REENA RAGGI, *Circuit Judge*, concurring in part in judgment and dissenting in part:

Today, our court becomes the first to hold that a Bivens action can be maintained against the nation's two highest ranking law enforcement officials—the Attorney General of the United States and the Director of the Federal Bureau of Investigation ("FBI")—for policies propounded to safeguard the nation in the immediate aftermath of the infamous al Qaeda terrorist attacks of September 11, 2001 ("9/11").[1] I respectfully dissent from this extension of Bivens to a context not previously recognized by Supreme Court or Second Circuit precedent. I do not suggest that executive action in this, or any other, context is not subject to constitutional constraints. I conclude only that when, as here, claims challenge official executive policy (rather than errant conduct by a rogue official—the typical Bivens scenario), and particularly a national security policy pertaining to the detention of illegal aliens in the aftermath of terrorist attacks by aliens operating within this country, Congress, not the judiciary, is the appropriate branch to decide whether the detained aliens should be allowed to sue executive policymakers in

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[1] To date, four Courts of Appeals—for the Fourth, Seventh, Ninth, and D.C. Circuits—have declined to extend Bivens to suits against executive branch officials for national security actions taken after the 9/11 attacks. See Vance v. Rumsfeld, 701 F.3d 193 (7th Cir. 2012) (en banc); Mirmehdi v. United States, 689 F.3d 975 (9th Cir. 2012); Doe v. Rumsfeld, 683 F.3d 390 (D.C. Cir. 2012); Lebron v. Rumsfeld, 670 F.3d 540 (4th Cir. 2012); see also Ali v. Rumsfeld, 649 F.3d 762 (D.C. Cir. 2011); Rasul v. Myers, 563 F.3d 527 (D.C. Cir. 2009).

their individual capacities for money damages.

Even if a Bivens action were properly recognized in this context—which I submit it is not—I would still dissent insofar as the majority denies qualified immunity to five former federal officials, Attorney General John Ashcroft, FBI Director Robert Mueller, Immigration and Naturalization Service ("INS") Commissioner James Ziglar ("DOJ Defendants"), Metropolitan Detention Center ("MDC") Warden Dennis Hasty, and Associate Warden James Sherman ("MDC Defendants"), on plaintiffs' policy-challenging claims of punitive and discriminatory confinement and unreasonable strip searches. The majority does narrow these claims by allowing their pursuit only (1) by those aliens confined in the MDC's most restrictive housing unit, the "ADMAX SHU" ("MDC Plaintiffs"); and (2) for restrictive confinement after defendants purportedly learned that plaintiffs were being detained without individualized suspicion of their connection to terrorism. See Majority Op., ante at 41–42, 77. Even with the claims so narrowed, however, I think defendants are entitled to qualified immunity because plaintiffs fail to plead plausible policy-challenging claims that were clearly established at law in the period September 2001 to April 2002, when one or more MDC Plaintiffs were confined in the ADMAX SHU. As the majority acknowledges, the 9/11 attacks killed 3,000

people and presented "unrivaled challenges and severe exigencies" for the security of the nation. Majority Op., ante at 31. The law did not then clearly alert federal authorities responding to these challenges that they could not hold lawfully arrested illegal aliens—identified in the course of the 9/11 investigation and among the group targeted for recruitment by al Qaeda—in restrictive (as opposed to general) confinement pending FBI-CIA clearance of any ties to terrorism unless there was prior individualized suspicion of a terrorist connection. Indeed, I am not sure that conclusion is clearly established even now.

Accordingly, because I conclude both that a Bivens remedy should not be extended to plaintiffs' policy-challenging claims and that the DOJ and MDC defendants are entitled, in any event, to qualified immunity, I dissent from the majority's refusal to dismiss these claims.[2]

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[2] In concluding its opinion, the majority asserts that plaintiffs' claims cannot be dismissed because "[i]f there is one guiding principle to our nation it is the rule of law." Majority Op., ante at 106. The rule of law, however, is embodied not only in amendments to the Constitution, but also, and first, in that document's foundational structure of separated powers. See 1 Annals of Cong. 581 (1789) (reporting Madison's statement in first Congress that "if there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive, and Judicial powers"); see also Mass. Const. of 1780, Part the First, art. XXX (John Adams) (separating powers "to the end it may be a government of laws, and not of men"); Bowsher v. Synar, 478 U.S. 714, 721–22 (1986) (observing that "declared purpose of separating . . . powers of government, of

I. *Bivens* Should Not Be Extended to Plaintiffs' Policy-Challenging Claims

A. The Narrow Scope of *Bivens* Actions

On three occasions in the decade between 1971 and 1980, the Supreme Court implied directly from the Constitution private damages actions against federal officials for alleged violations of rights. See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (implying action for unlawful

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course, was to 'diffus[e] power the better to secure liberty,'" (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring))). Thus, it is the rule of law that demands that a court do more than identify a possible wrong; it must consider what authority the judiciary has to imply a remedy—specifically, a damages remedy—in the absence of legislative action. See The Federalist No. 47, at 251–52 (James Madison) (Carey & McClellan, ed. 2001) (quoting Montesquieu's maxim that "were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator"); INS v. Chadha, 462 U.S. 919, 951 (1983) (stating that "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted"); J. Harvie Wilkinson III, Our Structural Constitution, 104 Colum. L. Rev. 1687, 1707 (2004) (observing that "threshold question" for judge is not, "How should I resolve this case?" but "To whom does the Constitution entrust the resolution of this issue?").

It is also the rule of law—to which both sides in a lawsuit have a right—that requires a court to consider whether certain defenses, such as qualified immunity, shield a particular defendant in any event from a suit for damages. See, e.g., Pearson v. Callahan, 555 U.S. 223, 231–32 (2009) (reiterating that qualified immunity should be decided at earliest possible stage of litigation because it is immunity from suit, not just liability).

Thus, the rule of law animates this dissent no less than the majority opinion.

arrest and excessive force in arrest from Fourth Amendment prohibition of unreasonable searches and seizures); accord Carlson v. Green, 446 U.S. 14 (1980) (implying action for deliberate indifference to prisoner's medical needs from Eighth Amendment prohibition of cruel and unusual punishment); Davis v. Passman, 442 U.S. 228 (1979) (implying action for sex discrimination in federal employment from equal protection component of Fifth Amendment). The Court has never done so again. Instead, it has "consistently refused to extend Bivens liability to any new context or new category of defendants," Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001), emphasizing that "implied causes of actions are disfavored," Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009), and "in most instances . . . unjustified," Wilkie v. Robbins, 551 U.S. 537, 550 (2007).

This reluctance to extend Bivens is grounded in our constitutional structure of separated powers. As the Supreme Court has explained, deciding whether to extend Bivens focuses not on "the merits of the particular remedy" sought, but on "who should decide whether such a remedy should be provided," specifically, the legislative branch of government, Congress, or the adjudicative branch, the judiciary. Bush v. Lucas, 462 U.S. 367, 380 (1983). For more than thirty years now, the Supreme Court has invariably answered that question in favor of Congress. See,

e.g., Wilkie v. Robbins, 551 U.S. at 562 ("'Congress is in a far better position than a court to evaluate the impact of a new species of litigation' against those who act in the public's behalf." (quoting Bush v. Lucas, 462 U.S. at 389)).

Heeding this precedent, our own court, en banc, has stated "that the Bivens remedy is an extraordinary thing that should rarely if ever be applied in new contexts." Arar v. Ashcroft, 585 F.3d 559, 571 (2d Cir. 2009) (en banc) (internal quotation marks omitted). Most particularly, it should not be applied in a new context if any alternative process is available to address the claimed constitutional interest or if "special factors" counsel hesitation in recognizing a new damages action. Bush v. Lucas, 462 U.S. at 378; accord Minneci v. Pollard, 132 S. Ct. 617, 621 (2012); Wilkie v. Robbins, 551 U.S. at 550; Arar v. Ashcroft, 585 F.3d at 572 (collecting cases). In short, a Bivens remedy is never "an automatic entitlement"; it "has to represent a judgment about the best way to implement a constitutional guarantee." Wilkie v. Robbins, 551 U.S. at 550.

Applying these principles here, I conclude that plaintiffs' constitutional challenges to an alleged executive policy for confining lawfully arrested illegal aliens in the aftermath of the 9/11 attacks cannot pass the stringent test for recognizing a Bivens action. In holding otherwise, the panel majority maintains that plaintiffs'

challenges to the conditions of their confinement—with the exception of their Free Exercise challenge—"stand[] firmly within a familiar Bivens context," thus avoiding the need to consider factors counseling hesitation or alternative remedies. Majority Op., ante at 31–32, 35–36.[3] The majority can reach that conclusion, however, only by fashioning a new standard for construing the few recognized Bivens contexts that employs an impermissibly "high level of generality." Wilkie v. Robbins, 551 U.S. at 561 (cautioning against such construction); accord Arar v. Ashcroft, 585 F.3d at 572. I respectfully disagree with that analysis.[4]

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[3] I concur in the panel judgment dismissing plaintiffs' Free Exercise challenge. See Majority Op., ante at 35–36. Not only has the Supreme Court consistently declined to extend a Bivens remedy to a First Amendment claim in any context, see, e.g., Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009), but also Congress has provided alternative relief under the Religious Freedom Restoration Act, see 42 U.S.C. § 2000bb et seq.

[4] I dissent from the majority's allowance of Bivens claims against both the DOJ and the MDC Defendants even though the former group, having secured dismissal on other grounds in the district court, did not renew their Bivens challenge in defending that judgment on appeal. No matter. We can affirm on any ground supported by the record, see Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 413 (2d Cir. 2014), and the lists-merger theory on which the majority reverses dismissal was never advanced by plaintiffs' in either the district court or on appeal, see infra at 43 n.28.

B. Plaintiffs' Claims Do Not Arise in an Established *Bivens* Context

1. The *Arar v. Ashcroft* Standard for Identifying *Bivens* Context Is Holistic and Cannot Be Reduced to Two Factors

In deciding whether a claim arises in a previously recognized Bivens context, this panel is bound by our court's en banc decision in Arar v. Ashcroft, which defines "context" as "a potentially recurring scenario that has similar legal and factual components." 585 F.3d at 572. The majority pays lip service to this definition, see Majority Op., ante at 29, but then significantly narrows it to demand commonality only as to the "rights injured" and the "mechanism of injury," id. at 32. This substitution cannot be reconciled with controlling precedent. Arar's definition of context is unqualified, contemplating a careful, holistic examination of all legal and factual components of the "scenario" in which a claim arises to see if it is, indeed, a recurrent example of a previously recognized Bivens context. Arar v. Ashcroft, 585 F.3d at 572. Such an inquiry does not denominate any particular factors—such as the "rights injured" or "mechanism of injury"—as determinative. Nor does it pronounce other factors—such as a challenge to an executive policy, implicating the exercise of national security and immigration authority in a time of

crisis—irrelevant.[5] By doing both here, the majority not only fails to conduct the full inquiry mandated by Arar's definition of context. It also fails to heed the Supreme Court admonition that animates the Arar definition, i.e., that a Bivens remedy—generally "disfavored," Ashcroft v. Iqbal, 556 U.S. at 675, and usually "unjustified," Wilkie v. Robbins, 551 U.S. at 550—is never "an automatic entitlement" but, rather, the product of a considered "judgment about the best way to implement a constitutional guarantee" in particular circumstances, id. Such a judgment necessarily requires more than the general identification of a constitutional right or a mechanism of injury. It demands consideration of all factors counseling for and against an implied damages action in the specific legal and factual circumstances presented.

It is precisely because a Bivens judgment is made only after weighing all factors relevant to a given scenario that, when another case arises presenting similar legal and factual components, a court need not repeat the process. But where a

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[5] In pronouncing the national security challenges following the 9/11 attacks irrelevant to a Bivens context determination, the majority cites Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007), rev'd in part sub nom. Ashcroft v. Iqbal, 556 U.S. 662 (2009). See Majority Op., ante at 31. That reliance is misplaced because it conflates the question of clearly established rights—the qualified immunity concern at issue in Iqbal v. Hasty, 490 F.3d at 159—with the distinct Bivens question of previously established context.

proposed Bivens claim presents legal and factual circumstances that were not present in an earlier Bivens case, a new assessment is necessary because no court has yet made the requisite "judgment" that a judicially implied damages remedy is "the best way" to implement constitutional guarantees in that context. Wilkie v. Robbins, 551 U.S. at 550.

That is the concern here. No court has ever made the judgment that an implied damages remedy is the best way to implement constitutional guarantees of substantive due process, equal protection, and reasonable search when lawfully arrested illegal aliens challenge an executive confinement policy, purportedly made at the cabinet level in a time of crisis, and implicating national security and immigration authority. In the absence of a judgment made in that context, the majority cannot conclude that a Bivens remedy is available to these plaintiffs simply because they assert rights and mechanisms of injury present in some other Bivens cases. Indeed, because rights and mechanisms of injury can arise in a variety of circumstances, presenting different legal and factual components, these two factors cannot alone identify context except at an impermissibly high level of generality. See Wilkie v. Robbins, 551 U.S. at 561; Arar v. Ashcroft, 585 F.3d at 572.

This generality concern is only exacerbated by the majority's apparent

willingness to mix and match a "right" from one Bivens case with a "mechanism of injury" from another and to conclude that wherever such a right and such a mechanism of injury are paired together, the resulting Bivens claim arises in an established context. See Majority Op., ante at 31–35; 37. The problem is that no court has previously made the requisite judgment with respect to that pairing, much less made it in a legal and factual scenario similar to the one presented here.

2. The Majority Cites No Case Affording a *Bivens* Remedy in a Scenario Legally and Factually Similar to that Presented Here

a. Punitive Confinement Claim

The majority cites two cases, Carlson v. Green, 446 U.S. 14, and Thomas v. Ashcroft, 470 F.3d 491 (2d Cir. 2006), in which federal prisoners were allowed to maintain Bivens actions for injuries sustained in confinement. See Majority Op., ante at 32–33. But in each case, the claim asserted was deliberate indifference to the prisoner's particular medical needs. That scenario is neither legally nor factually similar to a substantive due process claim of punitive pre-trial confinement implied from allegedly purposeless restrictions. See generally Bell v. Wolfish, 441 U.S. 520 (1970).[6] Indeed, the difference in context is only highlighted by law affording prison

[6] When, in Bell v. Wolfish, the Supreme Court discussed the substantive due process prohibition on punitive pre-trial confinement, it did so on a petition for a writ of

authorities considerable discretion in establishing confinement policies. See generally Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1517 (2012).

