13-981-cv(L)

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

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees-Cross-Appellants,

(*caption continued on inside cover*)

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

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

DEBRA L. ROTH
JULIA H. PERKINS
SHAW, BRANSFORD & ROTH P.C.
1100 Connecticut Avenue, N.W.,
Suite 900
Washington, DC 20036
(202) 463-8400

JEFFREY A. LAMKEN
Counsel of Record
MARTIN V. TOTARO
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Avenue, N.W.
Washington, DC 20037
(202) 556-2000

Counsel for Defendant-Appellant-Cross-Appellee James Sherman

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

Plaintiffs-Appellees,

—against—

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

Defendants-Appellants-Cross-Appellees,

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

Defendants-Cross-Appellees,

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

Intervenors.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

INTRODUCTION

Plaintiffs do not dispute that the MDC Defendants have no affiliation with the FBI or INS; had no role in developing or implementing the hold-until-cleared policy; were not involved in selecting Plaintiffs for detention; did not designate Plaintiffs as "high interest" or "of interest" in connection with terrorism activities; and did not decide when any Plaintiff would be released. Rather, Plaintiffs urge that ***other officials*** (in the FBI and elsewhere) made those decisions, determining Plaintiffs' conditions of confinement and specifying that Plaintiffs were "suspected terrorists." Pl. Br. 11-12; *see id.* at 30, 34, 39.

Plaintiffs nonetheless seek to hold the MDC Defendants liable for relying on those decisions, by high-level national security officials, in the aftermath of an unprecedented terrorist attack. But that would require extending *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), to new contexts—to new constitutional provisions and novel circumstances. Both this Court and the Supreme Court have warned against extending *Bivens* beyond its current confines. And even if *Bivens* could be extended, qualified immunity should be granted.

ARGUMENT

I. PLAINTIFFS HAVE NOT STATED A FREE-EXERCISE CLAIM AGAINST MR. SHERMAN (COUNT 3)

Plaintiffs' free-exercise claim seeks an unwarranted extension of *Bivens*. Plaintiffs also fail to plead facts plausibly showing that Mr. Sherman ***individually***

and ***intentionally*** sought to deprive them of clearly established free-exercise rights. The sole conduct Plaintiffs attribute to Mr. Sherman personally—approval of a facially neutral "no-items-in-cells" policy—did not violate the Constitution at all, much less clearly established law.

A. *Bivens* Should Not Be Extended To Free-Exercise Claims In This Context

Plaintiffs concede that their free-exercise claims require "an extension of *Bivens*," Pl. Br. 52, and properly so. The Supreme Court "ha[s] never held that *Bivens* extends to First Amendment claims" of any kind, *Reichle v. Howards*, 132 S. Ct. 2088, 2093 n.4 (2012), including free-exercise claims, *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). Indeed, the Supreme Court has not extended *Bivens* to "any new context or new category of defendants" in 33 years. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001). 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).

Plaintiffs' primary argument for extending *Bivens* is that they might otherwise have no remedy. Pl. Br. 60. But the "absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply" that *Bivens* relief is appropriate. *Schweiker v. Chilicky*, 487 U.S. 412, 421-22 (1988). Court after court has agreed that the absence of complete relief—or any relief—does not itself justify *Bivens*' expansion. *E.g.*, *Wilson v. Libby*, 535 F.3d 697, 709-10 (D.C. Cir.

2008); *Zimbelman v. Savage*, 228 F.3d 367, 370-71 (4th Cir. 2000); *Saul v. United States*, 928 F.2d 829, 839-40 (9th Cir. 1991).

The absence of a statutory remedy here counsels dispositively ***against*** *Bivens*' expansion. Congress has actively regulated barriers to religious practice. The Religious Freedom Restoration Act (RFRA) creates a cause of action for burdens on free exercise and permits "appropriate relief" against the government. 42 U.S.C. §2000bb-1(c). Plaintiffs' objection (at 61) that RFRA's applicability to federal officials was "not clearly established in 2001" is unavailing. That courts have granted qualified immunity based on uncertainty over RFRA's scope, *see Elmaghraby v. Ashcroft*, 04-cv-1809, 2005 WL 2375202, at *29-31 (E.D.N.Y. Sept. 27, 2005); *Crocker v. Durkin*, 159 F. Supp. 2d 1258, 1274 (D. Kan. 2001), does not license courts to create a placeholder *Bivens* remedy imposing interim liability until RFRA's scope is resolved.

The Religious Land Use and Institutionalized Persons Act (RLUIPA) further protects incarcerated individuals from burdens on religious practice. *Id.* §2000cc-1(a). It makes no difference that Congress chose to apply RLUIPA only to States. Pl. Br. 61. Courts cannot second-guess that decision by creating a substitute action against federal officials under *Bivens*. "[C]ongressional ***inaction***" is entitled to "judicial deference" where it appears that Congress's choice "has not been inadvertent." *Schweiker*, 487 U.S. at 423 (emphasis added). It is implausible that Con-

gress inadvertently omitted a right of action for detained aliens alleging free-exercise violations.

"[W]here Congress has intentionally withheld a remedy" or limited its scope, courts must "refrain from providing" remedies under *Bivens*, in deference "to the considered judgment of Congress that certain remedies are not warranted." *Libby*, 535 F.3d at 709-10. Respect for Congress's choices is precisely the sort of "special factor" counseling "hesitation" that "foreclose[s] a *Bivens* remedy." *Arar*, 585 F.3d at 573. The "special factors" bar is "remarkably low": "'Hesitation' is 'counseled' whenever thoughtful discretion would pause even to consider." *Id.* at 574. Congress's choice not to create a remedy plainly warrants pause here.[1]

Additional factors counsel hesitation. "[A] suit against a federal official for decisions made as part of federal disaster response and cleanup efforts" after the unprecedented 9/11 attacks, this Court has held, "implicate[s] the sort of 'special factors' that counsel against creation of a *Bivens* remedy." *Benzman v. Whitman*, 523 F.3d 119, 126 (2d Cir. 2008). *A fortiori*, the 9/11 response challenged here counsels hesitation. Plaintiffs' challenges to post-9/11 policies "would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation." *Arar*, 585 F.3d at 574.

