UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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August Term, 2013

(Argued: May 1, 2014 Decided: June 17, 2015)

Docket Nos. 13-981, 13-999, 13-1002, 13-1003, 13-1662

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IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, PURNA BAJRACHARYA, on behalf of themselves and all others similarly situated,

*Plaintiffs-Appellees-Cross-Appellants,*

-v.-

DENNIS HASTY, former Warden of the Metropolitan Detention Center, MICHAEL ZENK, former Warden of the Metropolitan Detention Center, JAMES SHERMAN, former Metropolitan Detention Center Associate Warden for Custody,

*Defendants-Appellants,*

JOHN ASHCROFT, former Attorney General of the United States, ROBERT MUELLER, former Director, Federal Bureau of Investigation, JAMES W. ZIGLAR, former Commissioner, Immigration and Naturalization Service,

*Defendants-Cross-Appellees,*

SALVATORE LOPRESTI, former Metropolitan Detention Center Captain,
JOSEPH CUCITI, former Metropolitan Detention Center Lieutenant,

*Defendants*.*

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Before:

POOLER, RAGGI, AND WESLEY, *Circuit Judges*.

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Appeal from a January 15, 2013 Memorandum and Order of the United States District Court for the Eastern District of New York (Gleeson, J.) granting in part and denying in part Defendants' motions to dismiss. Cross-appeal from an April 10, 2013 Judgment of the United States District Court for the Eastern District of New York (Gleeson, J.), which was entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure on April 11, 2013, granting certain Defendants' motions to dismiss. We AFFIRM in part and REVERSE in part. Judge Raggi concurs in part in the judgment and dissents in part in a separate opinion.

RACHEL A. MEEROPOL, Center for Constitutional Rights, New York, NY (Michael Winger, Sunita Patel, Baher A. Azmy, Center for Constitutional Rights, New York, NY; Nancy L. Kestenbaum, Jennifer L. Robbins, Joanne Sum-Ping, Covington & Burling LLP, New York, NY, *on the brief*), *for Plaintiffs-Appellees-Cross-Appellants*.

HUGH D. SANDLER, Crowell & Moring LLP, New York, NY (Shari Ross Lahlou, Crowell & Moring LLP, Washington, D.C., *on the brief*), *for Defendant-Appellant Dennis Hasty*.

JOSHUA C. KLEIN (Allan N. Taffet, Kirk L. Brett, Megan E. Uhle, *on the brief*), Duval & Stachenfeld LLP, New York, NY, *for Defendant-Appellant Michael Zenk*.

* The Clerk of the Court is directed to amend the caption as set forth above.

JEFFREY A. LAMKEN, MoloLamken LLP, Washington, D.C. (Martin V. Totaro, MoloLamken LLP, Washington, D.C.; Debra L. Roth, Julia H. Perkins, Shaw, Bransford & Roth P.C., Washington, D.C., *on the brief*), *for Defendant-Appellant James Sherman*.

H. THOMAS BYRON III, Appellate Attorney, Civil Division (Stuart F. Delery, Assistant Attorney General, Ronald C. Machen Jr., United States Attorney, Dana Boente, United States Attorney, Barbara L. Herwig, Appellate Attorney, Civil Division, *on the brief*), U.S. Department of Justice, Washington, D.C., *for Defendants-Cross-Appellees John Ashcroft and Robert Mueller*.

WILLIAM ALDEN MCDANIEL, JR., Ballard Spahr LLP, Baltimore, MD, *for Defendant-Cross-Appellee James W. Ziglar*.

Trina Realmuto, National Immigration Project of the National Lawyers Guild, Boston, MA; Mary Kenney, American Immigration Council, Washington, D.C., *amici curiae in support of Plaintiffs-Appellees-Cross-Appellants*.

POOLER AND WESLEY, *Circuit Judges*:

On September 11, 2001, "19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda" hijacked four airplanes and killed over 3,000 people on American soil. *Ashcroft v. Iqbal* (*Iqbal*), 556 U.S. 662, 682 (2009). This case raises a difficult and delicate set of legal issues concerning

individuals who were caught up in the post-9/11 investigation even though they were unquestionably never involved in terrorist activity. Plaintiffs are eight male, "out-of-status" aliens[1] who were arrested on immigration charges and detained following the 9/11 attacks. Plaintiffs were held at the Metropolitan Detention Center (the "MDC") in Brooklyn, New York, or the Passaic County Jail ("Passaic") in Paterson, New Jersey; their individual detentions generally ranged from approximately three to eight months.

The operative complaint, a putative class action, asserts various claims against former Attorney General John Ashcroft; former Director of the Federal Bureau of Investigation (the "FBI") Robert Mueller; former Commissioner of the Immigration and Naturalization Service (the "INS") James Ziglar; former MDC Warden Dennis Hasty; former MDC Warden Michael Zenk; and former MDC Associate Warden James Sherman.[2] All claims arise out of allegedly

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[1] We use the term "out-of-status" alien to mean one who has either (1) entered the United States illegally and is deportable if apprehended, or (2) entered the United States legally but who has fallen "out of status" by violating the rules or guidelines for his nonimmigrant status (often by overstaying his visa) in the United States and is deportable.

[2] For ease of reference, we refer to Ashcroft, Mueller, and Ziglar collectively as the "Department of Justice ('DOJ') Defendants," and Hasty, Sherman, and Zenk collectively as the "MDC Defendants." The operative complaint also alleges claims against MDC officials Joseph Cuciti and Salvatore Lopresti. Cuciti did not appeal the district court's decision, and Lopresti filed a notice of appeal but did not timely pay the filing fee or file

discriminatory and punitive treatment Plaintiffs suffered while confined at the MDC or Passaic.

## BACKGROUND

### I. Procedural History[3]

Plaintiffs initiated this action over thirteen years ago on April 17, 2002. Over the following two and one-half years, Plaintiffs amended their complaint three times. In June 2006, following a series of motions to dismiss, the district court dismissed Plaintiffs' unlawful-length-of-detention claims but permitted to proceed, *inter alia*, the substantive due process and equal protection claims challenging the conditions of confinement at the MDC. *See Turkmen v. Ashcroft* (*Turkmen I*), No. 02 CV 2307(JG), 2006 WL 1662663, at *33–36, 40–41 (E.D.N.Y. June 14, 2006), *aff'd in part, vacated in part*, *Turkmen v. Ashcroft* (*Turkmen II*), 589 F.3d 542 (2d Cir. 2009) (per curiam), *remanded to Turkmen III*, 915 F. Supp. 2d at 314. Plaintiffs and Defendants appealed various aspects of that ruling.

Two significant events occurred while the appeal was pending. First, six of the original eight named Plaintiffs at that time withdrew or settled their claims

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a brief. Lopresti's appeal was dismissed pursuant to Federal Rule of Appellate Procedure 31(c). Thus, we do not address the claims against Cuciti and Lopresti.

[3] For a more comprehensive review of this case's procedural history, see *Turkmen v. Ashcroft* (*Turkmen III*), 915 F. Supp. 2d 314, 331–33 (E.D.N.Y. 2013).

against the government. *See Turkmen II*, 589 F.3d at 544 n.1, 545. This left only Ibrahim Turkmen and Akhil Sachdeva, both of whom were detained at Passaic, as opposed to the MDC. Second, the Supreme Court issued *Iqbal*, 556 U.S. at 662, which altered the pleading regime governing Plaintiffs' claims. In light of these events and the remaining Plaintiffs' stated desire to replead claims unique to the settling Plaintiffs, this Court affirmed the dismissal of the length of detention claims but vacated and remanded with respect to the conditions of confinement claims. *See Turkmen II*, 589 F.3d at 546–47, 549–50.

On remand, the district court permitted Plaintiffs to amend their complaint and granted leave for six additional Plaintiffs, all of whom had been held at the MDC, to intervene. The eight current named Plaintiffs are of Middle Eastern, North African, or South Asian origin; six of them are Muslim, one is Hindu, and one is Buddhist. The Fourth Amended Complaint (the "Complaint"), the operative complaint in this case, restates Plaintiffs' putative class claims on behalf of the "9/11 detainees," a class of similarly situated non-citizens who are

Arab or Muslim, or were perceived by Defendants as Arab or Muslim, and were arrested and detained in response to the 9/11 attacks.[4]

The Complaint dramatically winnowed the relevant claims and defendants; it alleges seven claims against eight defendants. The first six claims, all brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), are: (1) a conditions of confinement claim under the Due Process Clause; (2) an equal protection claim alleging that Defendants subjected Plaintiffs to the challenged conditions because of their, or their perceived, race, religion, ethnicity, and/or national origin; (3) a claim arising under the Free Exercise Clause; (4) and (5) two claims generally alleging interference with counsel; and (6) a claim under the Fourth and Fifth Amendments alleging unreasonable and punitive strip searches. The seventh and final claim alleges a conspiracy under 42 U.S.C. § 1985(3). The DOJ and MDC Defendants moved to dismiss the Complaint for failure to state a claim, on

[4] Benamar Benatta was originally detained by Canadian authorities on September 5, 2001, after crossing the Canadian border with false documentation. Following the September 11 attacks, Benatta was transported back to the United States and detained in the challenged conditions of confinement and pursuant to the post-9/11 investigation; therefore, we call him a "9/11 detainee."

qualified immunity grounds, and, in some instances, based on a theory that *Bivens* relief did not extend to the claim at issue.

## II. The OIG Reports

Plaintiffs supplemented the factual allegations in their amended complaints with information gleaned from two reports by the Office of the Inspector General of the United States Department of Justice (the "OIG reports")[5] that documented the federal law enforcement response to 9/11 and conditions at the MDC and Passaic.

The OIG reports, which the Complaint "incorporate[s] by reference except where contradicted by the allegations of [the Complaint]," Compl. ¶ 3 n.1, *see also id.* ¶ 5 n.2, play a significant role in this case.[6] Primarily, the OIG reports provide

[5] There are two OIG reports. The first OIG report, published in June 2003, covers multiple aspects of law enforcement's response to 9/11. *See* U.S. Dep't of Justice, Office of the Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks (April 2003) (the "OIG Report"), *available at* http://www.justice.gov/oig/special/0306/full.pdf. The second OIG report, published in December 2003, focuses on abuses at the MDC. *See* U.S. Dep't of Justice, Office of the Inspector General, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York (Dec. 2003) (the "Supplemental OIG Report"), *available at* http://www.justice.gov/oig/special/0312/final.pdf.

[6] Various Defendants challenge the district court's decision to consider the OIG reports to the extent that they are not contradicted by the Complaint. Defendants are correct that a complaint "include[s] any written instrument attached to it as an exhibit or any

invaluable context for the unprecedented challenges following 9/11 and the various strategies federal agencies employed to confront these challenges. The reports help orient our analysis of the Complaint.

## III. Plaintiffs' Allegations[7]

In the aftermath of the 9/11 attacks, the FBI and other agencies within the DOJ immediately initiated an immense investigation aimed at identifying the 9/11 perpetrators and preventing any further attacks. *See* OIG Report at 1, 11–12. PENTTBOM, the Pentagon/Twin Towers Bombings investigation, was initially run out of the FBI's field offices, but shortly thereafter, Mueller ordered that management of the investigation be switched to the FBI's Strategic Information

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statements or documents incorporated in it by reference." *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991); *accord DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010). But their objection misses the point. The district court accurately explained that at the pleading stage, although we must consider the words on the page (that is, we cannot disregard the fact that the OIG reports make particular findings), we need not consider the truth of those words to the extent disputed by Plaintiffs. *See Turkmen III*, 915 F. Supp. 2d at 342 n.14 (*citing DiFolco*, 622 F.3d at 111). Even were we to view the OIG reports as fully incorporated, reliance on any assertion of fact requires a credibility assessment that we are fundamentally unsuited to undertake at the Rule 12(b)(6) stage. And although the OIG reports cannot determinatively prove or disprove Plaintiffs' allegations, they remain relevant to our analysis because they supplement our understanding of the law enforcement response to 9/11.

[7] The allegations set forth herein are drawn from the Complaint and those portions of the OIG reports incorporated by reference. *See supra* note 6. We presume the veracity of Plaintiffs' well-pleaded allegations. *Iqbal*, 556 U.S. at 679.

and Operations Center (the "SIOC") at FBI Headquarters in Washington, D.C. Mueller personally directed PENTTBOM from the SIOC and remained in daily contact with FBI field offices.

In conjunction with PENTTBOM, the Deputy Attorney General's Office (the "DAG's Office") established the SIOC Working Group to coordinate "efforts among the various components within the [DOJ] that had an investigative interest in[,] or responsibility for[,] the September 11 detainees." *Id*. at 15.[8] The SIOC Working Group included representatives from, among other agencies, the FBI, the INS, and the DAG's Office. This group met daily—if not multiple times in a single day—in the months following 9/11; its duties included "coordinat[ing] information and evidence sharing among the FBI, INS, and U.S. Attorneys' offices" and "ensur[ing] that aliens detained as part of the PENTTBOM investigation would not be released until they were cleared by the FBI of involvement with the September 11 attacks or terrorism in general." *Id*.

Given that the 9/11 hijackers were all foreign nationals, the DOJ response carried a major immigration law component. *See id*. at 12. Ashcroft and Mueller developed "a policy whereby any Muslim or Arab man encountered during the

[8] The SIOC Working Group acquired this name because its initial meetings occurred at the FBI's SIOC.

investigation of a tip received in the 9/11 terrorism investigation . . . and discovered to be a non-citizen who had violated the terms of his visa, was arrested." Compl. ¶ 1; *see also id.* ¶¶ 39–49. Ashcroft also created the related "hold-until-cleared" policy, which mandated that individuals arrested in the wake of 9/11 not be released from "custody until [FBI Headquarters] affirmatively cleared them of terrorist ties." *Id*. ¶ 2; *see also* OIG Report at 38–39.

Within a week of 9/11, the FBI had received approximately 96,000 tips from civilians across the country. These tips varied significantly in quality and reliability.[9] "Mueller [nonetheless] ordered that every one of these tips be investigated, even if they were implausible on their face." Compl. ¶ 40. Ultimately, 762 detainees were placed on the INS Custody List (the "INS List") that then made them subject to Ashcroft's hold-until-cleared policy.

In the months following 9/11, the DOJ Defendants "received detailed daily reports of the arrests and detentions." *Id*. ¶ 47. Ashcroft and Mueller also "met

[9] For instance, Turkmen came to the FBI's attention when his landlord called the FBI's 9/11 hotline and reported "that she rented an apartment in her home to several Middle Eastern men, and she 'would feel awful if her tenants were involved in terrorism and she didn't call.'" Compl. ¶ 251. "The FBI knew that her only basis for suspecting these men was that they were Middle Eastern; indeed, she reported that they were good tenants, and paid their rent on time." *Id.* Another alien was arrested after the FBI received a tip that stated that the small grocery store where he worked was overstaffed, thus arousing the tipster's suspicions about the "Middle Eastern men" that worked there. OIG Report at 17.

regularly with a small group of government officials in Washington, D.C., and mapped out ways to exert maximum pressure on the individuals arrested in connection with the terrorism investigation." *Id.* ¶ 61.[10] This small group "discussed and decided upon a strategy to restrict the 9/11 detainees' ability to contact the outside world and delay their immigration hearings. The group also decided to spread the word among law enforcement personnel that the 9/11 detainees were suspected terrorists[] . . . and that they needed to be encouraged in any way possible to cooperate." *Id*.

Plaintiffs, with the exception of Turkmen and Sachdeva, were held at the MDC. Under MDC confinement policy, the 9/11 detainees placed in the MDC were held in the MDC's Administrative Maximum Special Housing Unit (the "ADMAX SHU")—"a particularly restrictive type of SHU not found in most [Bureau of Prisons ('BOP')] facilities because the normal SHU is usually sufficient

[10] It is unclear whether this "small group" refers to the SIOC Working Group or a distinct group involving Ashcroft, Mueller, and other senior Washington, D.C., officials. One possibility is that Plaintiffs are referring to the small group that consisted of Ashcroft, Mueller, Michael Chertoff, who was then Assistant Attorney General of the Criminal Division, and the Deputy Attorney General. *See* OIG Report at 13. According to Chertoff, this group discussed the DOJ's post-9/11 law enforcement strategy and policies. Given the makeup of this group and the SIOC Working Group, it is reasonable to infer that information flowed between them; for instance, Chertoff's deputy, Alice Fisher, was placed in charge of immigration issues for the Criminal Division and personally established the SIOC Working Group.

for correcting inmate misbehavior and addressing security concerns." *Id.* ¶ 76. The confinement policy was created by the MDC Defendants "in consultation with the FBI." *Id*. ¶ 65.

