UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IBRAHIM TURKMEN; ASIF-UR-REHMAN SAFI; SYED AMJAD ALI JAFFRI; YASSER EBRAHIM; HANY IBRAHIM; SHAKIR BALOCH; and AKIL SACHVEDA, on behalf of themselves and all others similarly situated,

Plaintiffs,

- against -

JOHN ASHCROFT, Attorney General of the United States; ROBERT MUELLER, Director of the Federal Bureau of Investigation; JAMES W. ZIGLAR, Commissioner of the Immigration and Naturalization Service; DENNIS HASTY, former Warden of the Metropolitan Detention Center; MICHAEL ZENK, Warden of the Metropolitan Detention Center; JOHN DOES 1-20, Metropolitan Detention Center, Corrections Officers, and JOHN ROES 1-20, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents,

Defendants.

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02 CV 2307 (JG)

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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INTRODUCTION

On June 18, 2003, Plaintiffs filed a Second Amended Complaint containing new allegations based upon a report released by the Justice Department's Inspector General on June 2, 2003, entitled "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" ("OIG Report"). This report provides a wealth of details that substantiate Plaintiffs' allegations that they and a class of similarly situated male Arab and/or Muslim nationals from South Asian and Middle Eastern countries were wrongfully arrested, detained, and designated as individuals "of interest" to the government's investigation of the September 11 attacks and subjected to an array of unconstitutional policies.

In particular, the Second Amended Complaint adds claims alleging: Defendants' failure to provide Plaintiffs with timely notice of the charges on which they were being held in violation of due process (Claim 17); a blanket policy to deny Plaintiffs' release on bond without regard to evidence of danger or flight risk in violation of due process and equal protection (Claims 18 and 19); assignment of Plaintiffs to extremely restrictive prison conditions without any procedural safeguards in violation of due process (Claim 20); and a "communications blackout" and other measures that interfered with Plaintiffs' ability to obtain counsel and petition the courts for redress in violation of the First Amendment and due process (Claims 21 and 22). Second Am. Compl. at ¶¶ 248-77. In addition, the new complaint asserts new allegations that further buttress the claims already asserted. *Id.* at ¶¶ 1-3, 5, 8, 28-31, 51-58.

In this memorandum, Plaintiffs show that their new claims are properly before the Court and state a claim for relief. For the reasons presented herein, Defendants' motion to dismiss the Second Amended Complaint should be denied in its entirety.

ARGUMENT

I. THE COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' NEW CLAIMS

Plaintiffs' new claims principally seek damages for violations of their First and Fifth Amendment rights.[1] This Court has subject matter jurisdiction to entertain those claims under 28 U.S.C. § 1331 because they arise under the Constitution. Defendants nonetheless contend that various provisions of the Immigration and Nationality Act ("INA") bar this Court's jurisdiction. Defendants' sweeping jurisdictional arguments maintain that no matter how abusively they treat non-citizens in immigration custody, government officials have been implicitly immunized from any suit for money damages. These arguments run directly counter to the principle that jurisdictional statutes should not be read to preclude review of constitutional claims absent the most explicit of directives from Congress.[2]

Defendants' jurisdictional arguments fail for two basic reasons. First, the provisions to which they point simply do not address challenges to the types of unconstitutional policies and practices at issue here. The principal INA provisions they cite are instead designed to consolidate judicial review of removal orders, and to forestall litigation that might delay and interfere with the prompt execution of removal orders. *See* 8 U.S.C. §§ 1252(b)(9) and (g); *Reno*

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[1] In addition to damages, Plaintiffs seek equitable relief with respect to their new and original claims for relief. Plaintiffs have standing to sue for such relief on their new claims for the same reasons that they have standing to sue for such relief with respect to their original claims. *See* Pl. Opp. Br. at 68-75.

[2] *Demore v. Kim*, 123 S. Ct. 1708, 1714 (2003) ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.") (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)); *INS v. St. Cyr*, 533 U.S. 289, 299 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,'...we are obligated to construe the statute to avoid such problems.") (citations omitted); *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974) ("clear and convincing evidence of congressional intent" required before a "statute will be construed to restrict access to judicial review.")

v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 485-87 (1999). Plaintiffs do not challenge their removal orders, but rather the unconstitutional mistreatment they suffered while in immigration custody. Indeed, because Plaintiffs did not challenge their removal orders, they would not have been able to challenge the policies and practices at issue here through the petition for review procedures to which Defendants would now relegate them.

Second, Defendants mistakenly rely on two INA provisions, 8 U.S.C. §§ 1236(e) and 1252(a)(2)(B)(ii), that bar judicial review over certain exercises of discretion in the immigration setting. These provisions do not apply here because Plaintiffs seek review not of an exercise of discretion, but of actions taken by the Attorney General and others that are wholly outside their discretionary authority. As neither the Attorney General nor any other government official has discretion to violate the Constitution, neither of these provisions precludes review of Plaintiffs' constitutional claims.

A. 8 U.S.C. §§ 1252(b)(9) and (g) Do Not Bar Jurisdiction of Plaintiffs' Challenges to Defendants' Unconstitutional Policies and Practices

1. 8 U.S.C. § 1252(b)(9) [INA § 242(b)(9)]

Defendants principally rely on 8 U.S.C. § 1252(b)(9) to bar review of Plaintiffs' claims. Subsection (b)(9) provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section." Defendants contend that this provision bars jurisdiction to hear Claims 17, 18, 19, 21, and 22 because they arise from Plaintiffs' removal proceedings. Gov't Br. at 3-4.

This provision does not apply because Plaintiffs do not challenge their removal orders. Nor do they challenge actions that could have been reviewed on a petition for review from a final

removal order. Instead, they challenge the mistreatment they received during their detention, a matter wholly collateral to the validity of their removal order. Claims 17, 18, and 19 assert systemic violations of due process with respect to their detentions, not their removal orders. Similarly, Claims 21 and 22 challenge Defendants' systemic communications blackout and other efforts to interfere with Plaintiffs' access to counsel and the courts. A petition for review of a removal order in the court of appeals would not provide a forum for adjudicating any of these claims because the validity of the removal order – the subject of a petition for review – is unaffected by the violations for which Plaintiffs seek redress. Challenges to unconstitutional detention practices cannot be remedied by the court of appeals on a petition for review of a removal order. Injunctive relief, even if it were available, would come too late in the day, and the petition process provides no occasion for damage actions against individual officers. Indeed, individual officers are not even proper parties on a petition for review. Accordingly, jurisdiction is proper here under 28 U.S.C. § 1331. [3]

The Second Circuit's decision in *Merritt v. Shuttle, Inc.*, 187 F.3d 263 (2d Cir. 1999), suggests the appropriate analysis here. In that case, the court held that the FAA's exclusive review provisions barred a *Bivens* action that essentially sought to relitigate the very questions at issue in the FAA's administrative and judicial review process arising from an airline accident.

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[3] This result is supported by *INS v. St. Cyr*, 533 U.S. 289, 313 (2001), which held that § 1252(b)(9) "does not bar habeas jurisdiction over removal orders *not* subject to judicial review under § 1252(a)(1)." In upholding habeas jurisdiction to hear the challenge of a "criminal alien" to his removal, the Court reasoned that the "purpose [of § 1252(b)(9)] is to consolidate 'judicial review' of immigration proceedings into one action in the court of appeals, but that it applies only 'with respect to review of an order of removal under subsection (a)(1).'" *Id.* As a "criminal alien," St. Cyr could not obtain review of his removal order in a petition for review under § 1252(a)(1), and therefore the Court held that § 1252(b)(9) did not apply. *Id.* Here, too, Plaintiffs could not have obtained review of their detention claims on a petition for review, and therefore § 1252(b)(9) is equally inapplicable.

The court found that because such litigation would "result in new adjudication over the evidence and testimony adduced in the [administrative] hearing, the credibility determinations made by the ALJ, and ultimately, the findings made by the ALJ," it was "an improper collateral attack on the FAA order." 187 F.3d at 271 (quoting *Tur v. FAA*, 104 F.3d 290, 292 (9th Cir. 1997)).

At the same time, the *Merritt* court distinguished "a broad-based, facial constitutional attack on an FAA policy or procedure [from]...a complaint about the agency's particular actions in a specific case," and cited several decisions holding that a broad-based facial attack would be "appropriate subject matter for a stand-alone federal suit" outside the FAA Act's exclusive review limitations.[4] Significantly, the court cited two cases in which the Supreme Court found subject matter jurisdiction to hear broad-based constitutional challenges to immigration practices in the face of apparently preclusive INA jurisdictional provisions. *Id.* at 272. In *McNary v. Haitan Refugee Center, Inc.*, 498 U.S. 479, 491, 492 & n.12 (1991), the Supreme Court held that a provision of the INA that barred judicial review of the Attorney General's decisions on applications for adjustment of status absent administrative exhaustion precluded review of "individual denials of [amnesty] status," but not of "general collateral challenges to unconstitutional practices and policies." And in *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 56 (1993), the Court similarly held that an INA provision barring review of single agency actions did not apply to a challenge to "an action challenging the legality of a regulation without referring to or relying on the denial of any individual application."

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[4] *Id.* at 271 (citing *Foster v. Skinner*, 70 F.3d 1084, 1088 (9th Cir. 1995) (holding that despite the FAA's exclusive jurisdiction provisions, "a district court [has] subject matter jurisdiction over [claims asserting] broad constitutional challenges [to FAA practices]"); *Mace v. Skinner*, 34 F.3d 854, 859-60 (9th Cir. 1994) (finding subject matter jurisdiction over broad constitutional challenge to agency practices)).

This approach makes particular sense here, because, as established above, the petition for review process could not have afforded Plaintiffs the relief they seek. Defendants' argument, if accepted, would preclude judicial review of Plaintiffs' constitutional challenges, and therefore must be rejected. As noted in the following point of this argument, jurisdictional statutes should not be read to have that effect absent an express directive from Congress. Nowhere in the INA or its legislative history is there any indication that Congress sought to preclude *Bivens* actions to remedy unconstitutional policies and practices in connection with immigration detentions.[5]

Because Plaintiffs' claims in no way challenge their removal, but instead raise broad-based constitutional challenges to Defendants' policies and practices with respect to their detention, and because Plaintiffs' challenges could not have been adjudicated on a petition for review of a removal order, § 1252(b)(9) does not bar review here.

2. 8 U.S.C. §1252(g) [INA § 242(g)]

Defendants contend that 8 U.S.C. § 1252(g) bars jurisdiction over Claim 17, which challenges Defendants' failure to serve Plaintiffs with Notices to Appear ("NTAs") in a prompt fashion. Subsection 1252(g) provides that except as otherwise provided in § 1252, there shall be no judicial review of decisions to "commence proceedings, adjudicate cases, or execute removal orders." Defendants argue that because the service of an NTA is part of the commencement of proceedings, Claim 17 is barred. But plaintiffs do not challenge the "commencement" of their proceedings. Instead, they challenge their *detention* without service of an NTA. The Supreme

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[5] Assuming arguendo that Plaintiffs could have sought equitable relief on certain claims (e.g., 17 through 20) through a habeas action brought during their detention, it is still the case that even expeditious habeas relief would not have compensated Plaintiffs for time already spent in unlawful detention; as in *Bivens*, for these claims "it is damages or nothing." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring). In any event, the challenged policies and practices at issue here include a systemic effort to bar access to counsel and the courts, making habeas review effectively unavailable for most of the detainees in the purported class.

