06-3745-cv(L)

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiff–Appellee–Cross-Appellants,

v.

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

Defendant–Appellant–Cross-Appellees,

UNITED STATES OF AMERICA,

Defendant–Cross-Appellee,

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

Defendants.

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

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Plaintiffs allege that they were rounded up and detained on the basis of their race, ethnicity, and religion, and that Defendants then delayed their removal in order to keep them detained so that they could be investigated for criminal law enforcement purposes. These allegations state violations of fundamental and well-established rights: freedom from racial and religious discrimination; and from deprivation of liberty without cause, evidence, or procedural protection. As this Court recently recognized, while some emergency actions are permitted in emergency situations, rights need "not vary with surrounding circumstances . . . [t]he strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times." *Iqbal v. Hasty*, 2007 U.S. App. LEXIS 13911, *41 (2d Cir. June 14, 2007).

The rights upon which Plaintiffs rely were clearly established prior to 9/11 and "they remain clearly established even in the aftermath of that horrific event." *Id.* at *42. Plaintiffs have adequately alleged each claim now before this Court, and under this Court's application of the "plausibility standard" recently

enunciated by the Supreme Court in *Bell Atlantic Corp. v. Twombly,* 127 S.Ct. 1955 (2007), they must be given the opportunity to advance those claims by discovery, and trial.

ARGUMENT

I. Defendants Violated Plaintiffs' Substantive Due Process Rights.

Plaintiffs allege that they were rounded up after September 11 without any evidence tying them to terrorism, and detained for sustained periods, not in order to secure their removal—the only legitimate purpose for immigration detention—but to incapacitate them while the FBI investigated to determine *whether* they were connected to terrorism, so that they might then be criminally charged. JA 109 ¶ 65, 110 ¶ 68, 112-13 ¶ 74-75. This "hold-until-cleared" policy was not authorized by law, and violated substantive due process.

A. Plaintiffs' Detention Was Not Authorized by the INA.

In arguing that the Immigration and Naturalization Act ("INA") permitted Plaintiffs' detention for a criminal investigation, Defendants ignore the definitive interpretation of that statute in *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001), holding that detention is not "pursuant to statutory authority" if it lasts

"beyond[] a period reasonably necessary to secure removal." As this Court too has held, "it is a fundamental principle of our immigration law that the attorney general must base his discretionary decisions only on the 'legitimate concerns' of the relevant statutory provision." *Doherty* v. *United States Dep't of Justice*, 908 F.2d 1108, 1117 (2d Cir. 1990), *rev'd on other grounds sub nomine, INS v. Doherty,* 502 U.S. 314 (1992); *cf. Rubinstein v. Brownell*, 206 F.2d 449, 456 (D.C. Cir. 1953) (holding that a non-citizen may not be detained under discretionary detention provision for the purpose of questioning by the Attorney General or because the non-citizen is unpopular).

The INS General Counsel was therefore plainly right when he concluded in 2001 that "the INS has no authority to continue holding [a 9/11] detainee if removal could otherwise be effectuated," because continued detention at that point would not be "related to removal." JA 358.

Defendants try to support their reading of the INA by interpreting various provisions to permit detention for purposes other than removal. As all of these provisions were in existence when *Zadvydas* was decided, they cannot justify departing from

Zadvydas's holding. In any event, they do not support Defendants' position. First, the Attorney General's authority to remove an alien to another country if the alien's choice is "prejudicial to the United States," 8 U.S.C. § 1231(b)(2)(C)(iv), is irrelevant for two reasons: (1) the provision does not provide any additional *detention* authority, and (2) there is no allegation that this was an issue here.[1]

Similarly, Congress's replacement in 1996 of a generalized duty of dispatch with a specific mandate that the Attorney General "*shall* remove the alien from the United States within a period of 90 days," 8 U.S.C. § 1231(a)(1)(A) (emphasis added), does not in any way undermine the Supreme Court's determination that immigration detention must not be divorced from the purpose of "securing removal." Nor does § 1231(a)(6) grant any general power to delay removal; it merely allows for continued detention of certain non-citizens who cannot be removed. *See*, *Thai v. Ashcroft*, 366 F.3d 790, 793 (9th Cir. 2004) ("In situations where removal cannot be accomplished within 90 days, detention beyond the removal period is authorized by 1231(a)(6).").

[1] The provision probably had no application to Plaintiffs in any event, since "prejudice" is not a ground for disregarding an alien's choice of the country where he is a citizen; *see* § 1231(b)(2)(D).

Defendants imply that national security justified their detention of Plaintiffs for investigation, but Congress explicitly provides a unique procedure for such circumstances in carefully circumscribed form: if the Attorney General or the Deputy Attorney General certifies that a non-citizen "endangers the national security of the United States," detention is permitted for seven days only, after which either criminal or removal proceedings must begin, or the non-citizen be released. 8 U.S.C. § 1226a(a)(3)-(5). Defendants did not invoke this authority, presumably because, absent any evidence of terrorist involvement, Plaintiffs could not be detained under that provision. The provision would be superfluous if the INA already allowed the indefinite detention for investigation of anyone ordered removed. *Cf. Al-Marri v. Wright*, 2007 U.S. App. LEXIS 13642, *80-*81 (4th Cir. June 11, 2007).