[1] Plaintiffs cite (at 59) a handful of cases that assumed the existence of a *Bivens* remedy for free-exercise claims, but none addressed, as the Supreme Court requires, whether special factors counseled hesitation.

That those policies concern non-citizens detained under the immigration laws "further 'counsels hesitation' in extending *Bivens*." *Mirmehdi v. United States*, 689 F.3d 975, 982-83 (9th Cir. 2012) (quoting *Arar*, 585 F.3d at 574). Expanding *Bivens* would embroil courts in the difficult task of trying to reconcile free-exercise concerns with the efficient operation of detention facilities—in the wake of 9/11, no less—a task "peculiarly within the province of the legislative and executive branches." *Turner v. Safley*, 482 U.S. 78, 85 (1987). Those concerns easily surmount the special factors test's "remarkably low" bar.

Plaintiffs claim not to challenge "immigration policy choices undertaken by Congress or the Executive." Pl. Br. 62. But their Complaint invokes a supposed "policy" of targeting aliens from certain Middle Eastern countries for immigration enforcement. Dkt.726 ¶1. And it asserts a purported lack of evidence linking Plaintiffs to terrorism. *Id.* ¶69. Plaintiffs' claims thus could require evaluating FBI information showing that Plaintiffs were "of interest" to the 9/11 investigation. That inquiry "would enmesh the courts ineluctably in an assessment of the validity" of those policies. *Arar*, 585 F.3d at 575.

Besides, the question is not whether ***this particular case*** would intrude on national security, foreign relations, and immigration issues. It is whether extending *Bivens* to ***this context*** could. When the Supreme Court concluded that Congress's plenary authority over military affairs counseled hesitation, it barred all

Bivens actions "'aris[ing] out of . . . activity incident to [military] service,'" whether or not the plaintiff challenged military policy. *United States v. Stanley*, 483 U.S. 669, 683-84 (1987). Here too, Congress's unique authority over immigration and national security counsels hesitation, whether or not Plaintiffs directly challenge immigration policy. *See Mirmehdi*, 689 F.3d at 982-83.

Likewise, the "special factors" analysis does not depend on whether this case would ***actually*** require disclosure of classified information. Pl. Br. 64. Courts do not consider whether a particular *Bivens* suit would "interfere[] with the legitimate mission of our military forces." *Lebron v. Rumsfeld*, 670 F.3d 540, 550 n.3 (4th Cir. 2012). That approach "misapprehends the question posed by 'special factors' analysis," which requires courts not to decide whether interference would result but to "defer to Congress as the branch constitutionally charged with addressing that question." *Id.* Whether or not ***this case*** creates such concerns—and we believe it does—the fact that the ***context*** raises concerns means that Congress, not courts, must decide whether to create a remedy.

Plaintiffs dismiss Congress's unique authority over immigration, national security, and foreign affairs because *Bivens* extends to other areas (*e.g.*, patents) where Congress has plenary power. *See* Pl. Br. 62-63. But "matters touching upon foreign policy and national security" in particular "fall within an area of executive action in which courts have long been ***hesitant*** to intrude absent congressional

authorization." *Arar*, 585 F.3d at 575 (quotation marks omitted). Judicial interference could "'embarrass[] . . . our government abroad' through 'multifarious pronouncements by various departments on one question.'" *Id.* at 576; *see also Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (discouraging judicial intervention in immigration policy).

Plaintiffs and their *amicus* (like the district court) insist that extending *Bivens* would enhance American "legitimacy among other nation states as a country that respects the rule of law and human rights." Pl. Br. 66; *Amicus* Br. at 27. That is debatable. But the fact that extending *Bivens* could ***affect international relations***—in any manner—is precisely why ***the political branches*** must address the issue. *See* Sherman Br. 31. "The special factors counseling hesitation [inquiry does] not concern the merits of the particular remedy." *Bush v. Lucas*, 462 U.S. 367, 380 (1983). It concerns "***who should decide*** whether such a remedy should be provided." *Id.* (emphasis added). Congress and the Executive have "considerable familiarity" with immigration and national security and possess fact-finding resources "not available to the courts." *Id.* at 389.[2] And Congress "is in a far

[2] *Amicus* suggests (at 26) that national security is irrelevant because the challenged conduct "occurred in the non-exigent confines of a prison cell." But that was true in *Arar*, where the challenged rendition occurred ***after*** the INS detained Arar and instituted removal proceedings. 585 F.3d at 565-66.

better position than a court to evaluate the impact of a new species of litigation." *Id.*[3]

B. Qualified Immunity Is Warranted

An official is entitled to qualified immunity for "conduct [that] does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). That doctrine protects "all but the plainly competent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011). Plaintiffs' free-exercise allegations do not overcome qualified immunity. The ***only*** allegation Plaintiffs plausibly link to Mr. Sherman is the "no-items" policy. Sherman Br. 36. But that directive was facially neutral and thus did not violate the Free Exercise Clause, much less clearly violate it as the law existed in 2001. Plaintiffs' remaining allegations are not attributable to the no-items policy and do not plausibly show that Mr. Sherman intentionally interfered with Plaintiffs' religious exercise.

