged rights at issue were not clearly established. No court has ever adopted plaintiffs' construction of the INA, let alone held that detention within *Zadvydas*'s temporal bounds can shock the conscience. And given the Supreme Court's longstanding recognition of the interrelation of foreign affairs and immigration policy, plaintiffs cannot seriously suggest that their construction of the INA – which divorces the two – was clearly established. Finally, defendants Ashcroft and Mueller had no notice that their actions in responding to the deadliest attack on American soil and in undertaking the largest and arguably most important law enforcement investigation in the Nation's history could subject them to personal liability for damages claims. Thus, they are entitled to qualified immunity.

B. The District Court Properly Held That Plaintiffs' Detention Did Not Violate The Fourth Amendment

Plaintiffs' Fourth Amendment claim (Claim 1) fares no better than their substantive due process claim. Indeed, before the district court, "Plaintiffs d[id] not even dispute that if their Fifth Amendment claim fails, so does their Fourth Amendment claim." Govt's D. Ct. Reply Brief at 15 n.15; *see also* Pl. Br. at 45-48 (arguing only that the Fourth Amendment covers both the initial arrest and continued detention, but not making any argument that the Fourth Amendment imposes broader restrictions on immigration detention than does substantive due process). To the extent plaintiffs are making new arguments on appeal, *see* Pl. Br. at 37-52, the Court should not consider them, *see Greene*, 13 F.3d at 586. In any event, plaintiffs' Fourth Amendment claim lacks merit.

1. First, as explained, plaintiffs' detention falls squarely within the bounds of detention permitted under *Zadvydas*. *See supra* at 14-18. Although *Zadvydas* did not expressly address the Fourth Amendment, the Court's statutory construction was driven by concerns of constitutional avoidance, and the Court made clear that detention consistent with its opinion would in fact avoid those concerns. *Zadvydas*, 533 U.S. at 699; *see also Wang*, 320 F.3d at 128. What the Court found lawful and thus reasonable in *Zadvydas* is lawful and reasonable for purposes of the Fourth Amendment as well. This Court should reject plaintiffs' novel argument, which has

never been adopted by any other court, that *Zadvydas* is just one restriction among many regarding the length of post-removal order detention**.**

2. In any event, plaintiffs' detention did not violate the Fourth Amendment, even assuming it applies to continued detention. As the Supreme Court has established, "the touchstone of the Fourth Amendment is reasonableness * * * , measured in objective terms by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). Plaintiffs' brief detention in the aftermath of September 11, while government investigators confirmed that plaintiffs had no connections to terrorism, was the paradigm of reasonableness. At a time when the country faced the prospect of additional attacks and was still assessing the nature of the enemy and those responsible for September 11, our government did exactly what it was supposed to do. As the district court recognized, "[w]e should expect nothing less" from it. SA 2; *see also supra* at 22.

3. As with their substantive due process claim, plaintiffs mistakenly argue that a government official's purpose is relevant to whether immigration detention (under INA section 241) was consistent with the Fourth Amendment. But it is hornbook law that, in determining the reasonableness of a seizure of a person, a court examines objective facts, not subjective motivations. *See Graham v. Connor*, 490 U.S. 386, 396-97 (1989). "[T]he subjective motivations of the individual officers * * * ha[ve]

no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment." *Id*. at 397. "An officer's evil intentions will not make a Fourth Amendment violation out of * * * objectively reasonable" conduct; "nor will an officer's good intentions make * * * objectively unreasonable * * * [conduct] constitutional." *Ibid.;* s*ee also Devenpeck v. Alford*, 543 U.S. 146, 153 (2004); *Whren v. United States*, 517 U.S. 806, 813 (1996). Thus, plaintiffs' motive-based claim – that there was no real immigration purpose supporting the delay in removal – is not cognizable under the Fourth Amendment.

Citing *Whren* and *Indianapolis v. Edmond*, 531 U.S. 32 (2000), plaintiffs contend that there are exceptions to the general rule that a government official's purpose is irrelevant to the Fourth Amendment. *See* Pl. Br. at 40-47. But the Supreme Court has made clear that there are only two such exceptions, neither of which is implicated here. In *United States v. Knights*, the Court concluded that, "[w]ith the limited exception of some special needs and administrative search cases, [the Court] ha[s] been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers." 534 U.S. 112, 122 (2001) (citing *Edmond*, 531 U.S. at 45, and *Whren*, 517 U.S. at 813). Plaintiffs understandably do not argue that this is a special needs case, *see, e.g.*, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *United States v. Amerson*, 483 F.3d 73 (2d Cir. 2007); *Cassidy*

v. Chertoff, 471 F.3d 67, 74-75 (2d Cir. 2006), in which the government seeks to justify an intrusion by citing a special need beyond the ordinary interest in law enforcement. Indeed, the government's contention is that the detentions at issue fall squarely within the ordinary immigration law enforcement authority in the INA. *See supra* at 11-14. Nor do plaintiffs contend that this case involves an administrative search, which it obviously does not. Accordingly, under Supreme Court precedent, the motivations and purposes of government officials are irrelevant.

Plaintiffs cite *Colyer v. Skeffington*, 265 F. 17 (D. Mass. 1920), and *Abel v. United States*, 362 U.S. 217 (1960), but these cases are inapposite. *Colyer* was not even a Fourth Amendment case. *See Colyer*, 365 F. 17 (addressing whether Communists are an organization advocating the overthrow of the government by force or violence, Due Process claims, and the excessiveness of bail), *rev'd in part by Skeffington v. Katzeff*, 277 F. 129 (1st Cir. 1922). *Abel* was a Fourth Amendment case, but it was also an administrative search case, in which the government allegedly used an administrative warrant for the "purpose of amassing evidence in the prosecution for crime." *Abel*, 362 U.S. at 230. Because "[t]he preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States," the government could not circumvent those restrictions by using an administrative warrant to gather

evidence for the "criminal case." *Id.* at 226, 230. *Abel* is inapposite to the case at hand, which does not involve an administrative search, let alone one that is used to bolster a criminal prosecution. Plaintiffs were never criminally charged, much less prosecuted.

4. At any rate, even if the government's purpose were relevant to plaintiffs' detention, plaintiffs' Fourth Amendment claim still fails. As discussed above (pp. 12-14, 18-21), plaintiffs' complaint and the OIG report which it incorporates establish that the government had a legitimate and, indeed, unassailable purpose – namely, completing a terrorism investigation before removing an illegal alien who potentially had connections to terrorism. Because of the inextricable link between immigration, foreign policy, and national security, the alleged purpose is unquestionably valid, and plaintiffs cannot plead otherwise. *See supra* at 18-21.

5. Finally, even if plaintiffs' detention violated Fourth Amendment rights, those rights were not clearly established. Plaintiffs cite no case in which any court has held that immigration detention that is consistent with *Zadvydas* and substantive due process can nonetheless violate the Fourth Amendment. Nor do plaintiffs cite authority for the proposition that the government's purpose is relevant to immigration detention or that completing a terrorism investigation is an impermissible purpose. In any event, as the district court held: "Plaintiffs themselves concede that the

Supreme Court has 'left open' the question whether the Fourth Amendment applies to post-arrest detention, and they cite no Second Circuit precedent resolving this issue in their favor. Therefore, at the very least, the Fourth Amendment's application in this context is not clearly established, and defendants are entitled to qualified immunity." SA 46.