Court has expressly rejected any broad reading of § 1252(g) and has interpreted it narrowly to apply "only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders'"—all essentially "challenges to the Attorney General's exercise of prosecutorial discretion." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482, 485 n.9 (1999) (quoting § 1252(g)). Since Plaintiffs do not challenge the commencement of their proceedings, but rather their *detention in the absence of any proceedings or notice*, § 1252(g) does not apply here. *See generally Medina v. United States*, 92 F. Supp. 2d 545, 553 (E.D. Va. 2000) (finding that 8 U.S.C. § 1252(g) does not bar a "claim for monetary damages for intentional torts and violations of constitutional rights ...where the immigration proceedings have terminated"), *vacated on other grounds*, 259 F.3d 220 (4th Cir. 2001).[6]

B. 8 U.S.C. §§ 1226(e) and 1252(a)(2)(B)(ii) [INA §§ 236(e) and 242(a)(2)(B)(ii)] Do Not Bar Jurisdiction Over Plaintiffs' Challenges to Defendants' Unconstitutional Policies and Practices

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[6] For essentially the same reasons, 8 U.S.C. § 1252(g) does not bar jurisdiction over Claims 1, 2, 5, and 6. These claims do not challenge "the timing of the execution of removal orders," as Defendants assert. Gov't Br. at 3 n.2. Rather, they challenge the fact of Plaintiffs' *detention*. Section 1252(g) simply does not govern detention decisions, as is illustrated by the Supreme Court's failure even to mention it in *Demore v. Kim*, 123 S. Ct. 1708 (2003), and *Zadvydas v. Davis*, 533 U.S. 678 (2001), both constitutional challenges to immigration detention.

Defendants rely on several cases from outside this circuit, such as *Van Dinh v. Reno*, 197 F.3d 427 (10th Cir. 1999), *Foster v. Townsley*, 243 F.3d 210 (5th Cir. 2001), and *Humphries v. Various Federal U.S. INS Employees*, 164 F.3d 936 (5th Cir. 1999). These cases are not binding here, and their reasoning is not persuasive. *Humphries* relies on an overbroad interpretation of § 1252(g) that the Supreme Court subsequently rejected in *Reno v. American-Arab Anti-Discrimination Commission. See Foster*, 243 F.3d at 213 n.2 ("*Humphries* does not control the outcome of this case because its interpretation of the IIRIRA preceded the Supreme Court's narrow construction of the statute in [*American-Arab*].."). *Foster* involved what was essentially a collateral challenge to a removal order, and not the type of broad-based constitutional challenge presented here. And *Van Dinh* was an individual habeas case to which Plaintiff sought to add a duplicative *Bivens* cause of action for injunctive relief. 197 F.3d at 435. None of these cases involved a class action complaint raising substantial constitutional challenges to a broad-based policy and practice regarding immigration detention.

Defendants maintain that two other provisions of the INA, 8 U.S.C. §§ 1226(e) and 1252(a)(2)(B)(ii), bar review of Claims 18, 19, and 20. But these provisions, both of which limit judicial review of certain exercises of discretion, are inapplicable here because Plaintiffs' claim is that Defendants were acting not within their discretion, but *ultra vires*, by violating the Constitution. As the Attorney General has no discretion to violate the Constitution,[7] these provisions by their terms do not bar jurisdiction over constitutional challenges.

Section 1226(e) provides: "The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." Section 1252(a)(2)(B)(ii) bars review of decisions which the INA places "in the discretion of the Attorney General." Neither statute expressly bars review of constitutional challenges, and therefore neither provision applies here.

The Supreme Court recently reached precisely this result in finding that § 1226(e) poses no jurisdictional bar to a constitutional challenge to the mandatory detention of "criminal aliens." In *Demore v. Kim*, the Court applied its mandate that "'where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.'" 123 S. Ct. 1708, 1714 (2003) (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)). Accordingly, the Court found that habeas jurisdiction was appropriate, even though Kim sought to "set aside...[a] decision by the Attorney General under this section regarding the detention or release of any alien." 123 S. Ct. at 1714 (quoting § 1226(e)).

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[7] *United States Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988); *see also Berkovitz v. United States*, 486 U.S. 531, 536 (1988); *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1196 (D.C. Cir. 1986).

Similarly, in *Webster*, 486 U.S. at 603, the Court held that although Congress had precluded judicial review of CIA employment decisions by committing them to "agency discretion," this statutory preclusion did not bar judicial review of *constitutional* claims. Noting that preclusion of review of constitutional claims "must be clear," it found that barring review of discretionary decisions did not bar review of claims that such decisions violated the Constitution. *Id.* The same reasoning applies here.

Because Plaintiffs challenge only the *constitutionality* of the government's across-the-board detention policies, and do not seek review of any constitutionally exercised "discretionary judgment," and because neither § 1226(e) nor § 1252(a)(2)(B)(ii) expressly precludes review of *constitutional* claims, they pose no bar to Plaintiffs' challenges here.[8]

II. CONGRESS HAS NOT EXPRESSLY PRECLUDED A *BIVENS* CAUSE OF ACTION FOR DAMAGES, NOR DO ANY "SPECIAL FACTORS" BAR SUCH A CAUSE OF ACTION

The Attorney General argues that even if none of the jurisdiction-limiting provisions of the INA bar a *Bivens* action, Plaintiffs cannot bring such an action because "special factors" counsel against it. Ashcroft Br. at 6-7. This argument falls outside the scope of the Court's order allowing supplementary briefs, and should be rejected on that ground.[9]

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[8] In addition, § 1226(e) bars review only of exercises of discretion "regarding the application of this section" [§1226], which mentions nothing about discretion to place non-citizens in administrative of disciplinary segregation, the action challenged in Claim 20. Moreover, the Second Amended Complaint alleges that in addition to INS officials, FBI and BOP officials played a role in placing Plaintiffs in the SHU without procedural protections, and nothing in the INA even arguably purports to bar review of Plaintiffs' claims against those officials.

[9] "The defendants need only supplement their pending motion to address the new claims; they should not reargue claims not impacted by the changes to the complaint." Order dated June 12, 2003, p. 2. Nothing in Ashcroft's *Bivens* argument depends on material added in the Second Amended Complaint; exactly the same argument could have been made in Defendants' original memoranda. In effect, the Attorney General is trying to make a second Rule 12(b)(6) motion, which should not be allowed. The availability of *Bivens* relief is not a question of subject matter

It is also wrong on the merits. *Bivens* claims are available for violations of the Due Process Clause, *Davis v. Passman*, 442 U.S. 228 (1979), and of the First Amendment, *Dellums v. Powell,* 566 F.2d 167, 194-95 (D.C. Cir. 1977); *Paton v. La Prade*, 524 F.2d 862, 869-70 (3d Cir. 1975); *Yiamouyiannis v. Chemical Abstracts Service*, 521 F.2d 1392, 1393 (6th Cir. 1975). A *Bivens* action is available for constitutional violations unless "defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective," or there are "special factors counseling hesitation in the absence of affirmative action by Congress." *Carlson v. Green*, 446 U.S. 14, 18-19 (1980). Defendant Ashcroft does not point to any substitute recovery scheme set forth by Congress, but instead argues that three "special factors" counsel against recognizing recovery here.

He first maintains that even if no single part of the INA bars *Bivens* relief, nevertheless the act *as a whole* constitutes a "comprehensive scheme" which excludes *Bivens*. Ashcroft Br. at 6. This misconstrues the law. What has been held sometimes to preclude a *Bivens* action is not comprehensiveness, but the existence of satisfactory alternative *remedies.* Thus in *Schweiker v. Chilicky, Bivens* relief was denied to Social Security Disability recipients who claimed Fifth Amendment due process violations, due to the existence of "elaborate administrative remedies." 487 U.S. 412, 424 (1988). The Court explained, "[w]hen the design of a Government program suggests that Congress has provided what it considers *adequate remedial mechanisms* for constitutional violations that may occur in the course of its administration, we have not created

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jurisdiction, which *Bivens* holds is supplied under 28 U.S.C. § 1331. *See Wong v. Beebe*, No. CV-01-718-ST, 2002 U.S. Dist. LEXIS 20340 at *22-*23 (D. Or. April 5, 2002). If, in fact, federal law does not *support* Plaintiffs' claims, then Plaintiffs have failed to state a claim—a defense under Fed.R.Civ.P. 12(b)(6), not 12(b)(1), which should not be considered at this late date.

additional *Bivens* remedies." 487 U.S. at 423 (emphasis added). Likewise, in *Bush v. Lucas*, *Bivens* relief was denied to a federal employee claiming violation of his First Amendment rights, because of "comprehensive...provisions *giving meaningful remedies*..." 462 U.S. 367, 368 (1983) (emphasis added).[10] The statutes in *Schweiker* and *Bush* both provided compensatory damages. Here, by contrast, the INA provides *no* compensatory remedies whatsoever for the challenged actions, much less meaningful relief that could substitute for a *Bivens* action.

Second, Ashcroft suggests that the availability of habeas corpus review is a "special factor" that counsels against awarding *Bivens* relief to Plaintiffs. Ashcroft Br. at 6. No authority is cited for this proposition, and the availability of *Bivens* relief to victims of wrongful arrest refutes it. Bivens himself could have sought habeas relief after his arrest, but there is no suggestion in the Supreme Court's opinion in *Bivens* that this option in any way limited his right to recover damages resulting from his arrest.[11] Release alone neither compensated Bivens for his injuries nor provided the incentive to avoid unlawful action at which the *Bivens* ruling aimed. Exactly the same is true here.

Finally, Ashcroft argues that "national security considerations are themselves a 'special factor' counseling against" awarding *Bivens* relief. *Id.* at 7. Defendants appear to regard "national security" as a talisman which, once invoked, excuses them of any need to justify their

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[10] The cases cited by the Attorney General do not suggest a different rule. *Sugrue v. Derwinski*, 26 F.3d 8, 12 (2d Cir. 1994), denied *Bivens* relief because the administrative scheme at issue "provides *meaningful remedies* in a multitiered and carefully crafted administrative process" (emphasis added). *Van Dinh v. Reno*, 197 F.3d 427, 435 (5th Cir. 1999), relied on the preclusive effect of two specific jurisdictional provisions. Both *United States v. Stanley*, 483 U.S. 669 (1987), and *Chappell v. Wallace*, 462 U.S. 296 (1983), involve unique concerns related to military service.

[11] Indeed, in *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), the Court held that habeas relief or the equivalent is a *prerequisite* to relief under 42 U.S.C. § 1983 for a wrongful conviction, a conclusion equally applicable to *Bivens*. *See Clemente v. Allen*, 120 F.3d 703, 705 (7th Cir. 1997), and cases there cited. Such a holding would make no sense if the availability of habeas were a *bar* to *Bivens* relief.

conduct. They go too far. Defendants are free to argue on the merits—indeed, they have argued—that national security interests justify their incursions on Plaintiffs' constitutional rights. But there is absolutely no support for the proposition that once the Attorney General invokes "national security," that *ends* the case at the *Bivens* threshold without any consideration of what Plaintiffs' rights are and whether they were violated.[12] Plaintiffs are entitled to a hearing on their *Bivens* claims.

III. PLAINTIFFS WERE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES PRIOR TO FILING SUIT

Judicial exhaustion requirements serve to protect the authority of administrative agencies and to promote judicial efficiency. *McCarthy v. Madigan*, 503 U.S. 140, 145-46 (1992). Exhaustion should be excused where these goals of exhaustion would not be advanced. *Id.* at 146-49. Defendants' contention that Plaintiffs' failure to exhaust administrative remedies requires dismissal of Claims 18 through 22 fails for three reasons: exhaustion would have been futile; the administrative process could not have provided effective relief; and Defendants interfered with Plaintiffs' ability to access the administrative process.

