UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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| IBRAHIM TURKMEN; ASIF-UR-REHMAN SAFFI; SYED AMJAD ALI JAFFRI, YASSER EBRAHIM; HANY IBRAHIM; SHAKIR BALOCH; AKHIL SACHDEVA; and ASHRAF IBRAHIM, on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br>v.<br><br>JOHN ASHCROFT, Attorney General of the United States; ROBERT MUELLER, Director Federal Bureau of Investigations; JAMES W. ZIGLAR, former Commissioner, Immigration and Naturalization Service; DENNIS HASTY, former Warden, Metropolitan Detention Center (MDC); MICHAEL ZENK, MDC Warden; MDC Associate Warden for Custody SHERMAN; MDC Captain SALVATORE LOPRESTI; MDC Lieutenants STEVEN BARRERE, WILLIAM BECK, LINDSEY BLEDSOE, JOSEPH CUCITI, HOWARD GUSSAK, MARCIAL MUNDO, DANIEL ORTIZ, STUART PRAY, and ELIZABETH TORRES, and MDC Correctional Officers PHILLIP BARNES, SIDNEY CHASE, MICHAEL DEFRANCISCO, RICHARD DIAZ, KEVIN LOPEZ, MARIO MACHADO, MICHAEL MCCABE, RAYMOND MICKENS, JOHN OSTEEN, BRIAN RODRIGUEZ, SCOTT ROSEBERY, and CHRISTOPHER WITSCHEL, MDC Counselors RAYMOND COTTON, CUFFEE, and CLEMMET SHACKS; JOHN DOES 1-20, Metropolitan Detention Center Corrections Officers; and the UNITED STATES,<br><br>Defendants. | ) | Civil Action<br>No. 02 CV 2307 (JG)<br><br>(Gleeson, J.) |

**MEMORANDUM OF LAW IN SUPPORT OF PARTIAL MOTION TO DISMISS ON BEHALF OF THE UNITED STATES AND MOTION TO DISMISS ON BEHALF OF DEFENDANTS JOHN ASHCROFT, ROBERT MUELLER, JAMES W. ZIGLAR DENNIS HASTY, AND MICHAEL ZENK**

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## INTRODUCTION

On September 11, 2001, the United States suffered the most devastating attack in our Nation's history. An enemy that was patiently hiding from within our borders and motivated by hate reemerged that morning to destroy the World Trade Center, ravage the Pentagon, and murder thousands of Americans, prompting a National Emergency.[1] Forced to respond to this unprecedented assault, our country's highest-ranking officials were immediately called upon to make complex and sensitive judgments with limited guidance from past practice and legal precedent.

In this suit, the eight named plaintiffs ("Plaintiffs")[2] challenge some of these high-level law enforcement decisions. In the weeks following September 11, 2001, Plaintiffs were arrested, detained, and placed in removal proceedings by the Immigration and Naturalization Service ("INS") pursuant to its power to remove illegal aliens from the country. See 8 U.S.C. § 1227. Plaintiffs do not dispute that they were in the United States illegally. Nor do they deny that the INS had the authority to remove them.

Instead, Plaintiffs challenge the decision to arrest and detain them (claims 8 and 9), the length of their detention (claims 1, 2, 5, 24, and 25), the conditions of their confinement (claims 3, 20, 23, and 28), their treatment by individual jail and prison officials (claims 4, 5, 7, 10-16,

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[1] See September 14, 2001 Proclamation of National Emergency by Certain Terrorist Attacks, No. 7453, 50 U.S.C. § 1621 (2003).

[2] The Plaintiffs are Asif-Ur-Rehman Saffi ("Saffi"), Syed Amjad Ali Jaffri ("Jaffri"), Yasser Ebrahim ("Ebrahim"), Hany Ibrahim ("H. Ibrahim"), Shakir Baloch ("Baloch"), Ashraf Ibrahim ("A. Ibrahim"), Ibrahim Turkmen ("Turkmen"), and Akhil Sachdeva ("Sachdeva"). See Third Am. Cplt. at p.2. Following the nomenclature adopted by the Third Amended Complaint, "MDC Plaintiffs" refers to the six of the eight Plaintiffs who were detained at the Metropolitan Detention Center ("MDC") in New York: Saffi, Jaffri, Ebrahim, H. Ibrahim, Baloch, and A. Ibrahim. Id. ¶¶ 16-20. The other two Plaintiffs, Turkmen and Sachdeva, were detained in Passaic, New Jersey. Id. ¶¶ 21-22.

26, 27, 29, and 31), the loss of personal possessions (claims 8 and 30), and the procedures surrounding their removal proceedings (claims 6, 17, 18, 19, 21, and 22). They ask this Court to grant them "monetary damages" and "declaratory and other relief" against Attorney General John Ashcroft, FBI Director Robert Mueller, former INS Commissioner James W. Ziglar, former Metropolitan Detention Center ("MDC") Warden Dennis Hasty, MDC Warden Michael Zenk, (collectively the "Original Defendants"), and the United States ("Government" or "United States").[3]

Plaintiffs' claims against these defendants fall into three categories. First, there are fifteen claims under the U.S. Constitution in which Plaintiffs assert:

- they were detained "longer than necessary to secure their removal" without a hearing "to determine whether there was probable cause to justify their continued detention" in violation of the Fourth Amendment right against seizure (claim 1, ¶ 289);
- they were detained "longer than necessary to secure their removal" in violation of the Fifth Amendment right to due process (claim 2, ¶ 294);
- they "were unreasonably detained and subjected to outrageous, excessive, cruel, inhumane, and degrading conditions of confinement" in violation of the Fifth Amendment right to due process (claim 3, ¶ 299);
- they "were subjected to coercive and involuntary custodial interrogation" in violation of the Fifth Amendment guarantee against self-incrimination (claim 4, ¶ 304);
- they were detained "longer than necessary to secure their removal" "and subject[ed] to harsh treatment not accorded similarly situated non-citizens . . . based on their race, religion, and/or ethnic or national origin" in violation of the Fifth Amendment's Equal Protection Clause (claim 5, ¶ 309);
- they were held "without the filing of indictment, information, or other formal criminal charge, and were not brought to trial within a reasonable period of time" in violation of the Sixth Amendment Right to a Speedy Trial (claim 6, ¶ 314);

[3] Plaintiffs also demand relief against twenty-six guards and officers at the detention facilities in which they were held. These defendants are not parties to this motion to dismiss.

- they have been denied "the ability to practice and observe their religion" in violation of the First Amendment (claim 7, ¶ 319);

- they have been deprived "of their personal property" in violation of the Fifth Amendment right to due process (claim 8, ¶ 324);

- the "[d]elays in serving charging documents" "have impaired the ability of the detainees to know the charges on which they are being held, obtain legal counsel, and seek release on bond" in violation of the Fifth Amendment right to due process (claim 17, ¶376);

- they were subjected to "a blanket no bond policy. . . without regard to whether the detainee posed a flight risk" in violation of the Fifth Amendment right to due process (claim 18, ¶ 381);

- they were subjected to "a blanket no bond policy . . . due to their ethnic or religious identity" in violation of the Fifth Amendment's Equal Protection Clause (claim 19, ¶ 386);

- they were "classified as 'of high interest'" and assigned to the Special Housing Unit ("SHU") "in an arbitrary and unreasonable manner" in violation of the Fifth Amendment right to due process (claim 20, ¶ 391);

- they "were subjected to a 'communications blackout' . . . while in detention that interfered with their access to lawyers and the courts" in violation of the First Amendment (claim 21, ¶ 396);

- they "were subjected to a 'communications blackout' . . . while in INS detention that interfered with their access to lawyers and the courts" in violation of the Fifth Amendment right to due process (claim 22, ¶ 401); and

- "they were subjected "to excessive and unreasonable strip searches" without "reasonable suspicion" and "in a deliberately humiliating manner" in violation of the Fourth Amendment and the Fifth Amendment right to due process (claim 23, ¶ 406).

On these claims, Plaintiffs seek damages and equitable relief. Although Plaintiffs nominally plead their requests for equitable relief against federal officers in their individual capacity, these requests are, in reality, claims against the officers in their official capacities. Because the United States is the only proper defendant in an official capacity claim, see McMillian v. Monroe County, 520 U.S. 781, 785 n. 2 (1997), Plaintiffs' requests for equitable relief must be construed as requests against the United States.

Second, there are three claims in which Plaintiffs seek "monetary damages" under "customary international law" and an international treaty, and allege:

- they were placed in "arbitrary detention" in violation of "customary international law" (claim 9, ¶ 329);
- they were subjected to "cruel, inhuman or degrading treatment" in violation of "customary international law" (claim 10, ¶ 335); and
- they "were not notified by arresting authorities of their right to communicate with consular officials" in violation of the Vienna Convention on Consular Relations (claim 11, ¶ 340).

Although these claims are made against the individual defendants, under the Liability Reform Act, the United States is substituted as the sole defendant. See infra Part VI.A.[4]

Finally, there are several claims for "monetary damages" under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-80. The United States, which is the only proper defendant in an FTCA suit, seeks to dismiss three of these claims in their entirety and one in part. On these claims, Plaintiffs allege:

- they were detained "longer than necessary to secure their removal . . . so as to constitute false imprisonment" in violation of state law (claim 24, ¶ 415);
- their "clearance investigations" were allowed "to linger for months rather than the mandated days," breaching a "duty of swift dispatch" in violation of state law (claim 25, ¶ 419);
- they were denied medical services required "under 18 U.S.C. § 4042(a)(2)" (claim 26, ¶ 423); and
- they were "intentionally deprived [of their property] so as to constitute the tort of conversion" in violation of state law (claim 30, ¶ 442).

[4] Accordingly, pursuant to 28 U.S.C. § 2679(d), the United States, by separate motion, seeks to substitute the United States for the individual Defendants as to these three claims.

## SUMMARY OF ARGUMENT

The United States and Defendants Ashcroft, Mueller, Ziglar, Hasty, and Zenk (the "Original Defendants") move to dismiss these claims against the United States and the Original Defendants. First, this Court should dismiss Plaintiffs' constitutional claims (claims 1-8 and 17-23) in their entirety.

1. This Court should dismiss Plaintiffs' requests for equitable relief in claims 1-7 and 17-23, because Plaintiffs lack Article III standing to obtain such relief. Plaintiffs have failed to allege that they face a "real and immediate" threat of future injury warranting the prospective remedy of equitable relief. City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983). Moreover, as aliens outside of the United States, Plaintiffs have no constitutional rights, and thus have no standing to seek remedies for prospective constitutional harm. Finally, because none of the Defendants has the power to alter the practices challenged in claims 1-3, 5, 6, and 17-19, no judgment of this Court will redress Plaintiffs' alleged grievances in these claims.

2. This Court should dismiss claims 1, 2, 5, 6, and 17-22 for both equitable and monetary relief, and against all Defendants, because the INA divests the Court of jurisdiction. The INA requires dismissal of those claims that Plaintiffs had the opportunity to (but did not) raise before the administrative agency and present to the court of appeals in a consolidated petition (claims 17-22); those claims challenging the Government's actions in commencing removal proceedings, adjudicating cases, and executing removal orders (claims 1, 2, 5, 6, and 17); and those claims contesting the discretionary decisions to detain aliens for over thirty days, to choose detention facilities, and to deny bond (claims 1, 2, and 18-20).[5]

[5] In addition, insofar as claims 3, 5, and 6 challenge the length of Plaintiffs' detention, any argument in this Memorandum addressing the length of Plaintiffs' detention applies to those claims as well.

3. This Court should decline Plaintiffs' invitation in claims 1, 2, 4-7, and 17-22, to imply a damages remedy against the Original Defendants under Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388 (1971). The INA establishes an "elaborate remedial system" limiting the rights and remedies available to aliens, and thus constitutes a special factor counseling against the creation of an additional damages remedy under Bivens. Bush v. Lucas, 462 U.S. 367, 388 (1982).

4. The Court should dismiss all claims against Ashcroft, Mueller, and Ziglar in their individual capacities. Because Plaintiffs do not (and cannot) allege that any of the challenged conduct was committed in New York by these Defendants or their "personal agents," the Court lacks personal jurisdiction over them and must dismiss them from this suit. Grove Press, Inc. v. Angleton, 649 F.2d 121, 123 (2d Cir. 1981).

5. Even if this Court concludes that it has jurisdiction and addresses the merits of Plaintiffs' constitutional challenges in claims 1-8 and 17-23, it should dismiss them insofar as they are asserted against the Original Defendants (in both their individual and official capacities). First, Plaintiffs fail to satisfy their burden of showing that the Original Defendants were personally involved in any of the challenged conduct. Second, Plaintiffs do not establish that the Original Defendants violated any constitutional rights, much less clearly established ones. Illegal aliens have no Fourth or Fifth Amendment rights to be removed at the earliest possible time; the Equal Protection Clause is not violated by nationality distinctions under immigration law, especially where, as here, Plaintiffs fail to identify any similarly situated group that received preferential treatment; the Fifth Amendment right against self-incrimination is not implicated where no incriminating statement has been elicited and used in a criminal proceeding; the Sixth Amendment's Speedy Trial Clause is not implicated where, as here, Plaintiffs do not

challenge any criminal charge, trial, or conviction; inmates cannot state a claim for violation of the First Amendment right to free exercise of religion or the Fifth Amendment right to property absent specific factual allegations demonstrating that the defendants caused the alleged deprivations or refused to act on administrative complaints explaining the alleged deprivations; the Fourth And Fifth Amendments are not violated by conditions of confinement or prison restrictions that are reasonably related to a legitimate government interest; there is no Fifth Amendment right to be served with charging documents at the earliest possible time; aliens have no due process rights to release on bond pending their removal proceedings; and the First and Fifth Amendments are not violated by short-term restrictions on a detainee's ability to communicate with the outside world. Accordingly, this Court should dismiss all of the requests for equitable and monetary relief Plaintiffs advance in claims 1-8 and 17-23.

Second, Plaintiffs' claims for monetary damages under "customary international law" (claims 9 and 10) and the Vienna Convention on Consular Relations (claim 11) are likewise foreclosed. Under the Liability Reform Act, the United States must be substituted as the sole defendant to these claims. See 28 U.S.C. § 2679. Because Plaintiffs seek only monetary damages, and the United States has not waived its sovereign immunity from damages suits under either customary international law or the Vienna Convention on Consular Relations, claims 9, 10, and 11 must be dismissed.

Finally, this Court should dismiss several of Plaintiffs' claims for violations of state law under the FTCA. Because Plaintiffs fail to state a claim for false imprisonment under New York law, claim 24 must be dismissed. Additionally, the discretionary function exception and the detention of goods exception bar Plaintiffs' claims that their clearance investigations were delayed (claim 25) and that they have been deprived of their property (claim 30). Lastly,

because Plaintiffs Baloch, Saffi, and A. Ibrahim failed to file administrative claims alleging denial of medical care, they cannot assert the claim now, and this Court should dismiss claim 26 as to them.

## ARGUMENT

### I. THIS COURT SHOULD DISMISS PLAINTIFFS' CLAIMS FOR EQUITABLE RELIEF IN CLAIMS 1-7 AND 17-23 BECAUSE PLAINTIFFS LACK ARTICLE III STANDING TO OBTAIN SUCH RELIEF.

This Court lacks Article III jurisdiction over all requests for equitable relief in claims 1-7 and 17-23 because Plaintiffs lack standing to obtain such relief. To establish standing, Plaintiffs must demonstrate, at an "irreducible constitutional minimum," three separate elements. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). First, Plaintiffs must allege "an 'injury in fact'" that is "actual or imminent, not 'conjectural' or 'hypothetical.'" Id. (citations and footnote omitted). Second, Plaintiffs must establish that the injury was caused by Defendants' acts and not "the independent action of some third party not before the court." Id. (citations and footnote omitted). Third, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed' by a favorable decision'" of this Court. Id. at 560-61.

For three independent reasons, Plaintiffs lack standing to obtain the equitable relief they request. First, they have failed to establish a "real and immediate" threat of injury warranting equitable relief. Second, as aliens outside of the United States, they have no constitutional rights and thus have no standing to seek remedies for prospective constitutional harm. Third, because none of the Defendants has the power to alter the practices challenged in claims 1-3, 5, 6, and 17-19, a declaratory judgment against them will not redress these grievances.

### A. Plaintiffs Fail To Allege That They Face A "Real And Immediate" Threat Of Future Injury.

Declaratory relief, like injunctive relief, is prospective in nature. It addresses future injuries, not past injuries. See City of Rome, N.Y. v. Verizon Communications, Inc., 362 F.3d 168, 175 n.3 (2d Cir. 2004); see also AmSouth Bank v. Dale, 386 F.3d 763, 786 (6th Cir. 2004) ("The 'useful purpose' served by the declaratory judgment action is the clarification of legal duties for the future, rather than the past harm a coercive tort action is aimed at redressing."). Accordingly, under Article III, Plaintiffs may obtain declaratory relief from a government practice or policy only if they demonstrate a "sufficiently real and immediate" threat that they will be subjected to the same alleged policy or practice in the future. O'Shea v. Littleton, 414 U.S. 488, 496 (1974). Because Plaintiffs do not allege that there is any threat that they will again return to the United States, be arrested and detained, and be placed in removal proceedings, they have failed to meet their burden, and the Government must be dismissed from claims 1-7 and 17-23.

In these claims, Plaintiffs allege only past injuries. Specifically, they allege that three years ago, they were detained for too long (claims 1, 2, and 5), subjected to restrictive and harsh conditions of confinement (claim 3, 20, and 23), mistreated by prison and jail officials (claims 4, 5, and 7), and subjected to improper procedures during their removal proceedings (claims 6, 17, 18, 19, 21, and 22). Nowhere do Plaintiffs aver that there is any threat that they will be subjected to these same alleged harms in the future. Indeed, none of Plaintiffs resides in the United States. See Third Am. Cplt. ¶¶ 149, 166, 180, 199, 213, 249, 272, 284. None has claimed any intention to return to the United States, much less an expectation that he will be arrested and detained in the United States at some point in the future. And none has alleged any continuing or expected involvement in immigration proceedings.

The Supreme Court has held that while allegations of past abuse by law enforcement officers may support claims for damages, as a matter of law they do not confer standing to obtain prospective relief against the Government. In City of Los Angeles v. Lyons, 461 U.S. 95 (1983), the Supreme Court refused to grant equitable relief where the plaintiff alleged only past mistreatment by law enforcement officials. The plaintiff sued the City of Los Angeles and four of its police officers for injuries allegedly sustained when he was stopped for a traffic violation and placed in a chokehold. Id. at 97-98. He sought declaratory and injunctive relief barring the use of chokeholds, see id. at 98, which he claimed were "routine[]" practice by Los Angeles police, id. at 105. The Court ruled that, although the plaintiff's prior injury "presumably afford[ed him] standing to claim damages against the individual police officers," it did not afford him standing to declaratory or other prospective relief. Id. The Court explained that the plaintiff failed to carry his burden to "establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him." Id. The plaintiff's "assertion that he may again be subject to an illegal chokehold" was not enough to "create the actual controversy that must exist for a declaratory judgment to be entered." Id. at 104. Moreover, the plaintiff's claims were not saved by his allegation that there was a pattern or policy of using chokeholds, because he produced no evidence that this policy would be applied to him again. See id. at 105. Similarly, here, Plaintiffs cannot obtain equitable relief. Plaintiffs never claim, and set forth no allegations suggesting, that they expect they will again be arrested, detained, and guarded by United States officials who will mistreat them in the future. Indeed, Plaintiffs present a weaker argument for standing than did the plaintiff in Lyons. Unlike the plaintiff in Lyons, who remained in Los Angeles and faced some likelihood that he "would again be stopped" by Los Angeles police

officers, id. at 99; accord id. at 104, Plaintiffs have all left the United States, Third Am. Cplt. ¶¶ 149, 166, 180, 199, 213, 249, 272, 284, and allege no intent of returning. In fact, as Plaintiffs acknowledge, id. ¶ 265, federal law prohibits them from returning to the United States for years. Plaintiffs Saffi, Jaffri, Ebrahim, H. Ibrahim, and A. Ibrahim had violated their visas, id. ¶¶ 150, 151, 169, 181, 223, 280, and thus are not eligible for admission into the country for ten years after removal. See 8 U.S.C. § 1182(a)(9)(A)(ii)(II). Turkmen admits that he lived and worked illegally in this country for nearly a year before he was arrested and placed in immigration proceedings, Third Am. Cplt. ¶¶ 252-54, which renders him ineligible to return for three years from the date of his departure. See 8 U.S.C. § 1182(a)(9)(B)(i)(I) (holding that aliens who live or work illegally in the United States for more than six months before voluntary departure are not eligible to return for three years). Additionally, Sachdeva "overstayed a prior voluntary departure order," Third Am. Cplt. ¶ 280, and is thus ineligible to reenter the United States for five years from the date of his removal. See 8 U.S.C. 1182(a)(9)(A)(i) and (ii). Finally, because Baloch has been removed twice, Third Am. Cplt. ¶¶ 202, 208, he is now ineligible to return to the United States for a period of twenty years. See 8 U.S.C. 1182(a)(9)(A)(i). Considering that Plaintiffs are outside of the country and cannot lawfully enter in the near future, there is no conceivable argument that they face a real and immediate threat from any of the allegedly unlawful policies and practices at issue in this litigation. See Lyons, 461 U.S. at 105; see also O'Shea v. Littleton, 414 U.S. 488, 497 (1974) (holding that a group of protesters lacked standing to claim that a local magistrate and an associate judge had discriminated against them in criminal proceedings on the basis of their beliefs, because it was "assumed" for standing purposes that they would "conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged" discrimination).

The Second Circuit has confirmed that the rule of Lyons and O'Shea applies to suits by former inmates challenging the conditions of their confinement. In Muhammad v. New York Dep't of Corrections, 126 F.3d 119 (2d Cir. 1997), the Second Circuit ruled that a former prisoner lacked standing to seek injunctive relief on his claims that officials interfered with his Islamic religious practices while he was in confinement, because he had been paroled and was no longer subject to the alleged interference. Id. at 123-24; see also Prins v. Coughlin, 76 F.3d 504, 506 (2d Cir. 1996) ("It is settled in this Circuit that a transfer from a prison facility moots an action for injunctive relief against the transferring facility."). Five other circuits have reached the same conclusion. Martin v. Sargent, 780 F.2d 1334, 1337 (8th Cir. 1985); Edwards v. Johnson, 209 F.3d 772, 776 (5th Cir. 2000); Barney v. Pulsipher, 143 F.3d 1299, 1306 & n.3 (10th Cir. 1998); Knox v. McGinnis, 998 F.2d 1405, 1413 (7th Cir. 1993); Nelsen v. King County, 895 F.2d 1248, 1249-54 (9th Cir. 1990).

