13-981-cv(L)

13-999(con), 13-1002(con), 13-1003(con), 13-1662(con)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees-Cross-Appellants,

(*caption continued on inside cover*)

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

PAGE-PROOF OPENING BRIEF FOR DEFENDANT-APPELLANT-CROSS-APPELLEE JAMES SHERMAN

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

Plaintiffs-Appellees,

—against—

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

Defendants-Appellants-Cross-Appellees,

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

Defendants-Cross-Appellees,

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

Intervenors.

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JURISDICTIONAL STATEMENT

The operative Complaint in this action asserts six claims under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), plus a conspiracy claim under 42 U.S.C. § 1985. On January 15, 2013, the district court entered an order recognizing an implied cause of action under *Bivens* for four counts in the Complaint; refusing Mr. Sherman qualified immunity for those counts; and rejecting qualified immunity for the § 1985 claim. SPA.1-61. A timely appeal followed on March 15, 2013. Dkt.779.

An order denying qualified immunity is immediately appealable under the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985); *Ashcroft v. Iqbal*, 556 U.S. 662, 673 (2009). Whether a *Bivens* action should be available in a particular context is likewise immediately appealable. *Wilkie v. Robbins*, 551 U.S. 537, 549-50 & n.4 (2007); *Doe v. Rumsfeld*, 683 F.3d 390, 393 (D.C. Cir. 2012). The district court had jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether *Bivens* should be extended to alleged violations of the Free Exercise Clause (Count 3) for foreign nationals detained on immigration charges; and, if so, whether the Complaint sufficiently alleges Mr. Sherman's personal

participation in the violation of clearly established rights to overcome his qualified immunity.

2. Whether *Bivens* extends to the remaining claims (Count 1's Fifth-Amendment due-process conditions-of-confinement claim, Count 2's Fifth-Amendment equal-protection claim, and Count 6's Fourth- and Fifth-Amendment claims based on allegedly unnecessary strip searches) and, if so, whether the Complaint sufficiently alleges Mr. Sherman's personal participation in a violation of clearly established law to overcome his qualified immunity.

3. Whether Defendants are entitled to qualified immunity for the alleged conspiracy to violate civil rights in violation of 42 U.S.C. § 1985 (Count 7) where the Complaint pleads no facts suggesting a meeting of the minds among Defendants and where, at the time the officers acted, it was not clear that § 1985 applied to federal officers or intra-enterprise conspiracies.

STATEMENT OF THE CASE

In the wake of the attacks of September 11, 2001, federal officials designated more than 700 foreign nationals who were illegally present in the United States as "of interest" to their terrorism investigation. Many were detained for immigration violations, and the Immigration & Nationalization Service ("INS") was directed not to release any detainee until the FBI cleared him of any connection to terrorism. Dkt.726 ¶33. This case is a putative class action brought

by six named plaintiffs who claimed they were detained at the Metropolitan Detention Center ("MDC"), under that "hold-until-cleared" policy. *Id.* ¶¶ 1, 29(c), 33.[1] Defendants include high-ranking officials such as former Attorney General John Ashcroft, FBI Director Robert Mueller, and former INS Commissioner James Ziglar. The Complaint also names five former MDC corrections officers—Dennis Hasty, Michael Zenk, James Sherman, Salvatore Lopresti, and Joseph Cuciti (collectively, the "MDC Defendants")—as defendants.

Plaintiffs filed their initial complaint on April 17, 2002, and amended the complaint on July 27, 2002, June 18, 2003, and September 13, 2004. The district court (Gleeson, J.) granted Defendants' motions to dismiss the Third Amended Complaint with respect to Plaintiffs' length-of-detention allegations but otherwise denied them. *Turkmen v. Ashcroft*, No. 02-cv-2307, 2006 WL 1662663 (E.D.N.Y. June 14, 2006).

On appeal, this Court affirmed the district court's dismissal of the length of detention claims. *Turkmen v. Ashcroft*, 589 F.3d 542, 547-50 (2d Cir. 2009) (per curiam). It vacated the district court's denial of Defendants' motion to dismiss the

[1] The Complaint states that some foreign nationals (including two named Plaintiffs) were detained at a state facility in Passaic, New Jersey. Dkt.726 ¶4. None of the MDC Defendants is alleged to have had any involvement with that facility. A.__(OIG Report 165). Accordingly, this brief focuses exclusively on the MDC-related claims.

other claims and remanded for reconsideration in light of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See* 589 F.3d at 547.

The district court then permitted Plaintiffs to file a fifth complaint. Dkt.724. Plaintiffs did so on September 13, 2010. Dkt.726. The court granted Defendants' motions to dismiss in part and denied them in part. SPA.1-62. The court dismissed all counts against Ashcroft, Mueller, and Ziglar, but allowed the free-exercise, equal-protection, due-process, and strip-search claims under *Bivens* to proceed against the MDC Defendants, together with the statutory conspiracy count. This appeal followed.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

I. PLAINTIFFS' DETENTION AND DESIGNATION BY THE FBI

A. The Arrest And Investigation Of Foreign Nationals Illegally Present In The United States In The Wake Of The 9/11 Attacks

In response to the terrorist attacks of 9/11, then-Attorney General Ashcroft directed federal law enforcement agencies to use "every available law enforcement tool" to find and arrest individuals who "participate in, or lend support to, terrorist activities." A.__(U.S. Dep't of Justice, Office of the Inspector General, *The September 11 Detainees* 1 (2003) ("OIG Report") (incorporated by reference into the Complaint, Dkt.726 ¶¶3 n.1, 5 n.2)).[2] Law enforcement turned to, among other

[2] Because the Complaint incorporates the OIG Report and a later Supplemental OIG Report by reference, both the well-pleaded facts and the facts in the incorporated OIG Reports should generally be taken as true for purposes of the motion to

sources, federal immigration laws to detain aliens suspected of having terrorist ties. *Id.*

Federal officials interviewed individuals with possible connections to terrorism. A.__(OIG Report 25). They detained foreign nationals who were here illegally. A.__, __(OIG Report 14, 25). The INS would ask the FBI whether each detained alien was "of interest" to the terrorism investigation. A.__(OIG Report 14). If the FBI responded that he was not, he was processed according to "normal INS procedures." A.__(OIG Report 40). Foreign nationals who were determined to be "of interest" by the FBI were detained pending further investigation of their possible ties to terrorism. *Id.*

B. Detention Under The Hold-Until-Cleared Policy

Over 700 people were designated "of interest" to the terrorism investigation, many in the New York City Area. A.__(OIG Report 15). Consistent with the Justice Department's hold-until-cleared policy, the INS was directed not to release any September 11 detainee until the FBI cleared that detainee of any connection to terrorism. A.__-__(OIG Report 37-38).

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dismiss and this appeal. *See DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010). This Court can "consider the full text of documents only partially quoted in the complaint." *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Co., Inc.*, 75 F.3d 801, 808 (2d Cir. 1996). The Court, however, "need not feel constrained to accept as truth . . . pleadings that . . . are contradicted either by statements in the complaint itself or by documents upon which its pleadings rely." *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 405 (S.D.N.Y. 2001).

The INS was charged with determining where each September 11 detainee should be confined. "[T]he INS's decision," however, "was based almost entirely on the FBI's assessment." A.__(OIG Report 19). With respect to each detainee, the FBI ordinarily provided the INS with a recommendation classifying each alien as "of interest," "interest unknown," or "high interest." A.__(OIG Report 25). At that time, the MDC was the only detention facility in New York City capable of housing detainees under restrictive conditions. A.__(OIG Report 126). The FBI requested that "high interest" detainees be housed there. A.__(OIG Report 18). A total of 84 such individuals were confined at the MDC from September 14, 2001, to August 27, 2002. A.__(OIG Report 111). By contrast, most "of interest" and "interest unknown" detainees were kept in lower-security facilities unconnected to the MDC Defendants. *Id.*; p. 3 n.1, *supra*.

C. Confinement At The Metropolitan Detention Center

The Bureau of Prisons ("BOP") directed that all detainees who were "convicted of, charged with, associated with, or in any way linked to terrorist activities" should be placed under the highest level of restrictions permitted under BOP policy. A.__(OIG Report 112). BOP officials instructed MDC staff that the September 11 detainees in their custody were "suspected terrorists." A.__(OIG Report 126). As BOP's Northeast Region Counsel later explained, the BOP accepted the FBI's assessment that the "detainees had a potential nexus to

terrorism and therefore were 'high-risk.'" A.__(OIG Report 127). BOP's Northeast Region Director mandated that wardens within that Region not release "terrorist related" inmates from restrictive detention "until further notice." A.__(OIG Report 113). BOP's Assistant Director for Correctional Programs similarly reaffirmed that any detainee who entered the MDC on or after September 11, and who "may have some connection to or knowledge of" terrorism, was required to be housed "in the Special Housing Unit" in the "tightest" allowable conditions until the FBI cleared him of terrorist connections. A.__(OIG Report 116 n.93).

Those requirements were consistent with guidance provided by the Justice Department. BOP Director Kathy Hawk Sawyer noted that two Justice Department officials called her to express concerns about the detainees' ability to communicate with other inmates and those outside the facility. A.__(OIG Report 112). One official "confirmed the substance of this conversation," while another admitted that "he discussed having these inmates placed under the most secure conditions possible," and instructed "that the BOP should, within the bounds of the law, push as far toward security as they could." A.__(OIG Report 113).

MDC staff thus placed all incoming September 11 detainees in the administrative maximum Special Housing Unit ("ADMAX SHU"). The conditions "includ[e] 'lockdown' for 23 hours a day, restrictive escort procedures for all

movement outside of the ADMAX SHU cells, and limits on the frequency and duration of legal telephone calls." A.__(OIG Report 112).