Conditions in the ADMAX SHU were severe and began to receive media attention soon after detentions began. *See* OIG Report at 2, 5. Detainees were: "placed in tiny cells for over 23 hours a day," Compl. ¶ 5; "strip-searched every time they were removed from or returned to their cell[s], . . . even when they had no conceivable opportunity to obtain contraband," *id.* ¶ 112; provided with "meager and barely edible" food, *id.* ¶ 128; denied sleep by "bright lights" that were left on in their cells for 24 hours a day, *id.* ¶ 119, and, "[o]n some occasions, correctional officers walked by every 20 minutes throughout the night, kicked the doors to wake up the detainees, and yelled" highly degrading and offensive comments, *id.* ¶ 120; constructively denied recreation and exposed to the elements, *see id.* ¶¶ 122–23; "denied access to basic hygiene items like toilet paper, soap, towels, toothpaste, [and] eating utensils," *id.* ¶ 130; and prohibited from moving around the unit, using the telephone freely, using the commissary, or accessing MDC handbooks, which explained how to file complaints about mistreatment, *see id.* ¶¶ 76, 83, 129, 140.

MDC staff also subjected the 9/11 detainees to frequent physical and verbal abuse. The abuse included slamming the 9/11 detainees into walls; bending or twisting their arms, hands, wrists, and fingers; lifting them off the ground by their arms; pulling on their arms and handcuffs; stepping on their leg restraints; restraining them with handcuffs and/or shackles even while in their cells; and handling them in other rough and inappropriate ways. *See id.* ¶ 105; *see also* Supplemental OIG Report at 8–28. MDC staff also referred to the 9/11 detainees as "'terrorists,' and other offensive names; threaten[ed] them with violence; curs[ed] at them; insult[ed] their religion; and ma[de] humiliating sexual comments during strip-searches." Compl. ¶ 109. Specifically, Plaintiffs and putative class members at the MDC were referred to by staff as "camel[s]," "fucking Muslims," and "Arabic asshole[s]," *id.* ¶¶ 110, 147, 218.

The MDC Plaintiffs did not receive copies of the Koran for weeks or months after requesting them, and one Plaintiff never received a copy, "pursuant to a written MDC policy . . . that prohibited the 9/11 detainees from keeping anything, including a Koran, in their cell[s]." *Id.* ¶ 132. The MDC Plaintiffs were also "denied the Halal food required by their Muslim faith." *Id.* ¶ 133. And "MDC staff frequently interrupted Plaintiffs' and class members' prayers,"

including "by banging on cell doors," yelling derogatory comments, and mocking the detainees while they prayed. *Id.* ¶ 136.

The named MDC Plaintiffs' individual experiences—several of which are highlighted below—add further texture to their collective allegations concerning the arrest and confinement of the 9/11 detainees.

**A. Anser Mehmood**

Mehmood, a citizen of Pakistan and devout Muslim, entered the United States on a business visa in 1989 with his wife, Uzma, and their three children. After his visa expired, Mehmood remained in the country and started a trucking business that provided enough earnings to purchase a home in New Jersey and to send funds to his family in Pakistan. In 2000, while living in New Jersey, he and Uzma had their fourth child. In May 2001, Uzma's brother—a United States citizen—submitted an immigration petition for the entire family.

On the morning of October 3, 2001, Mehmood was asleep with Uzma and their one-year-old son when FBI and INS agents knocked on his door. The agents searched Mehmood's home and asked whether he "was involved with a jihad." *Id.* ¶ 157. Mehmood admitted that he had overstayed his visa. The FBI informed Mehmood that they were not interested in him; they had come to arrest

his wife Uzma, whose name the FBI had encountered when investigating Plaintiff Ahmer Abbasi, her brother. Mehmood convinced the FBI to arrest him instead of Uzma because their son was still breastfeeding. "The Agent told Mehmood that they had no choice but to arrest one of the parents, but that Mehmood faced a minor immigration violation only, and he would be out on bail within days." *Id*. ¶ 159.

Upon his arrival at the MDC, Mehmood "was dragged from the van by several large correctional officers, who threw him into several walls on his way into the facility." *Id.* ¶ 162. "His left hand was broken during this incident" and "[t]he guards threatened to kill him if he asked any questions." *Id*. His experience in the ADMAX SHU tracked that of other 9/11 detainees. For instance, "[w]henever Mehmood was removed from his cell, he was placed in handcuffs, chains, and shackles. Four or more MDC staff members typically escorted him to his destination, frequently inflicting unnecessary pain along the way, for example, by banging him into the wall, dragging him, carrying him, and stepping on his shackles and pushing his face into the wall." *Id.* ¶ 166. Neither the FBI nor INS interviewed Mehmood following his arrest. Mehmood was not released from the ADMAX SHU until February 6, 2002.

**B. Ahmed Khalifa**

Khalifa, who had completed five years toward a medical degree at the University of Alexandria in Egypt, came to the United States on a student visa in July 2001. He came to the FBI's attention after the FBI received a tip that "several Arabs who lived at Khalifa's address were renting a post-office box, and possibly sending out large quantities of money." *Id.* ¶ 195. On September 30, 2001, FBI, INS, and officers from the New York City Police Department came to the apartment Khalifa shared with several Egyptian friends. The officers searched his wallet and apparently became "very interested in a list of phone numbers of friends in Egypt." *Id.* ¶ 196. After searching the apartment, the agents asked Khalifa for his passport and "if he had anything to do with September 11." *Id.* ¶ 197. One FBI agent told Khalifa that they were only interested in three of his roommates, but another agent said they also needed Khalifa, whom they arrested for "working without authorization." *Id.*

On October 1, 2001, after briefly stopping at a local INS detention facility to complete paperwork, Khalifa and his roommates were transported to the MDC. When he arrived at the MDC, Khalifa "was slammed into the wall, pushed and kicked by MDC officers and placed into a wet cell, with a mattress on the floor."

*Id.* ¶ 201. "[His] wrists were cut and bruised from his handcuffs, and he was worried about other detainees, whom he heard gasping and moaning through the walls of his cell." *Id.*

FBI and INS agents interviewed Khalifa on October 7, 2001. One of the agents apologized to Khalifa after noticing the bruises on his wrists. When Khalifa stated that MDC guards were abusing him, the agents "stated it was because he was Muslim." *Id.* ¶ 202. In notes from the interview, the agents did not question Khalifa's credibility, and noted no suspicion of ties to terrorism or interest in him in connection with PENTTBOM.

Following the interview, MDC guards strip searched Khalifa and "laughed when they made him bend over and spread his buttocks." *Id.* ¶ 203. Khalifa complains of the conditions associated with detention in the ADMAX SHU, including arbitrary and abusive strip searches, sleep deprivation, constructive denial of recreational activities and hygiene items, and deprivation of food and medical attention.

By November 5, 2001, the New York FBI field office affirmatively cleared Khalifa of any ties to terrorism and sent his name to FBI Headquarters for final

clearance. Khalifa was not officially cleared until December 19, 2001. He remained confined in the ADMAX SHU until mid-January 2002.

**C. Purna Raj Bajracharya**

Bajracharya is neither Muslim nor Arab. He is a Buddhist and native of Nepal who entered the United States on a three-month business visa in 1996. After overstaying his visa, Bajracharya remained in Queens, New York, for five years, working various odd jobs to send money home to his wife and sons in Nepal. Having planned to return home in the fall or winter of 2001, Bajracharya used a video camera to capture the streets he had come to know in New York. He came to the FBI's attention on October 25, 2001, when a Queens County District Attorney's Office employee "observed an '[A]rab male' videotaping outside a Queens[] office building that contained the Queens County District Attorney['s] Office and a New York FBI office." *Id.* ¶ 230. When approached by investigators from the District Attorney's Office, Bajracharya tried to explain that he was a tourist. The investigators took him inside the building and interrogated him for five hours. FBI and INS agents arrived at some point during the interrogation. Bajracharya subsequently took the agents to his apartment;

provided them with his identification documents, which established his country of origin; and admitted to overstaying his visa.

Apparently due to the videotaping, Bajracharya was designated as being of "special interest" to the FBI and on October 27, 2001, he was transported to the MDC. *Id.* ¶¶ 233–34. On October 30, 2001, the FBI agent assigned to Bajracharya's case, along with other law enforcement personnel, interviewed him with the aid of an interpreter. During the interview, "Bajracharya was asked whether he was Muslim or knew any Muslims." *Id.* ¶ 235. Bajracharya explained that he was not Muslim and knew no Muslims. The FBI agent's notes from the interview do not question Bajracharya's credibility or express any suspicion of ties to terrorism. Two days later, the same agent affirmatively cleared Bajracharya of any link to terrorism. By November 5, 2001, the New York FBI field office completed its investigation and forwarded Bajracharya's case to FBI Headquarters for final clearance. Documents at FBI Headquarters note that the FBI had no interest in Bajracharya by mid-November 2001. Nonetheless, he was not released from the ADMAX SHU until January 13, 2002. The FBI agent assigned to Bajracharya's case did not understand why Bajracharya remained in the ADMAX SHU throughout this period; the agent

eventually called the Legal Aid Society and advised an attorney that Bajracharya needed legal representation.

Bajracharya, who is 5'3" and weighed about 130 pounds at the time of his arrest, complains of the same conditions common to the other MDC Plaintiffs. For instance, he could not sleep due to the light in his cell, and when he was removed from his cell, he would be placed in handcuffs, chains, and shackles and escorted by four or more MDC staff members. Bajracharya became so traumatized by his experience in the ADMAX SHU that he wept constantly. When an attorney requested that the MDC transfer Bajracharya to general population, an MDC "doctor responded that Bajracharya was crying too much, and would cause a riot." *Id.* ¶ 241.

## IV. The New York List and the "Of Interest" Designation

As originally articulated by Ashcroft, following 9/11, the DOJ sought to prevent future terrorism by arresting and detaining those people who "have been identified as persons who participate in, or lend support to, terrorist activities." OIG Report at 12 (internal quotation marks omitted). To that end, Michael Pearson, who was then INS Executive Associate Commissioner for Field Operations, issued a series of Operational Orders, which addressed the

responsibilities of INS agents operating with the FBI to investigate leads on illegal aliens. A September 22, 2001 order instructed agents to "exercise sound judgment" and to limit arrests to those aliens in whom the FBI had an "interest" and discouraged arrest in cases that were "clearly of no interest in furthering the investigation of the terrorist attacks of September 11th." *Id*. at 45 (internal quotation marks omitted). The "of interest" designation by an FBI agent had significant implications for a detainee. "Of interest" detainees were placed on the INS List, subject to the hold-until-cleared policy, and required FBI clearance of any connection to terrorism before they could be released or removed from the United States. Detainees who were not designated "of interest" to the FBI's PENTTBOM investigation were not placed on the INS List, did not require clearance by the FBI, and could be processed according to normal INS procedures. *Id*. at 40.

The arrest and detention mandate was not uniformly implemented throughout the country. Specifically, the New York FBI investigated all PENTTBOM leads without vetting the initial tip and designated as "of interest" "anyone picked up on a PENTTBOM lead . . . regardless of the strength of the evidence or the origin of the lead." *Id*. at 41; *see also* Compl. ¶¶ 43–45. For

instance, days after 9/11, New York City police stopped three Middle Eastern men in Manhattan on a traffic violation and found plans to a public school in the car. The next day, their employer confirmed that the men had the plans because they were performing construction work on the school. Nonetheless, the men were arrested and detained. *See* OIG Report at 42. In another instance, a Middle Eastern man was arrested for illegally crossing into the United States from Canada over a week before 9/11. After the attacks, the man was placed on New York's "'special interest' list even though a document in his file, dated September 26, 2001, stated that FBI New York had no knowledge of the basis for his detention." *Id*. at 64 (internal quotation marks omitted).

In many cases, the New York FBI did not even attempt to determine whether the alien was linked to terrorism, *see id*. at 14, 16, 41–42, 47, and it "never labeled a detainee 'no interest' until *after* the clearance process was complete," *id*. at 18 (emphasis added). Thus, aliens encountered and arrested pursuant to a PENTTBOM lead in New York were designated "of interest" (or special interest) and held until the local field office confirmed they had no ties to terrorism. *Id*. at

14; *see also id.* at 53.[11] The result was that the MDC Plaintiffs and others similarly situated in New York were held at the MDC ADMAX SHU as if they met the national "of interest" designation. These practices—specifically the absolute lack of triage—appear to have been unique to New York. *See id.* at 47, 56.[12]

At some point in October 2001, INS representatives to the SIOC Working Group learned that the New York FBI was maintaining a separate list (the "New York List") of detainees who had not been included in the national INS List. One explanation for maintaining a separate New York List was that the New York FBI could not determine if the detainees had any connection with terrorist activity. *Id*. at 54.

After INS Headquarters learned of the separate New York List, small groups of senior officials from the DAG's Office, the FBI, and the INS convened on at least two occasions in October and November 2001 to suggest how to deal with the two separate lists of detainees. In discussing how to address the New

[11] The OIG Report indicates that 491 of the 762 detainees were arrested in New York. OIG Report at 21–22. However, the OIG Report does not identify how many New York arrests were the result of the New York FBI's efforts.

[12] The OIG Report posits that the New York response differed from the rest of the nation, at least in part, as a result of the New York FBI and U.S. Attorney's Office's long tradition of independence from their headquarters in Washington, D.C. *See* OIG Report at 54.

York List, "officials at the INS, FBI, and [DOJ] raised concerns about, among other things, whether the aliens [on the New York List] had any nexus to terrorism." *Id*. at 53. Nonetheless, this list was merged with the INS List due to the concern that absent further investigation, "the FBI could unwittingly permit a dangerous individual to leave the United States." *Id*. The decision to merge the lists ensured that some of the individuals on the New York List would remain detained in the challenged conditions of confinement as if there were some suspicion that those individuals were tied to terrorism, even though no such suspicion existed.

## V. The Issues on Appeal

In a January 15, 2013 Memorandum and Order, the district court granted in part and denied in part Defendants' motions to dismiss the Complaint. The district court dismissed all claims against the DOJ Defendants. As to the MDC Defendants, the district court denied their motions to dismiss Plaintiffs' substantive due process conditions of confinement claim (Claim 1); equal protection conditions of confinement claim (Claim 2); free exercise claim (Claim 3); unreasonable strip search claim (Claim 6); and conspiracy claim under 42 U.S.C. § 1985(3) (Claim 7). *See Turkmen III*, 915 F. Supp. 2d at 324. The MDC

Defendants appealed, and Plaintiffs cross-appealed the dismissal of the claims against the DOJ Defendants based on a judgment that was entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.[13]

## DISCUSSION[14]

### I. Pleading Standard

To satisfy *Iqbal*'s plausibility standard, Plaintiffs must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. at 678. Although plausibility is not a "probability requirement," Plaintiffs must allege facts that permit "more than a sheer possibility that a defendant has acted unlawfully." *Id*. (internal quotation marks omitted). Factual allegations that are "merely consistent with" unlawful conduct do not create a reasonable inference of liability. *Id*.

Moreover, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. Well-pleaded factual allegations, in contrast, should be presumed true, and we must determine

[13] Plaintiffs have not appealed the district court's dismissal of their interference with counsel claims (Claims 4 and 5).

[14] We review the district court's determination of Defendants' Rule 12(b)(6) motions to dismiss de novo. *See Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 88 (2d Cir. 2011).

"whether they plausibly give rise to an entitlement to relief." *Id*. at 679. Ultimately, every plausibility determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id*.

With the exception of the Section 1985 conspiracy claim, all of Plaintiffs' claims allege constitutional violations based on injuries first recognized by the Supreme Court in *Bivens*, 403 U.S. at 388. During the course of this litigation, the Supreme Court made it clear in *Iqbal* that a federal tortfeasor's *Bivens* liability cannot be premised on vicarious liability. 556 U.S. at 676. Thus, Plaintiffs must plausibly plead that each Defendant, "through the official's own individual actions," violated Plaintiffs' constitutional rights. *Id*. In other words, *Bivens* relief is available only against federal officials who are personally liable for the alleged constitutional tort. *Id*. at 676–77. *Iqbal* precludes relying on a supervisor's mere knowledge of a subordinate's mental state (*i.e.*, discriminatory or punitive intent) to infer that the supervisor shared that intent. *Id*. at 677. Knowing that a subordinate engaged in a rogue discriminatory or punitive act is not enough. But that is not to say that where the supervisor condones or ratifies

a subordinate's discriminatory or punitive actions the supervisor is free of *Bivens*'s reach. *See id.* at 683.