[3] Plaintiffs suggest (at 66 n.13) that certain treaties mandate *Bivens*' expansion. But treaties "are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing'. . . ." *Medellin v. Texas*, 552 U.S. 491, 505 (2008). Plaintiffs do not suggest that any of those treaties is self-executing; nor do they identify any implementing statutes (whose existence would itself bar a remedy under *Bivens*).

1. *The No-Items Policy Did Not Violate The Free Exercise Clause, Much Less Any Clearly Established Right*

Under *Employment Division v. Smith*, 494 U.S. 872 (1990), no free-exercise violation results if "prohibiting the exercise of religion . . . is not the object of the [government regulation] but merely the incidental effect of a ***generally applicable and otherwise valid provision***." *Id.* at 878 (emphasis added). That is all the no-items policy was. Plaintiffs acknowledge as much, alleging that the "written MDC policy . . . prohibited the 9/11 detainees ***from keeping anything***, including a Koran, in their cell." Dkt.726 ¶132 (emphasis added). The policy was "not specifically directed at their religious practice" but rather a "valid and neutral [policy] of general applicability." *Smith*, 494 U.S. at 878-79.

Plaintiffs do not even cite *Smith*. Instead, they invoke *Turner v. Safley*, 482 U.S. 78 (1987), urging that the no-items policy fails under that standard. Pl. Br. 96-97. But *Turner*—which requires burdens on religion to "reasonably relate[ ] to legitimate penological interests"—applies only "when a prison regulation impinges on an inmate's constitutional rights." 482 U.S. at 89. And after *Smith*, a facially neutral policy that only "incidental[ly] [a]ffect[s]" religious exercise does not impinge on free-exercise rights at all. 494 U.S. at 878.[4]

[4] Plaintiffs cite (at 59) *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), but *O'Lone* predates *Smith*.

Plaintiffs' suggestion (at 96-97) that an "exaggerated response" to a legitimate concern constitutes a constitutional violation similarly misunderstands *Turner*. *Turner* stated that "the existence of obvious, easy alternatives may be evidence that [a] regulation [impinging on constitutional rights] is not reasonable, but is an 'exaggerated response' to prison concerns." 482 U.S. at 90. That tailoring inquiry is irrelevant: *Turner*'s reasonableness inquiry applies only ***if*** there is an intrusion on constitutional rights. Under *Smith*, facially neutral government action does not impinge free exercise rights at all, rendering *Turner*'s reasonableness inquiry irrelevant.

Even if those conclusions were debatable, the contrary proposition was hardly so clear that it was "obvious that no reasonably competent officer" could have thought the policy permissible. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Courts have upheld similarly neutral policies with the effect of restricting high-security inmates' access to religious materials. *E.g.*, *Green v. Sneath*, 508 F. App'x 106, 109 (3d Cir. 2013); *see* Sherman Br. 37 n.6 (collecting cases). And courts routinely approve policies denying inmates access to certain items. *See, e.g.*, *Thornburgh v. Abbott*, 490 U.S. 401, 416 (1989); *Mason v. Clark*, 920 F.2d 493, 495 (8th Cir. 1990).

Plaintiffs invoke (at 97-98) *Pierce v. La Vallee*, 293 F.2d 233 (2d Cir. 1961). But that pre-*Smith* decision did not resolve the scope of free-exercise rights; it was

an abstention case allowing state inmates to ***file*** free-exercise challenges in federal court without first suing in state court under a state statute. *Id.* at 236. Plaintiffs cite *McEachin v. McGuinnis*, 357 F.3d 197 (2d Cir. 2004), for the proposition that "even general restrictions on prisoner property have to accommodate religious texts." Pl. Br. 98. But *McEachin* did not hold that a facially neutral policy was unconstitutional: It involved discipline that was "itself a product of religious discrimination." 357 F.3d at 201. Plaintiffs identify no pre-2001 case clearly establishing a "particularized" right of non-citizen terrorism suspects to possess religious texts in contravention of a facially neutral no-items policy. *Reichle*, 132 S. Ct. at 2094. Because the only allegation plausibly linked to Mr. Sherman is that he approved a "no-items" policy that was ***constitutional***—and certainly not plainly ***un***constitutional—Mr. Sherman is entitled to immunity.[5]

The "no-items" policy, moreover, did not cause Plaintiffs any injury. Notwithstanding the policy, nearly all Plaintiffs received Korans within "weeks" or a "month" after requesting one. *See* Pl. Br. 94; Dkt.726 ¶132. While one Plaintiff never received a Koran, he cannot blame the "no-items" policy when other detainees subject to the same policy did receive Korans. Sherman Br. 38. Plaintiffs may wish Korans were provided more promptly or consistently. But the

[5] *Hasty* does not compel a contrary result; it did not address whether any free-exercise rights were clearly established at the time of the alleged misconduct. *See* 490 F.3d at 173; Sherman Br. 48 n.9.

Complaint pleads no basis for blaming Mr. Sherman for that: It nowhere alleges that he participated in decisions about when individual detainees would receive Korans. Under *Bivens*, "each Government official . . . is only liable for his or her own misconduct." *Iqbal*, 556 U.S. at 677. With respect to those points, Sherman Br. 38-39, Plaintiffs offer no response.

Instead, Plaintiffs argue that, because MDC staff honored nearly all Koran requests, "Defendants knew that denying Korans substantially burdened Plaintiffs' right to religious exercise." Pl. Br. 94. That assertion is as preposterous as it is irrelevant. Qualified immunity is an ***objective*** standard; officers' subjective beliefs in conduct's lawfulness are irrelevant. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). That Plaintiffs eventually got Korans also proves nothing. If they had been given birthday cakes, no one would infer the officers thought those constitutionally required.