Moreover, Plaintiffs' claims to declaratory relief are not saved by the fact that some Plaintiffs have alleged that they presently suffer "emotional and psychological effects" from their detention. Third Am. Cplt. ¶ 168 (Saffi alleging "great difficulty . . . sleeping at night"); id. ¶ 201 (Ebrahim and H. Ibrahim alleging "sleepless nights" and H. Ibrahim alleging a "nervous breakdown"); id. ¶ 222 (Baloch alleging "depression," "nightmares," "anxiety," and sleeplessness); id. ¶ 250 (A. Ibrahim alleging "depression and anxiety"); id. ¶ 276 (Turkmen alleging nightmares and sleeplessness). These allegations of "emotional consequences" of past actions "simply are not a sufficient basis" for declaratory relief "absent a real and immediate threat of future injury" by federal officials. Lyons, 461 U.S. at 107 n.8.

Finally, Plaintiffs cannot circumvent Lyons, O'Shea, and their progeny by claiming that Plaintiffs suffer from "a presumption of guilt" and thus experience adverse treatment in their

home countries. Third Am. Cplt. ¶¶ 167, 200, 275, 285. An alleged injury will support standing only when the injury would be redressed by a judicial order operating on the defendants. See Lujan, 504 U.S. at 568-71 (plurality op.). The injury cannot be due to the "independent action of some third party not before the court," because courts lack the authority to bind the actions of non-parties. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976). This is especially true when the third party is an independent sovereign that need not take any steps in response to the Court's decisions. Dellums v. U.S. Nuclear Regulatory Comm'n, 863 F.2d 968, 976 (D.C. Cir. 1988) (finding no standing "when effectiveness of the relief requested depends on the unforeseeable actions of a foreign nation"). Indeed, it is wholly speculative that the "Egyptian State Security Investigations" would even learn of any decision of this Court, let alone discard its alleged "dossiers on . . . Ebrahim and H. Ibrahim" because of it, Third Am. Cplt. ¶ 200, or that the Turkish government would credit a declaratory judgment by this Court and re-hire Turkmen, Third Am. Cplt. ¶ 275 for example. In fact, in Lujan, the Supreme Court applied this principle to hold that the plaintiffs lacked standing to obtain declaratory relief against the Secretary of the Interior because the injuries that plaintiffs were seeking to prevent were more attributable to the actions of other federal agencies not before the Court, and it was unclear whether those agencies would comply with any decision rendered by the Court. Lujan, 504 U.S. at 568-69. If this Court may not presume that its holding will bind federal agencies not before it, see id., then it certainly may not presume that its holding will bind foreign sovereigns not before it. Even if Plaintiffs are suffering illegal treatment in their home countries, the appropriate

remedy is through whatever legal processes are afforded there against whomever is wronging them.[6]

### B. Plaintiffs Have No Constitutional Interests That Can Be Protected By This Court.

Plaintiffs lack standing to obtain equitable relief on an additional ground – namely, that they are aliens outside of the United States with no right to enter or be present in the United States. As aliens with no "presence" here, they currently have "no constitutional rights, under the due process clause or otherwise." People's Mojahedin Org. of Iran v. United States Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999), cert. denied, 529 U.S. 1104 (2000); accord 32 Sovereignty Comm. v. Dep't of State, 292 F.3d 797, 799 (D.C. Cir. 2002) (quoting People's Mojahedin Org., 182 F.3d at 22); Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990), and Johnson v. Eisentrager, 339 U.S. 763, 784 (1950)); Landon v. Plasencia, 459 U.S. 21, 32 (1982) (confirming the longstanding view that aliens have no constitutional right to enter the United States or remain free of detention). Accordingly, irrespective of whether Plaintiffs have standing to assert constitutional claims for past injuries, they have no standing to obtain prospective relief on their constitutional claims.

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[6] Plaintiffs' complaint is additionally deficient because it fails to make such allegations for all Plaintiffs and all class members. For example, Plaintiffs Jaffri and Baloch do not allege any "presumption of guilt" or adverse consequences in their home countries. It is not enough that some Plaintiffs have may have standing; every Plaintiff and class member must make the necessary allegations. See Simon, 426 U.S. at 40 n.20 (quoting Warth v. Seldin, 422 U.S. 490, 502 (1975)); Murray v. Auslander, 244 F.3d 807 (11th Cir. 2001); Holmes v. Pension Plan of Bethlehem Steel, Corp., 213 F.3d 124 (3d Cir. 2000); B.C. v. Plumas Unified School Dist., 192 F.3d 1260 (9th Cir. 1999); Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410 (6th Cir. 1998). Accordingly, the allegations that some Plaintiffs experience difficulties in their home countries are not sufficient to confer jurisdiction on this Court.

### C. Plaintiffs Fail To Satisfy The Redressability Requirement For Standing, Because None Of The Defendants Has The Authority To Provide Plaintiffs With The Equitable Relief They Request In Claims 1-3, 5, 6, And 17-19.

Finally, Plaintiffs lack standing to obtain equitable relief because the Defendants cannot provide such relief. Standing requires at an "irreducible minimum" that the injury "is likely to be redressed by a favorable decision" of this Court. Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982); Lujan, 504 U.S. at 560-61. Because none of the named Defendants has the authority to alter the policies and practices Plaintiffs challenge in claims 1-3, 5, 6, and 17-19, no decision of this Court can provide the relief that Plaintiffs seek.

Plaintiffs allege that they were arrested and detained under the authority of the INS, an administrative entity formerly within the Department of Justice. Plaintiffs seek a declaratory judgment to prevent immigration officials from following these alleged policies in the future. On March 1, 2003, however, the INS ceased to exist as an administrative entity, see Homeland Security Act of 2002, § 471(a), Pub. L. No. 107-298, 116 Stat. 2135, 2205 (2002), and most of its authority was transferred from the Department of Justice to the Department of Homeland Security ("DHS"). Id. § 1101. Accordingly, none of Defendants currently has prosecutorial authority regarding the arrest or detention of an alien pending immigration proceedings and pending removal. Indeed, Defendant Ziglar occupies no government post at all. Thus, Plaintiffs' equitable claims 1-3, 5, 6, and 17-19 are not enforceable against the Defendants.

Moreover, Plaintiffs have had ample opportunity to amend their complaint but have simply chosen not to add any officials in the Department of Homeland Security. Indeed, Plaintiffs have amended their complaint three separate times. The last time, on September 13, 2004, Plaintiffs received express permission from the Magistrate Judge to add new defendants

(in addition to substituting defendants for the Does and Roes). Plaintiffs decided not to do so. Accordingly, this Court should dismiss Plaintiffs' claims for equitable relief because none of Defendants can provide the requested remedy.

## II. THIS COURT SHOULD DISMISS PLAINTIFFS' CLAIMS (FOR EQUITABLE RELIEF AND DAMAGES) CHALLENGING THE COURSE OF THEIR REMOVAL PROCEEDINGS BECAUSE THE IMMIGRATION AND NATIONALITY ACT HAS DIVESTED THIS COURT OF JURISDICTION (CLAIMS 1, 2, 5, 6, AND 17-22).

In 1996, Congress amended the Immigration and Nationality Act ("INA") by adopting "new (and significantly more restrictive)" provisions for judicial review in immigration matters. Reno v. American-Arab Anti-Discrimination Committee ("AADC"), 525 U.S. 471, 475 (1999). As the Supreme Court has noted, "many provisions of [the 1996 amendments] are aimed at protecting the Executive's discretion from the courts – indeed, that can fairly be said to be the theme of the legislation." Id. at 486. Specifically, Congress expanded the withdrawal of federal question jurisdiction, inter alia, by (1) consolidating in the courts of appeals all legal and factual questions arising from actions taken to remove an alien, 8 U.S.C. § 1252(b)(9); (2) precluding challenges to the Government's decisions and actions to commence removal proceedings, adjudicate cases, or execute removal orders, 8 U.S.C. § 1252(g); and (3) barring judicial review of discretionary decisions altogether, 8 U.S.C. §§ 1252(a)(2)(B)(ii), 1226(e). See generally INS v. St. Cyr, 533 U.S. 289, 313 (2001); AADC, 525 U.S. at 472. These sections deprive a district court of federal question jurisdiction over claims based on challenges to the detention and removal of an alien, including Bivens claims. Cf. Merritt v. Shuttle, Inc., 187 F.3d 263, 270 (2d Cir. 1999); Foster v. Townsley, 243 F.3d 210 (5th Cir. 2001); La Voz Radio v. FCC, 223 F.3d 313 (D.C. Cir. 2000); Green v. Brantley, 981 F.2d 514 (11th Cir. 1993); Van Dinh v. Reno, 197 F.3d 427 (10th Cir. 1999); Tur v. FAA, 104 F.3d 290 (9th Cir. 1997). Just as the Aviation Act's

jurisdiction channeling provision barred Merritt's Bivens claim arising from the suspension of his pilot's license, see Merritt, 187 F.3d at 270, the INA's multiple jurisdiction channeling and stripping provisions bar Plaintiffs' from bringing equitable and Bivens claims in this Court relating to their detention and removal under the immigration laws.

First, central to the INA's blueprint for judicial review is 8 U.S.C. § 1252(b)(9). Described by the Supreme Court as "the unmistakable 'zipper' clause," this provision consolidates in the courts of appeals judicial review of all legal and factual questions arising from actions taken to remove an alien. AADC, 525 U.S. at 483. Specifically, this "zipper clause" provides:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under [8 U.S.C. §§ 1151-1379] shall be available only in judicial review of a final order under this section [8 U.S.C. § 1252].

8 U.S.C. § 1252(b)(9)(emphasis added). Such review of a formal order rests solely in the courts of appeals. See 8 U.S.C. § 1252(a) (providing that review is governed by chapter 158 of Title 28, which in § 2342 vests jurisdiction in the courts of appeals).

The impact of the INA's zipper clause on a district court's § 1331 federal question jurisdiction was addressed in Calcano-Martinez v. INS, 232 F.3d 328 (2d Cir. 2000), aff'd, 533 U.S. 348 (2001):

> Before INA § 242(b)(9), only actions attacking the deportation order itself were brought in a petition for review while other challenges could be brought pursuant to a federal court's federal question subject matter jurisdiction under 28 U.S.C. § 1331. Now, by establishing "exclusive appellate court" jurisdiction over claims "arising from any action taken or proceeding brought to remove an alien," all challenges are channeled into one petition.

Id. at 340 (internal citations omitted); see also St. Cyr, 533 U.S. at 313-14; see also Pena-Rosario v. Reno, 83 F. Supp. 2d 349, 359 (E.D.N.Y. 2000). As a result, those "other challenges" may no longer be brought "pursuant to a federal court's federal question . . . jurisdiction under 28 U.S.C. § 1331." Calcano-Martinez, 232 F.3d at 340.[7]

Second, Congress precluded district courts from entertaining claims arising from actions to commence removal proceedings, adjudicate cases, or execute a removal order. Section 1252(g) states:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [8 U.S.C. §§ 1101-1537].

8 U.S.C. § 1252(g) (emphasis added). The Supreme Court interpreted this provision in AADC. There, the plaintiffs charged that they had been targeted for deportation after "routine" status violations because of their membership in the Popular Front for the Liberation of Palestine. The Court concluded, however, that where a case arises from one of the "three discrete events" encompassed by § 1252(g) – the "decision or action" to "commence proceedings, adjudicate cases, or execute removal orders" – judicial review is not available in the district courts. AADC, 525 U.S. at 482, 487.

Third, Congress barred judicial review of discretionary decisions through the enactment of § 1252(a)(2)(B)(ii). See Van Dinh, 197 F.3d at 433 (citing INA provisions that protect

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[7] Without question, § 1252(b)(9) is more sweeping than the Federal Aviation Act's exclusive judicial review provision, 49 U.S.C. § 46110(a), considered in Merritt v. Shuttle, Inc., 187 F.3d at 270. Section 46110(a) provides for "review of the order" being challenged, by contrast to § 1252(b)(9)'s inclusive language reaching "all questions of law and fact . . . arising from any action taken or proceeding brought" to remove an alien.

discretionary decisions from review). This provision addresses all exercises of discretion found in sections 1151 through 1379 of title 8:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review –
>
> (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of [asylum] relief under section 1158(a) of this title.

8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added).

As the Second Circuit has held, "Section 1252 . . . strips the federal courts of jurisdiction to review certain discretionary decisions." Firstland Int'l v. USINS, 377 F.3d 127, 130 (2d Cir. 2004). To be sure, in Firstland, the Second Circuit recognized jurisdiction, but only because in that case Congress had "unequivocally limit[ed the Executive's] authority" through mandatory notice requirements. Id. at 131. The Court confirmed that when Congress has not placed "unequivocal[ ]" restraints on the Executive's discretion, courts lack jurisidiction. Id. at 131, 130.

As discussed below, the INA's judicial review provisions require the dismissal of many of Plaintiffs' claims. See Humphries v. Various Federal USINS Employees, 164 F.3d 936, 942, 945 (5th Cir. 1999) (dismissing First Amendment claim based on § 1252(g)); Foster, 243 F.3d 214-15 (dismissing excessive force, due process, equal protection, and First Amendment claims); Van Dinh, 197 F.3d at 433-34 (dismissing Bivens class action suit asserting that Executive's decision to transfer aliens between detention facilities interfered with aliens' access to counsel). Specifically, this Court should dismiss those claims that (1) could have been (but were not) raised before the administrative agency and presented to the court of appeals in a consolidated petition under the zipper clause (claims 17-19 and 21-22); (2) challenge the Government's actions in commencing removal proceedings, adjudicating cases, and executing

removal orders (claims 1, 2, 5, 6, and 17); and (3) contest the Government's discretionary decisions to detain an alien for over thirty days, to choose detention facilities, and to deny bond (claims 1, 2, and 18-20).

### A. Congress Has Precluded Challenges That Could Have Been Presented To The Court Of Appeals In A Consolidated Petition After Administrative Remedies Were Exhausted (Claims 17-19 And 21-22).

Plaintiffs' claims of delay in the commencement of their removal proceedings, denial of bond, and a "communications blackout" (claims 17-19 and 21-22) are jurisdictionally barred because Plaintiffs failed to present these claims to the court of appeals in a consolidated petition after exhausting their administrative remedies.

As noted, under the zipper clause, Congress has provided that an alien may obtain "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional . . . provisions, arising from any action taken or proceeding brought to remove an alien" only by filing in the court of appeals a petition for review of his final removal order. 8 U.S.C. § 1252(b)(9); see also 8 U.S.C. § 1252(a). If an issue is reviewable in the court of appeals on a petition for review, such a petition is the exclusive means of review, St. Cyr, 533 U.S. at 313, and the alien cannot collaterally challenge his removal proceedings in a separate lawsuit, see 8 U.S.C. § 1252(b)(9); AADC, 525 U.S. at 482-83.

This provision dovetails with the INA's exhaustion requirement. Under the INA, before an alien can present a claim to the court of appeals, the alien must first "exhaust[] all administrative remedies available to the alien as of right," 8 U.S.C. § 1252(d)(1), which include raising his claims before an Immigration Judge and the Board of Immigration Appeals.[8] An

[8] The Board of Immigration Appeals is the final administrative tribunal. An alien may file a petition for review of its decision in the appropriate court of appeals. 8 U.S.C. § 1252(a)(1), (b)(1).

alien's failure to do so deprives the courts of jurisdiction to hear his claims. See INA § 242(d)(1), 8 U.S.C. § 1252(d)(1); see also McCarthy v. Madigan, 503 U.S. 140, 144 (1992); McKart v. U.S., 395 U.S. 185, 193-95 (1969); United States v. Copeland, 376 F.3d 61, 69 (2d Cir. 2004). Together, the zipper clause and the exhaustion requirement map out the exclusive path that all challenges to removal actions must take.

In this case, Plaintiffs failed to follow this path. They did not present their claims to the court of appeals in a consolidated petition. And they did not exhaust their administrative remedies in the first place. Most Plaintiffs did not present their challenges to the Immigration Judge,[9] and none raised any of their claims to the Board of Immigration Appeals, even though the administrative forum was available. Claims 17, 21, and 22 allege deprivation of the right to counsel,[10] a complaint that can (and must) be presented to the Immigration Judge and the Board of Immigration Appeals before an alien may seek further review. See In re Madrigal-Calvo, 21 I. & N. Dec. 323, 329 (BIA 1996) (holding that alien waived claim that he was not provided counsel by failing to raise the argument before the Immigration Judge); Reid v. Engen, 765 F.2d 1457, 1461 (9th Cir. 1985) "[A] petitioner cannot obtain review of procedural errors in the administrative process that were not raised before the agency merely by alleging that every such error violates due process."). Claims 18 and 19 allege denial of bond, a determination which also may be reviewed by the Immigration Judge and Board of Immigration Appeals. See 8

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[9] The only exception is that H. Ibrahim and Ebrahim sought release on bond, but were denied by the Immigration Judge. Third Am. Cplt. ¶ 188. They, however, failed to appeal this adverse holding.

[10] Specifically, Plaintiffs allege that the Government's delay in commencing removal proceedings impaired their ability to "obtain legal counsel, and seek release on bond," Third Am. Cplt. ¶ 376 (claim 17), and that they were subject to a "communications blackout" which "interfered with their access to lawyers and the courts," id. ¶¶ 396, 401 (claims 21and 22).

C.F.R. § 236.1(d)(1) (allowing alien to apply to the Immigration Judge for "amelioration of the conditions under which he or she may be released," "including the setting of a bond"); 8 C.F.R. § 236.1(d)(3) (providing that an "appeal relating to bond and custody determinations may be filed to the Board of Immigration Appeals"). Because Plaintiffs failed to follow the proper procedural channels, they are jurisdictionally barred from presenting claims 17-19 and 21-22 to this Court. E.g., Copeland, 376 F.3d at 69.

**B. Congress Has Precluded Challenges To Government Decisions And Actions To Commence Proceedings, Adjudicate Cases, Or Execute Removal Orders (Claims 1, 2, 5, 6, And 17).**

As noted, Congress has divested all courts of jurisdiction over any "cause or claim by . . . any alien arising from the decision or action . . . to commence proceedings, adjudicate cases, or execute removal orders." INA § 242(g), 8 U.S.C. § 1252(g); accord AADC, 525 U.S. at 482. Yet Plaintiffs attempt to bring just such a claim. For example, in claims 1, 2, 5, and 6, Plaintiffs challenge the manner in which the Government commenced their proceedings and executed their removal orders, complaining that both processes took "longer than necessary."[11] Third Am. Cplt. ¶¶ 289, 294, 309; accord id. ¶ 314. Similarly, in claim 17, Plaintiffs claim that the Government impermissibly "delay[ed] the issuance and service of charging documents" used to commence removal proceedings. Third Am. Cplt. ¶ 376. Because the statute makes it clear that decisions on when to commence immigration proceedings and when to execute removal orders are matters of prosecutorial discretion, see AADC, 525 U.S. at 485 (citing Cheng Fan Kwok v. INS, 392 U.S. 206 (1968)); see also Jimenez-Angeles v. Ashcroft, 291 F.3d 594 (9th Cir. 2002), this Court lacks jurisdiction to consider claims 1, 2, 5, 6, and 17.

[11] In addition, insofar as claims 3, 5, and 6 challenge the length of Plaintiffs' detention, any argument in this Memorandum addressing the length of Plaintiffs' detention applies to those claims as well.

### C. Congress Has Precluded Challenges To The Discretionary Decisions To Detain An Alien For Over Thirty Days (1 And 2), To Choose Aliens' Detention Facilities (Claim 20), And To Deny Bond (Claims 18 And 19).

Finally, Congress has eliminated federal court jurisdiction over discretionary decisions in the removal process. In § 1252(a)(2)(B)(ii), Congress provided that "no court shall have jurisdiction to review . . . any . . . decision or action . . . specified under [8 U.S.C. §§ 1151-1378] to be in the discretion of the Attorney General." 8 U.S.C. § 1252(a)(2)(B)(ii); accord Van Dinh, 197 F.3d at 433. Under that provision, the Court lacks jurisdiction to review the decision to detain an alien under an order of removal beyond the 90 day removal period. 8 U.S.C. § 1231(a)(1)(A). Using the language of discretion, see Firstland, 377 F.3d at 130-31, § 1231(a)(6) provides that the Government "may" detain an alien beyond the removal period if it determines that the alien presents a risk to the community or flight risk. Plaintiffs define themselves as persons whom the FBI deemed were "of interest" in the investigation of the September 11th terrorist attacks. Third Am. Cplt. ¶ 57. Further, they do not dispute that they violated the immigration laws of the United States and were removable. Plaintiff Baloch admits he illegally entered the United States after a prior deportation and used counterfeit identification. Third Am. Cplt. ¶ 202. The decision to enforce the immigration laws to the fullest and to detain unlawful aliens until they were cleared and removed was an appropriate response to preserve the national security. See Demore v. Kim, 538 U.S. 510, 524-26 (2003) (the Constitution does not require individualized findings that alien presents a flight risk or potential danger and allows the Executive to act based on broader threats confronting the nation (citing Carlson v. Landon, 342 U.S. 524 (1952))). Because the detention decision fell within the Government's discretion, § 1252(a)(2)(B)(ii) bars review. Moreover, the INA also provides that the Government "may" disregard an alien's designation of a country of removal and send the alien to a different country

if the Government determines that "removing the alien to the country [designated by the alien] is prejudicial to the United States." 8 U.S.C. § 1231(b)(2)(C)(iv); see also Doherty v. Meese, 808 F.2d 938, 944 (2d Cir. 1986) (explaining that the decision is "essentially unreviewable"). This power to decide whether an alien's proposed course of action "is prejudicial to the United States" inherently includes the power to take the time necessary to investigate that proposed course of action. Otherwise, the Government would be forced to act on aliens' requests without information. Accordingly, the Court lacks jurisdiction over Plaintiffs' challenges to the timing of the execution of their removal orders in claims 1 and 2 ).

Similarly, the INA vests the Executive with discretion to choose the "appropriate places of detention" for aliens pending a decision on removal or execution of a removal order. 8 U.S.C. § 1231(g)(1). This decision is purely discretionary, Van Dinh, 197 F.3d at 434-35, and creates no "substantive or procedural right or benefit that is legally enforceable," 8 U.S.C. § 1231(h). Accordingly, under § 1252(a)(2)(B)(ii), this Court lacks jurisdiction to entertain Plaintiffs' allegations in claim 20 that the Government should have assigned them to a different detention facility. See Van Dinh, 197 F.3d at 434-35 (holding that § 1252(a)(2)(B)(ii) bars judicial review of the Government's decision to transfer alien to a different detention facility).