First, exhaustion would have been futile because the result of agency action was preordained.[13] It is entirely fanciful to imagine that any of the practices challenged here—

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[12] The only cases Ashcroft cites, *Beattie v. Boeing Co.*, 43 F.3d 559 (10th Cir. 1994), and *Reinbold v. Evers*, 187 F.3d 348 (4th Cir. 1999), involve disputes over security clearances, which depend upon "an affirmative act of discretion on the part of the granting official." *Beattie*, 43 F.3d at 565 (quoting *Dep't of Navy v. Egan*, 484 U.S. 518, 528 (1988)). These cases do not suggest any general doctrine that the presence of "national security" concerns precludes *Bivens* claims, and they have no relation to the wrongful detention and abuse claims asserted by Plaintiffs.

[13] *Gibson v. Berryhill*, 411 U.S. 564, 573 n.14 (1973); *United States v. Gotti*, 755 F. Supp. 1159, 1165 (E.D.N.Y. 1991). *See e.g., Heldman v. Sobol*, 962 F.2d 148, 159 (2d Cir. 1992) (plaintiffs excused from exhausting administrative remedies in case challenging state's implementation of Individuals with Disabilities Education Act because state officers did not have the authority to alter the challenged procedure); *Kelly v. Bd. of Ed. of Nashville*, 159 F. Supp.

directed by the highest levels of the Justice Department pursuant to a nationally coordinated investigation into the attacks of September 11—would have been altered through an individual administrative appeal. Claims 20 through 22 challenge assignment to the ADMAX SHU and the communications blackout, both of which were implemented by INS, BOP and MDC officials at the direction of high-level officials in the FBI and the Department of Justice. OIG Report at 18-19, 112-14; Gov't Br. at 15-16. Moreover, BOP and MDC officials did not even follow their own regulations in assigning and retaining Plaintiffs in the ADMAX SHU. With respect to Claims 18 and 19, any and all attempts for bond were sure to be futile as the Department of Justice demanded that the FBI and INS implement a strict no-bond policy for all post-9/11 detainees. Second Am. Compl. at ¶ 53; OIG Report at 37-38, 55-57, 66, 75.

Second, exhaustion is excused because the administrative remedies to which Defendants point could not have provided effective relief.[14] Plaintiffs suffered constitutionally cognizable injuries from the moment they were detained, for which the administrative process could not provide damages or any other retrospective relief. In *McCarthy v. Madigan*, the Supreme Court excused exhaustion under analogous circumstances – a convicted prisoner sought damages under *Bivens* that were unavailable through the administrative process. 503 U.S. at 149-52.[15]

272, 276 (M.D. Tenn. 1958) (plaintiffs excused from exhausting administrative remedies in school segregation case given that requiring "the plaintiffs to go before a board committed in advance to continuance of compulsory segregation would be to require them to perform a futile act.").

[14] *Gibson*, 411 U.S. at 575 n.14; *McCarthy*, 503 U.S. at 154 ("absence of any monetary remedy in the grievance procedure also weighs heavily against imposing an exhaustion requirement" on a prisoner seeking monetary compensation).

[15] The holding in *McCarthy* as it applies to convicted prisoners has since been superseded by the Prison Litigation Reform Act, by which Congress required both state and federal prisoners to exhaust all administrative remedies. *Booth v. Churner*, 532 U.S. 731, 731 (2001). *McCarthy* remains relevant for immigration detainees, however, who are not subject to the statutory exhaustion requirement of the PLRA. *See LaFontant v. INS*, 135 F.3d 158, 165 (D.C. Cir. 1998).

Finally, exhaustion is also excused because of Defendants' interference with the availability of administrative remedies.[16] According to the OIG Report, the vast majority of detainees in the ADMAX SHU at MDC were not given the MDC handbook that explains the Administrative Remedy Program. OIG Report at 148. Moreover, Plaintiffs could not have had access to the handbook, because the book was not on the list of items detainees could retain in the ADMAX SHU. *Id.* at 149. Plaintiffs' failure to request bond is excusable on the same ground. Defendants had an express policy of interfering with this review process by seeking continuances to hide the fact that they had no evidence to support detention. Second Am. Compl. at ¶ 53. And for several of the named Plaintiffs, their decision not to request bond (or, in the case of Plaintiffs Ibrahim and Ebrahim, not to appeal denial of bond) was made in reliance on false statements by Immigration Judges and INS officers that they would be allowed to voluntarily depart within days. *Id.* at ¶¶ 71, 94, 96, 128. Other Plaintiffs lacked the ability to request bond, or to find a lawyer to make the request for them, due to their extremely restrictive conditions of confinement, the communications blackout, and Defendants' obstruction of access to counsel even after the initial blackout. *Id.* at ¶¶ 55-56.[17]

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[16] *See J.G. v. Bd. of Educ.*, 830 F.2d 444, 447 (2d Cir. 1987); *see also Johnpoll v. Thornburgh*, 898 F.2d 849, 850-51 (2d Cir. 1990) (exhaustion not required if administrative remedies are not reasonably available); *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) ("A remedy that prison officials prevent a prisoner from utiliz[ing] is not an available remedy..."); *Arnold v. Goetz*, 245 F. Supp. 2d 527, 537 (S.D.N.Y. 2003) ("correctional institution's failure to provide an inmate with sufficient information about available grievance procedures may excuse his failure to exhaust administrative remedies"); *Johnson v. Garraghty*, 57 F. Supp. 2d 321, 329 (E.D. Va. 1999)(a grievance procedure that is not made known to inmates is not "available").

[17] Failure to exhaust administrative remedies is properly understood as an affirmative defense, not a jurisdictional defect. *Howard v. Goord*, No. 98-CV-7471, 1999 U.S. Dist. LEXIS 20260, at *8 (E.D.N.Y. Dec. 28, 1999) (describing Prison Litigation Reform Act's statutory exhaustion requirement as an affirmative defense). Because exhaustion is an affirmative defense, Defendants bear the burden of proof. *See Hall v. Sheahan*, No. 2000-C-1649, 2001 U.S. Dist. LEXIS 1194, at *4 (N.D. Ill. Feb 2, 2001) ("To be entitled to judgment on [the] grounds of

IV. PLAINTIFFS' NEW CAUSES OF ACTION STATE A CLAIM FOR RELIEF

Defendants also contend that Plaintiffs' new causes of action fail to state a claim for relief. As shown below, however, each Claim is predicated on the violation of a clearly established constitutional right.

A. By Detaining Plaintiffs for Extended Periods Without Notifying Them of the Charges on Which They Were Being Held, Defendants Violated Plaintiffs' Clearly Established Rights under the Due Process Clause (Seventeenth Claim for Relief)

Defendants systematically delayed the service of INS charging documents, known as Notices to Appear ("NTAs"), on post-9-11 detainees whom they arrested without warrants. Second Am. Compl. ¶¶ 52, 248-52; OIG Report at 29-30. As a result, Plaintiff Jaffri was arrested and detained for five days before he was served with an NTA; Plaintiff Sachveda was arrested and detained for a week before he was served with an NTA; and Plaintiffs Ebrahim and Ibrahim were arrested and detained for more than two weeks before they were served with NTAs. Second Am. Compl. ¶¶ 52, 102, 114, 152. For 48 class members, detention without notice of charges extended beyond 24 days. OIG Report at 30-31.

By incarcerating Plaintiffs and other class members without informing them of the charges against them in a timely manner, Defendants violated Plaintiffs' clearly established due process rights. Few rights are more basic than the right to know the reason for one's detention. Defendants' failure to provide such notice violated both the substantive due process right to freedom from arbitrary detention and the procedural due process right to meaningful notice at a meaningful time of the charges on which one is detained. These core constitutional rights are guaranteed to "all persons" in the United States, including non-citizens who entered the United

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non-exhaustion, defendants would need to establish that the grievance procedure was posted in such a manner that [the plaintiff] could reasonably be expected to see it....").

States unlawfully and non-citizens who have been found deportable. *Zadvydas v. Davis*, 533 U.S. 678, 679-80 (2001). [18]

1. Prolonged Detention Without Notice of the Charges on Which One Is Being Held Amounts to Arbitrary Detention and Constitutes a Violation of Substantive Due Process

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. The Government seeks to recast the five, seven, and 16 days that Jaffri, Sachveda, Ebrahim, and Ibrahim were respectively held without notice of the grounds for their detention as, "at most, a few days," and ignores altogether the even longer detention without notice suffered by other class members. Gov't Br. at 10. But revisionism cannot obscure the fact that Defendants locked up hundreds of individuals for extended periods of time without providing them notice of why they were being held.

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[18] Defendant Ashcroft, citing to *Shaughnessy v. United States ex rel Mezei*, 345 U.S. 206, 212 (1953), advances the fallacious proposition that non-citizens who are "inadmissible" because they entered the country without inspection should receive lesser due process protections than non-citizens who entered with inspection but are later found removable. Ashcroft Br. at 8. However, it is *entry* into the United States that triggers protection under the Due Process Clause, *not admissibility*. The *Mezei* Court itself explained, "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." Even though Congress amended the INA in 1996 so that the term "inadmissible" now describes both those non-citizens who have not entered the United States as well as those who have entered illegally, 8 U.S.C. § 1182(a)(6)(A)(i), this change in statutory language did not dilute the due process protections afforded to inadmissible non-citizens who have entered the United States. As recently as 2001, the Supreme Court affirmed that *all* non-citizens enjoy the full embrace of the Due Process Clause "from their moment of entry into the United States, whether their presence here is lawful, unlawful, temporary or permanent." *Zadvydas v. Davis*, 533 U.S. 682, 693 (2001). *See also Rosales-Garcia v. INS*, 322 F.3d 386, 406-07 (6th Cir. 2003) (noting that the *Zadvydas* Court did not distinguish between inadmissible entered non-citizens and deportable entered non-citizens in examining the due process implications of regulations permitting indefinite detention, but rather between those who had never entered and were found to be unprotected and those who had entered and were found to be protected).

In the criminal justice setting, the Supreme Court has imposed strict constitutional limits on the length of time that an individual may be detained before being afforded notice of the charges against him *and* a judicial determination as to whether the arrest was supported by probable cause. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). The Court in *Riverside* observed that "prolonged detention based on incorrect or unfounded suspicion may unjustly 'imperil [a] suspect's job, interrupt his source of income, and impair his family relationship,'" *id.* at 52 (citation omitted), and that "[a] State has no legitimate interest in detaining for extended periods individuals who have been arrested without probable cause." *Id.* at 55. The Court ruled that the Fourth Amendment presumptively requires a probable cause hearing within 48 hours of arrest, and that the government must prove that any delay beyond 48 hours was the result of a "bona fide emergency or extraordinary circumstance." *Id.* at 56. Significantly, the Court expressly held that any delay "for the purpose of gathering additional evidence to justify the arrest" was unconstitutional, even if it occurred within the initial 48-hour period. *Id.* at 56. Yet here, Defendants adopted an explicit policy of holding people without evidence in order to investigate them for terrorist ties, and of seeking to delay bond hearings for the express (and illegal) purpose of gathering additional evidence to justify the detention. OIG Report at 78-80; Second Am. Compl. at ¶¶ 5, 52-53 .