Deliberate indifference to an individual inmate's particular health needs was also the basis for the constitutional claim in Correctional Services Corp. v. Malesko, 534 U.S. 61. In that case, however, the Supreme Court declined to extend a Bivens remedy to such a claim when brought against a private corporation operating detention facilities under a contract with the Bureau of Prisons ("BOP"). See id. at 74. Thus, the Malesko observation cited by the majority—that "[i]f a federal prisoner in a BOP facility alleges a constitutional deprivation, he may bring a Bivens claim against the offending individual officers, subject to the defense of qualified immunity," Majority Op., ante at 33 (quoting Malesko, 534 U.S. at 72)—cannot be read apart from the context in which it was made. It would, in fact, be extraordinary to conclude that in a deliberate indifference case such as Malesko, in which all claims against individuals had been dismissed, and in which the Supreme Court declined to extend Bivens to the private corporate defendant, the Court was, nevertheless, using a single sentence of dictum to sweep well beyond Carlson and to hold that Bivens remedies are available to federal prisoners raising any constitutional

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habeas corpus, not in a Bivens action. See 441 U.S. at 526, 528.

challenge to any aspect of their confinement against individual federal employees. Indeed, that reading is foreclosed in this circuit by Arar, which observed that Carlson extended Bivens to Eighth Amendment violations by prison officials, after which "the Supreme Court has declined to extend the Bivens remedy in any new direction at all." Arar v. Ashcroft, 585 F.3d at 571 (emphasis added).

In Tellier v. Fields, also cited by the majority, ante at 34, a prison inmate did seek a Bivens remedy for restrictive confinement, but the right he asserted was procedural not substantive due process. See 280 F.3d 69, 73 (2d Cir. 2001). In short, he complained that defendants had failed to follow controlling procedures for imposing prison discipline. He did not contend that the restrictive conditions themselves were substantively unreasonable, a claim with quite different legal and factual components.[7]

In sum, the panel majority points to no case in which the Supreme Court or this court has yet extended a Bivens remedy to claims of punitive confinement by federal pre-trial detainees, and certainly not in the unprecedented context of a challenge to executive policy implicating the exercise of national security and

[7] This court has already dismissed procedural due process challenges to the confinement policy here at issue on grounds of qualified immunity. See Iqbal v. Hasty, 490 F.3d at 167–68.

immigration authority in a time of crisis.[8]

b. Discriminatory Confinement Claim

Nor does the majority cite to any case affording a Bivens remedy for alleged discriminatory conditions of confinement. The context of the single equal protection case cited, Davis v. Passman, 442 U.S. 228, was employment discrimination by a member of Congress. See Majority Op., ante at 32 n.15. That scenario bears almost no factual and legal similarity to the equal protection claim here, which is informed not only by the discretion afforded prison authorities in establishing confinement policies, see generally Florence v. Bd. of Chosen Freeholders, 132 S. Ct. at 1517, but also by the particular circumstances of the 9/11 attacks, see generally Ashcroft v.

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[8] The majority cites two cases—not controlling on this court—that allowed federal detainees to pursue a Bivens remedy for restrictive confinement. See Bistrian v. Levi, 696 F.3d 352, 374–75 (3d Cir. 2012); Cale v. Johnson, 861 F.2d 943, 947 (6th Cir. 1988), abrogated on other grounds by Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999 (en banc). In neither case, however, did these courts assess "context" by reference to the standard we articulated in Arar. In fact, Bistrian conducted no Bivens extension analysis. Much less were these other circuit courts confronted with the circumstances contributing to the unique scenario presented here.

Insofar as the majority cites the dissenting opinion in Arar for the proposition that this court has "presumed the availability of a Bivens remedy for substantive due process claims," Majority Op., ante at 32 n.15 (citing Arar, 585 F.3d at 598 (Sack, J., dissenting)), it is, of course, not the dissent, but the en banc majority opinion in Arar that controls our context consideration here. For reasons already discussed, that controlling opinion requires us to look to more than the right alleged to identify an established Bivens context.

Iqbal, 556 U.S. at 682 (observing that because 9/11 attacks were ordered and conducted by Arab Muslims, it was "no surprise" that legitimate law enforcement policies to identify 9/11 assailants and to prevent future attacks "would produce a disparate incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims").

Even in the context of employment discrimination claims, the Supreme Court has been reluctant to construe Davis v. Passman to reach beyond its particular factual scenario, especially where factors—not present in Davis—counsel hesitation. See Chappell v. Wallace, 462 U.S. 296, 297–305 (1979) (declining to extend Bivens to enlisted soldiers' claims of race discrimination against commanding officers). If, as the majority seems to recognize, Davis cannot be construed to afford a Bivens remedy for every claim of employment discrimination, see Majority Op., ante at 32 n.15, it can hardly be understood to afford a Bivens remedy in the altogether different context of alleged prison confinement discrimination.

c. Strip-Search Claim

In challenging the strip-search component of their restrictive confinement, the MDC Plaintiffs invoke the Fourth as well as the Fifth Amendment. The Fourth Amendment cases cited by the majority—Bivens, Groh v. Ramirez, 540 U.S. 551

(2004), and Castro v. United States, 34 F.3d 106 (2d Cir. 2006), see Majority Op., ante at 36–37—do not present scenarios similar to that here.

The potentially recurring scenario in Bivens was unlawful arrest, executed without probable cause and with excessive force. See 403 U.S. at 389. That hardly represents a judgment that an implied Bivens damages action is the best way to vindicate every Fourth Amendment claim. See Majority Op., ante at 37. Rather, to come within the context established by Bivens, a Fourth Amendment claim must have legal and factual components akin to unlawful arrest. See generally Arar v. Ashcroft, 585 F.3d at 572. Plaintiffs here do not challenge their arrests, which were all supported by probable cause to believe that each detained alien had violated immigration laws, and which were all effected without undue force. Instead, plaintiffs challenge a policy of restrictive confinement (including strip searches) after lawful arrest.

As for Groh and Castro, the searches there at issue were of private residences, a factually distinct scenario presenting different legally cognizable expectations of privacy giving rise to different legal standards of constitutional reasonableness than those applicable to prison searches. See Covino v. Patrissi, 967 F.2d 73, 75 (2d Cir. 1992) (observing, in § 1983 action, that constitutionality of pre-trial detainee strip

searches should be assessed under "legitimate penological interests" standard outlined in Turner v. Safley, 482 U.S. 78, 87 (1987)); accord Iqbal v. Hasty, 490 F.3d at 172.

To summarize, I respectfully dissent from the majority's conclusion that plaintiff's policy-challenging claims to restrictive confinement arise in a familiar Bivens context because (1) to the extent the majority employs a rights-injury calculus to reach that conclusion, it construes context at an impermissibly high level of generality; and (2) no case cited by the plaintiffs or the majority has yet made the requisite judgment that a Bivens remedy is the best way to implement constitutional rights in a scenario with legal and factual components similar to those presented here. In short, the context here is "fundamentally different from anything recognized in Bivens or subsequent cases." Correctional Servs. Corp. v. Malesko, 534 U.S. at 70. Thus, this court must conduct the full analysis necessary to extend a Bivens remedy to a new context. Because the majority declines to do so, see Majority Op., ante at 38 n.17, I undertake that task here.

C. Factors Counseling Against Extending *Bivens* to Plaintiffs' Policy-Challenging Claims

Not only do the unique circumstances of this case not fall within an established Bivens context, but a number of those circumstances also counsel

hesitation in extending a Bivens remedy here. See Bush v. Lucas, 462 U.S. at 378 (instructing courts to pay "particular heed" to "any special factors counseling hesitation before authorizing a new kind of federal litigation"); accord Minneci v. Pollard, 132 S. Ct. at 621; Wilkie v. Robbins, 551 U.S. at 550; Arar v. Ashcroft, 585 F.3d at 573 (characterizing "special factors" as "embracing category," which includes any circumstance provoking hesitation about propriety of court entertaining damages claim in absence of congressional action). I discuss four factors in particular, the first three of which are inextricably intertwined: (1) plaintiffs challenge an official executive policy (rather than rogue action), implicating (2) the executive's immigration authority, (3) as well as its national security authority, and (4) Congress has afforded no damages remedy to 9/11 detainees despite awareness of the concerns raised here.

1. Official Executive Policy

Plaintiffs challenge what they themselves characterize as an official confinement policy propounded by the nation's two highest ranking law enforcement officials, the Attorney General and the FBI Director, in response to the national security threat raised by the terrorist attacks of 9/11. Neither plaintiffs nor the panel majority identifies any case affording a Bivens remedy in the context of a

constitutional challenge to executive branch policy, and certainly not to policy made at the cabinet level. This is not surprising. A Bivens action has never been considered a "proper vehicle for altering an entity's policy." Correctional Servs. Corp. v. Malesko, 534 U.S. at 74. While Malesko made this observation in declining to extend Bivens to a suit against a corporate defendant, this court has recognized en banc that it applies with equal force to claims against individuals. As we explained in Arar v. Ashcroft, allowing a private party to maintain a Bivens action against federal officials for "policies promulgated and pursued by the executive branch, not simply isolated actions of individual federal employees . . . is without precedent and implicates questions of separation of powers as well as sovereign immunity." 585 F.3d at 578.

That admonition counsels particular hesitation here where the challenged confinement policy was purportedly propounded and maintained not by rogue actors, see Kreines v. United States, 33 F.3d 1105, 1108 (9th Cir. 1994) (stating that Bivens actions are generally brought "against rogue officers who step outside the scope of their official duties"), but by persons specifically charged by the President

with primary responsibility for homeland defense after 9/11.[9] In this regard, it is worth recalling that the confinement policy here at issue was not the only action taken by the nation in response to the security exigencies presented by the 9/11 attacks. Within a week, the United States went to war.[10] Defendants Ashcroft and Mueller were among those senior officials who served as the President's "war council," and it was in that context that they were charged with homeland defense.[11] These circumstances should only add to our hesitation in judicially implying a damages remedy against executive officials who might well be understood to have been acting as "the hand of the president" in formulating policies responding to a

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[9] See The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks upon the United States ("9/11 Report") 333 (2004), available at http://1.usa.gov/1AMXOO4 (detailing President's written assignment of responsibility for homeland security after 9/11 to Attorney General Ashcroft, FBI Director Mueller, and CIA Director George Tenet); see also Jack Goldsmith, The Terror Presidency 75 (2007) (recounting that, at September 12, 2001 meeting of National Security Council, President Bush told Attorney General Ashcroft, "'Don't ever let this happen again,'" a "simple sentence" that "set the tone for everything Ashcroft's Justice Department would do in the aftermath of 9/11").

[10] See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

[11] See 9/11 Report 330 (identifying Attorney General and FBI Director, along with Vice President, Secretaries of State and Defense, Chairman and Vice-Chairman of Joint Chiefs, National Security Advisor, CIA Director, and President's Chief of Staff, as "top advisers" convened by President on night of 9/11 and subsequently denominated by him as his "war council" in responding to terrorist attacks).

national emergency.[12]

Nor is a different conclusion warranted here because subordinates of the Attorney General may have disagreed among themselves about the parameters of the challenged policy. See Majority Op., ante at 49.[13] As this court has recognized, a Bivens damages action is not the appropriate vehicle for reopening executive branch debates so that the judiciary can second-guess the final policy decision. See Benzman v. Whitman, 523 F.3d 119, 126 (2d Cir. 2008) (observing that "right of federal agencies to make discretionary decisions when engaged in disaster relief without the fear of judicial second-guessing" raises separation-of-powers concern cautioning hesitation in extending Bivens (internal quotation marks omitted)). The

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[12] In Ponzi v. Fessenden, 258 U.S. 254, 262 (1922), Chief Justice (and former President) Taft described the Attorney General as "the hand of the president" in protecting United States interests in legal proceedings.

[13] The majority locates evidence of disagreement between the FBI and INS with respect to the MDC Plaintiffs' continued restrictive confinement in the ADMAX SHU in an OIG Report's account of a November 2, 2001 meeting. See Dep't of Justice, Office of the Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks ("OIG Report") 55–56 (April 2003), available at http://1.usa.gov/1ygkjKg. This is misleading. As I explain infra at 52–53, the OIG Report makes plain that the disagreement voiced by FBI and INS representatives at that meeting pertained not to whether illegal aliens detained at the MDC should continue to be held in the ADMAX SHU, but to whether New York list detainees (housed both restrictively at the MDC and in general population at the Passaic County Jail) should continue to be held at all.

Fourth Circuit reached that same conclusion in declining to extend Bivens to a due process challenge to the executive's designation of enemy combatants in the war on terrorism, a matter on which the FBI and Defense Department had allegedly disagreed. See Lebron v. Rumsfeld, 670 F.3d 540 (4th Cir. 2012). In so ruling, Lebron observed that the claims not only intruded on "past executive deliberations affecting sensitive matters of national security," but also risked chilling frank, future policy discussions in this area "shadowed as they might be by the thought that those involved would face prolonged civil litigation and potential personal liability." Id. at 551.

As earlier stated, hesitation in extending Bivens does not suggest that federal policymakers—even those appointed by the President and of cabinet rank—are not bound by constitutional constraints. See supra at 1–2. It simply recognizes that where an executive policy is at issue, Congress, not the judiciary, is the branch best suited to decide whether a damages action is the appropriate vehicle for challenging that policy. See Arar v. Ashcroft, 585 F.3d at 574 (explaining that "federal system of checks and balances provides means to consider allegedly unconstitutional executive policy, but a [judicially created] private action for money damages against individual policymakers is not one of them"); see also Vance v. Rumsfeld, 701 F.3d

193, 205 (7th Cir. 2012) (en banc) (observing that "normal means to handle defective policies and regulations is a suit under the Administrative Procedure Act or an equivalent statute, not an award of damages against the policy's author").

2. Implicating Executive's Immigration Authority

Further removing plaintiffs' claims from any recognized Bivens context, and certainly counseling hesitation in extending a Bivens remedy, is the fact that the challenged policy implicates the executive's immigration authority. As the Supreme Court has stated—in general and not simply with respect to Bivens—"any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government," matters "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference" absent congressional authorization. Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952); accord Arar v. Ashcroft, 585 F.3d at 570.