Finally, this Court lacks jurisdiction over the discretionary decisions to deny bond (claims 18 and 19). In addition to § 1252(a)(2)(B)(ii), in INA § 236(e) Congress specifically divested courts of jurisdiction to review the Government's discretionary decision to deny bond:

> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

8 U.S.C. § 1226(e). Because this provision precludes review of both the Government's decision to continue an alien's detention and its decision to oppose an alien's bond requests before the

administrative tribunal, Parra v. Perryman, 172 F.3d 954, 957 (7th Cir. 1999), this Court lacks jurisdiction to entertain Plaintiffs' Fifth Amendment challenges in claims 18 and 19. Demore, 538 U.S. at 516-17 (holding that § 1226(e) bars judicial review of the decision over whether to release an alien).

## III. THIS COURT SHOULD DISMISS THE DETENTION AND REMOVAL BIVENS CLAIMS (CLAIMS 1, 2, 4-7, AND 17-22) AGAINST THE ORIGINAL DEFENDANTS BECAUSE THE INA'S COMPREHENSIVE REGULATORY SCHEME CONSTITUTES A "SPECIAL FACTOR."

This Court should decline Plaintiffs' invitation in claims 1, 2, 4-7, and 17-22,[12] to imply a damages remedy (against the Original Defendants in their individual capacities) under Bivens, 403 U.S. 388. The Supreme Court has held that courts may not imply a Bivens cause of action when "special factors" exist that counsel against creation of a damages remedy. Bivens, 403 U.S. at 396-97. In Bush v. Lucas, 462 U.S. 367 (1982), the Court held that a special factor exists when Congress has established "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." Id. at 388. The Court also found that Congress, with its ability to inform itself through hearings and other factfinding procedures not available to the judiciary, was "in a far better position than a court to evaluate the impact of a new species of litigation" on the scheme that it had adopted. Id. at 389; see also Schweiker v. Chilicky, 487 U.S. 412, 423 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies."); Sugrue v. Derwinski, 26 F.3d 8, 11-12 (2d Cir. 1994) (declining

[12] To the extent claim 3 challenges the Executive's decision to assign Plaintiffs' to the SHU or challenges the length of Plaintiffs' detention, this Court should decline to recognize a Bivens remedy for claim 3 as well.

to recognize Bivens remedy to supplement legislative scheme for resolving veterans disability benefits); Payne v. Meeks, 200 F. Supp. 2d 200, 202-06 (E.D.N.Y. 2002) (holding the Congressional Accountability Act to be a comprehensive program sufficient to preclude a Bivens remedy). This holding applies even if the refusal to recognize a Bivens action leaves the plaintiff without a monetary remedy. Schweiker, 487 U.S. at 421-22.

There can be little doubt that the INA – with all its attendant amendments – serves as a comprehensive regulatory scheme concerning the degree to which the United States, as a sovereign nation, allows aliens within its borders. See DeCanas v. Bica, 424 U.S. 351, 353 (1976) (holding that the INA is a "comprehensive federal statutory scheme for regulation of immigration and naturalization"); St. Cyr, 533 U.S. at 292 (deeming the 1996 amendments to the INA "comprehensive" in their own right). Nor can there be any doubt that Congress consciously chose the remedial scheme by which such individuals may obtain relief from government action – a scheme in which "protecting the Executive's discretion from the courts . . . can fairly be said to be the theme of the legislation." AADC, 525 U.S. at 486. In this respect, Congress's failure to provide aliens a private cause of action for monetary damages cannot be seen as inadvertent. Cf. Sugrue, 26 F.3d at 12 (holding that a "multitiered and carefully crafted administrative process" expressed congressional intent that the "failure to create a remedy against individual employees of the V[eterans ]A[dministration] was not an oversight"); Payne, 200 F. Supp. 2d at 206.[13] To the contrary, Congress specifically provided that the INA's provisions regarding the detention, placement, and removal of an alien do not create any enforceable rights:

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[13] The INA provides a host of safeguards that afford an arena for putative unconstitutional action, including the retention of habeas relief, see St. Cyr, 533 U.S. at 292, and Immigration Court and Board of Immigration Appeals proceedings, which provide "a forum where the allegedly unconstitutional conduct would come to light," Bagola v. Kindt, 131 F.3d 632, 643 (7th Cir. 1997).

> Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

8 U.S.C. § 1231(h). This section clearly evinces congressional intent to refuse a damage remedy, a conclusion buttressed by Congress's decision to divest the district courts of jurisdiction to review these immigration decisions. See, e.g., Van Dinh, 197 F.3d at 433. Accordingly, this Court should decline Plaintiffs' claims

This conclusion is further reinforced by the national security and foreign policy concerns implicit in the removal of an alien in the course of a terrorism investigation. These concerns are themselves a "special factor" counseling against the creation of a Bivens remedy. See Beattie v. Boeing Co., 43 F.3d 559, 563 (10th Cir. 1994). In Beattie, the Tenth Circuit concluded that the "predominant issue of national security clearances amounts to . . . a special factor counseling against recognition of a Bivens claim." Id.; cf. Reinbold v. Evers, 187 F.3d 348 (4th Cir. 1999).

Indeed, the Supreme Court noted that the 1996 amendments to the INA are only Congress's most recent efforts in establishing "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations . . . ." Bush, 462 U.S. at 388. At bottom, the INA's legislative scheme does not merely "counsel" hesitation against creating a Bivens remedy, its comprehensive nature mandates that the courts not do so. See Hudson Valley Black Press v. IRS, 307 F. Supp. 2d 543, 550 (S.D.N.Y. 2004) (refusing to imply a Bivens remedy on the ground that the Internal Revenue Code is a comprehensive scheme).

## IV. THIS COURT SHOULD DISMISS ALL CLAIMS AGAINST DEFENDANTS ASHCROFT, MUELLER, AND ZIGLAR BECAUSE THE COURT LACKS PERSONAL JURISDICTION OVER THEM.

A plaintiff in a civil action has the burden of alleging and establishing the court's

jurisdiction over the defendant. See McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182 (1936). Here, there is no allegation that Defendants Ashcroft, Mueller, or Ziglar took any action within New York, must less any action relating to Plaintiffs. Instead, Plaintiffs presumably rely upon New York's long arm statute, N.Y. CPLR § 302, and presumably assert that the challenged actions were taken within New York by federal employees who acted as "agents" of Defendants Ashcroft, Mueller, and Ziglar. See id. § 302 (a)(2).

The Second Circuit, however, has rejected the application of the long arm statute to cases such as this one. In Grove Press, Inc. v. Angleton, 649 F.2d 121 (2d Cir. 1981), the court held that it lacked personal jurisdiction over a former CIA Director, even though agents of the CIA may have acted in New York. Id. at 123. The court explained that the CIA agents "were simply United States employees acting as agents for the United States government. More than this was required to make a prima facie showing that they were appellants' personal agents." Id.; accord Marsh v. Kitchen, 480 F.2d 1270, 1273 (2d Cir. 1973) (holding that the defendants were "agents of a common principal – the United States – and not of each other"); see also Lee v. Carlson, 645 F. Supp. 1430, 1434 (S.D.N.Y. 1986), abrogated on other grounds by McGann v. New York, 77 F.3d 672, 675 (2d Cir. 1996); Barbera v. Smith, 654 F. Supp. 386, 393-94 (S.D.N.Y. 1987). Here, too, Plaintiffs fail to allege any facts indicating that the federal officials who committed the challenged actions were acting as "personal agents" of Defendants Ashcroft, Mueller, or Ziglar. Grove Press, 649 F.2d at 123. Accordingly, this Court should dismiss all claims against these defendants.

## V. EVEN IF THIS COURT REACHES THE MERITS OF PLAINTIFFS' CLAIMS, IT SHOULD DISMISS THE CLAIMS AGAINST EACH OF THE ORIGINAL DEFENDANTS UNDER THE QUALIFIED IMMUNITY DOCTRINE AND AGAINST THE UNITED STATES BECAUSE PLAINTIFFS FAIL TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED.

Even if the Court concludes that it has jurisdiction and reaches the merits of Plaintiffs' constitutional claims (claims 1-8 and 17-23), it should still dismiss them in their entirety. Under Supreme Court precedent, individuals cannot be held liable unless they were personally involved in the challenged conduct and such conduct violated clearly established rights. Here, Plaintiffs cannot satisfy either prong of the test. Indeed, because they cannot even establish that there were violations, let alone clearly established ones, their claims for declaratory relief against the United States should be dismissed as well.

### A. Plaintiffs Fail To Plead Personal Involvement Of The Original Defendants.

In order to state a claim against government officials in their individual capacities, Plaintiffs must establish that the officials were personally involved in the challenged conduct. The doctrine of respondeat superior does not apply to government officials, and holding a "'high position of authority'" is not enough to trigger liability. Back v. Hasting on Hudson Free School Dist., 365 F.3d 107, 127 (2d Cir. 2004); see also Poe v. Leonard, 282 F.3d 123, 140 (2d Cir. 2002); Ford v. Moore, 237 F.3d 156, 162-63 (2d Cir. 2001). Indeed, liability can be premised only upon an official's personal involvement. Richardson v. Goord, 347 F.3d 431, 435 (2d Cir. 2003) (holding that "'linkage in the prison chain of command' is insufficient"); McKinnon v. Patterson, 568 F.2d 930, 934 (2d Cir. 1977) (holding that Commissioner of Corrections could not be held liable for due process violations at a prison hearing in which he took no part); Gubitosi v.

Kapica, 154 F.3d 30, 32 (2d Cir. 1998).[14] The reason for the requirement is clear. As the Supreme Court recognized long ago, "[c]ompetent persons could not be found to fill positions . . . if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person." Robertson v. Sichel, 127 U.S. 507, 515 (1888).

Moreover, Plaintiffs cannot evade the requirement to plead personal involvement by adding vague and conclusory references to undefined "polices and practices." See Graham v. Henderson, 89 F.3d 75, 79 (2d Cir. 1996) ("wholly conclusory" allegations are inadequate to state a constitutional claim); Sommer v. Dixon, 709 F.2d 173, 175 (2d Cir.), cert. denied, 464 U.S. 857 (1983) ("[A] complaint containing only conclusory, vague, or general allegations of a conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss."); Leeds v. Meltzer, 85 F.3d 51, 53 (2d Cir. 1996) ("While the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice."). Plaintiffs must include specific facts. Houghton v. Cardone, 295 F. Supp. 2d 268, 276 (W.D.N.Y. 2003). When ruling on a motion to dismiss on the basis of qualified immunity, "'federal courts [must be] alert to the possibilities of artful pleading'" by the plaintiff, and should "'firm[ly] appl[y] the Federal Rules of Civil Procedure.'" Harlow v. Fitzgerald, 457 U.S. 800, 808, 820 n.35 (1982) (quoting Butz v. Economou, 438 U.S. 478, 508 (1978)). "[W]holly conclusory" allegations "can be dismissed on the pleadings alone." Graham, 89 F.3d at 79; see also Sommer, 709 F.2d at 175 ("[A] complaint

[14] The Second Circuit has explained that supervisory liability requires: "'(1) actual direct participation in the constitutional violation, (2) failure to remedy a wrong after being informed through a report or appeal, (3) creation of a policy or custom that sanctioned conduct amounting to a constitutional violation, or allowing such a policy or custom to continue, (4) grossly negligent supervision of subordinates who committed a violation, or (5) failure to act on information indicating that unconstitutional acts were occurring.'" Richardson, 347 F.3d at 435.

containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss."); Ying Jing Gan v. City of New York, 996 F.2d 522, 536 (2d Cir. 1993) (granting motion to dismiss due to failure to plead personal involvement where the complaint "contained only conclusory and speculative assertions" that subordinate "engaged in the alleged conduct 'pursuant to the practice, custom, policy and particular direction of'" supervisory defendant). And so can claims that merely recite the applicable legal standard. See Houghton, 295 F. Supp. 2d at 276.

Indeed, the requirement that Plaintiffs plead personal involvement with factual detail is particularly important in cases against cabinet officers and agency heads. Officials at that level have supervisory authority over tens of thousands of employees performing functions throughout the world. It cannot automatically be inferred that such officials have involvement in, or even knowledge of, the discrete actions of every subordinate. As the Sixth Circuit has 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); see also Patton v. Przybylski, 822 F.2d 697, 701 (7th Cir. 1987) (holding that plaintiffs who want to bring head of department into a federal civil rights case must plead his involvement with greater specificity than "boilerplate" statement of the existence of a "custom, practice and policy"); Strauss v. City of Chicago, 760 F.2d 765, 768 (7th Cir. 1985) (holding that bare allegation of existence of policy without statement of grounds upon which allegation rests cannot survive motion to dismiss).

Without question, Plaintiffs fail to satisfy this test. In the few instances where they allege claims that could potentially rise to a constitutional dimension, they offer only boilerplate, conclusory statements without any facts connecting any Original Defendant to any illegal conduct.

As to Defendants Ashcroft, Mueller, and Ziglar, Plaintiffs offer only vague and conclusory allegations that they adopted "policies and practices" that violated Plaintiffs' rights. Third Am. Cplt. ¶ 23 (Ashcroft), ¶ 24 (Mueller), ¶ 25 (Ziglar); accord ¶¶ 2, 4, 5, 6, 9, 56(d), 74. Plaintiffs never specify precisely which policies Ashcroft, Mueller, and Ziglar supposedly adopted, or what actions they took with regard to these policies. These averments are too thin to support liability. The sheer fact that the Department of Justice, FBI, and INS devoted agency resources and attention to Plaintiffs is not sufficient to render the Attorney General, FBI Director, and INS Commissioner liable for all of the conduct Plaintiffs challenge. Moreover, the Inspector General's Reports on which Plaintiffs rely, see id. ¶¶ 77-86, contain nothing to link any Original Defendant to the development, approval, or knowledge of any policy or program to hold detainees longer than absolutely necessary to clear them of terrorist ties. Rather, the Reports show that in the wake of a devastating attack, our Nation's high-ranking officials worked to address complex, sensitive questions to the best of their abilities.

Indeed, a review of Plaintiffs' allegations highlights the truly generic nature of their complaint. Of the 450 paragraphs in Plaintiffs' Third Amended Complaint, only sixteen even mention Ashcroft, Mueller, and Ziglar.[15] Id. ¶¶ 2, 4, 5-8, 23- 25, 72, 74, 83, 211. And, despite the fact that Defendants Ashcroft, Mueller, and Ziglar had distinct responsibilities, thirteen of

[15] Given that Ziglar no longer works for the government and that any equitable claims asserted against him lie only against the United States, see McMillian, 520 U.S. at 785 n. 2, all claims against Ziglar should be read as seeking only money damages.

these paragraphs lump them into a single group and state identical allegations against all three of them. Id. ¶¶ 2, 4, 5-8, 23- 25, 72, 74, 83, 211. Eight of these paragraphs state no facts, but instead recite, verbatim, the same legal conclusion. Specifically, Plaintiffs assert that by "adopting, promulgating, and implementing" certain "policies and practices, Defendants John Ashcroft, Robert Mueller, James Ziglar, and others have intentionally or recklessly violated rights guaranteed to Plaintiffs [by] the Constitution," id. ¶¶ 2, 4, 5, 6, 7, and that Ashcroft, Mueller, and Ziglar "authorized, condoned, and/or ratified the excessively harsh conditions under which Plaintiffs and other class members have been detained," id. ¶¶ 23, 24, 25. Three of these paragraphs base allegations on "information and belief," underscoring the total absence of evidence against Ashcroft, Mueller, and Ziglar. Id. ¶¶ 72, 74, 211. And the remaining paragraphs are likewise devoid of any factual allegations supporting liability.[16] Plaintiffs further reveal that their complaint is simply boilerplate when they seek to hold individuals liable for actions completely outside of their authority.[17] For example, Plaintiffs ask this Court to hold

[16]Indeed, some of Plaintiffs' allegations against Attorney General Ashcroft undercut their claims against him. Plaintiffs allege that although "Attorney General Ashcroft instituted a directive allowing monitoring of attorney-inmate meetings under limited circumstances when approved by the Attorney General, . . . this authority was not used at the MDC." Third Am. Cplt. ¶ 97. Plaintiffs cannot state a claim based on policies and practices that they themselves allege were never implemented.

[17] Plaintiffs' new allegations regarding conditions of confinements are not even asserted against the Attorney General, Director Mueller, or former Commissioner Ziglar. "[P]hysical and verbal abuse, inhumane conditions of confinement, arbitrary and dehumanizing use of strip searches, disruption of sleep, deliberate interference with religious rights, unreasonable restrictions on communications, inadequate provision of medical attention, de facto denial of recreation, and denial of hygiene items and adequate food" are attributed to other defendants, Third Am. Cplt. ¶ 139; see also id. ¶¶ 128, 143, 145-46, as are Plaintiffs' allegations of excessive force, id. ¶¶ 140, 144, restrictions on "access to legal counsel, consulates, and the outside world generally," id. ¶ 148, and allegations that personal items were confiscated and not returned on their removal from the country, id. ¶ 132.

Ziglar liable for the choice of detention facilities and the conditions at the MDC, id. ¶ 83, even though it is undisputed that these decisions were beyond Ziglar's control.

Plaintiffs' allegations against Defendants Hasty and Zenk are similarly deficient. Plaintiffs offer no specific facts indicating that either Hasty or Zenk took part in, ordered, or contemporaneously learned of any of the alleged conduct. Indeed, Plaintiffs do not even allege that they tried to notify either Hasty or Zenk of their allegedly unconstitutional conditions. Instead, Plaintiffs merely assert that, because the warden has "immediate responsibility for the conditions . . . at the MDC," Defendants Hasty and Zenk may be held personally liable for the fact that MDC inmates were "subjected . . . to unreasonable and excessively harsh conditions." Third Am. Cplt. ¶ 26 (Hasty), ¶ 27 (Zenk). The Second Circuit has repeatedly dismissed such respondeat superior pleadings in suits against prison officials. For example, in Gaston v. Coughlin, 249 F.3d 156 (2d Cir. 2001), a prisoner brought an Eighth Amendment claim against the Commissioner of the New York Department of Corrections alleging "prolonged" exposure to sub-freezing temperatures, rodents, and raw sewage in or near his cell. Id. at 161. The Court dismissed these claims on the ground that the plaintiff failed to plead facts demonstrating that the alleged conditions had been reported to the Commissioner. Id. at 166; see also Ayres v. Coughlin, 780 F.2d 205, 210 (2d Cir. 1985) (claim for damages requires "a showing of more than the linkage in the prison chain of command); Poe, 282 F.3d at 140 ("[A] supervisor may not be held liable . . . merely because his subordinate committed a constitutional tort."). Similarly, in Sealy v. Giltner, 116 F.3d 47 (2d Cir. 1997), the Second Circuit dismissed an inmate's due process claims against the Commissioner of the New York Department of Corrections, even though the plaintiff had written several letters to the Commissioner complaining of violations in his disciplinary proceedings. Id. at 49. The Second Circuit held that, because the Commissioner

had referred the letters to a subordinate, the Commissioner did not have adequate personal involvement in the disciplinary proceedings to support a claim against him. Id.; see also Gill v. Mooney, 824 F.2d 192, 196 (2d Cir. 1987) (granting motion to dismiss because "the plaintiff does no more than allege that defendant was in charge of the prison"); Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994) (holding that inmate's letter to Governor complaining about conditions of confinement did not put Corrections Commissioner "on actual or constructive notice of the violation"); Barbera v. Smith, 836 F.2d 96, 99 (2d Cir. 1987) (dismissing suit against defendant supervisory official for failure to state a claim where "the complaint merely allege[d] in conclusory language that he negligently and recklessly failed to train and supervise [his subordinates]").

Again, Plaintiffs offer no factual support for their allegations. They simply parrot the operative legal test, see, e.g, Third Am. Cplt. ¶ 136, and lump Wardens Hasty and Zenk into the group "all Defendants" or "MDC Defendants," even where the facts plainly cannot support such allegations. For example, Plaintiffs bring claims against the wardens concerning Plaintiffs' assignment to the SHU, id. ¶ 390, the length of Plaintiffs' detention, id. ¶¶ 289, 294, denial of bond, id. ¶¶ 381, 386, delays in serving charging documents, id. ¶ 376, failure to provide a speedy trial, id. ¶ 313, even though it is undisputed that the warden had no authority over these processes. In contrast to their numerous specific allegations against the other MDC Defendants, Plaintiffs do not proffer a single specific allegation against Hasty or Zenk. Tellingly, the bulk of Plaintiffs' claims regarding their detention at the MDC – namely, the excessive force claims – do not even name the wardens as Defendants. See id. ¶¶ 344-73, 445-50.

Moreover, it is difficult even to imagine a viable claim against Defendant Zenk, who did not arrive at the MDC until April 2002 – after four of the six MDC Plaintiffs had been removed,

and only one and one-half months before the last MDC Plaintiff was removed. Third Am. Cplt. Exhibit 1 ("OIG Supp. Report"), at 32 n.25. Because nearly all of the alleged conduct had ended before Zenk arrived, Plaintiffs cannot even assert a respondeat superior claim against him, much less satisfy the requirements for overcoming qualified immunity.

**B. Plaintiffs Fail To Establish A Violation Of Any Clearly Established Rights, Or Of Any Rights At All.**

In any event, even if the Original Defendants were personally involved in the challenged conduct, they still could not be held liable, because Plaintiffs fail to allege violations of clearly established rights. Indeed, they cannot show violations of any rights at all, and thus their constitutional claims should be dismissed as a matter of law.

The Supreme Court has held, time and again, that government officials enjoy immunity from suit unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Behrens v. Pelletier, 516 U.S. 299, 305 (1996). The Court has articulated the rationale behind the immunity doctrine on several occasions, but perhaps best in Anderson v. Creighton, 483 U.S. 635 (1987):

> [P]ermitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liabilities and harassing litigation will unduly inhibit officials in the discharge of their duties.