Finally, Plaintiffs must adequately plead that Mr. Sherman had "the ***object or purpose***" of suppressing "religion or religious conduct." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1992). That requires more than "awareness of consequences"; it requires "undertaking a course of action 'because of,' not merely 'in spite of,' the action's adverse effects upon an identifiable group." *Iqbal*, 556 U.S. at 676-77 (quotation marks omitted). The Complaint provides no facts suggesting that delays in providing Korans resulted

from anything other than prison bureaucracy or, at worst, negligence by certain MDC officials. There is no basis to infer that such delays evinced the "conscious or intentional interference" required for a free-exercise violation. *Lovelace v. Lee*, 472 F.3d 174, 201 (4th Cir. 2006).[6]

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

Plaintiffs' remaining free-exercise allegations—denied or delayed receipt of Halal food, Dkt.726 ¶133, and alleged anti-Muslim epithets from MDC staff, Dkt.726 ¶¶136, 138—suffer from similar defects. Those allegations do not plausibly allege conduct by Mr. Sherman at all, much less his intentional deprivation of Plaintiffs' clearly established free-exercise rights.

Plaintiffs do not allege that Mr. Sherman decided to deny them Halal food. The Complaint's only specific allegation about the denial of Halal food is that one Plaintiff "brought his religion to the attention of ***MDC staff***." Dkt.726 ¶133 (emphasis added). As Mr. Sherman's opening brief noted (at 43), it is implausible

[6] Plaintiffs respond that a "temporary deprivation of a constitutional right is still a deprivation." Pl. Br. 94. No one disputes that. The complaint in *McEachin* alleged a "temporary deprivation" that resulted from "***intentionally***" issuing an order, "***knowing***" that interference with religious beliefs would result. 357 F.3d at 201 (emphasis added). Plaintiffs' Complaint contains no such well-pleaded facts.

that the associate warden of a large prison facility would supervise and approve individual inmates' dietary requests. Plaintiffs have no meaningful response.[7]

The same is true of Plaintiffs' allegations of verbal abuse by MDC guards. Verbal abuse alone is not a constitutional deprivation, much less a clearly established one. Sherman Br. 40-41. In any event, Plaintiffs argue only that the "MDC Defendants knew of these abuses and [were] deliberately indifferent to the risk" of injury. Pl. Br. 95 (quotation marks omitted). But even if the Complaint adequately alleged Mr. Sherman's "deliberate indifference"—and it does not[8]—that is not the standard. Plaintiffs must plausibly allege that Mr. Sherman failed to act because he ***intended*** to deprive them of their free-exercise rights. *See* p. 12, *supra*. The Complaint contains no such allegations. *See Iqbal*, 556 U.S. at 676-77; *Vance v. Rumsfeld*, 701 F.3d 193, 204 (7th Cir. 2012) (en banc). Immunity is warranted.

---

[7] Plaintiffs assert that they alleged more than "mere negligence" by Mr. Sherman with respect to denial of Halal food. Pl. Br. 96. But that is irrelevant: Because a free-exercise violation requires specific intent, *see* p. 12, *supra*, it is not enough to allege that Mr. Sherman was aware of Halal food denials and took no action in response. Instead, they must show that he acted with the ***purpose*** of suppressing their free-exercise rights. *See* p. 12, *supra*.

[8] The Complaint states that these actions "were brought to the attention of MDC management, including Hasty." Dkt.726 ¶137. Even assuming "MDC management" includes Mr. Sherman, that paragraph offers nothing more than a conclusory allegation of awareness, which falls short of deliberate indifference, and certainly does not show the mental state required under *Iqbal*. *See* 556 U.S. at 677, 679.

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

A. Counts 1, 2, And 6 All Extend *Bivens* To A New Context

Plaintiffs contend that Count 1's substantive due-process claim, Count 2's equal-protection claim, and Count 6's Fourth Amendment and due-process claims do not present new "contexts" that require *Bivens*' extension. Pl. Br. 52-58. But "context" involves similarity of both "legal ***and factual***" components. *Arar*, 585 F.3d at 572 (emphasis added). More than "simple factual distinction[s]" exist here. Pl. Br. 56. The fact that Plaintiffs were detained aliens unlawfully in this country is integral to the *Bivens* analysis. So are national security concerns.

1. "[I]mmigrants' remedies for vindicating the rights which they possess under the Constitution are not coextensive with those offered to citizens." *Mirmehdi*, 689 F.3d at 981. "[B]ecause Congress has the ability to 'make rules as to aliens that would be unacceptable if applied to citizens,' [courts] must consider whether an immigrant may bring a *Bivens* claim to vindicate certain constitutional rights ***separately*** from whether a citizen may bring such a *Bivens* claim." *Id.* at 981 n.3 (emphasis added) (citations omitted). An alien's assertion of a *Bivens* remedy thus necessarily presents a "new context" even if citizens may already assert similar *Bivens* claims. *See* pp. 5-7, *supra*.[9]

[9] The suggestion that the Constitution applies to immigrants, *Amicus* Br. 21-22, 26, thus has no bearing here. The question is whether, assuming a constitutional

For that reason (and others), labeling this a conditions-of-confinement case does not make *Carlson v. Green*, 446 U.S. 14 (1980), or *Thomas v. Ashcroft*, 470 F.3d 491 (2d Cir. 2006), relevant. *See* Pl. Br. 53. Neither case involved non-citizens detained on immigration charges. While Plaintiffs cite *Sanusi v. INS*, 100 F. App'x 49 (2d Cir. 2004), as suggesting that "a plaintiff's status as a foreign national" plays no role, Pl. Br. 56, that unpublished decision ruled only that "whether a *Bivens* action [was] available" was an "unsettled legal issue" for resolution on remand. 100 F. App'x at 52 & n.3. Likewise, *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 621-22 (5th Cir. 2006), merely assumed a *Bivens* remedy while disposing of the case on other grounds. The only case actually holding that alien status does not matter when deciding if a context is "new"—*Guardado v. United States*, 744 F. Supp. 2d 482, 489 (E.D. Va. 2010)—predates *Mermehdi* and is devoid of analysis.[10]