Ordinarily, Special Housing Units are utilized for inmates with disciplinary problems or who require administrative separation from the general population. A.__(OIG Report 118). For such inmates, BOP regulations provide for a weekly status review, with a formal hearing at monthly intervals. *Id.* With respect to the September 11 detainees, however, MDC staff "relied on the FBI's assessment." *Id.* If the FBI did not clear a September 11 detainee, that detainee's status was automatically maintained and the detainee remained in ADMAX SHU. *Id.*

D. Clearance From FBI Headquarters

Often, the FBI "took a long period of time to clear September 11 detainees." A.__(OIG Report 51). The delay—an average of 80 days—resulted from, among other things, the Justice Department's decision to apply the hold-until-cleared policy to all New York City-area arrests and a shortage of field agents to conduct clearance investigations. A.__(OIG Report 52).

II. PROCEEDINGS BELOW

Plaintiffs were detained on immigration violations after the 9/11 attacks, six of them at MDC. They filed their initial Complaint on April 17, 2002. Dkt.1. They named five corrections officers (the MDC Defendants) and several high-ranking government officials as defendants. Mr. Hasty was the Warden at MDC

until Mr. Zenk succeeded him in Spring of 2002; Mr. Sherman was MDC's Associate Warden for Custody; Mr. Lopresti was the Captain of the facility; and Mr. Cuciti was MDC's First Lieutenant. Dkt.726 ¶¶24-28.

The MDC Defendants have no affiliation with either the FBI or the INS. The Complaint does not allege that they had any role in developing or implementing the hold-until-cleared policy; in selecting any of the Plaintiffs for detention; in designating them as "of interest"; or in determining when or whether detainees would be released.

A. Early Proceedings

Plaintiffs amended their initial complaint three times, including once to incorporate the OIG Report (A.__-__), Dkt.28, and another time to incorporate the Supplemental OIG Report (A.__-__), Dkt.109. Defendants then moved to dismiss the Third Amended Complaint. The district court granted the motions in part and denied them in part. *Turkmen v. Ashcroft*, No. 02-cv-2307, 2006 WL 1662663 (E.D.N.Y. June 14, 2006). The court denied the motion with respect to Plaintiffs' claims that they were subjected to unconstitutional conditions of confinement. *Id.* at *1. But the court dismissed the claims challenging the decisions to detain them and all challenges to the duration of their detention. *Id.*

Both sides appealed. While that appeal was pending, the Supreme Court decided *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Iqbal* held that, to survive a

motion to dismiss, a plaintiff must "state a claim to relief that is ***plausible on its face***." *Id.* at 678 (emphasis added). The Complaint must include "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* *Iqbal* also held that, under *Bivens*, "each Government official . . . is only liable for his or her own misconduct." *Id.* at 676-77.

On December 18, 2009, this Court affirmed the district court's decision in part and reversed in part. *Turkmen v. Ashcroft*, 589 F.3d 542 (2d Cir. 2009) (per curiam). It affirmed the district court's dismissal of the length-of-detention claims, holding that Plaintiffs were lawfully detained as aliens subject to orders of removal or voluntary departure; that the government had probable cause to detain them; and that the motive for the detention was irrelevant. *Id.* at 549-50. It also held that Defendants were entitled to qualified immunity on those claims, because there was no authority clearly establishing the illegality of the alleged conduct. *Id.* at 550. Finally, this Court vacated the district court's decision on the condition-of-confinement claims in light of *Iqbal*. *Id.* at 546.

B. The Fourth Amended Complaint

On remand, the district court granted Plaintiffs' request for leave to amend. Dkt.704, 724. The Fourth Amended Complaint—the operative complaint in this appeal—seeks class-wide relief on seven causes of action. Plaintiffs purport to proceed "on behalf of themselves and a class of male non-citizens . . . who are

Arab, South Asian or Muslim or were perceived by Defendants to be Arab, South Asian or Muslim, [who] were arrested on minor immigration violations following the September 11, 2001 terrorist attacks on the United States." Dkt.726 ¶1. The Complaint alleges that "[e]ach Plaintiff was subjected to a policy whereby any Muslim or Arab man encountered during the investigation of a tip received in the 9/11 terrorism investigation (called 'PENTTBOM'), and discovered to be a non-citizen who had violated the terms of his visa, was arrested and treated as 'of interest' to the government's terrorism investigation." *Id.* The Complaint alleges that, under the "hold-until-cleared" policy, Plaintiffs were detained until the FBI "affirmatively cleared them of terrorist ties." *Id.* ¶2.

Members of the putative class were detained at MDC or the Passaic facility. Dkt.726 ¶¶1, 4, 29(c). The Complaint avers that some Plaintiffs "were classified by the FBI as being 'high interest' and placed in the most highly restrictive prison setting possible—the MDC's Administrative Maximum Special Housing Unit ('ADMAX SHU')," while others "were placed in the ADMAX SHU" without being "classified 'high interest.'" *Id.* ¶4.

Count 1 asserts a Fifth Amendment due-process claim challenging the conditions of confinement. Dkt.726 ¶¶276-279. The Complaint alleges that, as a matter of "policy and practice," Plaintiffs "were unreasonably detained and subjected to outrageous, excessive, cruel, inhumane, punitive and degrading

conditions of confinement." *Id.* ¶278. Plaintiffs, the Complaint states, "were subjected to these restrictive conditions . . . for between three and eight months pursuant to a written policy drafted by Cuciti, signed by Lopresti, and approved by Sherman and Hasty, and subsequently by Zenk." *Id.* ¶76.

The Complaint also asserts "routine" physical and mental abuse of MDC detainees, including punitive strip searches. Dkt.726 ¶¶105, 109. It alleges that "Defendant Cuciti was given responsibility for developing the strip-search policy on the ADMAX." *Id.* ¶111. And it alleges that Plaintiffs were effectively denied sleep, *id.* ¶119; recreation, *id.* ¶122; food, *id.* ¶128; and hygiene items, *id.* ¶130. The Complaint does not allege that ***any*** of the MDC Defendants were directly involved in those alleged acts. Instead, it avers that the alleged abuses were "the result of Hasty labeling the detainees as 'terrorists' in MDC memoranda." *Id.* ¶109. Plaintiffs also claim that "Hasty failed to investigate the abuse, punish the abusers, train his staff, or implement any process at MDC to review the tapes for abuse." *Id.* ¶107. The Complaint states that "[a]ll the MDC Defendants allowed Plaintiffs and class members to be beaten and harassed by ignoring direct evidence of such abuse." *Id.* ¶77. It identifies no specifics of when or how such abuse allegedly came to Mr. Sherman's attention.

The Complaint alleges that, although the FBI had no information tying Plaintiffs to terrorism, it designated them as being of "high interest" nonetheless.

Dkt.726 ¶¶1, 4. It similarly alleges that some MDC detainees who were classified as "of interest" rather than "high interest" were placed in ADMAX SHU "despite the absence of any information indicating they were dangerous or involved in terrorism." *Id.* ¶4. But it makes clear that the FBI, not MDC Defendants, made those designations. *Id.* ¶¶4, 47. The Complaint alleges that MDC staff established the restrictive confinement conditions in the belief that detainees were tied to terrorism and that the conditions would encourage cooperation. *Id.* ¶¶103, 144, 217.

The Complaint does not allege the MDC Defendants had any role in national security designations or authority to countermand the FBI's designations. It asserts, however, that "MDC Defendants were aware that the FBI had not developed any information to tie the MDC Plaintiffs and class members they placed in the ADMAX SHU to terrorism." Dkt.726 ¶69. According to the Complaint, an unnamed MDC intelligence officer received summaries of the reasons for each detainee's arrest, as well as any evidence suggesting he might pose a danger; those summaries allegedly had "a dearth of information connecting MDC Plaintiffs and class members to terrorism." *Id.* ¶¶70, 74. The Complaint does not explain why there was reason to believe, in an area permeated by national security concerns and the secrecy that accompanies it, that a reasonable MDC

officer would necessarily believe the FBI would reveal in those summaries ***all*** the potentially sensitive information it had in its possession.

Count 2 asserts a Fifth Amendment equal-protection claim. Dkt.726 ¶¶280-283. The Complaint alleges that Defendants "subject[ed] Plaintiffs and class members to harsh treatment not accorded similarly-situated non-citizens" and "singled out Plaintiffs and class members based on their race, religion, and/or ethnic or national origin, and intentionally violated their rights to equal protection." *Id.* ¶282. For example, the Complaint alleges that "MDC staff" subjected Plaintiffs to religious insults. *Id.* ¶109. It does not, however, allege that MDC Defendants like Mr. Sherman participated.

Count 3 asserts a First Amendment free-exercise-of-religion claim. Dkt.726 ¶¶284-287. The Complaint alleges that "Defendants adopted, promulgated, and implemented policies and practices intended to deny Plaintiffs and class members the ability to practice and observe" Islam. *Id.* ¶286. It asserts that "[t]hese policies and practices have included, among other things, the visitation of verbal and physical abuse upon Plaintiffs and class members, and the deliberate denial of all means by which they could maintain their religious practices, including access to Halal food and daily prayer requirements." *Id.* The Complaint, however, mentions Mr. Sherman only in connection with the claim that they "requested copies of the Koran" soon after arriving at MDC, "but did not receive them until weeks or even

months later." *Id.* ¶132. According to the Complaint, their delayed receipt of Korans was "pursuant to a written MDC policy (created by Cuciti and Lopresti, and approved by Hasty and Sherman) that prohibited the 9/11 detainees from keeping anything, including a Koran, in their cell." *Id.* The Complaint alleges that one plaintiff never received a Koran. *Id.* It alleges that "[e]vidence and complaints about these practices were brought to the attention of MDC management, including Hasty." Dkt.726 ¶137. With respect to Mr. Sherman, the Complaint does not contain even that conclusory allegation.

