6-2-2015

Reply Brief for Plaintiff-Appellant

Alexander A. Reinert

15-1786-cv

United States Court of Appeals

for the

Second Circuit

DANIEL MCGOWAN,

Plaintiff-Appellant,

– v. –

UNITED STATES OF AMERICA, CORE SERVICE GROUP, INC., TRACY RIVERS, Residential Reentry Manager, COMMUNITY FIRST SERVICES, INC.,

Defendants-Appellees,

GRACE TERRY, Facility Director, MASSIEL SURIEL, Case Manager, UNKNOWN UNITED STATES MARSHALS,

Defendants.

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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Plaintiff-Appellant Daniel McGowan submits this reply in response to the Brief for Defendants-Appellees United States of America and Tracy Rivers ("Defs.' Br."). Defendants concede that Plaintiff was placed in solitary confinement without any statutory or regulatory authorization and solely because he authored a blog post, speech protected by the First Amendment. Nonetheless, Defendants maintain that there is no remedy for this violation of Mr. McGowan's constitutional and common law rights. None of the reasons offered by Defendants for their position is compelling or supported by relevant law. When one steps back and considers Defendants' brief as a whole, it is an invitation to disregard Supreme Court and Second Circuit precedent, well-reasoned decisions from other circuits, and New York State law.

First, Defendants argue that Plaintiff may not bring an action pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), because such an action has not been recognized before and it should not be recognized now. For the reasons Plaintiff detailed in his opening brief and here, Defendants' position has no merit. Indeed, Defendants cannot identify a single appellate court opinion that rejected a *Bivens* cause of action under circumstances similar to the instant case. If Defendants' position is adopted in this

Circuit, federal prisoners will have no judicial remedy, damages or otherwise, that will operate as a realistic barrier to First Amendment retaliation.

Second, Defendants argue in the alternative that Plaintiff's claim is barred by qualified immunity, an issue that the District Court never reached. Even if this Court addresses qualified immunity here, Defendants' argument is primarily premised on the proposition that controlling Supreme Court precedent has been implicitly overruled. The remainder of Defendants' position fares no better, because it rests on a disregard for Second Circuit authority.

Finally, Defendants' arguments in support of the District Court's dismissal of Plaintiff's Federal Tort Claims Act ("FTCA") claims for negligence and false imprisonment fail for similar reasons. Defendants again suggest that Supreme Court authority has been overruled, despite the fact that this Court has explicitly relied on that authority in an opinion cited by Defendants. Defendants' attempt to distinguish this Court's precedent is also unavailing, as is Defendants' mischaracterization of New York State law that bears on the question.

As Plaintiff established in his opening brief, the District Court's decision was premised on a disregard of Supreme Court, Second Circuit, and New York State authority. Unfortunately, Defendants' opposition brief invites this Court to repeat and expand on the District Court's errors. For these reasons, Defendants' arguments should be rejected and the District Court's decision should be reversed.

ARGUMENT

I. A *Bivens* Remedy Is Available in this Case

Every appeals court that has considered *Bivens* claims in the context presented here has either specifically held or assumed that a cause of action is available for people like Mr. McGowan. (Pl.'s Br. 22-26). The reason for this near-uniform approach is straightforward. First, as Defendants implicitly concede and this Court held, the Supreme Court specifically opined that a *Bivens* claim should generally lie for First Amendment retaliation claims. *See Hartman v. Moore*, 547 U.S. 250, 256 (2006); *M.E.S., Inc. v. Snell*, 712 F.3d 666, 675 (2d Cir. 2013). Second, safeguarding against unbridled executive retaliation for engaging in protected speech is of central importance to any functioning democracy and therefore if any area is appropriate for a *Bivens* cause of action, it is this one. (Pl.'s Br. 26-27). Third, although the First Amendment offers less substantive protection in the context of prison, the ability of courts to craft judicially manageable standards to protect prisoners against retaliation has been amply demonstrated over time. (*Id.* 33-34). Fourth and finally, none of the traditional reasons for declining to find a *Bivens* remedy apply here, where there are no adequate remedies for Defendants' misconduct. (*Id.* 34-38). Defendants' arguments fall flat against this great weight of authority and logic.

A. A *Bivens* Remedy Already Has Been Recognized for Defendants' Conduct

Defendants' argument that there is no existing *Bivens* remedy to protect against First Amendment retaliation should be rejected for the reasons detailed in Plaintiff's opening brief (Pl.'s Br. 21-29). The cases cited in Plaintiff's opening brief directly rebut Defendants' contention that there is no generally available *Bivens* action to remedy official retaliation for engaging in protected speech, where no backwards-looking remedy is available. Defendants cannot dispute that this Court interpreted *Hartman* to establish the general availability of such claims. *M.E.S.*, 712 F.3d at 675. Defendants discount *M.E.S.* because this Court found that a retaliation claim was not available in that case, but that was because Congress had created a "comprehensive" and "elaborate" remedial scheme for the conduct at issue in *M.E.S.*, which neither the District Court nor Defendants are able to identify in this case. *Id*. at 671-72. Similarly, the Supreme Court's decision in *Bush v. Lucas*, 462 U.S. 367 (1983), does not bar relief here, given the congressionally-authorized remedies available in *Bush*. (Pl.'s Br. 17-18).