## II. Availability of a *Bivens* Remedy for Plaintiffs' Claims

Unlike the MDC Defendants, none of the DOJ Defendants challenge the existence of a *Bivens* remedy in their briefs to this Court. While the DOJ Defendants did raise this issue below, and are represented by able counsel on appeal, they have chosen to not offer that argument now as a further defense of their victory in the district court. However, as the reader will later discover, our dissenting colleague makes much of this defense, raising it as her main objection to our resolution of the appeal. Given the MDC Defendants' arguments, as well as the dissent's decision to press the issue, legitimately noting that a district court's judgment can be affirmed on any ground supported by the record, Dissenting Op., *post* at 7 n.4 (citing *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 413 (2d Cir. 2014)), we think it appropriate to explain our conclusion that a *Bivens* remedy is available for the MDC Plaintiffs' punitive conditions of confinement and strip search claims against both the DOJ and the MDC Defendants.

In *Bivens*, 403 U.S. at 388, the Supreme Court "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). "The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations." *Id*. at 70. Because a *Bivens* claim has judicial parentage, "the Supreme Court has warned that the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in new contexts." *Arar v. Ashcroft*, 585 F.3d 559, 571 (2d Cir. 2009) (en banc) (internal quotation marks omitted). Thus, a *Bivens* remedy is not available for all who allege injury from a federal officer's violation of their constitutional rights.

In *Arar*, we outlined a two-step process for determining whether a *Bivens* remedy is available. First, the court must determine whether the underlying claims extend *Bivens* into a "new context." *Id*. at 572. If, and only if, the answer to this first step is yes, the court must then consider (a) "whether there is an alternative remedial scheme available to the plaintiff," and, even if there is not, (b) "whether special factors counsel hesitation in creating a *Bivens* remedy." *Id*. (internal quotation marks and brackets omitted). As *Arar* noted, case law provides limited guidance regarding how to determine whether a claim presents

a new context for *Bivens* purposes. Thus, "[w]e construe[d] the word 'context' as it is commonly used in law: to reflect a potentially recurring scenario that has similar legal and factual components." *Id*.

Determining the "context" of a claim can be tricky. The MDC Defendants contend that the context of Plaintiffs' claims is the nation's "response to an unprecedented terrorist attack." Sherman Br. 45. The DOJ Defendants made a similar argument before the district court in an earlier round of this litigation. *See Turkmen I*, 2006 WL 1662663, at *30. The MDC Defendants, and the dissent on behalf of the DOJ Defendants, contend that *Arar* supports this view. But if that were the case, then why did *Arar* take pains to note that the "context" of Arar's claims was not the nation's continuing response to terrorism, but the acts of federal officials in carrying out Arar's extraordinary rendition? 585 F.3d at 572. We looked to both the rights injured and the mechanism of the injury to determine the context of Arar's claims. In rejecting the availability of a *Bivens* remedy, we focused on the *mechanism* of his injury: extraordinary rendition—"a distinct phenomenon in international law"—and determined this presented a new context for *Bivens*-based claims. *Id*. Only upon concluding that extraordinary rendition presented a new context did we examine the policy

concerns and competing remedial measures available to Arar. In our view, setting the context of the *Bivens* claims here as the national response in the wake of 9/11 conflates the two-step process dictated by this Court in *Arar*. The reasons why Plaintiffs were held at the MDC as if they were suspected of terrorism do not present the "context" of their confinement—just as the reason for Arar's extraordinary rendition did not present the context of his claim. Without doubt, 9/11 presented unrivaled challenges and severe exigencies—but that does not change the "context" of Plaintiffs' claims. "[M]ost of the rights that the Plaintiff[s] contend[] 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. The strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times." *Iqbal v. Hasty* (*Hasty*), 490 F.3d 143, 159 (2d Cir. 2007), *rev'd on other grounds sub nom*. *Iqbal*, 556 U.S. 662.

Thus, we think it plain that the MDC Plaintiffs' conditions of confinement claims are set in the following context: federal detainee Plaintiffs, housed in a federal facility, allege that individual federal officers subjected them to punitive

conditions. This context takes account of both the rights injured (here, substantive due process and equal protection rights)[15] and the mechanism of injury (punitive conditions without sufficient cause). The claim—that individual officers violated detainees' constitutional rights by subjecting them to harsh treatment with impermissible intent or without sufficient cause—stands firmly within a familiar *Bivens* context. Both the Supreme Court and this Circuit have recognized a *Bivens* remedy for constitutional challenges to conditions of confinement. In *Carlson v. Green*, 446 U.S. 14, 17–20 (1980), the Supreme Court recognized an implied remedy for the plaintiff's claim alleging an Eighth Amendment violation for prisoner mistreatment. Furthermore, in *Malesko*, in refusing to extend a *Bivens* remedy to claims against private corporations housing federal detainees, the Supreme Court observed in dicta that, while no

[15] The rights-injured component of Plaintiffs' claims fall within a recognized *Bivens* context. This Circuit has presumed the availability of a *Bivens* remedy for substantive due process claims in several cases. *See Arar*, 585 F.3d at 598 (Sack, J., dissenting) (citing cases). In addition, the Supreme Court has acknowledged the availability of "a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment." *Iqbal*, 556 U.S. at 675 (citing *Davis v. Passman*, 442 U.S. 228 (1979)). And while it is true that the Supreme Court has subsequently declined to extend *Davis* to other employment discrimination claims, such as in *Chappell v. Wallace*, 462 U.S. 296, 300–04 (1983), the Court's analysis was focused on the special nature of the employer-employee relationship in the military—or, in other words, the mechanism of injury. Here, where the mechanism of injury is also familiar, a *Bivens* remedy is plainly available.

claim was available against the *private corporation*, a federal prisoner would have a remedy against *federal officials* for constitutional claims. 534 U.S. at 72. "If a federal prisoner in a BOP facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer, subject to the defense of qualified immunity." *Id*. The Court went on to recognize that the "prisoner may not bring a *Bivens* claim against the officer's employer, the United States, or the BOP." *Id*. The MDC Plaintiffs' claims here plainly follow *Malesko*'s guidance: the claims are raised against the individual officers, both at the DOJ and the MDC, who were responsible for subjecting the Plaintiffs to punitive conditions of confinement.

The Second Circuit has also recognized the availability of *Bivens* relief for federal prisoners housed in federal facilities bringing claims against individual federal officers. In *Thomas v. Ashcroft*, 470 F.3d 491, 497 (2d Cir. 2006), this Court reversed the district court's dismissal of the prisoner plaintiff's *Bivens* claim for violation of his due process rights against supervisory prison officials. *See also Tellier v. Fields*, 280 F.3d 69, 80–83 (2d Cir. 2000) (recognizing a *Bivens* remedy for a claim of deprivation of procedural due process brought by a federal prisoner against federal prison officials). Furthermore, in *Hasty*, where we considered

claims nearly identical to those at issue in this case, we "did not so much as hint either that a *Bivens* remedy was unavailable or that its availability would constitute an unwarranted extension of the *Bivens* doctrine." *Arar*, 585 F.3d at 597 (Sack, J., dissenting) (discussing *Hasty*, 490 F.3d at 177–78).

Our sister circuits have also permitted *Bivens* claims for unconstitutional conditions of confinement. In *Cale v. Johnson*, 861 F.2d 943, 947 (6th Cir. 1988), *abrogated on other grounds by Thaddeus–X v. Blatter*, 175 F.3d 378 (6th Cir. 1999) (en banc), the Sixth Circuit held that "federal courts have the jurisdictional authority to entertain a *Bivens* action brought by a federal prisoner, alleging violations of his right to substantive due process." The Third Circuit has also permitted a federal inmate to bring a civil rights action against prison officials. *See Bistrian v. Levi*, 696 F.3d 352, 372–75 (3d Cir. 2012) (assuming availability of a *Bivens* remedy for plaintiff's Fifth Amendment substantive due process and other constitutional claims challenging his conditions of confinement).

Notwithstanding the persuasive precedent suggesting the availability of a *Bivens* remedy for the MDC Plaintiffs' conditions of confinement claims, the MDC Defendants, and our dissenting colleague, argue that the MDC Plaintiffs' claims present a new *Bivens* context because the Plaintiffs are illegal aliens. But

because the MDC Plaintiffs' right to be free from punitive conditions of confinement is coextensive with that of a citizen, their unlawful presence in the United States at the time of the challenged confinement does not place their standard mistreatment claim into a new context. Indeed, the Fifth Circuit has recognized a *Bivens* claim raised by a Mexican national for violations of her Fourth and Fifth Amendment rights to be free from false imprisonment and the use of excessive force by law enforcement personnel. *See Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 625 (5th Cir. 2006). The Ninth Circuit has also recognized a *Bivens* claim for due process violations that occurred during an illegal alien plaintiff's detention. S*ee Papa v. United States*, 281 F.3d 1004, 1010–11 (9th Cir. 2002).[16] Thus, we conclude that a *Bivens* remedy is available for the Plaintiffs' substantive due process and equal protection conditions of confinement claims.

Our understanding of *Bivens* and this Court's decision in *Arar* do not however suggest the availability of a *Bivens* remedy for the Plaintiffs' free exercise claim. That claim—that Defendants deliberately interfered with

[16] We note that the Ninth Circuit has declined to provide illegal aliens with an implied *Bivens* remedy for *unlawful detention* during deportation proceedings. *Mirmehdi v. United States*, 689 F.3d 975, 981–83 (9th Cir. 2012). Of course, that decision is plainly inapposite here where the MDC Plaintiffs do not challenge the fact that they were detained, but rather the conditions in which they were detained.

Plaintiffs' religious practices by: (1) denying them timely access to copies of the Koran; (2) denying them Halal food; and (3) failing to stop MDC staff from interfering with Plaintiffs' prayers—does not fall within a familiar *Bivens* context. Here, it is the right injured—Plaintiffs' free exercise right—and not the mechanism of injury that places Plaintiffs' claims in a new *Bivens* context. Indeed, the Supreme Court has "not found an implied damages remedy under the Free Exercise Clause" and has "declined to extend *Bivens* to a claim sounding in the First Amendment." *Iqbal*, 556 U.S. at 675 (citing *Bush v. Lucas*, 462 U.S. 367 (1983)). Accordingly, we agree with the MDC Defendants that Plaintiffs' free exercise claim should have been dismissed.

But the MDC Plaintiffs' claim that they were subjected to unlawful strip searches falls within an established *Bivens* context: federal detainee plaintiffs, housed in a federal facility, allege that individual federal officers subjected them to unreasonable searches in violation of the Fourth Amendment. The MDC Defendants fail to persuasively explain why recognizing the MDC Plaintiffs' unlawful strip search claim would extend *Bivens* to a new context. Indeed, the right violated certainly falls within a recognized *Bivens* context: the Fourth Amendment is at the core of the *Bivens* jurisprudence, as *Bivens* itself concerned a

Fourth Amendment claim. In *Bivens*, the plaintiff brought a Fourth Amendment claim for the defendants' use of unreasonable force without probable cause, resulting in the plaintiff's unlawful arrest. 403 U.S. at 389–90; *see also Groh v. Ramirez*, 540 U.S. 551, 555 (2004) (recognizing the availability of a *Bivens* remedy for a Fourth Amendment claim of an unreasonable search, as a result of a facially invalid warrant). This Circuit has also permitted *Bivens* relief for Fourth Amendment claims involving unreasonable searches. *See, e.g.*, *Castro v. United States*, 34 F.3d 106, 107 (2d Cir. 1994). And the mechanism of the violation—here, an unreasonable search performed by a prison official—has also been recognized by this Circuit. Indeed, in *Arar*, we stated 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. . . . [T]he immigration officer who subjected an alien to multiple strip searches without cause should have left the alien in his clothes." 585 F.3d at 580; *see also Hasty*, 490 F.3d at 170–73 (assuming the existence of a *Bivens* remedy to challenge strip searches under the Fourth Amendment).

Accordingly, we conclude that a *Bivens* remedy is available for Plaintiffs' conditions of confinement claims, under both the Due Process and Equal Protection Clauses of the Fifth Amendment, and Fourth Amendment unreasonable and punitive strip searches claim.[17] However, Plaintiffs' free exercise claim would require extending *Bivens* to a new context, a move we decline to make absent guidance from the Supreme Court.

## III. Claim 1: Substantive Due Process Conditions of Confinement

The MDC Plaintiffs allege that the harsh conditions of confinement in the MDC violated their Fifth Amendment substantive due process rights and that all Defendants are liable for this harm.[18] Plaintiffs present distinct theories of liability as to the DOJ and MDC Defendants.

### A. Applicable Legal Standard

The Fifth Amendment's Due Process Clause forbids subjecting pretrial detainees to punitive restrictions or conditions. *See Bell v. Wolfish* (*Wolfish*), 441

[17] Because we conclude that Plaintiffs' substantive due process, equal protection, and unreasonable punitive strip searches claims do not extend *Bivens* to a new context, we need not address "whether there is an alternative remedial scheme available to the plaintiff" or "whether special factors counsel hesitation in creating a *Bivens* remedy." *Arar*, 585 F.3d at 572 (internal quotation marks and brackets omitted).

[18] Turkmen and Sachdeva, the Passaic Plaintiffs, do not bring a substantive due process conditions of confinement claim or unreasonable strip search claim (Claims 1 and 6).

U.S. 520, 535 & n.16 (1979).[19] Plaintiffs must plausibly plead that Defendants, (1) with punitive intent, (2) personally engaged in conduct that caused the challenged conditions of confinement. *See id*. at 538; *see also Iqbal*, 556 U.S. at 676–77. Absent "an expressed intent to punish," *Wolfish*, 441 U.S. at 538, we may only infer that Defendants acted with punitive intent if the challenged conditions were "not reasonably related to a legitimate goal—if [they were] arbitrary or purposeless," *id*. at 539.

**B. The DOJ Defendants**

While the DOJ Defendants do not raise a no-*Bivens*-claim defense, they do forcefully contest liability here with powerful post-*Iqbal* assertions that "the former Attorney General and FBI Director did not themselves require or specify any of the particular conditions set forth in the complaint. And they cannot be held liable on what amounts to a theory of *respondeat superior* for the actions of others who may have imposed those conditions." Ashcroft & Mueller Br. 10. They contend that because the former Attorney General's initial detention order was constitutional, having been approved by the Supreme Court in *Iqbal*, the DOJ

[19] The parties have not argued for a different standard in this appeal. Accordingly, we do not address whether the rights of civil immigration detainees should be governed by a standard that is even more protective than the standard that applies to pretrial criminal detainees.

Defendants were "entitled to presume that the facially constitutional policy would in turn be implemented lawfully . . . ." *Id*. at 9. We agree . . . to a point.

The MDC Plaintiffs concede that the DOJ Defendants did not create the particular conditions in question. *See Turkmen III*, 915 F. Supp. 2d at 326 n.4; *see also* OIG Report at 19, 112–13 (reporting that, at least initially, BOP officials determined the conditions under which detainees would be held, without direction from the FBI or elsewhere). The MDC Plaintiffs similarly fail to plead that Ashcroft's initial arrest and detention mandate required subordinates to apply excessively restrictive conditions to civil detainees against whom the government lacked individualized suspicion of terrorism. Given the mandate's facial validity, the DOJ Defendants had a right to presume that subordinates would carry it out in a constitutional manner. *See Al-Jundi v. Estate of Rockefeller*, 885 F.2d 1060, 1065–66 (2d Cir. 1989). But that is not the end of the matter.