Count 4 asserts a First Amendment claim challenging an alleged communications blackout and post-blackout visitation restrictions that "interfered with [Plaintiffs'] access to family, lawyers, and the courts." Dkt.726 ¶¶288-291. Count 5 relies on those allegations to plead a Fifth Amendment due-process claim. *Id.* ¶¶292-296. Both Counts 4 and 5 were dismissed on qualified immunity grounds and are at issue in Case No. 13-1662, which is being briefed as a cross-appeal to this case. *See* Doc. No. 29 (consolidation order).

Count 6 asserts a Fourth and Fifth Amendment claim alleging that the MDC Defendants subjected Plaintiffs "to excessive and unreasonable strip-searches with no rational relation to a legitimate penological purpose" and "conduct[ed] the searches in a deliberately humiliating manner that was not reasonably related to any legitimate penological purpose." Dkt.726 ¶299. It also alleges that "MDC

Defendants were grossly negligent and/or deliberately indifferent in their supervision of MDC staff" who subjected Plaintiffs to those "strip-searches," *id.* ¶300, and/or "creat[ed] and approv[ed] the policy and practice" under which Plaintiffs were subjected to strip-searches, *id.* ¶301.

Count 7 asserts that the MDC Defendants conspired to violate Plaintiffs' civil rights in violation of 42 U.S.C. § 1985. Dkt.726 ¶¶303-306.

C. The District Court's Decision

The district court granted the defendants' motions to dismiss in part and denied them in part. SPA.1-62. The court dismissed all the claims against Ashcroft, Mueller, and Ziglar, along with Counts 4 and 5.[3] The motions were otherwise denied.

1. *Due Process Conditions Of Confinement (Count 1)*

The district court denied the MDC Defendants' motion to dismiss Count 1, which challenges the conditions of confinement under the Due Process Clause of the Fifth Amendment.

The district court first addressed whether Plaintiffs have a cause of action under *Bivens*. The court recognized that the Supreme Court has refused to extend

[3] The court ruled that the Complaint failed to plead that Ashcroft, Mueller, and Ziglar intended Plaintiffs to be confined in harsh conditions, subjected to discrimination, or burdened in the exercise of religion; those high-ranking officials, the court stated, "were entitled to expect that their subordinates would implement their directions lawfully." *See* SPA.31-32, 38, 56.

the judicially implied *Bivens* action to any new rights, classes of defendants, or contexts for three decades—and that this Court had cautioned against such extensions as well. SPA.26-27 n.10. Without defining the term "context," however, the district court concluded that "[t]he conditions-of-confinement claims do not present a new [*Bivens*] context. The Second Circuit has long assumed that mistreatment claims like those alleged here give rise to a *Bivens* claim." SPA.27 n.10. "[E]ven the en banc majority in *Arar*," the court stated, "acknowledged that *Bivens* claims are already available for the harsh conditions of confinement alleged here." *Id.* (citing *Arar v. Ashcroft*, 585 F.3d 559, 582 (2d Cir. 2009) (en banc)).

The district court also held that the MDC Defendants are not entitled to qualified immunity. Federal officials are entitled to qualified immunity unless their conduct violates constitutional rights that are so "clearly established" that every reasonable official would have understood that what he is doing violates that right. SPA.25. "It was clearly established in 2001," the court stated, "that punitive conditions of confinement could not be imposed upon unconvicted detainees." SPA.34.

The district court did not contest that the MDC Defendants played no role in designating Plaintiffs for restrictive confinement. SPA.34. But it held that the MDC Defendants could be liable because the Complaint alleged that assignment to ADMAX SHU was "facially discriminatory" and the MDC Defendants knew that

Plaintiffs had no terrorist connections. SPA.35. The court did not explain how corrections officials were positioned to second guess FBI national-security designations.

The district court elsewhere acknowledged that "a supervisory official is entitled to assume that subordinates will pursue their responsibilities in a constitutional manner." SPA.31. But it held the MDC Defendants responsible for alleged abuses by subordinate staff, citing allegations that Hasty, Zenk, and Sherman were "made aware" of certain abuses, Dkt.726 ¶¶24-26, that Lopresti "received numerous" unidentified complaints, *id.* ¶27, and that Cuciti "heard complaints," *id.* ¶28. The court found those allegations sufficient to "raise the reasonable inference that the MDC defendants had the requisite mens rea and that their inaction in the face of the unofficial abuse caused plaintiffs' injuries." SPA.34.

2. ***The Equal-Protection Claim (Count 2)***

The district court refused to dismiss the equal-protection *Bivens* claim (Count 2). The court ruled—again without reference to the term "context"—that "[t]he availability of a *Bivens* remedy for violations of the Equal Protection Clause has been conclusively established." SPA.35 n.15 (citing *Davis v. Passman*, 442 U.S. 228 (1979)).

Turning to qualified immunity, the district court asserted "that the Complaint raises the reasonable inference that [the MDC Defendants] effectuated the harsh

confinement policy and held the Detainees in restrictive conditions of confinement because of their race, religion, and/or national origin." SPA.40. "It was clearly established in 2001," the court stated, "that creating and implementing a policy expressly singling out Arabs and Muslims for harsh conditions of confinement violates their Fifth Amendment equal protection rights." SPA.41. "In addition, insofar as [the MDC Defendants] seek qualified immunity on the theory that they were following facially valid orders," the court stated, "this gets them nowhere; the Complaint alleges that the harsh confinement policy was facially discriminatory, not facially valid." *Id.*

3. ***The Free-Exercise Claim (Count 3)***

Turning to the free-exercise claim, the district court recognized that the Supreme Court had never extended *Bivens* to the free exercise context, much less to foreign nationals lawfully detained on immigration violations in connection with a terrorism investigation. But the court "h[e]ld that *Bivens* should be extended to afford the plaintiffs a damages remedy if they prove the alleged violation of their free exercise rights." SPA.51. It reasoned that, absent *Bivens*, "[t]here is no remedy for the violation of plaintiffs' free exercise rights." *Id.*

The district court also ruled that there are no special factors counseling hesitation to prevent *Bivens*' extension to this context. "[T]he right of a person detained in an American prison not to be subjected to malicious mistreatment by

federal officers that is specifically intended to deprive him of his right to free exercise of his religion," the court stated, "was not diminished by the September 11 attacks." SPA.54. The court asserted that allowing a *Bivens* remedy would not "adversely impact our national security." *Id.* Instead, the court posited the opposite: "[O]ne would think our national security interests would only be enhanced if the world knew that those officers were held liable for the damages they caused." *Id.*

The district court also denied qualified immunity. Plaintiffs' "right to a reasonable opportunity to worship," the court stated, "has long been clearly established." SPA.57. "[I]f the well-pleaded allegations of intentional interference with the plaintiffs' religious practices are proven," the court ruled, "no officer could reasonably believe that the conduct at issue was lawful." SPA.57-58.

4. ***The Unreasonable Strip-Search Claim (Count 6)***

The district court sustained Plaintiffs' Fourth and Fifth Amendment challenge to the alleged strip searches (Count 6). SPA.59-60. According to the court, "[i]t was clearly established at the time that a strip search policy designed to punish and humiliate was not reasonably related to a legitimate penological purpose and thus violated the Fourth Amendment." SPA.60.

5. ***The Conspiracy Claim (Count 7)***

Finally, the district court refused to dismiss Count 7, which asserted that Defendants conspired to violate Plaintiffs' civil rights in violation of 42 U.S.C. § 1985. The court agreed that "it may not have been clearly established in 2001 that § 1985 prohibited conspiracies among federal officials." SPA.60 n.32. But the court denied immunity because "'federal officials could not reasonably have believed that it was legally permissible for them to conspire with other federal officials to deprive a person of equal protection of the laws.'" *Id.* The court stated that it made no difference whether ***§ 1985*** provided a "clearly established" right in 2001. So long as there was a clear right to be free of such conspiracy under some source of law, qualified immunity for the § 1985 claim had to be denied.

SUMMARY OF ARGUMENT

I. The Supreme Court and this Court have repeatedly emphasized that the judicially implied *Bivens* remedy should rarely (if ever) be extended to new legal or factual contexts. But the district court did precisely that here, extending *Bivens* to a whole new category of constitutional claims. It acknowledged that the Supreme Court has ever extended *Bivens* to putative free-exercise violations. Yet the district court extended *Bivens* to that new legal context—and into the entirely new factual context of foreign nationals, illegally present in the United States, detained in the aftermath of a terrorist attack. That court did so, moreover, in the

face of substantial factors counseling hesitation, including the potential impact on international relations. In such a context, it should be Congress rather than the courts that determines whether to create a cause of action for constitutional torts.

In any event, qualified immunity should have been granted. Although Plaintiffs claim that some of them were denied access to Korans (generally temporarily), the only link between Mr. Sherman (or Mr. Hasty) to that denial is the assertion that they approved a neutral policy prohibiting detainees from having any items in their cells, including Korans. But a neutral, no-objects-in-cells policy does not violate the free exercise clause, even if applied to Korans. And even if it does, that was not clearly established law in 2001. Plaintiffs' remaining free exercise clause grievances all fail because Plaintiffs do not adequately allege personal participation or the requisite intent to burden religious exercise.

II. Plaintiffs' remaining *Bivens* claims fail for similar reasons. The Fifth Amendment due-process claim (Count 1) alleging harsh confinement conditions, Fifth Amendment equal-protection claim (Count 2) alleging that harsh conditions were directed discriminatorily at Muslim and Arab men, and the Fourth and Fifth Amendment claim (Count 6) challenging the use of punitive strip searches, each improperly seek to extend *Bivens* to a new context despite special factors counseling hesitation. The district court concluded that *Bivens* is available only by ignoring the facts that make this context new—that it concerns aliens unlawfully

present in the United States confined as part of an investigation in the wake of unprecedented terrorist attacks.

Mr. Sherman is also entitled to qualified immunity on those counts. The conduct alleged did not violate clearly established constitutional rights in the circumstances the MDC Defendants confronted. And the Complaint lacks any non-conclusory allegations that Mr. Sherman personally participated in the activities that allegedly violated Plaintiffs' rights.