B. The Criminal Investigation Plaintiffs Complain of Was Not a Matter of Immigration Law Enforcement.

Defendants seek to recast their criminal investigation as an immigration matter that authorized delaying removal (and continuing detention) under the INA. But their own brief belies this, as they acknowledge that Plaintiffs were arrested in a "law-

enforcement investigation" (U.S. Br. at 30), conducted to "identify and *bring to justice* those responsible for the [9/11] atrocities" (*id.* at 32) (emphasis added). Elsewhere, Defendants assert that Plaintiffs were investigated for the altogether different purpose of sharing information about any terrorist ties with the receiving country upon deportation. *Id.* at 20, 34. This assumption that non-citizens found to have some connection to the 9/11 terrorist attacks would nevertheless be deported is implausible on its face and not supported by anything in the Complaint; it is thus irrelevant on this motion to dismiss.

The Complaint alleges that Defendants' investigation of Plaintiffs—conducted, after all, by the FBI—was a criminal investigation (JA 94 ¶ 4, 112-13 ¶ 74-75; *see also* OIG Rep., JA 341, 358, 367), and the present motion must be decided on this basis. The express purpose of the hold-until-cleared policy was to remove only when aliens were cleared—in which case there would be nothing to tell the receiving country. An individual who is not cleared will not be removed—but will instead be "held" and brought "to justice."

The only authority Defendants cite for the proposition that an investigation into criminal activity may justify a delay in removal is an opinion of the Office of Legal Counsel (OLC) issued in February, 2003.[2] US Br. at 18-19. But that opinion does not address the circumstances presented here; rather, it assumes an investigation undertaken to notify foreign officials of relevant information upon a non-citizens' deportation (OLC Op. at 9-10)—an assumption which, as we have noted, cannot be made on this motion to dismiss.

The OLC opinion is also inapposite because it examines whether removal could be delayed in the case of a foreign national who had "significant connections to a known al Qaeda operative who was seized in Afghanistan and who is now held at the naval base at Guantanamo Bay," and where there was "a substantial possibility that the alien himself was a sleeper agent for al Qaeda." OLC Op. at *2. Whatever the proper resolution of that question, it is not presented here. Plaintiffs were arrested "based on vague suspicions rooted in racial, religious, ethnic, and/or national origin

[2] Office of Legal Counsel, U.S. Dep't of Justice, Limitations on the Detention Authority of the Immigration and Naturalization Service (Feb. 20, 2003), 2003 WL 21269067 (O.L.C.).

stereotypes rather than in hard facts." JA 109 ¶ 65; *see also* JA 115 ¶ 80; JA 281-83.[3]

Fundamentally, Defendants seek to justify detention for investigation, without individualized suspicion. As they put it, they wanted to know "*whether*" Plaintiffs had any terrorist connections (U.S. Br. at 35; emphasis added). But to interpret the immigration law to permit detention simply for the purpose of determining *whether* a detainee is a criminal—without any probable cause and without any need to detain to secure removal—is to permit freestanding investigative detention in violation of the INA as construed by the Supreme Court, and of due process.

While investigation can take place during detention, there must be an independent and legitimate legal purpose for the

[3] Even as to the potential al Qaeda sleeper, the OLC's conclusion rests on an impermissible sleight of hand. The opinion acknowledges that under *Zadvydas,* "detention under the INA must be related to the purpose for which detention is authorized—securing the alien's removal." OLC Op. at *4. But instead of adhering to that holding, the OLC memo *expands* the permissible purposes for detention to any "purposes related to the proper implementation of the immigration laws." *Id.* at *1. The latter are infinitely broader than the former. Under the OLC's expansive and unprecedented theory, all immigration decisions potentially implicate national security and foreign policy, and therefore any investigation, no matter how unfounded, that might possibly touch on such concerns would permit continuing an alien's detention, even without any obstacles to removal or evidence of dangerousness.

detention *other than* investigation. Thus, criminal suspects can be investigated while they are detained awaiting trial—but they can be detained awaiting trial *only* if there is already probable cause that they have committed a crime, and evidence that they pose a risk of flight or a danger to the community. *United States v. Salerno*, 481 U.S. 739, 750 (1984); *cf. County of Riverside v. McLaughlin,* 500 U.S. 44, 56 (1991) (delaying an arrestee's probable cause hearing "for the purpose of gathering additional evidence to justify the arrest" is "unreasonable" and violates due process). Once criminal charges are resolved, arrestees can no longer be detained for investigation.

The same principle applies to immigration detention, as *Zadvydas* confirms. Once civil immigration proceedings are resolved and removal can be effectuated, the "period reasonably necessary to secure removal" has ended, 533 U.S. at 699, and detention must end with it.