C. The District Court Properly Held That Plaintiffs' Detention Did Not Violate The Equal Protection Clause.

1. The context of the government's terrorism investigation is vital in assessing plaintiffs' Equal Protection claim (Claim 5). Immediately after al Qaeda hijacked commercial airliners, devastated prominent targets in the United States, and murdered thousands of innocent civilians, the government launched one of the largest and most significant law-enforcement investigations in the Nation's history. Within three days, more than 4,000 FBI Special Agents and 3,000 support personnel were assigned to work on the investigation. And by September 18, 2001, the FBI had received more than 96,000 leads from the public. JA 277-278.

This massive investigation sought to identify those who were connected to terrorism. As articulated in a memorandum from then-Attorney General Ashcroft to all United States Attorneys on September 17, 2001, the Department sought to prevent future terrorism by arresting and detaining violators who "have been identified as persons who participate in, or lend support to, terrorist activities." JA 224.

Naturally, in light of the identity of the September 11 terrorists, the investigation had a significant immigration component and took into account whether an individual was an illegal alien. JA 224-226. Allegedly, various officials involved in the investigation also took into account an alien's race, religion, and ethnicity in determining whether he was of interest and should be detained. According to plaintiffs, these considerations were constitutionally impermissible, and thus their detentions violated the Equal Protection Clause.

2. But even assuming plaintiffs' allegations to be true, plaintiffs' Equal Protection claim lacks merit. As the district court recognized, the Constitution does not require law enforcement to be blind to reality or to waste precious resources during a national emergency by ignoring information known about the assailants. In the early days of the investigation, the government learned that the attacks had been carried out at the direction of Osama bin Laden, leader of al Qaeda, "a fundamentalist Islamist group," motivated by its own religious extremism. SA 48. All 19 of the hijackers hailed from Arab countries, and some "were in violation of the terms of their visas at the time of the attacks," *id.* Accordingly, "[i]n the immediate aftermath of these events, when the government had only the barest of information about the hijackers to aid its efforts to prevent further terrorist attacks, it determined to subject to greater scrutiny aliens *who shared characteristics with the hijackers*, such as violating their visas and national origin and/or religion." *Ibid.* (emphasis added).

This common-sense approach did not violate any equal protection guarantee, especially considering the unprecedented threat the nation faced, the overwhelming size of the investigation, the limited information at the government's disposal, and the need to promptly identify and bring to justice those responsible for the atrocities before they could carry out additional attacks. Indeed, even in less compelling circumstances, this Court has allowed investigators to take into account demographic considerations in responding to specific threats from individuals of a particular race or religion. In *Brown v. City of Oneonta*, this Court sustained a dismissal of a claim that the police violated Equal Protection by focusing on black males after an assault victim described the assailant as a black male. *See* 221 F.3d 329, 337 (2d Cir. 2000). The police requested and obtained a list of all black male students at the state university, and then attempted to question them. In addition, the police conducted a "sweep" of the entire town in which they stopped and questioned anyone who was not white. Despite this focus on race, the Court rejected the Equal Protection challenge. As the Court recognized, "[i]f there are few black residents who fit the general description [of a criminal suspect], * * * it would be more useful for the police to use race to find a black suspect than a white one." *Ibid.* Likewise, it does not violate Equal Protection when the government focuses on young, male, Arab Muslims who have violated the immigration laws after learning that the hijackers were young, male,

Arab Muslims who violated the immigration laws. Accordingly, plaintiffs' claim fails.

3. Plaintiffs' claim is even more meritless because this case arises in the immigration context, and thus the standard of review is not strict scrutiny, as plaintiffs claim. Rather, the Executive generally need only provide "a facially legitimate and bona fide reason" for its actions. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972).[11] Once such a reason is given, courts should not "look behind" it. *Id.* at 770. As this Court has explained (in a case on which plaintiffs rely, *see* Plaintiffs' Brief at 60), this highly deferential standard applies even in the detention context. *See Bertrand v. Sava*, 684 F.2d 204, 212-213 (2d Cir. 1982) (detention of Haitians who were denied parole). Plaintiffs do not even attempt to show that the government violated this standard. *See* Pl. Br. at 59 (applying strict scrutiny).

4. In addition, as the district court held, plaintiffs' discrimination claim "is closely akin to a selective enforcement claim, which, in the immigration context, is

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[11] *See also Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979) ("Distinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive * * *[and] [s]o long as such distinctions are not wholly irrational they must be sustained"). Indeed, strict scrutiny would be inconsistent with the fact that government immigration policy necessarily makes distinctions based on nationality. *See, e.g.*, Immigration Act of 1990, Pub. L. No. 101-649, § 103 (1990) (setting aside visas for natives of Hong Kong); *id.* § 134 (special visas for Tibetans); Soviet Scientists Immigration Act of 1992, Pub. L. No. 102-509 (1992) (special admission rules for scientists from the former Soviet Union).

generally not cognizable." SA 47. In *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) ("*AADC*"), the Supreme Court held that "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. Plaintiffs attempt to distinguish this holding on the ground that the Court was addressing the situation of an alien asserting a defense "against his deportation." Pl. Br. at 57. The Court's rationale, however, is not so limited and clearly applies to the entire removal process. The *AADC* Court emphasized that courts should not probe the government's motives for seeking removal of some aliens, but not others. The Court recognized that such immigration matters are fraught with sensitive foreign policy concerns:

> The Executive should not have to disclose its "real" reasons for deeming nationals of a particular country a special threat – or indeed for simply wishing to antagonize a particular foreign country by focusing on that country's nationals – and even if it did disclose them a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy.

AADC, 525 U.S. at 490-91.

These concerns apply with full force here. As discussed above, the United States had an entirely legitimate interest in treating some illegal aliens differently from others with respect to the length of their detentions for the purpose of investigating their backgrounds prior to removing them. The United States and the country of removal should know if the alien had any nexus to the September 11

attacks before the removal is effectuated. Indeed, failure to investigate that question in advance would be a dereliction of the Executive's foreign affairs and national security obligations. *See supra* at 13-14. Thus, the government's decision to delay the removal of plaintiffs, whom the government apprehended in the immediate aftermath of September 11, for the purpose of determining whether they had any terrorist connections, raises just the type of discretionary exercise of the foreign affairs and immigration powers that the Supreme Court recognized should not be subject to judicial scrutiny based on a claim of discrimination.

In *AADC*, the Court did not "rule out the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome." 525 U.S. at 491. The district court correctly concluded, however, that the claims here did not fall within that possible exception. SA 48-49. The district court noted that although "outrageous" is not a self-defining term, in *AADC*, the Court itself noted "a few things the Court did not consider to be outrageous are apparent" (SA 48): "deeming nationals of a particular country a special threat * * *[and] antagoniz[ing] a particular foreign country by focusing [enforcement efforts] on that country's nationals." *AADC*, 525 U.S. at 491. Taking those benchmarks into account, there is nothing "outrageous" about the alleged discrimination in this context. SA 48.