Instead of showing how this case is similar to *Bush* or *M.E.S.*, Defendants ague that even if a *Bivens* claim is available as a general matter, this case presents a new "context" because it involves prisoners. Defendants cite no authority for the proposition that prison is a new "context" for *Bivens*, because there are none.

Defendants cite only two cases in support, but both were Section 1983, not *Bivens*, claims that related solely to the different scope of First Amendment protection in and outside of prison. (*See* Defs.' Br. 13 (*citing Shaw v. Murphy*, 532 U.S. 223 (2001) and *Farrell v. Burke*, 449 F.3d 470 (2d Cir. 2006))). This argument conflates the substantive limitation of First Amendment protection for prisoners with the predicate remedial question of whether to provide a damages remedy in the first instance. The proper moment for considering the substantive reach of Plaintiff's First Amendment rights necessarily comes *after* this Court finds that there is a remedy to be had.

If Defendants' position were correct, then a Fourth Amendment *Bivens* claim brought by a pretrial detainee would require an analysis of available remedies and "special factors," because the scope of Fourth Amendment protection is different for pretrial detainees or prisoners than for free citizens.[1] But courts do not distinguish the reach of *Bivens* based on this changed "context." In *Turkmen v. Hasty*, for example, this Court reasoned that because *Bivens* "concerned a Fourth Amendment claim," applying it to strip searches of immigrants held in detention did not present a new context.[2] 789 F.3d 218, 237 (2d Cir. 2015); *see also*

[1] *Bivens* involved an allegation of Fourth Amendment violations inflicted upon a free citizen. 403 U.S. at 389.

[2] This Court's decision in *Arar v. Ashcroft* is not to the contrary, because unlike the "extraordinary rendition" at issue there, this case does not involve a "distinct phenomenon in

Hernandez-Cuevas v. Taylor, 723 F.3d 91 (1st Cir. 2013) (applying *Bivens* to pretrial detainees); *Denson v. United States*, 574 F.3d 1318, 1339 (11th Cir. 2009) (applying *Bivens* to search and seizure at the border, where the government's interest is at its "zenith"); *Escobar v. Gaines*, No. 3–11–0994, 2014 WL 4384389, at *4 (M.D. Tenn. Sept. 4, 2014) (rejecting argument that *Bivens* challenge by undocumented immigrants is a "new" context).

Similarly, the Supreme Court recognized an Eighth Amendment *Bivens* remedy for deliberate indifference to serious medical needs in *Carlson v. Green*, 446 U.S. 14 (1980), but did not hesitate to apply *Carlson*'s holding to a case involving the failure of prison officials to protect a transgender prisoner from harm without discussing special factors or alternative remedies. *Farmer v. Brennan*, 511 U.S. 825 (1994). Courts also have applied *Carlson* to general conditions of confinement claims without hesitation. *See Del Raine v. Williford*, 32 F.3d 1024, 1031 (7th Cir. 1994) (considering *Bivens* Eighth Amendment challenge to "bitterly cold" cell); *Young v. Quinlan*, 960 F.2d 351, 361 (3d Cir. 1992) (applying *Bivens* in conditions of confinement context). It also has been assumed that *Carlson* applies in the context of Eighth Amendment excessive force, despite the very different standard for establishing such claims. *See, e.g.*, *Elorreage v. Metro. Det.*

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international law," nor does it "operate[] as a constitutional challenge to policies promulgated by the executive." 585 F.3d 559, 572-74 (2d Cir. 2009) (en banc).

Ctr., No. 12-CV-3344, 2012 WL 3764428, at *2 (E.D.N.Y. Aug. 27, 2012) (citing *Carlson*).

Defendants' attempts to distinguish the countless cases that recognize a *Bivens* First Amendment retaliation claim, for prisoners and non-prisoners alike, are likewise fruitless. Defendants are correct that *Espinoza v. Zenk,* No. 10-CV-427, 2013 WL 1232208 (E.D.N.Y. Mar. 27, 2013), addressed the reach of *Bivens* to employees of governmental contractors and therefore implicated *Minneci v. Pollard*, 132 S. Ct. 617 (2012). But this hardly helps the Government – *Minneci* made it harder, not easier, to bring a *Bivens* action against private contractors, so the fact that *Espinoza* recognized a *Bivens* cause of action against a private individual makes the argument even stronger when the action is brought against a federal employee as it is here.