The MDC Plaintiffs plausibly plead that the DOJ Defendants were aware that illegal aliens were being detained in punitive conditions of confinement in New York and further knew that there was no suggestion that those detainees were tied to terrorism except for the fact that they were, or were perceived to be,

Arab or Muslim.[20] The MDC Plaintiffs further allege that while knowing these facts, the DOJ Defendants were responsible for a decision to merge the New York List with the national INS List, which contained the names of detainees whose detention was dependent not only on their illegal immigrant status and their perceived Arab or Muslim affiliation, but also a suspicion that they were connected to terrorist activities. The merger ensured that the MDC Plaintiffs would continue to be confined in punitive conditions. This is sufficient to plead a Fifth Amendment substantive due process violation.[21] Given the lack of

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[20] The dissent counters that "[t]his is not apparent in the record," citing Plaintiff Bajracharya's videotaping of a building in Queens as evidence of that Plaintiff's possible tie to terrorism. Dissenting Op., *post* at 43 n.28. The dissent makes no mention, of course, of Plaintiff Khalifa, who was told that the FBI was only interested in his roommates, but who was arrested and then detained in the ADMAX SHU anyway, Compl. ¶ 197; or of Plaintiff Mehmood, who was arrested and detained in the ADMAX SHU in place of his wife, in whom the FBI had apparently expressed interest, but who was still breastfeeding their son, *id*. ¶ 159. The dissent further claims that detainees were not sent to the ADMAX SHU based on their perceived race or religion, but—as the OIG Report states—based on whether they were designated of "high interest" to the PENTTBOM investigation. Dissenting Op., *post* at 44 n.28 (citing OIG Report at 18, 111). But, as the dissent concedes, *id*., Plaintiffs' well-pleaded Complaint specifically contradicts this point: the MDC Plaintiffs were detained in the ADMAX SHU "even though they had not been classified 'high interest,'" Compl. ¶ 4.

[21] We acknowledge, as the dissent points out, that the MDC Plaintiffs did not advance the "lists-merger theory" before this Court or the district court. Dissenting Op., *post* at 43 n.28. Rather, they structured the Complaint to challenge Ashcroft's arrest and detention mandate as initially formulated and generally applied. In examining the Complaint's sufficiency, we have been clear that the pleadings are inadequate to challenge the validity of the policy *ab initio*, but do state a claim with regard to the merger decision, an event that Plaintiffs explicitly reference in the Complaint. *See*

individualized suspicion, the decision to merge the lists was not "reasonably related to a legitimate goal." *See Wolfish*, 441 U.S. at 539. The only reason why the MDC Plaintiffs were held as if they were suspected of terrorism was because they were, or appeared to be, Arab or Muslim. We conclude that this plausibly pleads punitive intent. *Id*.

1. *Punitive Conditions of Confinement*

Contrary to the district court's conclusion that Plaintiffs failed to "allege that the DOJ [D]efendants were even aware of [the] conditions," *Turkmen III*, 915 F. Supp. 2d at 340, the Complaint and the OIG Report each contain allegations of the DOJ Defendants' knowledge of the challenged conditions. Plaintiffs allege, *inter alia*, that Mueller ran the 9/11 investigation out of FBI Headquarters; and that "Ashcroft, Mueller[,] and Ziglar received detailed daily reports of the arrests and detentions," Compl. ¶ 47; *see also id.* ¶¶ 63–65.

The OIG Report makes plain the plausibility of Plaintiffs' allegations. The "[DOJ] was aware of the BOP's decision to house the September 11 detainees in high-security sections in various BOP facilities." OIG Report at 19. The Deputy Chief of Staff to Ashcroft told the OIG that an allegation of mistreatment was

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Compl. ¶ 47; Pls.' Br. 38. Sufficiency analysis requires a careful parsing of the Complaint and that is all that has occurred here.

called to the Attorney General's attention. *Id*. at 20. And BOP Director Kathy Hawk Sawyer stated that in the weeks following 9/11, the Deputy Attorney General's Chief of Staff and the Principal Associate Deputy Attorney General "called her . . . with concerns about detainees' ability to communicate both with those outside the facility and with other inmates," *id*. at 112, which she said confirmed for her that the decision to house detainees in the restrictive conditions of the ADMAX SHU was appropriate, *id*. at 112–113. This supports the reasonable inference that not only was Ashcroft's office aware of some of the conditions imposed, but affirmatively supported them. *See also id*. at 113 (DOJ officials told Sawyer to "take [BOP] policies to their legal limit").[22] Furthermore, the OIG Report also makes clear that conditions in the ADMAX SHU began to

[22] The dissent attempts to minimize the force of these comments, claiming that communications about a condition of confinement that was lifted before the merger decision cannot support an inference as to what the DOJ Defendants knew about the conditions in the ADMAX SHU. Dissenting Op., *post* at 56–57. Simply put, we disagree. The fact remains that a condition of confinement, less severe and abusive than the conditions at issue here, garnered the attention of senior officials; it stands to reason that conditions that kept detainees in their cells for twenty-three hours a day, denied them sleep by bright lights, and involved excessive strip searches and physical abuse, would have come to the DOJ Defendants' attention.

receive media attention soon after detentions began, *see id*. at 2, 5;[23] thus, it seems implausible that the public's concerns did not reach the DOJ Defendants' desks.

Of course, we cannot say for certain that daily reports given to Ashcroft and Mueller detailed the conditions at the ADMAX SHU or that the daily meetings of the SIOC Working Group (containing representatives from each of the DOJ Defendants' offices) discussed those conditions. But on review of a motion to dismiss, Plaintiffs need not *prove* their allegations; they must *plausibly plead* them. At a minimum, a steady stream of information regarding the challenged conditions flowed between the BOP and senior DOJ officials. Given the MDC Plaintiffs' allegations, the media coverage of conditions at the MDC, and the DOJ Defendants' announced central roles in PENTTBOM, it seems to us plausible that information concerning conditions at the MDC, which held eighty-four of the 9/11 detainees, reached the DOJ Defendants.[24]

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[23] *See, e.g.*, Neil A. Lewis, *A Nation Challenged: The Detainees; Detentions After Attacks Pass 1,000, U.S. Says*, N.Y. TIMES, Oct. 30, 2001, *available at* http://www.nytimes.com/2001/10/30/us/a-nation-challenged-the-detainees-detentions-after-attacks-pass-1000-us-says.html (citing "common news reports of abuse involv[ing] mistreatment of prisoners of Middle Eastern background at jails").

[24] Furthermore, the OIG reports were issued pursuant to the Office of the Inspector General's responsibilities under the USA PATRIOT Act, which was enacted on October 26, 2001. *See* OIG Report at 3 n.6. The PATRIOT Act, Section 1001, reads: "The Inspector General of the Department of Justice shall designate one official who shall—(1) review information and receive complaints alleging abuses of civil rights and civil

2. *Lack of Individualized Suspicion*

The MDC Plaintiffs also plausibly plead that the DOJ Defendants were aware that the FBI had not developed any connection between some of the detainees and terrorist activities. The Complaint and OIG Report both make clear that the New York FBI arrested all "out-of-status" aliens encountered—even coincidentally—in the course of investigating a PENTTBOM lead. OIG Report at 41–42, 69–70. These arrestees were "deemed 'of interest' for purposes of the 'hold until cleared' policy, regardless of the strength of the evidence or the origin of the lead." *Id*. at 41. Those deemed of "high interest" were sent to the MDC's ADMAX SHU, *id.* at 111, but "there was little consistency or precision to the process that resulted in detainees being labeled 'high interest,'" *id*. at 158.[25]

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liberties by employees and officials of the Department of Justice." PATRIOT Act, Pub. L. No. 107-56, § 1001, 115 Stat. 272 (2001). "On October 30, 2001, the OIG reviewed a newspaper article in which a September 11 detainee alleged he was physically abused when he arrived at the MDC on October 4, 2001. Based on the allegations in the article, the OIG's Investigations Division initiated an investigation into the matter." OIG Report at 144. It seems to us most plausible that if the OIG—who is "under the authority, direction, and control of the Attorney General with respect to audits or investigations," 5 U.S.C. App. 3 § 8E(a)(1)—was aware of the challenged conditions at the MDC, the DOJ Defendants were as well.

[25] Even some detainees who were not labeled "high interest" were nonetheless sent to the MDC's ADMAX SHU. For example, "Abbasi, Bajracharya, Mehmood, and Khalifa[] were placed in the ADMAX SHU even though they had not been classified 'high interest' and despite the absence of any information indicating they were dangerous or involved in terrorism, or any other legitimate reason for such treatment." Compl. ¶ 4.

Even if the DOJ Defendants were not initially aware of this practice, the Complaint and OIG reports support the reasonable inference that Ashcroft and Mueller learned of it within weeks of 9/11. The Complaint clearly alleges that the DOJ Defendants agreed that individuals for whom the FBI could only articulate an immigration law violation as a reason for detention—and for whom the FBI had not developed any reliable tie to terrorism—would continue to be treated as if the FBI had reason to believe the detainees had ties to terrorist activity. Compl. ¶ 67. Plaintiffs point to the detailed daily reports that the DOJ Defendants received regarding arrests and detentions and allege that the DOJ Defendants "were aware that the FBI had no information tying Plaintiffs and class members to terrorism prior to treating them as 'of interest' to the PENTTBOM investigation." *Id.* ¶ 47. Indeed, they claim that Ashcroft, in particular, "insisted on regular, detailed reporting on arrests"; they allege that he received a daily "Attorney General's Report" on persons arrested. *Id*. ¶ 63. They further allege that it was Ziglar who was ultimately responsible for providing much of this information—which he gleaned from his twice daily briefings with his staff regarding the 9/11 detentions—to Ashcroft, indicating that he too was aware of the lack of individualized suspicion. *Id*. ¶ 64.

Once again, the OIG reports also support the MDC Plaintiffs' allegation that the DOJ Defendants became aware of the lack of individualized suspicion for some detainees held in the challenged conditions of confinement. The OIG Report states that "[a] variety of INS, FBI, and [DOJ] officials who worked on the[] September 11 detainee cases told the OIG that it soon became evident that many of the people arrested during the PENTTBOM investigation might not have a nexus to terrorism." OIG Report at 45. Other DOJ officials also stated that it "soon became clear" that only some of the detainees were of "genuine investigative interest"—as opposed to aliens identified by the FBI as "of interest" for whom the FBI had no suspicion of a connection to the attacks or terrorism in general. *Id*. at 47.

The OIG Report supports the reasonable inference that this information, known by other DOJ officials, came to the attention of the DOJ Defendants. In particular, the OIG Report specifies that Ashcroft and Mueller were involved in a "'continuous meeting' for the first few months" after 9/11, at which "the issue of holding aliens until they were cleared was discussed." *Id*. at 39–40. Furthermore, the OIG Report makes clear that the SIOC Working Group, containing representatives from the offices of each of the DOJ Defendants, was

aware of the lack of evidence tying detainees to terrorism. *Id*. at 53–57. As we have already noted, the OIG Report details how at some point in October 2001, the SIOC Working Group learned about the New York List and that "officials at the INS, FBI, and [DOJ] raised concerns about, among other things, whether the aliens had any nexus to terrorism." *Id*. at 53. Clearly this created a major problem for the DOJ. The existence of the New York List suddenly presented the possibility of more than doubling the number of detainees subject to the hold-until-cleared policy.[26] It seems quite *plausible* that DOJ officials would confer with the Attorney General and the Director of the FBI (it was, after all, his agents who were arresting out-of-status Arab and Muslim aliens and holding them as if they were "of interest" without any suspicion of terrorist connections) about the problem of the New York List and the hundreds of detainees picked up in contravention of Ashcroft's stated policy. Indeed, it seems to us *implausible* they did not. Finally, the OIG Report once again makes clear that media reports regarding allegations of mistreatment of detainees alleged that detainees

[26] In October and November of 2001, the New York List contained approximately 300 detainees while the INS List for the rest of the nation contained only 200 detainees. OIG Report at 54.

remained in detention even though they had no involvement in terrorism. *Id*. at 2, 5.

3. *The Decision to Merge the Lists*

Plaintiffs plausibly plead that, despite the DOJ Defendants' knowledge of the conditions at the ADMAX SHU and the lack of any form of verified suspicion for a large number of those detainees on the New York List, Ashcroft approved, or at least endorsed, a decision to merge the New York List. The MDC Plaintiffs contend that he did so notwithstanding vocal opposition from various internal sources. The Complaint clearly alleges that "[a]gainst significant internal criticism from INS agents and other federal employees involved in the sweeps, Ashcroft ordered that, despite a complete lack of any information or a statement of FBI interest, all such Plaintiffs and class members [on the New York List] be detained until cleared and otherwise treated as 'of interest.'" Compl. ¶ 47. By taking this action, Ashcroft ensured that some of the individuals on the New York List would be placed in, or remain detained in, the challenged conditions of confinement.

Our dissenting colleague levels a concern as to the import of the merger of the lists and counters that nothing in the OIG reports confirms Ashcroft's

personal knowledge of the correlation between the merger of the lists and the lack of individualized suspicion as to the MDC Plaintiffs. The dissent contends that, because Plaintiffs' allegations are not based on personal knowledge, there is no factual basis in the record for them. Dissenting Op., *post* at 45. True enough that Ashcroft did not acknowledge that he was aware of the merger of the lists and its implication for the MDC Plaintiffs, nor did he take responsibility for it. But then again a review of the OIG Report gives no indication that anybody asked him.

The absence of an inquiry to the former Attorney General is not a criticism of the Office of the Inspector General's methods, but a simple recognition of a fact that points out a key difference between our view of the OIG reports and that of the dissent. For us, the OIG reports provide context for the allegations of the Complaint. *See supra* note 6. However, it would be a mistake to think of the OIG reports as a repository of all relevant facts of that troubled time; but that is exactly what the dissent seems inclined to do. The dissent measures plausibility by the absence or presence of fact-findings in the OIG reports. Thus, for the dissent, the fact that the Attorney General may not have been questioned is confirmation that he knew nothing. The reports make no such assertion.

It may be that following discovery it will be clear that Ashcroft was not responsible for the merger decision (nor was Mueller or Ziglar), but that is not the question at the pleading stage. The question is whether the MDC Plaintiffs plausibly plead that Ashcroft was responsible. Given the importance of the merger and its implications for how his lawful original order was being carried out, we think the MDC Plaintiffs plausibly allege that he was.

Indeed, the OIG Report supports the MDC Plaintiffs' allegation that Ashcroft was responsible for the merger decision. An incident at one of the New York List meetings provides additional context that supports that allegation. At the November 2, 2001 meeting, the group discussed the necessity of CIA checks, often a prerequisite to a 9/11 detainee's release from detention. OIG Report at 55. In response, Stuart Levey, the Associate Deputy Attorney General responsible for oversight of immigration issues, stated that he had to "check" before communicating a decision on whether "any detainees could be released without the CIA check." *Id*. at 56. This response could reasonably indicate (a) a lack of authority to respond to the question, or (b) that Levey wanted to consider other views before making the decision. Because either is plausible, it is irrelevant that

only inference (a) supports the conclusion that Levey could not answer the question on his own and had to take it to more senior officials.[27]

Furthermore, in late November 2001, when the INS Chief of Staff approached Levey about the CIA check policy, Levey said that he "did not feel comfortable making the decision about [the] request to change the CIA check policy without additional input." *Id*. at 62. It seems to us that if Levey was not comfortable changing the CIA check policy without input from more senior officials, he certainly would not have been comfortable making the decision on his own to double the number of detainees subject to that policy in the first instance.[28]

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[27] The OIG Report states that Levey specifically consulted David Laufman, the Deputy Attorney General's Chief of Staff. OIG Report at 62. The dissent takes this as definitive proof that Ashcroft was not consulted on this, or the merger, decision. Dissenting Op., *post* at 47–49. The dissent mischaracterizes our reference to the CIA checks decision. We do not contend that Levey consulted Ashcroft about *that* decision, nor do we need to. In our view, the fact that Levey spoke to Laufman about *that* decision is not the end of the matter; indeed, the only relevance of the CIA checks decision, period, is that Levey was not capable of making it on his own, suggesting that he also would not be able to make the list-merger decision on his own.

[28] Indeed, Ziglar told the OIG that he contacted Ashcroft's office on November 7, 2001, to discuss concerns about the process of clearing names from the INS Custody List, especially the impact that merging the lists would have on that process and said that "based on these and other contacts with senior Department officials, he believed the Department was fully aware" of the INS's concerns. OIG Report at 66–67. This also suggests that Levey had communicated those concerns to Ashcroft, who nonetheless made the decision to merge the lists.

The dissent argues that the OIG Report forecloses the plausibility of the allegation that Levey brought the list-merger decision to Ashcroft because "Levey made the lists-merger decision '[a]t the conclusion of the [November 2] meeting' at which the subject was first raised to him." Dissenting Op., *post* at 49 (quoting OIG Report at 56). But the OIG Report does *not* indicate that the merger issue was first raised to Levey at the November 2 meeting. Rather, the OIG Report makes clear that the issue of the New York List was discovered in October 2001,[29] and that the decision to merge the lists was communicated at the November 2 meeting. Thus, surely it is plausible that Levey consulted with more senior officials, including Ashcroft, *prior to* that meeting.[30] Of course, discovery may show that Levey was solely responsible for the decision. But, again, the

[29] While the dissent's observation that Levey did not attend the October 22, 2001 meeting during which the "problems presented by the New York List" were discussed is accurate, it is also irrelevant. *See* Dissenting Op., *post* at 49–50 (quoting OIG Report at 55). We do not contend that Levey learned about the New York List at the October 22 meeting, but simply that he learned about it *before* the November 2 meeting, giving him time to consult with more senior officials, including Ashcroft, before communicating a decision at that November meeting. Indeed, one would think that Levey would not attend the November 2 meeting without knowing its agenda.