III. Plaintiffs' conspiracy claim under 42 U.S.C. § 1985 (Count 7) also fails. To the extent the substantive claims fail, the conspiracy claim must fail as well. The allegations of conspiracy are also wholly conclusory. And qualified immunity should have been granted. First, under the intra-enterprise conspiracy doctrine, members of a single entity are incapable of conspiring; here, Defendants were all employed by the same entity. Even if the intra-enterprise conspiracy doctrine does not apply, that was not clearly established law in 2001. In 2001, moreover, it was not clearly established that § 1985 prohibited conspiracies by federal officials. Because a reasonable officer could have believed it extended only to conspiracies involving state officials, qualified immunity should be granted.

ARGUMENT

Plaintiffs—foreign nationals who were detained on immigration violations in the wake of the 9/11 attacks—seek damages for alleged violations of their constitutional and statutory rights while in custody. But Plaintiffs seek the wrong remedy, in the wrong forum, against the wrong people. All but one count of the Complaint rests on the judicially implied cause of action from *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). But *Bivens* has not been extended to new contexts for decades, and the Supreme Court and this Court have warned against its further expansion. Plaintiffs seek just such an unprecedented expansion.

To overcome qualified immunity, moreover, a plaintiff must show that the official personally participated in the alleged deprivation. The Complaint's allegations fall short of sufficiently alleging personal participation. Finally, even where an official violates a statute or the Constitution, the official is entitled to qualified immunity unless his or her conduct violates clearly established rights. Unless the challenged conduct so clearly violated the plaintiff's rights that no reasonably competent officer could have thought it lawful under the circumstances, the defendants are immune and the suit must be dismissed. The Complaint fails to overcome that immunity.

Standard of Review: Legal issues, like availability of a *Bivens* remedy and denials of qualified immunity, are reviewed *de novo*. *See Grace v. Corbis–Sygma*, 487 F.3d 113, 118 (2d Cir. 2007); *Arlio v. Lively*, 474 F.3d 46, 51 (2d Cir. 2007).

I. PLAINTIFFS' FREE-EXERCISE CLAIM (COUNT 3) SHOULD HAVE BEEN DISMISSED

Count 3 of the Complaint alleges a violation of Plaintiffs' rights under the free exercise clause of the Constitution, U.S. Const, amend. I, cl. 2. *See* Dkt.726 ¶¶284-287. But the Supreme Court has never extended *Bivens* to free-exercise claims, much less, as here, to free-exercise claims by foreign nationals in the immigration detention context. And even if *Bivens* were extended to this new context, Mr. Sherman is entitled to qualified immunity. The Complaint offers no well-pleaded facts linking him (or Hasty) to the alleged deprivation other than the claim that they approved an across-the-board policy prohibiting detainees from possessing any items in their cells, which applied to Korans. But that facially neutral policy did not violate the Constitution; a reasonable officer could certainly have thought it constitutionally permissible, and the Complaint's allegations are insufficient to plausibly aver the requisite intent or causation.

A. The Cause Of Action Under *Bivens* Neither Extends To, Nor Should Be Extended To, This New Context

1. *The Supreme Court And This Court Have Made Clear That* Bivens *Should Rarely If Ever Be Extended To New Contexts*

Forty years ago, *Bivens* "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001). In *Bivens*, the Supreme Court "held that the victim of a Fourth Amendment violation by federal officers had a claim for damages"; in the decade that ensued, the Supreme Court "recognized two more nonstatutory damages remedies, the first for employment discrimination in violation of the Due Process Clause, *Davis v. Passman*, 442 U.S. 228 (1979), and the second for an Eighth Amendment violation by prison officials, *Carlson v. Green*, 446 U.S. 14 (1980)." *Wilkie v. Robbins*, 551 U.S. 537, 549-50 (2007).

But in the 33 years since, the Supreme Court has refused to extend *Bivens* to any new context—to any new categories of claims, to any new classes of defendants, to any new factual scenarios. It has "held against applying the *Bivens* model to claims of First Amendment violations by federal employers, *Bush v. Lucas*, 462 U.S. 367 (1983), harm to military personnel through activity incident to service, *United States v. Stanley*, 483 U.S. 669 (1987); *Chappell v. Wallace*, 462 U.S. 296 (1983), and wrongful denials of Social Security disability benefits,

Schweiker v. Chilicky, 487 U.S. 412 (1988)." *Wilkie*, 551 U.S. at 550. It has also "seen no case for extending *Bivens* to claims against federal agencies, *FDIC v. Meyer*, 510 U.S. 471 (1994), or against private prisons, *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001)." *Id.* In *Minneci v. Pollard*, 132 S. Ct. 617 (2012), the Supreme Court refused to "imply the existence of an Eighth Amendment-based damages action (a *Bivens* action) against employees of a privately operated federal prison." *Id.* at 620.

This Court has thus observed that "[t]he *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in 'new contexts.'" *Arar*, 585 F.3d at 571. That is true by design: The "decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). Courts must decline to extend *Bivens* to a new context if there are "any special factors counseling hesitation before authorizing a new kind of federal litigation.'" *Wilkie*, 551 U.S. at 550. And the "special factors counseling hesitation" threshold is "remarkably low": "Hesitation is a pause, not a full stop, or an abstention; and to counsel is not to require. 'Hesitation' is 'counseled' whenever thoughtful discretion would pause even to consider." *Arar*, 585 F.3d at 573-74.

2. *The Free-Exercise Claim Does Not Meet The Exacting Standards For Extending* Bivens

The free-exercise claim falls short of those exacting standards. There is no dispute that Plaintiffs' free-exercise allegations would require extending *Bivens* to a whole new category of constitutional claims. In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court observed that it "ha[s] not found an implied damages remedy under the Free Exercise Clause." *Id.* at 675; *cf. Hudson Valley Black Press v. IRS*, 409 F.3d 106, 113 (2d Cir. 2005). And the district court acknowledged that Count 3 could not proceed without extending *Bivens* to the "new context" of free-exercise claims. SPA.50.

But that understates the required extension. In connection with *Bivens*, "context" is construed "to reflect a potentially recurring scenario that has similar legal and factual components." *Arar*, 585 F.3d at 572. Here, the district court did not merely extend *Bivens* to free-exercise claims. It extended *Bivens* to such claims in the new context of detained foreign nationals, held on immigration charges, in the wake of a national security crisis. Particularly in that new context, special factors do not merely counsel but compel hesitation.

The fact that this case involves detained foreign nationals illegally present on U.S. soil, as opposed to legal immigrants or citizens, itself counsels hesitation in the judicial expansion of a cause of action. "[C]ontrol over matters of immigration is a sovereign prerogative, largely within the control of the executive and the

legislature," *Landon v. Plasencia*, 459 U.S. 21, 34 (1982), and "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations" and "the war power," *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952). "[T]he power over aliens," moreover, "is of a political character and therefore subject only to narrow judicial review." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976). "[I]mmigration issues 'have the natural tendency to affect diplomacy, foreign policy, and the security of the nation,' which further 'counsels hesitation' in extending *Bivens*." *Mirmehdi v. United States*, 689 F.3d 975, 982-83 (9th Cir. 2012) (quoting *Arar*, 585 F.3d at 574). Because allowing suits by detained foreign nationals against federal officials implicates those factors, Congress, and not the courts, should decide whether to create and define any cause of action in that context.

This case, moreover, involves decisions in the aftermath of the September 11 attacks, which created "a national and international security emergency unprecedented in the history of the American Republic." *Iqbal v. Hasty*, 490 F.3d 143, 179 (2d Cir. 2007) (Cabranes, J., concurring). The "natural tendency" of "immigration issues" to affect "'foreign policy, and the security of the nation' which further 'counsels hesitation' in extending *Bivens*," *Mirmehdi*, 689 F.3d at 982-83, was thus at its apogee. "[J]udges 'traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.'" *Lebron v.*

Rumsfeld, 670 F.3d 540, 549 (4th Cir. 2012), *cert. denied*, 132 S. Ct. 2751 (2012) (quoting *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988)). And this Court has already held "that a suit against a federal official for decisions made as part of federal disaster response and cleanup efforts" following the 9/11 attack "implicate the sort of 'special factors' that counsel against creation of a *Bivens* remedy." *Benzman v. Whitman*, 523 F.3d 119, 126 (2d Cir. 2008). If that militates against expansion of *Bivens*, surely the government's handling of religious freedom issues for foreign nationals, illegally in the United States, detained in the wake of that terrorist attack, counsels hesitation more strongly still. The propriety of extending *Bivens* to that context should be left to the political branches.

Finally, the detention context counsels additional restraint. Running a detention facility is "inordinately difficult." *Turner v. Safley*, 482 U.S. 78, 85 (1987). It "requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government," particularly in the unique and uncertain immediate post-9/11 aftermath at issue here. *Id.*

Each of those factors by itself surmounts the "remarkably low" bar of counseling "hesitation" identified in *Arar*; together they amply clear it. 585 F.3d at 573-74. Simply put, the Supreme Court—after refusing *Bivens*' expansion for 33 years—would not find its extension to an entirely new category of claims (free

exercise), in sensitive circumstances implicating foreign-policy and national-security powers, warranted here. *Iqbal*, 556 U.S. at 675. This Court should conclude likewise.

3. *The District Court's Analysis Is Mistaken*

The district court's contrary analysis is upside down. That court dismissed special-factors concerns, speculating that extending *Bivens* would promote U.S. interests: International relations and U.S. "national security interests," it stated, would be "enhanced if the world knew" that officials could be liable for misconduct in this context. SPA.54. But precisely the opposite is probable. Such lawsuits can impede the ability of the United States to speak with a single voice in the international arena. *See Baker v. Carr*, 369 U.S. 186, 217 (1962) (noting "potentiality of embarrassment from multifarious pronouncements by various departments on one question"). They can threaten exposure of national security information.[4] They can displace more direct nation-to-nation efforts to resolve disputes.[5] The proliferation of such lawsuits can also create unhelpful publicity

[4] Here, for example, Plaintiffs insist there was no information linking them to terrorism. Dkt.726 ¶69. But rebutting such claims could in some cases require inquiry into sensitive information held by the FBI and other law enforcement agencies. It was precisely such concerns that led this Court in *Arar* to refuse expansion of *Bivens* there. *See* 585 F.3d at 576-78. It likewise weighs against the expansion proposed here.