Defendants also concede that numerous cases assume the existence of a *Bivens* First Amendment remedy for retaliation, itself significant given Defendants' position that *Bush* forecloses such a remedy. (Defs.' Br. 18 n.6). More importantly, Defendants make no effort to distinguish the numerous non-prison cases in which multiple appellate courts explicitly recognized *Bivens* First Amendment retaliation claims, raised in divergent contexts. (*Id.* 19). Defendants focus instead on arguing that some of the cases recognizing a *Bivens* cause of action for *prisoners* alleging First Amendment retaliation were decided before

Bush v. Lucas. (*Id.* 19).[3] Defendants are certainly correct as a matter of timing, but this is not a sufficient ground for distinction. First, Defendants do not present any evidence that those courts have revisited their decision post-*Bush*, because they have not done so. The Third Circuit has reaffirmed its pre-*Bush* decision. *See Bistrian v. Levi*, 696 F.3d 352, 376 n. 9 (3rd Cir. 2012). And although it goes unacknowledged by Defendants, this Court has cited *Bistrian* with approval, albeit in the context of conditions of confinement rather than First Amendment claims. *Turkmen*, 789 F.3d at 236. Notably, Defendants do not cite a single case refusing to apply *Bivens* to First Amendment speech retaliation claims brought by prisoners.

B. Even if This Were a New Context, Defendants Have Made No Compelling Arguments Against Extending *Bivens*.

Even if this Court determines that this case presents a new *Bivens* "context," Defendants' arguments cannot salvage the District Court's decision. (See Pl.'s Br. 29-38). Defendants argue that *Wilkie v. Robbins*, 551 U.S. 537 (2007), and *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) suggest that an alternative remedy is available here via the prison grievance system and the

[3] Counsel for Plaintiff erroneously stated that *Crawford-El v. Britton*, 523 U.S. 574 (1998), was a *Bivens* First Amendment retaliation case, and apologizes to the Court for this error. As Defendants point out, *Crawford-El* involved a Section 1983 retaliation claim, not a *Bivens* claim. (Defs.' Br. 20). Nonetheless, the Supreme Court found it appropriate in a *Bivens* retaliation action to cite to *Crawford-El*'s rationale. *Hartman*, 547 U.S. at 256.

availability of habeas corpus through 28 U.S.C. § 2241. Defendants' argument is not credible on multiple levels. First, in *Wilkie*, despite the existence of a "patchwork" of state and federal alternative-remedies, the Court concluded that "[i]t would be hard to infer that Congress expected the Judiciary to stay its *Bivens* hand." 551 U.S. at 554. Defendants make no effort to show that the remedies available in *Wilkie*, which included state tort law damages claims and federal administrative claims, are comparable to those available to Plaintiff. Therefore, if the remedies available in *Wilkie* were insufficient to lead to the conclusion that Congress "expected the Judiciary to stay its *Bivens* hand," *id*. at 554, the remedies available here are by definition insufficient. And in *Malesko*, the plaintiff had an adequate damages remedy in state law that was "at least as great, and in many respects greater," than what was available in *Bivens*. 534 U.S. at 71-72.

Nor do Defendants cite any authority to support the proposition that the forward looking relief available through a habeas claim is a sufficient substitute for a *Bivens* action. As Plaintiff pointed out (Pl.'s Br. 35-36), if this argument were colorable, then no *Bivens* claim would ever lie because a plaintiff could always theoretically bring an injunctive claim challenging unconstitutional conduct; Defendants tellingly have no response. Defendants also agree that a prison official could repeatedly place someone in solitary confinement as retaliation for protected speech without fear of liability, but argue that the prisoner has nonetheless

"benefitted" from the availability of Section 2241 relief because the unconstitutional conduct will cease if the official wants to avoid the burden of a Section 2241 action. This conception of "benefit" strains the meaning of the word. There is no "benefit" to not being treated unconstitutionally in prison. And whatever "benefit" a prisoner obtains from being released from unconstitutionally-imposed solitary confinement will cease when the official decides to repeat the cycle over and over again. It is therefore unsurprising that Defendants cite to no case finding that the availability of a habeas-type action or internal administrative remedy has ever been considered an adequate alternative remedy available to displace a *Bivens* action. As Plaintiff demonstrated in his opening brief, alternative remedies sufficient to displace a *Bivens* cause of action have always been backwards-looking in at least some respects. (Pl.'s Br. 17-18; 34-35).[4]

Along similar lines, Defendants' arguments regarding "special factors" are essentially a repetition of the inadequate grounds offered by the District Court:

[4] Defendants make no effort to rebut the one-sided legislative history of the Westfall Act, cited in part by the Supreme Court in *Carlson*, establishing Congressional approval of *Bivens* actions as of 1988. (Pl.'s Br. 27-29). Instead, Defendants argue that the Westfall Act leaves *Bivens* jurisprudence as it existed in 1988. (Defs.' Br. 20-21). Even assuming Defendants are correct, this is fatal to their argument because by 1988 the Supreme Court had clearly required comprehensive backward-looking alternative remedies to foreclose the recognition of a *Bivens* cause of action. (Pl.'s Br. 17-18). By contrast, Defendants' special factors and alternative remedies arguments are based almost entirely on post-Westfall Act *Bivens* cases, cases that are arguably inconsistent with the pre-Westfall Act *Bivens* cases.

because this case involves the free expression of prisoners, the Court should hesitate to find a cause of action. Defendants cite to no cases that suggest that prison is a special factor that should cause one to hesitate before remedying First Amendment violations; the cases cited by Defendants suggest only that the freedoms protected by the First Amendment will be limited by the fact of confinement. And as detailed above and in Plaintiff's opening brief, no court ever has held that confinement in prison is a special factor counseling hesitation before inferring a *Bivens* action. (Pl.'s Br. 30-32).

Nor can a special factor be found in the existence of the Prison Litigation Reform Act ("PLRA"), which neither establishes a remedial scheme nor limits the availability of *Bivens* actions within prison. Defendants can cite to no case holding that the PLRA constitutes a "special factor" in the *Bivens* context, because there is no logic to the position. If the existence of the PLRA were a "special factor," no *Bivens* claim, for the First Amendment or otherwise, could ever be cognizable in prison, a position that even Defendants do not embrace. Nor do Defendants deny that the PLRA specifically contemplates *Bivens* actions in prison; they only argue that this does not mean "that a *Bivens* remedy should be recognized in all prison contexts." (Defs.' Br. 31). But Plaintiff has not argued that the PLRA creates a presumption in favor of a *Bivens* remedy. He argues, rather, that it is impossible to

treat a statute that specifically contemplates a *Bivens* action as a special factor counseling hesitation against adopting *Bivens* actions.

Indeed, *Wilkie*'s "special factors" analysis assists Plaintiff, not Defendants, because in *Wilkie* the failure to devise a workable cause of action was a special factor, 551 U.S. at 562, and Defendants do not dispute that federal courts in this Circuit adjudicate the First Amendment rights of state prisoners with regularity. *Atterbury v. U.S. Marshals Serv.*, 805 F.3d 398 (2d Cir. 2015), relied upon by defendants, is not to the contrary. *Atterbury* confirms that for there to be a special factor counseling hesitation, Congress must have comprehensively addressed the issue in a way that suggests Congressional disapproval for such a remedy. *Id*. at 404-05. In *Atterbury*, Congress had specifically excluded the plaintiff from one remedial scheme, but left available a remedy under the Administrative Procedure Act that was backwards looking and provided both compensatory and injunctive relief. *Id*. at 405-08. Neither of the elements that were present in *Atterbury* are present here. Defendants also cite *Benzman v. Whitman*, 523 F.3d 119 (2d Cir. 2008), but in *Benzman* Congress had created a damages remedy to be heard exclusively in the Southern District of New York that encompassed the plaintiffs' claims. *Id.* at 125-26; *Diaz-Bernal v. Myers*, 758 F. Supp. 2d 106, 128 (D. Conn. 2010) (distinguishing *Benzman* because Congress had created a statutory scheme that permitted affirmative relief). And the special factor counseling hesitation in

Benzman was federal disaster response and clean-up efforts, an area in which "Congress [has] developed considerable familiarity." 523 F.3d at 126 (alteration in original and internal quotation marks omitted).

Defendants essentially ask this Court to leave federal prisoners completely unprotected from repeated First Amendment retaliation, without any indication that Congress has contemplated or approved such an outcome. Defendants maintain that the Court should not be troubled, because other cases, namely *Malesko* and *Schweiker*, have minimized the importance of the existence of an alternative remedy. (Defs.' Br. 22). But none of the cases identified by Defendants even vaguely resembles this case. In *Schweiker v. Chilicky*, 487 U.S. 412 (1988), the Court held that no *Bivens* remedy existed where the plaintiffs were provided with backwards-looking remedies similar to what was provided in *Bush* (retroactive restoration of benefits, but no damages against individual federal officers for emotional distress caused by delays in receiving social security benefits). *Id*. at 424–25. And as discussed above, in *Malesko*, the plaintiff had access to remedies that were comparable or superior to the remedies available in *Bivens* itself. 534 U.S. at 71-72 (finding that Mr. Malesko was not "confronted with a situation in which claimants in [his] shoes lack effective remedies."). Defendants' reliance on *Dotson v. Griesa*, 398 F.3d 156 (2d Cir. 2005), fares no better because Congress had specifically foreclosed *Bivens* relief by crafting a remedial scheme that

consciously excluded the plaintiff in *Dotson*. *Id.* at 160-61. Moreover, the plaintiff in *Dotson* still had access to judicially created administrative remedies, a factor that informed Congressional exclusion. *Id.* Defendants can point to no such comprehensive or even half-baked Congressionally-created scheme here. For the foregoing reasons, this Court should permit Plaintiff to bring a First Amendment retaliation claim for his mistreatment by Defendants.