2. National security concerns likewise render this context "new." Such concerns were front-and-center in the Supreme Court's decision not to extend *Bivens* equal-protection claims to the military context. *Chappell v. Wallace*, 462 U.S. 296, 300-01 (1983). They also undergird *Arar*'s classification of extraordi-

---

violation, the judicially created *Bivens* ***remedy*** should be extended. *See Mirmehdi*, 689 F.3d at 982-83.

[10] Contrary to Plaintiffs' assertion (at 58), nothing in *Mirmehdi* conflicts with *Papa v. United States*, 281 F.3d 1004 (9th Cir. 2002), which merely assumed without deciding that aliens' claims do not present new contexts under *Bivens*.

nary rendition as a new *Bivens* "context." The plaintiffs there "target[ed] the 'policy' of extraordinary rendition," raising

> claim[s that] cannot proceed without inquiry into the perceived need for the 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 in light of apparent geopolitical circumstances and our relations with foreign countries.

585 F.3d at 575. Here too, plaintiffs target policies implicating the Nation's response to an unprecedented terrorist attack. The Complaint—whose central theme is that nothing suggested Plaintiffs were terrorists—plainly "touch[es] upon foreign policy and national security." *Id.*

Plaintiffs insist that *Arar* permits *Bivens* actions for all domestic mistreatment claims except extraordinary rendition. Pl. Br. 54-55. But *Arar* explicitly stated that, "[t]o the extent [plaintiffs' conditions of confinement] claim[s] may be deemed to be a *Bivens*-type action, it may raise some of the special factors considered later in this opinion." 585 F.3d at 569. The Court did state that a *Bivens* remedy typically lies for prisoners beaten by guards and immigrants subjected to unlawful strip searches. 585 F.3d at 580. Crucially absent from those hypothetical claims, however, are official conditions imposed in response to a major terrorist attack in light of national security concerns. Indeed, *Arar* relied on national security concerns to ***distinguish*** that case from those hypothetical claims. *Id.* at 580-81.

Plaintiffs urge (at 57) that such an approach would result in differential treatment of two groups asserting the same constitutional claim. But that does not require extending *Bivens* to both groups. *Contrast Davis v. Passman*, 442 U.S. 228 (1979) (extending *Bivens* to employment discrimination claim for congressional staff), *with Chappell*, 462 U.S. 296 (refusing to extend *Bivens* to employment discrimination claim for military personnel).

Because national security implications and Plaintiffs' alien-detainee status render this a "new context," *Bivens* cannot be extended without examining whether special factors counsel hesitation. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); pp. 2-3, *supra*. Plaintiffs make no effort to address those factors. And the special factors counseling hesitation before extending *Bivens* to Plaintiffs' free-exercise claims apply equally to their other claims. Sherman Br. 47; pp. 2-8, *supra*.[11]

B. Qualified Immunity Should Be Granted For Counts 1, 2, And 6

At the core of Counts 1, 2, and 6 is Plaintiffs' assertion that, following the 9/11 attacks, Mr. Sherman—a mid-level prison warden with no national security background or role in the 9/11 investigation—violated clearly established law by failing to (a) disregard prisoner classifications made by DOJ and FBI national security experts or (b) defy orders to hold those prisoners in restrictive confine-

[11] Because context requires legal similarity as well, *Arar*, 585 F.3d at 572, cases entertaining *Bivens* claims for deprivations of property—a claim Plaintiffs do not raise—are irrelevant. *See* Pl. Br. 53 n.8.

ment. The argument answers itself. No such obligation of insubordination was clearly established law in 2001. And Plaintiffs have not adequately pleaded Mr. Sherman's personal involvement in the conditions they challenge.

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

a. *Official Policy Acts*

Count 1's Fifth Amendment claim alleges that restrictive confinement conditions were unwarranted because the MDC Defendants knew Plaintiffs had no connection to terrorism. But such claims require that Mr. Sherman ***intended*** to punish Plaintiffs through restrictive conditions. SPA.27 (citing *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)).

Far from plausibly pleading that intent, the Complaint provides the "obvious alternative explanation" for Mr. Sherman's actions, *Iqbal*, 556 U.S. at 682: High-level national security officials identified Plaintiffs as detainees of interest and required they be confined under the most restrictive conditions permitted by BOP policy. Plaintiffs allege that the DOJ officials, the FBI, and the INS—not Mr. Sherman—"arrested and treated [Plaintiffs] as 'of interest'" to the 9/11 investigation. Dkt.726 ¶¶1-2. They allege that the DOJ officials—not Mr. Sherman—"call[ed Plaintiffs] 'suspected terrorists' . . . ensur[ing] that Plaintiffs would be detained in the harshest conditions that exist in the federal system." Pl. Br. 39; *see id.* at 20, 37; Dkt.726 ¶¶65, 67-68. A high-level BOP official—not Mr. Sher-

man—decreed that all detainees who "may have some connection to or knowledge of" the 9/11 attacks must be housed "in the Special Housing Unit" in the "tightest" conditions. A.__ (OIG Report 19, 116); *see also* A.__ (OIG Report 112); A.__ (OIG Report 127).[12] Plaintiffs thus allege no more than Mr. Sherman's compliance with directives from "the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, . . . to keep suspected terrorists in the most secure conditions available," *Iqbal*, 556 U.S. at 683—not that he had intent to punish them.