Id. at 638; see also Harlow, 457 U.S. at 806. Indeed, absent the doctrine, some future officials might flinch when confronted with difficult and novel choices or be less "hardy" when their responsibilities demand action. See Otis v. Watkins, 13 U.S. (9 Cranch) 339, 355-56 (1817). Suits against senior officers of government – particularly the heads of the major departments of the Executive Branch – pose special concerns for the public interest. The Supreme Court in Mitchell recognized that the need for protection is particularly acute for our most senior officers who shoulder the responsibility to act when the very safety of our Nation and its people are at

stake. Moreover, "there surely is a national interest in enabling Cabinet officers with responsibilities in this 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). As Justice Stevens once observed:

> The passions aroused by matters of national security and foreign policy and the high profile of the Cabinet officers with functions in that area make them "easily identifiable target[s][sic] for suits for civil damages." Persons of wisdom and honor will hesitate to answer the President's call to serve in these vital positions if they fear that vexatious and politically motivated litigation associated with their public decisions will squander their time and reputation, and sap their personal financial resources when they leave office.

Id. at 541-42 (citation omitted).

Accordingly, when ruling on a motion to dismiss for qualified immunity, courts apply a two-pronged analysis. First, courts ask whether the allegations in the complaint, viewed in the light most favorable to the plaintiff, state a claim for a constitutional violation by the government official. See Saucier v. Katz, 533 U.S. 194, 201 (2001). And second, if the allegations do state a claim for a constitutional violation, courts inquire whether the particular right in question was "clearly established." See Back, 365 F.3d at 129; see also Saucier, 533 U.S. at 201; Palmer v. Richards, 364 F.3d 60, 66-67 (2d Cir. 2004). With this as background, the Second Circuit has held that a right is clearly established if

> (1) the law is defined with reasonable clarity, (2) the Supreme Court or the Second Circuit has recognized the right, and (3) "a reasonable defendant [would] have understood from the existing law that [his] conduct was unlawful."

Anderson v. Recore, 317 F.3d 194, 197 (2d Cir. 2003) (quoting Young v. County of Fulton, 160 F.3d 899, 903 (2d Cir. 1998)); see also Back, 365 F.3d at 129-30. The court does not make a generalized, "abstract legal" inquiry into whether the plaintiff has any constitutional rights, Gittens v. LeFevre, 891 F.2d 38, 42 (2d Cir. 1989), but instead asks the "more particularized"

question of whether, under the particular circumstances of the case, a defendant could have reasonably believed that his acts were lawful, Saucier, 533 U.S. at 202. If at the time the official acted, "officers of reasonable competence could disagree on the legality of [the] actions," qualified immunity applies and the suit must be dismissed. Dunahy v. Buscaglia, 134 F.3d 1185, 1190 (2d Cir. 1998).

Plaintiffs cannot satisfy this test. In claims 1-8 and 17-23, they fail to demonstrate any constitutional violations, much less violations of clearly established law. Accordingly, Plaintiffs' claims must be dismissed on the merits and under the doctrine of qualified immunity for failure to state a claim.

Indeed, Plaintiffs would have failed to state a claim even if the alleged incidents occurred in normal times, and not in the aftermath of 9/11. But considering the circumstances in which the Original Defendants were forced to make the complex and sensitive judgments at issue, it is critical to afford them the "necessary . . . leeway" that the Supreme Court has consistently extended in matters involving national security. Zadvydas v. Davis, 533 U.S. 678, 700-01 (2001); see also, e.g., Mitchell v. Forsyth, 472 U.S. 511, 542 (1985). In fact, the Supreme Court has admonished that "definitive answer[s]" must be given cautiously, step by step where, as here, the national security interests of the nation are involved. Mitchell, 472 U.S. at 534; see also United States v. United States District Court, 407 U.S. 292, 321-22 (1972) (resolving the question left open in Katz only with respect to electronic surveillances with a domestic purpose and leaving open whether a different result would obtain “with respect to activities of foreign powers or their agents”); Katz v. United States, 389 U.S. 347, 358 n.23 (1969) (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"); Haig v. Agee, 453 U.S.

280, 291-92 (1981); see Nixon v. Fitzgerald, 457 U.S. 731, 751-53 (1982) (recognizing that "before exercising jurisdiction [courts] must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch."). Against this backdrop, it is clear that Plaintiffs' claims cannot succeed.

**1. Claims 1 And 2, Challenging The Length Of Plaintiffs' Detention, Should Be Dismissed Because The Detention Was Objectively Reasonable.**

To begin with, Plaintiffs' Fourth and Fifth Amendment challenges to the length of their detention fail as a matter of law. See Third Am. Cplt. ¶¶ 289, 294 (alleging that their detention was for "months longer than necessary to secure their removal" and without either a probable cause hearing or "any legitimate immigration law enforcement purpose"). No court has ever held that, when an illegal alien is detained, he has a constitutional right to be removed from the United States at the earliest possible time. To the contrary, the Supreme Court has determined that detention lasting as long as six months raises no constitutional questions, and that continued detention may be warranted in cases involving national security (or when the alien's removal is reasonably foreseeable). See Zadvydas v. Davis, 533 U.S. 678, 700-01 (2001).

In Zadvydas, the Supreme Court examined whether criminal aliens could be detained indefinitely. Choosing not to resolve the constitutional issue raised by indefinite detention, the Court instead interpreted the detention statute (8 U.S.C. § 1231) as limited by a "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 continuing 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 continued detention. 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. 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. Unwilling to cabin the Executive in times of crisis, the Court expressly reserved the question of what temporal limits 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. Id.

Under Zadvydas, Plaintiffs cannot establish a constitutional right to immediate removal. Although Zadvydas dealt specifically with the detention of illegal aliens who cannot be removed, the Court's decision confirms that the alleged detentions in this case are permissible. First, all of the detentions were within the Supreme Court's six-month guideline.[18] Thus,

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[18] Saffi was removed within 150 days. See Third Am. Cplt. ¶¶ 160, 166 (ordered removed 10/8/01, removed 3/5/02). Jaffri was removed within 106 days. Id. ¶¶ 178, 180 (ordered removed 12/20/01, removed 4/1/02). Turkmen was removed within 117 days. Id. ¶¶ 264, 272 (ordered removed 10/31/01, voluntarily departed 2/25/02). A. Ibrahim was removed within 143 days. Id. ¶¶ 248-49 (ordered removed 11/6/01, removed 3/28/02). Sachdeva was removed within 97 days. Id. ¶¶ 280, 284 (ordered removed 12/31/01, removed 4/17/02). Baloch had his removal order reinstated on September 22, 2001, but in January 2002, he was subject to criminal proceedings until he was sentenced to time served and removed on April 2, 2002. Id. ¶¶ 208, 210, 213. Thus, his immigration detention was only about 100 days. Ebrahim and H. Ibrahim were ordered removed on November 20, 2001. Id. ¶188. Unless they expressly waived appeal, their removal period began thirty days later, on December 20, 2001, when their time to appeal expired. See 8 C.F.R. § 241.1. Because they were removed on June 6, 2002, and May 29, 2002, their post-order detention lasted only 177 and 169 days, respectively. Id. ¶ 199. Moreover, even if they had expressly waived appeal (and they do not allege to having done so), their post-order detention would have been only 207 days and 199 days, respectively – well

Plaintiffs were removed within a reasonable time period.

Second, this is the quintessential case presenting national security concerns that justify protective detention. The extraordinary attacks on September 11 by terrorist aliens within our own country, and the unquestionable need to protect against further assaults, involved the very national security concerns that the Zadvydas Court said might require "heightened deference to the judgment of the political branches." Id. Indeed, deference here is particularly appropriate. The investigations were exceedingly complex, requiring a nationwide effort to obtain information regarding terrorist organizations, methodology, and personnel. Cf. Halkin v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978); CIA v. Sims, 471 U.S. 159, 178 (1985). Moreover, the challenged detentions concerned not just our Nation's security, but that of our allies. Before the United States sends an alien to another country, it has sound foreign policy interests in determining the alien's background, especially when there is a suggestion of involvement with international terrorism. That way, the United States can forewarn the receiving country about potentially dangerous aliens, and thus avoid "endanger[ing] the interests" of that country, which would "creat[e] serious problems for American foreign relations and foreign policy." Haig, 453 U.S. at 308. Questions of how much inquiry is needed and how long it should take are all matters vested exclusively in the Executive's discretion as an inherent component of its management of foreign affairs. See Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."). "Such matters are so exclusively entrusted to the political branches of

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within the "reasonably foreseeable future" language of Zadvydas.

government as to be largely immune from judicial inquiry or interference." Id. at 589; see also Regan v. Wald, 468 U.S. 222, 243 (1984) (applying the "traditional deference to the Executive's judgment '[i]n this vast external realm'" of "foreign policy interests").

Further, the INA recognizes the need to conduct investigations into an alien's background. The statute authorizes the Government to refuse an alien's request to be removed to a particular country if such removal would be "prejudicial to the United States." 8 U.S.C. § 1231(b)(2)(C)(iv). This authority would be virtually useless if the Government could not investigate before it made its decision. See Mathews v. Diaz, 426 U.S. 67, 81 (1976) ("Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution."). Accordingly, there is no merit to Plaintiffs' suggestions that the Government violated Plaintiffs' due process rights by conducting an investigation before removing them.

In any event, even if Plaintiffs had a Fourth or Fifth Amendment right to be removed as soon as possible, that right was not clearly established under Zadvydas. The Supreme Court's decisions in Katz, 389 U.S. 347, and Mitchell, 472 U.S. 511, leave no room for doubt. In Katz, the Court held that warrantless electronic surveillance generally requires a warrant, but reserved judgment on whether a warrant would be necessary "in a situation involving the national security." Katz, 389 U.S. at 358 n.23. Subsequently, in Mitchell, the Court pointed to this reservation in finding uncertainty in the law and in sustaining a defense of qualified immunity for a warrantless domestic security wiretap. Mitchell, 472 U.S. at 542. The Court recognized that the question had been "left open" in Katz and "had yet to receive the definitive answer that it demanded." Mitchell, 472 U.S. at 534. Under these circumstances, to say that a constitutional rule "had already been 'clearly established' [would have] give[n] that phrase a meaning that it

[could] not easily bear." Id. at 535.

When viewed against this jurisprudential backdrop, it is clear that each of the Original Defendants is entitled to qualified immunity in this case. Zadvydas, like Katz, left open the question of whether national security circumstances would create an exception to a general rule. Accordingly, in this case, like in Mitchell, the alleged constitutional rights are not clearly established, and the defendants are entitled to qualified immunity. See Mitchell, 472 U.S. at 534 (recognizing that "definitive answer[s]" are given cautiously, step by step where the national security interests of the nation are involved).

Finally, Plaintiffs' Fourth Amendment argument fails for an additional reason: It is well established that the Fourth Amendment does not cover any period of detention that may ensue after a lawful arrest is made. See Gerstein v. Pugh, 420 U.S. 103 (1975); California v. Hodari, 499 U.S. 621, 625 (1991). As long as the initial seizure is permissible, the length or manner of detention does not raise any Fourth Amendment concerns. See Bell v. Wolfish, 441 U.S. 520, 535-39 (1979) (concluding that claims relating to length of detention lie in Fifth Amendment); Graham v. Connor, 490 U.S. 386, 395 n.10 (1989) (same); Riley v. Dorton, 115 F.3d 1159, 1162-64 (4th Cir. 1997) (en banc) (rejecting "continuing seizure theory" under Fourth Amendment); Valencia v. Wiggins, 981 F.2d 1440, 1444 (5th Cir. 1993). Here, Plaintiffs do not dispute that they were lawfully arrested for their illegal presence in the United States. See Third Am. Cplt. ¶¶ 54(a), 57 (stating that each Plaintiff was arrested on immigration violations). They challenge only the length of their detentions following their arrests. See id. ¶¶ 289, 294. Because Plaintiffs do not dispute that they violated the immigration laws and that their initial detention was permissible, they have failed to state a claim under the Fourth or Fifth Amendments, and they certainly have failed to demonstrate a violation of a clearly established

right.

**2. Claim 5 Challenging Plaintiffs' Detention On Equal Protection Grounds Should Be Dismissed Because Plaintiffs Have Alleged No Unlawful Discrimination.**

Likewise, there is no merit to Plaintiffs' assertions that they were "singled out" for lengthy detention "based on their race, religion, and/or ethnic or national origin" in violation of the Equal Protection Clause. Id. ¶¶ 307-11. A classification of aliens based upon nationality satisfies equal protection where, as here, there is a "facially legitimate and bona fide reason" for the classification. See Rojas-Reyes v. INS, 235 F.3d 115, 122 (2d Cir. 2000); Bertrand v. Sava, 684 F.2d 204, 212-13 (2d Cir. 1982) (applying standard to INS denial of immigration parole).

Indeed, nationality distinctions have long been a fact of life in immigration law. See Harisiades, 342 U.S. at 597 (1952) (Frankfurter, J., concurring); Fiallo v. Bell, 430 U.S. 787, 792 (1977); Diaz, 426 U.S. at 78-80. Over the years, Congress itself has enacted into law numerous special nationality-based immigration preferences, reflecting foreign policy concerns of the United States. 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); see also Carlson v. Landon, 342 U.S. 524, 534 (1952) (recognizing that "[c]hanges in world politics and in our internal economy bring legislative adjustments affecting the rights of various classes of aliens to admission and deportation"). It would thus be a dramatic departure from well-established precedent for this Court to hold that distinctions among aliens cannot be based on national origin. See Narenji v. Civiletti, 617 F.2d 745, 746-47 (D.C. Cir. 1980), cert. denied, 446 U.S. 957 (1980) (holding that regulation requiring all immigrant Iranian post-secondary school students to provide information as to their

residence and immigration status has a rational basis and is constitutional).

Moreover, in AADC, 525 U.S. 471, the Supreme Court held that the Equal Protection Clause is generally inapplicable in the context of proceedings to remove illegal aliens. See id. at 489-91. The Court addressed claims by aliens that the United States had selectively commenced deportation proceedings against them on invidious grounds in violation of, inter alia, their equal protection rights. Id. at 474-75. In rejecting the aliens' claims, the Court recognized that selective prosecution claims are highly disfavored, even in the realm of criminal prosecutions of American citizens, because such claims "invade a special province of the Executive – its prosecutorial discretion." Id. at 489. The Court then went on to observe that the Executive's exercise of prosecutorial discretion is even less susceptible to judicial review in the context of its role in deporting illegal aliens:

> What will be involved in deportation cases is not merely the disclosure of normal domestic law enforcement priorities and techniques but often the disclosure of foreign-policy objectives and . . . foreign intelligence products and techniques. 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.

Id. at 490-91.

The Court's analysis in AADC is no less salient when applied to the Government's alleged decision to delay the removal of Plaintiffs, who were apprehended in the immediate wake of a terrorist attack on the United States perpetrated by foreign nationals, and were allegedly held for the purpose of determining whether they had any terrorist connections. In view of the "changing world conditions" occasioned by the events of September 11, see Diaz 426 U.S. at 81, 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. These distinctions were properly based in part on national origin, ideology, affiliations, or on other criteria related to terrorism and the potential perpetrators.

Indeed, the Supreme Court acknowledged that the Government could "deem[] nationals of a particular country a special threat." AADC, 525 U.S. at 491. In light of the standard set forth in AADC and the absence of any authority mandating a contrary course under the circumstances of September 11, reasonable officials could conclude that the challenged conduct was lawful. Given the consistent authorities upholding distinctions in immigration law, the distinctions allegedly drawn in this case certainly did not violate clearly established law. See Malley v. Briggs, 475 U.S. 335, 341 (1986) ("[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized.").

Finally, the Court should reject Plaintiffs' equal protection claim on the independent ground that Plaintiffs have failed to identify other similarly situated aliens who allegedly received preferential treatment. In United States v. Armstrong, 517 U.S. 456 (1996), the Supreme Court held that a plaintiff alleging selective prosecution cannot prevail – or even obtain discovery – without alleging that "similarly situated individuals of a different race were not prosecuted." Id. at 466; see also Pyke v. Cuomo, 258 F.3d 107, 109 (2d Cir. 2001) (distinguishing selective prosecution claims, which require the plaintiff to "plead and establish the existence of similarly situated individuals who were not prosecuted," from other equal protection claims (emphasis added)). The plaintiff does not meet his burden by alleging that the law "is enforced solely and exclusively against persons of the" plaintiff's race, religion, or ethnicity. Armstrong, 517 U.S. at 466. "When pleading a violation of the Equal Protection

Clause, [by virtue of] selective prosecution on the basis of his race, [the plaintiff] 'must show that similarly situated individuals of a different race were not prosecuted.'" Brown v. City of Oneonta, 221 F.3d 329, 337 (2d Cir. 2000) (quoting Armstrong, 517 U.S. at 469); see also United States v. Linda, 212 F. Supp. 2d 541, 566-67. Plaintiffs never identify the "similarly situated" group whom they believe received favorable treatment. Accordingly, under Armstrong, Plaintiffs fail to state a claim under the Equal Protection Clause.

**3. Claim 4 Alleging Violations Of Plaintiffs' Rights Against Compulsory Self-Incrimination Should Be Dismissed For Failure To Allege Government Use Of Incriminating Statements Against Plaintiffs.**

Plaintiffs fail to state a violation of their Fifth Amendment rights against self-incrimination. In claim 4, Plaintiffs allege that they were subjected to "custodial interrogation designed to overcome their will and to coerce involuntary and incriminating statements from them." Third Am. Cplt. ¶ 304. The apparent basis for this claim is that Plaintiffs were allegedly questioned on various occasions by federal law enforcement officers who did not administer Miranda warnings to them or provide them with access to counsel. See id. ¶¶ 70, 75(c), 183, 202, 256-58, 278. Plaintiffs do not claim, however, that any of the allegedly coerced statements were either incriminating or used against them in a criminal proceeding. Accordingly, claim 4 of their amended complaint must be dismissed.

Merely compelling an involuntary statement from a criminal suspect does not implicate the Fifth Amendment. Rather, because the Fifth Amendment protects only against self-incrimination, the allegedly offending statement must actually be incriminating in order to support a cause of action. Fisher v. United States, 425 U.S. 391, 408 (1976) (Fifth Amendment privilege "applies only when the accused is compelled to make a [t]estimonial [c]ommunication that is incriminating") (emphasis added). Here, Plaintiffs do not contend that any of their

allegedly involuntary statements were actually incriminating. To the contrary, Plaintiffs repeatedly assert that they told various authorities time and again that they were not involved in the events of September 11 and that they did not know anyone who was. Third Am. Cplt. ¶¶ 152, 183, 202, 208, 224, 225, 256-59, 263, 279.

Moreover, eliciting an involuntary, incriminating statement does not violate the Fifth Amendment if the allegedly offending statement is never used as evidence in a criminal proceeding. Chavez v. Martinez, 538 U.S. 760, 766-67 (2003). In Chavez, the plaintiff sued an officer who asked him questions while the plaintiff was receiving treatment for wounds. Id. at 765. Criminal charges never were brought, and the plaintiff's interview never was used in a criminal proceeding. Id. at 765-66. The Supreme Court held that there was no violation of the Fifth Amendment's protections against self-incrimination, explaining that even if a statement were "compelled by police interrogations . . . it is not until [the statement is used] in a criminal case that a violation of the Self-Incrimination Clause occurs . . . ." Id. at 767 (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990)).

With the exception of Baloch, none of the Plaintiffs has alleged that he ever was charged with a criminal offense, and Baloch does not allege that he made any incriminating statement that was offered against him in his criminal case.[19] Moreover, it is irrelevant that Plaintiffs were charged with immigration violations, because it is well settled that immigration proceedings are civil in nature for Fifth Amendment purposes, see Nason v. INS, 370 F.2d 865, 867-68 (2d Cir.),

[19] Indeed, Baloch could not seek recovery in this case on any such claim consistent with the Supreme Court's decision in Heck v. Humphrey, 512 U.S. 477 (1994). The Supreme Court held in Heck that a plaintiff pursuing a cause of action to recover damages for any allegedly unconstitutional action that would render a conviction against him invalid "must prove that the conviction or sentence has been reversed on direct appeal" or otherwise overturned. Id. at 486-87. Here, the only Bivens claim Baloch could possibly assert under the Self-Incrimination Clause – that the use of his statements caused his conviction – is foreclosed. Id. at 487 n.7.

cert. denied, 393 U.S. 830 (1968), and that Miranda warnings are not required, see Avila-Gallegos v. INS, 525 F.2d 666, 667 (2d Cir. 1975); United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 155 (1923). Accordingly, claim 4 should be dismissed for failure to state a violation of the Fifth Amendment.

**4. Claim 6 Alleging Violations Of Plaintiffs' Speedy-Trial Rights Should Be Dismissed Because Plaintiffs Admit They Were Never Criminally Charged, Tried, Or Convicted.**

Plaintiffs' also fail to state a violation of the Sixth Amendment's guarantee to a speedy trial. The Speedy Trial Clause is implicated only when criminal proceedings have begun. Because Plaintiffs expressly allege that they were never criminally charged,[20] Third Am. Cplt. ¶ 314, they cannot state a claim under the Speedy Trial Clause.

The Supreme Court has held that the Speedy Trial Clause is not triggered by the commencement of a criminal investigation of a suspect; rather, the suspect must be criminally charged or a formal indictment or information must issue. United States v. Marion, 404 U.S. 307 (1971). In Marion, the defendant was indicted for criminal acts committed over three years earlier. Id. at 308. The district court dismissed the indictment for "lack of speedy prosecution." Id. at 310. In reversing, the Supreme Court explained: "On its face, the protection of the [Sixth] Amendment [Speedy Trial Clause] is activated only when a criminal prosecution has begun." Id. at 313 (emphasis added). The Court further explained that a prosecution begins when there has been "a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge." Id. at 320 (emphasis added); see also United States v.

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[20] Baloch was indicted for illegal reentry into the country, but he admits that he pled guilty on the charge soon after he was indicted, and he does not claim a violation of his speedy trial rights as to that charge. Id. ¶ 210. Moreover, Baloch is not permitted to collaterally attack his guilty plea on the reentry charge in this case by claiming a violation of his speedy trial rights. See supra at n.19; see also Heck, 512 U.S. at 486-87.

MacDonald, 456 U.S. 1 (1981) (holding that the period after the Government dropped its charge until the indictment was not covered by the Speedy Trial Clause, and that a mere criminal investigation does not trigger the Clause); Jhirad v. Ferrandina, 536 F.2d 478, 485 n.9 (2d Cir. 1976) (holding that Speedy Trial Clause did not apply to petitioner's extradition proceeding because it was not a criminal prosecution).