II. Qualified Immunity Is Unavailable to Defendants

The District Court did not address qualified immunity, and this Court generally declines to consider such arguments for the first time on appeal. *Bacolitsas v. 86th & 3rd Owner*, 702 F.3d 673, 681 (2d Cir. 2012). Even if the alternate issues were briefed by the parties below, it remains the "distinctly preferred practice" of this Court "to remand such issues for consideration by the district court in the first instance." *Schonfeld v. Hillard*, 218 F.3d 164, 184 (2d Cir. 2000). This Court has followed this practice in qualified immunity as well. *Jova v. Smith*, 582 F.3d 410, 418 n.4 (2d Cir. 2009). Defendants offer no reason for the Court to disregard its settled practice.

If this Court addresses qualified immunity, it should reject Defendants' argument. Defendants maintain that qualified immunity is appropriate because "there was no decision from the Supreme Court or this Court holding that a

prisoner has a constitutional right to publish an article under a byline" or to "engage in substantially similar conduct." (Defs.' Br. 34). Defendants mischaracterize the scope of qualified immunity, particularly at this stage.

Defendants' make a progression of arguments, none of which is adequate. First, Defendants argue that a Supreme Court decision, *Hope v. Pelzer*, 536 U.S. 730 (2002), and a Second Circuit decision, *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir.2004), both of which establish that one can defeat qualified immunity by showing that the law was clearly established through cases involving analogous facts, have been overruled by a more recent Supreme Court case, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011).[5] (Defs.' Br. 33-34 n.9). Of course, Defendants fail to note that the Supreme Court stated in *al-Kidd* that "[w]e do not require a case directly on point." 131 S. Ct. at 2083. More importantly, Defendants' argument cannot be squared with this Court's decisions.[6] In *Terebesi v. Torreso*, 764 F.3d 217 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1842 (2015), this Court held that officers were not entitled to qualified immunity for the use of stun grenades in a routine search. The officers in *Terebesi* argued that

[5] In *al-Kidd*, the specificity of clearly established law was "especially important" because of the fact-intensive nature of the Fourth Amendment inquiry. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015).

[6] The Fifth and Sixth Circuits have specifically rejected a similar argument regarding the resilience of *Hope* after *al-Kidd*. *Baynes v. Cleland*, 799 F.3d 600, 612 n.3 (6th Cir. 2015); *Morgan v. Swanson*, 659 F.3d 359, 393 (5th Cir. 2011).

qualified immunity was appropriate because there was no specific Circuit precedent addressing the use of a stun grenade in a search. This Court rejected that argument, citing *Hope* for the proposition that qualified immunity is not appropriate "every time a novel method is used to inflict injury." 764 F.3d at 237 (internal quotation marks omitted); *see also Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994) (cited in *Terebesi* and holding that officers do not need a "particularized expression of the law" for each kind of force used).

In the specific context of retaliation for constitutionally protected speech, this Court also has implicitly rejected precisely the argument made by Defendants here. In *Golodner v. Berliner*, 770 F.3d 196 (2d Cir. 2014), a contractor alleged that a city had discontinued its relationship with the contractor because of the contractor's lawsuit against the city. While assessing qualified immunity for one of the defendants, this Court acknowledged *al-Kidd*, and noted that the right must be defined neither "too narrowly based on the exact factual scenario presented" nor "too broadly." 770 F.3d at 206 ("In a sense, we must apply the Goldilocks principle."). This Court then rejected the defendants' entitlement to qualified immunity because (1) the First Amendment right of public employees to be free of retaliation for protected speech is beyond debate; (2) established law had clarified that there was no meaningful distinction between government employees and independent contractors, for First Amendment retaliation purposes; and (3) it was

clear that a complaint filed in court "may constitute a form of speech for First-Amendment purposes." *Id.* at 206-07; *see also Spencer v. Philemy*, 540 F. App'x 69, 72 (2d Cir. 2013) (denying qualified immunity in public employment context without requiring a prior case holding that reporting to particular agencies was considered a speech on a matter of public concern); *cf. State Emp. Bargaining Agent Coal. v. Rowland*, 718 F.3d 126, 132 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1002 (2014) (denying qualified immunity even though the Court had "never articulated a standard for determining whether, and under what circumstances" the particular right at issue would be violated); *Nagle v. Marron*, 663 F.3d 100, 115-16 (2d Cir. 2011) (denying qualified immunity even though no case law was precisely on point).