[30] The dissent challenges the sufficiency of Plaintiffs' allegations and our reading of them as "wholly speculative." Dissenting Op., *post* at 48. Of course, Plaintiffs have no way of knowing what Levey and Ashcroft discussed; nor do we. *Iqbal* does not require as much, but rather "sufficient factual matter, accepted as true" to allow the court to draw the reasonable inference that Ashcroft was ultimately responsible for the decision. 556 U.S. at 678. We believe that Plaintiffs have met this burden.

question is whether Plaintiffs' allegations support the inference that the decision was Ashcroft's; they do.

The MDC Plaintiffs' allegations against Mueller and Ziglar are also sufficient. The Complaint alleges, *inter alia*, that Ashcroft made the decision to merge the lists in spite of the lack of individualized suspicion linking the MDC Plaintiffs to terrorism and that "Mueller and Ziglar were fully informed of this decision, and complied with it." Compl. ¶ 47; *see also id.* ¶¶ 55–57, 67. Mueller and Ziglar are not exculpated from this claim merely because Plaintiffs allege that they complied with, as opposed to ordered, the list merger. Plaintiffs plausibly plead that both were aware that the separate list contained detainees for whom the FBI had asserted no interest and that subjecting them to the challenged conditions would be facially unreasonable. Even if an official is not the source of a challenged policy, that official can be held personally liable for constitutional violations stemming from the execution of his superior's orders if those orders are facially invalid or clearly illegal. *See, e.g.*, *Varrone v. Bilotti*, 123 F.3d 75, 81 (2d Cir. 1997) (granting defendants qualified immunity where there was "no claim that the order was facially invalid or obviously illegal"). In this instance, Plaintiffs plausibly allege that Ashcroft's decision was facially invalid; it

would be unreasonable for Mueller and Ziglar to conclude that holding ordinary civil detainees under the most restrictive conditions of confinement available was lawful.

4. *Punitive Intent*

The MDC Plaintiffs must show not only that the DOJ Defendants knew of and approved continued use of the ADMAX SHU, but also that they did so with punitive intent—that they endorsed the use of those conditions with an intent to punish the MDC Plaintiffs. Federal courts have long recognized that punitive intent is not often admitted. The Supreme Court has noted that it can be inferred if the conditions of confinement are "not reasonably related to a legitimate goal." *Wolfish*, 441 U.S. at 539. If the conditions under which one is held have no reasonable connection to a legitimate goal of the state, then one logical assumption is that they are imposed for no other purpose than to punish. *See id*.

The DOJ Defendants argue that even if they knew of the plight of the MDC Plaintiffs, the decision to continue their confinement at the MDC under exceptionally harsh conditions was motivated by national security concerns—a legitimate worry during the days following the 9/11 attacks—and not some animus directed at the MDC Plaintiffs. They seem to imply that once "national

security" concerns become a reason for holding someone, there is no need to show a connection between those concerns and the captive other than that the captive shares common traits of the terrorist: illegal immigrant status and a perceived Arab or Muslim affiliation. Indeed, our dissenting colleague asserts that because the MDC Plaintiffs were, or appeared to be, members of the group—Arab or Muslim males—that was targeted for recruitment by al Qaeda that they could be held in the ADMAX SHU without any reasonable suspicion of terrorist activity. Dissenting Op., *post* at 64–65, 76–77. Under this view, the MDC Plaintiffs were not held with punitive intent because there was no way to know that they were not involved in terrorist activities. Simply being in the United States illegally and being, or appearing to be, Arab or Muslim was enough to justify detention in the most restrictive conditions of confinement available. Indeed, Levey admitted that the decision to merge the lists, ensuring that some of the 9/11 detainees would be subject to the challenged harsh conditions of confinement, was made because he "wanted to err on the side of caution so that a terrorist would not be released by mistake." OIG Report at 56.

This argument rests on the assumption that if an individual was an out-of-status Arab or Muslim, and someone called the FBI for even the most absurd

reason, that individual was considered a possible threat to national security. It presumes, in essence, that all out-of-status Arabs or Muslims were potential terrorists until proven otherwise. It is built on a perception of a race and faith that has no basis in fact. There was no legitimate governmental purpose in holding someone in the most restrictive conditions of confinement available simply because he happened to be—or, worse yet, appeared to be—Arab or Muslim.

To be clear, it is "no surprise"—nor is it constitutionally problematic—that the enforcement of our immigration laws in the wake of 9/11 had a "disparate, incidental impact on Arab Muslims." *Iqbal*, 556 U.S. at 682. And we do not contend that Supreme Court, or our own, precedent requires individualized suspicion to subject detainees to *generally* restrictive conditions of confinement; restriction is an incident of detention. Rather, we simply acknowledge that "if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Wolfish*, 441 U.S. at 539. We believe, then, that the challenged conditions—keeping detainees in their cells for twenty-three

hours a day, constructively denying them recreation and exposing them to the elements, strip searching them whenever they were removed from or returned to their cells, denying them sleep by bright lights—were not reasonably related to a legitimate goal, but rather were punitive and unconstitutional.

While national security concerns could justify detaining those individuals with suspected ties to terrorism in these challenged conditions for the litany of reasons articulated by the dissent, *see* Dissenting Op., *post* at 67–68, those concerns do not justify detaining individuals solely on the basis of an immigration violation and their perceived race or religion in those same conditions. Individualized suspicion is required here because, absent some indication that the detainees had a tie to terrorism, the restrictions or conditions of the ADMAX SHU were "arbitrary or purposeless." *Wolfish*, 441 U.S. at 539.[31]

[31] The dissent cites several cases that it claims demonstrate that individualized suspicion is not required for imposing restrictive conditions of confinement. Dissenting Op., *post* at 62–63. We do not disagree: individualized suspicion is not required to impose conditions that are reasonably related to a legitimate governmental objective. *Wolfish*, 441 U.S. at 539. Thus, in each of the cases cited by the dissent, rather than announce that individualized suspicion was not required, the Supreme Court determined that the restrictions at issue in each of those cases were related to the legitimate goal of prison security and, therefore, were not punitive. Thus, the cases cited by the dissent do not change our conclusion here, where the challenged conditions—the most restrictive available and imposed on detainees *qua* detainees—are not reasonably related to either the goal of prison security, or national security.

Indeed, in *Wolfish*, the Supreme Court acknowledged that "loading a detainee with chains and shackles and throwing him in a dungeon may ensure his [detention] and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish." *Id*. at 539 n.20. That is the situation before us. Clearly detention conditions less restrictive than the ADMAX SHU were feasible for the MDC Plaintiffs, given that the detainees held in the Passaic facility "were not held in isolation or otherwise placed in restrictive confinement." Compl. ¶ 66. Placing the MDC Plaintiffs in chains and shackles and throwing them in the ADMAX SHU ensured that they posed no threat in the aftermath of 9/11; but we can reach no conclusion other than that the DOJ Defendants' decision to do so was made with punitive intent.

In view of the foregoing, we hold that the MDC Plaintiffs fail to plausibly plead a substantive due process claim against the DOJ Defendants coextensive with the entire post-9/11 investigation and reaching back to the time of Plaintiffs' initial detention. Nonetheless, Plaintiffs' well-pleaded allegations, in conjunction

with the OIG Report's documentation of events such as the New York List controversy, render plausible the claim that by the beginning of November 2001, Ashcroft knew of, and approved, the MDC Plaintiffs' confinement under severe conditions, and that Mueller and Ziglar complied with Ashcroft's order notwithstanding their knowledge that the government had no evidence linking the MDC Plaintiffs to terrorist activity. Discovery may ultimately prove otherwise, but for present purposes, the MDC Plaintiffs' substantive due process claim—with the exception of the temporal limitation noted above—may proceed against the DOJ Defendants.

5. *Qualified Immunity*

A defendant is entitled to qualified immunity if he can establish (1) that the complaint fails to plausibly plead that the defendant personally violated the plaintiff's constitutional rights, or (2) that the right was not clearly established at the time in question. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009); *Varrone*, 123 F.3d at 78 (noting that the qualified immunity inquiry turns, generally, on the objective legal reasonableness of a defendant's actions).

For the reasons stated above, the MDC Plaintiffs plausibly plead that the DOJ Defendants violated their substantive due process rights. With regard to the

second prong of this inquiry, the law regarding the punishment of pretrial detainees was clearly established in the fall of 2001. As discussed, *Wolfish* made clear that a particular condition or restriction of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees. *See* 441 U.S. at 535–39 & n.20. And in *Hasty*, this Court denied qualified immunity with respect to a materially identical conditions claim against Hasty. 490 F.3d at 168–69. We explained that "[t]he right of pretrial detainees to be free from punitive restraints was clearly established at the time of the events in question, and no reasonable officer could have thought that he could punish a pretrial detainee by subjecting him to the practices and conditions alleged by the Plaintiff." *Id*. at 169.

*Hasty* further rejected the argument that the post-9/11 context warranted qualified immunity even if it was otherwise unavailable. *Id*. at 159–60, 169. Recognizing the "gravity of the situation" that 9/11 presented, we explained that qualified immunity remained inappropriate because a pretrial detainee's right to be free from punishment does not vary with the surrounding circumstances. *Id*. at 159. Nothing has undermined the logic or precedential authority of our qualified immunity holding in *Hasty*. We therefore conclude that the DOJ

Defendants are not entitled to qualified immunity on the MDC Plaintiffs' conditions of confinement claim.

**C. The MDC Defendants**

In his opinion below, Judge Gleeson divided the MDC Plaintiffs' conditions of confinement claim against the MDC Defendants into two categories: "official conditions" allegations and "unofficial abuse" allegations. The "official conditions" allegations concern express confinement policies that the MDC Defendants approved and implemented; the "unofficial abuse" allegations concern the physical and verbal abuse that the MDC Defendants employed or permitted their subordinates to employ. We find this taxonomy helpful in analyzing the conditions claim against Hasty, Sherman, and Zenk.[32]

1. *Official Conditions*

The MDC Plaintiffs generally allege that the "official conditions" to which the MDC Defendants subjected them constituted punishment. We do not address whether Plaintiffs have sufficiently alleged an express intent to punish, but rather analyze whether they have plausibly pleaded that (1) the MDC

[32] Plaintiffs' allegations against Zenk do not extend to the "unofficial abuse" nor to any harm arising from the "official conditions" that occurred prior to April 22, 2002, the date he became MDC Warden.

Defendants caused them to suffer the challenged conditions, and that (2) the challenged conditions were "not reasonably related to a legitimate goal," which allows us to infer punitive intent, *Wolfish*, 441 U.S. at 539.

The MDC Plaintiffs plausibly plead that Hasty and Sherman are personally responsible for and caused the MDC Plaintiffs to suffer the challenged conditions. The Complaint contains allegations that Hasty ordered the creation of the ADMAX SHU and directed two of his subordinates to design "extremely restrictive conditions of confinement." Compl. ¶¶ 24, 75; *see also id.* ¶ 76 (describing the extreme conditions in the ADMAX SHU). According to the Complaint, those conditions were then approved and implemented by Hasty and Sherman. *Id*. ¶ 75.

The OIG reports support these allegations. While the decision to impose highly restrictive conditions was made at BOP headquarters, OIG Report at 19, MDC officials created the particular conditions imposed, *id*. at 124–25. The reports specify that MDC officials modified one wing of the preexisting SHU to accommodate the detainees and that the ADMAX SHU was "designed to confine the detainees in the most restrictive and secure conditions permitted by BOP policy." Supplemental OIG Report at 2–3. As Warden and Associate Warden of

the MDC, Hasty and Sherman had the responsibility to carry out these tasks. But that alone would not sustain liability for either.

However, the MDC Plaintiffs also plausibly plead that Hasty and Sherman subjected them to the challenged conditions with punitive intent because the conditions were "not reasonably related to a legitimate goal." *Wolfish*, 441 U.S. at 539. Specifically, the MDC Plaintiffs allege that Hasty and Sherman imposed these harsh conditions despite the fact that they "were aware that the FBI had not developed any information to tie the MDC Plaintiffs [and other detainees] they placed in the ADMAX SHU to terrorism." Compl. ¶ 69. As discussed above with respect to the DOJ Defendants, individualized suspicion was not required to subject detainees to the restrictive conditions of confinement inherent in any detention. But the challenged conditions were not simply restrictive; they were punitive: there is no legitimate governmental purpose in holding someone as if he were a terrorist simply because he happens to be, or appears to be, Arab or Muslim.

The MDC Defendants, and our dissenting colleague, note that BOP Headquarters ordered that the detainees "be placed in the highest level of restrictive detention" and, thus, argue that we cannot infer punitive intent from

the MDC Defendants' compliance with that order. *See* Dissenting Op., *post* at 70 n.40, 71 (quoting OIG Report at 112). They further claim that because the FBI had designated the individuals held in the ADMAX SHU as "of interest," the MDC Defendants are absolved from liability. *See, e.g.*, Hasty Br. 17, 25–26.

But even if Hasty and Sherman *initially* believed that they would be housing only those detainees who were suspected of ties to terrorism, the Complaint contains sufficient factual allegations that the MDC Defendants eventually knew that the FBI lacked any individualized suspicion for many of the detainees that were sent to the ADMAX SHU. Plaintiffs allege that Hasty and Sherman received regular written updates explaining why each detainee had been arrested and including "all evidence relevant to the danger he might pose" to the MDC, and that these updates often lacked any indication of a suspicion of a tie to terrorism. Compl. ¶ 69.[33] They further explain that "[t]he exact language of these updates was repeated weekly, indicating the continued lack of any

[33] For example, the MDC Defendants were informed that Plaintiff Abbasi was "'encountered' by INS pursuant to an FBI lead; that he used a fraudulent passport to enter the U.S. to seek asylum, and later destroyed that passport; that he requested and was denied various forms of immigration relief; that he obtained and used a fraudulent advance parole letter to enter the country, and that he was thus inadmissible. The update included no statement of FBI interest in Abbasi." Compl. ¶ 72.

information tying [Plaintiffs] to terrorism, or tending to show that any of them might pose a danger." *Id*. ¶ 73.

The MDC Plaintiffs relatedly allege that Hasty and Sherman knew that BOP regulations require individualized assessments for detainees placed in the SHU for more than seven days, yet ordered the MDC Plaintiffs' continued detention in the ADMAX SHU without performing these assessments, and Hasty "ordered [his] subordinates to ignore BOP regulations regarding detention conditions." *Id.* ¶ 68; *see also id.* ¶¶ 73–74.

The MDC Plaintiffs further allege that Hasty and Sherman approved a document that falsely stated that "executive staff at MDC had classified the 'suspected terrorists' as 'High Security' based on an individualized assessment of their 'precipitating offense, past terrorist behavior, and inability to adapt to incarceration.'" *Id*. ¶ 74. In addition, the MDC Plaintiffs allege that Hasty and Sherman continued to detain them in the ADMAX SHU even after affirmatively learning that the FBI lacked individualized evidence linking Plaintiffs to terrorism. *See id.* ¶¶ 69–71, 74. These allegations are buttressed by Plaintiffs' assertions that they remained confined in the ADMAX SHU even after receiving final clearance from the New York FBI field office and FBI Headquarters. For

instance, the Complaint alleges that Benamar Benatta was cleared on November 14, 2001, that this information was available to the MDC, and that Benatta nonetheless remained in the ADMAX SHU until April 30, 2002. *See id.* ¶ 188.

The OIG Report directly supports these allegations; as stated by one BOP official, all 9/11 detainees at the MDC were placed in the ADMAX SHU and subjected to the official conditions because, at least initially, "the BOP did not really know whom the detainees were." OIG Report at 19; *see also* Compl. ¶ 4; OIG Report at 112, 126. Specific factual allegations that Hasty and Sherman failed to assess whether the restrictive conditions were appropriate for individual 9/11 detainees buttress the MDC Plaintiffs' claim that the challenged conditions were not reasonably related to a legitimate goal, and that Hasty and Sherman were personally responsible for the treatment.