Plaintiffs cannot argue that they were denied the right to a speedy trial. As Plaintiffs themselves admit, they were never criminally charged and never subjected to a criminal prosecution. Third Am. Cplt. ¶ 314. Rather, they were charged with civil immigration violations and removed on that basis. Because of the civil nature of removal proceedings, "Sixth Amendment safeguards, are not applicable to such proceedings." Lavoie v. INS, 418 F.2d 732, 734 (9th Cir. 1969); accord Nason, 370 F.2d at 867-68. And because any extension of the Sixth Amendment to immigration proceedings would be wholly novel and contrary to clearly established law, it certainly could not defeat Defendants' qualified immunity.[21]

Finally, Plaintiffs have no standing to bring a speedy trial claim. The Supreme Court has emphasized that "'the only possible remedy'" for a violation of the Sixth Amendment right to a speedy trial is "to reverse the conviction, vacate the sentence, and dismiss the indictment."

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[21] Moreover, it is no response to suggest that the proceedings in this case became functionally criminal as soon as removal was possible. Third Am. Cplt. ¶ 314. Even if it were true that immigration interests no longer justified Plaintiffs' detention, there were no criminal charges triggering speedy trial rights. And even if the Sixth Amendment were extended to detention that is "tantamount to criminal detention" or has a criminal purpose, id., that too would be novel and thus would not give rise to clearly established rights. Indeed, such a conclusion would not only be inconsistent with Marion and MacDonald, but also with Zadvydas and the INA, which confirm that the government has authority to detain an alien beyond the moment at which removal becomes possible. As explained, Zadvydas approved of a six-month post-order detention period to effectuate removal, and did not suggest that detention of less than six months would violate the Constitution. Further, in the INA, Congress expressly afforded the Executive Branch the power to decline to remove an alien to a designated country even though removal is possible. See 8 U.S.C. § 1231(b)(2)(C)(iv).

Strunk v. United States, 412 U.S. 434, 440 (1973) (quoting Barker v. Wingo, 407 U.S. 514, 522 (1972)); accord Cody v. Henderson, 936 F.2d 715, 722 (2d Cir. 1991) (noting that under the Sixth Amendment right to a speedy trial, "'dismissal of the indictment' is 'the only possible remedy'" (quoting Barker, 407 U.S. at 522)). Accordingly, the Second Circuit has held that equitable relief is not available to redress violations of the Speedy Trial Clause. Wallace v. Kern, 499 F.2d 1345, 1350-51 (2d Cir. 1974) (citing Barker, 407 U.S. 514). Because Plaintiffs are not seeking to reverse a conviction, vacate a sentence, or dismiss an indictment, their claim is not redressable, and they lack standing to assert claim 6. Lujan, 504 U.S. at 561.

**5. Claim 7 Alleging Denial Of Free Exercise of Religion Should Be Dismissed For Failure To Allege Supporting Facts.**

Nor have Plaintiffs stated a claim for denial of their First Amendment rights "to practice and observe their religion" while in custody. Third Am. Cplt. ¶ 319 (claim 7). Plaintiffs assert claim 7 against all Defendants. Id. ¶ 321. Their allegations, however, are limited only to prison guards and staff members. For example, they allege that "MDC staff members . . . insulted their religion," id. ¶ 107 (emphasis added), that "MDC Defendants" denied them "a copy of the Koran," "food which would allow them to conform to a Halal diet," and information on "the time of day in order to conform to their daily prayer requirements," id. ¶ 128(a), (b), (c) (emphasis added), and that "MDC COs constantly interrupted [their] prayers by regularly banging on cell doors [and] screaming derogatory anti-Muslim comments," id. ¶ 128(d) (emphasis added); see also id. ¶¶ 157-58, 173, 193, 207, 229 (limiting allegations to MDC Defendants). And the context of those allegations makes clear that the alleged perpetrators were prison guards and staff members. Plaintiffs state no facts indicating any involvement or knowledge on the part of the Original Defendants. Instead, Plaintiffs rely solely on boilerplate assertions that "Defendants have adopted, promulgated, and implemented policies and practices intended to deny Plaintiffs

and class members the ability to practice and observe their religion." Id. ¶ 319; accord id. ¶ 56(j). As explained above, these conclusory statements cannot withstand a motion to dismiss. See supra Part V.A.

Moreover, Plaintiffs' allegations of a high-level "policy" to deprive them of religious liberties contradict their own complaint, which states that these alleged deprivations occurred in violation of federal policy. Id. ¶ 107, 108 (alleging that "MDC staff members . . . insulted their religion" "contrary to BOP policy"). Plaintiffs' allegations are also belied by the comprehensive regulations that provided Plaintiffs the right to request religious accommodations. Specifically, the regulations provided detainees the right, upon making an appropriate request, to observe religious holy days, observe daily prayer, and receive a religious diet, 28 C.F.R. § 548.20, prohibited personnel from deriding detainees' religious faith, 28 C.F.R. § 548.15, and created a procedure whereby detainees could report violations, 28 C.F.R. § 542.10 et seq. Plaintiffs never claim that they pursued these avenues for relief or that they alerted any Original Defendant that they desired a religious accommodation. Cf. Colon v. Couglin, 58 F.3d 865, 873-74 (2d Cir. 1995) (explaining that plaintiff must specify the precise manner in which he made a request to a prison official in order for the court to evaluate whether the official should have understood the import of that request). Accordingly, they cannot establish liability against the Original Defendants, and this Court should dismiss all requests for equitable and monetary relief in claim 7 against these Defendants.

**6. Claim 8 Should Be Dismissed Because Plaintiffs Fail To Allege Sufficient Facts To Support A Fifth Amendment Claim To Deprivation of Property.**

Likewise, Plaintiffs' Fifth Amendment claim for deprivation of property fails. Plaintiffs offer no facts demonstrating that the Original Defendants personally took part in, ordered, or

contemporaneously learned of the seizure of Plaintiffs' personal possessions.[22] Plaintiffs state that their possessions were taken by FBI, INS, and BOP officers at the time of their arrest, Third Am. Cplt. ¶¶ 131, 183, 224, 272, 279, or upon their arrival at the detention facilities, id. ¶¶ 153, 172, 184, 203, 229. But they offer only a single, conclusory statement that Defendants Ashcroft, Mueller, and Ziglar "adopt[ed], promulgat[ed], and implement[ed] this policy and practice." Id. ¶ 6. As explained above, such vague, boilerplate allegations do not state a claim as a matter of law. See supra Part V.A.

Additionally, if the Court rejects the Government's argument that the FTCA does not permit recovery under claim 30, see infra Part VII.C, then Plaintiffs had an adequate post-deprivation remedy under the FTCA, and their Fifth Amendment claim is precluded as a matter of law. Hudson v. Palmer, 468 U.S. 517, 533 (1984) (holding that Due Process Clause is not implicated when a prisoner's property is lost or destroyed during incarceration "if a meaningful postdeprivation remedy for the loss is available"); see also 28 C.F.R. § 543.30 ("Pursuant to the Federal Tort Claims Act, a claim for money damages for . . . damage to or loss of property must be filed against the United States by the injured party with the appropriate Federal agency for administrative action."); 28 C.F.R. § 14.10.

**7. Claims 3, 20, And 23, Challenging The Conditions of Confinement And Regulations At MDC And Passaic, Should Be Dismissed Because The Conditions Were Adequate And The Restrictions Were Reasonably Related To The Government's Interest In Maintaining Security.**

Plaintiffs' conditions-of-confinement claims should be dismissed, as well. The reasons

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[22] At the request of the Government's counsel, Plaintiffs' counsel has recently provided a particularized statement of the property they believe to be in the Government's possession. The Government is currently confirming what property was received by, and remains in, the Government's possession, and will be arranging for the release of all property it has which is properly returnable to Plaintiffs.

are threefold. First, Plaintiffs' core allegations do not aver that Plaintiffs were deprived of "the minimal civilized measure of life's necessities," Kost v. Kozakiewicz, 1 F.3d 176, 188 (3d Cir. 1993) (quoting Wilson v. Seiter, 501 U.S. 294, 298 (1990)), or exposed to an "excessive risk" to their health or safety, see Brown v. Bargery, 207 F.3d 863, 867 (6th Cir. 2000). The alleged limited quantity of soap and towels, cold cells, limited recreation activities, "barely edible" food, 24-hour lighting, and overcrowding fall far short of this standard. See Third Am. Cplt. ¶¶ 117-24, Indeed, it is well settled that detainees have no right under the Constitution to "comfortable" facilities. See Keenan v. Hall, 83 F.3d 1083, 1091 (9th Cir. 1996). Further, as the Second Court has made clear, there is "a stringent test for determining when overcrowding will amount to punishment." Lareau v. Manson, 651 F.2d 96, 103 (2d Cir. 1981). "It must be shown that the overcrowding subjects a detainee over an extended period to genuine privations and hardship not reasonably related to a legitimate governmental objective." Id. Most pertinent to the allegations advanced here, "[t]he question is one of degree and must be considered in light of the particular circumstances of each case and the particular facility in question." Id.; see also Bell, 441 U.S. at 542 (there is no "'one man, one cell' principle lurking in the Due Process Clause of the Fifth Amendment"). Only Plaintiffs Turkmen and Sachdeva complain of "crowded conditions," Third Am. Cplt. ¶¶ 3, 268(c), 282, yet they allege no facts supporting this claim. They do not state how large their cells were, how many people shared them, or how long they were confined there each day. Because Plaintiffs have failed to state sufficient facts, this Court should dismiss their claims alleging overcrowded conditions.

Second, Plaintiffs fail to allege that the Original Defendants exhibited "deliberate indifference" to their health or safety. Cuoco v. Moritsugu, 222 F.3d 99, 107 (2d Cir. 2000) (emphasis added) (internal quotations omitted). To state a claim, plaintiffs must allege that

defendants were "aware of" the unlawful conditions, and failed to act in a manner "evinc[ing] a conscious disregard of a substantial risk of serious harm." Id. (emphasis added); see also Tesch v. County of Greenlake, 157 F.3d 465, 476 (7th Cir. 1998) (equating deliberate indifference with "reckless in a criminal or subjective sense"). Being the warden at a facility where an alleged violation occurred is not enough. See, e.g., Gill, 824 F.2d at 196 (holding that the fact that defendant "was in charge of the prison" insufficient to state a claim absent specific allegations of personal involvement). A fortiori, being the head of a law enforcement agency or an entire department is not sufficient either. See Patton, 822 F.2d at 701; Nuclear Transport, 890 F.2d at 1355. Moreover, Plaintiffs cannot compensate for this deficiency with the unsubstantiated assertion that Defendants "adopted, promulgated and implemented policies and practices," Third Am. Cplt. ¶ 5. See, e.g., Ying, 996 F.2d at 536; Graham, 89 F.3d at 79. Because Plaintiffs fail to allege facts sufficient to demonstrate that any Original Defendant exhibited the culpable recklessness to constitute deliberate indifference, this Court should dismiss the Fifth Amendment claims against these defendants. See Cuoco, 222 F.3d at 107.

Third, as the Supreme Court made clear in Turner v. Safley, 482 U.S. 78, 89 (1987), a prison regulation that impinges on inmates' constitutional rights is "valid if it is reasonably related to legitimate penological interests." See also Bell, 441 U.S. at 560; Washington v. Harper, 494 U.S. 210, 223 (1990); O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987). "[T]he effective management of the detention facility . . . is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment." Bell, 441 U.S. at 540. Here, plaintiffs cannot meet this standard. The important security interests served by fingerprinting, confiscation of personal

items, handcuffing and shackling,[23] restrictions on communication with other detainees, the use of guard dogs,[24] and restrictions on paper and eating utensils[25] are all facially obvious and warrant no specific discussion. Other items are addressed separately below.

**a. Strip searches at the MDC.**

There is no merit to the MDC Plaintiffs' allegations in claim 23 that the Defendants violated their Fourth and Fifth Amendment rights by subjecting them to MDC's policy of

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[23] Plaintiff Jaffri alleges that his constitutional rights were violated when he was placed in handcuffs and shackles for the purpose of being transported to and from his cell. Third Am. Cplt. ¶ 174. He does not claim that he was left handcuffed and shackled for extended periods while in his cell. Courts routinely have held that restraining inmates while transporting them within the prison, or elsewhere, even when the restraints are left on for considerable periods, does not amount to an unconstitutional condition of confinement. See, e.g., Morreale v. City of Cripple Creek, 1977 WL 290976, at *7 (10th Cir. May 27, 1997) (table op.) (holding that policy of placing persons detained on minor traffic offenses in shackles when transporting them from their cells does not violate Due Process Clause); Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996) (placing prisoner in restraints when transporting him from cell not an unconstitutional condition of confinement even where prisoner felt pain and suffered cuts).

[24] Plaintiff Turkmen does not allege that he was attacked, touched, or in any respect harmed by the canines, only that the dogs were "menacing," and he was "threatened" by them. Third Am. Cplt. ¶ 268. Even assuming the dogs posed an objective risk of harm to Turkmen, the mere exposure of a detainee to a risk of harm does not state a claim for an unconstitutional condition of confinement. See Babcock v. White, 102 F.3d 267, 272 (7th Cir. 1996) (finding that the touchstone of a conditions-of-confinement claim is failure to prevent actual harm, not exposure to risk of harm).

[25] Prison officials are justified in restricting toilet paper because it can be used in detention facilities for bad purposes, such as setting fires and clogging toilets. In addition, detainees have no constitutional right to unlimited toilet paper; they are entitled only to the opportunity to maintain a basic standard of hygiene. See Keenan, 83 F.3d at 1091; Davenport v. DeRobertis, 844 F.2d 1310, 1316 (10th Cir.), cert. denied, 488 U.S. 908 (1988). Plaintiffs do not claim that they were unable to maintain basic cleanliness. Similarly, detainees obviously have no constitutional right to a panoply of sharp implements to feed themselves. The issue is solely whether they have the means to obtain fundamental nutrition while confined. See Robles v. Coughlin, 725 F.2d 12, 15 (2d Cir. 1983) (inmates entitled to nutritionally adequate food); LeMaire v. Maass, 12 F.3d 1444, 1456 (9th Cir. 1993) (serving inmate "nutraloaf" designed to be eaten without utensils held not unconstitutional so long as nutritionally adequate).

performing strip searches.[26] See Third Am. Cplt. ¶ 406; see also id. ¶¶ 153-54,174, 193, 207, 232. Because the MDC's policy of performing strip searches furthers the legitimate goal of prison security, the Government was permitted to apply that policy to all inmates, including pretrial detainees, without making individualized assessments of probable cause.

In Covino v. Patrissi, 967 F.2d 73 (2d Cir. 1992), the Second Circuit upheld a policy under which officials "selected at random each night" one or two detainees, including pretrial detainees, and then searched their rooms and performed "visual body-cavity search[es]" on them. Id. at 73, 75. Applying Turner, the Second Circuit determined that the Government's legitimate security interest in preventing inmates from obtaining illicit drugs justified conducting searches without any individualized assessment of risk, even if the detainees had no "contact visits." Id. at 79 & n.5. The Court rejected the suggestion that the practice of other prisons showed that it would be "equally easy" and effective for the defendants to conduct searches only "upon a 'reasonable belief'" that the inmate was carrying contraband. Id. at 80. The court instead deferred to the administrator's judgment that such a policy would not be equally effective. Id. at 80; Bell, 441 U.S. at 558-60 (upholding use of strip searches even though they were not least intrusive means, because they have "not been shown to be irrational or unreasonable.").

Likewise, in Shain v. Ellison, 273 F.3d 56 (2d Cir. 2001), the Second Circuit confirmed that the deferential review articulated in Covino applies in evaluating strip searches of pretrial detainees in prisons. Shain, 273 F.3d at 65 & n.3. Although Shain applied a different standard and reached a different result on the facts before it, the Court strictly limited its holding to detainees in "jails" and affirmed that strip searches conducted in prisons, including strip searches

[26] To the extent that Plaintiffs assert claims against individual guards, alleging that guards took actions outside of the MDC's policy on strip searches, those claims are not subject to this motion to dismiss.

of pretrial detainees, are controlled by Covino. Id. Here, Plaintiffs limit their strip-search claims to only those Plaintiffs and class members detained at MDC, Third Am. Cplt. ¶ 405, and acknowledge that MDC is a "prison," OIG Supp. Report at 2 (identifying MDC as a "high security BOP prison in Brooklyn, New York that houses men and women either convicted of criminal offenses or awaiting trial or sentencing" (emphasis added)); id. at 1 (identifying MDC as a unit of the Bureau of Prisons); Third Am. Cplt. ¶ 1 (identifying the SHU as a "highly restrictive prison setting"). Accordingly, this claim is controlled by Bell and Covino and must be dismissed. At the very least, the claim should be dismissed against the Original Defendants because Plaintiffs have not alleged a violation of a clearly established right.

**b. Classification and assignment to the Special Housing Unit at MDC.**

This Court should also dismiss the MDC Plaintiffs' allegations that the Government acted improperly in classifying certain Plaintiffs as "of high interest" and assigning them to the Special Housing Unit ("SHU"), which enforces more restrictive regulations than other facilities. First, in Bell v. Wolfish, 441 U.S. 520 (1979), the Supreme Court provided that the proper standard for determining the constitutionality of pretrial detention conditions is "whether those conditions amount to punishment of the detainee." Id. at 535. Plaintiffs do not allege (nor can they) that the Original Defendants made any decision in order to punish them. Even presuming arguendo that the conditions plaintiffs alleged at MDC violated the Constitution, nothing pled sets out any factual basis as to personal knowledge by high-level officials such as the Attorney General, FBI Director, INS Commissioner, or the wardens, about individualized details of Plaintiffs' treatment, their access to recreation opportunities and religious materials, or any of the challenged conditions.

Second, the September 11 detainees posed critical security concerns, even as to the

release of their identity. See Center for Nat'l Security Studies v. DOJ, 331 F.3d 918, 928-33 (D.C. Cir. 2003).[27] The Government's interest in maintaining the "high interest" plaintiffs in administrative detention until cleared could not have been more "substantial." Cf. Benjamin v. Fraser, 264 F.3d 175, 189 (2d Cir. 2001). The September attacks crated an immediacy to the efforts of law enforcement to locate individuals who have involvement with or knowledge of terrorist plans and activities.

Third, the complex and sensitive determinations that had to be made in this case are devoid of the "particularized standards" and "substantive limitations on official discretion" the Supreme Court requires before finding a protected liberty interest. Olim v. Wakinerona, 461 U.S. 238, 249 (1983) (citation omitted). Indeed, the circumstances presented here are far different from the situation ordinarily contemplated by the prison regulations. In the routine prison situation addressed by the Court of Appeals in Tellier v. Fields, 280 F.3d 69 (2d Cir. 2000), liberty interests may constrain the period in which a pretrial detainee may be placed in administrative detention.[28] But here, the Government was dealing with a situation that was anything but routine. Indeed, the uncertain application of prison regulations to an unprecedented situation in a national emergency following a foreign attack raised legitimate questions given the overarching foreign terrorist investigative concerns at stake and the inherent mandate of the

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[27] These concerns hardly would have been evaporated by placing detainees in the general prison population where "information quickly travels through the prison 'grapevine.'" Dawson v. Smith, 719 F.2d 896, 899 (7th Cir. 1983).

[28] Moreover, a circuit conflict on whether 28 C.F.R. § 541.22 creates a liberty interest is a compelling ground for judicial recognition that the law was not clearly established. Compare Crowder v. True, 74 F.3d 812, 815 (7th Cir. 1996) (per curiam) (Sandin analysis) with Tellier, 280 F.2d at 81. The nationwide responsibilities of the Attorney General, the FBI Director, and the INS Commissioner call for flexibility in the qualified immunity equation. See generally Harlow, 457 U.S. at 819 (recognizing that "extraordinary circumstances" may warrant immunity).

Government to act to protect the Nation from future attacks.[29]

Moreover, the justification for qualified immunity is especially appropriate here. Plaintiffs' allegations ignore the enormity of the task that confronted the FBI, immigration, and prison officials in the aftermath of the attacks. Plaintiffs' objection to the absence of "specific criteria or a uniform classification system" ignores the reality of foreign intelligence and foreign terrorist investigations; certainly, these classifications did not offend clearly established constitutional or judicially defined standards on how to conduct investigations responding to an attack on our Nation. See generally Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988); Zadvydas, 533 U.S. at 696. There was no "definitive answer" in the caselaw that told prison officials acting under the Attorney General how to address the very real problems they confronted when dealing with the detention of hundreds of unlawful aliens who were being investigated by the FBI for possible ties to international terrorist activities. Mitchell, 472 U.S. at 534. Indeed, the threshold question of what liberty interests apply to unlawful aliens when national security concerns are involved has not yet been addressed by the Court. Moreover, the possibility that some Plaintiffs had ties to terrorists could not be ignored. Nor could the possibility that these detainees might be threatened if placed in the general prison population,[30]

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[29] Bureau of Prison regulations, 28 C.F.R. § 541.22, recognize deviations from the regulations would be justified in exceptional circumstances, even in the routine prison environment. See id. §§ 541.22(a), (c)(1). Even these provisions did not anticipate what confronted MDC after September 11, a large influx of unlawful alien detainees whom FBI counterterrorism investigators identified as of "high interest" to a foreign terrorist investigation. Courts have recognized that statutes should not be read to preclude action for legitimate national security reasons that Congress never anticipated in enacting a law. See United States v. Butenko, 494 F.2d 593, 601 (3d Cir. 1974) (en banc) (wiretap statute did not limit President's foreign security electronic surveillance powers "[i]n the absence of any indication that the legislators considered the possible effect of § 605 [the statute] in the foreign affairs field").

[30] This Court has confirmed that under circumstances when an inmate's own safety might be at issue (such as a threat against an inmate's life), a decision by officials to place an alien

or the possibility that even the identities of detainees might have significance to Al Qaeda. See Center for Nat'l Security Studies, 331 F.3d at 928-33. The unique situation that arose from September 11 had no precedent, and the appropriate balance between the government's considerable interests and a detainee's own interests had not yet been determined. This case thus presents an even more compelling situation for application of the qualified immunity doctrine than Mitchell. In consideration of the extraordinary efforts required of our officials to house unlawful aliens who were arrested in connection with the investigation of the terrorist attacks, Plaintiffs' claim that their classification and housing in the SHU pending clearance by the FBI should be dismissed.