Here, the same syllogism counsels against Defendants' qualified immunity defense. First, the right of prisoners to be free of retaliation for protected speech is beyond debate. (Pl.'s Br. 53-54). Second, for the purposes of the First Amendment, there is no meaningful distinction between federal and state prisoners. *See, e.g.*, *Thornburgh v. Abbott*, 490 U.S. 401, 405-19 (1989) (applying Section 1983 cases to First Amendment challenge to federal prison regulations). And third, at the time of the complained-of conduct, it was clear that publishing a blog post "may constitute a form of speech for First-Amendment purposes."

Golodner, 770 F.3d at 206-07. In the prison context, this is enough to deny qualified immunity. *Washington v. Gonyea*, 538 F. App'x 23, 27 (2d Cir. 2013).

Nor do Defendants cite any cases suggesting that a reasonable official could have believed it constitutional to put someone in solitary confinement for writing a blog post. Because qualified immunity is an affirmative defense, Defendant Rivers may invoke it here "only if it was objectively reasonable for [her] to believe that [she] could" impose adverse consequences on Plaintiff for publishing a blog post without violating the First Amendment. *Reuland v. Hynes*, 460 F.3d 409, 419-20 (2d Cir. 2006) (applying same principle in context of public employment); *Johnson v. Ganim*, 342 F.3d 105, 116 (2d Cir. 2003).

Defendants also argue that Defendant Rivers is entitled to qualified immunity because she did not know that the regulation in question had been rescinded. (Defs.' Br. 36). Whether or not she knew the regulation was rescinded is in fact irrelevant to the qualified immunity inquiry – what is relevant is what a reasonable officer would have known about the legal regime in place. *Nagle*, 663 F.3d at 114. The "subjective good faith of government officials" plays no part in the inquiry. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982). [7]

[7] *Sudler v. City of New York*, 689 F.3d 159 (2d Cir. 2009), cited by Defendants, is not to the contrary. There the Court found that the relevant case law was uncertain. *Id.* at 177. Therefore, even an officer familiar with that law would not have known whether he was violating clearly established law. Here, no valid regulation authorized confinement of Plaintiff in SHU. No reasonable officer could have believed that such punishment was authorized.

Defendants' insistence that there be a prior decision establishing the right of a prisoner to write a blog post about solitary confinement is the same argument rejected by the court in *Golodner*. 700 F.3d at 206 (rejecting argument that right be defined "based on the exact factual scenario presented"); *De Litta v. Village of Mamaroneck*, 166 F. App'x 497, 498 (2d Cir. 2005) (denying qualified immunity without identifying prior case showing that specific conduct was protected by First Amendment). If filing a lawsuit or a grievance is protected expression for prisoners, no reasonable officer could conclude that writing a blog post about solitary confinement is unprotected. *See Graham v. Henderson*, 89 F.3d 75, 80 (2d Cir. 1996) (putting retaliation for filing a grievance in same category as retaliation for cooperating with investigation into prisoner abuse); *Shaheen v. Filion*, No. 04-CV-625, 2006 WL 2792739, at *3 (N.D.N.Y. Sept. 17, 2006) (finding that prisoner writing newspaper articles was "clearly" protected expression) (cited with approval in *Dolan v. Connolly*, 794 F.3d 290, 294 n.1 (2d Cir. 2015)). Moreover, at the time of Defendant Rivers' conduct, the law was clear that publishing a blog post was protected expression. *See, e.g.*, *Doninger v. Niehoff*, 527 F.3d 41, 49 (2d Cir. 2008) (describing "blog postings" as protected expression). And because *outgoing* communication by prisoners is subject to greater protection than incoming communication, Plaintiff's rights here were much closer in line with the rights of a

free citizen. *See generally Abbott*, 490 U.S. at 411-12; *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003).

III. The District Court Improperly Dismissed Plaintiff's False Imprisonment Claim

Defendants argue that Plaintiff's FTCA claim for false imprisonment was properly dismissed, but in so doing they ignore controlling circuit and New York law. Defendants first argue that Plaintiff does not "expressly challenge" the District Court's rationale for dismissing Plaintiff's false imprisonment claim: namely that that because "liability for false imprisonment *never* rises or falls based on the conditions under which [a prisoner] is held," Plaintiff's claim fails on the merits. (JA 49 (emphasis added)). Defendants' contention is incorrect. Plaintiffs' opening brief clearly attacks this faulty reasoning, with ample citation to New York State law. (Pl.'s Br. 38-44).

Notably, Defendants do not spend any time defending the District Court's broad and unsupported rationale for its decision. Instead, they argue that (1) Plaintiff has waived his arguments about the tort of "wrongful excessive confinement" because they were not raised below and (2) in the alternative, they should be rejected on the merits. Defendants' waiver argument is audacious, given the proceedings in District Court. Defendants, after all, made only one argument

in support of dismissing Plaintiff's false imprisonment claim: that there was no private analogue for it because (1) "[]private persons do not transfer individuals from halfway houses to prisons" and (2) because BOP had "the discretionary authority to have Plaintiff serve his sentence at MDC" rather than the halfway house." (Defs.' Letter Br. in Support of Motion to Dismiss, District Court Doc. No. 23, at 3; *see also* Defs.' Reply Br., Docket No. 28, at 5).[8]

Defendants never made the argument adopted by the District Court, which was that false imprisonment claims can "never" be based on conditions of confinement. The District Court expressly acknowledged that its decision was based on an argument never raised by Defendants. (JA 50-51). Plaintiff cannot waive an argument that only became salient with the issuance of the District Court's decision, especially where the basis for the District Court's decision is an affirmative defense. (Pl. Br. 39).