The majority, however, concludes that plaintiffs' immigration status is irrelevant to assessing a Bivens context because illegal aliens have the same rights as citizens to be free from punitive or discriminatory conditions of confinement. See Majority Op., ante at 35. Whatever the merits of that conclusion generally, it begs

the relevant Bivens extension question, which is not whether the Constitution affords illegal aliens certain rights co-extensive with those of citizens, but whether a judicially implied damages remedy is the best way to implement such rights when the plaintiff is an illegal alien and not a citizen. See Wilkie v. Robbins, 551 U.S. at 550; Mirmehdi v. United States, 689 F.3d 975, 981 (9th Cir. 2012) (observing that "immigrants' remedies for vindicating the rights which they possess under the Constitution are not coextensive with those afforded to citizens," and declining to extend Bivens to illegal alien's claim of wrongful detention pending deportation).

Even assuming that in the familiar Bivens contexts of false arrest or deliberate indifference, the law were to conclude that the distinction between citizens and aliens did not counsel hesitation in extending a Bivens remedy, that is not this case. Plaintiffs here seek to employ a Bivens action to challenge an executive policy for the restrictive confinement of lawfully arrested illegal aliens while the FBI and CIA determined if they had any connection to recent terrorist attacks by aliens operating in this country or if they posed a threat of future attacks. This is hardly a familiar Bivens context, and such an intrusion on the executive's immigration authority counsels hesitation in denominating a judicially implied damages remedy against policymakers as the "best way" to implement constitutional guarantees in those

circumstances. Wilkie v. Robbins, 551 U.S. at 550.

3. Implicating Executive's National Security Authority

Plaintiffs' claims also propose to inquire into—and dispute—the executive's exercise of its national security authority. Indeed, that seems to be their primary purpose. This is an unprecedented Bivens context strongly counseling hesitation.

To explain, plaintiffs' due process and equal protection claims require proof of defendants' specific intent, either to punish, see Bell v. Wolfish, 441 U.S. at 538, or to discriminate, see Washington v. Davis, 426 U.S. 229, 241–42 (1976). Such intent may be either express or implied. See Brown v. City of Oneonta, 221 F.3d 329, 337 (2d Cir. 2000). The majority here concludes that plaintiffs plausibly imply proscribed intent through allegations that the challenged confinement policy was "not reasonably related to a legitimate goal." See Majority Op., ante at 55–58 (citing Bell v. Wolfish, 441 U.S. at 539). It similarly concludes that plaintiffs' plausibly plead that frequent strip searches were unreasonable relative to any legitimate penological interest. See id. at 97.

The "legitimate goal" at issue here is national security. MDC Plaintiffs propose to prove that their confinement in the ADMAX SHU was punitive and/or discriminatory by showing that there was no real national security need to maintain

them in such restrictive confinement pending FBI-CIA clearance, at least not in the absence of prior individualized suspicion that each alien posed a terrorism threat. Plaintiffs propose to make essentially the same showing in challenging the reasonableness of the strip-search policy that accompanied restrictive confinement. Thus, the executive's exercise of national security authority, far from being irrelevant to plaintiffs' Bivens claims, see Majority Op., ante at 31, will be the critical focus of this litigation—and of the exhaustive discovery that will undoubtedly attend it.

The Supreme Court has never afforded a Bivens remedy to a party challenging the executive's exercise of its national security authority. See Doe v. Rumsfeld, 683 F.3d 390, 394 (D.C. Cir. 2012) (making observation in declining to recognize Bivens action). Indeed, the Court has observed—in general and not simply with respect to Bivens—that "[m]atters intimately related to . . . national security are rarely proper subjects for judicial intervention" in the absence of congressional authorization. Haig v. Agee, 453 U.S. 280, 292 (1981); see Department of Navy v. Egan, 484 U.S. 518, 529–30 (1988) (stating that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security

affairs"); accord Arar v. Ashcroft, 585 F.3d at 578 (noting that intrusion on executive's national security authority raises "grave concerns about the separation of powers" dictated by the Constitution and, thus, counsels hesitation in extending Bivens).

Further counseling hesitation is the judiciary's limited competency to make national security assessments, see Arar v. Ashcroft, 585 F.3d at 575–78, particularly ones that could be informed by classified information, see generally Boumediene v. Bush, 553 U.S. 723, 797 (2009) (observing that federal judges do not "begin the day with briefings that may describe new and serious threats to our Nation and its people").[14] That competency concern is only heightened here by the extensive inquiry that will be necessary to understand and assess the risk concerns reasonably informing the challenged restrictive confinement policy. At a minimum, such an inquiry would have to consider the 9/11 attacks, the al Qaeda terrorist organization that ordered them, the attacks' alien perpetrators, and how those aliens—and, therefore, similarly minded others—could operate in the United States without

[14] See also Goldsmith, The Terror Presidency 71–74 (describing "threat matrix" provided daily to President and select officials, including Attorney General and FBI Director).

detection.[15] It would have to consider the history of al Qaeda attacks on American interests prior to 9/11,[16] as well as terrorists' frequent use of immigration fraud to conceal their murderous plans.[17] It would have to consider past life-threatening actions by Islamic terrorists while in federal custody.[18] It would have to consider events after 9/11—during the time when the challenged confinement policy was maintained—that fueled fears of further attacks.[19]

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[15] See, e.g., 9/11 Report 227–29 (reporting how, when 9/11 hijackers Mohamed Atta and Marwan al Shehhi encountered difficulty re-entering United States in January 2001 without presenting student visas, they nevertheless persuaded INS inspectors to admit them so that they could continue flight training).

[16] Previous al Qaeda attacks included (1) the 1993 World Trade Center bombing (six deaths); (2) the thwarted 1993 conspiracy to bomb New York City landmarks led by the "Blind Sheikh," Omar Abdel Rahman; (3) the thwarted 1995 plot to explode American commercial airplanes over the Pacific Ocean, led by Ramzi Yousef; (4) the 1996 bombing of an apartment complex housing United States Air Force personnel in Khobar, Saudi Arabia (19 deaths); (5) the 1998 bombings of United States embassies in Tanzania and Kenya (224 deaths); (6) the thwarted millennial bombing of Los Angeles International Airport; and (7) the 2000 bombing of the U.S.S. Cole (17 deaths). See United States v. Farhane, 634 F.3d 127, 132 n.4 (2d Cir. 2011); In re Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 93, 103–05 (2d Cir. 1998).

[17] See, e.g., 9/11 Report 177–78 (discussing how conspirators in Los Angeles Airport plot followed "a familiar terrorist pattern" of using "fraudulent passports and immigration fraud to travel" in furtherance of their scheme).

[18] See, e.g., infra at 67–68 (discussing prison actions of Omar Abdel Rahman and Mamdouh Mahmud Salim).

[19] Among these events were (1) the September 18, 2001 transmittal of anthrax in letters sent to various government and media offices, killing five, and infecting 17;

Hesitation is also counseled by sober recognition that national security assessments, "particularly in times of conflict, do not admit easy answers, especially not as products of the necessarily limited analysis undertaken in a single case." Lebron v. Rumsfeld, 670 F.3d at 549. This contrasts sharply with "the small number of contexts in which courts have implied a Bivens remedy," where it generally has "been easy to identify both the line between constitutional and unconstitutional conduct, and the alternative course which officers should have pursued." Arar v. Ashcroft, 585 F.3d at 580.

Here, the majority proposes to draw a line between generally and restrictively confining illegal aliens until they are cleared of terrorist connections. It concludes that general confinement raises no constitutional concerns—even though the aliens

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(2) the mysterious November 12, 2001 crash of an American Airlines plane soon after takeoff from John F. Kennedy Airport, killing all onboard; (3) the thwarted December 22, 2001 attempt by Richard Reid to detonate a shoe bomb onboard an American Airlines plane traveling from Paris to Miami; and (4) the January 2002 kidnapping, and February 2002 beheading of Wall Street Journal reporter Daniel Pearl in Pakistan. Subsequent investigation would link the last two events to al Qaeda, with 9/11 mastermind Khalid Sheikh Mohammed claiming particular credit for the Pearl murder. See Peter Finn, Khalid Sheik Mohammed killed U.S. Journalist Daniel Pearl, report finds, Wash. Post, Jan. 20, 2011, http://wapo.st/NyvICX; Pam Belluck, Threats and Responses: The Bomb Plot; Unrepentant Shoe Bomber Is Given a Life Sentence For Trying to Blow Up Jet, N.Y. Times, Jan. 31, 2003, http://nyti.ms/ZhFZJF.

so confined were mostly Arab and Muslim. But it concludes that restrictive confinement of such aliens (at least in the absence of individualized suspicion) goes too far reasonably to relate to national security. See Majority Op., ante at 40–41. Setting aside the question of judicial competency to make this national security assessment, the Supreme Court has specifically cautioned against extending Bivens to claims that propose to show that government officials "went too far" in pursuit of a legitimate objective. Wilkie v. Robbins, 551 U.S. at 556–57. That caution is particularly apt here where, before 9/11, the executive had never had to consider whether, and how restrictively, to confine illegal aliens in the aftermath of a surprise terrorist attack by aliens operating within this country. Much less had the courts ever confronted these questions. Precedent provided no easy answer—and certainly no easy negative answer—to whether it "reasonably related" to national security to hold lawfully arrested illegal aliens in restrictive confinement, at least until the FBI and CIA cleared them of terrorist connections. The law does not, after all, invariably demand individualized suspicion to support the restrictive confinement of lawfully arrested persons to ensure security, a point I discuss further infra at 62–63, and with which the majority agrees. See Bell v. Wolfish, 441 U.S. at 560–62; accord Florence v. Bd. of Chosen Freeholders, 132 S. Ct. at 1523; Whitley v. Albers, 475 U.S. 312, 316

(1986); Block v. Rutherford, 468 U.S. 576, 577 (1984); see also Majority Op., ante at 58 n.31.

Where plaintiffs' policy-challenging claims thus turn on a "reasonably related" inquiry implicating national security decisions made within "a complex and rapidly changing legal framework beset with critical legal judgments that have not yet been made, as well as policy choices that are by no means easily reached," we not only confront a new Bivens context, but also one strongly counseling hesitation. Arar v. Ashcroft, 585 F.3d at 575, 580 (declining to extend Bivens to claim requiring "inquiry into the perceived need for the [challenged] policy, the threats to which it responds, the substance and sources of the intelligence used to formulate it, and the propriety of adopting specific responses to particular threats").

Again, this does not mean that executive detention and confinement decisions implicating national security are insulated from judicial review. The Constitution's guarantee of habeas corpus ensures against that. See Boumediene v. Bush, 553 U.S. at 771; Hamdi v. Rumsfeld, 542 U.S. 507, 525, 533 (2004); see also Bell v. Wolfish, 441 U.S. at 526. But the fact that the Constitution expressly affords a liberty-safeguarding remedy against the sovereign even when national security concerns are present is hardly an invitation to the judiciary to imply a damages remedy

against individual executive officials in these circumstances. See Lebron v. Rumsfeld, 670 F.3d at 550 (drawing distinction). Such a decision is more properly made by the legislative rather than the adjudicative branch of government.[20]

Thus, where, as here, plaintiffs urge this court to imply a damages action where none has been provided by Congress so that persons unlawfully in this country can challenge executive policy relating to national security in a time of crisis, a proper regard for separation of powers counsels hesitation in judicially extending Bivens to that new context. Indeed, I would decline to extend Bivens to plaintiffs' policy-challenging claims for this reason alone. There is, however, yet one further factor counseling hesitation.

4. Congress's Failure To Provide a Damages Remedy

The judiciary will not imply a Bivens action where Congress itself "has provided what it considers adequate remedial mechanisms for constitutional

[20] Were Congress to afford compensatory relief in the circumstances at issue, it is hardly obvious that it would place the burden on individual officials rather than the sovereign on whose behalf they acted. See generally John Paul Stevens, Reflections About the Sovereign's Duty to Compensate Victims Harmed by Constitutional Violations, Lawyers for Civil Justice Membership Meeting ("Stevens Reflections") 11 (May 4, 2015), available at http://1.usa.gov/1Ih51e4 (proposing that "sovereign, rather than its individual agents," compensate any persons whose rights were violated in course of 9/11 investigation).

violations." Schweiker v. Chilicky, 487 U.S. 412, 423 (1988). Even where a congressionally prescribed remedy is lacking, however, courts will hesitate to extend Bivens to a new context where there is reason to think Congress's inaction is not "inadvertent." Id.; accord Dotson v. Griesa, 398 F.3d 156, 167 (2d Cir. 2005). That conclusion is warranted here, where Congress has not provided a damages remedy to post-9/11 detainees despite its awareness that (1) DOJ was arresting and detaining illegal aliens as part of its response to 9/11, (2) DOJ might press hard against constitutional bounds in its efforts to safeguard national security, and (3) concerns had arisen pertaining to the detention of Arab and Muslim aliens.

As to the first point, Attorney General Ashcroft and FBI Director Mueller (as well as other DOJ officials) repeatedly testified before Congress that the arrest of illegal aliens was part of DOJ's post-9/11 strategy against terrorism.[21]

As to the second point, when Congress enacted the PATRIOT Act in October

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[21] See, e.g., Dep't of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary, 107th Cong. 312 (Dec. 6, 2001) (statement of John Ashcroft, Att'y Gen. of the United States) (explaining "deliberate campaign of arrest and detention to remove suspected terrorists who violate the law from our streets," noting that "INS has detained 563 individuals on immigration violations" and that BOP had "acted swiftly to intensify security precautions in connection with al Qaeda and other terrorist inmates," and adding that DOJ "has briefed members of the House, the Senate and their staffs on more than 100 occasions").

2001, it anticipated possible DOJ overreaching and required the Department's Inspector General to review and report semi-annually to Congress on any identified abuses of civil rights and civil liberties in fighting terrorism.[22] Indeed, it is pursuant to this legislative mandate that the Inspector General provided Congress with the very OIG Reports upon which plaintiffs rely in pleading their complaint.

As to the third point, these OIG Reports discussed concerns about the treatment of confined Arab and Muslim aliens, and Congress's attention to these concerns is evident in the public record.[23] Despite its awareness of these matters, however, neither in enacting the PATRIOT Act, nor in the more than thirteen years that have now followed—during which time portions of the PATRIOT Act were re-authorized five times[24]—has Congress afforded a damages remedy to aliens who

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[22] See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("PATRIOT Act"), Pub. L. No. 107-56, § 1001, 115 Stat. 272, 391 (2001).