Plaintiffs insist that some detainees in the ADMAX SHU were not designated as "high interest." Pl. Br. 89. That is irrelevant. Even those labeled "of interest" to the 9/11 investigation required FBI clearance—and restrictive confinement—before release. Dkt.726 ¶¶29, 44; *see also* A.__ (OIG Report 14, 25). Mr. Sherman simply implemented the orders of superiors with greater access to intelligence and expertise. Clearly established law does not require prison wardens to second-guess and overrule FBI and DOJ national-security determinations. *See, e.g.*, *Pahls v. Thomas*, 718 F.3d 1210, 1242 (10th Cir. 2013) (no constitutional requirement for local police officer to "go head to head with Secret Service agents"

[12] Nothing in the Complaint contradicts the OIG Report—incorporated into the Complaint by reference—insofar as it finds that the FBI designated detainees as "of interest" to the 9/11 investigation and that BOP officials senior to Mr. Sherman mandated highly restrictive confinement for all such detainees.

and to "override" the agents' decisions to "avoid §1983 liability"); Sherman Br. 49.[13]

Plaintiffs urge that no reasonable officer could ignore BOP regulations concerning use of restrictive conditions. Pl. Br. 84. But the question here is what the ***Constitution*** requires. "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Davis v. Scherer*, 468 U.S. 183, 194 (1984); *see Hasty*, 490 F.3d at 160-61 (prison regulations). *Hasty* specifically considered a procedural due process challenge to long-term administrative detention where detainees were denied "the reasons for [such] placement" and "any hearings," in violation of BOP regulations. 490 F.3d at 160-61. This Court concluded that a "legitimate question" exists "whether the Due Process Clause required administrative segregation hearings or any procedures other than the FBI's clearance system" in 2001 and 2002. It therefore held that the putative procedural due process right was

[13] Plaintiffs invoke an alleged memorandum stating that MDC "executive staff" classified the "suspected terrorists" as "High Security" based on individualized assessments of their "precipitating offense, past terrorist behavior, and inability to adapt to incarceration." Dkt.726 ¶74. Plaintiffs insist (at 90) that the statement was untrue, but do not dispute that Executive Branch officials told the MDC Defendants that the 9/11 detainees were "of interest" to the 9/11 investigation, or that the BOP directed their restrictive confinement based on that designation. *See* pp. 18-20, *supra*. Plaintiffs complain that "none of the MDC Defendants saw or considered" such information, Dkt.726 ¶74, but the quoted statement does not say that, nor does it say who conducted the individualized assessments. Plaintiffs nowhere plausibly allege that they were held in ADMAX for reasons other than the FBI's designations.

not clearly established. *Id.* at 167-68. Plaintiffs cannot create clearly established law by invoking the same BOP regulations and repackaging dubious procedural due process claims as dubious substantive due process claims.

Plaintiffs assert that, "after a few months of interacting" with detainees, the MDC Defendants realized "they were not terrorists." Pl. Br. 85. But that speculated "realization" cannot change ***the FBI's*** "high interest" or "of interest" classifications; alter ***the BOP's*** directive to hold such detainees in restrictive conditions; or authorize ***Mr. Sherman*** to release detainees not cleared by the FBI. To suggest otherwise—that law enforcement officers should reject directives from superiors and agencies with primary expertise—is an unsupported invitation for chaos.[14]

Plaintiffs' characterization of the orders as "facially invalid" misses the mark. Pl. Br. 86-87. Plaintiffs' cases all involve orders that both ***were unlawful on their face*** and ***had previously been ruled as such***. *See Sorensen v. City of New York*, 42 F. App'x 507, 511 (2d Cir. 2002) ("strip-search policy . . . had twice been declared unconstitutional"); *Diamondstone v. Macaluso*, 148 F.3d 113, 126 (2d Cir. 1998) (officer "ignored" earlier court rulings). The policy here—that

[14] Plaintiffs claim Mr. Sherman received "all evidence relevant to the danger [detainees] might pose ***to the institution***." Dkt.726 ¶69 (emphasis added); Pl. Br. 85. But that says nothing about the threat to the Nation or potential terrorist ties. And Mr. Sherman cannot substitute his assessment for the judgment of superiors and agencies with national security expertise. He was an associate warden, not head of the CIA.

PENTTBOM detainees be held in the BOP's most restrictive confinement—is not facially invalid. To the contrary, assignment of 9/11 detainees to the ADMAX SHU "could be reasonably understood . . . to relate to matters of national security." *Hasty*, 490 F.3d at 167. Plaintiffs argue invalidity ***as applied to them*** because they were allegedly known not to have terrorism ties. But then-existing law did not require (much less clearly require) Mr. Sherman to second-guess designations by high-level Executive Branch officials.

b. ***The Complaint Does Not Properly Plead Personal Involvement In The Unofficial Acts***

With respect to their claims of unofficial abuse (such as anti-Muslim taunting and physical abuse by MDC staff members), Plaintiffs do not suggest that Mr. Sherman himself participated. That resolves the matter. Under *Bivens*, "each Government official . . . is only liable for his or her ***own misconduct***." *Iqbal*, 556 U.S. at 677 (emphasis added).