We recognize that the MDC Defendants may have been in a difficult position when they received detainees without accompanying information regarding those individuals. Record proof may eventually establish that the MDC Plaintiffs' claim is limited to the period of time that Hasty and Sherman knew that the MDC Plaintiffs were being held without suspicion of ties to terrorism. But we cannot conclude, at least at the motion to dismiss stage, that it

was reasonable to take a default position of imposing the most restrictive form of detention available when one *lacks* individualized evidence that the detainee poses a danger to the institution or the nation. Accordingly, we conclude that the MDC Plaintiffs plausibly plead a substantive due process claim against Hasty and Sherman as to the official conditions.

The Complaint does not, however, permit an inference of personal liability as to Zenk, who did not become MDC Warden until April 22, 2002, when only two Plaintiffs remained in the ADMAX SHU. Fundamentally, the allegations that personally identify Zenk are too general and conclusory to support Plaintiffs' claim. We therefore dismiss the MDC Plaintiffs' substantive due process claim against Zenk.

2. *Unofficial Abuse*

The district court properly viewed the MDC Plaintiffs' "unofficial abuse" allegations under the deliberate indifference standard commonly applied in the Eighth Amendment prisoner-mistreatment context. *See Turkmen III*, 915 F. Supp. 2d at 341 & n.13.[34] Given the nature of the MDC Plaintiffs' "unofficial abuse"

[34] The deliberate indifference standard would clearly apply if the MDC Plaintiffs had been prisoners entitled to the Eighth Amendment's protection against cruel and unusual punishment. *See Walker v. Schult*, 717 F.3d 119, 125 (2d Cir. 2013). Because a

allegations, premising liability on Hasty and Sherman's deliberate indifference is consistent with *Iqbal*'s holding that *Bivens* defendants are liable only if, through their own actions, they satisfy each element of the underlying constitutional tort. *See* 556 U.S. at 676.

Prior to *Iqbal*, this Court recognized claims against a supervisory defendant so long as the defendant was personally involved with the alleged constitutional violation. In *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995), this Court identified five ways in which a plaintiff may establish a defendant's personal involvement. One is through a defendant's "deliberate indifference." *Id*. As the district court explained, the fact that a particular type of conduct constitutes "personal involvement" under *Colon* does not inherently preclude the conduct from also supporting a theory of direct liability. *Turkmen III*, 915 F. Supp. 2d at 335–36. For instance, plausibly pleading that a defendant "participated directly in the alleged constitutional violation"—one form of personal involvement

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pretrial detainee's rights are at least as robust as those of a sentenced prisoner, we have applied the Eighth Amendment deliberate indifference test to pretrial detainees bringing claims under the Due Process Clause of the Fifth Amendment. *See, e.g.*, *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000). We do not address whether civil immigration detainees should be governed by an even more protective standard than pretrial criminal detainees.

enumerated in *Colon*, 58 F.3d at 873—could establish direct, as opposed to vicarious, liability. The proper inquiry is not the name we bestow on a particular theory or standard, but rather whether that standard—be it deliberate indifference, punitive intent, or discriminatory intent—reflects the elements of the underlying constitutional tort. *See Iqbal*, 556 U.S. at 676 ("The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.").

Our conclusion is consistent with *Iqbal*, this Court's prior rulings, *see Walker*, 717 F.3d at 125, and the weight of Circuit precedent. For instance, in *Starr v. Baca*, 652 F.3d 1202, 1206–07 (9th Cir. 2011), the Ninth Circuit determined that *Iqbal* does not preclude *Bivens* claims premised on deliberate indifference when the underlying constitutional violation requires no more than deliberate indifference. *See also Dodds v. Richardson*, 614 F.3d 1185, 1204–05 (10th Cir. 2010); *Sandra T.E. v. Grindle*, 599 F.3d 583, 590–91 (7th Cir. 2010); *Sanchez v. Pereira–Castillo*, 590 F.3d 31, 49 (1st Cir. 2009).

The MDC Plaintiffs' "unofficial abuse" claim therefore survives so long as Plaintiffs plausibly plead that the conditions were sufficiently serious, and Hasty and Sherman "kn[e]w of, and disregard[ed], an excessive risk to inmate health or

safety." *Walker*, 717 F.3d at 125 (internal quotation marks omitted); *accord Cuoco*, 222 F.3d at 107. The MDC Plaintiffs clearly meet this standard with respect to Hasty. Simply stated, their factual allegations permit the inference that he knew that MDC staff subjected the MDC Plaintiffs to the "unofficial abuses" and permitted—if not facilitated—the continuation of these abuses. *See* Compl. ¶¶ 24, 77–78, 107, 109–10.

For example, the Complaint contains allegations that Hasty avoided evidence of detainee abuse by "neglecting to make rounds on the ADMAX [SHU] unit," as was required of him by BOP policy. *Id*. ¶ 24. The MDC Plaintiffs also allege that Hasty was nonetheless made aware of the abuse "through inmate complaints, staff complaints, hunger strikes, and suicide attempts." *Id*.; *see also id*. ¶¶ 77–78 (detailing how Hasty made it difficult for detainees to file complaints and ignored the evidence when they did, and how staff officials who complained were called "snitches" and were threatened). Indeed, complaints about abuse of 9/11 detainees were pervasive enough to cause the BOP to videotape all detainee movements and resulted in the investigations later detailed in the OIG reports. *Id*. ¶ 107. The MDC Plaintiffs also complain that

Hasty encouraged his subordinates' harsh treatment of the detainees by himself referring to the detainees as terrorists. *Id*. ¶¶ 77, 109.

The allegations against Sherman, because they are more general and conclusory in nature, are more tenuous. For instance, Plaintiffs allege principally that Sherman "allowed his subordinates to abuse MDC Plaintiffs and class members with impunity. Sherman made rounds on the ADMAX SHU and was aware of conditions there." *Id.* ¶ 26. These allegations lack a specific factual basis to support a claim that Sherman was aware of the particular abuses at issue. Therefore, we hold that the MDC Plaintiffs fail to plausibly plead an unofficial conditions claim as to Sherman.[35]

3. *Qualified Immunity*

The MDC Defendants claim that qualified immunity is appropriate because they were merely following the orders of BOP superiors, "with the input and guidance of the FBI and INS." *See, e.g.*, Hasty Br. 33. Specifically, Hasty claims that the "BOP, INS, and FBI officials ordered [him] to place 'high interest' 9/11 detainees in the ADMAX SHU, and directed that they be subject to the 'tightest' security possible." *Id*. He further argues that "[t]he sole basis for the

[35] The MDC Plaintiffs nonetheless maintain a substantive due process claim against Sherman as to the official conditions, as discussed *supra*.

detainees' confinement in the ADMAX SHU—the FBI's investigative interest—was outside the scope of MDC officials' discretion." *Id*. at 35. By extension, he claims that it was reasonable to detain the MDC Plaintiffs and other "high interest" 9/11 detainees in the ADMAX SHU.

These arguments fail. First, as with the DOJ Defendants, our qualified immunity analysis in *Hasty* applies with equal force to the MDC Plaintiffs' conditions claim against Hasty and Sherman in this case. *See Hasty*, 490 F.3d at 168–69. In 2001, it was clearly established that punitive conditions of confinement, like those involved here, could not be imposed on pretrial detainees such as the MDC Plaintiffs. As discussed above with respect to the DOJ Defendants, *Wolfish* made clear that a condition of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees. *See* 441 U.S. at 535–39 & n.20; *Hasty*, 490 F.3d at 169. Furthermore, given the nearly identical claims and circumstances in *Hasty* and this case, we see no reason to depart from our prior determination that Hasty was not entitled to qualified immunity.

Nor is Hasty entitled to qualified immunity with regard to the unofficial conditions claim. As discussed, the MDC Plaintiffs have plausibly alleged that

Hasty personally violated their constitutional rights by knowing of, and disregarding, an excessive risk to their health or safety. The right of the MDC Plaintiffs to be free from such unofficial abuse was clearly established at the time of the events in question. *See, e.g.*, *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) ("[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by . . . the Due Process Clause."); *see also* *Walker*, 717 F.3d at 125, 130; *Cuoco*, 222 F.3d at 106.

Plaintiffs' allegations, the OIG Report, and the MDC Defendants' arguments confirm that Hasty and Sherman housed 9/11 detainees for extended periods of time in highly restrictive conditions without ever obtaining individualized information that would warrant this treatment. Because Plaintiffs' allegations support an inference of punitive intent, and it would be inappropriate to wrestle with competing factual accounts at this stage of the litigation, we hold that a reasonable officer in the MDC Defendants' position

would have concluded that this treatment was not reasonably related to a legitimate goal.

## IV. Claim 2: Equal Protection – Conditions of Confinement

Plaintiffs next assert a claim that Defendants subjected them to the harsh conditions of confinement detailed above based on their race, ethnicity, religion, and/or national origin, in violation of the equal protection guarantee of the Fifth Amendment.[36]

### A. Applicable Legal Standard

To state an equal protection violation under the Fifth Amendment, "the plaintiff must plead and prove that the defendant acted with discriminatory purpose." *Iqbal*, 556 U.S. at 676. "[P]urposeful discrimination requires more than intent as volition or intent as awareness of consequences." *Id.* (internal quotation marks omitted). "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." *Id.* at 676–77 (alteration in original) (internal quotation marks omitted).

[36] All Plaintiffs assert an equal protection claim against the DOJ Defendants. Abbasi, Khalifa, Mehmood, and Bajracharya do not assert this claim against Zenk, and Sachdeva and Turkmen do not make this claim against any of the MDC Defendants.

A plaintiff can show intentional discrimination by: (1) "point[ing] to a law or policy that expressly classifies persons on the basis of" a suspect classification; (2) "identify[ing] a facially neutral law or policy that has been applied in an intentionally discriminatory manner[;]" or (3) "alleg[ing] that a facially neutral statute or policy has an adverse effect and that it was motivated by discriminatory animus." *Brown v. City of Oneonta, N.Y.*, 221 F.3d 329, 337 (2d Cir. 2000) (internal quotation marks omitted).

The district court characterized Plaintiffs' equal protection claim as falling within the first category—that is, a claim that Defendants subjected Plaintiffs to the challenged conditions of confinement pursuant to a policy that expressly classified Plaintiffs on the basis of their race, ethnicity, religion, and/or national origin. Given our reading of Plaintiffs' allegations and arguments on appeal, we will not analyze this claim, particularly as it relates to the MDC Defendants, under the first equal protection theory alone.

**B. The DOJ Defendants**

The district court concluded that Plaintiffs failed to state an equal protection claim against the DOJ Defendants, but "f[ou]nd the issue to be a close one." *Turkmen III*, 915 F. Supp. 2d at 345. In view of our analysis of Plaintiffs'

substantive due process claim against the DOJ Defendants, and particularly these Defendants' roles with respect to the merger of the New York List, we hold that the MDC Plaintiffs have adequately alleged an equal protection claim against Ashcroft, Mueller, and Ziglar.

Plaintiffs' well-pleaded allegations and the OIG Report give rise to the following reasonable inferences, which render plausible the MDC Plaintiffs' equal protection claim against the DOJ Defendants: (1) the New York FBI field office discriminatorily targeted individuals in the 9/11 investigation not based on individualized suspicion, but rather based on race, ethnicity, religion, and/or national origin, and those individuals were then placed on the New York List; (2) the DOJ Defendants knew about the discriminatory manner in which the New York FBI field office placed individuals on the New York List; and (3) the DOJ Defendants condoned the New York FBI's discrimination by merging the New York List with the INS List, thereby ensuring that some of the individuals on the New York List would be subjected to the challenged conditions of confinement.

Plaintiffs allege that the New York FBI field office targeted individuals in the PENTTBOM investigation and placed them on the New York List based on race, ethnicity, religion, and/or national origin. "[T]he head of the New York FBI

field office stated that an individual's Arab appearance and status as a Muslim were factors to consider in the investigation." Compl. ¶ 42. Even more telling, a supervisor in the same local FBI office, "who oversaw the clearance process[,] stated that a tip about Russian tourists filming the Midtown tunnel was 'obviously' of no interest, but that the same tip about Egyptians was of interest." *Id.* Individuals who were arrested by the New York FBI and INS in connection with a PENTTBOM lead were automatically treated as "of interest," OIG Report at 40–41, and were placed on the New York List, *see id.* at 53.

This discriminatory approach, focusing on "an individual's Arab appearance," Compl. ¶ 42, is consistent with what is alleged to have occurred in Bajracharya's case. Bajracharya, who as noted, is a Buddhist and native of Nepal, came to the FBI's attention when an employee from the Queens County District Attorney's Office "observed an '[A]rab male' videotaping outside a Queens[] office building that contained the Queens County District Attorney['s] Office and a New York FBI office." *Id.* ¶ 230. Investigators from the District Attorney's Office questioned Bajracharya about "why he was taking pictures," and Bajracharya "tried to explain that he was a tourist." *Id.* He was arrested after acknowledging he overstayed his visa and was detained in the ADMAX SHU.

Given the Complaint's allegations regarding the New York FBI's tactics, it is reasonable to infer that officials in the New York FBI targeted certain individuals, including Plaintiffs, for investigation, arrest, and placement on the New York List simply because they were, or appeared to be, Arab or Muslim, *and not* because of any suspicion regarding a link to terrorism.

As we conclude above with respect to the substantive due process claim, the DOJ Defendants were informed of the problems presented by the New York List. As noted, the OIG Report reveals that by October 2001 the SIOC Working Group learned about the New York List and that "officials at the INS, FBI, and [DOJ] raised concerns about, among other things, whether the aliens had any nexus to terrorism." OIG Report at 53. Plaintiffs allege that a high-ranking DOJ official noted that individuals were detained "without any attempt" to determine if they were of "actual interest," and that the official "was concerned early in the investigation that detainees were being held simply on the basis of their ethnicity." Compl. ¶ 45. The DOJ Defendants were unlikely to have remained unaware of these concerns, as they "received detailed daily reports of the arrests and detentions," *id.* ¶ 47, *see also id.* ¶¶ 63–64, and Mueller "was in daily contact with the FBI field offices regarding the status of individual clearances," *id.* ¶ 57.

In light of these allegations, we can reasonably infer that these Defendants were aware that the New York FBI field office was placing individuals on the New York List not because of any suspected ties to terrorism but rather because they were, or were perceived to be, Arab or Muslim.

While the DOJ Defendants' mere knowledge of this discriminatory action by the New York FBI field office would be insufficient to allow for the reasonable inference that these Defendants possessed the discriminatory purpose required to state an equal protection claim, Plaintiffs' allegations are not limited to the DOJ Defendants' knowledge alone. Rather, as we discuss in detail in the substantive due process analysis above, Plaintiffs plausibly plead that Ashcroft made the decision to merge the New York List with the national INS List, ensuring that some of the individuals on the New York List would be placed in, or remain detained in, the challenged conditions of confinement. Plaintiffs further allege that Mueller and Ziglar were aware that the New York List contained detainees against whom the FBI had asserted no interest and that subjecting them to the challenged conditions would be facially unreasonable. In ordering and complying with the merger of the New York List, the DOJ

Defendants actively condoned the New York FBI field office's discriminatory formulation of that list.

The DOJ Defendants' condonation of the New York FBI field office's purposeful discrimination allows us to reasonably infer at the motion to dismiss stage that the DOJ Defendants themselves acted with discriminatory purpose. The Supreme Court in *Iqbal* stated that "discrete wrongs—for instance, beatings—by lower level Government actors[] . . . if true, and if condoned by [Ashcroft and Mueller], could be the basis for some inference of wrongful intent on [Ashcroft and Mueller's] part." 556 U.S. at 683. In a similar vein, we have held, in a case involving an equal protection claim under 42 U.S.C. § 1983, that a reasonable factfinder could conclude that the Commissioner of the Fire Department of the City of New York intended to discriminate when he decided to continue to use the results of employment examinations that he knew had a disparate impact based on race. *See United States v. City of New York*, 717 F.3d 72, 94 (2d Cir. 2013). Here, it is reasonable to infer that Ashcroft, Mueller, and Ziglar possessed the requisite discriminatory intent because they knew that the New York List was formed in a discriminatory manner, and nevertheless condoned that discrimination by ordering and complying with the merger of the lists,

which ensured that the MDC Plaintiffs and other 9/11 detainees would be held in the challenged conditions of confinement.