The Due Process Clause applies in the context of civil detention schemes like the INS detention scheme at issue in this suit.[19] But the policy considerations that compel the provision

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[19] The same result obtains if the Court finds that the Fourth Amendment controls here. Because Plaintiffs have pleaded the essential facts underlying this violation, the Court is free to find a violation under either the Fourth or Fifth Amendments. "A complaint should not be dismissed [under Rule 12(b)(6)] merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." *Bowers v. Hardwick*, 478 U.S. 186, 201 (1986) ("Even if respondent did not advance claims based on the Eighth or Ninth

of notice of charges within 48 hours in the case of warrantless criminal arrests apply with equal force in the case of warrantless INS arrests. An INS detainee "has been removed from his community, his home, and his family, and has been denied rights that '[rank] high among the interests of the individual.'" *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 413 (D.N.J. 1999) (quoting *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)). Service of an NTA provides the detainee with his first official notice of the INS's factual and legal bases for his arrest.

Defendants suggestion that Plaintiffs must show that their detention without notice of charges prejudiced the outcome of their removal proceedings finds no support. On that view, if the INS detained a foreign national for three months without such notice, and then released him without even bringing charges, he would have no claim, because he could show no "prejudice." Plaintiffs have suffered a direct constitutional injury from being held for extended periods without notice of the reason for their detention are entitled to damages for this harm regardless of its impact on their removal. Moreover, Defendants' suggestion ignores the reality that the NTA provides critical information to INS detainees. The NTA notifies its recipient that he has the right to be represented by counsel in his removal proceeding; that he will be provided with an Immigration Judge hearing at which he may testify, submit evidence, present witnesses, and examine any evidence presented by the government; and that he will be given a reasonable opportunity to apply for voluntary departure at that hearing. Further, the NTA warns its recipient that any statement he makes may be used against him in his removal proceeding. Finally, the

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Amendments, or on Equal Protection Clause, his complaint should not be dismissed if any of those provisions could entitle him to relief.") overruled on other grounds by *Lawrence v. Texas*, 123 S. Ct. 2472 (2003); *see also* 5A C. Wright and A. Miller, Federal Practice and Procedure § 1357 at 336-37 (2d ed. 1990).

NTA is accompanied by a list of qualified attorneys and legal organizations that may be available to represent the detainee at no cost.[20]

Defendants' citation of the INS custody regulation amended by Ashcroft shortly after September 11, 2001, is of no avail here. *See* 8 C.F.R. § 287.3(d). This regulation provides that a non-citizen may be held without issuance of an NTA for 48 hours or "in the event of an emergency or other extraordinary circumstance ... an additional reasonable period of time." *Id.* The existence of a regulation does not, of course, answer the question of what the Constitution demands.[21]

2. The Failure to Provide Notice of the Basis for Detention at a Meaningful Time Also Violates Procedural Due Process

Defendants' failure to provide Plaintiffs with prompt notice of the charges on which they were detained also violated procedural due process. "[N]otice at a meaningful time and in a meaningful manner" is an essential component of the "opportunity to be heard" guaranteed by procedural due process. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988).

Claims sounding in procedural due process are evaluated under a three-pronged balancing test that considers: 1) the interest of the individual affected by official action; 2) the risk of an erroneous deprivation of the interest and the value of additional safeguards or

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[20] A copy of the NTA form used by the INS at the time Plaintiffs were detained is provided in Appendix D of the OIG Report.

[21] *See generally* Immigrant Rights Clinic, New York University School of Law, *Indefinite Detention Without Probable Cause: A Comment on INS Interim Rule 8 C.F.R. §287.3*, 26 N.Y.U. Rev. L. & Soc. Change 397 (2001).

The Government's brief interjects new facts on the basis of which the Government claims that "the events of September 11th and its aftermath constituted precisely such an 'emergency or other extraordinary circumstance.'" *See* Gov't Br. at 8. But these facts were not alleged in the Complaint and are, for this reason, inappropriate for consideration on this motion to dismiss. Furthermore, these facts suggest that the INS was itself responsible for imposing impediments to the speedy service of NTAs on the post-9-11 detainees notwithstanding the flexibility of the INS regulations, which permit NTAs to be issued, amended, and cancelled with ease. *See* Argument Point IVA2, *infra*.

substitute procedures; and 3) the government's interest, including fiscal and administrative burdens, that additional or substitute procedures would entail. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). This analysis compels the conclusion that Defendants' failure to provide Plaintiffs with NTAs promptly violated procedural due process.

First, the private interest of an INS detainee in his fundamental right to physical liberty "must be accorded the utmost weight." *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 413 (D.N.J. 1999) (quoting *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)). For the reasons noted above, an INS detainee's prompt receipt of an NTA is crucial to his ability to obtain the assistance of counsel and to determine whether, when, and how to seek his release.

Second, the failure to issue an INS detainee with a timely NTA carries a dangerous risk of an erroneous deprivation of liberty, and the value of additional safeguards or substitute procedures is high. Keeping an INS detainee in the dark as to the charges against him and the procedures by which he can seek his release obstructs the fact-finding process and places the detainee in an untenable situation.

Third, the service of an NTA is far less burdensome than the probable cause hearing that is required within 48 hours of a criminal arrest. The government need only provide a piece of paper with its reasons for an immigration arrest. The government has no legitimate interest in delaying service of notice of charges, and no fiscal or administrative burdens are entailed by ensuring that NTAs are timely served. The arresting officer is required to know the basis for arrest at the time the arrest is effectuated. *See* 8 U.S.C. § 1357(a)(2). Furthermore, NTAs may be issued by a wide range of qualified officers, including the arresting officer. *See* 8 C.F.R. § 239.1(a). And once issued, an NTA can be modified with ease. *See* 8 C.F.R. §§ 1003.30, 1240.10(e), 1239.2(a)-(c).

For the foregoing reasons, Defendants' failure to provide Plaintiffs with timely notice of the charges on which they were detained violated their rights to substantive and procedural due process.

B. Defendants' Policy and Practice of Detaining Plaintiffs Without Regard to Evidence of Danger or Flight Risk Violated Plaintiffs' Clearly Established Rights Under the Due Process Clause (Eighteenth Claim for Relief)

Few principles of due process are more clearly established than the concept that preventive detention is permissible only where there is something to prevent, namely danger to the community or risk of flight.[22] Yet Defendants adopted an explicit policy and practice of holding the post-9-11 detainees *without regard to evidence of danger or flight risk*, interfering with their ability to obtain counsel to seek release, and delaying and continuing bond hearings with the express purpose of obfuscating the fact that they had no evidence to support the detentions. This conduct, authorized at the highest levels of the Justice Department, plainly violates substantive due process, because to detain persons in the absence of evidence of dangerousness or flight risk is the very definition of arbitrary detention.

Defendants' principal response is that Plaintiffs were not denied due process because, as foreign nationals in removal proceedings, they have no liberty interest protected by due process. This is because, the Government maintains, there is no "right to release on bond;" release decisions are discretionary, and no statute creates a substantive liberty entitlement. Gov't Br. at 11. The very breadth of this argument is its own refutation—if accepted, the physical liberty of any non-citizen against whom the government has instituted deportation proceedings would be left entirely to the unfettered discretion of the Attorney General, and there would be no due

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[22] *See, e.g., Kansas v. Crane*, 534 U.S. 407, 412-13 (2002); *Zadvydas v. Davis*, 533 U.S. 687, 688 (2001); *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997); *Salerno v. United States*, 481 U.S. 739, 751 (1987);. Outside of a declared war, the Supreme Court has *never* upheld preventive detention absent a showing of either dangerousness or flight risk.

process objection even if detention were determined by a mere flip of a coin.

This breathtakingly sweeping position finds no support in the case law. On the contrary, as noted above, all persons in the United States are protected by the Due Process Clause, including foreign nationals illegally here, *see* note 18 *supra,* and the right to be free of bodily restraint stems directly from the Due Process Clause itself, and does not turn on any statutory entitlement or "absolute" right to release. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). The Government's argument to the contrary cannot be squared with *Zadvydas,* in which the Court, in order to avoid due process concerns, imposed strict limits on detention even after a removal order has been issued and the non-citizen has no right to remain in the United States. *See id.* at 682.[23]

The Government's contention is also refuted by the cases the Government itself relies upon. *Demore v. Kim,* 123 S. Ct. 1708 (2003), *Reno v. Flores*, 507 U.S. 292 (1993), and *Carlson v. Landon*, 342 U.S. 524 (1952), all presented due process challenges to the detention of non-citizens pending deportation proceedings. None of these cases was decided on the novel theory the Government advances here—that due process is irrelevant because such persons have no liberty interest. Rather, in all three cases the Court upheld the detentions only after concluding that due process had been satisfied.

In *Demore*, for example, the Court ruled that due process was satisfied because Congress had identified a class of foreign nationals especially likely to pose a flight risk based on strong statistical evidence. 123 S. Ct. at 1720 ("Congress had before it evidence suggesting that

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[23] Indeed, directly contrary to its position here, the government conceded in *Zadvydas* that even foreign nationals facing final orders of removal have due process rights with respect to detention. *See* Brief for the Respondents in *Zadvydas*, at 34 ("Congress's plenary power over aliens does not, however, render the Due Process Clause of the Fifth Amendment altogether inapplicable to petitioner."); *id.* at 39 ("The fact that an alien is under a final deportation order does not mean that such an alien has no substantive due process rights at all.").

permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully.") Similarly, in *Carlson*, the Court held that due process was satisfied by a finding that the detained non-citizens posed a threat to national security. 342 U.S. at 541-42. In both cases, the INS relied in part on a legislative scheme that deemed certain categories of persons dangerous or flight risks, *see Demore*, 123 S. Ct. at 1718 (discussing *Carlson*), but the important point is that the Court in both cases found due process satisfied, and in neither case did it even suggest that non-citizens lack a due process interest in liberty. [24]

The Government also contends that due process was satisfied because Plaintiffs "were provided an individualized hearing." Gov't Br. at 12. This is wrong for two reasons. First, Plaintiffs' claim is that it violates *substantive* due process to subject them to preventive detention under a blanket policy that denied bond without regard to dangerousness or flight risk. The provision of a hearing is no answer to a policy that violates *substantive* due process by its arbitrariness. A policy of detaining every third foreign national would not be saved by the availability of a hearing. Second, Plaintiffs' Second Amended Complaint and the OIG Report make clear that Defendants did everything within their power to *deny* Plaintiffs access to hearings, from imposing an initial communications blackout, to interfering with Plaintiffs' ability

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[24] In *Flores*, as well, the Court held that due process was *satisfied*, not *inapplicable*, expressly stating that "[o]f course, the INS regulation must still meet the (unexacting) standard of rationally advancing some legitimate governmental purpose." 507 U.S. at 306. If the government were correct that aliens have no liberty interest in remaining free pending their deportation proceedings, the regulation would not have to meet any standard at all. The government also maintains that the Court's upholding of a presumption regarding the suitability of releasing juveniles to parents, close relatives, and legal guardians somehow supports its ad hoc adoption of an across-the-board policy of detaining individuals without evidence of dangerousness or flight risk. Gov't Br. 14. That is a *non sequitur*. The permissibility of one presumption about family relations does not mean that any presumption is permissible. On that theory, the Attorney General could adopt a presumption that all non-citizens whose names begin with "A" should be detained.

to contact counsel even after the blackout had ended, to adopting a formal policy of continuing and delaying custody hearings to conceal the fact that the Government lacked any evidence to justify a detention. Second Am. Compl., ¶¶ 1, 3, 5, 52, 55-57.

Ashcroft argues that *Zadvydas* precludes any inquiry into the propriety of Plaintiffs' detentions because it establishes that detaining non-citizens for six months is presumptively permissible. Ashcroft Br. at 10-11. *Zadvydas* establishes no such proposition. It addressed the question of how long *demonstrably dangerous* foreign nationals under final deportation orders could be held where their removal could not be effectuated in the foreseeable future, and it interpreted the statute to limit detention in such circumstances to six months. *Zadvydas v. Davis*, 533 U.S. 678, 682, 701 (2001). But construing a statute to contain a *limit* on detentions under such circumstances does not in any way give the INS license to detain individuals for six months even where there is *no evidence* of dangerousness and no barrier to removal.