Finally, Plaintiffs' claims are independently barred because Plaintiffs failed to file a grievance with the prison authorities or pursue other BOP administrative remedies. See 28 C.F.R. § 40.3 (establishing a prison grievance procedure); see also 28 C.F.R. § 40.5 ("The grievance procedure shall be applicable to a broad range of complaints" and "shall permit complaints by inmates regarding policies and conditions within the jurisdiction of the institution or the correctional agency that affect them personally . . . ."). Plaintiffs were required to exhaust these administrative remedies. See Booth v. Churner, 532 U.S. 731 (2001). Because they failed to do so, they cannot assert their conditions-of-confinement claims here. See id.

**c. Inadequate screening and classification systems at Passaic**.

The allegation that Plaintiff Turkmen was housed with the general population at Passaic County Jail, Third Am. Cplt. ¶ 268, also fails to state a claim. Courts have repeatedly held that the mere lack of a classification system does not violate due process standards. To state a claim

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detainee in the Special Housing Unit at MDC falls well within constitutional bounds. See United States v. Zampardi, 1996 WL 1088905 (E.D.N.Y. Nov. 6, 1996) (quoting Bell, 441 U.S. at 541 n.23 (citations and quotation marks omitted)).

based upon exposure to dangerous prisoners or detainees, a detainee must at least allege some physical harm suffered at the hands of others with whom the detainee was housed in close proximity. See Martin v. Tyson, 845 F.2d 1451, 1455 (7th Cir.), cert. denied, 488 U.S. 863 (1988) (inmate classification system not a constitutional requirement); Babcock v. White, 102 F.3d at 272. Turkmen alleges only that he was "forced to eat meals at the same table" and "sleep in the same dormitories" with "the general prison population," not that he was ever assaulted or injured by them in any way. Third Am. Cplt. ¶ 268(a). Turkmen, therefore, falls far short of alleging a violation of the Due Process Clause. Moreover, Plaintiffs do not sue any guards, wardens, or other officers of the Passaic County Jail – only the Original Defendants. Because Plaintiffs do not (and cannot) allege that the Original Defendants created or had any control over the conditions at Passaic. This Court should dismiss the Passaic Plaintiffs' conditions-of-confinement claims.

**8. Claim 17 Should Be Dismissed Because There Was No Unconstitutional Delay In The Service Of Documents Commencing Immigration Proceedings.**

Plaintiffs have also failed to state a due process claim relating to the service of documents commencing immigration proceedings against Ebrahim, H. Ibrahim, Sachdeva, Jaffri, and A. Ibrahim. Allegedly, defendants "delay[ed] the issuance and service of charging documents" thereby "impair[ing] the ability of the detainees to know the charges on which they [were] being held, obtain legal counsel, and seek release on bond." Id. ¶ 376. Because Plaintiffs fail to identify any constitutionally protected liberty interest and fail to allege prejudice, the Court should dismiss claim 17 as a matter of law.

To plead a due process claim, Plaintiffs must identify a constitutionally protected liberty or property interest, Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972), and they must allege prejudice, United States v. Fernandez-Antonia, 278 F.3d 150, 157-58 (2d Cir. 2002);

Douglas v. INS, 28 F.3d 241, 244, 246 (2d Cir.1994). Here, they have done neither. First, Plaintiffs have identified no liberty or property interest – let alone a clearly established interest – in immediate notification of the charges against them. As the Supreme Court has determined, the alleged delay of (at most) a few days in the service of such documents does not violate due process. See United States v. Lovasco, 431 U.S. 783, 792 (1977) (holding that due process does not require the Government "to file charges promptly" or "compel[] prosecutors to initiate prosecutions as soon as they are legally entitled to do so").

Further, the regulation that Plaintiffs cite does not create a liberty interest in a charging document being issued or served immediately. See Third Am. Cplt. ¶ 78 (citing 8 C.F.R. § 287.3). According to Plaintiffs, this regulation requires the Government to issue and serve a charging document (known as a notice to appear), within 48 hours. But that is incorrect. In fact, the regulation simply provides that a "determination will be made within 48 hours of the arrest, except in the event of an emergency or other extraordinary circumstance in which a determination will be made within an additional reasonable period of time." 8 C.F.R. § 287.3(d). The regulation does not set time limits for the actual issuance and service. Because Plaintiffs have not alleged that the Government failed to make the "determination" within 48 hours, Plaintiffs have failed to plead a violation of § 287.3(d).

In fact, even if the Government had failed to make the determination within 48 hours, Plaintiffs' claim still would fail. Section 287.3(d) specifically authorizes a "reasonable period of time" to make a determination regarding whether to issue a notice to appear in the event of "an emergency or other extraordinary circumstance." Id. There can be no doubt that the events of September 11th and its aftermath constituted precisely such an "emergency or other extraordinary circumstance." In the wake of the devastating terrorist attacks, law enforcement

authorities sought to protect the Nation's security by engaging in a wide-ranging investigation intended to find the perpetrators and to prevent future attacks. See OIG Report[31] at 10-15. In the confusion and chaos that resulted from the attacks, a determination regarding whether a charging document should be issued may not have been made in all cases within 48 hours of an alien's arrest. This is especially true given the "number of aliens arrested and the prospects of significantly more alien arrests," see id. at 28, the logistical disruptions in New York City from the attacks, the transfer of detainees from New York City facilities to New Jersey, and the procedures for INS Headquarters' review of the notices to appear, id. at 31-34.

For these reasons, even if the prescribed determinations were not made until the date of actual service, they were made "within an additional reasonable period of time" as contemplated by the regulation. According to Plaintiffs, Jaffri was served within four days of his arrest, Sachdeva within seven days, Ebrahim and H. Ibrahim within seventeen days, and A. Ibrahim within ten days.[32] In light of the National Emergency and ensuing chaos following September 11, it is clear no regulatory violation occurred.

In any event, Plaintiffs have not met their burden to plead facts establishing prejudice. To establish a claim for violation of the Fifth Amendment Due Process Clause, it is not enough that Plaintiffs allege that there were "procedural flaws in their [removal] proceeding[s]."

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[31]References throughout to the "OIG Report" are to the Offices of Inspector General of the Department of Justice on June 2, 2003, entitled "The September 11 Detainees: A Review of the Treatment of Aliens of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks," which is available at http://www.usdoj.gov/oig/special/0306/full.pdf. A copy of the OIG Report was attached as Exhibit 1 to Plaintiffs' Second Amended Complaint.

[32] Third Am. Cplt. ¶¶ 170, 177 (Jaffri arrested 9/27/01, served 10/1/ 01); ¶¶ 279, 280 (Sachdeva arrested 12/20/01, served 12/27/01); ¶¶ 182, 185 (Ebrahim and H. Ibrahim arrested 9/30/01, served 10/17/01); ¶¶ 225, 234 (A. Ibrahim arrested 9/23/01, immigration hearing 10/3/01).

Fernandez-Antonia, 278 F.3d at 159. Plaintiffs must allege "that, absent the procedural errors, [they] would not have been removed." Id. Plaintiffs have not alleged that their removal was improper or that they would have obtained a different result had they been served earlier. Their assertion that their ability to know the charges against them, to obtain counsel, and to seek release on bond was "impaired" cannot establish prejudice because they were promptly served with notices to appear in less than three weeks, and in most cases, within one week. Thus, Plaintiffs were aware of the charges against them and could have pursued their immigration-law remedies. Indeed, Plaintiffs Ebrahim and H. Ibrahim were represented by counsel during their immigration hearings and requested release on bond before an Immigration Judge, which request was denied. Third Am. Cplt. ¶¶ 187-88.

Also significant is the fact that Plaintiffs Jaffri, Ebrahim, H. Ibrahim, and Sachdeva never contested the charges against them in their removal proceedings. Id. at ¶¶ 178, 188, 248, 280. Nor do they now claim that the charges against them were erroneous. Because Plaintiffs do not allege that the immigration charges against them were improper, or that they had no opportunity to obtain counsel or to seek bond before the Immigration Judge, Plaintiffs have not pleaded the requisite prejudice.

**9. Claims 18 And 19 Should Dismissed Because There Is No Constitutional Right To Release On Bond Pending Completion Of Removal Proceedings, And Individualized Hearings Were Not Required.**

**a. There is no fundamental due process right to release on bond pending completion of removal proceedings**.

Plaintiffs' Fifth Amendment challenges to the "blanket no bond policy" fail as well. Third Am. Cplt. ¶¶ 379-88 (claims 18 and 19). As the Supreme Court has made clear, aliens do not have any right – let alone a clearly established right – to release on bond pending the completion of removal proceedings. Demore v. Kim, 538 U.S. 510, 514, 531 (2003) (rejecting

due process challenge to Government's decision to detain aliens during removal proceedings without bond and without providing individualized determination as to dangerousness or flight risk); Carlson, 342 U.S. at 541-42 (upholding Government's power to deny bail to aliens pending removal without individualized showing of dangerousness); Doherty v. Thornburgh, 943 F.2d 204, 208-10 (2d Cir. 1991) (noting that aliens do not have the same due process rights as criminal defendants and upholding Government's decision to hold alien without bond for eight years), cert. denied sub nom., Doherty v. Barr, 503 U.S. 901 (1992).

Rather, release from custody is a matter left solely to the Government's discretion. 8 U.S.C. § 1226(a); see also Reno v. Flores, 507 U.S. 292, 306 (1993)). Because bond is purely discretionary, it cannot form the basis for a constitutional entitlement. See Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981); Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 282-83 (1998). Thus, Plaintiffs have failed to allege that they have been deprived of any "fundamental liberty interest." See Parra, 172 F.3d at 958; see also Reno, 507 U.S. at 306; Carlson, 342 U.S. at 537, 540-41; Doherty, 943 F.2d at 208-11. Moreover, as the Supreme Court explained, officials performing discretionary functions are protected by qualified immunity when controlling legal precedents have declined to recognize the constitutional right a plaintiff advances. Mitchell, 472 U.S. at 584-85; see also In re D-J-, 23 I. & N. Dec. 572, 579-80 (AG 2003) (noting that in evaluating a bond application, the Board and immigration judges may consider as a factor the "adverse consequences for national security and sound immigration policy").

**b. Individualized hearings were not required, but in any event, they were provided to Plaintiffs**.

Nor is there a right to an individualized hearing. Indeed, the Supreme Court's decision in Carlson, 342 U.S. 524, forecloses Plaintiffs' claim. In Carlson, the Attorney General had the

discretion to release aliens on bond, but the INS adopted a blanket policy of refusing to grant bail to aliens found deportable because of their participation in the Communist Party. Id. at 559. In sustaining this decision, the Court rejected the same argument Plaintiffs advance – that they were entitled to release from detention if they did not present a risk of flight or danger. Id. at 538; see also Demore, 538 U.S. at 514, 531. According to the Court, the Attorney General was not required to make individualized findings of flight risk or danger to justify his decision to oppose release on bond for the plaintiffs. Carlson, 342 U.S. at 534; see also Lopez v. Davis, 531 U.S. 230, 243-44 (2001) (permitting agency to make "categorical exclusions" instead of "case-by-case assessments"); Flores, 507 U.S. at 313 (rejecting argument that INS had to hold "individualized hearings" and sustaining regulation against due process challenge); Weinberger v. Salfi, 422 U.S. 749, 777 (1975); Burlington N.R.R. v. Dep't of Pub. Serv. Reg., 763 F.2d 1106, 1113 (9th Cir. 1985).

In any event, Plaintiffs' complaint demonstrates that they were provided an individualized hearing on whether they should be released on bond. Only Plaintiffs Ebrahim and H. Ibrahim allege that they applied for release on bond before an Immigration Judge, pending disposition of their removal proceedings. Third Am. Cplt. ¶¶ 187-88. And they admit that the Immigration Judge denied their requests because he was not convinced that they would appear at future hearings. Id. at ¶ 188. Notably, neither Plaintiff alleges that the INS failed to submit evidence sufficient to support the Immigration Judge's decision to deny bond. Thus, contrary to their allegations of a "no bond" policy, Plaintiffs were afforded the opportunity to demonstrate eligibility for release on bond before an independent adjudicator – the Immigration Judge – and, if bond were denied, the Board of Immigration Appeals. Accordingly, Plaintiffs fail to state a claim of a constitutional deprivation.

**c. Plaintiffs' equal protection claim fails as a matter of law**.

Likewise, Plaintiffs' equal protection claim fails. Even accepting Plaintiffs' assertions as true, the alleged classifications are the kinds of distinctions among aliens that are acceptable in formulating and administering the immigration law. See supra Part V.B.2. And even if the classifications did infringe on equal protection rights, these rights were certainly not clearly established.

**10. Claims 21 And 22, Alleging A "Communications Blackout," Should Be Dismissed Because The Government's Short-Term Restrictions Were Reasonable.**

There is no merit to the MDC Plaintiffs' allegations that Defendants denied them access to the courts by instituting a "communications blackout," Third Am. Cplt. ¶¶ 396, 401, "for the first few weeks of their detention," id. ¶ 69; accord id. ¶ 82 (MDC Plaintiffs alleging "blackout [of] two weeks to two months"). The Government's restrictions were based on legitimate security concerns, caused Plaintiffs no injury, and were, as a matter of law, too short-lived to support Plaintiffs' constitutional claims**.**

**a. The Government's short-term limitations on detainees' ability to communicate with the general public were based on a facially legitimate and bona fide reason.**

Courts have long recognized the need for deference to Congress and the Executive in immigration matters. E.g., Kleindienst v. Mandel, 408 U.S. 753, 762 (1972). Accordingly, the Supreme Court has established that when the Executive exercises immigration powers delegated by Congress, it need only supply "a facially legitimate and bona fide reason" for its actions. Id. at 770. In Kleindienst, the plaintiffs argued that the Attorney General had denied a university professor an entry visa because of his communist views, in violation of the First and Fifth Amendments. Id. at 760. The plaintiffs contended that there was no legitimate security reason

for the Attorney General's decision, as demonstrated by the State Department's recommendation to grant the visa. Id. at 759. But, in affirming the agency's decision, the Supreme Court refused to consider these arguments regarding the Attorney General's intent. The Court noted that the Attorney General had proffered "a facially legitimate and bona fide" reason for his decision – that the professor had previously violated a visa by scheduling more speaking engagements than the visa permitted and by appearing at a fundraiser – and held that this was dispositive. Id. at 769, 759 n.5. The Court emphasized that it would not "look behind the exercise of th[e Executive's] discretion" or "balanc[e the Executive's] justification against the First Amendment interests" asserted. Id. at 770.; see also Fiallo v. Bell, 430 U.S. 787, 794 (1977) (rejecting due process and equal protection challenges to immigration statute granting special preference to children and parents of United States citizens because the statute was based on a "facially legitimate and bona fide reason"); Diaz, 426 U.S. at 82 (holding that courts must apply "a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization").

Here, the Government has proffered more than "a facially legitimate and bona fide reason" for temporarily restricting Plaintiffs' communications. In the wake of September 11, the Government had strong security concerns that aliens with possible terrorist ties might reveal information vital to national security. Indeed, several courts have held that national security concerns surrounding September 11 justified restrictions on information. See Center of Nat'l Security Studies v. DOJ ("CNSS"), 331 F.3d 918, 926, 932 (D.C. Cir. 2003) (upholding, on national security grounds, Government's right to withhold names of persons detained for immigration violations in wake of September 11, names of their attorneys, and dates and locations of their arrests); North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 217-18 (3d

Cir. 2002) (rejecting First Amendment challenge to closure of "special interest" deportation hearings involving INS detainees with alleged connections to terrorism); ACLU v. U.S. DOJ, 265 F. Supp. 2d 20, 31 (D.D.C. 2003) (upholding Government's right to withhold statistics regarding number of times Government had utilized information-gathering powers under Patriot Act, including roving surveillance, pen registers, trap devices, demand for tangible things, and sneak-and-peek warrants, on ground that nondisclosure was reasonably connected to protection of national security); Holy Land Foundation for Relief and Development v. Ashcroft, 333 F.3d 156, 164 (D.C. Cir. 2003) (holding that "national security" interests allowed Government to designate groups as foreign terrorist organizations based upon classified information and to refuse to divulge that information). Additionally, the possibilities that one terrorist might tell another "which of their members were compromised by the investigation, and which were not," or might convey "the substantive and geographic focus of the investigation" were dangers that the Government had an obligation to prevent. CNSS, 331 F.3d at 928. Plaintiffs do not dispute that the Government acted on national security concerns. Accordingly, because the Government has provided a "facially legitimate and bona fide" reason for its decisions, under the rule of Kliendienst, 408 U.S. at 740, this Court should dismiss Plaintiffs' challenges to the Government's immigration decisions.

**b. The Government's short-term limitations on detainees' ability to communicate with the general public served a legitimate interest and have not prejudiced Plaintiffs.**

Even if this Court were to disregard Kleindienst and apply the standards applicable to U.S. citizens, Plaintiffs' claims still must fail. The communications restrictions were reasonably related to legitimate interests in prison and national security, have caused plaintiffs no legally cognizable injury, and were, as a matter of law, too short-lived to constitute a constitutional

violation.

There is no merit to Plaintiffs' claims that the prison regulations violated their First and Fifth Amendment rights – let alone clearly established rights – by limiting their ability to contact the "general public" and their "family members." Third Am. Cplt. ¶ 69; see also id. ¶¶ 71, 396. First, the alleged limitation on detainees' First Amendment rights to communicate with the public had "a valid, rational, connection" to a "legitimate governmental interest." Turner v. Safley, 482 U.S. 78, 89 (1987) (internal quotation marks and citation omitted); see also Nichols v. Miller, 189 F.3d 191, 194 (2d Cir. 1999). In Turner, the Court rejected constitutional challenges to restrictions by the Missouri Division of Corrections on "correspondence between inmates at different institutions." Turner, 482 U.S. at 81, 91. The Court explained that the trial and circuit courts had erred in searching for "a less restrictive way of solving the problem," id. at 89, and rejected their suggestions that "officials could effectively cope with the security problems [by] scanning the mail of potentially troublesome inmates," id. at 83; see also id. at 88. The Court held that "the risk of missing dangerous communications, taken together with the sheer burden on staff resources required to conduct item-by-item censorship . . . supports the judgment of prison officials," and sustained the policy. Id. at 93. Accordingly, the constitutional claims in this case should be dismissed. If the security interest in Turner – concern over "communications among gang members" and potential escape and attack plans – supported permanent restrictions, id. at 91, then the security interests in this case – concern over communications between possible terrorists and potential escape and attack plans – certainly support the temporary restrictions that Plaintiffs allege.

Second, Plaintiffs fail to allege that they actually have been denied access to the courts under the First and Fifth Amendments. The Supreme Court has explained that in order to state a

claim for lack of access to the courts, the party must allege that the defendant has caused him to forfeit "a nonfrivolous legal claim." Lewis v. Casey, 518 U.S. 343, 353 & n.3 (1996); accord Davis v. Goord, 320 F.3d 346, 352 (2d Cir. 2003) (requiring plaintiff to demonstrate that the defendant has "caused him to miss court deadlines" or has "prejudiced his legal actions"). Moreover, the plaintiff "should state the underlying legal claim" that he alleges to have lost, "just as if it were being independently pursued, and a plain statement should describe any remedy" sought. Christopher v. Harbury, 536 U.S. 403, 417-18 (2002) (confirming that the pleading rule of Lewis applies when Plaintiffs allege that they have been denied a past, or "backward looking," legal remedy); accord id. at 415. The Court has explicitly "disclaim[ed]" any suggestions that "the right of access to the courts" includes the right "to discover grievances, and to litigate effectively once in court." Lewis, 518 U.S. at 354 (emphasis in original). Moreover, the Second Circuit has emphasized that "mere delay in being able to work on one's legal action or communicate with the courts does not rise to the level of a constitutional violation." Davis, 320 F.3d at 352.

Plaintiffs do not allege that the MDC's temporary restrictions have caused them to forfeit any legal remedies. They do not dispute that they were legally removed and do not allege that they had wished to appeal their removal orders or raise any "nonfrivolous legal claim[s]" opposing removal. Lewis, 518 U.S. at 353. And, as the instant suit demonstrates, they have not forfeited the opportunity to bring damages claims. At best, Plaintiffs might complain that they were unable to bring the instant suit at an earlier date. But, as the Second Circuit has held, such allegations of delay are not sufficient to state a claim under the First and Fifth Amendments for lack of access to the courts. Davis, 320 F.3d at 352. Additionally, such claims are belied by Plaintiffs' repeated requests to amend their complaint up to the eve of the statute of limitations.

Accordingly, Plaintiffs have failed to state a claim for denial of access to the courts.

In any event, the "few weeks" of delays alleged here are not, as a matter of law, sufficient to state a constitutional violation, much less a clearly established one. Third Am. Cplt. ¶ 69; accord id. ¶ 82. In Lewis, the district court found that under Arizona prison regulations, "lockdown prisoners routinely experience delays in receiving legal materials or legal assistance, some as long as 16 days." Lewis, 518 U.S. at 362. The Supreme Court held that so long as the regulations were "reasonably related to legitimate penological interests, such delays are not of constitutional significance, even where they result in actual injury." Id. (emphasis added). If the Constitution is not violated by a sixteen-day delay that causes a prisoner to forfeit a legal claim, then it surely was not violated in this case, where Plaintiffs allege delays of a "few weeks" that caused them no legally cognizable injury. At the very least, Lewis demonstrates that the delays asserted in this case did not violate clearly established law.

Finally, to the extent Plaintiffs allege that the Original Defendants enforced a communications-blackout policy, Third Am. Cplt. ¶¶ 82, 396, 401, their own allegations belie such claims. Although Rule 12(b)(6) requires the Court to take the allegations in the complaint as true, see Albright v. Oliver, 510 U.S. 266, 267 (1994), it does not require the Court to accept bald assertions, legal conclusions, or unwarranted inferences to aid the pleader. Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996) (the court will not "swallow the plaintiff's invective hook, line, and sinker; bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like need not be credited"). The Court is not required to accept allegations not specific to Plaintiffs or contradictory factual allegations and inferences. See Albert v. Carovano, 851 F.2d 561, 572 (2d Cir. 1988) (en banc).

Plaintiff Turkmen alleges that upon his arrival, he was given a list of telephone numbers

for free legal services and was allowed to place phone calls. Third Am. Cplt. ¶ 269. The only apparent limitation on his communication was that he was not allowed to call his family in Turkey, though he was allowed to contact his "friend." Id. ¶ 267. Accordingly, he cannot claim to have been subjected to a "communications blackout." Plaintiffs Ebrahim and H. Ibrahim do not allege that they were ever denied a request to make any communication.[33] Ultimately, Ebrahim and H. Ibrahim obtained counsel for their immigration proceedings. Id. ¶¶ 187, 188. Accordingly, the most they could allege would be delay, which is legally insufficient. Davis, 320 F.3d at 352. Finally Sachdeva alleges only that he was not allowed to contact the Canadian Consulate. Id. at 283. Because he does not allege that he was denied permission to contact an attorney or anyone else, his allegations likewise undercut the assertion that the Original Defendants promulgated a blanket, communications-blackout policy.