Plaintiffs urge that the Complaint "plead[s] facts which suggest the requisite wrongful intent"—in particular, "deliberate indifference." Pl. Br. 79; Dkt.726 ¶ 77 (claiming Mr. Sherman "ignor[ed] direct evidence of such abuse"). After *Iqbal*, indifference is insufficient; intent is required. *Vance*, 701 F.3d at 203; Sherman Br. 51. Even under a deliberate-indifference theory, moreover, Plaintiffs "would need to allege that [Mr. Sherman] knew of a substantial risk to [Plaintiffs], and ignored that risk ***because he wanted plaintiffs (or similarly situated persons) to be***

harmed." *Vance*, 701 F.3d at 204 (emphasis added); *see Iqbal*, 556 U.S. at 677. Plaintiffs plead no plausible facts that Mr. Sherman intended to harm them.[15]

Plaintiffs urge that Mr. Sherman "made rounds on the ADMAX SHU and was aware of conditions there." Dkt.726 ¶26; Pl. Br. 80. But conclusory allegations of awareness (especially awareness of "conditions" generally) are insufficient: Awareness alone does not show Mr. Sherman ***intended*** any harm. *See Vance*, 701 F.3d at 204.[16] "Prisons are dangerous places, and misconduct by both prisoners and guards is common." *Id.* If awareness alone were sufficient, "[l]iability for wardens would be purely vicarious," *id.*—a result *Iqbal* forbids, 556 U.S. at 677.[17] Yet that is all Plaintiffs plead for Mr. Sherman.

---

[15] That likewise forecloses reliance on *Hasty*. That case found "general allegations of knowledge" sufficient to overcome qualified immunity, 490 F.3d at 169, a holding that does not survive *Iqbal*, 556 U.S. at 667.

[16] *See also Pahls*, 718 F.3d at 1238, 1240; *L.L. Nelson Enters., Inc. v. County of St. Louis*, 673 F.3d 799, 810 (8th Cir. 2012); *Evans v. Chalmers*, 703 F.3d 636, 660-61 (4th Cir. 2012); *Mamani v. Berzain*, 654 F.3d 1148, 1153-54 (11th Cir. 2011); *Santiago v. Warminster Township*, 629 F.3d 121, 134 (3d Cir. 2010). Even if supervisory liability based on awareness alone did survive *Iqbal*, Plaintiffs have failed to plead Mr. Sherman's ***specific awareness*** of the allegedly unconstitutional conduct. *See Vincent v. Yelich*, 718 F.3d 157, 173 (2d Cir. 2013). In *Vincent*, the complaint alleged that a supervisor ***knew specifically*** of the challenged policy, that the policy had been held unconstitutional, and that his subordinates continued to implement the policy nonetheless. *Id.* Here, by contrast, the Complaint nowhere alleges Mr. Sherman's awareness of specific constitutional violations at the ADMAX SHU.

[17] Some allegations generically state that the "MDC Defendants" were aware of the unofficial abuses. *See* Dkt.726 ¶¶77, 121. But such group pleading is insufficient

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

Count 2 (a Fifth Amendment equal-protection claim) likewise fails for want of discriminatory intent. Plaintiffs insist that Mr. Sherman's motivation is a factual question. Pl. Br. 88-89. But a "plaintiff can plead himself out of court by alleging facts which show that he has no claim." *Official Comm. of Unsecured Creditors v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2d Cir. 2003).

Plaintiffs do precisely that here. They allege the MDC Defendants placed Plaintiffs in the ADMAX SHU "[t]o implement Ashcroft, Mueller and Ziglar's policy." Dkt.726 ¶68. Other allegations in the Complaint and the OIG Report demonstrate that Mr. Sherman acted on superiors' orders, not on personal discriminatory beliefs. *See* pp. 18-20, *supra*. Indeed, the Complaint attributes discriminatory animus ***only*** to higher-level officials. *See, e.g.*, Dkt.726 ¶¶39-44, 48-49, 51, 57, 60. By alleging the "obvious alternative explanation" for Mr. Sherman's actions—obedience to superiors, not discriminatory animus—as his actual motivation, Plaintiffs have pleaded themselves out of court. *Iqbal*, 556 U.S. at 682.

Plaintiffs accuse Mr. Sherman of "d[oing] more than carry[ing] out a discriminatory policy dictated by [his] superiors." Pl. Br. 89. But the Complaint does

---

and does not establish Mr. Sherman's individual involvement or desire to cause harm.

not. To the extent that Mr. Sherman's actions disproportionately affected Arabs and Muslims, that resulted not from his own invidious purpose but from his superiors' policy of targeting the 9/11 investigation toward those matching the descriptions of suspected terrorists. *See Iqbal*, 556 U.S. at 682; *Brown v. City of Oneonta*, 221 F.3d 329, 337-39 (2d Cir. 1999). The allegation that non-Arab, non-Muslim immigration detainees were treated differently, Pl. Br. 91, is consistent with that explanation: The Complaint does not allege that the FBI designated any of those other detainees as "of interest" or "high interest" to the 9/11 investigation.

Finally, Plaintiffs claim that Mr. Sherman allowed subordinates to abuse and taunt them. But that fails for the same reason: Discrimination claims require ***purpose***. *Iqbal*, 556 U.S. at 676-77. Any claim that subordinates' actions by themselves establish the superior's intent cannot survive *Iqbal*'s prohibition on vicarious liability.

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

The Complaint does not allege Mr. Sherman's personal participation in developing or executing the strip-search policy challenged in Count 6. Plaintiffs instead claim Mr. Sherman approved unspecified conditions of confinement to carry out Ashcroft, Mueller, and Ziglar's unwritten policies. Dkt.726 ¶75; Pl. Br. 99-102. But the Complaint nowhere identifies the strip-search policy as one of the conditions that Sherman approved. *See* Dkt.726 ¶¶111-118. That is particularly

glaring given the Complaint's identification of ***other*** policies that Mr. Sherman allegedly approved. *See* Dkt.726 ¶¶74, 79, 129, 132.