[23] See, e.g., Oversight Hearing: Law Enforcement and Terrorism: Hearing Before the S. Comm. on the Judiciary, 108th Cong. 192 (July 23, 2003) (questioning by Sen. Patrick Leahy of FBI Director Mueller about OIG report "alleging, among other things, the abuse of immigrants being held in Federal custody," particularly "Muslim and Arab immigrants being held on civil violations of our immigration laws").

[24] See Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 ("USA FREEDOM Act"), Pub. L. No. 114-23, 129 Stat. 268 (2015); PATRIOT Sunsets Extension Act of 2011, Pub. L. No.

were, or in the future could be, detained in connection with terrorism investigations. We must presume that Congress was aware that alternative, albeit non-compensatory, remedies were available to challenge unconstitutional confinement, notably, habeas corpus and the "remedial mechanisms established by the BOP, including suits in federal court for injunctive relief." Correctional Servs. Corp. v. Malesko, 534 U.S. at 74 (observing that injunctive relief has long been recognized as proper means for altering unconstitutional policy); see Bell v. Wolfish, 441 U.S. at 526 (habeas corpus review).[25] Where Congress, with awareness of the concerns at issue, as well as the remedies available to address them, legislates repeatedly in an

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112-14, 125 Stat. 216 (2011); Act to Extend Expiring Provisions of the USA PATRIOT Improvement and Reauthorization Act of 2005 and Intelligence Reform and Terrorism Prevention Act of 2004 until February 28, 2011, Pub. L. No. 111-141, 124 Stat. 37 (2010); USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178, 120 Stat. 278 (2006); USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2005).

[25] MDC Plaintiff Baloch was among the illegal aliens arrested in the 9/11 investigation who filed a habeas petition to challenge his confinement. See Turkmen v. Ashcroft, No. 02 CV 2307 (JG), 2006 WL 1662663, at *5 (E.D.N.Y. June 14, 2006) ("Turkmen I") (stating that Baloch filed habeas petition and six weeks later was transferred from ADMAX SHU to general population), aff'd in part, vacated in part, 589 F.3d 542 (2d Cir. 2009) ("Turkmen II"); see also OIG Report 87, 99–100, 102 (reporting other detainees' filing of habeas petitions).

The Ninth Circuit has cited the availability of a habeas remedy (and plaintiffs' pursuit of such relief) as a factor counseling hesitation in extending Bivens to claims of unlawful detention. See Mirmehdi v. United States, 689 F.3d at 982.

area without affording a damages remedy, there is strong reason to think that its inaction was not inadvertent and, thus, for the judiciary to hesitate before extending Bivens to that area. See Klay v. Panetta, 758 F.3d 369, 376 (D.C. Cir. 2014) ("If Congress has legislated pervasively on a particular topic but has not authorized the sort of suit that a plaintiff seeks to bring under Bivens, respect for the separation of powers demands that courts hesitate to imply a remedy."); Lebron v. Rumsfeld, 670 F.3d at 551–52 (observing that where "Congress was no idle bystander" and had "devoted extensive attention" to the concerns at issue in case but nonetheless did not create damages remedy, court could infer that "congressional inaction ha[d] not been inadvertent"); cf. Arar v. Ashcroft, 585 F.3d at 573 (stating that "complexity" of remedial immigration scheme created (and frequently amended) by Congress would ordinarily warrant "strong inference that Congress intended the judiciary to stay its hand and refrain from creating a Bivens action in this context").

Accordingly, insofar as plaintiffs invoke Bivens to challenge an official executive policy for the restrictive confinement and strip searching of illegal aliens in the aftermath of the 9/11 attacks, I conclude that their claims must be dismissed because a Bivens remedy has not been extended to such a context, and factors strongly counsel against this court doing so here. If illegal aliens should be afforded

a damages remedy to challenge an executive policy implicating immigration and national security authority, that decision should be made by Congress rather than by the courts. See Arar v. Ashcroft, 585 F.3d at 580–81 ("Congress is the appropriate branch" to decide whether policy decisions "directly related to the security of the population and the foreign affairs of the country" should be "subjected to the influence of litigation brought by aliens").

II. Defendants Are Entitled to Qualified Immunity

A. The Concept of Qualified Immunity

Whether or not a Bivens action is available to challenge the executive policy at issue, defendants are entitled to dismissal on grounds of qualified immunity. Qualified immunity—a concept derived from common law—shields federal and state officials from claims for money damages "unless a plaintiff pleads facts showing that (1) the official violated a statutory or constitutional right, and (2) the right was 'clearly established' at the time of the challenged conduct." Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080 (2011) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). For law to be clearly established, it is not necessary to identify a case directly on point. But precedent must have spoken with sufficient clarity to have placed the constitutional question "beyond debate." Id. at 2083; accord Carroll v.

Carman, 135 S. Ct. 348, 350 (2014). Put another way, the law must have made "the contours" of the asserted right "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." Ashcroft v. al-Kidd, 131 S. Ct. at 2083 (internal quotation marks omitted).

Qualified immunity affords such a broad shield to protect not simply government officials but government itself, specifically, "government's ability to perform its traditional functions." Wyatt v. Cole, 504 U.S. 158, 167 (1992). Thus, qualified immunity is afforded to ensure both that talented persons are not deterred from entering public service by the threat of crippling damages suits, see id., and that those in government service act "with the decisiveness and the judgment required by the public good," Scheuer v. Rhodes, 416 U.S. 232, 240 (1974); accord Filarsky v. Delia, 132 S. Ct. 1657, 1665 (2012); Richardson v. McKnight, 521 U.S. 399, 409 (1997) (describing "unwarranted timidity" on the part of those engaged in public's business as "most important special government immunity-producing concern"); Amore v. Novarro, 624 F.3d 522, 530 (2d Cir. 2010) (recognizing that qualified immunity is animated by "concern that for the public benefit, public officials be able to perform their duties unflinchingly and without constant dread of retaliation").

Toward this end, qualified immunity serves to give public officials "breathing room to make reasonable but mistaken judgments" without fear of disabling liability. Messerschmidt v. Millender, 132 S. Ct. 1235, 1244 (2012) (internal quotation marks omitted). Indeed, the standard is sufficiently forgiving that it protects "'all but the plainly incompetent or those who knowingly violate the law.'" Ashcroft v. al-Kidd, 131 S. Ct. at 2085 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).[26]

It is difficult to imagine a public good more demanding of decisiveness or more tolerant of reasonable, even if mistaken, judgments than the protection of this nation and its people from further terrorist attacks in the immediate aftermath of the horrific events of 9/11.[27] Whatever lessons hindsight might teach about how best to achieve this legitimate government objective within our system of laws, I cannot

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[26] The Supreme Court's recent repeated unanimous awards of qualified immunity emphasize the narrow circumstances in which government officials may be held personally liable for their actions in suits for money damages. See, e.g., Taylor v. Barkes, 135 S. Ct. 2042, 2044 (2015); Carroll v. Carman, 135 S. Ct. at 350–52; Lane v. Franks, 134 S. Ct. 2369, 2383 (2014); Wood v. Moss, 134 S. Ct. 2056, 2070 (2014); Plumhoff v. Richard, 134 S. Ct. 2012, 2023–24 (2014); Stanton v. Sims, 134 S. Ct. 3, 7 (2013).

[27] See generally Stevens Reflections 9 (advocating absolute immunity for "dedicated public officials"—including Ashcroft and Mueller—who, in aftermath of 9/11, were "attempting to minimize the risk of another terrorist attack," while proposing that federal government assume responsibility for compensating any persons whose rights were violated).

conclude that defendants here were plainly incompetent or defiant of established law in instituting or maintaining the challenged restrictive confinement policy. Insofar as the majority decides otherwise based on its determinations that plaintiffs have (1) plausibly pleaded violations of Fourth and Fifth Amendment rights, (2) which rights were clearly established at the time of defendants' actions, I respectfully dissent. As to the second point in particular, I think the majority defines established law at an impermissibly "high level of generality." Id. at 2084.

B. Punitive Confinement

The MDC Plaintiffs having been lawfully arrested for, but not yet convicted of, violations of federal immigration law, their confinement status was that of pre-trial detainees. The Fifth Amendment guarantee of substantive due process does not permit pre-trial detainees to be subjected to confinement, or to restrictive conditions of confinement, "for the purpose of punishment." Bell v. Wolfish, 441 U.S. at 538. At the same time, due process does not preclude restrictive confinement "incident of some other legitimate government purpose." Id. In short, pre-trial confinement, or a condition of pre-trial confinement is not deemed "punishment" in the abstract, but only by virtue of the purpose for which it is imposed.

To maintain a punitive confinement claim, then, a pre-trial detainee must

plausibly plead that a defendant imposed restrictive confinement with the specific intent to punish. See id. Where, as here, plaintiffs propose for such intent to be implied, they must plead facts sufficient to admit a plausible inference that the challenged conditions of their confinement were "not reasonably related to a legitimate goal" but, rather, were "arbitrary or purposeless." Id. at 539. The burden is significant because a reasonable relatedness inquiry is not an end in itself. Rather, it is a proxy for determining a defendant's true intent. Thus, a plaintiff does not plausibly plead punitive intent simply by alleging some mismatch between challenged conditions of confinement and the legitimate goal they are intended to serve. See, e.g., id. at 558–60 (rejecting challenge to routine body cavity searches of pre-trial detainees following contact visits even though there had been only one reported attempt to smuggle contraband into facility in body cavity); accord Block v. Rutherford, 468 U.S. at 587 (rejecting lower courts' characterization of total ban on contact visits as excessive in relation to security and other interests at stake). The mismatch must be so glaring as to make the challenged condition "arbitrary or purposeless" relative to any legitimate goal. Moreover, when the professed legitimate goal is security, the plausibility of any arbitrary or purposeless assertion must be considered in light of the "wide-ranging deference" that the law accords

prison administrators in determining the conditions necessary to preserve discipline and security. Bell v. Wolfish, 441 U.S. at 547 (cautioning that courts must not depend on their own "idea of how best to operate a detention facility"); accord Florence v. Bd. of Chosen Freeholders, 132 S. Ct. at 1517; Trammell v. Keane, 338 F.3d 155, 163 (2d Cir. 2003).

Further, as the Supreme Court recently explained in rejecting an earlier discriminatory confinement challenge to the very policy here at issue, plaintiffs cannot carry their pleading burden by alleging facts that admit only a "possibility" of defendants' proscribed intent. Ashcroft v. Iqbal, 556 U.S. at 678. "[F]acts that are merely consistent with a defendant's liability . . . stop[] short of the line between possibility and plausibility of entitlement to relief." Id. (internal quotation marks omitted). This is particularly so where "more likely" legitimate explanations for defendants' actions are "obvious." Id. at 681–82.

1. DOJ Defendants

The panel majority concludes—and I agree—that plaintiffs fail plausibly to plead that the DOJ hold-until-cleared policy, as applied ab initio to illegal aliens arrested in the course of the FBI's 9/11 investigation, implies the DOJ Defendants' punitive intent. The "obvious" and "more likely explanation[]" for the policy was

the government's legitimate interest in national security, specifically, in identifying and apprehending any persons connected with the 9/11 terrorist attacks and in detecting and preventing future attacks. Id. In pursuing those goals, the DOJ Defendants were entitled to assume that subordinates would lawfully implement the hold-until-cleared policy. See Majority Op., ante at 40; see also Turkmen v. Ashcroft, 915 F. Supp. 2d 314, 340 (E.D.N.Y. 2013) ("Turkmen III").

Where I depart from the majority is in its determination that plaintiffs plausibly plead that the DOJ Defendants' legitimate national security purpose transformed to proscribed punitive intent by November 2001, when they approved merger of the FBI New York detainee list with the INS national detainee list, thereby maintaining the MDC Plaintiffs in the ADMAX SHU pending FBI-CIA clearance without individualized suspicion of these aliens' connection to terrorism. See Majority Op., ante at 40–42. Much less can I agree that clearly established law alerted every reasonable official that such actions violated substantive due process.[28]

[28] Plaintiffs themselves never raised this lists-merger theory, either in their briefs to this court or in the district court. The majority, however, views merger of the New York and national lists as the critical event because it construes the pleadings to allege that "illegal aliens were being detained in punitive conditions of confinement in New York" with "no suggestion that those detainees were tied to terrorism except for the fact that they were, or were perceived to be Arab or Muslim." Majority Op., ante at 40–41. This is not apparent in the record.

First, insofar as the November 2001 lists-merger decision is the critical factor

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For example, when MDC Plaintiff Purna Raj Bajracharya was placed in restrictive confinement, federal officials knew that, approximately two weeks before the 9/11 attacks, he had been observed videotaping a Queens building that housed both a New York FBI unit and the Queens County District Attorney's Office. See id. at 19. They further knew that when Bajracharya—who had lived illegally in the United States for five years—was questioned about this conduct, he falsely claimed to be a tourist. While these circumstances did not conclusively link Bajracharya to terrorism, no more so did Zacarias Moussaoui's pre-9/11 interest in flight simulator training for large jets. What both circumstances did provide, however, was individualized suspicion for investigating these mens' ties to terrorism, which in Moussaoui's case led to his conviction for participation in the 9/11 conspiracy. See United States v. Moussaoui, 591 F.3d 263, 266 (4th Cir. 2010).