5. Plaintiffs cannot rely on their pleading efforts to save this claim. Although plaintiffs alleged "invidious animus against Arabs and Muslims," JA 113, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to [defeat] a motion to dismiss." *Achtman,* 464 F.3d at 337. As the Supreme Court held, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, slip op at 8. Indeed, when a claim against a government official involves allegations of improper motive, a reviewing court must "exercise its discretion in a way that protects the substance of the qualified immunity defense," in order to ensure that the official is "not subject to unnecessary and burdensome discovery or trial proceedings." *Crawford-El v. Britton*, 523 U.S. 574, 597 (1998). A court may therefore insist that a plaintiff "put forward 'specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment." *Id.* at 598 (*quoting Siegert v. Gilley,* 500 U.S. 226, 236 (1991) (Kennedy, J., concurring)).

Here, plaintiffs have fallen far short of what is required. The alleged policy itself – delaying the removal of aliens deemed of interest to the terrorism investigation until cleared – is perfectly lawful and non-discriminatory. And as the district court recognized, "subject[ing] to greater scrutiny aliens who shared

characteristics" with the hijackers is not invidious discrimination. SA 48. *See also Brown v. City of Oneonta*, 221 F.3d at 337. Plaintiffs have failed to present "specific, nonconclusory factual allegations," and thus consistent with *Twombly* and *Crawford-El*, this Court should affirm the decision below as to this claim.

6. Moreover, plaintiffs have failed to adequately plead the personal involvement of the former Attorney General and the FBI Director. As we argued in our opening brief (pp. 26-35) and as further discussed below (pp. 46-47), a *respondeat superior* claim is not cognizable in a *Bivens* action. Instead, plaintiffs had to allege that defendants Ashcroft and Mueller were personally responsible for discriminatory decisions. Nowhere do they do that. Plaintiffs' mere conclusory allegations of a discriminatory "policy" do not suffice. *See infra* at 47-54.

7. In any event, plaintiffs have failed to allege the violation of clearly established rights. Plaintiffs cite no authority for the proposition that the Equal Protection Clause prohibits the government from taking into account the demographic characteristics of terrorist hijackers when conducting a terrorism investigation, much less an investigation of the scale and importance that the government launched in the wake of September 11. At a minimum, *Brown*, *Kleindienst*, and *American Arab* cast significant doubt on this dubious and novel claim. Thus, plaintiffs Ashcroft and Mueller are entitled to qualified immunity.

D. Plaintiffs' Due Process Claim Relating To The Lack Of Formal Custody Reviews Under 8 C.F.R. § 241.4 Was Waived And In Any Event Is Without Merit.

1. Plaintiffs argue (pp. 61-66) for the first time on appeal that the government violated their procedural due process rights by not providing a "custody review" pursuant to 8 C.F.R. § 241.4, in order to assess whether they were dangerous and suitable for release in the discretion of the Attorney General. *See also* 8 U.S.C. § 1231(a)(6) (providing discretionary authority to detain). Plaintiffs never raised this claim before the district court.[12] Indeed, nowhere in their district court brief do plaintiffs even cite this regulation, let alone argue that there was an unconstitutional deprivation of review under it. Thus, the claim is waived. *Greene*, 13 F.3d at 586.

2. In any event, plaintiffs' procedural due process argument fails on the merits. Not every violation of a regulation constitutes a violation of the Due Process Clause, let alone a clearly established violation. *See, e.g., Wilkinson*, 545 U.S. at 224*; Massey v. Helman*, 259 F.3d 641, 647 (7th Cir. 2001) ("[a]lthough a violation of a state-created liberty interest can amount to a violation of the Constitution, not every

[12] Nor did plaintiffs adequately assert this claim in their complaint. The complaint does not state a cause of action based upon the alleged failure to have a custody review under 8 C.F.R. 241.4. Paragraph 84 of the complaint alleges the lack of a custody review, but nowhere does the complaint suggest that this lack of review gives rise to a claim for relief. Plaintiffs should not be heard to criticize footnotes in the district court opinion that pertain to a claim that plaintiffs never clearly made, and never raised at all in their district court brief.

violation of state law or state-mandated procedure is a violation of the Constitution"); s*ee also Davis v. Scherer*, 468 U.S. 183, 194 (1984) (noting that officials "do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision").

And as explained above, under *Zadvydas*, an alien has no Due Process right to release in the first six months after entry of the removal order or while removal remains reasonably foreseeable. The Executive can detain him without giving rise to any "serious constitutional threat." *Zadvydas*, 533 U.S. at 699. Plaintiffs – all of whom were illegal aliens ordered removed from this country – had no right to be released back into the country, and thus their detention could not violate the Constitution, whether or not they had a custody review.

Moreover, the review that plaintiffs contend was required would have been an empty formality. Plaintiffs were the subjects of an ongoing terrorism investigation conducted by the FBI, and they make no argument that the INS could have or should have trumped the FBI by declaring them to be non-dangerous and worthy of release prior to the completion of the investigation. The Constitution does not require the INS to double check the FBI. Thus, plaintiffs fail to establish prejudice. Indeed, even the plaintiffs who were allegedly detained for a brief period of time after being

cleared of terrorism (but while information continued to pour in) never allege prejudice.

At any rate, plaintiffs failed to file a habeas petition and thus should not be allowed to seek *Bivens* damages. *See Heck v. Humphrey*, 512 U.S. 477 (1994). If plaintiffs thought they were unlawfully detained, there was a remedy they could have pursued. They could have moved the habeas court to require the INS to provide custody reviews under the regulation. Because plaintiffs chose not to pursue that remedy, they should not be permitted to present their claim here. *See supra* at 23-24.

Finally, as discussed in depth in our opening brief (pp. 26-35) and below (pp. 46-58), a plaintiff must allege that a supervisor had some personal involvement in the asserted violation. Plaintiffs' complaint fails to allege the personal involvement of Ashcroft and Mueller as to the asserted deprivation of § 241.4 review.

E. The District Court's Rejection Of The Claims Relating To The Length Of Their Post-Removal Order Detention Should Also Be Affirmed On The Ground That It Is Inappropriate To Recognize A *Bivens* Remedy In This Context.

Even if plaintiffs had adequately alleged a violation of clearly established rights, their *Bivens* claims relating to the length of their confinement would still fail. As discussed in our opening brief (pp. 56-57), 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. *See Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988); *Bush v. Lucas*, 462 U.S. 367 (1983). The Supreme Court and this Court have consistently refused to imply a *Bivens* remedy where Congress has established a statutory remedial scheme to handle a particular category of disputes with the federal government, even where a claimed constitutional injury would otherwise "go unredressed." *Chilicky*, 487 U.S. at 425. The INA provides such a comprehensive scheme for the United States's administration of its sovereign authority over immigration. *See DeCanas v. Bica*, 424 U.S. 351, 353 (1976) (INA is a "comprehensive regulatory scheme 'of immigration and naturalization'"); *INS v. St. Cyr*, 533 U.S. 289, 292 (2001) (1996 amendments to INA are "comprehensive"). More specifically, the INA provides a detailed scheme addressing pre- and post-removal order detention. 8 U.S.C. §§ 1226, 1231. It generally bars review of discretionary detention decisions, and permits a habeas remedy to challenge unlawful detention. 8 U.S.C. § 1226(e). Further, the INA recognizes that when and where an alien is to be removed can implicate national interests, and vests discretion over such matters with the Attorney General. *See* 8 U.S.C. § 1231(b)(2)(C)(iv), (b)(2)(E)(vii). This detailed scheme is properly deemed to bar all of plaintiffs' constitutional *Bivens* claims seeking money damages for the length of their immigration detention.