Nor is it sufficient that Mr. Sherman allegedly "made rounds on the ADMAX SHU and was aware of conditions there." Dkt.726 ¶26; Pl. Br. 100. That neither establishes Mr. Sherman's awareness of the specific conduct at issue—strip searches—nor shows that he ***wanted*** strip searches to occur as ***punishment***. *See* p. 19, *supra*; Sherman Br. 51. And Mr. Sherman's purported access to a "visual search log," Dkt.726 ¶114; Pl. Br. 101, does not show Mr. Sherman reviewed it, much less that he promoted searches with invidious intent.

III. MR. SHERMAN IS ENTITLED TO QUALIFIED IMMUNITY ON COUNT 7's CONSPIRACY CLAIM

A. Plaintiffs offer no answer to the Supreme Court's explicit direction that, where a plaintiff asserts a cause of action under a statute (like 42 U.S.C. §1985), officers are entitled to qualified immunity unless it was clearly established that their conduct violated ***that statute***—not some other source of law. "[O]fficials become liable for damages only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action for damages." *Davis*, 468 U.S. at 194 n.12; *see Elder v. Holloway*, 510 U.S. 510, 515-16 (1994); Sherman Br. 60-61. Here, "it was not clearly established in 2001 that section 1985(3) applied to federal officials." *Hasty*, 490 F.3d at 176. Qualified immunity must be granted.

Plaintiffs' assertion (at 103) that a "violat[ion of] the Constitution" is sufficient ignores those precedents. Plaintiffs never try to reconcile their position with *Davis* or *Elder*. Nor do they deny that, given the patent conflict between those Supreme Court precedents and the Second Circuit precedent the district court invoked, initial en banc review is warranted. Sherman Br. 61.

B. Qualified immunity is also appropriate because a reasonable officer could have believed the intra-enterprise conspiracy doctrine applied. Sherman Br. 57-58. Plaintiffs argue (at 104) that the doctrine is irrelevant because BOP and DOJ are separate entities. Not so: "The Bureau of Prisons is part of the Department of Justice," *White v. Henman*, 977 F.2d 292, 293 (7th Cir. 1992), and is subject to the Attorney General's control, 18 U.S.C. §§ 4041, 4042(a)(1).

Plaintiffs invoke (at 104-105) a personal-interest exception to the intra-enterprise conspiracy doctrine. That exception requires some "independent personal stake in achieving the [enterprise's] objective." *Johnson v. Nyack Hosp.*, 954 F. Supp. 717, 723 (S.D.N.Y. 1997) (quoting *Girard v. 94th St. & 5 Ave. Corp.*, 530 F.2d 66, 71-72 (2d Cir. 1976)). The defendant must derive some ***personal benefit*** from the challenged action, such as monetary gain from the discriminatory firing of a competing coworker, *id.* at 724-25, or similar "promotions and other benefits," *Yeadon v. N.Y.C. Transit Auth.*, 719 F. Supp. 204, 207, 212 (S.D.N.Y. 1989). The Complaint neither alleges nor implies that Mr. Sherman had an inde-

pendent personal stake in any action he took. Instead, it pleads that his actions pursued the policies of his superiors. *See* pp. 18-20, *supra*. Mr. Sherman was "merely carrying out the corporation's managerial policy," rendering the personal-interest exception inapplicable. *Girard*, 530 F.2d at 71.

Plaintiffs also argue that Mr. Sherman's alleged "personal bias" or "deliberate[ ] violat[ion of] BOP regulations" triggers the personal-interest exception. If that were the law, "the exception would swallow the rule, and *Girard* and *Herrmann* [*v. Moore*, 576 F.2d 453 (2d Cir. 1978)], would be meaningless." *Johnson*, 954 F. Supp. at 723. "[P]ersonal bias is not the sort of individual interest that takes [Mr. Sherman] out of the intraenterprise conspiracy doctrine where, as here, the action complained of arguably served a legitimate interest of" the MDC and the BOP. *Id.*; *see also Hartman v. Bd. of Trs.*, 4 F.3d 465, 470 (7th Cir. 1993).[18]

Even if there were doubt, Mr. Sherman is entitled to immunity unless "existing precedent" in 2001 made clear that the alleged conduct fell outside the intra-enterprise conspiracy doctrine. *Reichle*, 132 S. Ct. at 2093. The Complaint does not even arguably establish the applicability of the "personal interest"

[18] *De Litta v. Village of Mamaroneck*, 166 F. App'x 497 (2d Cir. 2005), held that "the intra-enterprise doctrine would not apply" if the defendant and "other employees conspired with each other on the basis of personal animus, and ***not out of any desire to serve the interests of the Village***." *Id.* at 499 (emphasis added). Consequently, if personal bias is the defendant's ***sole*** motivation, the doctrine might not apply. Here, however, Plaintiffs allege Mr. Sherman acted on his superiors' orders—serving their (and the Nation's) interests, not his own.

exception, much less place the issue "beyond debate." *Id.* For that reason too, immunity must be granted.

CONCLUSION

The district court's denial of Mr. Sherman's motion to dismiss Counts 1, 2, 3, 6, and 7 should be reversed.

November 26, 2013

Respectfully submitted,

/s/ Jeffrey A. Lamken

Jeffrey A. Lamken
Counsel of Record
Martin V. Totaro
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 556-2000

Debra L. Roth
Julia H. Perkins
SHAW BRANSFORD & ROTH P.C.
100 Connecticut Ave. NW, Suite 900
Washington, D.C. 20036
(202) 463-8400

Counsel for Defendant-Appellant-Cross-Appellee James Sherman

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

_X_ this brief contains 6,996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

____ this brief uses a monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

_X_ this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point font, or

____ this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

/s/ Jeffrey A. Lamken
Jeffrey A. Lamken