Further, New York list detainees were not uniformly detained in "punitive" conditions—by which I understand the majority to be referring to highly restrictive conditions of confinement rather than to the intent with which such restrictions were imposed. Much less were they so confined for no reason other than ethnicity or religion. This is evident from the fact that the vast majority of the approximately 300 persons on the New York list at the time of the merger decision were Arab or Muslim. Nevertheless, no more than 84 detainees were ever restrictively confined in the ADMAX SHU. See OIG Report 2, 22, 111. The remainder were held in general confinement at the Passaic County Jail. The designation difference appears generally to have been based on whether an arrested illegal alien was designated "high interest," "of interest," or "interest undetermined" to the 9/11 investigation. See OIG Report 18, 111 (explaining that arrested illegal aliens in first category were generally held in high security confinement at MDC, while persons in latter two categories were generally held in less restrictive confinement at Passaic County Jail). Nevertheless, because the OIG Report provides no specifics on this point, and because plaintiffs allege that some of them were detained at the MDC "even though they had not been classified 'high interest,'" Fourth Am. Compl. ¶ 4. I do not pursue the matter further. Rather, I proceed to explain why plaintiffs fail, even under the majority's lists-merger theory, plausibly to plead a claim for punitive (or discriminatory) confinement, much less one supported by clearly established law.

in the majority's identification of a plausible punitive confinement claim, plaintiffs fail to plead a sufficient factual basis for ascribing the merger decision to any of the three DOJ Defendants. See Ashcroft v. Iqbal, 556 U.S. at 678. Their allegations—that Attorney General Ashcroft "ordered that" New York list detainees "be detained until cleared and otherwise treated as 'of interest,'" and that FBI Director Mueller and INS Commissioner Ziglar "were fully informed of this decision, and complied with it," Fourth Am. Compl. ("Compl.") ¶ 47—are plainly not based on personal knowledge and, in fact, are belied by the very OIG Report on which they rely to support their claims, see id. ¶ 3 n.1. That report states quite clearly that it was Associate Deputy Attorney General Stuart Levey who, at the end of the November 2, 2001 meeting with FBI and INS representatives, "decided that all the detainees on the New York list would be added to the INS Custody List and held without bond." OIG Report 56. To be sure, plaintiffs profess to incorporate the OIG Report into their pleadings only to the extent it is not "contradicted" by their own allegations. Compl. ¶ 3 n.1. But that begs the question of whether there is sufficient factual matter—either in plaintiffs' allegations or in the OIG Report—plausibly to ascribe merger responsibility to any of the DOJ Defendants. There is not. Nothing in the OIG Report indicates that Levey's merger decision was ever ordered or endorsed

by Attorney General Ashcroft, FBI Director Mueller, or INS Commissioner Ziglar, or even communicated to them.

In concluding otherwise, the majority asserts that OIG identification of Levey as the lists-merger decisionmaker does not absolve Ashcroft of responsibility because the OIG appears not to have asked Ashcroft about his role in that decision. See Majority Op., ante at 50. To the extent this implies OIG negligence or oversight, that hardly supplies a factual basis for inferring Ashcroft's responsibility. See Ashcroft v. Iqbal, 556 U.S. at 678. In any event, negligence is belied by the OIG's detailed 198-page, single-spaced report, which includes a careful discussion of when, how, and by whom the merger decision was made. See OIG Report 55–57; see also Compl. ¶ 3 n.1 (describing "well-documented" OIG Report).[29]

Nor can the majority infer Ashcroft's responsibility simply by referencing "the importance of the merger and its implications for how [Ashcroft's] lawful original

[29] The majority responds that I mistakenly treat "the OIG reports as a repository of all . . . facts" relevant to plaintiffs' claims, "measur[ing] plausibility by the absence or presence of fact-findings" in these reports. See Majority Op., ante at 50. Not so. It is plaintiffs who support their pleadings by incorporating the OIG Reports. And it is the majority that maintains that statements in (or in the instant example, an omission from) the OIG Report, reasonably establish the plausibility of plaintiffs' claims. I herein demonstrate only why no "factual matter" supports such a conclusion. Ashcroft v. Iqbal, 556 U.S. at 678.

[hold-until-cleared] order was being carried out." Majority Op., ante at 51. Not only is the assertion conclusory, but also Ashcroft v. Iqbal holds that even facts "merely consistent with a defendant's liability . . . stop[] short of the line between possibility and plausibility." 556 U.S. at 681–82 (internal quotation marks omitted).

Insofar as the majority maintains that the OIG Report itself provides factual support for a plausible inference that Ashcroft, not Levey, was the ultimate merger decisionmaker, the conclusion does not bear close examination. For example, the majority highlights part of the OIG Report indicating that, at the same November 2 meeting where the lists-merger question arose, an INS official questioned the need for CIA (as well as FBI) checks prior to releasing 9/11 detainees, prompting Levey to reply that he would need to check to see if "'any detainees could be released without the CIA check.'" Majority Op., ante at 51 (quoting OIG Report 56). The majority reasons that if this statement is construed to suggest Levey's "lack of authority" to make a decision as to CIA checks, it plausibly "supports the conclusion that Levey . . . had to take [the question] to more senior officials." Id. at 51–52. The majority then quotes another part of the OIG Report indicating that, in late November, when the INS Chief of Staff asked if DOJ would reconsider the CIA check requirement, Levey was still concerned about "'chang[ing] the CIA check

policy without additional input.'" Id. at 52 (quoting OIG Report 62). It concludes that "if Levey was not comfortable changing the CIA check policy without input from more senior officials, he certainly would not have been comfortable making the decision on his own to double the number of detainees subject to that policy in the first instance" and, therefore, it is plausible to think that he brought the question to Ashcroft. Id.

This reasoning is wholly speculative in assuming Levey's equal discomfort with the CIA check and merger decisions. Moreover, the majority's inference that Ashcroft was the consulted "senior official" is defeated by the very OIG Report on which it purports to rely. That report specifically identifies the person Levey consulted about continuing CIA checks: it was not Attorney General Ashcroft, but "David Laufman, the Deputy Attorney General's Chief of Staff." OIG Report 62. It was Laufman who advised Levey to continue the CIA checks. See id.[30] In its footnote acknowledgment of Laufman's role, the majority denies any intent to imply Ashcroft's responsibility for the CIA checks decision. It maintains that "the only

[30] The majority can hardly have overlooked the OIG's identification of Laufman because it occurs in the very sentence of the Report that the majority quotes (in part) about Levey's continuing discomfort with making a CIA check decision in late November 2001. See OIG Report 62.

relevance of the CIA checks decision, period, is that Levey was not capable of making it on his own, suggesting that he also would not be able to make the list merger decision on his own." Majority Op., ante at 52 n.27. What the majority fails to explain, however, is how that analogy supports an inference that Ashcroft made the merger decision.

While that could end this discussion, I further note that the OIG Report does not, in fact, permit one to infer from Levey's discomfort with canceling CIA checks on his own that he must have been equally uncomfortable with making the lists-merger decision. The OIG Report expressly states that Levey made the lists-merger decision "[a]t the conclusion of the [November 2] meeting" at which the subject was first raised to him. OIG Report 56. In short, there was no delay in Levey's making of the merger decision for him to consult with Ashcroft or anyone else, leaving the majority's reasoning on this point wholly without any basis in fact.

The majority responds that because "the issue of the New York list was discovered in October 2001, . . . surely it is plausible that Levey consulted with more senior officials, including Ashcroft, prior to [the November 2] meeting." Majority Op., ante at 53 (emphasis in original). Even if this were an accurate account of events, it admits no more than a possibility that Levey consulted with anyone in the

interim, much less that the person consulted was Ashcroft. But I do not think this account is accurate. While the OIG Report does detail an October 22, 2001 meeting at which DOJ, FBI, and INS representatives discussed "problems presented by the New York List," the critical fact omitted by the majority is that Levey was not in attendance. OIG Report 55. The OIG Report states that what Levey attended was a "follow-up meeting" on November 2, 2001. It was there that he heard the competing views of the three interested entities, and made the merger decision. Id. at 55–56. The majority nevertheless deems it plausible that Levey learned about the October New York list discussion in advance of the November meeting because "Levey would not attend the November 2 meeting without knowing its agenda." Majority Op., ante at 53 n.29. This gave him "time to consult with more senior officials, including Ashcroft, before communicating a decision" at the November 2 meeting. Id. (emphasis added). Such attenuated reasoning stops well "short of the line between possibility and plausibility." Ashcroft v. Iqbal, 556 U.S. at 681–82 (internal quotation marks omitted). It is pure speculation.[31]

[31] In another footnote, the majority further asserts that Levey's communication with Ashcroft about the lists-merger decision, and Ashcroft's approval of the merger, find support in Ziglar's statement to the OIG that "he [i.e., Ziglar] contacted the Attorney General's Office on November 7, 2001 [i.e., five days after Levey had already made the merger decision], to discuss concerns about the clearance process, especially the

Thus, the pleadings, even with incorporation of the OIG Report, do not "contain sufficient factual matter" plausibly to ascribe the lists-merger decision to the DOJ Defendants Ashcroft v. Iqbal, 556 U.S. at 678 (stating that well-pleaded facts must permit court to infer more than mere possibility of misconduct).

Second, even if plaintiffs could plausibly allege the DOJ Defendants' responsibility for the merger decision—which they cannot—plaintiffs fail to plead that these defendants thereby intended for plaintiffs to be held in the MDC's ADMAX SHU. The Complaint pleadings quoted at the start of the preceding point, see supra at 44–45, assert only that New York list detainees should be designated as "of interest" and held until cleared; they make no mention of any DOJ Defendant dictating aliens' continued confinement in the ADMAX SHU, or even their awareness of that result. Indeed, after merger, most New York list detainees continued to be held in general confinement at the Passaic County Jail. See OIG

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impact of adding the New York cases to the INS Custody list." OIG Report 66. But the OIG Report makes clear that who Ziglar called was not Ashcroft himself, but his Chief of Staff, and that the person he in fact spoke with was Deputy Chief of Staff David Israelite. Id. at 66–67. Further, when Ziglar's quoted statement is read in the context of preceding and subsequent paragraphs, it is plain that his concerns related only to the "slow pace" of the FBI's clearance process, not to the conditions of confinement for New York list detainees held at the MDC. Id. These facts cannot admit a plausible inference that Ashcroft made the merger decision, much less that he made it for a punitive purpose.

Report 111.

Moreover, the OIG Report's detailed discussion of the lists-merger decision gives no indication that the issue of continued restrictive—as opposed to general—confinement informed the merger decision in any way. The Report explains that INS officials opposed merger because of "how it would look when [INS] statistics regarding the number of September 11 detainees doubled overnight." OIG Report 55. The INS feared these high numbers would persist because of the time it was taking the FBI New York office to conduct clearance inquiries. The INS predicted that such delay would make it difficult for its attorneys to argue for continued detention without bail. See id. at 55–56.[32] Viewed in this context, the statement of Victor Cerda, Ziglar's Chief of Staff, explaining INS's opposition to the merger decision—"INS did not want to begin treating all the detainees on the New York list under the more restrictive INS policies applicable to September 11 detainees," OIG Report 56—can only be understood to reference the INS policy of

[32] At the same time that the OIG Report criticized the slow pace of FBI clearance, it acknowledged that the FBI New York office was under enormous pressure after the 9/11 attacks, both in investigating that event and in preventing future attacks. The New York office had by far the most leads to pursue, in the course of which it encountered the most illegal aliens. See OIG Report 2, 22 (indicating that, of the 762 illegal aliens arrested during the 9/11 investigation nationwide through August 6, 2002, 491 were arrested in New York).

holding all 9/11 detainees without bond, a restriction that it did not apply to illegal aliens generally, see id. at 73. In sum, the merger debate between the INS and FBI was about whether illegal aliens on the New York list should continue to be detained at all, not about the conditions of their confinement. Thus, the debate admits no inference that the merger decision—by whomever made—was motivated by a desire to subject the MDC Plaintiffs to restrictive confinement.

Third, as the district court observed in dismissing plaintiffs' punitive confinement claim against the DOJ Defendants, plaintiffs do not allege that these defendants "were even aware" of the challenged restrictive confinement conditions at the MDC. Turkmen III, 915 F. Supp. 2d at 340. The majority nevertheless concludes that the Complaint admits an inference of such awareness, pointing to allegations that (1) FBI Director Mueller oversaw the 9/11 investigation from FBI Headquarters, see Compl. ¶¶ 56–57); and (2) the DOJ Defendants "received detailed daily reports of the arrests and detentions," id. ¶ 47. See Majority Op., ante at 42. I respectfully submit that these allegations admit no more than a possibility that the DOJ Defendants ever learned of the particular conditions of confinement imposed by BOP officials at the MDC—or, indeed, at any of the other facilities around the country where the 738 illegal aliens arrested in the course of the 9/11 investigation

were held until cleared.

The first allegation, that FBI Director Mueller oversaw the vast 9/11 investigation from headquarters—as opposed to the investigation being run out of one or more field offices—says nothing to support an inference that Mueller would therefore have had personal knowledge as to the particular confinement conditions imposed by the BOP on MDC detainees. See Ashcroft v. Iqbal, 556 U.S. at 678 (holding that complaint must do more than plead facts "merely consistent with a defendant's liability" to cross the line from "possibility" to "plausibility"). To be sure, plaintiffs allege that the MDC defendants formulated the challenged restrictive conditions "in consultation with the FBI." Compl. ¶ 65. But the FBI is an organization with more than 13,000 agents among 30,000 employees. Thus, this pleading hardly admits an inference that the FBI Director himself (much less the Attorney General or INS Commissioner) personally participated in or even knew of these consultations.

As to the second allegation highlighted by the majority, even assuming arguendo that it might admit an inference that the DOJ Defendants received daily reports on the number of illegal aliens detained in the 9/11 investigation, and on facts about such persons relevant to the ongoing terrorism investigation, it is pure

conjecture to think that daily reports to federal authorities at this high level detailed the particular conditions of confinement under which each arrested alien was being held at the various facilities being used for that purpose. See id. Indeed, as the district court observed, plaintiffs themselves allege that the challenged conditions of confinement at the MDC were the "result" of the DOJ Defendants' policy of holding illegal aliens until cleared, rather than a specifically approved element of that policy. Turkmen III, 915 F. Supp. 2d at 340 (citing Compl. ¶ 61).

Nor do those parts of the OIG Report cited by the majority support a different conclusion. See Majority Op., ante at 42–44. A BOP official's statement that "the Department [of Justice] was aware of the BOP's decision to house the September 11 detainees in high-security sections in various BOP facilities," OIG Report 19 (emphasis added), is too vague to ascribe personal awareness to the three DOJ Defendants in this case.[33] Moreover, the statement references how the BOP generally implemented the hold-under-clear policy throughout the country—which

[33] Indeed, the OIG Report indicates that a number of DOJ witnesses—including Michael Chertoff, the Assistant Attorney General in charge of the Criminal Division; his Deputy Alice Fisher, who oversaw terrorism issues in the division; David Israelite, the Deputy Chief of Staff to the Attorney General; and Southern District of New York Deputy U.S. Attorney David Kelley, the lead prosecutor on the 9/11 investigation—stated that they either had "no information" or "no input" into where detainees would be held or the conditions of their confinement at the various BOP facilities. Id. at 20.

the panel concludes does not support plausible constitutional claims against these defendants. It does not reference the particular MDC restrictive confinement here at issue.