In either the criminal system or the immigration system, due process demands that detention be narrowly tailored to legitimate legal purposes, and detention for the purpose of investigation has never been deemed a legitimate purpose. Because Defendants did not detain Plaintiffs "to secure removal," but instead deferred

their removal to secure their detention, their detention was not authorized by statute, and violated due process.

C. Detention Without Authorization "Shocks the Conscience" and Violates Due Process.

Defendants argue that even if they detained Plaintiffs without statutory authority, the detentions did not violate due process because they did not "shock the conscience." U.S. Br. at 21-23. This is a surprising claim. While not every statutory infraction violates due process, it is clearly established that *detention* without legal authority does.[4] Indeed, it was precisely a concern about violating substantive due process that led the Supreme Court in *Zadvydas* to restrict detention to the "period reasonably necessary to secure removal." 533 U.S. at 699. Locking a prisoner up without legal authority and without a legitimate legal purpose is the paradigmatic "exercise of power without any reasonable justification in the service of a legitimate governmental objective," and therefore violates substantive due process. *County*

[4] The Supreme Court has routinely adjudicated substantive due process challenges to civil detention schemes without even using the phrase "shocks the conscience." *See, e.g., Demore v. Kim,* 538 U.S. 510 (2003); *Kansas v. Crane*, 534 U.S. 407 (2002); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *see also Zadvydas v. Davis,* 533 U.S. 678 (2001).

of Sacramento v. Lewis 523 U.S. 833, 846 (1998); *see also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (due process at its core protects against detention based on "arbitrary government action").

Even before *Zadvydas*, this Court and others had long recognized that extending immigration detention where not necessary to secure removal could violate due process. *See Doherty v. Thornburgh*, 943 F.2d 204, 211 (2d Cir. 1991) ("were Doherty's lengthy detention largely the result of a government strategy intended to delay, we might find a due process violation"); *United States ex rel. Ross v. Wallis*, 279 F. 401, 404 (2d Cir. 1922) ("any further or other detention under pretense of awaiting opportunity for deportation would amount, and will amount, to an unlawful imprisonment"); *Nwankwo v. Reno*, 819 F. Supp. 1186, 1188 (E.D.N.Y. 1993) (same); *Doherty v. Thornburgh*, 750 F. Supp. 131, 137 (S.D.N.Y. 1990) ("continued [immigration] detention becomes punitive and unconstitutional . . . [where] the Government was not continuing to make a reasonable, good faith effort to deport").[5]

[5] Defendants' cases do not hold otherwise. *Lombardi v. Whitman*, 485 F.3d 73 (2d Cir. 2007), did not involve detention, but rather a claim that inaccurate government press releases about air quality at the site of the 9/11 World Trade Center attacks facilitated harms caused by third parties. *Wilkinson v. Austin*, 545 U.S. 209, 224

D. The Detentions of Plaintiffs Turkmen, Ebrahim, H. Ibrahim, and Saffi Violated the INA and Due Process for Independent Reasons.

For the reasons stated above, all of Plaintiffs' detentions beyond the point at which they could be removed violated the INA and due process. But several Plaintiffs' detentions were also unlawful and unconstitutional for additional reasons specific to them. Three Plaintiffs were detained for lengthy periods after they were cleared of any terrorist connections. Ebrahim and H. Ibrahim were detained for nearly six months after they were cleared, and Saffi was detained for four months after he was cleared. JA 152 ¶ 190; 156 ¶ 199; 145-46 ¶¶ 163, 166. Defendants advance no rationale whatsoever for detaining individuals who can be removed and have been cleared. Thus, even under Defendants' theory, these detentions were wholly arbitrary, statutorily unauthorized, and in violation of due process.

(2005), examined *procedural* rather than substantive due process. And *Russo v. City of Bridgeport*, 479 F.3d 196, 205-10 (2d Cir. 2007), supports Plaintiffs' claim, holding that continued detention of an individual arrested on a valid warrant could be unconstitutional if defendants intentionally extended the plaintiff's detention beyond that legally authorized. That is precisely what Plaintiffs allege here.

In addition, Plaintiffs Turkmen and Ebrahim do not fit any of the statutory criteria set forth in 8 U.S.C. § 1231(a)(6) for detention beyond the statutory 90-day removal period.[6] Although an immigration judge upheld Ebrahim's detention while removal proceedings were pending on flight risk grounds, that cannot be a basis for continued detention where removal could be effectuated, and, as here, Plaintiffs were actively seeking to be removed. Moreover, Turkmen was never determined to be a flight risk in any proceeding (*contra* U.S. Br. at 23, citing JA 151-52, which does not mention Turkmen). As explained in section IV, below, *Heck v. Humphrey*, 512 U.S. 477 (1994), has no application here, as Plaintiffs' challenge the lack, rather than the result, of a prior hearing.