## VI. THIS COURT SHOULD DISMISS PLAINTIFFS' INTERNATIONAL LAW CLAIMS (CLAIMS 9, 10, AND 11).

This Court should dismiss Plaintiffs' requests for money damages under "customary international law," Third Am. Cplt. ¶¶ 329, 335 (claims 9 and 10), and the Vienna Convention on Consular Relations, id. at ¶¶ 338-343 (claim 11). As an initial matter, under the Liability Reform Act, the United States must be substituted as the sole defendant for each of these claims. See 28 U.S.C. § 2679. And once the substitution is made, the claims must be dismissed, because Plaintiffs seek only "monetary damages," Third Am. Cplt. ¶¶ 331, 337, 343, and the United States has not waived its sovereign immunity under either customary international law or the

[33] In the Second Amended Complaint, Ebrahim and H. Ibrahim admitted that on October 14, 2001, they were each given a list of phone numbers for free legal services and were permitted to place numerous phone calls. Second Am. Cplt. ¶ 113, 117. They also obtained counsel through the telephone. Id. However, they omit those allegations in the Third Amended Complaint.

Vienna Convention on Consular Relations. Finally, the international law claims are not actionable under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680.[34]

## A. THE UNITED STATES MUST BE SUBSTITUTED AS THE SOLE DEFENDANT TO PLAINTIFFS' INTERNATIONAL LAW CLAIMS.

The Liability Reform Act provides that a claim against the United States under the Federal Tort Claims Act is the exclusive remedy for persons seeking recovery of damages for any "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . . ." 28 U.S.C. § 2679(b)(1) (emphasis added). The only exceptions to this rule provide that a plaintiff may directly sue a federal officer for a violation of the U.S. Constitution or a federal statute. 28 U.S.C. §§ 2679(b)(2)(A), 2679(b)(2)(B). The Liability Reform Act emphasizes that all other "civil action[s] or proceeding[s] . . . against the employee [are] precluded." 28 U.S.C. § 2679(b)(1); accord United States v. Smith, 499 U.S. 160, 166-67 (1991). Accordingly, unless a claim is brought for violation of the U.S. Constitution or a federal statute, the United States must be substituted as the sole defendant. Smith, 499 U.S. at 166.

It is indisputable that claims 9 and10 are not brought for violations of the U.S. Constitution. And, as the Supreme Court explained in Smith, 499 U.S. 160, they cannot be characterized as claims for violation of a federal statute, either. In Smith, the plaintiff argued that the Gonzalez Act, 10 U.S.C. § 1089, authorized suit directly against military doctors for medical malpractice committed in foreign jurisdictions, and thus a suit under the Gonzalez Act was a suit for violation of a federal statute for purposes of the Liability Reform Act. Id. at 173-

[34] Defendants do not concede that any of these claims would be actionable under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. See Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2765-66, 2769 (2004).

74. The Supreme Court rejected this argument. The Court held that, even if the Gonzalez Act generally authorized the suits against federal officers, the statute was wholly jurisdictional and created no "obligations or duties." Id. at 174. Because the Gonzalez Act established no affirmative obligations or duties, the Supreme Court held that there could have been no "violation" of the Gonzalez Act as required to trigger the exception to the Liability Reform Act. Id.

The same analysis applies to Plaintiffs' attempts to seek recovery for alleged violations of customary international law. Although Plaintiffs cite the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, in claims 9 and 10, this does not alter the nature of their claims. Plaintiffs confirm that customary international law – not the ATS – is the source of substantive liability underlying claims 9 and 10, alleging that the Defendants' "acts violated customary international law" and the "law of nations." Third Am. Cplt. ¶¶ 329, 335. Like the Gonzalez Act, the ATS is wholly "jurisdictional" and creat[es] no new causes of action." Sosa v. Alvarez Machain, 124 S. Ct. 2739, 2761 (2004). It merely authorizes "civil action[s] by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The ATS is similar in this regard to 28 U.S.C. § 1331, which establishes jurisdiction for federal questions but does not create any "obligations or duties." Smith, 499 U.S. at 174. Accordingly, the fact that Plaintiffs cite the ATS does not transform claims 9 and 10 into claims for violation of a federal statute, just as the fact that Plaintiffs cite 28 U.S.C. § 1331, Third Am. Cplt. ¶ 12, does not transform their Bivens claims into claims for violation of a federal statute, see Smith, 499 U.S. at 174. Accordingly, Plaintiffs do not satisfy either exception to the Liability Reform Act, and the United States must be substituted as the sole defendant for claims 9 and 10. See id. at 166. Indeed, the Ninth Circuit reached precisely this conclusion in Alvarez-Machain v. United States,

331 F.3d 604, 631-32 (9th Cir. 2003) (en banc), rev'd on other grounds sub nom. Sosa v. Alvarez Machain, 124 S. Ct. 2739 (2004). In approving substitution of the United States under the Liability Reform Act, the en banc court relied on the fact that the ATS "creates no obligations or duties." Id. at 632; accord Schneider v. Kissinger, 310 F. Supp. 2d 251, 266-67 (D.D.C. 2004).[35]

The Court should likewise substitute the United States as sole defendant for claim 11, brought for violation of the Vienna Convention on Consular Relations. Third Am. Cplt. ¶¶ 338-343. It cannot reasonably be argued that this claim is either a claim for violations of the U.S. Constitution or a federal statute. Although treaties adopted by the United States are sometimes referred to as the "the law of the land," see Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996), a tort claim based directly upon a treaty, by definition, does not constitute a claim for the violation of the Constitution or a federal statute.[36] That is especially clear given the Supreme Court's narrow construction of the exceptions to the Liability Reform Act. Smith, 499 U.S. at 166-67.[37]

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[35] In rejecting the conclusion that the respondent's claims were actionable under the ATS, the Supreme Court in Alvarez-Machain left undisturbed the Ninth Circuit's holding that substitution of the United States in place of the defendant federal employees under the Liability Reform Act was appropriate.

[36] Indeed, the distinction between federal constitutional, statutory, and treaty provisions is expressly recognized in the Constitution. In this regard, the Supremacy Clause states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or shall be made, under the Authority of the United States, shall be the Supreme Law of the Land. . . ." U.S. CONST. art. VII, cl. 2 (emphasis added).

[37] Moreover, the Vienna Convention on Consular Relations would not support a private right of action even if the Liability Reform Act did not apply. See, e.g., United States v. Jimenez-Nava, 243 F.3d 192, 197-98 (5th Cir. 2001); United States v. Li, 206 F.3d 56, 66-76 (1st Cir.) (Selya, J. and Boudin, J., concurring), cert. denied, 531 U.S. 956 (2000).

## B. SOVEREIGN IMMUNITY PRECLUDES PLAINTIFFS' INTERNATIONAL LAW CLAIMS AGAINST THE UNITED STATES.

Once the United States is substituted as the sole defendant for the international law claims, those claims must be dismissed. Plaintiffs seek only "monetary damages" for these claims, Third Am. Cplt. ¶¶ 331, 337, 343, and the United States has not waived its sovereign immunity from damages suits either for customary international law claims under the ATS or for claims under the Vienna Convention on Consular Relations.

Plaintiffs do not (and cannot) point to any express waiver of the United States' sovereign immunity from claims for damages under either customary international law or the Vienna Convention on Consular Relations. See Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 474 (1994) (absent an express waiver of sovereign immunity, a plaintiff may not sue the United States in federal court); United States v. Mitchell, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."); see also Macharia v. United States, 238 F. Supp. 2d 13, 29 (D.D.C. 2002) (holding that because the International Covenant on Political and Civil Rights does not contain express waiver of sovereign immunity, the United States may not be sued for damages thereunder), aff'd, 334 F.3d 61 (D.C. Cir. 2003). Additionally, it is well established that the ATS does not purport to waive the sovereign immunity of the United States. See, e.g., Koohi v. United States, 976 F.2d 1328, 1332 & n.4 (9th Cir. 1992); Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 967-68 (4th Cir. 1992); Industria Panificadora, S.A. v. United States, 957 F.2d 886, 886 (D.C. Cir. 1992); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985). Accordingly, Plaintiffs' claims under international customary law and the Vienna Convention on Consular Relations must be dismissed.

Finally, the Liability Reform Act provides that, once the United States is substituted for

individual defendants under the Act, the action "shall proceed in the same manner as any action against the United States filed pursuant to [the FTCA] and shall be subject to the limitations and exceptions applicable to those actions." 28 U.S.C. § 2679(d)(4); see Alvarez-Machain v. United States, 331 F.3d at 631-32 ("Because the United States is substituted for the DEA agents, we treat the [ATS] claims brought against the agents within the context of the FTCA.").

"[T]o be actionable under [the FTCA], a claim must allege, inter alia, that the United States 'would be liable to the claimant' as 'a private person' 'in accordance with the law of the place where the act or omission occurred.'" Meyer, 510 U.S. at 477 (quoting 28 U.S.C. § 1346(b)). The "reference to the 'law of the place' means law of the State – the source of substantive liability under the FTCA." Id. (emphasis added); see also Miree v. DeKalb County, 433 U.S. 25, 29 n.4 (1977). Here, the sources of substantive liability underlying claims 9, 10, and 11 are not State law, but "customary international law" and an international treaty. Third Am. Cplt. ¶¶ 329, 335, 340. Accordingly, claims 9, 10, and 11 are not actionable under the FTCA and must be dismissed. See Meyer, 510 U.S. at 478; Dorking Genetics v. United States, 76 F.3d 1261, 1266 (2d Cir. 1996).

## VII. THIS COURT SHOULD DISMISS SEVERAL OF THE FTCA CLAIMS (CLAIMS 24, 25, 26, AND 30).

Finally, the Court should dismiss several of the FTCA claims as a matter of law. Because the FTCA authorizes suit only against the United States, the United States is the sole defendant for all of Plaintiffs' FTCA claims, and the individual defendants should be dismissed. 28 U.S.C. §§ 1346(b), 2679(b); see also Third Am. Cplt. ¶ 10. Moreover, the United States can be sued only to the extent that it has waived sovereign immunity. United States v. Orleans, 425 U.S. 807, 814 (1976). Waivers of sovereign immunity are to be strictly construed, Lane v. Pena, 518 U.S. 187, 192 (1996), and "any limitations imposed by the waiver, whether they be

substantive, procedural, or temporal, are to be strictly applied against the claimant," Millares Guiraldes de Tineo v. United States, 137 F.3d 715, 719 (2d Cir. 1998).

The FTCA's waiver of immunity is expressly limited. First, Congress waived immunity only over claims alleging negligent or wrongful acts and omissions of federal employees acting within the scope of their employment, "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b); see also 28 U.S.C. § 2674. Second, Congress exempted "several important classes of tort claims" from that waiver. 28 U.S.C. § 2680; United States v. S.A. Empresa de Viacao Aerea Rio Grandense ("Varig Airlines"), 467 U.S. 797, 808 (1984). For example, the discretionary function exception bars claims challenging the discretionary, policy-based conduct of federal employees, see 28 U.S.C. § 2680(a), and the detention of goods exception precludes suit for claims arising out of the detention of goods by law enforcement officers, see 28 U.S.C. § 2680(c). In addition, the FTCA establishes a jurisdictional prerequisite to suit: All potential litigants are required to present an administrative claim to the relevant agency and afford the agency six months in which to investigate the claim before filing suit. 28 U.S.C. § 2675(a). An administrative claim must, among other things, recount the salient facts upon which any subsequent legal claim will be premised.

These FTCA provisions pose insurmountable obstacles for Plaintiffs. Claim 24, which alleges that the MDC Plaintiffs were falsely imprisoned, fails to state a claim under New York law and thus is not cognizable under section 1346(b) of the FTCA. Claim 25, which alleges negligent delay in the conduct of Plaintiffs' clearance investigations, and claim 30, which alleges conversion under New York and New Jersey law, are barred by the discretionary function exception and the detention of goods exception, respectively. 28 U.S.C. §§ 2680(a), 2680(c).

Finally, Plaintiffs Baloch, Saffi, and A. Ibrahim must be dismissed from claim 26, which alleges deprivation of medical care, because their administrative claims do not indicate that they sought and were denied medical treatment, and they have thus failed to exhaust their administrative remedies with respect to that claim.

## A. CLAIM 24 SHOULD BE DISMISSED BECAUSE PLAINTIFFS FAIL TO STATE A CLAIM FOR FALSE IMPRISONMENT UNDER NEW YORK LAW.

Claim 24 alleges false imprisonment of the MDC Plaintiffs at the MDC, a BOP facility in Brooklyn, New York. See Third Am. Cplt. ¶¶ 414-17. As noted, under the FTCA, liability is limited to circumstances in which the United States, if a private party, would be liable to the plaintiff under the law of the state where the negligence took place. 28 U.S.C. §§ 1346(b), 2674. Thus, in order to state a cognizable claim under the FTCA, the MDC Plaintiffs must state a claim for false imprisonment under New York law.[38] Because the detentions were authorized by facially valid commitment papers, the MDC Plaintiffs cannot establish a claim for false imprisonment under New York law, and claim 24 must be dismissed.

Under New York law, to state a claim for false imprisonment, "the plaintiff must show that: (1) the defendant intended to confine him, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged." Broughton v. State, 37 N.Y.2d 451, 456 (N.Y.), cert. denied, 423 U.S. 929 (1975). The MDC Plaintiffs' claim of false imprisonment fails to satisfy the fourth requirement that their confinement was not "otherwise privileged." This is so because BOP's

[38] In accordance with the proviso to 28 U.S.C. § 2680(h), sovereign immunity has been waived for claims of false imprisonment when the alleged tort was committed by investigative or law enforcement officers.

detention of the MDC Plaintiffs was authorized by law.[39]

The MDC Plaintiffs were INS detainees in the custody of the INS, and were simply housed at a BOP facility pursuant to INS detainer agreements. See Govt. Exhibit A (attached). Indeed, Plaintiffs do not contest that they were in INS custody. None disputes that he was properly found removable from the United States under the immigration laws. Accordingly, the MDC Plaintiffs' claim of false imprisonment by BOP fails because BOP employees were acting pursuant to facially valid INS detainer agreements.

It is "well settled that prison officials are conclusively bound by the contents of commitment papers accompanying a prisoner and that they cannot add to or detract therefrom." Middleton v. State, 389 N.Y.S.2d 159, 160 (N.Y. App. Div. 1976) (dismissing claim of false imprisonment against State Department of Corrections which detained plaintiff based upon a facially valid warrant of commitment), aff'd, 43 N.Y.2d 678 (N.Y. 1977); see also Murray v. Goord, 769 N.Y.S.2d 165, 167-68 (N.Y. Ct. App. 2003) (emphasizing Middleton's statement that "prison officials are conclusively bound by the contents of commitment papers accompanying a prisoner" and holding that the Department of Correctional Services' "only valid option . . . is to comply with the plain terms of the last commitment order received" (emphasis in original)); Romeo v. County of Oneida, 523 N.Y.S.2d 318, 319-20 (N.Y. App. Div. 1987) (rejecting plaintiff's claim that the "City and County were liable for continuation of his confinement" because "the police have no power to release a suspect who is confined and charged pursuant to lawful process"); Tesseyman v. State, 199 N.Y.S.2d 355, 358 (N.Y. Ct. Cl. 1960); Douglas v.

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[39] Claim 24 expressly seeks to hold the United States liable for the negligence of the MDC Defendants, all of whom are employees of BOP. See Third Am. Cplt. ¶¶ 26-53 (listing the MDC Defendants), 415 ("[T]he MDC Defendants . . . completely confined said Plaintiffs so as to constitute false imprisonment.").

State, 56 N.Y.S.2d 245, 247-48 (N.Y. App. Div.), aff'd, 296 N.Y. 530 (N.Y. 1945). Because the BOP had lawful authority to detain the MDC Plaintiffs, the MDC Plaintiffs cannot establish a claim for false imprisonment under New York law, and claim 24 must be dismissed for failure to state a claim upon which relief can be granted.[40]

## B. CLAIM 25 SHOULD BE DISMISSED BECAUSE THE DISCRETIONARY FUNCTION EXCEPTION BARS PLAINTIFFS' CLAIM THAT THEIR CLEARANCE INVESTIGATIONS WERE NEGLIGENTLY DELAYED.

Likewise, this Court should dismiss claim 25, in which Plaintiffs challenge the pace at which their clearance investigations were conducted.[41] Third Am. Cplt. ¶ 419. According to Plaintiffs' allegations, their clearance investigations were completed by the FBI within approximately six months of their final orders of removal.[42] Indeed, Plaintiffs Ebrahim and H.

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[40] Although the MDC Plaintiffs have not alleged false imprisonment by the INS, such a claim would also fail under New York law. As explained above, a plaintiff claiming false imprisonment must establish that his detention was not "privileged." Broughton, 37 N.Y.2d at 456. Here, for the reasons set forth above, the INS's detention of Plaintiffs was, for its entire duration, legally justified under the INA. See supra Part V.B.1. Because the INS was privileged to detain them under federal immigration law, Plaintiffs could not state a claim for false imprisonment by the INS, even if they had alleged such a claim. See Caban v. United States, 728 F.2d 68, 74 (2d Cir. 1984) (construing New York false imprisonment law in FTCA case challenging INS detention and holding that "[t]he detention of plaintiff was privileged if the INS agents acted in conformance with the federal standards regarding treatment of applicants for entry to the United States").

[41] Although claim 25 is asserted against all Defendants, which includes employees of BOP, INS, and FBI, the gravamen appears to be based on conduct undertaken by the FBI, as the claim explicitly takes issue with the Plaintiffs' "clearance investigations." Third Am. Cplt. ¶ 419. As the complaint alleges, it was the FBI that was tasked with clearing the Plaintiffs of ties to terrorism, id. ¶ 1 (alleging that INS detained Plaintiffs until the FBI cleared them of terrorist ties), and it is this clearance process that has been referred to as the "clearance investigations," see id. ¶ 84 ("According to the OIG Report, the INS held detainees long after removal could have been effectuated, simply because the FBI had not completed its 'clearance' process."); see also OIG Report at 21, 25, 37-71 (describing the "clearance process" by which FBI acted to clear September 11 detainees of any connection to terrorism).

[42] See Third Am. Cplt. ¶¶ 160, 163, 166 (Saffi ordered removed 10/8/01, cleared 11/2/01, and removed 3/5/02); ¶¶178, 180 (Jaffri ordered removed 12/20/01, removed 4/1/02); ¶¶ 188,

Ibrahim were cleared by the FBI within two weeks of having been issued final orders of deportation, and Saffi was cleared within one month. See supra note 42. Accordingly, Plaintiffs' contention that the clearance investigations were "negligently delayed," causing them to endure continued detention while the FBI could complete its work, reduces to an assertion that the FBI should have conducted all of the clearance investigations within shorter time frames. This claim, however, is barred by the discretionary function exception to the FTCA. 28 U.S.C. § 2680(a).

Under the FTCA, the United States has preserved its sovereign immunity against "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion be abused." 28 U.S.C. § 2680(a). As this Court has recognized, "[i]n order to determine whether governmental conduct falls within the discretionary function exception, [the Court] must conduct a two-tiered analysis." Lanzilotta v. United States, 1998 WL 765143, at *4 (E.D.N.Y. Jan. 5, 1998) (Gleeson, J.). The first prong of the test inquires whether the challenged conduct is discretionary, that is, whether "it involves an element of judgment or choice." Berkovitz v. United States, 486 U.S. 531, 537 (1988); see also United States v. Gaubert, 499 U.S. 315, 324 (1991). Only when a federal employee is not permitted to exercise judgment or choice, such as "when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," will a claim fall outside the discretionary function exception and thus fail to meet the first prong of the test. Berkowitz, 486

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190, 199 (Ebrahim and H. Ibrahim ordered removed 11/20/01, cleared 12/7/01, removed 6/6/02 and 5/29/02); ¶¶ 248-249 (A. Ibrahim ordered removed 11/6/01, removed 3/28/02); ¶¶ 208, 213 (Baloch's removal reinstated 9/22/01, removed 4/2/02); ¶¶ 264, 272 (Turkmen ordered removed 10/31/01, removed 2/25/02); ¶¶ 280, 284 (Sachdeva ordered removed 12/31/01, removed 4/17/02).

U.S. at 536.

The second part of the discretionary function test asks the Court to consider whether the challenged conduct is susceptible to policy analysis. Gaubert, 499 U.S. at 325; Berkovitz, 486 U.S. at 536. In § 2680(a), Congress intended to prevent "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. Varig Airlines, 467 U.S. at 814. Thus, "[w]hen established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising the discretion." Gaubert, 499 U.S. at 324 (emphasis added); Fazi v. United States, 935 F.2d 535, 538 (2d Cir. 1991).

Applying the two-part test to the conduct Plaintiffs challenge here, it is apparent that the discretionary function exception operates to bar claim 25.

**1. The FBI Had Discretion As To The Pace With Which It Conducted Its Investigation.**

Following September 11, 2001, the FBI conducted an investigation (PENTTBOM) to gather information about the attacks and to prevent future attacks. The FBI investigated each Plaintiff to determine whether he was connected to the attack or had ties to terrorism. Declaration of Charles Frahm ¶ 4, Govt. Exhibit B (attached) ("Frahm Decl."). Under the discretionary function test, the first inquiry is whether the FBI "violated a mandatory regulation or policy" that required it to act more quickly. Lanzilotta, 1998 WL 765143, at *3. Although Plaintiffs allege that the clearance investigations were allowed “to linger for months rather than the mandated days," Third Am. Cplt. ¶ 419, they fail to identify any such regulation or policy. In fact, no statute, regulation, or directive mandated that the clearance investigations be performed by a certain deadline or within a certain time frame. See Frahm Decl. ¶¶ 5-6. The

PENTTBOM investigation was opened as a "full investigation," and full international terrorism investigations are not subject to any limitations on duration. Id. Because Plaintiffs do not (and cannot) point to a mandate limiting the FBI's discretion, the decisions "are necessarily discretionary" and thus satisfy the first prong of the discretionary function analysis. See Minns v. United States, 155 F.3d 445, 452 (4th Cir. 1998), cert. denied, 525 U.S. 1106 (1999); see also ALX El Dorado, Inc. v. United States, 36 F.3d 409, 411-12 (5th Cir. 1994) (per curiam) (plaintiffs' generalized assertions that mandatory rules were violated without pointing to a single specific mandatory provision is insufficient to overcome the hurdle of establishing that the conduct was non-discretionary); Lafayette Federal Credit Union v. United States, 76 F. Supp. 2d 645, 652 (D. Md. 1999) ("Plaintiffs must identify a breach of a specific mandatory statute, regulation, or policy which prescribes a specific course of conduct."); Johnson v. United States, 47 F. Supp. 2d 1075, 1080 (S.D. Ind. 1999) ("Plaintiffs . . . have failed to link their claims with any facts or specific regulatory or policy guidelines that would call into doubt the discretionary nature of the marshal's actions.").