[5] For example, foreign nations whose citizens are harmed can bring suit in the International Court of Justice. *See* Int'l Court of Justice, *Jurisdiction*, *at* http://www.icj-cij.org/jurisdiction/index.php?p1=5. Foreign nations can seek recom-

about the United States abroad. And judicial rulings that go against foreign nationals claiming deprivations could create unhelpful publicity, undermining international perceptions of this Nation. If Congress requires courts to adjudicate such disputes, the judiciary cannot shrink from the task. But courts ought not take on matters unilaterally.

Even if this Court thought the district court's conclusions more likely, the need to consider the impact of expanding *Bivens* on international relations and national security shows that Congress rather than the courts should decide that issue. The Constitution commits "the entire control of international relations" to the political branches, *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893), and "[t]he doctrine of separation of powers prohibits the federal courts from excursions into areas committed to the Executive Branch or the Legislative Branch," *In re Austrian, German Holocaust Litig.*, 250 F.3d 156, 163-64 (2d Cir. 2001). In this context, those principles at the very least counsel hesitation to consider whether Congress rather than courts should decide whether a cause of action should be created in this context.

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pense for its citizens through diplomatic channels. And detainees can invoke visitation and correspondence rights under Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 100-01. Foreign nationals would have little reason to press their home States to pursue relief through those traditional international channels if federal courts afford them a judicially created right to sue on their own behalf.

Finally, the district court found it "unsettling" that, absent *Bivens*, Plaintiffs might not be able "to seek ***any*** remedy from an officer for intentionally and maliciously interfering with his right to practice his religion." SPA.52. The Supreme Court, however, has already rejected that sort of reasoning. "The absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." *Schweiker v. Chilicky*, 487 U.S. 412, 421-22 (1988). To the contrary, the Supreme Court has stressed the need for "judicial deference to indications that congressional inaction [in providing that remedy] has not been inadvertent." *Id.* at 423; *see United States v. Fausto*, 484 U.S. 439, 448-49 (1988); *Wilson v. Libby*, 535 F.3d 697, 709-10 (D.C. Cir. 2008).

That deference is warranted here. Over the past 20 years, Congress has actively addressed barriers to religious worship. In the wake of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), Congress enacted the Religious Freedom Restoration Act, declaring that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. §§2000bb-1(a). When that was invalidated as applied to the States, *see City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress enacted the Religious Land Use and Institutionalized Persons Act, which provides religious protections for incarcerated individuals.

See 42 U.S.C. § 2000cc-1(a). In doing so, Congress has imposed specific limits on prisoner suits, requiring exhaustion of administrative remedies and foreclosing actions for emotional injury absent a showing of physical harm. *Id.* § 1997e(a), (e). But Congress has never created a domestic right of action for foreign nationals, detained on immigration charges, for free-exercise violations. Given Congress's activity in this area, and its failure to do so here, courts ought not create such a cause of action on their own.

B. The Free-Exercise Claim Does Not Overcome Qualified Immunity

Even where a *Bivens* action is available, the complaint must overcome qualified immunity. Qualified immunity protects government officials from suit "'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). That objective inquiry "gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

"To be clearly established, a right must be sufficiently clear that ***every*** reasonable official would have understood that what he is doing violates that right. In other words, existing precedent must have placed the statutory or constitutional

question ***beyond debate***." *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (emphasis added). "[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley*, 475 U.S. at 341.

In evaluating qualified immunity, courts often proceed in two steps: They first ask "whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right." *Pearson*, 555 U.S. at 232. If so, they then ask "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* Courts may, however, proceed directly to the second step—asking if the purported right was "clearly established" by prior case law, "without resolving the often more difficult question whether the purported right exists at all." *Reichle*, 132 S. Ct. at 2093.

Federal officers, moreover, are liable only for their own conduct, not the conduct of their colleagues or subordinates. "In the limited settings where *Bivens* does apply, . . . Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior." *Iqbal*, 556 U.S. at 675-76. "Because vicarious liability is inapplicable to *Bivens* . . . suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.* at 676. Under those standards, the Complaint cannot be sustained.

1. *The Establishment And Enforcement Of The No-Items Policy Did Not Violate Clearly Established Law*

Plaintiffs' principal complaint—the only one linked to Mr. Sherman by well-pleaded facts—is the claim that some detainees were temporarily denied Korans while in custody, and one detainee never received one. Plaintiffs blame "a written MDC policy (created by Cuciti and Lopresti, and approved by Hasty and Sherman) that prohibited the 9/11 detainees from keeping anything, including a Koran, in their cell." Dkt.726 ¶132. By alleging that Sherman (and Hasty) approved a facially neutral policy applicable to all objects—as opposed to singling out Korans—Plaintiffs plead themselves out of a case.

Under *Turner v. Safley*, 482 U.S. 78 (1987), regulations that encroach on the constitutional rights of detainees must be sustained so long as the regulation is "reasonably related to legitimate penological interests." *Id.* at 89. A court must evaluate "whether prison regulations restricting inmates' First Amendment rights operated in a neutral fashion." *Id.* Moreover, in *Employment Division v. Smith*, the Supreme Court made clear that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" 494 U.S. 872, 879 (1990). Consequently, case after case has held that application of a facially neutral policy to the

possession of religious materials in a prison setting is not unconstitutional.[6] The facially neutral, no-items policy allegedly approved by Messrs. Sherman and Hasty thus did not violate any free-exercise right. But even if that were debatable, the illegality of that across-the-board no-items policy was hardly so obviously unlawful—particularly given the unique, unprecedented security concerns presented by the September 11 detainees—that no reasonably competent officer could have thought otherwise. *Al-Kidd*, 131 S. Ct. at 2085; *Malley*, 475 U.S. at 341. Immunity should be granted.

While acknowledging that "a neutral prison policy" is valid if "'reasonably related to legitimate penological interests,'" SPA.55 n.27 (quoting *Turner*, 482 U.S. at 89), the district court denied qualified immunity. "Because intentional burdening of religious practices is involved here," it stated, "the *Turner v. Safley* standard does not apply." *Id.* But the policy was facially neutral under *Employment Division v. Smith* even apart from *Turner*. And any claim that the policy was intended to intentionally burden free-exercise rights is unsupported by the well-pleaded facts required under *Iqbal* to establish plausibility. *See* 556 U.S. at 682. In *Iqbal*, the Supreme Court held that the plaintiff's "allegations are consistent

[6] *See, e.g.*, *Hall v. Bellmon*, 935 F.2d 1106, 1113 (10th Cir. 1991); *Friend v. Kolodzieczak*, 923 F.2d 126, 127 (9th Cir. 1991); *Pressley v. Beard*, 266 F. App'x 216, 218-19 (3d Cir. 2008); *Daniel v. Trimberger*, No. 06-5010, 2007 WL 4751594, at *2-4 (W.D. Ark. Dec. 12, 2007); *Naves v. Carlson*, No. 2:06-cv-658, 2007 WL 3275147, at *4-5 (D. Utah Nov. 5, 2007).

with petitioners' purposefully designating detainees of high interest because of their race, religion, or national origin." *Id.* at 681. But it rejected that allegation in light of the "obvious alternative explanation" that "a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Id.* at 682. Here too, the "obvious alternative explanation" for the facially neutral, across-the-board no-items policy is that it was adopted for national-security reasons; any claim that it was adopted to burden free-exercise rights fails for the same reason the similar discrimination claim failed in *Iqbal*.

Plaintiffs, moreover, concede that some of them received Korans after a few "weeks," others received them after "a month"; and they identify only one Plaintiff who allegedly "never received one." Dkt.726 ¶132. Whatever wrong that isolated Plaintiff might have suffered in never receiving a Koran, it cannot be attributed to the supposed policy—and the officials who allegedly created it—where others subject to the same policy received a Koran. And the Complaint nowhere alleges any reason to believe Mr. Sherman participated in decisions about whether or when detainees would receive Korans; his sole participation alleged is the approval of a neutral policy. And the fact that Plaintiffs concede that the majority received Korans demonstrates that MDC officials did accommodate religious needs—even

if the Constitution does not require it. That too renders the claim that the policy was approved to interfere with Plaintiffs' free-exercise rights implausible under *Iqbal*.

Temporary delays and isolated errors, moreover, do not give rise to a free-exercise claim. Because a plaintiff "must assert ***conscious or intentional*** interference with his free exercise rights to state a valid claim," even "***negligent*** acts by officials causing unintended denials of religious rights do not violate the Free Exercise Clause." *Lovelace v. Lee*, 472 F.3d 174, 201 (4th Cir. 2006) (emphasis added). The Complaint at most suggests that MDC staff—in applying a facially neutral policy—were negligent or slow in responding to some requested exemptions. And the Complaint never shows that Mr. Sherman had any role in the allegedly slow responses, much less that he intended to deprive Plaintiffs of Korans for the purpose of impeding religious observance. *See* Dkt.726 ¶132.

The district court also urged that the "right to a reasonable opportunity to worship has long been clearly established." SPA.57. But the Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *Al-Kidd*, 131 S. Ct. at 2084. "The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." *Id.* Similarly here, the proposition that individuals should have a

reasonable opportunity to worship does not "clearly establish" the proposition that the no-items policy was unconstitutional, particularly as applied to suspected terrorists held in the immediate aftermath of the worst terrorist attack in U.S. history.