Defendants next argue that the tort of wrongful excessive confinement is different from the tort of false imprisonment and therefore is not relevant to this appeal. (Defs.' Br. 40-41). But as Plaintiff showed in his opening brief, New

[8] One could read Defendants' opening motion papers as making an argument that Plaintiff's claim was foreclosed because his detention was "otherwise privileged." (Defs.' Letter Br. in Support of Motion to Dismiss, District Court Doc. No. 23, at 3). But Defendants disclaimed any such argument in their reply papers, arguing only that they were pursuing a "state analogue" argument. (Defs.' Reply Br., Docket No. 28, at 5 n. 4). And in any event, Defendants never argued, as the District Court held, that they had discretion to place any prisoner in solitary confinement simply by virtue of a prisoner's detention under federal custody.

York courts treat wrongful excessive confinement as a species of false imprisonment, specifically applicable to the circumstances presented here. (Pl.'s Br. 41 n.14).[9] Moreover, Plaintiff need only show that New York law would recognize a cause of action for false imprisonment under circumstances "similar" to those alleged here. *See Liranzo v. United States*, 690 F.3d 78, 94 (2d Cir. 2012). And this Court recently treated a wrongful solitary confinement claim as a false imprisonment claim. *Willey v. Kirkpatrick*, 801 F.3d 51, 71 (2d Cir. 2015).

Defendants argue on the merits (for the first time) that Plaintiff's false imprisonment claim must fail because he cannot show that his due process rights were violated. According to Defendants, because Plaintiff's confinement in MDC and solitary confinement cannot meet the "atypical and significant" test announced by *Sandin v. Conner*, 515 U.S. 472 (1995), which governs when a liberty interest is established for *federal* constitutional due process claims, Plaintiff's state tort law claim must fail. Defendants' argument fails on multiple fronts. First, when the New York Court of Appeals first recognized a claim for wrongful excessive confinement it distinguished between a claim based on failure to adhere to due process and a claim for "subjecting appellant to punitive segregation for no

[9] Indeed, one of the cases cited by Defendants stated that the tort could "legitimately be considered a 'species' of false imprisonment." *Ramirez v. State*, 171 Misc. 2d 677, 682 (Ct. Cl. 1997).

legitimate reason." *Wilkinson v. Skinner*, 312 N.E.2d 158, 163 (N.Y. 1974); *see also Jackson v. New York State Dep't of Corr. Servs.*, No. 94-CV-8731, 1995 WL 539644, at *2 (S.D.N.Y. Sept. 8, 1995) (post-*Sandin* decision relying on *Wilkinson* while recognizing validity of false imprisonment claim for 13 days in keep-lock). Moreover, in several post-*Sandin* cases, federal and state courts have considered wrongful excessive confinement claims without conducting any *Sandin* analysis. *See Ifill v. State*, 46 Misc. 3d 1228(A) (N.Y. Ct. Cl. 2013) (unreported disposition); *DuBois v. State*, 887 N.Y.S.2d 448, 450 (Ct. Cl. 2009) (recognizing false imprisonment claim for wrongful confinement in keeplock). Indeed, this Court recently reinstated pendent state law claims for false imprisonment for wrongful confinement in solitary confinement without conducting any *Sandin* analysis. *Willey*, 801 F.3d at 71.

Even if Defendants are correct that one must necessarily show wrongful confinement was imposed in violation of due process, Defendants mistakenly assume that the reference to due process for state law purposes is coextensive with the federal procedural due process right at issue in *Sandin*. For instance, in *DuBois*, the Court concluded that the claimant's due process rights were violated because the State did not follow its own regulations. 887 N.Y.S.2d at 450. And *DuBois* cites numerous unreported cases to the same effect, many of which permitted recovery even though the period of confinement was much less than

would be considered "atypical and significant" under *Sandin*. *Id.* at 450-51 (referring to cases involving disciplinary confinement of as few as 4 days). Only *Callender v. State*, 956 N.Y.S.2d 792 (Ct. Cl. 2012), suggests otherwise, but it acknowledges that it is in tension with prior caselaw. *Id.* at 797 n.7. And *Callender* looks only to *Sandin*'s "general principles" to hold that the claimant's complaint about the level of disciplinary segregation in which he was held was not "significant." *Id.* at 792. In so doing, *Callender* held that the difference between the three levels of disciplinary segregation was not "significant" for due process purposes, "particularly when compared to the deprivation occasioned by Callender's placement in SHU at Southport in the first instance, which is not challenged here." *Id.* at 798. Thus, *Callender* suggests that the transition at issue here, from a halfway house to solitary confinement in the MDC, would be considered "significant" for the purposes of a state law claim based on false imprisonment.