As discussed in our opening brief (pp. 56-57), the district court erroneously attempted to distinguish *Chilicky* based on the fact that Congress did not see fit to include a private cause of action for monetary damages for constitutional violations in the INA. The same was true, however, in *Chilicky*. *See Dotson v. Griesa*, 398 F.3d 156, 166-67 (2d Cir. 2005) (under *Chilicky*, "it is the overall comprehensiveness of the statutory scheme at issue, not the adequacy of the particular remedies afforded, that counsels judicial caution in implying *Bivens* actions"). In *Chilicky*, the plaintiff was limited to equitable relief (including an order granting disability benefits), and the Social Security scheme offered no monetary remedy for the alleged due process violations. The Court held, however, that it was inappropriate for a court to supplement the scheme with a monetary remedy. That reasoning is fully applicable here and should bar plaintiffs' length-of-detention claims.

Notably, the courts of appeals have refused to recognize *Bivens* claims where Congress has not provided for a monetary remedy but instead contemplated that judicial review of an agency decision would be afforded under the APA. "[T]he existence of a right to judicial review under the APA is[] alone sufficient to preclude * * * a *Bivens* action." *Miller v. U.S. Dep't of Agr. Farm Serv. Agency*, 143 F.3d 1413, 1416 (11th Cir. 1998); *Moore v. Glickman*, 113 F.3d 988, 994 (9th Cir. 1997). As the Eighth Circuit recently explained, "[w]hen Congress has created a

comprehensive regulatory regime, the existence of a right to judicial review under the APA is sufficient to preclude a *Bivens* action * * *. Parties may not avoid administrative review simply by fashioning their attack on an agency decision as a constitutional tort claim against individual agency officers." *Nebraska Beef v. Greening*, 398 F.3d 1080, 1084 (9th Cir. 2005).

The rationale of these cases applies fully here. Congress has provided for judicial review of the agency removal order in proceedings that are in many ways similar to the APA and has also provided, through habeas, the right to challenge the lawfulness of immigration detention. Congress's careful attention to this subject matter and creation of the comprehensive and particularly calibrated and channeled review scheme strongly counsel against judicial creation of remedies going beyond what Congress chose to provide.

Moreover, courts have consistently refused to recognize a *Bivens* cause of action in contexts involving national security or foreign affairs. *See United States v. Stanley*, 483 U.S. 669, 678-85 (1987); *Chappell v. Wallace*, 462 U.S. 296, 298-304 (1983); *Beattie v. Boeing Co.*, 43 F.3d 559, 563-66 (10th Cir. 1994); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 205 (D.C. Cir. 1985) (Scalia, J.). As discussed above, the decisions of when and where to remove alien can strongly implicate foreign policy and national security concerns. The decision to create a monetary

damage action against an official rendering such sensitive decisions is thus properly made by Congress and not the courts.

II. THE DISTRICT COURT PROPERLY REJECTED PLAINTIFFS' FTCA CLAIM RELATING TO THE LENGTH OF PLAINTIFFS' DETENTION.

For the elements of a tort claim, the Federal Tort Claims Act ("FTCA") looks to the "law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). As the district court held, plaintiffs fail to state a viable false imprisonment claim (Claim 24) under New York law. In order to state such a claim, a plaintiff must show, *inter alia,* that the "confinement was not otherwise privileged." *Broughton v. State*, 37 N.Y.2d 451, 456 (N.Y.), *cert. denied*, 423 U.S. 929 (1975). Given the district court's ruling that the continued detention was fully authorized by and appropriate under the INA, the court properly held that the detention was "privileged" and thus could not support a state tort claim.

Plaintiffs argue for the first time on appeal that under *Dawoud v. United States*, 92 Civ. 1370, 1993 U.S. Dist. LEXIS 2682 (S.D.N.Y. 1993), defendants' actions "became tortious once the FBI cleared Plaintiffs and the United States, through negligence, continued to hold them." Pl. Br. at 72. Because this claim was not previously raised, it has been waived. *See Greene*, 13 F.3d at 586 In any event, the argument fails on the merits. *Dawoud* does not apply because, even after the FBI had

cleared plaintiffs in the main terrorism investigation, the INS still had legal authority to detain them on immigration charges, *see supra* at 11-16. Whereas in *Dawoud*, "once the state charges were dropped there was no evidence that Dawoud had violated the immigration laws," 1993 U.S. Dist. LEXIS 2682 at *7, here by contrast, there is no dispute that plaintiffs had in fact violated the immigration laws. And as discussed in Part I.A, the INA and *Zadvydas* expressly permit the detention of aliens ordered removed for six months and then for a longer period of time as long as removal remains reasonably foreseeable.

In addition, as plaintiffs' complaint itself notes, during this period, investigators were still pouring over information from overseas to ensure that the detainees did not have ties to terrorism. JA 105. Even after plaintiffs were cleared from the primary terrorism investigation, the Executive still needed to make an informed decision regarding where to remove plaintiffs and then to make the formal arrangement with the country of removal. These determinations involve sensitive and careful foreign policy and national security considerations. The INA does not require this decision to happen overnight, and plaintiffs cite no authority to the contrary. Because the detention was "privileged," plaintiffs do not have a valid false imprisonment claim under New York law.

Finally, plaintiffs suggest that their detention amounted to false imprisonment due to the "conditions of their confinement." Pl. Br. at 67. But plaintiffs never presented this claim to the agency, as required by the FTCA, 28 U.S.C. § 2675(a), or to the district court. Thus, the claim is barred. In any event, plaintiffs cite no New York case holding that harsh conditions such as alleged abuse can give rise to a false imprisonment claim. Thus, the claim is meritless.

ISSUES ON DEFENDANTS ASHCROFT AND MUELLER'S APPEAL

I. THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE CLAIMS AGAINST DEFENDANTS ASHCROFT AND MUELLER RELATING TO THE ALLEGED CONDITIONS OF CONFINEMENT.

A. Plaintiffs Failed To Adequately Allege Personal Involvement.

Plaintiffs seek to hold the former Attorney General and the FBI Director responsible for the abuse plaintiffs allegedly suffered at the hands of prison guards and for the other conditions of their confinement (including the placement of the MDC plaintiffs in the ADMAX SHU and the alleged "communications backout"). This Court has held, however, that an agency head is *not* liable for the alleged wrongs committed by his subordinates, unless he himself was personally involved in the wrongdoing. *Black v. Coughlin*, 76 F.3d 72, 74 (2d Cir. 1996) (agency heads cannot be "held personally responsible [in a money damage action] simply because" of their

"high position[s] of authority" during time of the alleged constitutional violations). Because plaintiffs have failed to allege the personal involvement of defendants Ashcroft and Mueller, and instead rely on insufficient conclusory allegations, plaintiffs' conditions-of-confinement claims (Claims 3, 5, 7, 8, and 20-23) should have been dismissed. This Court should reverse the decision below on these claims, which are the subject of defendants' appeal.