Contrary to the dissent's contentions, *see* Dissenting Op., *post* at 76–78, this case is distinguishable from *Iqbal*, where the Supreme Court concluded that the plaintiff failed to state an equal protection claim. In *Iqbal*, there were "more likely explanations" for why the plaintiff was detained in harsh conditions other than his race, religion, or national origin. 556 U.S. at 681. Those more likely explanations for the plaintiff's treatment, according to the Supreme Court, were that Ashcroft and Mueller supported "a legitimate policy . . . to arrest and detain individuals *because of their suspected link to the attacks*," which "produce[d] a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Id.* at 682 (emphasis added). The Supreme Court noted that "*[o]n the facts respondent alleges* the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States *and who had potential connections to those who committed terrorist acts*." *Id.* (emphasis added); *see also id.* at 683 (noting that all the allegations in *Iqbal* "suggest[ed] is that the Nation's top law enforcement officers . . . sought to keep *suspected terrorists* in the most secure

conditions available until the suspects could be cleared of terrorist activity" (emphasis added)).

In this case, unlike in *Iqbal*, it is not "more likely" that the MDC Plaintiffs were detained in the challenged conditions *because of* their suspected ties to the 9/11 attacks. Indeed, as discussed at length earlier, Plaintiffs have plausibly alleged that they were detained without *any* suspicion of a link to terrorist activity and that the DOJ Defendants knew that the government lacked information tying Plaintiffs to terrorist activity, but decided to merge the lists anyway.[37] Thus, unlike in *Iqbal*, there was no legitimate reason to detain the MDC Plaintiffs in the challenged conditions and, thus, no obvious, more likely

[37] Given the clear language used by the Supreme Court in *Iqbal* regarding the detainees' connections to terrorism, 556 U.S. at 682–83, we understand the *Iqbal* Court to have rejected as conclusory the allegation in the *Iqbal* complaint identified by the dissent, which only pleads in the broadest terms that the *Iqbal* plaintiffs were confined without "any individual determination" that such restrictions were "appropriate or should continue." *See* Dissenting Op., *post* at 81–82 (quoting First Am. Compl. ¶ 97, App. to Pet. for Cert. 173a, *Ashcroft v. Iqbal*, No. 07-1015 (U.S. Feb. 6, 2008), *available at* http://1.usa.gov/1CfHJQF). Here, in contrast, the well-pleaded allegations, as supported by the OIG reports, allege that the DOJ Defendants made, and complied with, the decision to merge the New York List with the national INS List, thereby ensuring that the MDC Plaintiffs, and others, remained in the challenged conditions of confinement despite the absence of any suspicion that they were tied to terrorism.

explanation for the DOJ Defendants' actions with respect to the New York List merger.[38]

The dissent also argues that we cannot plausibly infer the DOJ Defendants' discriminatory intent from the merger decision because not all of the individuals on the New York List were subjected to the same level of restrictive confinement. *See* Dissenting Op., *post* at 79–80. But the fact that some individuals of the same race, ethnicity, religion, and/or national origin as the MDC Plaintiffs were restrained in the Passaic County Jail, as opposed to the ADMAX SHU, hardly dooms the MDC Plaintiffs' claim against the DOJ Defendants. There is no allegation that the DOJ Defendants were responsible for the assignment of certain actual or perceived Arab and Muslim males to Passaic as opposed to the more restrictive ADMAX SHU. *See* OIG Report at 17–18, 126–27, 158 (noting that assignment responsibility fell largely to the arresting FBI agent). Rather, Plaintiffs have plausibly alleged that the DOJ Defendants condoned and ratified the New York FBI's discrimination in *identifying* detainees by merging the New

[38] Furthermore, the fact that Plaintiffs plausibly plead that the DOJ Defendants merged the New York List, and complied with the list merger, based on punitive intent (the substantive due process claim) arguably suggests the plausibility of the MDC Plaintiffs' allegations that the DOJ Defendants also possessed the discriminatory intent required for an equal protection claim. *See supra* Section III.B.

York List with the INS List. The DOJ Defendants, apparently deferring to others' designation of detainees for particular facilities, thus ensured that some (and for all they knew, all) of the individuals on the New York List would be subjected to the challenged conditions of confinement solely on the basis of discriminatory criteria. The fact that some of these individuals were actually assigned to the less restrictive Passaic facility is thus a red herring.[39]

Based on the foregoing, we conclude that the MDC Plaintiffs' allegations are sufficient to state an equal protection claim against Ashcroft, Mueller, and Ziglar for their condonation of the New York FBI's discriminatory formulation of the New York List, which resulted in the MDC Plaintiffs being subjected to the conditions of confinement challenged here.

[39] Moreover, to the extent this differential assignment of class members, again apparently by agents of the New York FBI and not the DOJ Defendants, might be relevant to Plaintiffs' equal protection claim, because it could suggest that the New York FBI was not actually discriminating, it is more appropriately considered at summary judgment. Indeed, the cases embraced by the dissent conclude that evidence of differential treatment of members of the same class may weaken an inference of discrimination *at the summary judgment stage*. *See O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 309 (1996) (summary judgment); *Fleming v. MaxMara USA, Inc.*, 371 F. App'x 115, 116 (2d Cir. 2010) (summary order) (summary judgment); *James v. N.Y. Racing Ass'n*, 233 F.3d 149, 151 (2d Cir. 2000) (summary judgment). In light of the well-pleaded allegations regarding discrimination by the New York FBI, Plaintiffs have hardly pleaded themselves out of court on this point.

**C. The MDC Defendants**

We agree with the district court that the MDC Plaintiffs have stated a plausible equal protection claim against Hasty and Sherman, although we base our decision on somewhat different reasoning than that employed by the court below. However, we do not agree with the district court that the MDC Plaintiffs have adequately alleged this claim against Zenk.

Our conclusion focuses on allegations of mendacity by Hasty and Sherman regarding the basis for detaining the MDC Plaintiffs in the ADMAX SHU. The Complaint asserts that Hasty and Sherman "were aware that placing the 9/11 detainees in the ADMAX SHU unit without an individualized determination of dangerousness or risk was unlawful." Compl. ¶ 74. However, these Defendants never actually undertook that "required individualized assessment." *Id.* ¶ 73. Nevertheless, Hasty and Sherman approved a document that "untruthfully stated that the executive staff at [the] MDC had classified the 'suspected terrorists' as 'High Security' based on an individualized assessment of their 'precipitating offense, past terrorist behavior, and inability to adapt to incarceration.'" *Id.* ¶ 74. In fact, neither Hasty nor Sherman "saw or considered information in any of these categories in deciding to place the 9/11 detainees in

the ADMAX SHU." *Id.*;[40] *see also id.* ¶¶ 68–72 (Hasty and Sherman held the MDC Plaintiffs in the ADMAX SHU knowing that they were not tied to terrorism and without performing the required individualized assessment of whether Plaintiffs posed a danger to the facility).

Based on the foregoing allegations of duplicity regarding the basis for confining the 9/11 detainees, it is reasonable to infer that Hasty and Sherman approved this false document to justify detaining actual or perceived Arabs and Muslims in the harsh conditions of the ADMAX SHU based on discriminatory intent. *Cf. Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (in the employment discrimination context, "the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose"); *id.* (an inference of discriminatory purpose based on an employer's false explanation "is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt" (internal quotation marks

[40] As previously noted, the term "9/11 detainees" is defined in the Complaint as non-citizens from the Middle East, South Asia, and elsewhere who are Arab or Muslim, or were perceived to be Arab or Muslim. Individuals with certain of these characteristics who were arrested and detained in response to the 9/11 attacks constitute the putative class in this case.

omitted)); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) ("disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may . . . show intentional discrimination" in the employment discrimination context).

The dissent argues that we cannot infer discriminatory intent from the MDC Defendants' approval of this false document, concluding that the "more likely" reason for this mendacity is these Defendants' concern for national security. *See* Dissenting Op., *post* at 83–84. Although recognizing that the MDC Defendants might be faulted for approving a false document stating that each detainee had been assessed as a "High Security" "suspected terrorist[]," our dissenting colleague believes Hasty and Sherman's actions are more likely explained by reliance on the FBI's designation of each MDC Plaintiff as a person "of interest" or "of high interest" to the ongoing terrorism investigation. Yet, the allegations in the Complaint belie this alternative explanation for Hasty and Sherman's dishonesty. Plaintiffs allege that the "MDC Defendants were aware that the FBI had not developed *any information*" to tie the 9/11 detainees to terrorism. Compl. ¶ 69 (emphasis added). Indeed, the MDC Defendants received regular updates on the FBI's investigation, *including* the dearth of

evidence connecting the 9/11 detainees to terrorism. Such briefing—placing Hasty and Sherman on repeated notice of the lack of any specific information justifying restrictive confinement in the ADMAX SHU—renders implausible the innocent explanation for their mendacity.

As an additional matter, the fact that the false document that Hasty and Sherman approved, on its face, applied to suspected terrorists and not just actual or perceived Arabs and Muslims does not undermine the reasonableness of the inference that these Defendants acted based on discriminatory intent. Plaintiffs allege that Hasty and Sherman approved the document even though they had not performed the required individualized assessments and knew that keeping "the 9/11 detainees" in the ADMAX SHU without those assessments was unlawful. *Id.* ¶¶ 73–74. They further allege that, in approving the document, Hasty and Sherman failed to consider the past offenses, past terrorist activity, and inability to adapt to incarceration with respect to "the 9/11 detainees." *Id.* ¶ 74. Based on Plaintiffs' allegations about how the false document related in particular to the 9/11 detainees, a group the Complaint specifically defines on racial, ethnic, and religious grounds, *see id.* ¶ 1, it is reasonable to infer, at least at

the motion to dismiss stage, that Hasty and Sherman lied in order to conceal an intent to discriminate on the basis of suspect classifications.

Further buttressing this inference, the Complaint asserts that MDC staff used racially, ethnically, and religiously charged language to refer to the MDC Plaintiffs. *See id*. ¶ 109 (MDC staff referred to the MDC Plaintiffs as terrorists and insulted their religion); *id.* ¶ 110 (Saeed Hammouda and others complained "that MDC staff called them 'camel[s]'"); *id.* ¶ 136 (MDC staff mocked Plaintiffs' prayers and interrupted their praying by "screaming derogatory anti-Muslim comments"); *id.* ¶ 218 (during his transport and processing Hammouda was called "Arabic asshole"). These allegations are supported by the OIG reports. *See* OIG Report at 144 (noting allegations that MDC officers used racial slurs); Supplemental OIG Report at 28–30 (concluding that some MDC staff verbally abused detainees based on their Muslim faith, among other grounds).

The context in which the term "terrorist" was used at the MDC bolsters the inference that the MDC Plaintiffs were believed to be terrorists simply because they were, or were perceived to be, Arab or Muslim. Significantly, the term "terrorist" was not used in isolation. Rather, MDC staff called the MDC Plaintiffs "'fucking Muslims' and 'terrorists,'" Compl. ¶ 147, as well as

"'terrorist' and 'Arabic asshole,'" *id.* ¶ 218; *see also* Supplemental OIG Report at 28 (noting that along with the term "terrorists," MDC staff referred to detainees as "fucking Muslims" and "bin Laden Junior" (internal quotation marks omitted)).

While most of the aforementioned comments are not directly attributed to Hasty, Sherman, or Zenk, Plaintiffs do allege that the use of racially, ethnically, and religiously charged language was brought to the attention of the MDC Defendants through detainee complaints and reports from MDC staff, among other means. Mere knowledge of the MDC staff's discriminatory comments, of course, is insufficient to infer shared discriminatory intent by Hasty, Sherman, or Zenk. *See Iqbal*, 556 U.S. at 676–77. However, with respect to Hasty, Plaintiffs allege more than mere awareness of the MDC staff's discriminatory treatment of the MDC Plaintiffs. Plaintiffs claim that Hasty fostered the MDC staff's use of discriminatory language to refer to the MDC Plaintiffs by himself "referring to the detainees as 'terrorists,'" Compl. ¶ 77, *see also id.* ¶ 109, notwithstanding Hasty's knowledge that the MDC Plaintiffs lacked ties to terrorism. Hasty's knowledge about the charged manner in which the term "terrorist" was used to refer to the MDC Plaintiffs, and his personal use of the term in that context,

renders even more plausible the conclusion that he approved the false document justifying the MDC Plaintiffs' detention in the ADMAX SHU based on discriminatory animus. Given the fact that the 9/11 hijackers were Arab Muslims, and Hasty knew that there were no articulable ties between the MDC Plaintiffs and terrorism, Plaintiffs plausibly plead that Hasty referred to the MDC Plaintiffs as terrorists, and treated them as if they were, simply because they were, or he believed them to be, Arab or Muslim.

In view of the foregoing, the MDC Plaintiffs have stated a plausible claim that Hasty and Sherman detained them in the challenged conditions because of their race, ethnicity, religion, and/or national origin. These Defendants' approval of the false document, and Hasty's use of charged language in the particular context of the MDC Plaintiffs' detention, support the reasonable inference that Hasty and Sherman subjected the MDC Plaintiffs to harsh conditions of confinement based on suspect classifications.

With respect to Zenk, the MDC Plaintiffs' allegations are more limited and fail to support the reasonable inference that he established or implemented the alleged conditions of confinement based on animus that offends notions of equal protection.

**D. Qualified Immunity**

The DOJ Defendants, Hasty, and Sherman are not entitled to qualified immunity on the MDC Plaintiffs' equal protection claim. With regard to the first prong of this inquiry, whether the complaint plausibly pleads that a defendant personally violated the plaintiff's constitutional rights, for the reasons stated above, the MDC Plaintiffs have plausibly alleged that Ashcroft, Mueller, Ziglar, Hasty, and Sherman violated their rights under the equal protection guarantee.

With respect to the second prong of the inquiry, it was clearly established at the time of Plaintiffs' detention that it was illegal to hold individuals in harsh conditions of confinement and otherwise target them for mistreatment because of their race, ethnicity, religion, and/or national origin. Plaintiffs' right "not to be subjected to ethnic or religious discrimination[] w[as] . . . clearly established prior to 9/11, and . . . remained clearly established even in the aftermath of that horrific event." *Hasty*, 490 F.3d at 160. In *Hasty*, the plaintiff alleged "that he was deemed to be 'of high interest,' and accordingly was kept in the ADMAX SHU under harsh conditions, solely because of his race, ethnicity, and religion," and "that Defendants specifically targeted [him] for mistreatment because of [his] race, religion, and national origin." *Id.* at 174 (alterations in original). We

concluded "that any reasonably competent officer would understand [those alleged actions] to have been illegal under prior case law." *Id.* (internal quotation marks omitted). There is no reason that this analysis should not govern here. Although, as the dissent notes, *see* Dissenting Op., *post* at 62, *Hasty* employed a more lenient pleading standard than what we now utilize in assessing factual allegations, this hardly prevents us from relying on its conclusions as to whether certain legal principles were clearly established at the time of Plaintiffs' detention. Accordingly, in view of the sufficiency of the MDC Plaintiffs' allegations here, the DOJ Defendants, Hasty, and Sherman are not entitled to qualified immunity on this claim.

We reverse the portion of the district court's decision that dismissed the MDC Plaintiffs' equal protection claim against the DOJ Defendants, affirm the district court's denial of Hasty and Sherman's motions to dismiss the MDC Plaintiffs' claim, and reverse the district court's decision denying Zenk's motion to dismiss the equal protection claim.

Because the Passaic Plaintiffs were held in the general population and not the ADMAX SHU, we agree with the district court that they have failed to adequately plead that they were subjected to harsh conditions of confinement

because of their race, ethnicity, religion, and/or national origin. Thus, we affirm the district court's dismissal of the Passaic Plaintiffs' equal protection claim.

## V. Claim 6: Unreasonable and Punitive Strip Searches

The MDC Plaintiffs claim that they were subject to unreasonable and punitive strip searches while detained at the MDC, in violation of the Fourth and Fifth Amendments.[41]

### A. Applicable Legal Standard

Determining the legal standard that applies to this claim turns on whether the MDC Plaintiffs were held in a prison or a jail. *See Hasty*, 490 F.3d at 172. In *Hasty*, we decided that the plaintiff, who was detained in the ADMAX SHU at the MDC (like the MDC Plaintiffs here), should be treated in accordance with the standard governing prisons. *See id.* Under that standard, a "regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482

[41] Only the MDC Plaintiffs assert this claim, which is only raised against the MDC Defendants. Benatta and Hammouda alone assert this claim against Zenk. To the extent that the MDC Plaintiffs' allegations regarding the strip searches are cognizable under the Fifth Amendment, we factor these allegations into our analysis of the substantive due process claim, which is discussed above. *See supra* Section III.C.