In sum, locking up a human being for preventive detention is permissible *only* in narrow circumstances, and only where he or she poses either a risk of flight or danger to the community. Defendants' policy of holding individuals without bond without regard to any such evidence was arbitrary, and violates clearly established substantive due process standards.

C. Defendants' Policy and Practice of Detaining Plaintiffs Without Bond Was Motivated in Significant Part by Plaintiffs' Ethnic and Religious Identity, and Violates Equal Protection (Nineteenth Claim for Relief)

Plaintiffs' Claim 19 maintains that Defendants subjected Plaintiffs to the "no-bond" policy in significant part because of their ethnic and religious identity, in violation of the equal protection component of the Fifth Amendment. Plaintiffs' Amended Complaint and the OIG Report show that Plaintiffs were singled out for detention not based on objective evidence showing that they were connected to terrorism, but on the flimsiest of reasons, and in many

instances on no affirmative evidence at all, but simply because the FBI could not "rule out" that they might be involved in the September 11 attacks. Individuals were arrested and subjected to a "no-bond" policy on the basis of tips themselves expressly based on religious or ethnic identity, such as a tip that "too many" Muslim men were working in a convenience store. OIG Report at 16-17. Where government officials base their action on the private biases of individuals, they violate equal protection. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

The Government did not subject *all* non-citizens to this policy—only those labeled "of interest" to the PENTTBOM investigation. The fact that virtually all of those so labeled and detained without bond were Arabs and/or Muslims and/or South Asians, OIG Report at 21, combined with the paucity of objective evidence of suspicion, *id.* at 16-17, gives rise to a reasonable inference that ethnic and religious identity were significant factors in the decision-making process, and supports Plaintiffs' allegations of discrimination.

Defendants do not dispute that detention based on ethnic or religious identity would clearly violate equal protection. Instead, they seek to dispute the factual allegations, arguing that "nationality-based" distinctions by the Government, are permissible. Gov't Br. at 13; Ashcroft Br. at 11-12. But whether the government was acting on the basis of nationality or on the basis of ethnic or religious identity is a factual matter not appropriately raised on a motion to dismiss. In addition, the fact that courts have upheld *registration* of foreign nationals from a country that has taken Americans hostage, *Narenji v. Civiletti*, 617 F.2d 745, 749 (D.C. Cir. 1980), *cert. denied*, 446 U.S. 957 (1980), hardly supports the proposition that it is constitutional to *lock up* hundreds of foreign nationals based on their nationality, especially where their nations have taken no hostile action against us. The detentions here were directed not at a specific hostile nation and its citizens, but at nationals of countries who were our *allies* in the war on terrorism,

suggesting that to the extent that nationality was relied upon, it was only a pretext for ethnic or religious identity.[25]

Defendant Ashcroft argues that *Reno v. American-Arab Anti-Discrimination Commission*, 525 U.S. 471 (1999), held that equal protection is "generally inapplicable to removal proceedings." Govt. Br. at 12. He is incorrect. The Court in *American-Arab* did state in *dicta* that except in extreme situations, it was disinclined to recognize a selective prosecution defense to deportation, but its reasoning turned largely on the fact that the relief would result in a continuing legal violation. 525 U.S. at 490 ("in deportation proceedings the consequence [of recognizing a selective prosecution claim] is to permit and prolong a continuing violation of United States law.") By contrast, Plaintiffs here do not seek to overturn their deportation orders, and the relief requested would *not* require sanctioning an ongoing legal violation, but simply granting a damage remedy to individuals illegally detained.[26]

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[25] Defendants notably do not cite the strongest precedent on point, *Korematsu v. United States*, 323 U.S. 214 (1944). There, the Court held that detention based on ethnic identity must satisfy strict scrutiny. The Court found strict scrutiny satisfied by the military's showing of national security necessity during a declared war with Japan. But here, we were not at war with the countries whose citizens were detained, and the government has not shown that it was necessary to national security to lock up hundreds of people who had no connections to terrorism. In any event, eight of the nine sitting Justices have said that *Korematsu* was wrongly decided, not for applying strict scrutiny, but for finding that this exacting standard was satisfied. *See* David Cole, *Enemy Aliens*, 54 Stan. L. Rev. 953, 993 n.165 (2002).

[26] Defendant Mueller argues that Plaintiffs must identify similarly-situated non-citizens who were treated differently from Plaintiffs. Mueller Br. at 7. In fact, as the Second Circuit has twice held, "it is not necessary to plead the existence of a similarly situated non-minority group when challenging a law or policy that contains an express, racial classification." *Brown v. Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000); *see also Pyke v. Cuomo*, 258 F.3d 107 (2d Cir. 2001). Those cases, like this one, challenged government investigatory actions that expressly relied in part on race. Thus, Plaintiffs need not identify a similarly situated group. Moreover, it is a matter of public record that the government does not detain without bond the vast majority of persons placed in removal proceedings for overstaying their visas. Alice Fisher, a senior Justice Department official, admitted that "the Department was detaining aliens on immigration violations that generally had not been enforced in the past." OIG Report at 13. It was doing so

D. Defendants' Arbitrary Assignment of Plaintiffs to the ADMAX SHU at MDC Without any Procedures Whatsoever Violated Plaintiffs' Clearly Established Rights to Procedural Due Process (Twentieth Claim for Relief)

Plaintiffs' Claim 20 maintains that assignment to the ADMAX SHU at MDC deprived them of liberty, and that doing so without any notice or hearing whatsoever violated clearly established principles of procedural due process. Plaintiffs placed in the ADMAX SHU were locked down in their cells for at least 23 hours a day, subjected to a four-man hold restraint policy when moved from their cells, monitored by camera at all times, and subjected to an initial communications blackout and to severely limited contacts with the outside world thereafter. Second Am. Compl. at ¶¶ 55, 56. These conditions are worse than those faced by the vast majority of convicted criminals in the federal prison system and were inflicted upon Plaintiffs assigned to the ADMAX SHU without any procedural protections whatsoever. [27]

As established below, Plaintiffs have a liberty interest in being free of the restrictive confinement of the ADMAX SHU arising directly from the Due Process Clause and from the mandatory terms of the BOP's regulations. The fundamental nature of this liberty interest requires that Plaintiffs be afforded the protections guaranteed prisoners in disciplinary hearings,

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not as to *all* foreign nationals with such violations, but almost exclusively as to Arab and Muslim foreign nationals.

[27] Plaintiffs have previously argued that the conditions of their confinement at MDC and Passaic County Jail violated substantive due process. Pl. Opp. Br. at 46-55; Second Am. Compl. at ¶¶ 170-74. Claim 20 is a distinct *procedural* due process challenge. Defendants' characterizations of Plaintiffs' claim as assertion of a right "not to be detained in a Special Housing Unit" and their references to *Bell v. Wolfish,* 441 U.S. 520 (1979), misconceive the nature of Claim 20. *See* Mueller Br. at 9, Hasty Br. at 6, Ashcroft Br. at 12-14, Gov't Br. at 15. In *Bell,* the Supreme Court explained the correct standard for *substantive due process* challenges to the conditions of confinement brought by pretrial detainees. Claim 20, however, challenges the procedures by which Plaintiffs were placed in the SHU, and not the conditions of confinement themselves. Whether Defendants had a "legitimate non-punitive purpose" behind Plaintiffs' segregation in the ADMAX SHU may be relevant to Plaintiffs' *substantive* due process conditions claim, already argued in Plaintiffs' Opposition Brief, but is of no relevance to the issue of procedural due process.

set out in *Wolff v. McDonnell*, 418 U.S. 539 (1974). For purposes of this motion, however, the Court need not specify the precise level of process required, because Plaintiffs were assigned to the ADMAX SHU without *any procedural protections whatsoever.*

1. Placement In The ADMAX SHU Under Extremely Restrictive Conditions Infringed On Plaintiffs' Liberty Under The Due Process Clause Itself.

Confinement of immigration detainees who have never been convicted, much less accused, of a crime, in the harshly restrictive conditions of the ADMAX SHU plainly triggers a liberty interest. *See Benjamin v. Fraser*, 264 F.3d 175, 188 (2d Cir. 2001) (pretrial detainee has a liberty interest in avoiding special restraints). Even where incarceration is justified by a criminal conviction, and the inmate has forfeited his general liberty interest, the Due Process Clause requires additional procedural protections before an individual may be subjected to conditions or treatment "qualitatively different" from the punishment characteristically suffered by a person convicted of a crime.[28]

Defendants' classifications of Plaintiffs as "high interest," "witness security" and "Management Interest Group 155" triggered a dramatic departure from basic conditions of immigration detention and subjected Plaintiffs to atypically restrictive confinement. Second Am.

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[28] *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); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (individual held incompetent to stand trial has a liberty interest in not being held longer then necessary to determine if he could be cured and become competent); *Baxstrom v. Herold*, 383 U.S. 107, 113-14 (1966) (convicted criminal nearing end of term has a liberty interest in avoiding civil commitment).

Plaintiffs' situation is easily distinguishable from Supreme Court precedent holding that a convicted prisoner's transfer to a less favorable prison does not implicate a liberty interest under the due process clause. *See Olim v. Wakineknoa*, 461 U.S. 238, 248 (1983); *Meachum v. Fano*, 427 U.S. 215, 225 (1976). Such transfers result in confinement different "[in] degree, not [in] kind." *Olim*, 461 U.S. at 248. By contrast, Plaintiffs here were never even accused, much less convicted, of a crime, and their detention was indeed different *in kind* than that which is reasonably expected of immigration detention.

Compl. at ¶¶ 54-56. The ADMAX SHU was specifically created to provide the most restrictive conditions available at a federal facility—conditions that are rarely used against convicted criminals, much less against persons never even *accused* of a crime. *Id.* at ¶ 55. As the Second Circuit has ruled, assignment to such restrictive conditions before a criminal conviction directly implicates the detainee's liberty interest. *See Benjamin*, 264 F.3d at 188 (pretrial detainees have a liberty interest in avoiding "restraint" and "Red I.D." status, because both classifications, while allegedly "non-punitive safety measures," have a "severe and deleterious effect" tantamount to punishment). As another district court has already held in an analogous circumstance involving another post-9/11 detainee, Plaintiffs' "conditions of confinement arguably were so severe, and were such a departure from the ordinary conditions of pretrial detention, that they implicated a liberty interest arising directly from the Due Process Clause." *Adnan v. Santa Clara County Department of Corrections*, 2002 WL 32058464, at *7 (N.D. Cal. Aug. 15, 2002). [29]

Accordingly, Plaintiffs had a liberty interest in not being assigned to the ADMAX SHU arising directly from the Due Process Clause itself.

2. Under 28 CFR § 541.22, Plaintiffs Have a State-created Liberty Interest in Not Being Placed in the SHU Without Adequate Procedural Protections

Plaintiffs also have a protected liberty interest in not being placed in the ADMAX SHU arising from BOP regulations. States (or federal agencies) may create a liberty interest where one does not already exist through enactment of mandatory statutory or regulatory measures.

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[29] Defendants also placed at stake Plaintiffs' "good name, reputation, honor, and integrity..." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). The label "high interest" and the resulting placement decisions attached a "badge of infamy" to Plaintiffs, the efficacy of which was proved all too clearly by the systematic brutality exhibited by MDC guards. *Id.*; Second Am. Compl. at ¶¶ 86-87, 105, 108, 117, 121, 139. Plaintiffs' stigmatic injuries are cognizable as a liberty interest because they were tied to an accompanying loss of physical liberty and change in legal status. *See Paul v. Davis*, 424 U.S. 693, 708-709 (1976).