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[6] Plaintiffs have not waived this claim. The issue of whether Plaintiffs' detention was statutorily authorized is raised in the Complaint (JA 109-110 ¶ 67), and the specific defect argued here turns entirely on an issue of law, which is before this Court *de novo* in any event. "Arguments made on appeal need not be identical to those made below . . . if the elements of the claim were set forth and additional findings of fact are not required." *Vintero Corp. v. Corporacion Venezolano de Fomento*, 675 F.2d 513, 515 (2d Cir. 1982). Waiver is in any case "prudential, not jurisdictional," *Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (2d Cir. 2004), and is disregarded when the argument presents a question of law with no need for additional fact-finding. *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994).

II. Defendants Violated Plaintiffs' Fourth Amendment Rights.

When detention is conducted for the sole or primary purpose of criminal investigation, immigration law does not permit evasion of the Fourth Amendment's bedrock requirement of probable cause. Plaintiffs allege exactly such detention, not for the legitimate administrative purpose of accomplishing their removal, but to hold them for investigation while their removal was affirmatively and purposefully *delayed*.

Defendants' claim that the purpose of detention is irrelevant to the Fourth Amendment relies on a single sentence in *United States v. Knights*, 534 U.S. 112, 122 (2001), which noted in dictum that the Court has not looked to purpose except in "some special needs and administrative search cases, *see Indianapolis v. Edmond*, 531 U.S. 32, 45 (2000)." Defendants' argument here depends on silence: the absence of an explicit reference to administrative *seizure* cases. But if Defendants are suggesting that administrative *seizures* are analytically distinct for these purposes from administrative *searches*, they are wrong: *Indianapolis v. Edmond*, the authority cited for this dictum, was itself a seizure case in which the decisive factor in the Court's analysis was the

checkpoint's criminal law enforcement purpose. 531 U.S. at 46-47 (also citing three other seizure cases). And if Defendants are suggesting that immigration detention is not a form of administrative or special needs seizure, they are also wrong, for no other theory could justify detention without probable cause.

Defendants' other cases are no more helpful. They cite *Graham v. Connor*, 490 U.S. 386, 396-97 (1989) for the proposition that a court may not consider subjective motivation in determining the reasonableness of a seizure, but *Graham* involved the entirely unrelated question of determining what level of force is excessive. *Whren v. United States*, 517 U.S. 806 (1996), and *Devenpeck v. Alford*, 543 U.S. 146 (2004), say only that subjective motivation is irrelevant when there is probable cause of criminal activity.

As in their due process argument, Defendants seek to contradict Plaintiffs' factual allegation, insisting that they had a "legitimate and . . . unassailable purpose" inextricably linked to immigration: "completing a terrorism investigation before removing an illegal alien who potentially had connections to terrorism." U.S. Br. at 29. As we explained in Section I. B, this argument cannot be

made on a motion to dismiss; it is flatly contradicted by the Complaint and by Defendants' themselves. *See* U.S. Br. at 30, 32.

Defendants also suggest that Plaintiffs' detention was permissible because it was "reasonable," even if contrary to immigration law. *Id.* at 26. But to win dismissal on this basis, Defendants must show that their intrusion on Plaintiffs' liberty, and not just the purpose that motivated the intrusion, was reasonable—on the pleadings, and as a matter of law.

A "search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *Edmond*, 531 U.S. at 37. The Court has recognized only limited and "closely guarded" circumstances exempt from this rule. *Chandler v. Miller*, 520 U.S. 305, 309 (1997). None are present here. Defendants lacked *any* quantum of evidence that Plaintiffs were terrorists. JA 109 ¶ 65, 115 ¶ 80. Rather, they singled out Plaintiffs as Muslim non-citizens of Arab or South Asian descent. JA 113-14 ¶ 76.

When "the balance of interest precludes insistence upon some quantum of individualized suspicion other safeguards are generally relied upon to assure that the individual's reasonable

expectation of privacy is not subject to the discretion of the official in the field." *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979) (internal quotation marks omitted). Here, no safeguards existed; the only winnowing of general detention authority came from Defendants' discriminatory plan. JA 109 ¶ 65, 115 ¶ 80.

Defendants claim a need to investigate "potential terrorists," but fail to explain how a general need to fight terrorism justified indefinite detention of these Plaintiffs, without any individualized basis to suspect terrorist ties.

Even if Plaintiffs' detentions were authorized by statute, the Fourth Amendment independently requires detention to be objectively reasonable in the context of the administrative scheme under which it is authorized. *See* Plaintiffs' Opening Br. at 49-52; *New York v. Burger,* 482 U.S. 691, 711 (1987). Defendants fail to explain how delaying removal in order to detain Plaintiffs advanced the only legitimate purpose of immigration detention—to secure removal.

Defendants' remaining arguments require little response. Plaintiffs' Fourth and Fifth Amendment claims are independent (*contra* U.S. Br. at 25), and while Plaintiffs have expanded their

analysis since briefing below, they raise no new claims or facts and have thus waived none of their arguments here. *See* note 6 above. Second, *Zadvydas* does not decide Plaintiffs' Fourth Amendment claims, for there was no allegation there of detention motivated by a criminal investigative goal (*contra* U.S. Br. at 25-26).