Insofar as the Attorney General's Deputy Chief of Staff recalled "one allegation of prisoner mistreatment being called to the attention of the Attorney General," id. at 20, a single complaint suggests rogue abuse, not the restrictive confinement policy at issue here. Further, the Attorney General's response was not to approve such conduct, but to call for a staff inquiry, hardly action implying punitive intent. See id.

BOP Director Kathy Hawk Sawyer did tell the OIG of conversations she had in the weeks following 9/11 with the Deputy Attorney General's Chief of Staff, David Laufman, and the Principal Associate Deputy Attorney General, Christopher Wray, in which these men expressed "concerns about detainees ability to communicate both with those outside the facility and with other inmates,"and urged the BOP to take "policies to their legal limit" to prevent such communication in order "to give officials investigating the detainees time to 'do their job.'" Id. at 112–13. But statements by members of the Deputy Attorney General's staff admit no more than a "possibility" that the Attorney General himself was aware of their

content. Ashcroft v. Iqbal, 556 U.S. at 678. That conclusion applies with even more force to the FBI Director or INS Commissioner. Moreover, the Laufman-Wray communications appear to have urged a communication blackout for all 9/11 detainees, not just those held at the MDC. See OIG Report 113. Thus, they cannot support an inference that the DOJ Defendants knew the particular restrictive conditions imposed in that facility. Further, it appears that the BOP lifted the communications blackout on 9/11 detainees—even at the MDC—by mid-October 2001, see id. at 114, which is before the November merger decision that is the majority's triggering date for a plausible claim of punitive and discriminatory confinement by MDC Plaintiffs. Thus, communications before the November merger, by persons other than the DOJ Defendants, about a condition of confinement that BOP lifted before the merger decision was made, support no inference as to what the DOJ Defendants knew about conditions of confinement at the MDC in November 2001.[34]

Fourth, even if plaintiffs' allegations were sufficient to admit an inference that

[34] For the same reasons that I think pleadings related to the lists-merger decision do not admit a plausible inference that the DOJ Defendants knew of the particular restrictive conditions of confinement at the MDC, I do not think they admit a plausible inference that the DOJ Defendants knew that such conditions were being imposed without individualized suspicion of terrorist connections.

the DOJ Defendants knew that, as a consequence of the lists' merger, MDC Plaintiffs would remain in restrictive confinement, that would be insufficient to imply the requisite specific intent. As the Supreme Court explained in Ashcroft v. Iqbal, "purposeful" conduct "requires more than intent as volition or intent as awareness of consequences." 556 U.S. at 681. It requires that a decisionmaker undertake a course of action "'because of,' not merely 'in spite of' the action's adverse effects." Id. (internal quotation marks and citation omitted). Here, the pleadings provide no factual basis to conclude that anyone made the merger decision because it would keep the MDC Plaintiffs in restrictive confinement.

Fifth, plaintiffs fail in any event plausibly to allege facts admitting an inference that their continued MDC restrictive confinement after November 2001 was "arbitrary or purposeless" to any legitimate objective, so that plaintiffs' real intent must have been punitive. Bell v. Wolfish, 441 U.S. at 539. That inference is, I submit, foreclosed by the "obvious" and "more likely" explanation for the challenged action: the DOJ Defendants' determination to identify and apprehend anyone involved in the 9/11 attacks and to safeguard the nation from further terrorist attacks. Ashcroft v. Iqbal, 556 U.S. at 681–82.

This non-punitive motivation is no after-the-fact invention. The Supreme

Court recognized it to motivate the entire vast investigation that followed 9/11 and pursuant to which plaintiffs were arrested and confined. See id. at 667 (stating that "FBI and other entities within the Department of Justice began an investigation of vast reach to identify the [9/11] assailants and prevent them from attacking anew," dedicating "more than 4,000 special agents and 3,000 support personnel to the endeavor"). The OIG Report makes the same point. See OIG Report 12–13 (noting Attorney General's directive that all components of DOJ "focus their efforts on disrupting any additional terrorist threats," and general understanding within DOJ that every available legal means should be used "to make sure that no one else was killed").

The panel majority acknowledges that national security concerns "might well" have motivated defendants' challenged actions, see Majority Op., ante at 106, including the merger decision on which it relies to deny dismissal to the DOJ Defendants, see id. at 54–55 (quoting Levey's statement to OIG that, in merging lists, "he wanted to err on the side of caution so that a terrorist would not be released by mistake," OIG Report 56). Indeed, the OIG Report specifically concludes that the merger decision "was supportable, given the desire not to release any alien who might be connected to the [9/11] attacks or [to] terrorism." OIG Report 71.

Nevertheless, the majority maintains that, even if the DOJ Defendants were intent on ensuring national security, the mismatch between that object and the restrictive confinement conditions at the MDC was so great (in the absence of individualized suspicion) as to be deemed arbitrary and purposeless, admitting an inference of punitive intent. See Majority Op., ante at 55–58.

Whether a court, upon identifying an obvious non-punitive intent for challenged conduct, can nevertheless allow plaintiffs to pursue a substantive due process claim on a theory of implied punitive intent is not apparent. See, e.g., Ashcroft v. Iqbal, 556 U.S. at 683 (rejecting discrimination claim in such circumstances); Block v. Rutherford, 468 U.S. at 589 (instructing that once court identifies legitimate purpose for challenged confinement policy, its inquiry should end because "further 'balancing' result[s] in an impermissible substitution of [the court's] views" for those of confining authorities). Certainly, the conclusion is not placed "beyond debate" by clearly established law, without which defendants must be afforded qualified immunity. Carroll v. Carmon, 135 S. Ct. at 350; Ashcroft v. al-Kidd, 131 S. Ct. at 2083.

In urging otherwise, the majority cites Bell v. Wolfish, 441 U.S. 520, and Iqbal v. Hasty, 490 F.3d 143. See Majority Op., ante at 61. Bell v. Wolfish held that if a

condition of pre-trial confinement "is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the government action is punishment." 441 U.S. at 539. But that simply states a "general proposition," which affords "little help in determining whether the violative nature of particular conduct is clearly established." Ashcroft v. al-Kidd, 131 S. Ct. at 2084. Moreover, because Wolfish itself rejected all constitutional challenges to the restrictive conditions there at issue, see 441 U.S. at 560–62, it hardly made the parameters of the substantive due process ban on punitive pre-trial confinement "sufficiently clear that every reasonable official would have understood" that the restrictive conditions here at issue were arbitrary or purposeless to ensuring national security in the absence of individualized suspicion of terrorism, Ashcroft v. Al-Kidd, 131 S. Ct. at 2083 (holding that unless law is so clearly established, official is entitled to qualified immunity).

As for Iqbal v. Hasty, this court did not there place beyond dispute the need for individualized suspicion of terrorism to place 9/11 detainees in restrictive confinement. Indeed, that case made no mention of the lack of such suspicion in observing that "[t]he right of pretrial detainees to be free from punitive restraints was clearly established at the time of the events in question, and no reasonable

officer could have thought that he could punish a detainee by subjecting him to the practices and conditions alleged by the Plaintiff." Iqbal v. Hasty, 490 F.3d at 169. In fact, this statement was made in concluding that plaintiffs had adequately alleged Warden Hasty's express punitive intent. That conclusion having been reached under a pleading standard abrogated by the Supreme Court in Ashcroft v. Iqbal, 556 U.S. at 680, Hasty's preclusive effect here is open to question. But even if we assume that this court there correctly concluded that the prohibition on punitive restraints is clearly established in any circumstance where a defendant acts with the express intent to punish, Hasty did not hold that the same conclusion applies in the myriad circumstances where plaintiffs propose to imply intent by challenging the reasonableness of a restraint relative to a legitimate objective. Certainly, Hasty did not hold it well established that the restrictive confinement of lawfully arrested persons without individualized suspicion of a security risk is implicitly punitive.

Meanwhile, considerable law indicates that individualized suspicion is generally not required to impose restrictive conditions of confinement on lawfully arrested detainees in pursuit of a legitimate security objective. Block v. Rutherford, 468 U.S. at 585–87, upheld a blanket prohibition on pre-trial detainees' contact visits, observing that the "identification of those inmates who have propensities for

violence, escape, or drug smuggling is a difficult if not impossible task," id. at 587. Bell v. Wolfish, 441 U.S. at 558, rejected a challenge to body cavity searches of all pre-trial detainees after contact visits even though there had been only a single past incident of contraband being concealed in a body cavity. Whitley v. Albers, 475 U.S. at 316, held, in the context of a prison riot, that a "shoot low" (i.e., below vital organs) policy could be applied without individual suspicion to any prisoner climbing stairs leading to where hostages were being held. Most recently, Florence v. Board of Chosen Freeholders, 132 S. Ct. at 1523, upheld visual strip searches of all arrestees without individualized suspicion.[35]

The reasoning of these cases applies with equal, if not more, force here where defendants had an obvious and legitimate interest in identifying anyone connected with the 9/11 attacks and in safeguarding the nation from further terrorist attacks.

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[35] The majority attempts to distinguish these cases by saying that, in each, the Supreme Court did not state that individualized suspicion was not required but, rather, determined that the challenged restrictions reasonably related to the legitimate object of prison security. See Majority Op., ante at 58 n.31. The reasoning is perplexing. Implicit in the rejection of challenges to generally applicable restrictive conditions of confinement is the conclusion that no individualized suspicion was necessary for the condition reasonably to relate to the legitimate object of prison security. In any event, the majority points to no case holding a generally applicable restrictive condition to fail the reasonably related inquiry for lack of individualized suspicion, and certainly not one doing so in the context of a condition whose professed object is national security.

Because the attacks were carried out by Arab Muslim aliens who proclaimed themselves members of al Qaeda, it is "no surprise" that authorities focused their investigative and preventative attention on persons encountered in the course of the FBI's 9/11 investigation, who were not lawfully in this country, and who fell within the same ethnic and religious group as the hijackers or as those targeted for recruitment by al Qaeda. Ashcroft v. Iqbal, 556 U.S. at 682 (recognizing that circumstances of 9/11 attacks necessarily produced "disparate, incidental impact on Arab Muslims"); see also United States v. Farhane, 634 F.3d 127, 132 n.4 (2d Cir. 2011) (discussing "fatwa" proclaiming it religious duty of Muslims worldwide to kill Americans and their allies wherever found). Moreover, given (1) the inherent difficulty in identifying in advance of an FBI-CIA investigation who, among such a group of illegal aliens, might have terrorist connections; (2) the serious risk of murderous harm posed by persons with such connections (even while incarcerated[36]); and (3) events following 9/11 fueling fears of further imminent attacks,[37] I cannot conclude that established precedent would have alerted the

[36] See infra at 67–68 (discussing actions of Omar Abdel Rahman and Mamdouh Mahmud Salim while incarcerated).

[37] See supra at 28 & n.19 (detailing anthrax scare, airliner crash, shoe bomb attempt, and journalist beheading, all within five months of 9/11 attacks).

Attorney General, the FBI Director, and the INS Commissioner that, in the absence of individualized suspicion of terrorist connections, it was arbitrary or purposeless to national security to hold such illegal aliens in restrictive, rather than general, confinement pending clearance.

In disputing that conclusion, the majority mischaracterizes this dissent to assert that "because the MDC Plaintiffs were, or appeared to be, members of the group—Arab or Muslim males—that were targeted for recruitment by al Qaeda, they may be held in the ADMAX SHU without any reasonable suspicion of terrorist activity." Majority Op., ante at 56. I suggest no such thing. In fact, no plaintiff was "held" on anything less than probable cause, specifically, probable cause to think the alien was in violation of federal immigration laws. Moreover, the majority itself identifies no plausible constitutional claim against the DOJ Defendants for holding 9/11 detainees until they were cleared of terrorism connections—even though detainees were overwhelmingly Arab and Muslim, and detention continued after the lists-merger decision even without individualized suspicion of terrorism for the New York list detainees. See Majority Op., ante at 39–40. Nor does it identify any precedent clearly establishing that substantive due process does not permit detention to be restrictive in such circumstances unless there is individualized

suspicion of terrorist connections. It is in the absence of such precedent that I assert the DOJ Defendants are entitled to qualified immunity.

Nor do I suggest that government officials can "hold[] someone in the most restrictive conditions of confinement available simply because he happens to be—or, worse yet, appeared to be—Arab or Muslim." Majority Op., ante at 57. Rather, as I explain in discussing plaintiffs' equal protection claim, the pleadings do not admit a plausible inference that the MDC Plaintiffs were restrictively confined because of their ethnicity or religion. See infra Part II.B.

The majority further misconstrues the dissent "to imply that once 'national security' concerns become a reason for holding someone," there is no need to consider whether restrictive conditions reasonably relate to that objective. See Majority Op., ante at 55. Not so. Bell v. Wolfish makes plain that neither confinement, nor any condition of confinement, can be imposed on pre-trial detainees for the purpose of punishment. See 441 U.S. at 535. Thus, I have never suggested that a legitimate national security purpose for holding someone supports the further imposition of restrictive conditions of confinement without any need to consider whether such conditions also reasonably relate to the same objective, or whether they are so arbitrary and purposeless as to admit an inference that their real

purpose was punishment. What I assert is that an arbitrary and purposeless conclusion as to the restrictive conditions here at issue is not so beyond debate that the DOJ Defendants can be denied qualified immunity.