2. *Mr. Sherman Is Entitled To Qualified Immunity On Plaintiffs' Remaining Free-Exercise Allegations*

Plaintiffs also allege denial or delayed receipt of Halal food, Dkt.726 ¶133, and harassment by MDC officials when attempting to pray, *id.* ¶136. But Plaintiffs provide no basis for attributing either to Mr. Sherman, much less for concluding that he intended such unauthorized acts to burden religious exercise. Negligence in providing religiously compliant food does not violate the Free Exercise Clause. *See, e.g.*, *Gallagher v. Shelton*, 587 F.3d 1063, 1070 (10th Cir. 2009); *Colvin v. Caruso*, 605 F.3d 282, 293-94 (6th Cir. 2010). Here, Plaintiffs at most plead negligence by MDC staff. And they certainly plead no facts suggesting that Mr. Sherman was involved in decisions regarding their food, much less that he ***intended*** to deprive them of Halal food.

The Complaint also alleges anti-Muslim behavior by MDC staff members. Dkt.726 ¶¶136, 138. While reprehensible, "[v]erbal harassment or abuse . . . is not sufficient to state a constitutional deprivation." *Collins v. Cundy*, 603 F.2d 825, 827 (10th Cir. 1979); *see Martin v. Sargent*, 780 F.2d 1334, 1338 (8th Cir. 1985) (threats are not constitutional violations cognizable under § 1983); *Marten v. Hunt*,

No. 08-cv-77, 2009 WL 1858257, at *6 (W.D. Pa. June 29, 2009). As explained below, Mr. Sherman is not responsible for those actions. *See* pp. 41-43, *infra*. But even if he were, that conduct does not so clearly cross the constitutional line that, in 2001, precedent placed its unconstitutionality "beyond debate." *Reichle*, 132 S. Ct. at 2093.

3. *The Complaint Rests On The Sort Of Group Allegations That Cannot Be Reconciled With The Personal Conduct Requirement*

The Complaint, and the district court's decision sustaining it, impermissibly invoke group pleading, repeatedly treating everyone in the MDC as a single entity. *See, e.g.*, Dkt.726 ¶¶69-72, 77, 98, 104, 140; SPA.28-29, 40-41, 56-57. But "undifferentiated" allegations directed toward "Defendants" generally, without a "link" to "any defendant, named or unnamed," are insufficient even at the pleading stage. *Arar*, 585 F.3d at 569; *see Pearce v. Labella*, 473 F. App'x 16, 20 (2d Cir. 2012). Rather, "each Government official, his or her title notwithstanding, is only liable ***for his or her own*** misconduct." *Iqbal*, 556 U.S. at 677 (emphasis added). And "conclusory statements" are insufficient as a matter of law to support allegations of personal participation. *Id.* at 678. The plaintiff must establish, with

specific factual allegations, that the official personally participated in each alleged violation of law. *Poe v. Leonard*, 282 F.3d 123, 140 (2d Cir. 2002).[7]

The effort to impose liability for allegedly abusive conduct by MDC guards, based on "alleg[ations] that the MDC defendants were aware of the abusive conduct," fails for that reason. SPA.57. Although the Complaint alleges that Mr. Sherman "allowed his subordinates to abuse MDC Plaintiffs and class members with impunity," Dkt.726 ¶26, that is the sort of conclusory allegation that *Iqbal* rejects. *See* 556 U.S. at 681. The Complaint pleads no ***facts*** that Mr. Sherman participated in that conduct.

Likewise, the Complaint nowhere plausibly suggests that Mr. Sherman was responsible for alleged delays in providing Halal food. *See Andreola v. Wisconsin*, 211 F. App'x 495, 498 (7th Cir. 2006) (defendant could not be held liable for failure to provide kosher food where plaintiff "presented no evidence that [the defendant] was even aware of the decision not to give him kosher food").

[7] In *Colon v. Coughlin*, 58 F.3d 865 (2d Cir. 1995), this Court held that a supervisor may be held liable for constitutional violations by a subordinate in five enumerated circumstances. *Id.* at 873. There are good reasons to believe that *Iqbal* "abrogates several of the categories of supervisory liability enumerated in *Colon v. Coughlin*." *Bellamy v. Mount Vernon Hosp.*, No. 07-cv-1801, 2009 WL 1835939, at *6 (S.D.N.Y. Jun. 26, 2009). Otherwise, supervisors would be liable to "answer for the torts" of their subordinates, which is precisely what *Iqbal* forbids. 556 U.S. at 677. This Court, however, need not decide here whether and to what extent *Iqbal* abrogated particular *Colon* categories. Since the Complaint does not sufficiently allege facts showing that Mr. Sherman was even made aware of alleged abuses committed by MDC staff—much less that he failed to act on them—the district court's decision cannot be sustained post-*Iqbal*.

Plaintiffs accuse MDC staff of failing to provide the date and time to facilitate their prayer, *see* Dkt.726 ¶134, but they do not allege that Mr. Sherman was involved in those failures either. Nor is it obvious—or even plausible—that an associate warden would become involved in such inmate-specific slights. Indeed, the Complaint suggests otherwise, alleging that grievances were not communicated up the chain. *Id.* ¶ 140. For that reason too, Count 3 should have been dismissed.

II. THE REMAINING *BIVENS* COUNTS FAIL FOR SIMILAR REASONS

Plaintiffs' remaining *Bivens* counts should have been dismissed for similar reasons. The district court erred by extending *Bivens*. And the Complaint failed to set forth personal participation in conduct that violates clearly established law.

A. Counts 1, 2, And 6 Each Improperly Seek To Extend *Bivens* To New Contexts

Counts 1 and 6 of the Complaint challenge certain conditions of confinement. The district court held that those claims did not require *Bivens* to be extended, since this Court "has long assumed that mistreatment claims like those alleged here give rise to a *Bivens* claim." SPA.27 n.10. Count 2 alleges that the MDC Defendants violated Plaintiffs' equal-protection rights by subjecting them "to harsh treatment not accorded similarly-situated non-citizens" and "singl[ing]" them out "based on their race, religion, and/or ethnic or national origin, and intentionally violat[ing] their rights to equal protection." Dkt.726 ¶282. For that

count, the district court stated that "[t]he availability of a *Bivens* remedy for violations of the Equal Protection Clause has been conclusively established." SPA.35 n.15 (citing *Davis v. Passman*, 442 U.S. 228 (1979)).

The district court misunderstood what it means to extend *Bivens* to a new "context." The term "context" does not simply mean categories of constitutional claims (*e.g.*, free-exercise claims, mistreatment claims). As this Court explained in *Arar*, "[a]t a sufficiently high level of generality, any claim can be analogized to some other claim for which a *Bivens* action is afforded." 585 F.3d at 572. Rather, "context" refers to a "recurring scenario that has similar ***legal and factual*** components." *Id.* (emphasis added). For example, in *Davis v. Passman*, 442 U.S. 228 (1979), the Supreme Court allowed a congressional staff member to bring an employment-discrimination case under *Bivens*. *Id.* at 248-49. Yet when Navy-enlisted men sought to bring employment-discrimination claims under *Bivens* in *Chappell v. Wallace*, 462 U.S. 296 (1983), the Court considered that to be a new context, refusing to extend *Bivens* based on the "special status of the military." *Id.* at 302-05. Similarly, in *Minneci v. Pollard*, 132 S. Ct. 617 (2012), the Supreme Court refused to extend *Bivens* to Eighth Amendment claims "against employees of a privately operated federal prison," *id.* at 620, even though, 32 years earlier, the Court's decision in *Carlson v. Green*, 446 U.S. 14 (1980), had recognized a *Bivens*

remedy for Eighth Amendment claims against federal officers operating in governmental prisons.

The district court here ruled that *Bivens* would not have to be extended for Counts 1, 2, and 6 because *Bivens* claims previously have been recognized for "mistreatment" in custody, SPA.27 n.10, and for "violations of the equal protection clause," SPA.35 n.15. But the court failed to address the circumstances that make this context very different.[8] This is not the ordinary context of U.S. citizens in federal detention. It addresses the response to an unprecedented terrorist attack and the treatment of foreign nationals, illegally in the United States, detained in the wake of that attack. *See* pp. 28-31, *supra.*

Rather than address whether it was appropriate to extend *Bivens* to that new context, the district court relied on *Arar*'s statement that, "[i]n the small number of contexts in which courts have implied a *Bivens* remedy, it has often been easy to identify both the line between constitutional and unconstitutional conduct, and the alternative course which officers should have pursued." 585 F.3d at 580. "The guard who beat a prisoner should not have beaten him; the agent who searched without a warrant should have gotten one; and the immigration officer who subjected an alien to multiple strip searches without cause should have left the

[8] The district court cited the dissenting opinion in *Arar* as support, SPA.27 n.10, but that was a dissent for a reason—it ***unsuccessfully*** argued that *Bivens* would not need to be extended to the plaintiff's claims in that case. 585 F.3d at 597 (Sack, J., dissenting).

alien in his clothes." *Id.* But the district court omitted what came next: This Court explained that ***context matters***—while such actions might support a *Bivens* claim under ordinary circumstances, different considerations apply where analogous actions are taken in "a complex and rapidly changing legal framework beset with critical legal judgments that have not yet been made, as well as policy choices that are by no means easily reached." *Id.* It is those crucial distinguishing factors that make this case a new context for *Bivens*. Yet the district court did not address them at all.

Nor did the district court consider Plaintiffs' status as aliens illegally in the United States at the time of their detention. "It is well established that immigrants' remedies for vindicating the rights which they possess under the Constitution are not coextensive with those offered to citizens." *Mirmehdi*, 689 F.3d at 981. As a result, courts "must consider whether an immigrant may bring a *Bivens* claim to vindicate certain constitutional rights separately from whether a citizen may bring such a *Bivens* claim." *Id.* at 981 n.3. The district court ignored that distinction, too.