1. The Supreme Court has rejected the central premise of plaintiffs' argument defending their complaint and reaffirmed that conclusory allegations are insufficient. *See, e.g.*, *Bell Atlantic v. Twombly*, __ U.S. __, No. 05-1126 (May 21, 2007). In their brief, plaintiffs contend that their bare-bones allegations against defendants Ashcroft and Mueller should survive dismissal because "[d]ismissal 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." Pl. Br. at 19 (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *see also* Pl. Br. at 116 (same). The district court relied on the same premise. *See*, *e.g.*, SA 28, 38, 39, 42, 47. In *Twombly*, however, the Supreme Court expressly disavowed this language and explained that it "is best forgotten as an incomplete, negative gloss on an accepted pleading standard." Slip op. at 16. Thus, the Supreme Court undermined the very basis of plaintiffs' argument and the district court's opinion.

In addition, the Supreme Court clarified what Rule 8 demands from a plaintiff. The Court held that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 8. "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* And a plaintiff must make "a 'showing,' rather than a blanket assertion, of entitlement to relief." *id*. at 8 n.3.

Finally, the Court stressed that "[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management.'" *Id*. at 12. Instead, the Court admonished, courts should "tak[e] care to require allegations" that meet the Federal Rules' threshold pleading requirements. *Ibid*. Those discovery concerns are particularly pressing here, where plaintiffs seek discovery into sensitive discussions of the Nation's highest-ranking law enforcement officials in the aftermath of an unprecedented national crisis.

Plaintiffs' allegations against defendants Ashcroft and Mueller do not pass muster under these settled pleading standards. Despite the length of plaintiffs' complaint, which spells out in detail the allegations against *other* individuals, plaintiffs failed to allege *any* facts establishing the personal involvement of

defendants Ashcroft and Mueller. Far from making a "'showing' * * * of entitlement to relief," *id*. at 8 n.3, plaintiffs allege only that: the former Attorney General was "a principal architect of the policies and practices challenged here;" Director Mueller was "instrumental in the adoption, promulgation and implementation" of those policies; and both the former Attorney General and the Director "authorized, condoned and/or ratified the unreasonable and excessively harsh conditions" under which plaintiffs were detained. JA 95, 100-101. The few other paragraphs of the complaint that name Ashcroft and Mueller are similarly minimalist. JA 94-96, 111-112, 117. None of plaintiffs' allegations rises "above the speculative level," *Twombly*, slip op. at 8, or provides more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action," *ibid.* Under *Twombly*, plaintiffs' conditions-of-confinement claims should be dismissed.

2. Further, the Supreme Court's admonition that courts must "tak[e] care" to enforce these threshold pleading requirements, and must not rely on "the discovery process" and "careful case management" to weed out groundless claims, *id*. at 12, has particular force in the qualified immunity context. As explained above, qualified immunity is "an *immunity from suit* rather than a mere defense to liability," and an "entitlement not to stand trial or face the other burdens of litigation." *Mitchell*, 472 U.S. at 526. Because the benefits of qualified immunity are "effectively lost" if the

defendant is forced to endure these burdens, *id.*, the qualified immunity inquiry must be resolved "at the earliest possible stage [of the] litigation," *Scott v. Harris*, 127 S. Ct. 1769, 1773 n.2 (2007) (internal quotation marks and citations omitted), and inadequate, conclusory allegations must be dismissed prior to discovery. *See also Butz v. Economou*, 438 U.S. 478, 508 (1978) (requiring "firm" application of Federal Rules of Civil Procedure in qualified immunity cases). That is true even when the defendants are ordinary law enforcement officials, but it is especially true when it comes to subjecting the Nation's highest-ranking law enforcement officials to the burdens and demands of civil discovery.

Indeed, if plaintiffs' complaint were sufficient to survive dismissal, qualified immunity would provide little protection to agency heads and other high-level officials. A mere conclusory allegation of the existence of a policy, coupled with more-detailed allegations regarding the actions of subordinates, would be sufficient to drag the government official through vexatious and time-consuming discovery. The purported protections of "limited" or "phased" discovery are elusive, *Twombly*, slip. op. at 13 n.6, and the agency head could become inundated with burdensome discovery requests into his decisional process. As a result, "[p]ersons of wisdom and honor w[ould] hesitate to answer the President's call to serve," *Mitchell*, 472 U.S. at 541-42 (Stevens, J., concurring in the judgment), and government officials might be

deterred from executing their offices "with decisiveness and the judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 239-240 (1974); *see Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (qualified immunity doctrine "exists because 'officials should not err always on the side of caution' because they fear being sued"); *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (qualified immunity doctrine reduces "the risk that fear of personal monetary liabilities and harassing litigation will unduly inhibit officials in the discharge of their duties"); *cf. Crawford-El*, 523 U.S. at 597 (providing that a reviewing court must "exercise its discretion in a way that protects the substance of the qualified immunity defense," in order to ensure that the official is "not subject to unnecessary and burdensome discovery or trial proceedings").

As Justice Stevens has explained, "there surely is a national interest in enabling Cabinet officials with responsibilities in [the national security] area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation." *Mitchell*, 472 U.S. at 541 (Stevens, J., concurring in the judgment). Because plaintiffs' argument, if adopted, would interfere with such duties by burdening agency heads with unnecessary discovery and compelling them to proceed with undue caution, this Court should reject it and faithfully apply the *Twombly* standard to plaintiffs' conclusory complaint.

3. Sharing these concerns, numerous circuit courts have rejected conclusory allegations resembling those made plaintiffs. For example, in affirming the dismissal of a bare-bones complaint, the Sixth Circuit explained: "If a mere assertion that a former cabinet officer and two other officials 'acted to implement, approve, carry out, and otherwise facilitate' * * * alleged unlawful policies were sufficient to state a claim, any suit against a federal agency could be turned into a *Bivens* action by adding a claim for damages against the agency head and could needlessly subject him to the burdens of discovery and trial." *Nuclear Transport & Storage, Inc. v. United States*, 890 F.2d 1348, 1355 (6th Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990). Likewise, in reversing a denial of a motion to dismiss, the Eleventh Circuit held that "vague and conclusory allegations do not establish supervisory liability" for high-ranking officials such as a former Attorney General. *Gonzalez v. Reno*, 325 F.3d 1228, 1235 (11th Cir. 2003). Plaintiffs cannot rely on "bold statements and legal conclusions without alleging any facts to support them," and thus the Court directed the dismissal of a complaint that, if anything, was more specific than the one at issue here.[13] *Id.*

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[13] In *Gonzalez*, the plaintiffs alleged that the supervisory defendants "personally directed and caused a paramilitary raid upon [their] residence, and had actual knowledge of, and agreed to, and approved of, and acquiesced in, the raid in violation of the Fourth Amendment rights of Plaintiffs herein;" that the agents on the scene "acted under the personal direction of Defendants, JANET RENO, DORIS (continued...)