Moreover, Plaintiffs' Fourth Amendment rights were clearly established in 2001. In their opening brief, Plaintiffs demonstrated that the Fourth Amendment applies to post-arrest detention, *see,* Plaintiffs' Opening Br. at 52-53, citing *Lauro v. Charles*, 219 F.3d 202 (2d Cir. 2000); *United States v. Birrell*, 470 F.2d 113, 117 (2d Cir. 1972), and Defendants make no effort to distinguish either of these cases. *See also Russo v. City of Bridgeport*, 479 F.3d 196, 209 (2d Cir. 2007). It was also eminently clear in 2001 that Defendants could not lawfully rely on an immigration detention to justify a seizure conducted for the sole purpose of criminal investigation. *See Edmond*, 531 U.S. at 46; *Abel v. United States*, 362 U.S. 217, 229-30 (1960); and *Burger*, 482 U.S. at 702.

III. Defendants Denied Plaintiffs Equal Protection of the Law.

This Court's recent decision in *Iqbal v. Hasty*, 2007 U.S. App. LEXIS 13911, *85-*92 (2d Cir. June 14, 2007), requires the restoration of Plaintiffs' equal protection claims. In *Iqbal*, as here, Arab and Muslim plaintiffs detained on immigration charges after 9/11 alleged that they were classified as "of interest" on the basis of their race and religion, without evidence of terrorist ties. This Court ruled that this allegation was sufficient to survive a motion to dismiss; that it stated a violation of clearly established constitutional law; that *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471 (1999), was no bar to plaintiff's claim; and that Ashcroft and Mueller could be held personally responsible given their oversight of the detention policy. It also specifically held that among the rights which "do not vary with surrounding circumstances" is "the right not to be subjected to ethnic or religious discrimination." *Iqbal* at *41.

The same conclusions follow here, for Plaintiffs' allegations are based on the same circumstances as Mr. Iqbal's. While Mr. Iqbal did not challenge the hold-until-cleared policy, that is not a material difference. *Brown v. City of Oneonta*, 221 F.3d 329 (2d

Cir. 2000), relied on here for the assertion that Defendants were not required to "ignor[e] information known about the assailants" (U.S. Br. at 31), provides no defense. In *Brown*, the police sought a specific assailant identified by the victim as a young, black male, 221 F.3d at 334, and based on this first-hand account they stopped non-white persons for questioning. Finding that discriminatory intent was not pleaded, and holding that the police were entitled to "rely[] in their search on the victim's description of the perpetrator," 221 F.3d at 338, this Court dismissed the plaintiffs' equal protection claims.

But this case is not *Brown v. Oneonta*. Defendants here were not seeking anyone in particular, and they had neither a description nor any other individualized information to guide them. For *Brown* to resemble this case, we would need to modify it. If we imagine that in *Brown* the assailant had been identified and was no longer being sought; if the authorities supposed that the assailant had associates who helped him, or might themselves commit similar assaults; if they assumed that such people (if they existed) were also young, black males; if it appeared that racial animus lay behind this assumption; if the authorities then arrested all the

young, black males they could find and held them in jail until investigators could determine whether they were connected with the assailant—if all that had happened, and this Court had approved it, then Defendants would have some authority for what they did to Plaintiffs.

As it is, however, *Brown* underscores Defendants' improprieties here.

Defendants also assert (U.S. Br. at 33) that discrimination based on race or religion does not require strict scrutiny "in the immigration context;" but none of the cases they cite support this thesis, particularly as applied to this case. *Kleindienst v. Mandel*, 408 U.S. 753 (1972), concerned a First Amendment claim; there was no issue of race, or religion, or indeed of equal protection, and neither an arrest nor a criminal investigation. *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), involved special treatment (though not detention or investigation) of Iranians during the hostage crisis based on *nationality*, not race, religion, or national origin. While immigration law inherently draws distinctions based on nationality, discrimination "based on race, ethnicity, or religion" is a different matter. *Iqbal*, at *88-89. And *Bertrand v. Sava*, 684 F.2d 204 (2d

Cir. 1982), as this Court has subsequently explained, "involved questions concerning the admittance or exclusion of aliens who had never been lawfully admitted to the United States," *Etuk v. Slattery*, 936 F.2d 1433, 1443 (2d Cir. 1991), and were treated as having limited constitutional rights for that reason.