Courts should "rarely if ever" extend *Bivens* to "new contexts." *Arar*, 585 F.3d at 571. Neither this Court nor the Supreme Court has ever recognized a remedy in a case with facts remotely analogous to those here. Having failed to

acknowledge the fact that it was expanding *Bivens*, the district court likewise failed to carry the heavy burden of justifying that expansion.

Nor can that expansion be justified. Like Count 3, Counts 1, 2, and 6 raise a multitude of "special factors" that make it improper to extend *Bivens* to the allegations in this case. The potential impact on national security concerns and foreign relations; interference with the ability of the United States to speak with one voice; the possibility of probing into classified material; and the potential impact of judicial rulings on international perceptions. The factors, separately and cumulatively, traverse the "remarkably low" "special factors" standard for rejecting *Bivens*' expansion here. *Arar*, 585 F.3d at 573-74; pp. 31-32, *supra*.

B. Mr. Sherman Is Entitled To Immunity For Counts 1, 2, And 6

Mr. Sherman is, in any event, entitled to qualified immunity, as his alleged conduct did not violate Plaintiffs' clearly established rights. It is settled that a detained illegal alien's rights are not coterminous with a U.S. citizen's. "In exercising its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens." *Doherty v. Thornburgh*, 943 F.2d 204, 209 (2d Cir. 1991). As a result, "Governmental conduct that may be considered 'shocking' when it serves to deprive the life, liberty or property of a citizen may not be unconstitutional when directed at an alien." *Id.*; *see Demore v. Kim*, 538 U.S. 510, 521-22 (2003); *Reno v. Flores*, 507

U.S. 292, 305-06 (1993). Even "[i]ndefinite detention of excludable aliens" on U.S. soil, for example, "does not violate due process." *Guzman v. Tippy*, 130 F.3d 64, 66 (2d Cir. 1997). And "[i]t is well within the [BOP's] discretion to consider [a party's] status as an alien in setting his conditions of confinement." *Thye v. United States*, 109 F.3d 127, 129-30 (2d Cir. 1997).

Those differences vary according to "considerations of the national interest." *Doherty*, 943 F.2d at 209. Even distinctions among aliens "are subject to rational basis review." *Domond v. INS*, 244 F.3d 81, 87 (2d Cir. 2001). "Under this slight standard of review, the distinctions made by the government are given a strong presumption of validity." *Id.* Whatever the precise scope of Plaintiffs' rights—and whatever the extent to which their parameters were well established in 2001—the factual averments of the Complaint do not establish that Mr. Sherman so clearly transgressed them that no reasonable officer could think his conduct lawful.[9]

[9] Mr. Sherman acknowledges that this Court, in *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), stated that "most of the rights that the Plaintiff contends were violated do not vary with surrounding circumstances, such as the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination." *Id.* at 159. That, however, may not have been clear in 2001. And it addresses only the aftermath of September 11, not the unique status of foreign nationals illegally in the United States. It does not address, moreover, Mr. Sherman's individual conduct.

1. *Count 1 Fails To Sufficiently Allege Mr. Sherman's Personal Involvement In The Violation Of A Clearly Established Right*

Plaintiffs challenge their placement in restrictive conditions by arguing that they had no connection to terrorism, and that the MDC Defendants knew that. But they do not allege that Mr. Sherman had any role in classifying them as "of interest" or "high interest," or determining the conditions of confinement based on those classifications. *See, e.g.*, Dkt.726 ¶¶4, 47. To the contrary, those determinations were made by the FBI. *Id.* ¶¶61, 144, 161, 199, 217; A.__(OIG Report 5). Mr. Sherman cannot be held liable for determinations he never made. *See Poe*, 282 F.3d at 140-47; *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 255 (2d Cir. 2001).

Absent an allegation that Mr. Sherman personally participated in those determinations with an intent to punish Plaintiffs, Count 1 cannot stand. *See Bell v. Wolfish*, 441 U.S. 520, 538-39 (1979). Because the Complaint at most plausibly alleges that Mr. Sherman relied on the FBI's determination that the detainees were suspected terrorists and followed BOP directives regarding the need for restrictive custody, he is entitled to qualified immunity. Mr. Sherman was not required to "independently investigate the basis and reason for the order." *Varrone v. Bilotti*, 123 F.3d 75, 81 (2d Cir. 1997); *Savino v. City of N.Y.*, 331 F.3d 63, 74 (2d Cir. 2003); *United States v. Colon*, 250 F.3d 130, 135 (2d Cir. 2001).

In denying immunity, the district court relied on the Complaint's allegations that "MDC Defendants were aware that the FBI" had not connected Plaintiffs to terrorism, and "realized that they were not terrorists." Dkt.726 ¶¶69, 70, 74; *see* SPA.35. According to the Complaint, an unnamed MDC intelligence officer received "summaries" of the reasons for each detainee's arrest and "all evidence relevant to the danger he might pose to the institution"; those summaries, Plaintiffs allege, contained a "a dearth of information connecting MDC Plaintiffs and class members to terrorism." Dkt.726 ¶¶69, 70, 74.

Those allegations cannot defeat qualified immunity. In matters of national security and terrorism, Mr. Sherman—a corrections official—was surely entitled to rely on the classifications established by the FBI. It borders on the absurd to suggest that a jailer with no involvement in the terrorism investigation should be expected to reexamine and overrule federal officials' judgments that particular detainees were "suspected terrorists [who should be held] in the most secure conditions available until the suspects could be cleared of terrorist activity." *Iqbal*, 556 U.S. at 683. And even if plausible, that obligation to second guess the FBI's determination was not clearly established law in 2001.

Plaintiffs, moreover, do not allege why Mr. Sherman was supposed to believe that a "summary"—disclosed to someone at his level, in his role—would reveal all the potentially confidential information being garnered by the FBI in an

ongoing and sensitive terrorism investigation. If the FBI's classifications were wrong, Plaintiffs perhaps might seek relief from those who made them. But their effort to hold Sherman liable would mean that jailers must make independent, *post hoc* determinations about detainee designations to trump the designations by national security experts. That cannot be the law, much less clearly established law.

The district court also denied immunity on the theory that Mr. Sherman was "deliberately indifferent" to the risk that MDC staff would subject Plaintiffs to various abuses. SPA.33. But *Bivens* limits liability to an official's "own misconduct." *Iqbal*, 556 U.S. at 677. And "knowledge of a subordinate's misconduct is not enough for liability." *Vance v. Rumsfeld*, 701 F.3d 193, 203 (7th Cir. 2012) (en banc), *cert. denied*, 2013 WL 488898 (U.S. June 10, 2013). "The supervisor can be liable only if he wants the unconstitutional or illegal conduct to occur." *Id.* The Complaint fails under that standard. With respect to Mr. Sherman, the Complaint alleges that he "allowed his subordinates to abuse MDC Plaintiffs and class members with impunity." Dkt.726 ¶26. But the Complaint offers no "well-pleaded facts giv[ing] rise to a plausible inference that" Mr. Sherman was informed of any alleged abuse and failed to act on it, much less that he intended the abuse to occur to "punish" the detainees. *Iqbal*, 556 U.S. at 682. For that reason too, immunity should be granted.

2. *Count 2 Fails To Sufficiently Allege Mr. Sherman's Personal Involvement In The Violation Of A Clearly Established Right*

Count 2 alleges that Defendants violated Plaintiffs' equal-protection rights by placing them in restrictive confinement because of their race, religion, and/or national origin. Dkt.726 ¶¶280-283. To state a claim for such a violation, it is not enough to allege merely that Mr. Sherman knew detention policies would adversely affect Arab Muslim men. Nor is it sufficient to allege that Mr. Sherman or others were "aware" of misconduct based on ethnic or religious motives but failed to intervene. Rather, Plaintiffs must plausibly allege that each Defendant ***intentionally*** subjected them to harsh conditions of confinement and that each did so because of race, religion, or national origin:

> [P]urposeful discrimination requires more [than] awareness of consequences. ***It instead involves a decisionmaker's undertaking a course of action because of, not merely in spite of, the action's adverse effects upon an identifiable group.*** It follows that, to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

Iqbal, 556 U.S. at 676-77 (quotation marks, alterations, and citations omitted; emphasis added).

Here, the Complaint asserts that the MDC Defendants "singled out Plaintiffs and class members based on their race, religion, and/or ethnic or national origin." Dkt.726 ¶282. But *Iqbal* makes clear that such a conclusory assertion is not

sufficient: The plaintiff must "plead sufficient ***factual matter*** to show that" the defendant "adopted and implemented the detention policies at issue . . . for the purpose of discriminating on account of race, religion, or national origin" and "not for a neutral, investigative reason." 556 U.S. at 676-77; *see also McReynolds v. Merrill Lynch & Co., Inc.*, 694 F.3d 873, 886 (7th Cir. 2012); *HDC, LLC v. City of Ann Arbor*, 675 F.3d 608, 613 (6th Cir. 2012). Indeed, *Iqbal* required dismissal because, on "the facts . . . allege[d]" there, the challenged arrests were most likely motivated by the "nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts," rendering the "invidious discrimination [the plaintiff] asks us to infer . . . not a plausible conclusion." 556 U.S. at 682.

The same is true here. Here, the "obvious alternative explanation" for the confinement conditions was that the FBI provided the "high interest" designations, and BOP directives mandated that arriving detainees with such designations be held in restrictive conditions. *See, e.g.*, Dkt.726 ¶4. This was a case of following individual security classification decisions made by the FBI, not discriminatory animus. Indeed, there is nothing in the Complaint suggesting that any of the defendants—including Mr. Sherman—harbored ill will toward Arab Muslim men, much less any facts plausibly giving rise to an inference that they imposed the restrictive confinement policy for that reason.