Finally, the Third Circuit, while expressly eschewing a heightened pleading standard, recently explained that Rule 8 requires a plaintiff to allege "actual facts" and "specific act[s]" indicating that the supervisory defendant was personally responsible for the alleged wrongful conduct. *Evancho v. Fisher*, 423 F.3d 347, 353 (3d Cir. 2005). A complaint must adequately state "the conduct, time, place, and persons responsible" in order to put the defendant on adequate notice of the basis of the claim against him. *Id.* Evancho's complaint failed because it relied on "bald assertions" and "conclusions" and did not allege "*when* the [state Attorney General] made the decision to transfer her, *what steps* he took to effect the transfer, *whom* he instructed to prepare the necessary transfer forms, or *who* signed those forms."[14] *Id.*

Plaintiffs' complaint is similarly vague, alleging only the adoption and implementation of "policies and practices." Consistent with *Twombly*, *Evancho*, *Nuclear Transport*, and *Gonzalez*, this Court should reverse the decision below and

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[13](...continued)
MEISSNER and ERIC HOLDER, and with the knowledge, agreement, approval, and acquiescence of Defendants, JANET RENO, DORIS MEISSNER and ERIC HOLDER;" and that the supervisory defendants "personally participated in the constitutional violations, and there was clearly a causal connection between their actions and the constitutional deprivation." *Id.*

[14] In relevant part, the complaint alleged that the job "transfer [that plaintiff was contesting] was carried out by underlings reporting directly to the attorney general and/or by the attorney general himself for the explicit purpose of either setting [her] up for dismissal or, if that were not successful, making her work life so miserable as to force her resignation." *Evancho*, 423 F.3d at 354.

hold that plaintiffs' bald assertions do not survive a motion to dismiss. *See also Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996) ("bald assertions and conclusions of law will not suffice.").

4. Plaintiffs' attempt to distinguish that case law only confirms why their complaint should be dismissed. According to plaintiffs, each of the cases cited against them "involved a complaint that either simply restated the legal standard for personal involvement, or failed to plead any facts supporting defendants' involvement." Pl. Br. at 122. Yet plaintiffs' complaint does no more. As plaintiffs note (p. 118), under circuit precedent, a supervisory official is personally involved if, *inter alia*, he "created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom." *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995). Virtually parroting that language, plaintiffs' complaint merely alleges that "Defendants created the unconstitutional and unlawful policies and customs relating to the manner in which the post-9/11 detainees were detained." JA 136. This is precisely the kind of "formulaic recitation of the elements of a cause of action" that the Supreme Court recently reaffirmed "will not do." *Twombly*, slip op. at 8.

5. Indeed, the inference that plaintiffs are asking this Court to draw – that the then-Attorney General and FBI Director were personally involved in directing the

tortious actions of individual prison guards and BOP officials – is especially inapposite considering that such direction would have been inconsistent with the Department's own regulations and formal policies, as well as the presumption that government officials (including defendants) comply with such regulations. *See U.S. Postal Service v. Gregory*, 534 U.S. 1, 10 (2001). For instance, as plaintiffs aver, "all of the [alleged] forms of physical abuse were *completely against BOP policy*, which provides that it is improper for staff members to use more force than necessary on detainees or cause detainees unnecessary physical pain or extreme discomfort." JA 125 (citing BOP P.S. 5566.05) (emphasis added). In essence, plaintiffs are implying (but never actually alleging) that, despite the formal policies of the Department, the Attorney General and FBI Director surreptitiously and informally instructed low-level officials to do the exact opposite of what they were supposed to do. Because plaintiffs offer no "[f]actual allegations" to support this innuendo, their complaint remains mired at "the speculative level," *id.*, and provides no basis for subjecting agency heads to discovery.

In their brief to this Court, plaintiffs contend that, because defendants Ashcroft and Mueller launched the post-September 11 investigation, they must have been responsible for anything and everything that followed, including "the manner in which that same investigation" was carried out and the "missteps of * * * subordinates." Pl.

Br. at 115. But that is wholly implausible. Agency heads are neither omniscient nor omnipotent, and it is unrealistic and inappropriate under existing pleading standards to assume that defendants Ashcroft and Mueller knew about, let alone personally directed, the alleged missteps of each of their thousands of subordinates.[15] *See Evancho*, 423 F.3d at 353 (recognizing that, with many levels of bureaucracies between them, a state Attorney General cannot be deemed personally responsible for all actions by lower-level subordinates). Even if defendants Ashcroft and Mueller were personally involved in developing the alleged policy to hold illegal aliens until the FBI cleared them of terrorism charges, that does not mean that defendants Ashcroft and Mueller were also involved in every other action taken against plaintiffs, including the alleged physical and verbal abuse (Claims 3 and 23), the confinement in the ADMAX SHU (Claims 5 and 20), and the alleged communications blackout (Claims 21-22). Plaintiffs' theory amounts to a claim of *respondeat superior* liability, which

[15] Plaintiffs also erroneously contend that defendants Ashcroft and Mueller "seem to suggest that really, no one was responsible for anything." Pl. Br. at 115. Plaintiffs assert that defendants are inconsistent in arguing (a) that Mueller and the FBI are not responsible for the actual conditions at the MDC but that (b) the FBI was better situated than BOP to make a determination whether a detainee was a national security threat, a determination that resulted in plaintiffs remaining in restrictive confinement. *Id.* at 115-16. Needless to say, there is nothing inconsistent about having different components of the Department of Justice be responsible for different tasks.

courts have uniformly rejected in this context. *See, e.g.*, *Black*, 76 F.3d at 74. Accordingly, plaintiffs' complaint should be dismissed.

6. Next, plaintiffs erroneously contend that defendants are seeking to impose a heightened pleading standard in disregard of *Swierkiewicz v. Sorema* , 534 U. S. 506, 515 (2002). *See* Pl. Br. at 117-124. To the contrary, defendants are simply seeking application of Supreme Court and circuit precedent. In *Twombly*, the Court rejected the argument that plaintiffs make here, and explained that: "In reaching this conclusion [that the plaintiffs failed to state a claim], we do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished 'by the process of amending the Federal Rules, and not by judicial interpretation.'" Slip op. at 23 n.14 (quoting *Swierkiewicz*, 534 U. S. at 515). Rather, the Court explained, it was dismissing the complaint simply "because it failed *in toto* to render plaintiffs' entitlement to relief plausible." *Ibid.*

Similarly, as noted, the Third Circuit in *Evancho* rejected a heightened pleading standard but upheld the dismissal of the conclusory complaint. *See Evancho*, 423 F.3d at 353. And even the courts that have used the phrase "heightened pleading standard" in essence performed the same inquiry that *Twombly* required. *See Nuclear Transport*, 890 F.2d at 1355; *Gonzalez*, 325 F.3d at 1235. Like the Supreme Court, these courts simply took a common-sense approach that dismissed complaints based on bald

conclusions and speculative inferences, and that required "[f]actual allegations" and "a 'showing' . . . of entitlement to relief." *id*. at 8 n.3. Defendants Ashcroft and Mueller request nothing more.

B. The Complaint Does Not State A Violation Of Constitutional Rights, Let Alone Clearly Established Rights, With Respect To Confinement In The ADMAX SHU Or The Alleged Communications Blackout.

Even if plaintiffs had alleged personal involvement, their claims regarding confinement in the ADMAX SHU (Claims 5 and 20) and the alleged communications blackout (Claims 21-22) would still fail.