Defendants' discussion of *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), U.S. Br. at 33-34, is disposed of by *Iqbal*, at *88-89, and the points made in our opening brief, at 56-58. Defendants' challenge to Plaintiffs' pleading of equal protection (U.S. Br. at 36) is likewise disposed of by *Iqbal*, at *89-90, and is also contradicted by Defendants' own response to this claim. On the one hand, Defendants say that prudence required them to use race and religion to classify Plaintiffs (U.S. Br. at 31-32, 36-37); but then they complain that Plaintiffs have failed to allege that Defendants actually did what prudence demanded (*id.* at 36). These are not alternative defenses. Defendants cannot offer a detailed defense against Plaintiffs' charge of discrimination, and say at the same time that Plaintiffs have not explained that charge. In the same way, Defendants Ashcroft and Mueller's challenge to the allegations of their personal involvement is disposed of both by

Iqbal, at *91-92, and by their own claim that the discrimination alleged here was actually part of the fundamental policy which they claim was the rational response to the events of September 11. U.S. Br. at 31-32, 36-37.

IV. Defendants Violated Plaintiffs' Procedural Due Process Rights.

Defendants' claim (U.S. Br. at 38) that Plaintiffs have waived a challenge based on 8 C.F.R. § 241.1 is specious; Plaintiffs specifically alleged that they were denied the reviews required by that regulation, JA 117-18 ¶ 84, JA 373, and argued below that Defendants denied them procedural due process by failing to provide any hearing or "fair opportunity to contest their detention." District Court Brief [Docket No. 206] at 43. This remains their claim on appeal. Defendants' waiver argument is based only on the fact that Plaintiffs did not cite 8 C.F.R. § 241.4 in their briefing before the district court. However, as the claim was fairly presented to the district court, and is supported by the allegations in the complaint, it has not been waived. *See* note 6 above.

On the merits, Defendants ignore the well established balancing test for procedural due process found in *Mathews v.*

Eldridge, 424 U.S. 319 (1976), arguing instead that Plaintiffs had no right to procedural due process because *Zadvydas* permitted their detention. U.S. Br. at 39. This confuses substantive and procedural due process; because the *Zadyvdas* petitioners received post-order custody reviews, 533 U.S. at 692, that case addresses only substantive due process.

If Defendants are correct, then their belief that Plaintiffs were lawfully detained dispenses entirely with the regulation Congress put in place to ensure that their beliefs were accurate. But the fact that detention might be lawful does not make process unnecessary; the purpose of procedural due process is to provide a check against government officials like Defendants exercising unfettered discretion to determine whether detention is authorized. *See e.g., Chi Thon Ngo v. INS*, 192 F.3d 390, 398 (3d Cir. 1999).

Defendants' disregard for Plaintiffs' right to procedural due process is highlighted by their argument that any process "would have been an empty formality," because Plaintiffs were held pending FBI clearance, and "the INS [is not required] to double

check the FBI."[7] U.S. Br. at 39. But that is exactly what the post-order custody reviews require—an independent evaluation of the risk the detainee poses at the time of the review. Indeed, if the reviews were an "empty formality," that in itself would violate due process, like the "rubber stamps denials" in *Chi Thon Ngo*. 192 F.3d at 398.

While Defendants' argument fails under *Mathews*, it does belie their perfunctory claim of lack of personal involvement, as Defendants acknowledge that FBI clearance alone determined Plaintiffs' release, and do not dispute their responsibility for creation of the hold-until-cleared policy.

Finally, *Heck v. Humphrey*, 512 U.S. 477 (1994), has no application here (*contra* U.S. Br. at 40), because this is not a collateral attack on a prior proceeding, 512 U.S. at 484-85, but a challenge to the denial of any hearing at all.

[7] Defendants' allegation that "information [about the 9/11 detainees] continued to pour in" after they were cleared of connection to terrorism (U.S. Br. at 40) is unsupported by the record.

V. Plaintiffs Have Stated a Claim for False Imprisonment Under New York Law and the Federal Tort Claims Act.

Defendants misunderstand *Dawoud v. United States*, 1993 U.S. Dist. LEXIS 2682 (S.D.N.Y. March 8, 1993), and Plaintiffs' FTCA claim for false imprisonment based on it. As explained in Plaintiffs' opening brief, Plaintiffs' detention beyond the period reasonably necessary to secure their removal was not authorized by immigration law, and consequently was tortious false imprisonment. But if detention until clearance was lawful, then the Governments' failure to release Plaintiffs promptly after clearance was "attributable to negligence and not otherwise privileged," and tortious for that reason. *Id.* at *7-8. Defendants' argument that this additional detention was not negligent but rather based on the Government's need to address sensitive national security considerations (U.S. Br. at 45), raises factual issues that cannot be decided on this motion to dismiss.

This claim has not been waived, as the relevant facts and legal argument were fairly presented below.[8] *See* note 6 above.

[8] JA 145-46 ¶¶ 163, 166; 152 ¶ 190; 156 ¶ 199. Plaintiffs argued negligent delay in clearance as a separate tort in their brief below opposing dismissal [Docket No. 206], at 79-83, and specifically cited *Dawoud* (*id.* at 82).

Neither have Plaintiffs waived their claim of false imprisonment based on their conditions of confinement (*contra* U.S. Br. at 46); all of Plaintiffs' FTCA claims were presented to the relevant agencies, and denied by inaction. JA 200 ¶ 416.