To explain, isolating the 9/11 detainees confined at the MDC from one another and from the outside world while clearance investigations were conducted ensured that—in the event detainees were found to have terrorist connections—they would not have been able to communicate in ways that either furthered terrorist plans or thwarted government investigations. Further, strict restrictions on prison movement and cell conditions minimized the possibility that, while clearance was pursued, an as-yet-unidentified terrorist associate would threaten either national or prison security. We need only look to our own precedent to understand why the executive would reasonably have had such concerns. In the two years before the 9/11 attacks, convicted terrorist Omar Abdel Rahman ("the Blind Sheikh") had managed to use his lawyer to communicate from prison to followers in Egypt that he now sanctioned renewed terrorist attacks. See United States v. Stewart, 590 F.3d 93, 163–65 (2d Cir. 2009) (Walker, J., concurring in part and dissenting in part). Also in the year before 9/11, pre-trial detainee Mamdouh Mahmud Salim, charged with participating in the bombings of United States embassies in Africa, viciously

attacked a guard at New York's Metropolitan Correctional Center with a sharpened plastic comb, causing the guard both to lose an eye and to suffer permanent brain damage. See United States v. Salim, 690 F.3d 115, 119–20 (2d Cir. 2012). Both men had been held in some degree of restrictive confinement. Events after 9/11, suggesting ongoing terrorist plots, see supra at 28 & n.19, would only have reinforced the executive's view that national security required that the MDC Plaintiffs be restrictively confined until authorities could determine whether they had terrorist connections. The majority cites no established precedent to the contrary. Nor can it ground an arbitrary and purposeless conclusion in the fact that not all New York list detainees were held in restrictive confinement pending clearance. See Majority Op., ante at 59. As the Supreme Court stated in Bell v. Wolfish, "the Due Process Clause does not mandate a 'lowest common denominator' security standard, whereby a practice permitted at one penal institution must be permitted at all institutions." 441 U.S. at 554. Its singular concern is that defendants' real purpose not be punitive.

With the benefit—or handicap—of hindsight, persons might now debate how well the challenged restrictive confinement policy at the MDC served national

security interests.[38] But it is no more a judicial function to decide how best to ensure national security than it is to decide how best to operate a detention facility. See id. at 539. Rather, on qualified immunity review, our task is to determine whether the MDC Plaintiffs plausibly allege a substantive due process violation that, in late 2001, was so clearly established by precedent as to put the illegality of the DOJ Defendants' actions beyond debate. See Ashcroft v. al-Kidd, 131 S. Ct. at 2083. For the reasons stated herein, I conclude that is not this case and that the DOJ Defendants are, therefore, entitled to dismissal of plaintiffs' punitive confinement claim on the ground of qualified immunity.

2. MDC Defendants

By contrast to the DOJ Defendants, MDC Defendants Hasty and Sherman were personally involved in the MDC Plaintiffs' restrictive confinement in the ADMAX SHU both before and after the November 2001 merger decision.[39] As

[38] See 9/11 Report 339 (cautioning, with respect to judging actions leading and responding to 9/11 attacks, that hindsight can both make things seem "crystal clear" that at relevant time were "obscure and pregnant with conflicting meanings," and make it "harder to reimagine" the "preoccupations and uncertainty" of a past time as memories "become colored" by knowledge of what happened and was written later).

[39] The decision to impose strict restrictive confinement was apparently made at the headquarters level of the BOP, see OIG Report 19, with the MDC Defendants establishing the conditions effecting such confinement, see Compl. ¶¶ 24, 26, 68, 75.

warden and deputy warden of the MDC, however, these defendants have a particular claim to judicial deference in determining the confinement conditions reasonably related to legitimate security interests. See Florence v. Bd. of Chosen Freeholders, 132 S. Ct. at 1517; Bell v. Wolfish, 441 U.S. at 548. The majority concludes that no such deference is warranted here because the MDC Defendants (1) imposed the conditions without adequate supporting information or an evaluation of their propriety, and (2) maintained the restrictive conditions even after learning that they were not supported by individualized suspicion of the detained aliens' terrorist connections. See Majority Op., ante at 63–65. Moreover, the majority observes that this court denied qualified immunity on a materially identical substantive due process claim in Iqbal v. Hasty, 490 F.3d at 143, 168–69, and identifies no reason to rule differently here. See Majority Op., ante at 73. I respectfully disagree.

First, plaintiffs' pleadings do not admit a plausible inference that Hasty and Sherman imposed restrictive conditions of confinement without any supporting information or assessment of propriety. As to the latter, the OIG Report recounts that, immediately after the 9/11 attacks, BOP Headquarters ordered that "all detainees who were 'convicted of, charged with, associated with, or in any way

linked to terrorist activities' . . . be placed in the highest level of restrictive detention." OIG Report 112. A plausible inference of punitive intent cannot reasonably be drawn from the MDC Defendants' carrying out this order without making an independent assessment of its categorical need. The obvious and more likely motivation for their doing so is national and prison security. Defendants reasonably deferred to their superiors' assessment that, in the aftermath of a devastating terrorist attack, lawfully arrested illegal aliens, whom the FBI and CIA were investigating for possible terrorist connections, should be kept "in the most secure conditions available until the suspects could be cleared of terrorist activity." Ashcroft v. Iqbal, 556 U.S. at 683. The Supreme Court has already held that such motivation does not admit a plausible inference of discriminatory intent. See id. No more will it admit a plausible inference of punitive intent.

Further, because it is undisputed that the FBI had designated each MDC Plaintiff as a person "of high interest," or "of interest" in their ongoing terrorism investigation, and that BOP employees relied on this designation in imposing restrictive confinement, see, e.g., Compl. ¶¶ 1–2, 4; see also OIG Report 111–12, 126, 158, it cannot be said that the MDC Defendants acted without any information so as to admit an inference that their conduct was arbitrary or purposeless. See

generally Martinez v. Simonetti, 202 F.3d 625, 635 (2d Cir. 2000) (holding that police may reasonably rely on information provided by other officers even when confronted with conflicting accounts). Thus, these allegations do not plausibly imply discriminatory intent.

Second, insofar as plaintiffs fault the MDC Defendants for maintaining them in restrictive confinement even after learning that the FBI's designations were not based on individualized suspicion, I have already explained with reference to the DOJ Defendants why established precedent does not support that conclusion, much less alert every reasonable federal official that restrictive confinement in the absence of individualized suspicion of a security threat violates substantive due process. See supra at 62–63.

Iqbal v. Hasty, 490 F.3d 140, does not dictate otherwise. As discussed supra at 61–62, the court there applied a "notice pleading standard" to "general allegations of knowledge" to identify alleged "purposeful infliction of restraints that were punitive in nature." Id. at 169. In thus identifying express punitive intent, Hasty never discussed whether the pleadings otherwise plausibly implied intent. Although the MDC Defendants were not parties in Ashcroft v. Iqbal, the Supreme Court's rejection of the pleading standard employed in Hasty, see 556 U.S. at 684,

does not admit preclusive effect to Hasty's assessment of the sufficiency of plaintiffs' specific intent claims, particularly insofar as they imply intent.[40]

Accordingly, I would dismiss plaintiffs' policy-challenging punitive confinement claim against the MDC Defendants, as well as the DOJ Defendants, on grounds of qualified immunity.[41]

B. Discriminatory Confinement

To state a Fifth Amendment claim for discriminatory confinement, a plaintiff must plead sufficient factual matter to show that defendants adopted the challenged restrictive confinement policy not for a neutral reason "but for the purpose of discriminating on account of race, religion, or national origin." Ashcroft v. Iqbal, 556 U.S. at 676–77 (explaining that standard is not satisfied by pleadings of intent as "volition" or "awareness of consequences"; instead, pleadings must plausibly allege that defendant undertook conduct "because of," not merely "in spite of[,]" its

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[40] Indeed, when reviewing Turkmen I in light of Ashcroft v. Iqbal, we vacated the district court's decision and remanded "for further proceedings consistent with the standard articulated in Twombly and Iqbal." Turkmen II, 589 F.3d at 546–47. On remand, the district court did not cite Hasty in identifying a plausible punitive confinement claim against the MDC Defendants. See Turkmen III, 915 F. Supp. 2d at 341. These developments do not comport with a conclusion that Hasty is dispositive on this appeal.

[41] This dissent does not pertain to plaintiffs' non-policy claims of "unofficial abuse" against the MDC Defendants.

discriminatory effect). The Supreme Court articulated this standard in reversing this court's determination that these plaintiffs' original complaint stated a plausible claim for discriminatory confinement based on race, religion, or national origin. See id. at 687. While acknowledging that plaintiffs had pleaded facts "consistent with" purposeful discrimination, the Court concluded that such a claim was not plausible in light of the "obvious," and "more likely" non-discriminatory reason for the challenged confinement policy, specifically, national security concerns about "potential connections" between illegal aliens identified in the course of the FBI's investigation of the 9/11 attacks and Islamic terrorism. Id. at 682–83 (holding that, where all pleadings "plausibly suggest[] is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity," plaintiffs "would need to allege more by way of factual content to nudge [their] claim[s] of purposeful discrimination across the line from conceivable to plausible" (internal quotation marks omitted)).

One might have thought that put plaintiffs' policy-challenging claims of discriminatory confinement to rest. The majority, however, affords the MDC Plaintiffs another opportunity to pursue these claims, concluding that the newest

amended complaint now pleads sufficient facts to show that it is "not more likely" that the MDC Plaintiffs were held in restrictive confinement because of suspected ties to terrorism. Majority Op., ante at 83.

The pleadings the majority cites to support this conclusion as to both the DOJ and MDC Defendants can be summarized as follows: (1) the New York FBI office expressly relied on race, religion, ethnicity, and national origin in targeting persons identified in their 9/11 investigation for detention; (2) the DOJ Defendants were aware of and condoned such discriminatory intent by merging the New York FBI detainee list with the INS national detainee list, knowing that the former list was not supported by individualized suspicion of a terrorist threat; (3) the MDC Defendants also knew there was no individualized suspicion tying the aforementioned detainees to terrorism when they confined them in the ADMAX SHU; and (4) the MDC Defendants falsely reported that MDC staff had classified the ADMAX SHU detainees as "high security" based on an individualized assessment when no such assessment was ever conducted. See id. at 55–62. I am not persuaded.

First, the amended complaint's pleadings of purposeful FBI discrimination are not materially different from those considered in Ashcroft v. Iqbal. See 556 U.S. at 669 (acknowledging that plaintiffs pleaded purposeful designation of detainees

based on race, religion, or national origin); see also id. at 698 (Souter, J., dissenting) (detailing specific allegations that FBI officials implemented policy that discriminated against Arab Muslim men based solely on race, religion, or national origin). Thus, we are bound by the Supreme Court's holding that such allegations are inadequate to plead plausible discriminatory intent in light of the obvious and more likely national security explanation for the challenged confinement. See id. at 681–82.

Not insignificantly, in reaching this conclusion, the Supreme Court acknowledged that it was the perpetrators of the 9/11 attacks who injected religion and ethnicity into the government's investigative and preventative efforts. The Court stated that the attacks "were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples." Id. at 682. Where a terrorist group thus effectively defines itself by reference to religion and ethnicity, see supra at 64, the Constitution does not require investigating authorities to ignore that reality nor to dilute limited resources casting a wider net for no good reason. It is "no surprise" then that a law enforcement policy—including a

restrictive confinement policy—legitimately aimed at identifying persons with connections to the 9/11 attacks and preventing further attacks "would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." Ashcroft v. Iqbal, 556 U.S. at 682; see also Brown v. City of Oneonta, 221 F.3d at 337 (observing that racial description of perpetrator, "which originated not with the state but with the victim, was a legitimate classification within which potential suspects might be found," even though it might well have disparate impact on minority groups).[42]

Thus, as in Ashcroft v. Iqbal, plaintiffs cannot plausibly imply proscribed discriminatory intent from pleadings merely "consistent with" the New York FBI's alleged purposeful targeting and detention of aliens based on ethnicity and religion. 556 U.S. at 681–82. Here, those characteristics originated with the terrorists not the state, the FBI actions were limited to aliens not lawfully in this country and

[42] In recently forbidding investigative stereotyping, the Department of Justice nevertheless stated that, "in conducting activities directed at a specific criminal organization or terrorist group whose membership has been identified as overwhelmingly possessing a listed characteristic, law enforcement should not be expected to disregard such facts in taking investigative or preventive steps aimed at the organizations' activities." U.S. Dep't of Justice, Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity 4 (Dec. 2014), available at http://1.usa.gov/1ytxRoa.

encountered in the course of the 9/11 investigation, and the obvious and more likely reason for the challenged confinement was ensuring national security in the face of an Islamic terrorist threat.[43]

Second, the DOJ Defendants' purported involvement with the lists-merger decision also cannot imply these defendants' discriminatory intent. As I have already explained with respect to punitive intent, plaintiffs fail plausibly to plead these defendants' involvement with that decision. See supra at 44–51.

In any event, the merger decision—by whomever made—applied equally to all New York list detainees, the larger number of whom were not subjected to restrictive confinement, but housed in general prison population at the Passaic

[43] In discussing the actions of the New York FBI office—and particularly its maintenance of its own list of 9/11 detainees—the OIG and the majority reference that office's tradition of independence from headquarters. See Majority Op., ante at 24 n.12 (citing OIG Report 54). Such independence does not plausibly imply rogue conduct. To the contrary, in the years before 9/11, the New York FBI office led the nation's pursuit of Islamic terrorism, as is evident in a number of exemplary investigations. See, e.g., 9/11 Report 72 (commending "superb investigative and prosecutorial effort" of New York FBI and U.S. Attorney's Office in identifying and convicting perpetrators of first World Trade Center attack, as well as the "Blind Sheikh" and Ramzi Yousef); see also In re Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 93 (affirming New York convictions for terrorist bombings of American embassies in Africa based on guilty verdicts returned only weeks before 9/11). In short, at the time of the 9/11 investigation, there was no FBI field office with greater knowledge of, or experience investigating, Islamic terrorism than that in New York. This, and not invidious discriminatory intent, is the obvious and more likely explanation for its independence.