1. The Due Process Claim Regarding The Alleged Restrictive-Confinement Policy (Claim 20).

a. As explained in our opening brief (pp. 36-38), a detainee may be lawfully held in restrictive conditions where, as here, the decision to do so is supported by legitimate, non-punitive reasons and where the restrictive conditions do not impose an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. Plaintiffs contend that the placement of aliens in the ADMAX SHU was an atypical and significant hardship. But, under standard BOP practice, all newly arrived inmates and detainees are generally placed in "administrative detention" in a special housing unit, while they are assessed for security risks, before they are placed in the general prison population. *See* 28 C.F.R. § 541.22(a); JA 393. Thus, placement

of a new inmate or detainee in separate, more restrictive housing is not atypical. Indeed, the district court itself recognized that the decision to place plaintiffs in the ADMAX SHU *in the first instance*, based on an initial assessment of their links to the September 11 investigation, did *not* support a due process claim. SA 2, 42 (adopting the rationale of its prior ruling so holding, *Elmaghraby v. Ashcroft*, 2005 WL 2375202 at *17 n.18).

Plaintiffs argue that even though the district court adopted its prior rationale in *Elmaghraby*, that prior ruling is inapplicable here because "unlike *Elmaghraby*, Plaintiffs [here] were civil immigration detainees." Pl. Br. at 94. *Elmaghraby*, however, dealt with pre-trial detainees, who cannot be subject to punishment without due process. In both contexts, the standard procedure under BOP regulations is to place any new inmate or detainee in separate, more restrictive housing. JA 393. Indeed, elsewhere in their appeal brief, plaintiffs admit that their status as "immigration detainees" is "analogous to pretrial detainees." Pl. Br. at 92.

In this case, as in *Elmaghraby*, the district court's refusal to dismiss the claims against defendants Ashcroft and Mueller, was not in fact based on the initial placement, but rather on the claim that plaintiffs remained too long in restrictive confinement without the formal periodic hearings generally required by BOP regulations. Plaintiffs' brief on appeal similarly demonstrates that their real claim is

not in regard to their initial placement, but rather their continued confinement in that facility. *See, e.g.,* Pl. Br. at 100 ("Plaintiffs received no process in connection with their prolonged assignment to the ADMAX SHU").

b. Plaintiffs argue that prison regulations vested them with a due process right to periodic formal hearings, in which BOP would review plaintiffs' continued placement in the ADMAX SHU. In our opening brief, however, we explained that *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005), forecloses this argument. In *Wilkinson*, the Court determined that "it is clear that the touchstone of the 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.'" *Id.* (emphasis added). Thus, the mandatory language of the regulation does not by itself create a liberty interest.

Moreover, *Wilkinson* confirmed that detention in the ADMAX SHU for less than a year without formal review does not violate Due Process. In *Wilkinson*, the inmate was held in the most restrictive confinement available – the Ohio "Super-Max" facility. The Court held that the State had complied with due process by providing formal reviews every 12 months. 545 U.S. at 213-219, 224-229. In this case, plaintiffs were detained in the ADMAX SHU for eight months or less, under

conditions far less restrictive than those at issue in *Wilkinson*. Given that the 12-month review satisfied due process in *Wilkinson*, plaintiffs are simply incorrect in insisting that due process mandated hearings every 30-days in the MDC context.

Plaintiffs attempt to distinguish *Wilkinson* on the ground that the plaintiff there was criminally convicted. Plaintiffs here, however, were lawfully arrested and detained on immigration charges. As in *Wilkinson*, each plaintiff was "held in lawful confinement." *Wilkinson*, 545 U.S. at 224.

Further, there can be little doubt that the government had a significant interest in detaining high-security suspects that it determined to be "of high interest" in its ongoing terrorism investigation. Even the BOP regulations cited by the district court permit longer restrictive confinement without review in such "exceptional circumstances." 28 C.F.R. § 541.22(c)(1). *See also* JA 285, 381 (OIG report discussing the unique security concerns presented by the post-September 11 detainees).

c. In addition, as detailed in our opening brief (pp. 40-41), during the time period at issue, there was a process in place under which FBI officials were seeking to determine whether plaintiffs could be cleared from the terrorism investigation. JA 303-306, 312. In this context, a formal BOP hearing would not have provided a meaningful process, because BOP officials were simply in no position to second-guess

the FBI's determination that those detainees were "of high interest" to the FBI's ongoing investigation. In their appeal brief, plaintiffs call this argument "curious," and speculate that a BOP hearing would have "uncovered a complete lack of any evidence of dangerousness." Pl. Br. at 101-102. But plaintiffs allege no facts to support this groundless inference, and in any event, it would have been inappropriate for the BOP to compel the FBI to produce evidence showing the connections between the detainee and the ongoing terrorism investigation, and then to second-guess the FBI's national security determinations. It also would have been inappropriate for the BOP to attempt to influence the course of the FBI's ongoing investigation, which was conducted as expeditiously as reasonable possible under the extraordinary conditions the FBI faced.

Thus, a BOP hearing in this context would have been limited to inquiring as to whether a detainee had been cleared by the assigned FBI agents. The lack of such a formal hearing caused no real injury, and thus did not, by itself, violate plaintiffs' due process rights.

d. Plaintiffs cite *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), for the indisputable proposition that "our Nation's commitment to due process" must be preserved even in times of national emergency. Pl. Br. at 88. The plurality opinion in *Hamdi*, however, reiterated the basic principle that the level of process that is due, even to an

American citizen, depends upon context. *Id.* at 529. That is not to say that "law disappeared on September 11th," as plaintiffs mischaracterize defendants' position (Pl. Br. at 89); instead, it is merely to say that the specific context of the September 11 attacks and the extraordinary challenges that law enforcement officials faced in the wake of September 11 are *relevant* – indeed, highly relevant – in assessing whether plaintiffs received sufficient process to vindicate any constitutionally protected liberty interest.

In *Hamdi* itself, the Court applied precisely such a context-specific approach in determining the process due to an American citizen who was detained as an enemy combatant in this country. The plurality opinion held that the process provided "may be tailored to alleviate [its] uncommon potential to burden the Executive at a time of ongoing military conflict." 542 U.S. at 528, 533. Just as the process provided to an American citizen detained in a military conflict arising after the September 11 attacks must be "tailored" to the context, so too must the process afforded to plaintiffs—who are not American citizens, who were already being detained on other grounds, and who were being held in restrictive conditions because they were determined to be "of interest" to a terrorism investigation. Furthermore, the constitutional analysis must take into account the unprecedented demands placed on law enforcement officials in the aftermath of September 11 and the grave dangers that officials reasonably feared

about releasing individuals who may have been involved in the September 11 attacks. *See Elmaghraby v. Ashcroft*, 2005 WL 2375202 at *19 (recognizing that the "September 11 attacks placed an enormous burden on law enforcement and created unprecedented challenges for policymakers and their subordinates" and concluding that "[t]hese events affected * * * the contours of detainees' due process rights"); *see also* JA 271, 440 (discussing the "monumental challenges" faced by law enforcement officials).[16]

e. At the very least, the law was not clearly established that the government lacked the power to detain illegal aliens in restrictive confinement while they were still "of interest" to the ongoing investigation into the murder of thousands of innocent civilians and possible related plots. The Supreme Court has admonished that "definitive answer[s]" must be given cautiously, step by step, when national security interests are involved. *Mitchell*, 472 U.S. at 534; *Katz v. United States*, 389 U.S. 347, 358 n.23 (1967) (reserving the question of "[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security"). And given the demands on the FBI at the time, and the unprecedented threat the Nation was facing, it was not unreasonable for the FBI

[16] In any event, because *Hamdi* was decided two years after the events at issue in this case, it of course could not constitute "clearly established" law for purposes of qualified immunity. See *Brosseau*, 543 U.S. at 200 n.4

to take 2½ to 8½ months to clear plaintiffs – who had already been determined to be "of interest" – from the largest investigation in our country's history.