Hewitt v. Helms, 459 U.S. 460, 469 (1983).[30] A liberty interest arises when "statutes or regulations require, in language of unmistakably mandatory character, that a prisoner not suffer a particular deprivation absent specified predicates." *Tellier v. Fields*, 280 F.3d 69, 81 (2d Cir. 2000) (citations omitted). Under 28 C.F.R. § 541.22, detainees[31] placed in administrative segregation are entitled to substantial protections of an "unmistakably mandatory character":

> (b) The Warden shall prepare an administrative detention order detailing the reasons for placing an inmate in administrative detention, with a copy given to the inmate... within 24 hours ...unless this delivery is precluded by exceptional circumstances.
>
> (c) ... the Segregation Review Official ["SRO"] shall conduct a record review within three work days of the inmate's placement in administrative detention and shall hold a hearing and review these cases on the record (in the inmate's absence) each week, and shall hold a hearing and review these cases formally at least every 30 days. The inmate appears before the SRO at the hearing unless the inmate waives the right to appear. ... Administrative detention is to be used only for short periods of time except where an inmate needs long-term protection (see § 541.23) or where there are exceptional circumstances ordinarily tied to security or complex investigative concerns. An inmate may be kept in administrative detention for longer term protection only if the need for such protection is documented by the SRO ...

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[30] In *Sandin v. Connor*, the Supreme Court held that, in the context of lawful incarceration pursuant to a criminal conviction, a prisoner may only rely on a state created liberty interest that's deprivation would result in an "atypical and significant hardship." 515 U.S. 472, 484 (1995). However, *Sandin* does not apply to pretrial or immigration detainees who have not been convicted and sentenced. *Benjamin v. Fraser*, 264 F.3d 175, 189-90 (2d Cir. 2001) (affirming district court holding that *Sandin* does not apply to pretrial detainees because their liberty interests have not yet been extinguished by a lawful conviction); *Resnick v. Hayes*, 213 F.3d 443, 448 (9th Cir. 2000) (reading *Sandin* to mean that a pretrial detainee, unlike a convicted prisoner, has a liberty interest in not being placed in disciplinary segregation); *Rapier v. Harris*, 172 F.3d 999, 1004-05 (7th Cir. 1999)(same); *Fuentes v. Wagner*, 206 F.3d 335, 341-42 n. 9 (3d Cir. 2000) (same), *cert. denied*, 531 U.S. 821 (2000). Moreover, even if *Sandin* applied to pretrial and immigration detainees, the conditions of Plaintiffs' detention represent a significant and atypical hardship in comparison to a baseline of typical immigration detention. Second Am. Compl. at ¶¶ 55-56.

[31] 28 C.F.R. § 551.101 states that "an inmate committed for civil contempt, or as a deportable alien ... is considered a pretrial inmate." Pretrial inmates are subject to the same classification regulations as convicted prisoners under the authority of the BOP. 28 C.F.R. § 551.105.

Because § 541.22 is "replete with words such as 'shall,' 'unless,' and 'only,'" and it is "intended to guide the decision making power of prison officials by requiring that certain prerequisites be met and certain procedures followed whenever a prisoner [is] subjected to segregated housing," it gives rise to a constitutionally protected liberty interest that triggers due process. *Tellier*, 280 F.3d at 81.

3. Plaintiffs Were Denied Any Procedural Protections Upon Being Assigned to the ADMAX SHU.

The Second Circuit has ruled that pretrial classifications leading to serious deprivations of liberty such as those imposed here require at a minimum the procedural protection set out by the Supreme Court in *Wolff v. McDonnell*, namely, a hearing with written notice, adequate time to prepare a defense, a written statement of the reasons for the actions taken, and some ability to present witnesses and evidence. *Benjamin,* 264 F.3d at 189-90, citing and applying *Wolff v. McDonnell*, 418 U.S. 539, 561-70 (1974). However, this case does not require the Court to specify precisely what level of process is due, because Plaintiffs were held for up to six months in the ADMAX SHU without any process whatsoever. Second Am. Compl. at ¶¶ 54–55. Unless the Court were to find that *no process whatsoever* was required, a holding foreclosed by *Benjamin*, Claim 20 must survive the motion to dismiss.[32]

Plaintiffs' liberty interest in not being placed in the ADMAX SHU without any opportunity for a hearing was clearly established more than a decade ago. *Tellier*, 280 F.3d at 84

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[32] Defendant Ashcroft's insistence that Plaintiffs were placed in the ADMAX SHU for "their own and others' safety" does not advance his defense. Ashcroft Br. at 14. 28 C.F.R. 541.23 (b) states that inmates involuntarily placed in administrative detention for protection are entitled to a hearing no later than seven days from the time of their admission. The hearing shall include written notice, staff representation, the right to make a statement and present documentary evidence, to request witnesses, to be present and advance advisement of inmate rights. *Id.* Defendant Ashcroft relies on this Court's decision in *United States v. Zampardi*, yet in that case, unlike the case at hand, Mr. Zampardi had the benefit of a hearing. Ashcroft Br. at 14 n.13; *United States v. Zampardi*, 1996 WL 1088905, at *1 n.1 (E.D.N.Y. Nov. 6, 1996).

(holding in 1992 that plaintiff's "procedural due process rights in defendants' adhering to [Section 541.22] were clearly established"); *see also United States v. Gotti*, 755 F. Supp. 1159, 1164 (E.D.N.Y. 1991) (holding in 1991 that prison officials cannot place a "pretrial detainee in administrative detention for a stated reason without providing any basis for the reason... [p]rison authorities are not afforded unbridled discretion because the detainee is either notorious or newsworthy or both.") Indeed, as early as 1983 "prison officials [could not] doubt that they have acted unconstitutionally where confinement... continued, without a hearing, for 67 days." *Tellier*, 280 F.3d at 84 (citing *Wright v. Smith*, 21 F.3d 496, 500 (2d Cir. 1994)).

E. Defendants Deliberately Interfered With Plaintiff's Right of Access to the Courts and Right to Counsel (Twenty-First and Twenty-Second Claims for Relief)

As detailed in the Complaint and OIG Report, Defendants undertook a wide variety of measures to deny Plaintiffs access to counsel and the courts, from an initial communications blackout, to highly restrictive limits on phone calls and visits with attorneys thereafter, to falsely denying that individuals were in Defendants' custody at all, to denying bond without supporting evidence and seeking continuances to delay review of detention where no evidence existed to justify it. Second Am. Compl. at ¶ 53; OIG Report at 78-80. Indeed, the OIG Report discloses that guards went so far as to deceive detainees into forgoing calls to attorneys by asking on multiple occasions, "Are you okay?," and treating an affirmative answer as a statement that the inmate wished to forego his opportunity to call an attorney. OIG Report at 131. Taken together, these measures directly interfered with Plaintiffs' access to counsel and the courts, and violated their clearly established constitutional rights.[33]

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[33] In an attempt to divide and conquer, each of the Defendants selects a discrete part of the policy for which he is undeniably personally responsible and attempts to argue that this one policy is not a sufficient hurdle to make out a violation of Plaintiffs' right of access to the courts.

1. The Constitutional Rights to Counsel and Access to the Courts Are Well Established

a. Access to the Courts

There can be no doubt that the right of access to the courts—"the right conservative of all other rights, [which] lies at the foundation of orderly government," *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907)—is "well-established." *Lewis v. Casey*, 518 U.S. 343, 350 (1996). The Supreme Court recognized an inmate's right of access to the courts more than fifty years ago in *Ex Parte Hull*, 312 U.S. 546, 549 (1941), holding that prison officials cannot impose themselves as barriers between prisoners and the courts when inmates are seeking to challenge their criminal convictions. In *Johnson v. Avery*, 393 U.S. 483, 485 (1969), the Court extended the right to invalidate a regulation forbidding inmates from assisting one another in legal matters. In *Bounds v. Smith*, 430 U.S. 817, 828 (1971), the Court held that the right of access to the courts is so fundamental that prison officials have an affirmative obligation to ensure that it is maintained, and required North Carolina to establish legal research facilities at its prisons. The Court has also extended the right to inmates' civil rights actions challenging their conditions of confinement. *See Wolff v. McDonnell*, 418 U.S. 539, 579-80 (1974).[34]

At its core, the constitutional right protects against governmental action "actively interfering" with a person's ability to press a legal claim in the courts. *Lewis v. Casey*, 518 U.S. 343, 349-50 (1996). The Supreme Court has enforced this right in several situations analogous to the circumstances presented here. It has invalidated restrictions on prisoners' ability to obtain

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See, e.g., Ziglar Br. at 1, Hasty Br. at 5. In so doing, they fail to acknowledge that Plaintiffs have alleged each of the Defendant's participation in a number of unlawful practices which worked together to violate Plaintiffs' rights.

[34] In *Smith v. Coughlin*, 748 F.2d 783, 789 (2d Cir. 1984), the Second Circuit held that the right of prisoners to receive visits from legal workers was clearly established for qualified immunity purposes by *Procunier v. Martinez*, 416 U.S. 396 (1974).

assistance in preparing and filing claims, *Procunier v. Martinez*, 416 U.S. 396, 419-20 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989), and struck down prohibitions on referrals to attorneys that impaired an individual's access to the courts, *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1963).

In sum, the courts have held that the constitutional right of access to a judicial forum to pursue claims applies to government action—whether formal or informal and whether the result of an official policy or an unwritten practice—that prevents persons from accessing a judicial forum. The right provides a crucial safeguard against government barriers that deny recourse to judicial process, and is nowhere more important than where an individual has been detained.

b. Right to Counsel

Depriving a prisoner of access to legal counsel is tantamount to denying him access to the courts. "*[M]eaningful* access to the courts is the touchstone." *Bounds*, 430 U.S. at 823 (emphasis added). A necessary corollary of the right to access the courts is the right of an individual to communicate with someone learned in the law, who is often better equipped to seek meaningful redress from the courts than laypersons:

> The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.

Procunier v. Martinez, 416 U.S. at 419. Thus, the Court invalidated a ban on prisoners' provision of legal assistance to their fellow inmates because it "effectively prevented prisoners who were 'unable themselves, with reasonable adequacy, to prepare their petitions,' from challenging the legality of their confinements." *Bounds*, 430 U.S. at 823 (quoting *Johnson v. Avery*, 393 U.S. 483, 489 (1969)).

Furthermore, the Supreme Court has long recognized that due process often requires the assistance of a lawyer. *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *see also Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (observing that counsel can aid in identifying legal questions and presenting arguments). While the right to counsel in criminal cases is explicitly protected by the Sixth Amendment, the Fifth Amendment-based due process right to counsel has not been limited in application to the criminal context. In circumstances involving significant, non-criminal deprivations of liberty, the courts have also recognized a due process right to counsel.[35] Thus, it is clearly established that Defendants' affirmative interference with the detained Plaintiffs' access to counsel and the courts was unconstitutional.[36]

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[35] *See Project Release v. Prevost*, 722 F.2d 960, 976 (2d Cir. 1983) ("A right to counsel in civil commitment proceedings may be gleaned from the Supreme Court's recognition that commitment involves a substantial curtailment of liberty and thus requires due process protection."); *see also Vitek v. Jones*, 445 U.S. 480, 492-93 (1980) (due process requires appointment of counsel to indigent prisoners who are facing transfer hearings from the main prison facility to mental health hospital because of the "adverse social consequences" and "stigma" that can result from a finding of mental illness); *United States v. Budell*, 187 F.3d 1137, 1141 (9th Cir. 1999) ("because an adverse result in a commitment hearing results in a substantial curtailing of the respondent's liberty ... the Supreme Court has held that procedural due process does guarantee certain protections to civil commitment respondents," including the right to counsel (citation omitted)).