The district court reached the opposite conclusion because: (1) detainees were placed in the ADMAX SHU without individualized hearings; and (2) detainees remained in that setting even after the defendants purportedly knew there was no information supporting the FBI's designations. SPA.40. Those are non-sequiturs. Detainees are ordinarily placed in special housing units because of disciplinary problems, or administrative separation from the general population is otherwise necessary. A.__(OIG Report 118); p. 8, *supra*. In those circumstances, the local prison officials (who placed the detainee in the SHU) will have the facts and competence to determine whether the placement continues to be appropriate. *Id.* But the Complaint itself makes clear that Plaintiffs were placed in restrictive settings not because of anything Mr. Sherman or other MDC Defendants observed or knew. Their placement was the result of FBI assessments made during the terrorism investigation. MDC staff "relied on the FBI's assessment of 'high interest.'" *Id.* Consequently, for each month MDC officials did not receive notice that the FBI had cleared a September 11 detainee, the detainee's prior status was automatically maintained and the detainee remained in SHU. *Id.* That process raises no inference of discriminatory animus. It shows at most that local corrections officials relied on the FBI and INS because they were not positioned to reexamine those agencies' determinations.

The claim that Defendants supposedly were "aware" that no information supported the FBI's "high interest" designations, Dkt.726 ¶69, fares no better. There is no support for that conclusory assertion. *See* pp. 13-14, 50, *supra*. The MDC Defendants—local correctional officials—were entitled to rely on the determinations and directives of law enforcement and intelligence professionals. Doing so raises no inference of discriminatory animus. And, to the extent the district court relied on abuses by MDC staff, SPA.31, that simply repeats its earlier error of attempting to hold Mr. Sherman responsible for conduct he never encouraged, participated in, or desired. "[E]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Iqbal*, 556 U.S. at 677. Alleged abuses by others says nothing about Mr. Sherman's intent, and it certainly does not overcome the obvious reason for his conduct—following directives based on security designations he was neither positioned nor authorized to second guess. Because Plaintiffs' theory that the MDC Defendants imposed the conditions of confinement to punish Plaintiffs for being Arab, South Asian, or Muslim is belied by the "obvious alternative explanation" that the MDC Defendants were relying on FBI designations and BOP policies, Plaintiffs' allegations are not "plausible" and should be dismissed. *Iqbal*, 556 U.S. at 682.

3. *Count 6 Fails To Sufficiently Allege Mr. Sherman's Personal Involvement In The Violation Of A Clearly Established Right*

Finally, Count 6—which alleges impermissible strip searches in violation of the Fourth and Fifth Amendments—should be dismissed against Mr. Sherman for lack of personal involvement. *See Poe*, 282 F.3d at 140-47. The district court denied immunity on the theory that, "[a]ccording to the Complaint, Hasty and Zenk ordered the creation of an unreasonable and punitive strip search policy, and Cuciti, with the help of Sherman and Lopresti, developed the specific policy." SPA.59. But the Complaint neither says that nor provides well-pleaded facts to support it. It thus fails under *Iqbal*.

The Complaint alleges that the strip search policy was developed and overseen by Mr. Cuciti. *See* Dkt.726 ¶¶28, 111. It alleges that MDC staff conducted the searches. *Id.* ¶¶115-116. But it offers no facts to suggest that Mr. Sherman participated in, condoned, or even knew about any excesses. Because "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct," *Iqbal*, 556 U.S. at 677, the absence of any factual allegation showing Mr. Sherman's participation requires dismissal.[10]

[10] The Complaint does say that "[m]any, though not all" of the strip searches about which Plaintiffs complain were included in a visual search log created "for review by MDC management, including Hasty." Dkt.726 ¶114. But Mr. Sherman is not mentioned, and the Complaint contains no well-pleaded facts that he (or Mr. Hasty) actually reviewed it.

III. PLAINTIFFS' CONSPIRACY CLAIM (CLAIM 7) IS BARRED BY QUALIFIED IMMUNITY

Finally, the conspiracy claim under 42 U.S.C. §1985 should have been dismissed on qualified immunity grounds. In 2001, it was far from "clearly established" that an ***intra-enterprise*** conspiracy (*e.g.*, a conspiracy within a corporation) would violate §1985. Nor was it clear that ***federal officers*** were covered by that statute.

A. The Conspiracy Claim Falls With All Other Claims

Because conspiracy is a theory for imposing secondary, not primary, liability, *see Beck v. Prupis*, 529 U.S. 494, 501-03 (2000), a conspiracy charge "will stand only insofar as the plaintiff can prove . . . the violation of a federal right," *Singer v. Fulton County Sheriff*, 63 F.3d 110, 119 (2d Cir. 1995). Consequently, to the extent Plaintiffs have not stated a claim under the other (substantive counts), the conspiracy claim under §1985 must fail as well.

B. The Conspiracy Claim Fails Under The Intra-Enterprise Conspiracy Doctrine And For Want Of Factual Support

The conspiracy count also fails because Defendants are employed by the same entity, the MDC. *See* Dkt.726 ¶¶24-28. Under the intra-enterprise conspiracy doctrine, members of a single entity are incapable of conspiring for purposes of section 1985(3). *See, e.g.*, *Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66, 71 (2d Cir. 1976); *Hermann v. Moore,* 576 F.2d 453, 459 (2d Cir. 1976); *Hull v. Cuyahoga Valley Joint Voc. Sch. Dist. Bd. of Educ.,* 926 F.2d 505, 509-10 (6th Cir.

1991). The doctrine applies to civil rights claims, *see Moore,* 576 F.2d at 459; *Buschi v. Kirven*, 775 F.2d 1240, 1251-52 (4th Cir. 1983), and to employees of public entities, *see Dunlop v. City of N.Y.*, No. 06-cv-0433, 2008 WL 1970002, at *9 (S.D.N.Y. May 06, 2008); *Benningfield v. City of Houston*, 157 F.3d 369, 378 (5th Cir. 1998); *Eggleston v. Prince Edward Volunteer Rescue Squad, Inc.*, 569 F. Supp. 1344, 1352 (E.D. Va. 1983). Because all Defendants work for the same entity, they cannot form a conspiracy as a matter of law. *See* Hasty Opening Br. [Pt.IV].

At the very least, it was not clearly established law in 2001 that an intra-enterprise conspiracy, like the one alleged here, would violation §1985. Because existing precedent did not put that issue "beyond debate" in 2001, qualified immunity should be granted. *Reichle*, 132 S. Ct. at 2093; pp. 34-35, *supra*.

The Complaint also fails to provide the required "factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end." *Webb v. Goord*, 340 F.3d 105, 110 (2d Cir. 2003). The Complaint alleges that "Defendants Ashcroft, Mueller, Ziglar, Hasty, Zenk, Sherman, Lopresti and Cuciti, by agreeing to implement a policy and practice whereby Plaintiffs'" rights were allegedly violated, "conspired to deprive Plaintiffs of the equal protection of the law and of equal privileges and immunities of the laws of the United States." Dkt.726 ¶305. Those "conclusory or general

allegations are insufficient to state a claim for conspiracy." *Walker v. Jastremski*, 430 F.3d 560, 564 n.5 (2d Cir. 2005). Plaintiffs fail to allege, for example, when the parties agreed (expressly or tacitly) to deprive Plaintiffs of their rights, much less how a "meeting of the minds" could have been reached between the U.S. Attorney General, a mid-level corrections officer at a single BOP facility, and six other defendants. Plaintiffs' assertions "amount to nothing more than a 'formulaic recitation of the elements' of" conspiracy that, under *Iqbal*, is insufficient. 556 U.S. at 681.

Finally, the "conspiracy must also be motivated by some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators action." *Britt v. Garcia*, 457 F.3d 264, 269 n.4 (2d Cir. 2006). As explained above, there are no such allegations here. *See* pp. 52-54, *supra*. The district court held that this requirement was met because Plaintiffs alleged a "facially discriminatory" confinement policy interfered with their free exercise. SPA.61. But the term "facially discriminatory" is a legal conclusion, not a well-pleaded fact. The Complaint lacks any facts supporting the conclusion that the conditions of confinement were based on discriminatory animus, much less that Mr. Sherman entered into a conspiracy because of such animus.

C. Qualified Immunity Must Be Granted Because, In 2001, It Was Not Clearly Established That § 1985 Applied To Federal Officers

In 2001, it was not clearly established that § 1985(3) prohibited conspiracies by federal officials like the MDC Defendants. *See Iqbal v. Hasty*, 490 F.3d 143, 176 (2d Cir. 2007). The district court agreed. SPA.60 n.32. But it denied immunity because "federal officials could not reasonably have believed that it was legally permissible for them to conspire with other federal officials to deprive a person of equal protection of the laws." *Id.* (quotation marks omitted). In other words, the district court ruled that it did not matter whether it was clear that the conduct violated § 1985, so long as some other source of law made it unlawful.

That ruling directly contradicts the Supreme Court's decision in *Davis v. Scherer*, 468 U.S. 183 (1984). In that case, the Court rejected the claim that officials could be denied immunity for violating a constitutional provision that did not clearly bar the officer's conduct at the time he acted merely because some other source of law clearly proscribed it. "[O]fficials become liable for damages," the Court held, "only to the extent that there is a clear violation ***of the statutory rights that give rise to the cause of action for damages***." *Id.* at 194 n.12 (emphasis added). And the Supreme Court reiterated that holding again in *Elder v. Holloway*, 510 U.S. 510 (1994): "Is qualified immunity defeated where a defendant violates any clearly established duty, including one under state law, or must the clearly established right be the federal right on which the claim for relief is based?

The Court [in *Davis v. Scherer*] held the latter." *Id.* at 515-16. It appears that, in *Russo v. City of Bridgeport*, 479 F.3d 196, 212 (2d Cir. 2007), this Circuit took the opposite view (without citing *Davis* or *Elder*); the panel may be bound by *Russo*. But the Court should consider granting initial en banc review to overrule *Russo* and conform circuit law to Supreme Court precedent.

CONCLUSION

The district court's decision denying the motion to dismiss Counts 1, 2, 3, 6, and 7 should be reversed.

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Respectfully submitted,

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