Nearly six years removed, plaintiffs ask this Court to second guess the decisions that the government made in the middle of an unprecedented national security crisis and to ignore the fact that the Nation had just experienced the most deadly terrorist attack in its history. But in the days and months that followed September 11, government officials could not know the magnitude of the threat that the Nation continued to face or whether or to what extent additional attacks were planned. Defendants' actions must be judged from the perspective of the officials who were called upon to respond to this unprecedented crisis – from the standpoint of the situation they faced at that time – and not with the luxury of 20/20 hindsight. *See Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987); *Brosseau v. Haugen*, 543 U.S. 194, 200-01 (2004). Accordingly, at the very least, the Court should afford defendants Ashcroft and Mueller qualified immunity.

2. The Equal Protection Claim Regarding The Alleged Restrictive-Confinement Policy (Claim 5).

With regard to their discrimination claim, plaintiffs contend (Pl. Br. at 126) that they should be allowed to proceed based on the bare-bones allegation that the alleged restrictive confinement policy was motivated by "invidious animus," JA 113. As explained above, however, conclusory allegations of motive do not defeat a motion

to dismiss. *See supra* at 47-54; *see also Crawford-El*, 523 U.S. at 597-98 (in order to "protect[] the substance of the qualified immunity defense," a court may insist that a plaintiff "put forward 'specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment") (quotation omitted); *Twombly*, slip op. at 8.

Tellingly, when called to cite to any fact demonstrating that the alleged policies were motivated by invidious discrimination, plaintiffs cite (Pl. Br. at 126) only to an alleged statement by the former Attorney General that "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." JA 114. Even if the former Attorney General made this statement about religious tenets (and he did not[17]), it hardly suggests, much less adequately pleads, that any of the alleged detention policies were animated by discriminatory intent. Furthermore, this alleged statement does nothing to impugn the acts of the FBI Director.

Plaintiffs' "naked assertions" of discrimination fail to state a claim, and plaintiffs' discrimination claims should therefore be dismissed. *See Martin v. New York State Dep't of Mental Hygiene*, 588 F.2d 371, 372 (2d Cir. 1978).

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[17] For the Court's information, the former Attorney General has disputed making this statement. *See* Dan Eggen, "Ashcroft Disputes Report on Islam Views," Washington Post, A15 (Feb. 12, 2002).

3. The "Communications Blackout" Claims (Claims 21 and 22).

a. This Court should reject plaintiffs' claims regarding the alleged temporary "communications blackout" (Claims 21 and 22). As we explained in our opening brief, these claims do not state a constitutional violation, because the temporary restrictions were reasonably related to the government's legitimate interest in maintaining security in the immediate aftermath of September 11. In *Turner v. Safley*, 482 U.S. 78 (1987), the Court upheld prison-communication restrictions based on concerns over "communications among gang members" and potential escape and attack plans. Plaintiffs attempt to distinguish *Turner* by contending that, in this case, there was no legitimate security reason for the alleged policy. Pl. Br. at 105. But plaintiffs' bald assertion cannot be squared with the OIG Report on which they rely. As the OIG recognized, BOP adopted the restrictions for inmates who presented "special security concerns." JA 378. In the immediate aftermath of September 11, "BOP did not know who the detainees were or what security risks they might present to BOP staff and facilities." *Id.*; *see also id.* at 424 (recognizing the "uncertainty surrounding these detainees and the chaotic conditions in the immediate aftermath of the September 11 attacks" and stating that the policy was "within the BOP's discretion"). Thus, the very limited alleged restrictions on communications were "reasonably related to the government's asserted security concerns." *See United States*

v. El-Hage, 213 F. 3d 74, 80-82 (2d Cir. 2000) (upholding communications restrictions). At the very least, the government's actions did not violate clearly established rights.

b. Our opening brief explained that plaintiffs' claim regarding their right of access to counsel and the courts (Claim 22) failed for the additional reason that plaintiffs failed to allege prejudice to any underlying claim or right, as required by *Christopher v. Harbury*, 536 U.S. 403, 413-14 (2002). In response, plaintiffs make no attempt to satisfy the *Harbury* standard. Instead, they argue that interference with access to counsel in the context of immigration proceedings[18] is actionable even when there is no plausible defense to pursue and even though counsel would not have made a difference to the outcome of those proceedings. Pl. Br. at 107-08. But it is beyond peradventure that plaintiffs must show prejudice to support a claim of access to counsel. *See, e.g.*, *Romero v. INS*, 399 F.3d 109 (2d Cir. 2005) (rejecting a due process claim of denial of the right to an effective counsel where the alien failed to show prejudice). Here, plaintiffs are required to articulate what defense to the removal

[18] Plaintiffs expressly abandon any access to courts claim (*see* Pl. Br. at 107 n.15).

charges was impaired in their immigration cases.[19] Because plaintiffs do not even attempt to do so, Claim 22 should be dismissed.

II. THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE CLAIMS AGAINST DEFENDANTS ASHCROFT AND MUELLER FOR WANT OF PERSONAL JURISDICTION.

In our opening brief (pp. 58-61), we explained that the district court erred in refusing to dismiss the claims against Ashcroft and Mueller for want of personal jurisdiction. In their response, plaintiffs contend that this argument was waived in the district court because it was raised in the motion to dismiss after plaintiffs filed their third amended, superseding complaint. This argument is without merit.

Plaintiffs rely upon *Gilmore v. Shearson/American Express, Inc.*, 811 F.2d 108, 112 (2d Cir. 1987), where the defendant expressly and unequivocally disclaimed the right to compel arbitration with respect to the original complaint. This Court held that the filing of amended complaint did not permit the defendant to retract the express waiver as to the claims in the original complaint.

Plaintiffs misread *Gilmore* as stating a broad principle that a defense not raised in an initial motion to dismiss cannot be asserted later in a subsequent motion to dismiss filed in response to an amended complaint. This Court has explained,

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[19] Because plaintiffs have abandoned their prejudice argument (on which the district court relied) and articulated no such defense, there is no longer a need for the Court to reach the issue of whether the defense had to be raised in the immigration proceedings, and whether plaintiffs are jurisdictionally barred from raising it here.

however, that *Gilmore* is limited to "defenses and objections that are irrevocably waived by answering an original complaint." *Shields v. Citytrust Bancorp, Inc*., 25 F.3d 1128, 1128 (2d Cir. 1994). Here, there was no answer or unequivocal waiver of the right to assert a personal jurisdiction defense. Thus, that defense was properly asserted in defendants' motion to dismiss, after plaintiffs filed their superceding complaint.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court on the issues raised in plaintiffs' cross-appeal and reverse the district court on the issues raised in defendants' appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and Second Circuit Rule 32(a)(2), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 16,329 words (which does not exceed the applicable 16,500 word limit).

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Robert M. Loeb

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2007, I filed and served the foregoing cross-appellees/reply brief by causing an original and fourteen copies to be delivered to the Court via FedEx overnight delivery (and e-mail delivery) and to counsel of record via FedEx overnight delivery (and e-mail delivery):

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