County Jail, even though they shared the same racial, religious, and national identities as the MDC Plaintiffs. See supra at 51–52. Such circumstances do not permit discriminatory intent plausibly to be inferred from the merger decision. See generally O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 313 (1996) (holding that inference of age discrimination cannot be drawn from "replacement of one worker with another worker insignificantly younger"); James v. N.Y. Racing Ass'n, 233 F.3d 149, 154 (2d Cir. 2000) (stating that prima facie case for discrimination required proof of employer "preference for a person not of the protected class"). Indeed, the conclusion that a plaintiff cannot urge an inference of discriminatory purpose from his receipt of treatment less favorable than most members of his own protected class is so obvious that we generally pronounce it summarily. See, e.g., Fleming v. MaxMara USA, Inc., 371 F. App'x 115, 117 (2d Cir. 2010) (summary order). District court opinions in this circuit to the same effect are countless. See, e.g., Baez v. New York, 56 F. Supp. 3d 456, 467–68 (S.D.N.Y. 2014) (collecting cases); White v. Pacifica Found., 973 F. Supp. 2d 363, 381 (S.D.N.Y. 2013) (collecting cases). Thus, no clearly established law would have alerted every reasonable official that the lists-merger decision violated equal protection.[44]

[44] The majority recognizes that the precedent cited herein undermines plaintiffs' equal protection claim, but it maintains that these holdings properly apply on

In concluding otherwise, the majority dismisses the Passaic assignments as a "red herring." Majority Op., ante at 85. The label will not stick. The reality that most Arab Muslim detainees on the New York list were not held in restrictive confinement precludes a plausible inference that arresting FBI agents were intent on discriminating against Arab Muslims in assigning a minority of New York detainees to the MDC. Thus, even if the lists-merger decision can be understood to manifest the DOJ Defendants' "deference to others' designation of detainees for particular facilities," id. at 84, that is not a factual basis for plausibly inferring their discriminatory intent against MDC detainees. To overcome this hurdle, the majority parenthetically suggests that "for all [the DOJ Defendants'] knew, all" New York list detainees were held in restrictive confinement. Id. This is, again, pure speculation. Moreover, because the facts are to the contrary, a plaintiff (or a panel majority)

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summary judgment review, not dismissal. See Majority Op., ante at 85 n.39. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), does not admit that conclusion. Therein, the Supreme Court observed that it had earlier ruled "at the summary judgment stage" that an inference of anticompetitive collusion could not be drawn from parallel conduct. Id. at 554 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1976)). It then applied that same rule at the motion to dismiss stage, holding that where plaintiffs' pleadings, taken as true, show only parallel conduct, a conspiracy is not plausibly alleged. See id. at 556. The same principle applies here. Just as evidence of differential treatment within a suspect class is insufficient on summary judgment to demonstrate proscribed discriminatory intent, allegations of such differential treatment are insufficient to plead discriminatory intent so as to defeat a motion for dismissal.

looking to locate invidious intent in defendants' possible misunderstanding of the confinement circumstances surely needs to identify some factual basis for its hypothesis. See Ashcroft v. Iqbal, 556 U.S. at 678. That is missing here.

In sum, plaintiffs fail plausibly to plead either that DOJ Defendants were responsible for the lists-merger decision or that the decision was animated by discriminatory intent.

Third, allegations that the DOJ and MDC Defendants maintained the challenged restrictive confinement after learning that the FBI designations were not based on individualized suspicion of terrorist threats are also inadequate to conclude that defendants were "not more likely" concerned with ensuring national and prison security. Majority Op., ante at 83. Indeed, the conclusion is foreclosed by Ashcroft v. Iqbal, 556 U.S. at 681–82, because the discrimination allegations there deemed implausible in light of the more likely national security explanation for defendants' actions included assertions that the MDC Plaintiffs' restrictive confinement was not supported by "any individual determination" that such restrictions were "appropriate or should continue." First Am. Compl. ¶ 97, App. to Pet. for Cert. 173a, Ashcroft v. Iqbal, No. 07-1015 (U.S. Feb. 6, 2008), available at http://1.usa.gov/1CfHJQF. Thus, the majority cannot suggest that when the

Supreme Court there rejected an equal protection challenge to efforts by "the Nation's top law enforcement officers . . . to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity," Ashcroft v. Iqbal, 556 U.S. at 682–83, it did not understand that plaintiffs were complaining of the lack of prior individualized suspicion. See Majority Op., ante at 82–83.[45]

In any event, and as already explained, courts have upheld the imposition of restrictive conditions of confinement on lawfully arrested persons without requiring individualized suspicion of a security threat, recognizing both the difficulty in identifying which detainees pose the particular risk needing to be addressed, and the serious harm that can ensue from a failure to do so. See supra at 62–63. Thus, no clearly established law would have alerted reasonable officials that restrictive confinement without individualized suspicion was unconstitutionally punitive or discriminatory in the circumstances presented here.

Fourth, allegations that the MDC Defendants (1) failed to follow BOP procedures requiring "individualized determination of dangerousness or risk" for restrictive confinement, and (2) approved documents falsely representing that such

[45] The lists-merger pleadings support no different conclusion for reasons just discussed. See Majority Op., ante at 84–85.

determinations had been made, also do not render it "not more likely" that the challenged conduct was motivated by national security. See Majority Op., ante at 86. This court has already granted qualified immunity to some of these same MDC Defendants on a procedural due process challenge to their failure to follow BOP procedures in connection with the same challenged confinement. See Iqbal v. Hasty, 490 F.3d at 167–68. In doing so, moreover, Hasty acknowledged that the "separation" of the MDC Plaintiffs "from the general prison population could be reasonably understood . . . to relate to matters of national security, rather than an ordinary criminal investigation." Id. at 167. Hasty further noted that, in 2001–2002, neither the Supreme Court nor this court had considered whether BOP administrative segregation procedures had to be afforded "to persons detained under special conditions of confinement until cleared of connection with activities threatening national security." Id.

The fact that plaintiffs here use procedural failures to imply discriminatory intent rather than to assert a denial of procedural due process warrants no different qualified immunity conclusion. As the OIG Report indicates, by October 1, 2001, BOP Headquarters had effectively ceded "individualized" risk assessment responsibility for 9/11 detainees to the FBI. A memorandum of that date from

Michael Cooksey, the BOP Assistant Director for Correctional Programs, "directed all BOP staff, including staff at the MDC, to continue holding September 11 detainees in the most restrictive conditions of confinement possible until the detainees could be 'reviewed on a case-by-case basis by the FBI and cleared of any involvement in or knowledge of on-going terrorist activities.'" OIG Report 116 (quoting Cooksey's October 1, 2001 memorandum). In these circumstances, even if the MDC Defendants might be faulted for approving documents suggesting individualized risk assessments of MDC Plaintiffs that were not made by the BOP, their actions cannot plausibly imply discriminatory intent because they are obviously and more likely explained by reliance on the FBI's designations of each MDC Plaintiff as a person "of high interest," or "of interest," to the ongoing terrorism investigation.

In sum, as to both the DOJ and MDC Defendants, the pleadings highlighted by the majority are insufficient to render "not more likely" what the Supreme Court in Ashcroft v. Iqbal held "obvious" and "more likely": MDC Plaintiffs were restrictively confined pending FBI-CIA clearance for the legitimate purpose of ensuring national security. 556 U.S. at 681–82. Moreover, to the extent the majority implies discriminatory intent from the MDC Plaintiffs' restrictive confinement

without individualized suspicion of terrorist connections, no clearly established law would have alerted every reasonable officer that it violated equal protection so to confine these lawfully arrested illegal aliens pending clearance. Accordingly, I conclude that both the DOJ and the MDC Defendants are entitled to dismissal of the MDC Plaintiffs' equal protection claims on the ground of qualified immunity.[46]

C. Fourth Amendment Claim

As the majority acknowledges, plaintiffs do not assert that the Fourth Amendment absolutely prohibited them from being strip-searched while incarcerated at the MDC. See Majority Op., ante at 95. Rather, plaintiffs contend that the frequency with which they were strip searched—every time they were removed from or returned to their cells, or randomly even when not so moved, "even when they had no conceivable opportunity to obtain contraband"—was constitutionally unreasonable. Compl. ¶ 112. They further allege that the manner in which they were strip searched—with female officers present or in view of other prisoners and staff, with prohibited videotaping, or with humiliating

[46] Because I would dismiss plaintiffs' equal protection claims, I would also dismiss their § 1985 claims. See Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) ("The language [in § 1985(3)] requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."); accord Reynolds v. Barrett, 685 F.3d 193, 201–02 (2d Cir. 2012).

comments—was unconstitutional. See id. ¶¶ 112–15.

Insofar as plaintiffs seek damages from MDC Defendants Hasty and Sherman for the challenged strip search policy, Ashcroft v. Iqbal does not admit a theory of supervisory liability on a Bivens claim. See 556 U.S. at 676–77. Rather, plaintiffs must plausibly plead that each Bivens defendant, "through the official's own individual actions, has violated the Constitution." Id. at 676. Plaintiffs do not allege that Hasty and Sherman themselves ever participated in any of the challenged strip searches or that they personally developed the policy. The latter conduct is attributed to MDC First Lieutenant Joseph Cuciti. See Compl. ¶ 111.

The majority nevertheless concludes that plaintiffs carry their Iqbal pleading burden by alleging that (1) "Hasty ordered [MDC Captain] Lopresti and Cuciti to design extremely restrictive conditions of confinement," which were "then approved and implemented by Hasty and Sherman," id. ¶ 75; and (2) many of the strip searches "were documented in a 'visual search log' created by MDC staff for review by MDC management, including Hasty," id. ¶ 114. The majority holds that these pleadings are sufficient to allege Hasty's and Sherman's personal involvement "in creating and executing" the challenged strip-search policy, or at least their awareness of the searches "based on the search log." Majority Op., ante at 97–98.

It then further concludes that neither Hasty nor Sherman is entitled to qualified immunity because, at the time of the MDC Plaintiffs' confinement, it was clearly established that strip searches had to be "'rationally related to legitimate government purposes.'" Id. at 100 (quoting Iqbal v. Hasty, 490 F.3d at 172). I cannot join in this reasoning.

First, insofar as plaintiffs challenge the frequency of the strip searches, it is their burden to plead facts sufficient to demonstrate that the challenged policy lacked a rational relationship to a legitimate government objective, specifically, prison security. See Turner v. Safley, 482 U.S. at 89 (establishing standard for challenging prison regulation); Covino v. Patrissi, 967 F.2d at 78–80 (applying standard to body-cavity search challenge). That burden is, moreover, a heavy one because it requires a showing that the "logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." Turner v. Safley, 482 U.S. at 89–90. I do not think plaintiffs' pleadings plausibly allege that the frequency with which they were strip searched was so unrelated to prison security as to be arbitrary or irrational.

Plaintiffs assert that they were strip searched "even when they had no conceivable opportunity to obtain contraband." Compl. ¶ 112. The conclusion

borrows from Hodges v. Stanley, a case in which this court reinstated a complaint challenging a second strip search under circumstances where "it seems clear that there was no possibility that Hodges could have obtained and concealed contraband." 712 F.2d 34, 35 (2d Cir. 1983). Hodges, however, was decided before Turner and Covino. Thus, courts cannot assume that its "no possibility" to obtain contraband conclusion invariably equates to the required showing of no rational relationship to a legitimate government purpose. Notably, Hodges reached the "no possibility" conclusion in circumstances where the prisoner had been searched "immediately prior to the search forming the basis of his complaint." Id. at 35 (emphasis added). Plaintiffs here allege no such immediately successive—and, therefore, purposeless—strip searches. Rather, they complain of random strip searches in their cells or of required strip searches in circumstances involving intervening events—e.g., before and after non-contact visits—that plaintiffs conclusorily maintain afforded them no opportunity to receive contraband. See Compl. ¶ 112. In the aftermath, however, of an all-too-successful attack on a BOP guard by a restrictively confined terrorist suspect, see United States v. Salim, 690 F.3d at 119–20, it was hardly irrational for prison authorities to conclude that persons under investigation for terrorist connections should be strip searched both

randomly in their cells and whenever they were moved from one location to another to ensure prison security. Hodges cannot be read to make clear to every reasonable officer that such searches were unconstitutional. Indeed, this is precisely the sort of "difficult judgment[] concerning institutional operations" that the Supreme Court has concluded must be made by "prison administrators . . . , and not the courts." Turner v. Safley, 482 U.S. at 89 (internal quotation marks omitted).[47]

Second, with respect to the manner in which the searches were conducted, plaintiffs' claims against Hasty and Sherman depend on these defendants' review

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[47] The majority's reliance on Iqbal v. Hasty, 490 F.3d at 172, in holding otherwise, see Majority Op., ante at 98, is misplaced for the reasons already discussed. See supra at 61–62.

So too is its citation to N.G. v. Connecticut, 382 F.3d 225 (2d Cir. 2004). See Majority Op., ante at 98 n.44. There, this court held that repetitive strip searches after supervisory transport of persons confined in juvenile facilities were not reasonable under the Fourth Amendment in the absence of reason to suspect the juvenile's possession of contraband. See N.G. v. Connecticut, 382 F.3d at 233–34. It is hardly apparent that the same conclusion applies where the persons being searched are adults and where they are being confined subject to clearance of terrorist activities. The higher risks to prison and public safety of missed contraband in that circumstance, as well as terrorists' proved ability to evade even restrictive confinement does not admit a conclusion that N.G. clearly established unreasonableness in the context here at issue. See generally id. at 234 (acknowledging that continuous custody cannot "guarantee" protection for subsequent access to contraband).

Even if such a conclusion were possible, however, N.G. was not decided until 2004. Thus, the majority can hardly rely on that decision as the clearly established law that, in late 2001, put beyond debate that the strip-search policy here at issue violated the Fourth Amendment.

of a visual search log allegedly created by MDC staff for management. The "possibility" that defendants reviewed such logs is not enough, however, to state a plausible claim against them for the manner of the searches. Ashcroft v. Iqbal, 556 U.S. at 678 (stating that "plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully"). Indeed, even if their review of the logs were plausible, it would, at best, support an inference of Hasty's and Sherman's knowledge of the manner in which the searches were being conducted. Further facts indicating more than negligence in these defendants' failure to take corrective action would be necessary plausibly to plead that through their "own individual actions," each had "violated the Constitution." Id. at 676; see also, e.g., O'Neill v. Krzeminski, 839 F.2d 9, 11 n.1 (2d Cir. 1988) ("Negligence is not a basis of liability for constitutional torts.").

I would thus grant Hasty and Sherman dismissal of the MDC Plaintiffs' Fourth Amendment claim on the ground of qualified immunity.

* * *

In sum, I respectfully dissent from the judgment entered on appeal in this case insofar as it allows the MDC Plaintiffs to pursue money damages on policy-challenging Fifth Amendment claims for punitive and discriminatory confinement

against defendants Ashcroft, Mueller, Ziglar, Hasty, and Sherman, and an attendant policy-challenging Fourth Amendment claim for unreasonable strip searches against defendants Hasty and Sherman. I conclude that no established Bivens action is available for plaintiffs to pursue these claims and that significant factors counsel hesitation in extending Bivens to an action challenging executive policy pertaining to immigration and national security made in a time of crisis. In any event, I would grant defendants' motions for dismissal on grounds of qualified immunity because plaintiffs fail either to plead plausible constitutional violations or to demonstrate that clearly established law would have alerted every reasonable official that the challenged actions were unlawful.