U.S. 78, 89 (1987). Given that the parties here do not argue for a different standard, we assume that the foregoing standard applies in this case.[42]

**B. The MDC Defendants**

The MDC Plaintiffs allege that Defendant Joseph Cuciti, a former lieutenant at the MDC and not a party on appeal, was tasked with "developing the strip-search policy on the ADMAX [SHU]." Compl. ¶ 111. Plaintiffs further claim that "Hasty ordered . . . Cuciti to design extremely restrictive conditions of confinement." *Id.* ¶ 75. The reasonable inference based on these allegations is that Hasty ordered Cuciti to develop the strip-search policy, which was "then approved and implemented by Hasty and Sherman, and, later, by Zenk." *Id.*

Plaintiffs allege that the 9/11 detainees at the MDC were strip searched upon arrival, and again after they had been escorted in shackles and under continuous guard to the ADMAX SHU. They were also strip searched every time they were taken from or returned to their cells, including after non-contact

[42] We note, however, that this standard governs prison regulations, *see Turner*, 482 U.S. at 89, and that the application of this standard in *Hasty* may have been justified because the plaintiff in that case faced criminal charges (apparently felonies), *see* 490 F.3d at 147–48 & n.1, 162 n.8, 172. In contrast, Plaintiffs here were almost exclusively charged with civil immigration violations and were detained on that basis. While it may be that a different standard, one more favorable to detainees, should govern the constitutionality of searches in the context of civil immigration detention, we leave that question for another day.

attorney visits, when "physical contact between parties was prevented by a clear partition," OIG Report at 123, and when being transferred from one cell to another. Benatta was strip searched on September 23, 24, and 26 of 2001, even though he was not let out of his cell on any of those days. Numerous strip searches were documented in a "visual search log" that was created for review by MDC management, including Hasty. Compl. ¶ 114 (internal quotation marks omitted).

Plaintiffs' allegations regarding the strip searches are supported by the Supplemental OIG Report, which concluded that MDC staff "inappropriately used strip searches to intimidate and punish detainees." Supplemental OIG Report at 35. That report also "questioned the need for the number of strip searches, such as after attorney and social visits in non-contact rooms." *Id.*

The foregoing allegations, supported as they are by the Supplemental OIG Report, are sufficient to establish at this stage of the litigation that Hasty and Sherman were personally involved in creating and executing a strip-search policy that was not reasonably related to legitimate penological interests. Hasty ordered the policy, and both he and Sherman approved and implemented it. Under that policy, the MDC Plaintiffs were strip searched when there was no

possibility that they could have obtained contraband. Plaintiffs have alleged that Hasty and Sherman were aware of these searches either based on the search log that was created for review by MDC management, or because they were involved in the implementation of the strip-search policy.[43] These allegations give rise to a plausible Fourth Amendment claim against Hasty and Sherman. *See Hasty*, 490 F.3d at 172 (finding a plausible allegation of a Fourth Amendment violation in the post-9/11 context where the plaintiff alleged that he "was routinely strip searched twice after returning from the medical clinic or court and that, on one occasion, [he] was subjected to three serial strip and body-cavity searches in the same room"); *Hodges v. Stanley*, 712 F.2d 34, 35 (2d Cir. 1983) (noting that because "there was no possibility that [the plaintiff] could have obtained and concealed contraband[] . . . the second search appears to have been unnecessary").[44]

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[43] To the extent the dissent believes that we premise Hasty and Sherman's personal involvement entirely on these Defendants' alleged review of the visual search log, *see* Dissenting Op., *post* at 90, that assertion is incorrect. As discussed, Plaintiffs have plausibly alleged that Hasty ordered the development of, and that he and Sherman approved and implemented, the challenged strip-search policy. Plaintiffs' allegations regarding the visual search log only buttress the inference of Hasty's personal involvement.

[44] Although the dissent correctly notes that *Hodges* was decided before the Supreme Court's opinion in *Turner*, *see* Dissenting Op., *post* at 88, we have ratified *Hodges* in subsequent strip search case law. *See Hasty*, 490 F.3d at 172; *N.G. v. Connecticut*, 382 F.3d

With respect to Zenk, however, the MDC Plaintiffs fail to state a plausible Fourth Amendment claim. As noted earlier, Plaintiffs do not assert any claim against Zenk for injuries they suffered prior to the date on which he became Warden of the MDC, which was April 22, 2002. Only two Plaintiffs, Benatta and Hammouda, were still detained at the MDC as of that date. These Plaintiffs have not sufficiently alleged that they were unlawfully strip searched during the period in which Zenk was Warden of the MDC.

**C. Qualified Immunity**

Hasty and Sherman are not entitled to qualified immunity on the MDC Plaintiffs' strip search claim. With respect to the first prong of the qualified immunity analysis, Plaintiffs have plausibly alleged that Hasty and Sherman each violated the MDC Plaintiffs' rights under the Fourth Amendment. With regard to the second prong of the inquiry, Plaintiffs' Fourth Amendment rights were clearly established at the time of the searches at issue.

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225, 233–34 (2d Cir. 2004). Similarly, we reject the dissent's attempt to confine *Hodges* to its facts, only finding the absence of a legitimate penological purpose where the strip searches are "*immediately* successive." Dissenting Op., *post* at 88 (emphasis added). Like previous panels, we read *Hodges* as holding that a search may be unnecessary and purposeless where "there was no possibility that [the plaintiff] could have obtained and concealed contraband." 712 F.2d at 35; *see also N.G.*, 382 F.3d at 233–34. Here, consistent with *Hodges,* Plaintiffs have plausibly alleged that they were strip searched when there was no opportunity to acquire contraband, including in instances where they were shackled and under escort, or were never permitted to leave their cells.

In *Hasty*, we denied Hasty qualified immunity on the plaintiff's Fourth Amendment claim, stating that in the wake of 9/11 "it was clearly established that even the standard most favorable to prison officials required that strip and body-cavity searches be rationally related to legitimate government purposes." 490 F.3d at 172; *see also id.* at 159–60 (the "right not to be needlessly harassed and mistreated in the confines of a prison cell by repeated strip and body-cavity searches" was "clearly established prior to 9/11, and . . . remained clearly established even in the aftermath of that horrific event"). Because the MDC Plaintiffs' claim here is substantially the same as the Fourth Amendment claim at issue in *Hasty*, we are bound by that decision and thus deny Hasty and Sherman qualified immunity on the Fourth Amendment claim in this case.

Accordingly, we affirm the district court's denial of Hasty and Sherman's motions to dismiss the MDC Plaintiffs' Fourth Amendment strip search claim, and reverse the district court's denial of Zenk's motion to dismiss this claim.

## VI. Claim 7: Conspiracy Under 42 U.S.C. § 1985

Plaintiffs' final claim is that Defendants conspired to deprive them of their rights in violation of 42 U.S.C. § 1985(3).

**A. Applicable Legal Standard**

A conspiracy claim under Section 1985(3) has four elements: "(1) a conspiracy, (2) for the purpose of depriving any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws, (3) an act in furtherance of the conspiracy, and (4) whereby a person is injured in his person or property or deprived of a right or privilege of a citizen." *Hasty*, 490 F.3d at 176.[45] In addition, this claim requires that "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971); *accord Reynolds v. Barrett*, 685 F.3d 193, 201–02 (2d Cir. 2012).

**B. The Sufficiency of the Allegations**

In this case, the MDC Plaintiffs have sufficiently alleged that Ashcroft, Mueller, and Ziglar met regularly and eventually agreed to subject the detainees to the challenged conditions of confinement by merging, and complying with the

[45] Section 1985(3) of Title 42 of the United States Code provides, in pertinent part, that:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

merger of, the New York List. The MDC Plaintiffs have also plausibly alleged that the DOJ Defendants' actions with respect to the New York List merger were based on the discriminatory animus required for a Section 1985(3) conspiracy claim, as we conclude above in our analysis of the equal protection claim. With respect to Hasty and Sherman, their joint approval of the false document without performing the requisite individualized assessment supports the reasonable inference that these two Defendants came to an agreement to and did subject Plaintiffs to harsh conditions of confinement based on the discriminatory animus required by Section 1985(3).

Plaintiffs also allege an agreement, albeit not an explicit one, among the DOJ Defendants and Hasty and Sherman to effectuate the harsh conditions of confinement with discriminatory intent. Such a tacit agreement can suffice under Section 1985(3). *See Webb v. Goord*, 340 F.3d 105, 110–11 (2d Cir. 2003). The Complaint asserts that the conditions of confinement at the MDC "were formulated in consultation with the FBI." Compl. ¶ 65. In addition, Hasty ordered, and Hasty and Sherman approved and implemented, the conditions of confinement "[t]o carry out Ashcroft, Mueller[,] and Ziglar's unwritten policy to subject the 9/11 detainees to harsh treatment." *Id.* ¶ 75; *see also id.* ¶ 68. The

foregoing allegations are sufficient to support the reasonable inference that the DOJ Defendants, Hasty, and Sherman shared such a tacit understanding about carrying out the unlawful conduct with respect to the MDC Plaintiffs' detention.

Accordingly, the MDC Plaintiffs' allegations state a plausible claim for a Section 1985(3) conspiracy against Ashcroft, Mueller, Ziglar, Hasty, and Sherman.

**C. The Intracorporate Conspiracy Doctrine**

The MDC Defendants argue that they are legally incapable of conspiring with each other, and with the DOJ Defendants, because they are all part of the same governmental entity—the DOJ. In *Girard v. 94th Street & Fifth Avenue Corp.*, 530 F.2d 66, 70–72 (2d Cir. 1976), we recognized that the defendants—officers and directors of a single corporation, and the corporation itself—could not legally conspire with one another in violation of Section 1985(3). We reached that conclusion because the defendants formed a "single business entity with a managerial policy implemented by the one governing board." *Id.* at 71. Thus, the defendants could not satisfy the statutory requirement of a conspiracy between two or more persons. *Id.* We also noted, however, that where various entities in a single institution have "disparate responsibilities and functions," a

conspiracy claim could lie because the actions of those entities would not be "actions of only one policymaking body." *Id.*

Assuming that Defendants can ultimately invoke the intracorporate conspiracy doctrine in this case, at this stage of the litigation, we cannot conclude that Ashcroft, Mueller, Ziglar, Hasty, and Sherman acted as members of a single policymaking entity for purposes of the MDC Plaintiffs' Section 1985(3) conspiracy claim. According to the Complaint, the former Attorney General, the former Director of the FBI, the former Commissioner of the INS, and the former Warden and Associate Warden at the MDC had varied responsibilities and functions that distinguish them from the single corporate entity in *Girard*. Although Hasty and Sherman may have acted, at least in part, to implement the DOJ Defendants' policy, it is also the case that Hasty and Sherman themselves established policies at the MDC. Thus, factual questions about how disparate or distinct Defendants' functions were, and how policy was created by the various Defendants, preclude us from deciding as a matter of law that Defendants resemble the single policymaking body of a corporation.[46]

[46] We note that the BOP and, therefore, the MDC, are subject to the supervision of the Attorney General. *See* 18 U.S.C. § 4041. We have also found one unpublished district court decision that concludes that the Attorney General and employees of a BOP facility

**D. Qualified Immunity**

The DOJ Defendants, Hasty, and Sherman are not entitled to qualified immunity on this claim. First, the MDC Plaintiffs have plausibly alleged a Section 1985(3) conspiracy claim against these Defendants. In addition, as we concluded in *Hasty*, in the wake of the 9/11 attacks, "even without a definitive ruling from this Court on the application of section 1985(3) to federal officials, 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." 490 F.3d at 177. In that case, we denied the defendants qualified immunity on the Section 1985(3) claim. *See id.* Given the sufficiency of the allegations in this case, our qualified immunity decision in *Hasty* controls here.

Accordingly, we reverse the district court's dismissal of the Section 1985(3) claim against the DOJ Defendants and affirm the denial of Hasty and Sherman's motions to dismiss this claim. Because the MDC Plaintiffs fail to adequately

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cannot conspire together under Section 1985. *See Chesser v. Walton*, No. 12-cv-01198-JPG, 2013 WL 1962285, at *3 (S.D. Ill. May 10, 2013). However, for the reasons stated above, neither this statutory provision nor district court case satisfy us that Defendants here were sufficiently similar to the members of a single corporate policymaking body such that the intracorporate conspiracy doctrine should apply.

plead that Zenk acted with discriminatory animus, we reverse the denial of Zenk's motion to dismiss the conspiracy claim. This claim is also dismissed with respect to the Passaic Plaintiffs, as they fail to adequately plead that Defendants acted with the requisite discriminatory animus.

## VII. Final Thoughts

If there is one guiding principle to our nation it is the rule of law. It protects the unpopular view, it restrains fear-based responses in times of trouble, and it sanctifies individual liberty regardless of wealth, faith, or color. The Constitution defines the limits of the Defendants' authority; detaining individuals as if they were terrorists, in the most restrictive conditions of confinement available, simply because these individuals were, or appeared to be, Arab or Muslim exceeds those limits. It might well be that national security concerns motivated the Defendants to take action, but that is of little solace to those who felt the brunt of that decision. The suffering endured by those who were imprisoned merely because they were caught up in the hysteria of the days immediately following 9/11 is not without a remedy.

Holding individuals in solitary confinement twenty-three hours a day with regular strip searches because their perceived faith or race placed them in the

group targeted for recruitment by al Qaeda violated the detainees' constitutional rights. To use such a broad and general basis for such severe confinement without any further particularization of a reason to suspect an individual's connection to terrorist activities requires certain assumptions about the "targeted group" not offered by Defendants nor supported in the record. It assumes that members of the group were already allied with or would be easily converted to the terrorist cause, until proven otherwise. Why else would no further particularization of a connection to terrorism be required? Perceived membership in the "targeted group" was seemingly enough to justify extended confinement in the most restrictive conditions available.

Discovery may show that the Defendants—the DOJ Defendants, in particular—are not personally responsible for detaining Plaintiffs in these conditions. But we simply cannot conclude at this stage that concern for the safety of our nation justified the violation of the constitutional rights on which this nation was built. The question at this stage of the litigation is whether the MDC Plaintiffs have plausibly pleaded that the Defendants exceeded the bounds of the Constitution in the wake of 9/11. We believe that they have.

## CONCLUSION

For the foregoing reasons, we affirm in part and reverse in part the district court's decision on Defendants Rule 12(b)(6) motions. More specifically, we conclude that: (1) the MDC Plaintiffs have plausibly alleged a substantive due process claim against the DOJ Defendants, against Hasty with regard to both official and unofficial conditions, and against Sherman with regard to official conditions only, and these Defendants are not entitled to qualified immunity on this claim; (2) the MDC Plaintiffs have plausibly alleged an equal protection claim against the DOJ Defendants, Hasty, and Sherman, and these Defendants are not entitled to qualified immunity on this claim; (3) the free exercise claim is dismissed as to all Defendants; (4) the MDC Plaintiffs have plausibly alleged their Fourth Amendment strip search claim against Hasty and Sherman, and these Defendants are not entitled to qualified immunity on this claim; (5) the MDC Plaintiffs have plausibly alleged the Section 1985(3) conspiracy claim against the DOJ Defendants, Hasty, and Sherman, and these Defendants are not entitled to qualified immunity on this claim; and (6) the MDC Plaintiffs have not plausibly alleged any claims against Zenk. We affirm the dismissal of the claims brought by the Passaic Plaintiffs.

The Clerk of the Court is directed to enter an order consistent with these conclusions, AFFIRMING in part and REVERSING in part, and REMANDING the matter to the district court for further proceedings consistent with this opinion.

**United States Court of Appeals for the Second Circuit**
**Thurgood Marshall U.S. Courthouse**
**40 Foley Square**
**New York, NY 10007**

**ROBERT A. KATZMANN**
**CHIEF JUDGE**

**CATHERINE O'HAGAN WOLFE**
**CLERK OF COURT**

Date: June 17, 2015
Docket #: 13-981cv
Short Title: Turkmen v. Ashcroft

DC Docket #: 02-cv-2307
DC Court: EDNY (BROOKLYN)
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DC Judge: Gold
DC Judge: Gleeson

## BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit**
**Thurgood Marshall U.S. Courthouse**
**40 Foley Square**
**New York, NY 10007**

**ROBERT A. KATZMANN**
**CHIEF JUDGE**

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DC Judge: Gold
DC Judge: Gleeson

## VERIFIED ITEMIZED BILL OF COSTS

Counsel for

_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

_____

and in favor of

_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____ ) _____

Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____ ) _____

**(VERIFICATION HERE)**

_____
Signature