[36] Defendants misrepresent the standard of review to be applied by this Court in its scrutiny of Defendants' decision to block Plaintiffs' communications. Gov't Br. at 17. The deferential "facially legitimate and bona fide" standard proposed by Defendants originated in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and has only been applied to judicial review of substantive immigration decisions where the political branches have acted within their broad powers to admit or exclude non-citizens. In *Kleindienst*, the Supreme Court applied a deferential review standard to uphold the government's refusal to grant a visa to a Belgian Marxist who wished to enter the United States for the purpose of academic exchange. *Kleindienst v. Mandel*, 408 U.S. at 770.

The *Kleindienst* standard has never been extended to policies that, like the communications blackout and the other policies under challenge in this suit, are procedural in nature and infringe on constitutional rights. As the Sixth Circuit concluded following a detailed review of the case law, where procedural immigration rules implicate constitutional rights, *Kleindienst* is inapposite and meaningful judicial scrutiny is applied. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 687-93 (6th Cir. 2002) (discussing cases in which courts have

2. Plaintiffs Need Not Show Actual Injury for the Claims Alleged

Contrary to the Defendants' assertions, *see* Gov't Br. at 20-24; Ashcroft Br. at 14-16, Plaintiffs are not required to demonstrate that they suffered an "actual injury" in order to prevail on their claims of violation of their rights to counsel and access to the courts. *See Benjamin v. Fraser,* 264 F.3d 175, 185 (2nd Cir. 2001). The court in *Benjamin* held that an individual can assert a constitutional right without showing "actual injury" where "the right at issue is provided directly by the Constitution or federal law." *Id.* The rights at issue here, the right of meaningful access to the courts and the right to counsel, are provided for directly by the Constitution. *See e.g., Bounds,* 430 U.S. at 822-23; *see also Procunier v. Martinez,* 416 U.S 396, 419 (1974). The court in *Benjamin* distinguished rights that are derivative from another constitutional right from those found directly in the Constitution.[37] *See also Amaker v. Goord,* No. 98 Civ 3634, 2002 U.S. Dist. Lexis 5932, at * 34, *35 (S.D.N.Y. Mar. 29, 2002) (distinguishing a violation of the First Amendment right to access the courts from violations of derivative rights.) The cases cited by Defendants fall into the former category, while Plaintiffs' claims of direct interference with access to counsel and the courts meet the latter criteria.[38]

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recognized constitutional limits on the exercise of non-substantive immigration decisions, including *INS v. Chadha,* 462 U.S. 919 (1983), and *Zadvydas v. Davis,* 533 U.S. 678 (2001)).

[37] Defendant Ashcroft's attempt to distinguish *Benjamin* fails. Ashcroft Br. at 15 n.14. Ashcroft cannot reasonably assert that a policy of a complete blackout of attorney-client communication is somehow less onerous than the mere delays in communication struck down in *Benjamin. Benjamin,* 264 F.3d at 179-80. Furthermore, the Second Circuit does not limit its broad holding that plaintiffs have standing where they can show a direct violation of a Constitutional right, to the Sixth Amendment context. *Benjamin,* 264 F.3d at 185. Indeed, the *Benjamin* court uses the facts of *Lewis,* a denial of access case, to make the distinction between derivative rights (*i.e.,* law library access) and direct constitutional rights (*i.e.,* access to counsel.) *Id.*

[38] None of the cases cited by the Government Defendants in support of their "actual injury" argument are based on the direct denial of the right of access to the courts. *See* Gov't Br. at 20. As the *Benjamin* court explained, *Lewis v. Casey,* 518 U.S. 343 (1996) does not address the direct denial of a constitutional right. *Benjamin,* 264 F.3d at 184-85. The other cases cited by

Defendants also contend that so long as the Plaintiffs obtained any form of relief on any issue, no matter how ineffective or delayed, they are barred from bringing an access to courts claim. Gov't Br. at 20-24. That is not the law. To be sure, the Supreme Court explained in *Lewis v. Casey* that principles of standing require a plaintiff alleging a violation of access to the courts to demonstrate "actual injury." 518 U.S. 343, 349 (1996). However, injury is not cabined to cases in which all relief has been cut off. As the *Lewis* Court held, in the context of an access to courts claim, injury exists if defendants' conduct "hindered [plaintiff's] efforts to pursue a legal claim," *id.* at 351, or stated differently, that a "legal claim had been frustrated or was being impeded." *Id.* at 353. The circumstances here unequivocally meet that test.

Defendants would have this Court hold that government officials are free to conceal information, and completely block access to counsel and the courts at will for the express purpose of shielding the government from judicial scrutiny. In Defendants' view, no

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the Government clearly address derivative rights. *Monsky v. Moraghan* concerns a plaintiff who complained that being sniffed by a judge's dog while in a clerk's office in connection with her pending state civil litigation interfered with her right of access to the courts. No. 97-7015, 1997 U.S. App. LEXIS 36158, *2-4 (2d. Cir. Oct. 2, 1997). In *Davis v. Goord,* a prisoner complained that on two occasions his legal mail was opened by guards in his absence, and these incidents constituted a violation of his right of access to the courts. No. 01-0116, 2003 U.S. App. LEXIS 13030, *4-5 (2d. Cir Feb. 10, 2003). Neither of these cases concern a denial of the right to counsel, much less the complete blackout of attorney-client communication revealed in the OIG Report. OIG Report at 18, 113-114. Furthermore, *Davis*, the only case cited by Defendants that post-dates *Benjamin*, does not in any way overturn the principle set forth in *Benjamin* that plaintiffs need not show "actual injury" where they are alleging a direct violation of a constitutional right. *Benjamin,* 264 F.3d at 185.

Nor does *Christopher v. Harbury*, 536 U.S. 403, 415 (2002), disturb Second Circuit precedent regarding the distinction between direct constitutional violations and derivative violations. *Christopher* merely held that a plaintiff's denial of access claim must be based on a "nonfrivolous," "arguable" underlying claim and that the claim may be based on "an opportunity yet to be gained or an opportunity already lost." *Christopher*, 536 U.S. at 414-15. As a result of Defendants' blackout policy on attorney-client communications, during that period, Plaintiffs lost their opportunity to challenge: (i) their failure to receive timely NTAs; (ii) the denial of a fair bond redetermination hearing; (iii) the "Hold Until Cleared" policy; and (iv) their confinement in Special Housing Units. There is nothing frivolous about any of these claims.

constitutional principle would prevent officials from continuing to conceal detainees' whereabouts and from blocking all contact with family members and counsel. Unless the Court is to accept that extreme view, Defendants' motions to dismiss Claims 21 and 22 must be denied.

V. DEFENDANTS ARE PERSONALLY RESPONSIBLE FOR VIOLATING PLAINTIFFS' CONSTITUTIONAL RIGHTS

Each named Defendant argues that the Second Amended Complaint does not include sufficient allegations of personal involvement to hold them liable. These arguments suffer from three common flaws: they disregard the applicable decisional authority regarding personal involvement; they ignore the pleading rules delineated in the federal rules of civil procedure; and they overlook the inclusive allegations of the Second Amended Complaint.

Personal involvement of a supervisory official in a *Bivens* action may be established by evidence that:

> (1) the official participated directly in the alleged constitutional violation, (2) the official, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the official created a policy or custom under which the unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the official was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the official exhibited deliberate indifference to the rights of others by failing to act on information indicating that unconstitutional acts were occurring.[39]

In addition, "anyone who 'causes' any citizen to be subjected to a constitutional deprivation is also liable." *Wong v. Beebe*, 2002 WL 31548486, at *14 (D. Or. April 5, 2002) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)). "The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know

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[39] *Vazquez v. Parks*, No. 02 Civ. 1735, 2003 U.S. Dist. LEXIS 3957, at *24 (S.D.N.Y. Jan. 27, 2003) (quoting *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 254 (2d Cir. 2001), in turn quoting *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995)); *Noguera v. Hasty*, No. 99 Civ 8786, 2001 U.S. Dist. LEXIS 2458, at *3 (S.D.N.Y. Mar. 12, 2001).

would cause others to inflict the constitutional injury."[40]

Similarly, Defendants appear to have discounted the fact that Plaintiffs are entitled to rely upon statements included in the OIG Report to satisfy their pleading requirements. Rule 10(c) of the Federal Rules of Civil Procedure provides that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Under this Rule "[t]he complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." *Int'l Audiotext Network, Inc. v. AT&T*, 62 F.3d 69, 72 (2d Cir. 1995) (quoting from *Cortec Indus., Inc. v. Sum Holding, L.P.*, 949 F.2d 42, 47 (2d Cir. 1991), *cert. denied*, 503 U.S. 960 (1992)). Here, because the OIG Report has been attached to the Second Amended Complaint and relied upon heavily in drafting the new claims, it is "integral" to the Complaint and therefore may be appropriately considered by the Court in deciding whether Plaintiffs can prove any set of facts that would entitle them to relief. *Id.*; *see Perks v. Town of Huntington*, 96 F. Supp. 2d 222, 225-26 (E.D.N.Y. 2000) (holding that facts stated in fact-finder's report may be considered as further allegations in court's determination of whether any set of facts exists under which plaintiff is entitled to relief).

Finally, Defendants' claims that insufficient allegations of personal involvement have been made simply ignore the allegations included in the Second Amended Complaint specifying that all Defendants played significant supervisory and/or operational roles in the challenged policies. Second Am. Compl. at ¶¶ 1-5, 55-57, 265, 270, 275. In addition, there are more than enough specific allegations to support liability against each Defendant.

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[40] *Johnson*, 588 F.2d at 743-44; *see also Saye v. St. Vrain Valley Sch. Dist.*, 785 F.2d 862, 867-68 (10th Cir. 1986) (holding that liability for a retaliatory discharge is not cut off when a school board decides to dismiss a teacher based on the recommendation of principal who had retaliatory intent); *Prof'l Ass'n of Coll. Educators v. El Paso County Cmty. Coll. Dist.*, 730 F.2d 258, 266 (5th Cir. 1984) (holding Board of Trustees liable on the basis of its decision affirming college president's retaliatory termination of professor).

1. James Ziglar. Defendant Ziglar's contention that the allegations of his role in the prolonged placement of detainees in extremely restrictive confinement "has no relation whatsoever" to Plaintiffs' First and Fifth Amendment claims of violations of their rights to counsel and access to the courts or to claims 17 through 20, Ziglar Br. at 1, is simply wrong. As the allegations of the Second Amended Complaint make clear, the government blocked Plaintiffs' access to counsel and the courts through several different mechanisms, one of which was the assignment of Plaintiffs to the ADMAX SHU. *See* Second Am. Compl. at ¶¶1-5, 55-57, 265, 270, 275. From September 11-21, INS Executive Associate Commissioner for Field Operations Michael Pearson—who directly reported to Defendant Ziglar, OIG Report at 38—made the decisions regarding where to house post-9-11 detainees. *Id.* at 18. Thereafter, the INS created the Custody Review Unit at INS Headquarters and appointed three INS District Directors to make the detainee housing determinations. *Id.* at 18-19. Ziglar was responsible in a supervisory capacity for all of these decisions and is therefore implicated in claims 20 through 22.