VI. Congress Has Not Precluded A *Bivens* Remedy, Nor Do "Special Factors" Bar Such A Cause of Action.

Defendants contend that Plaintiffs' *Bivens* claims relating to their detention for non-removal purposes should fail because Congress has created "an elaborate regulatory and remedial scheme" to address administration of the federal immigration laws, and because Plaintiffs' claims raise sensitive national security concerns. U.S. Br. at 40-44. As Plaintiffs explain in their opening brief at 113-14, Defendants' argument is unavailing.

First, while the INA provides a relatively elaborate scheme for the review of challenges to *removal*, it provides no such elaborate scheme for challenges to *detention*. The only remedy for unlawful detention is a habeas petition, which is the remedy generally available for challenges to unlawful detention. Defendants cite no authority for the proposition that the mere existence of a habeas remedy is the kind of elaborate administrative

review scheme that suggests Congressional intent to preclude *Bivens* relief.

The cases Defendants cite are inapplicable because they involved complex review schemes, from which it could be inferred that the absence of a damage remedy was deliberate. Both *Miller v. U.S. Department of Agriculture Farm Services Agency, USDA*, 143 F.3d 1413 (11th Cir. 1998) and *Moore v. Glickman*, 113 F.3d 988 (9th Cir. 1997), found that Congress's exclusion of Agricultural Stabilization and Conservation Service employees from certain rights under the Civil Service Reform Act was not inadvertent. Both courts found that Bivens relief was unavailable because Congress had deliberately given such employees certain employment rights and excluded them from the ones at issue. *Miller*, 43 F.3d at 1416-17; *Moore*, 113 F.3d at 992-93.

The same cannot be said here. Congress neither created a comprehensive review scheme for detention, nor deliberately excluding remedies for unconstitutional detention; it merely, by inaction, left open the default avenue of habeas corpus relief. As the district court noted, that avenue provides no relief for past unconstitutional detention. SPA 34-35. One cannot infer from the

routine availability of habeas that Congress intended to deny persons subject to unconstitutional detention any opportunity to seek relief through an action for damages.

Neither do national security and foreign policy concerns warrant barring a *Bivens* action. The Supreme Court has denied *Bivens* remedies in the military setting not because of generalized foreign policy or national security concerns, but because of the military's "unique disciplinary structure." *United States v. Stanley*, 483 U.S. 669, 683-84 (1987) (internal quotations omitted); *Chappell v. Wallace*, 462 U.S. 296 (1983). The only other cases Defendants cite are plainly inapposite on their facts. *Beattie v. Boeing Company*, 43 F.3d 559 (10th Cir. 1994), denied a *Bivens* remedy to the employee of a federal government contractor seeking recovery for denial of security clearance; *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208-09 (D.C. Cir. 1985), denied a *Bivens* remedy to Nicaraguan citizens suing for injuries allegedly caused by U.S. foreign policy supporting anti-Nicaraguan government forces.

The general presence of national security or foreign affairs concerns does not bar constitutional claims. The Supreme Court routinely reviews statutory, constitutional, and international

law challenges to government actions in wartime, including suits for damages, and has done so in cases that have raised direct challenges to executive authority. *See e.g., Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466, 466-67 (2004). If courts can review challenges by "enemy combatants" captured on the battlefield, they can surely adjudicate Plaintiffs' claims here concerning their immigration detentions in Brooklyn.

The Supreme Court has rejected the argument that national security interests immunize federal officials from personal liability for constitutional violations. In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Supreme Court ruled in an analogous setting that "'[w]here an official could be expected to know that his conduct would violate statutory or constitutional rights, he should be made to hesitate . . .' This is as true in matters of national security as in other fields of governmental action." *Id.* at 524 (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).[9]

[9] Furthermore, federal courts routinely review immigration cases, including those raising concerns about security and foreign affairs. *See, e.g., Zadvydas*, 533 U.S. at 679; *Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963) (reversing deportation of foreign national alleged to be member of a group advocating violent

As the district court noted in rejecting the "special factors" defense below, "the events of September 11, 2001 [do not] provide any cause to relax enforcement of the rights guaranteed by our Constitution." SPA 35. Defendants are free to argue on the merits that national security interests justified their incursions on Plaintiffs' constitutional rights. But such arguments are not properly made in an effort to preclude a *Bivens* claim from proceeding altogether.

VII. This Court's Decision in *Iqbal v. Hasty* Controls Several Issues Here.

Iqbal v. Hasty, 2007 U.S. App. LEXIS 13911 (2d Cir. June 14, 2007), decided after Plaintiffs' and Defendants' opening briefs were filed and discussed above in section III, also controls on other issues. Mr. Iqbal was detained at MDC at the same time and under many of the same practices and polices as Plaintiffs. *Iqbal*, at *4-*9. Defendant-Appellants Ashcroft, Mueller and Hasty were also defendant-appellants in *Iqbal*.