Indeed, the FBI, which is empowered to "investigate violations of the laws . . . and collect evidence in cases in which the United States is or may be a party in interest," is vested with broad discretionary power to determine how to carry out its statutorily authorized duties. See 28 U.S.C. § 533; 28 C.F.R. § 0.85. Moreover, it is simply common sense that the time it takes to cultivate and follow up on leads, or to gather information from various sources here and abroad, cannot be subject to mandatory deadlines. It cannot be foretold, for example, when one lead will give rise to several more leads, which themselves may require investigation. Accordingly, the pace at which the Plaintiffs' clearance investigations were conducted was discretionary, and the first prong of the test for whether the discretionary function exception bars

the claim is satisfied.

**2. The Timing Of The Investigations Was Policy-Based.**

The second prong is satisfied as well, because the decision as to the length of the investigation was grounded in policy considerations. By challenging the speed with which Plaintiffs' clearance investigations were conducted, Plaintiffs necessarily question the way in which the clearance investigations were handled. The cases are legion which hold that claims challenging the course of a federal investigation fall within the discretionary function exception. See Kelly v. United States, 924 F.2d 355, 362 (1st Cir. 1991) (dismissing claim of negligent investigation by DEA and observing that "decisions to investigate, or not, are at the core of law enforcement activity"); Frigard v. United States, 862 F.2d 201 (9th Cir. 1988) (discretionary function exception bars claim of negligent investigation by CIA), cert. denied, 490 U.S. 1098 (1989); Georgia Cas. and Sur. Co. v. United States, 823 F.2d 260, 262-63 (8th Cir. 1987) (discretionary function exception bars claim of negligent investigation by FBI); Crenshaw v. United States, 959 F. Supp. 399 (S.D. Tex. 1997) (same); McElroy v. United States, 861 F. Supp. 585, 591-92 (W.D. Tex. 1994) (discretionary function exception bars claim of negligent investigation by Organized Crime and Drug Enforcement Task Force because "[t]he negligent acts or omissions of the federal agents and officers during the preliminary investigation of [the intended target] were clearly guided by judgment and choices and not by any federal rule or policy" and "the discretion exercised . . . was guided by public policy considerations . . . of punishing and deterring distribution of illegal narcotics"); Rourke v. United States, 744 F. Supp. 100, 103 (E.D. Pa. 1988) (section 2680(a) bars plaintiffs' challenge to FBI's handling of investigation), aff'd, 909 F.2d 1477 (3d Cir. 1990).

Moreover, it cannot be gainsaid that the FBI, in pursuing the PENTTBOM investigation

and the clearance investigations that it spawned, was engaged in a quintessentially discretionary function. At every step of the way, FBI agents exercised the discretion vested in them by statute and regulations to achieve the agency's objective of enforcing federal law by gathering evidence about a crime and its perpetrators, and by helping to deter future terrorist acts. As this Court observed in Lanzilotta, "[t]he discretionary function exception bars claims based on day-to-day management decisions if those decisions amount to the selection of the wisest course from a range of permissible options." Lanzilotta, 1998 WL 765143, at *4. FBI investigative officers were continually called upon to make just such judgment calls and to prioritize among permissible options. Courts have consistently concluded that such prioritization is grounded in strong public policy considerations and cannot be the basis for a negligence action against the United States. See, e.g., Georgia Cas. and Sur. Co. 823 F.2d at 263 (FBI's investigatory decisions were grounded in policy because "the FBI had to weigh the public concern for reducing widespread criminal activity against the harm to innocent victims resulting from a covert operation"); Crenshaw, 959 F. Supp. at 402 (FBI's investigatory decisions were grounded in policy because "[i]n making decisions related to the investigation, the agents were concerned with obtaining evidence of illegal activities [and] . . . this objective correlates with the public policy goal of punishing and deterring" criminal misconduct); see also Frigard, 862 F.2d at 202 ("Because the CIA is charged by Congress with collecting intelligence, and because this charge involves elements of judgment and choice and strong public policy considerations, the decision as to how best to fulfill this duty is within its discretion."). Indeed, the Supreme Court has instructed that where, as here, the agency in question has deemed it appropriate to leave matters of method and timing to the investigative agent's discretion, "it must be presumed that the agent's acts are grounded in policy when exercising the discretion." Gaubert, 499 U.S. at 324

(emphasis added); see also Fazi, 935 F.2d at 538.

Plaintiffs conclusorily assert in claim 25 that the delay of which they complain resulted from "failure to timely act and follow up on leads, misplaced files, poor communication, disorganization, and other forms of negligence." Third Am. Cplt. ¶ 419. It is well-settled, however, that if the two-parts of the discretionary function test are satisfied, it is irrelevant to the analysis that negligence may have occurred in carrying out the protected conduct. See 28 U.S.C. §2680(a) (the discretionary function exception applies "whether or not the discretion involved be abused"); Gaubert, 499 U.S. at 323 ("Actions taken in furtherance of the program were likewise protected, even if those particular actions were negligent."); Dalehite v. United States, 346 U.S. 15, 33-34 (1953) (section 2680(a) is meant "to preclude action 'for abuse of discretionary authority whether or not negligence is alleged to have been involved'") (citation omitted); In Re Agent Orange Prod. Liab. Litig., 818 F.2d 210, 215 (2d Cir. 1987) ("[T]he fact that discretion is exercised in a negligent manner does not make the discretionary function exception inapplicable.").

The Ninth Circuit recently reaffirmed this principle in a case in which the plaintiff challenged the INS's delay of one-year in acting on a recommendation that an employee be discharged. Vickers v. United States, 228 F.3d 944, 950 (9th Cir. 2000). The court noted that INS's explanation for the delay in decisionmaking was that the final termination decisions were back-logged because of staffing shortages. Id. The court further noted that the record was devoid of evidence as to whether "the INS made any policy-based choice or judgment concerning which termination recommendations to review promptly, and which to delay. Indeed, for all the record shows, the . . . recommendation was misfiled, forgotten in a pile of paper, or otherwise negligently treated." Id. However, the Court held that the delayed

termination decision was protected by the discretionary function exception because (1) the record did not reflect that the "INS violated any mandatory policy in failing to act within a reasonable time"; and (2) "[d]ecisions concerning which termination recommendations to review when and in what order, particularly when faced with staffing shortages and consequent necessary delays, are ones that involve choice or judgment." Id. at 951. Likewise, here, the FBI, facing an enormously important and far-ranging objective and laboring with limited staff and limited resources, was constantly required to prioritize. In challenging the speed with which the FBI conducted their clearance investigations, Plaintiffs necessarily – and impermissibly – challenge discretionary, policy-based conduct. Accordingly, claim 25 comes within the discretionary function exception and must dismissed for lack of subject matter jurisdiction.

**C. CLAIM 30 SHOULD BE DISMISSED BECAUSE THE DETENTION OF GOODS EXCEPTION BARS CLAIMS FOR CONVERSION OF PROPERTY AGAINST LAW ENFORCEMENT OFFICERS**.

This Court should dismiss Plaintiffs' claims of conversion of property. According to Plaintiffs, personal property was confiscated from them at the time of their arrest or detention, or during searches of their homes by the FBI or INS. See, e.g., Third Am. Cplt. ¶¶ 131-32. Plaintiffs further allege that their property has not been returned to them. Id. Based upon these allegations, Plaintiffs assert in claim 30 that employees of the BOP, INS, and FBI committed the tort of conversion under state law. Id. ¶ 442. Because these claims arise out of the detention of goods by law enforcement officers, they are barred by 28 U.S.C. § 2680(c), which excludes from the FTCA's waiver of immunity all claims arising out of "the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer." 28 U.S.C § 2680(c).

As this Court has noted, Frederick v. United States, 2003 WL 21738597, at *3 (E.D.N.Y.

June 16, 2003) (Gleeson, J.), the Supreme Court has read § 2680(c) to bar "any claim arising out of the detention of goods, and includes a claim resulting from negligent handling or storage of detained property," Kosak v. United States, 465 U.S. 848, 854 (1984); see also Adeleke v. United States, 355 F.3d 144, 154 (2d Cir. 2004). Indeed, following Kosak, "[t]he courts have interpreted section 2680(c) to bar claims premised on essentially any injury to property sustained during its detention." United States v. Bein, 214 F.3d 408, 415 (3d Cir. 2000), cert. denied, 534 U.S. 943 (2001). Because Plaintiffs' claims for conversion arise out of the detention of goods by FBI, INS, and BOP law enforcement officers, they are barred by section 2680(c). See, e.g., O'Ferrell v. United States, 253 F.3d 1257, 1271 (11th Cir. 2001) (section 2680(c) bars plaintiffs' claim for conversion based on allegation that FBI failed to return personal property to them even after determining it to be of no evidentiary value to investigation).

In addition, most federal courts have construed the clause "any officer of customs or excise or any other law enforcement officer" to encompass federal law enforcement officers other than those performing customs and excise functions. Bramwell v. U.S. Bureau of Prisons, 348 F.3d 804, 806 (9th Cir. 2003) ("The majority of our sister circuits read § 2680(c) expansively to include federal law enforcement officers beyond those who assess taxes or collect customs duties."); see also Cheney v. United States, 972 F.2d 247, 248 (8th Cir. 1992); Schlaebitz v. United States Dep't of Justice, 924 F.2d 193, 194 (11th Cir. 1991); United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1491 (10th Cir.), cert. denied, 469 U.S. 825 (1984); United States v. Lockheed L-188 Aircraft, 656 F.2d 390, 397 (9th Cir. 1979). But see Ortloff v. United States, 335 F.3d 652, 657-58 (7th Cir. 2003), cert. denied, 124 S. Ct. 1520 (2004); Bazuaye v. United States, 83 F.3d 482, 483-84 (D.C. Cir. 1996); Kurinsky v. United States, 33 F.3d 594, 596 (6th Cir. 1994), cert. denied, 514 U.S. 1082 (1995).

Although the Second Circuit has not squarely decided whether the phrase "any . . . law enforcement officer" applies to all law enforcement officers detaining goods in the course of their official duties, it has construed the language to encompass DEA agents. Formula One Motors, Ltd. v. United States, 777 F.2d 822, 823-24 (2d Cir. 1985). The district courts within the Second Circuit read Formula One Motors, Ltd. as indiciating that the Second Circuit would be persuaded by the reasoning of the majority of circuits and interpret the relevant language broadly.[43] See, e.g., Deutsch v. United States, 2004 WL 633236, at *8 (E.D.N.Y. Mar. 19, 2004) (section 2680(c) bars claim for loss of property confiscated by U.S. Marshals when they took plaintiff into custody); Hallock v. United States, 253 F. Supp. 2d 361, 365-66 (N.D.N.Y. 2003) ("The vast majority of courts, including the Second Circuit and lower courts therein, have interpreted the exception's protection to extend to all law enforcement officers performing any law enforcement function."); Schreiber v. United States, 1997 WL 563338, at *5, *7 (S.D.N.Y. Sept. 8, 1997); Rufu v. United States, 876 F. Supp. 400, 406 (E.D.N.Y. 1994).

According to the allegations of the complaint, the property at issue here was taken and retained by law enforcement officers of the BOP, FBI, and INS, incident to the arrests, searches, and confinement of Plaintiffs. See, e.g., Third Am. Cplt. ¶¶ 131-32. Significantly, courts have held that the phrase "any . . . other law enforcement officer" encompasses agents of the BOP, FBI, and INS. See Steele v. Federal Bureau of Prisons, 355 F.3d 1204, 1213-14 (10th Cir. 2003) (2680(c) bars prisoner's claim against BOP for missing property); Bramwell, 348 F.3d at

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[43] In addition, to the extent that the phrase "any . . . law enforcement officer" is ambiguous, it is axiomatic that the ambiguity must be construed in favor of the sovereign. Lane, 518 U.S. at 192 (scope of waiver of sovereign immunity will be strictly construed in favor of sovereign); United States v. Williams, 514 U.S. 527, 531 (1995) (In construing a waiver of sovereign immunity "we may not enlarge the waiver beyond the purview of the statutory language. Our task is to discern the 'unequivocally expressed' intent of Congress, construing ambiguities in favor of immunity." (citations omitted)).

807 (2680(c) bars prisoner's claim against BOP for detaining and destroying personal property, including eyeglasses); Chapa v. United States Department of Justice, 339 F.3d 388, 391 (5th Cir. 2003) (2680(c) bars prisoner's claim that BOP lost his property after his transfer to a different prison); O'Ferrell, 253 F.3d at 1271 (2680(c) bars claim against FBI for detaining property pursuant to investigation); Halverson v. United States, 972 F.2d 654, 656 (5th Cir. 1992) (2680(c) bars claim against INS agents for confiscation and loss of plaintiff's personal belongings), cert. denied, 507 U.S. 925 (1993); Ysasi v. Rivkind, 856 F.2d 1520, 1524 (Fed. Cir. 1988) (2680(c) bars claim arising out of seizure of truck by INS agents); Houghton v. FBI, No. 98 Civ. 3418, 1999 WL 1133346, at *4 (S.D.N.Y. Dec. 10, 1999) (2680(c) bars claim against FBI for seizure of bonds); Garnay, Inc. v. M/V Lindo Maersk, 816 F. Supp. 888, 897 (S.D.N.Y. 1993) ("[I]t seems clear that FBI agents are law-enforcement officers within the statute. If they are not, it is difficult to imagine who is.").

Because Plaintiffs' claims for conversion arise out of the detention of their property by BOP, FBI, and INS law enforcement officers, they fall squarely within the exception to the waiver of sovereign immunity at section 2680(c) of the FTCA. Claim 30 must therefore be dismissed for lack of subject matter jurisdiction.

Alternatively, if this Court were to conclude that the detention of goods exception did not bar Plaintiffs' claims for conversion, the Court should dismiss Plaintiffs' claim for equitable relief for the return of their property (claim 8). This equitable claim would have to be dismissed because there would be an adequate remedy a law. See Hudson, 468 U.S. at 533 (recognizing that the Due Process Clause is not implicated when a prisoner's property is lost or destroyed during incarceration "if a meaningful postdeprivation remedy for the loss is available").

## D. CLAIM 26 SHOULD BE DISMISSED AS TO PLAINTIFFS BALOCH, SAFFI, AND A. IBRAHIM BECAUSE THEY FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES AS TO ANY CLAIM THAT THEY WERE DENIED MEDICAL TREATMENT.

Claim 26 should be dismissed against those Plaintiffs who have failed to exhaust their administrative remedies. Section 2675(a) of the FTCA provides in pertinent part that "an action shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have first presented the claim to the appropriate Federal agency." 28 U.S.C. § 2675(a); see also 28 U.S.C. § 2401(b). The administrative claim requirement is a jurisdictional prerequisite to suit that cannot be waived. See, e.g., Adams v. Dep't of Housing and Urban Development, 807 F.2d 318, 321 (2d Cir. 1986); Gerry v. Behr, 1998 WL 782015, at *4 (E.D.N.Y. Nov. 6, 1998) (Gleeson, J.). Here, the district court lacks jurisdiction over the claims for denial of medical treatment by Plaintiffs Baloch, Saffi, and A. Ibrahim because they did not give notice of these claims in their administrative claims.

In the Second Circuit, "a Notice of Claim filed pursuant to the FTCA must provide enough information to permit the agency to conduct an investigation and to estimate the claim's worth." Romulus v. United States, 160 F.3d 131, 132 (2d Cir.1998); see also 28 C.F.R. § 14.2. The purpose of the exhaustion requirement is to provide the agency with the opportunity to investigate the claim and, if appropriate, to attempt to settle it in advance of trial. Johnson v. United States, 788 F.2d 845, 848-49 (2d Cir.), cert. denied, 479 US. 914 (1986); State Farm Ins. Co. v. United States, 2004 WL 1638175, at *2 (E.D.N.Y. July 23, 2004) (Gleeson, J.) ("The purpose of this exhaustion requirement is not to make recovery from the government technically more difficult, but rather 'to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States.'" (quoting S. REP. NO. 89-1327, at 2516 (1966))). Although Plaintiffs

are not required to advance particular legal theories in their administrative claims, they must allege all facts that would be necessary to support any argument they might subsequently make. Deloria v. Veterans Admin., 927 F.2d 1009, 1012 (7th Cir. 1991). "[A] plaintiff cannot 'present one claim to the agency and then maintain suit on a different set of facts.'" Id. (quoting Dundon v. United States, 559 F. Supp. 469, 476 (E.D.N.Y. 1983)).

Indeed, "courts . . . routinely dismiss actions brought on legal theories not presented to the relevant federal agency, legal theories which could expose the agency to damages which were unforeseen during the administrative review period and which could potentially have affected the Government's ability to conduct meaningful settlement negotiations." Danowski v. United States, 924 F. Supp. 661, 667-68 (D. N.J.1996); see also Roma v. United States, 344 F.3d 352, 362-63 (3d Cir. 2003) (administrative claim alleging injury from firefighter's instruction that plaintiff remove his self-contained breathing apparatus not sufficient to exhaust claim that federal employees negligently failed to prevent fire), cert. denied,125 S.Ct. 87 (2004); Dynamic Image Tech., Inc. v. United States, 221 F.3d 34, 39-40 (1st Cir. 2000) (holding that amended complaint exceeded scope of administrative claim where plaintiff alleged emotional distress claim based upon allegedly false arrest, but plaintiff's administrative claim did not refer or allude to false arrest or describe the underlying incident); Bembenista v. United States, 866 F.2d 493, 498-99 (D.C. Cir. 1989) (plaintiffs barred from raising claim of medical malpractice where administrative claim referenced sexual assault only, despite that plaintiffs attached more than 400 documents including medical records to the administrative claim); Parra VDA de Mirabal v. United States, 675 F. Supp. 50, 51 (D. P.R. 1987) (dismissing claim that injuries were caused by failure to provide psychological or psychiatric treatment to address plaintiff's self-destructive impulses where administrative claim alleged only negligent medical treatment of plaintiff during

surgery and hospitalization).

Here, Plaintiffs Baloch, Saffi, and A. Ibrahim did not exhaust their administrative remedies with respect to their allegations that they were deprived of medical care. Specifically, these Plaintiffs aver that the MDC Defendants refused to provide them "with medical services necessary for their health and well-being." Third Am. Cplt. ¶ 423. Yet, as is evident from a review of the administrative claims presented, none of these three Plaintiffs so much as alluded to having requested medical treatment, let alone to having been deprived of it. See Administrative Claims of Baloch, Saffi and A. Ibrahim, Govt. Exhibit C (attached). A claim that federal employees deprived these Plaintiffs of requested medical treatment is a "wholly distinct incident" from their other claims of mistreatment during their incarceration. See Deloria, 927 F.2d at 1012. Plaintiffs' assertions, for example, that they were deprived of sleep when the lights were left on continuously, or that their property was confiscated and not returned, did not put BOP on notice that Plaintiffs would litigate the question whether BOP employees denied them requested medical attention.[44] Accordingly, Baloch's, Saffi's, and A. Ibrahim's claims to have

[44] Moreover, as to Plaintiffs Saffi and A. Ibrahim, not only do their administrative claims make no mention of having sought and been denied medical care, but also the Third Amended Complaint contains no allegations of fact to support such a claim. As to Plaintiff Baloch, the complaint alleges that he "complained of an earache in his left ear" and that "PA Lorenzo refused to treat his earache," Third Am. Cplt. ¶ 127, but his administrative claim does not state that he ever complained to anyone that he was suffering from any ailment, or that his requests for treatment went unheeded. See Govt. Exhibit C (attached). In addition, the complaint alleges that Baloch requested a transfer to a new room because his roommate had tuberculosis, that he was not transferred, and that he has since been diagnosed with tuberculosis. Third Am. Cplt. ¶ 127. On its face, this allegation fails to support a claim for denial of medical treatment – the complaint does not allege that Baloch required or demanded medical treatment for tuberculosis. In any event, Baloch's administrative claim is insufficient to exhaust any claim based upon a requested and denied transfer due to potential tuberculosis exposure, because it states only that "[a]fter his return to Canada, he tested positive for tuberculosis for the first time – a disease that he doubtless contracted during his incarceration." See Govt. Exhibit C (attached).

been deprived of such services must be dismissed.[45]

## CONCLUSION

For the foregoing reasons, this Court should dismiss claims 1-11, 17-25, 30, and (in part) 26 against the United States and all claims against the Original Defendants.

Respectfully submitted,


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[45] Plaintiffs demand in the Prayer for Relief that the Court "[c]ertify[] this suit as a class action." Third Am. Cplt. at p. 117. To the extent that Plaintiffs seek certification of the suit under the Federal Tort Claims Act, class actions are impermissible in the absence of exhaustion by every class member.

"It is well established that neither the district court nor this Court has jurisdiction over a Federal Tort Claims class action where, as here, the administrative prerequisites of suit have not been satisfied by or on behalf of each individual claimant. " In re Agent Orange Prod. Liab. Litig., 818 F.2d at 198 (citing, among other cases, Keene Corp. v. United States, 700 F.2d 836, 841 (2d Cir.), cert. denied, 464 U.S. 864 (1983)); see also Lunsford v. United States, 570 F.2d 221, 225-26 (8th Cir. 1977); Gollehon Farming v. United States, 17 F. Supp. 2d 1145, 1160 (D. Mont. 1998), aff'd on other grounds, 207 F.3d 1373 (Fed. Cir. 2000); Founding Church of Scientology of Wash., D.C., Inc. v. Director of FBI, 459 F. Supp. 748, 754 (D.D.C. 1978). Accordingly, to the extent Plaintiffs demand that the entire suit be certified as a class action under the Federal Tort Claims Act, their demand must be denied for lack of subject matter jurisdiction.

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**CERTIFICATE OF SERVICE**

I CERTIFY that on November 30, 2004, I caused to sent to counsel for plaintiffs an electronic version of the foregoing document, and a copy by U.S. mail, addressed to:

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