Defendant Ziglar's *own* requirement that INS Headquarters review and approve all NTAs for legal sufficiency prior to their service on the detainees establishes his involvement with respect to Claim 17, and also thwarted Plaintiffs' access to counsel and the courts, implicating Claims 21 and 22. OIG Report at 32, 35-36.

Finally, Ziglar had a significant role in the implementation of the blanket no-bond policy at issue in Claims 18 and 19. As the OIG Report makes clear, INS Commissioner Ziglar personally instructed Pearson to order all INS field offices to hold detainees until the FBI clearance procedure was complete. *Id.* at 38, 77. To effectuate this directive, Pearson issued an order on September 13, 2001 to INS field offices instructing them to hold detainees until they

were individually cleared by the FBI. *Id.* at 77. Furthermore, this policy was implemented despite the specific concerns raised, in a meeting attended by Defendant Ziglar's Chief of Staff, Victor Cerda, and officials from the FBI and DOJ, that the full FBI clearance process was taking too long, and that the "Department might be subject to 'Bivens liability' if it did not release the New York detainees in a timely manner." *Id.* at 55.

2. Robert Mueller. Defendant Mueller, as Director of the FBI, was personally involved in every aspect of the conduct underlying Plaintiffs' new claims. The OIG Report makes clear that the FBI: (i) coordinated the terrorism investigation from its Strategic Information and Operations Center ("SIOC") at FBI Headquarters, OIG Report at 11; (ii) coordinated the New York aspects of the investigation through its New York Joint Terrorism Task Force, *id.* at 11-12; (iii) led the terrorism task forces pursuing investigative leads and determined who would be arrested and classified as September 11 detainees, *id.* at 15-16; (iv) made the assessment of detainees' possible links to terrorism and forwarded the assessment to the INS for its use in making housing determinations in the detention facilities, *id.* at 17; (v) requested that detainees of "high interest" be housed at BOP high security facilities, such as MDC, *id.* at 18, 25; (vi) instituted the process under which detainees were held until cleared by the FBI (even after the INS had ordered removal), *id.* at 25-26, 37-38, 42; (vii) sanctioned the no-bond policy, *id.* at 39; (viii) implemented a policy under which detainees who had been found to be unconnected to the attacks or terrorism in general were nevertheless held for additional clearance, *id.* at 48; (ix) undertook the detainee clearance investigations, *id.* at 49-50; and (x) centralized the clearance process and required that all aspects of the clearance investigation be routed through FBI Headquarters, *id.* at 51.

3. Dennis Hasty. Defendant Hasty contends that he cannot be held personally

responsible for the new claims because he was acting pursuant to BOP orders regarding the classification and holding of detainees without bond until they were cleared by the FBI and the terms of restrictive detention in the ADMAX SHU. *See* Hasty Br. at 9. He further argues that Plaintiffs have failed to allege that he had "any role whatsoever in formulating or implementing" these policies. *Id.* at 10. Defendant Hasty, however, is incorrect as to the facts and the law.

With regard to the facts, Plaintiffs clearly included Defendant Hasty in their allegations regarding the hold-until-cleared policy, the classification and assignment of detainees, the conditions of confinement, and the communications blackout. Second Am. Compl. at ¶¶5, 265, 270, 275. In addition, the OIG Report makes clear that "MDC officials placed all incoming September 11 detainees in the ADMAX SHU without conducting the routine individualized assessment" and subjected them to "the most restrictive conditions of confinement authorized by BOP policy." OIG Report at 112. On September 12, 2001, David Rardin, the BOP's Northeast Region Director, directed the wardens in his region—including Hasty at MDC, *id.* at 113—not to release inmates classified by BOP as "terrorist related" "until further notice." *Id.* Five days later, according to the Report, Rardin ordered the communications blackout for the detainees during a telephone conference call with the Northeast Region Wardens. *Id.* There can be no doubt that Defendant Hasty communicated and enforced the assignment to the ADMAX SHU, the hold-until-cleared, and the communications blackout policies.

Further, the Report documents the fact that MDC officials, supervised by Hasty, did not follow the BOP's inmate security risk assessment procedures for determining where to house the detainees, but relied upon the FBI's assessment and placed them in the ADMAX SHU. *Id.* at 126-27. Even after detainees were "cleared" by the FBI, they were kept in the ADMAX SHU for "days or weeks after they were supposed to be transferred to the MDC's less restrictive

general population." *Id.* at 127. These allegations plainly show Defendant Hasty's responsibility for implementation of the policies challenged here.[41]

4. Michael Zenk. Defendant Zenk urges the Court to dismiss the claims against him in his personal capacity because he "was Warden [only] for a period of weeks" until Plaintiff Yasser Ebrahim was deported to Egypt on June 6, 2002. Zenk Br. at 2-3. Defendant Zenk's argument, however, ignores several essential facts.[42] First, as Warden of the MDC facility, Defendant Zenk was legally responsible for the conditions of confinement under which Plaintiff Yasser Ebrahim and Shakir Baloch (and other class members) were held, regardless of the duration of that confinement, and regardless of who initially instituted the unconstitutional practices.[43] Second, during Zenk's supervisory period, Plaintiffs continued to suffer under his adherence to unlawful policies. These policies included prolonging detainees' confinement in the ADMAX SHU even after they had been cleared by the FBI, OIG Report at 127, and turning away visitors seeking access because of the detainees' high security classification. *Id.* at 117. Defendant Zenk's knowing adherence to these unconstitutional policies unequivocally renders him personally liable for the violations that resulted from them.[44]

5. John Ashcroft. Defendant Ashcroft asserts lack of personal involvement only with respect to Claim 20, challenging arbitrary assignment to the ADMAX SHU. Ashcroft Br. at 13

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41 *See Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995); *Noguera v. Hasty*, No. 99 Civ 8786, 2001 U.S. Dist. LEXIS 2458, at *3 (S.D.N.Y. Mar. 12, 2001).

42 Defendant Zenk also fails to note that Plaintiff Shakir Baloch was also confined at MDC during the first week or weeks of Defendant Zenk's tenure. Second Am. Compl. at ¶146.

43 *See Poe v. Leonard*, 282 F.3d 123, 143 (2d Cir. 2002) ("In some cases, notice will also be imputed to an individual because of the particular duties he is assigned by virtue of his position"); *McCann v. Coughlin*, 698 F.2d 112, 125 (2d Cir. 1983) (Superintendent may be fairly viewed as having had "at least constructive notice" of the practices employed at the correctional center he controlled).

44 *See Meriwether v. Coughlin*, 879 F.2d 1037, 1048 (2d Cir. 1989); *Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir. 1986).

n.12. [45] Plaintiffs' Second Amended Complaint plainly refutes this assertion. According to Michael Cooksey, the BOP's Assistant Director for Correctional Programs, the Justice Department was aware of the BOP's decision to house the detainees in high-security confinement. *Id.* at 19. Indeed, BOP director Kathy Hank Sawyer stated that she was directed by high-up officials in the Deputy Attorney General's office to keep detainees in as restrictive conditions as possible. *Id.* at 112-13.

VI. PLAINTIFFS' SECOND AMENDED COMPLAINT AND THE OIG REPORT ALSO SUPPORT PLAINTIFFS' ORIGINAL CLAIMS

Finally, the Second Amended Complaint adds allegations from the OIG Report that buttress claims in the First Amended Complaint. In particular, the OIG Report's revelations that the government's policy was to deny post-9-11 detainees release on bond without regard to evidence of their dangerousness or flight risk, Second Am. Comp. ¶ 28(d), that the government identified detainees as "of interest" in the absence of any affirmative evidence of ties to terrorism, *id.* at ¶ 2, that the government failed to conduct post-removal-order custody reviews for any of the post-9-11 detainees, *id.* at ¶ 58, and that some class members were detained for over six months after their removal orders were final, *id.* at ¶ 41, all support Plaintiffs' Fifth Amendment challenge to their detention long after their removal could have been effectuated (Claim 2). Plaintiffs' principal contention, which the OIG Report shows was shared by the

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[45] Defendant Ashcroft does not dispute his personal involvement in the remaining constitutional violations, and for good reason. Ashcroft maintained a very public direct personal involvement in supervising and directing the government's preventive detention campaign since shortly after the September 11 attacks. According to the OIG Report, Ashcroft himself is the likely architect of the "no bond" hold until cleared policy challenged by Plaintiffs in Claims 18 and 19. OIG Report at 37-38. Defendant Zigler maintains that the Department was "fully aware" of the troubling ramifications caused by the length of the clearance process. *Id.* at 67. Defendant Ashcroft is also clearly implicated in the communications blackout challenged in Plaintiffs' Claims 21 and 22, as BOP director Kathy Hank Sawyer stated that she was directed by high-up officials in the Deputy Attorney General's office to curtail detainees' ability to communicate with the outside world. *Id.* at 112-13.

INS's own General Counsel, OIG Report at 92-97, is that immigration detention is permissible only to the extent necessary to effectuate removal, and any detention not necessary to that end violates substantive due process.[46]

Even accepting *arguendo* the Government's argument that it has a legitimate interest in *investigating* foreign nationals under removal orders before actually removing them, the Government has offered no explanation for detaining such persons while the investigation goes on, particularly given the OIG Report's revelation that the government's policy was to treat people as "of interest" and deny them release *without any evidence of dangerousness or flight risk*. The government's failure to conduct post-removal order custody reviews required under immigration regulations—a review that is designed to determine whether detention is warranted—further underscores Plaintiffs' point, for it shows that Defendants sought to detain them even in the absence of evidence that they were dangerous or a flight risk.[47]

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[46] The Office of Legal Counsel memorandum that Ashcroft has attached as an exhibit to his brief disagrees with the INS General Counsel. But it is noteworthy that this memorandum was written long after this case was filed and is entirely self-serving. It merely elaborates on the legal arguments made by Defendants in their initial memorandum. As this Court instructed that supplemental briefing should be limited to the new matters presented by the Second Amended Complaint, Ashcroft's submission constitutes an improper attempt to subvert *both* that order and the Court's denial of Ashcroft's motion to file a brief of 45 pages. In any event, the memorandum addresses the plainly distinguishable situation of a foreign national who was positively identified as an associate of Al Qaeda. Here, by contrast, Defendants subjected Plaintiffs and other class members to post-removal order detention *without any evidence of dangerousness or flight risk* The OLC memo does not take the position that *detaining* people who pose *no danger or flight risk* long after their removal could be effectuated would be constitutional. For the reasons we asserted in our prior brief, that conduct is plainly unconstitutional.

[47] The new allegations also provide further support for Plaintiffs' Equal Protection challenges, because the OIG Report not only confirms that virtually all those detained were Arab or Muslim foreign nationals, but reveals that the government often arrested individuals and labeled them as "of interest" based on groundless tips sparked in significant part by ethnic or religious appearance. OIG Report. at 15-17, 21. As noted above, when government officials incorporate private biases and take official action on that basis, they violate equal protection. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss the Second Amended Complaint should be denied.

Dated: New York, New York
July 16, 2003

Respectfully submitted,

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Counsel express their gratitude to law students Julie Fry, Elizabeth Evensen, Veena Iyer, Matthew Strugar, and Daniel Suleiman for their work on this memorandum.

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2003, I caused the foregoing Plaintiffs' Memorandum of Law in Opposition to Defendants' Supplemental Motion to Dismiss the the Second Amended Complaint to be filed with this Court and to be served upon the following counsel by pre-paid overnight mail:

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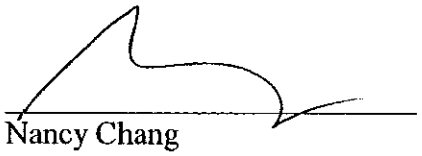

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