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overthrow of U.S. government); *Doherty v. Meese*, 808 F.2d 938 (2d Cir. 1986) (reviewing on the merits a deportation order against an alleged IRA terrorist).

Defendants in both cases asserted immunity from suit based largely on the claim that their personal involvement in the mistreatment of detainees is not adequately alleged. These arguments do not survive *Iqbal*. Following the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), this Court rejected the heightened pleading standard explicitly and implicitly urged by the *Iqbal* defendants. *Iqbal*, at *20, *34-*35. Under *Iqbal* and *Bell Atlantic,* a plaintiff must only meet a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." *Id*. at *35; *see also, Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007) (citing *Bell Atlantic*, 127 S.Ct. 1955 (2007) ("[s]pecific facts are not necessary" to satisfy Rule 8; a complaint "need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests") (internal quotation marks omitted). Plaintiffs, like Mr. Iqbal, easily meet this standard.

In *Iqbal*, the Court found adequate allegations described by Defendants here as "conclusory." *E.g.* *59-*60 (allegation that Ashcroft and Mueller "condoned" and Hasty knew of policy to hold

plaintiff under harsh conditions of confinement until cleared of a connection to terrorism suffices to defeat dismissal for lack of personal involvement); *73 (allegations that Hasty knew or should have known of mistreatment carried out by his subordinates "is at least plausible" and "requires no subsidiary facts"). Under this framework, the Court must deny all Defendants' substantially identical arguments here. *See e.g.,* Ziglar Reply Br. at 4-6 (citing as "conclusional" Plaintiffs' allegation that "INS Commissioner Ziglar . . . ordered and/or condoned the prolonged placement of these detainees in extremely restrictive confinement.")

Like Mr. Iqbal, *84-*85, Plaintiffs have alleged that Defendants interfered with their ability to practice their religion, improperly placed them in the ADMAX SHU without procedural protections, and implemented a communications blackout that interfered with their ability to access counsel. *See* JA 133-34 ¶ 45, 195 ¶ 391, 119-20 ¶ 87-88. Defendant Hasty's arguments of lack of personal involvement in each claim are barred by *Iqbal,* at *84, *60, *74-*75, as is Defendants Ashcroft and Muellers' argument on assignment to the ADMAX SHU. *Id.* at *59-*60.

Iqbal also forecloses other arguments made by Defendants. First, Defendants here argue that Plaintiffs' equal protection challenge to their conditions of confinement and harsh treatment must be dismissed due to Plaintiffs' "boilerplate" allegations of personal involvement and racial animus. U.S. Br. at 32; Hasty Br. at 44 n. 22. But these allegations suffice to state a claim, and satisfy the *Bell Atlantic* plausibility standard. *Iqbal* at *90-*92. Similarly foreclosed is Defendant Ashcroft and Mueller's defense of lack of personal jurisdiction. *Id.* at *98.

However, one *Iqbal* holding does not govern this case. In dismissing Mr. Iqbal's procedural due process challenge to placement in the ADMAX SHU, this Court relied on grounds not present here. The Court held that Mr. Iqbal—a criminal detainee—adequately alleged a liberty interest "based primarily" on BOP regulations regarding SHU placement, *id.* *58-*59, but nevertheless granted the defendants immunity because "officers of reasonable competence could [have] disagree[d]" about whether placing Mr. Iqbal in the ADMAX SHU without following the BOP mandated administrative segregation procedures violated his procedural due process rights. *Id.* at *63, *quoting Malley v. Briggs*, 475 U.S. 335,

341 (1986). The Court's conclusion was largely based on uncertainty attributable to the requirements of the regulations. *Id.* at *64-*66.

But unlike *Iqbal,* Plaintiffs' here are *civil* detainees with a liberty interest in freedom from the punitive conditions of the ADMAX based on the due process clause as well as BOP regulations. *See, Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (distinguishing a liberty interest arising from the Constitution itself, by reason of guarantees implicit in the word "liberty," from those based on state laws or policies). The due process clause requires additional procedural protections before an individual may be subjected to treatment "qualitatively different" from that which normally accompanies his status. *See, e.g., Vitek v. Jones*, 445 U.S. 480, 491-94 (1980) (state prisoner has a liberty interest in not being transferred involuntarily to a state mental hospital for treatment because it is not within the range of conditions of confinement to which a prison sentence subjects an individual); *Baxstrom v. Herold*, 383 U.S. 107, 110-11 (1966); *cf. Benjamin v. Fraser*, 264 F.3d 175, 188 (2d Cir. 2001).

Plaintiffs' classification as "high interest" detainees resulted in confinement different "in kind" from that of typical of immigration detention. *Cf. Olim v. Wakinekona*, 461 U.S. 238, 248 (1983). Subjecting civil detainees to such punishing conditions with *no* process is objectively unreasonable and a clearly established violation of procedural due process. *See, e.g., Vitek*, 445 U.S. at 494; *Benjamin*, 264 F.3d at 188.

Conclusion

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

Dated: New York, New York
June 26, 2007

Respectfully submitted,

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