Defendants finally revisit the only argument they made below (and not the basis for the District Court's holding), which is that there is no state law analogue for the false imprisonment claim raised here. Defendants claim that because "only the State of New York or its employees can be held liable under New York law for wrongful excessive confinement, there is no private analogue." (Defs.' Br. 46). Defendants cite no authority for the proposition that only State employees can be

held liable for wrongful excessive confinement. They confuse the fact that wrongful excessive confinement cases focus on the State of New York and its employees with whether wrongful excessive confinement claims could run against others. None of the cases involving wrongful excessive confinement claims limits its reach to State employees. Therefore, such a claim would presumably be viable against municipalities and their employees as well as against private contractors operating local, state, or federal detention facilities.

Even if Defendants were correct about the tort's scope, this Court and the Supreme Court have recognized that the FTCA contemplates liability even for "uniquely governmental" activities. (Pl.'s Br. 45-46). Defendants' argument is essentially that, because only the State can put people in solitary confinement wrongfully, there is no private law analogue. But the FTCA asks whether the United States would be liable in tort if it were a "private person" engaging in the same or similar conduct to that alleged here, would be liable in tort. *United States v. Olson*, 546 U.S. 43, 46 (2005). It does not ask whether as a practical matter a private person could be in a position to commit the tort. Defendants suggest that in *Olson*, which involved liability for negligent mine inspection, the Court looked to whether state law would impose liability "on private persons who conduct mine safety inspections," (Defs.' Br. 45), but that is incorrect. In fact, *Olson* drew an analogy to "private persons who conduct safety inspections." 546 U.S. at 47

(internal quotation marks omitted). This is consistent with the United States' litigation position in *Olson*. *See* Petitioner's Reply Br. in *Olson* at 3, available at 2005 WL 2011332 (Aug. 22, 2005) ("[T]he reference to the liability of a private person does not mean that the FTCA applies only to conduct that private persons in fact perform.").

In New York, in similar circumstances, state law recognizes that private persons may be liable for a tort of false imprisonment. *See, e.g.*, *Peters v. Rome City Sch. Dist.*, 747 N.Y.S.2d 867, 869 (App. Div. 4th Dep't 2002) (finding that false imprisonment claim could be proved by showing that school had removed student from a classroom to a "time-out" room); *Zegarelli-Pecheone v. New Hartford Cent. Sch. Dist.*, 17 N.Y.S.3d 212, 212-13 (App. Div. 4th Dep't 2015) (finding false imprisonment claim adequately shown where student was confined in administrator's office and nurse's office during an investigation); *Sindle v. New York City Transit Auth.*, 307 N.E.2d 245, 247 (1973) (permitting false imprisonment claim to be brought against bus driver and city transit authority where bus driver departed from normal bus route). Indeed, given that a private citizen may be held liable for the tort of false imprisonment where they instigate an arrest by law enforcement, *Lowmack v. Eckerd Corp*., 757 N.Y.S.2d 406, 408 (App. Div. 4th Dep't 2003), a private person who directly causes the tort by wrongfully confining someone in solitary confinement would also presumably be

liable for the tort. In general, private citizens are *more* vulnerable to false imprisonment liability as compared to public officials. *See, e.g.*, *White v. Albany Med. Ctr. Hosp.*, 542 N.Y.S.2d 834, 835 (App. Div. 3d Dep't 1989).

IV. The District Court Erroneously Dismissed Plaintiff's Negligence Claim

Defendants' argument regarding Plaintiff's negligence FTCA claim similarly rests on the private analogue argument. Defendants face a heavy hurdle, as both the United States Supreme Court and this Court have held that a prison official's failure to follow internal regulations is sufficient to state a negligence claim under the FTCA. (Pl.'s Br. 47-50). Defendants argue that *United States v. Muniz*, 374 U.S. 150 (1963), should be ignored because "its discussion of the private analogue issue is no longer good law." (Defs.' Br. 51). If that is so, it is up to the Supreme Court, not Defendants, to say so. And this Court in *Liranzo*, while acknowledging some tension between *Muniz* and *Olson*, concluded that for the purposes of the private law analogue, *Muniz* was still the law as to the federal prison context. *See Liranzo*, 690 F.3d at 97 (concluding that immigration context was "more closely akin to *Muniz* than *Feres [v. United States*, 340 U.S. 135 (1950)]" and therefore that one could find a private law analogue even in the "quintessentially federal" immigration law context).

Shockingly, Defendants argue that this Court did not reaffirm *Muniz*, but only "mentioned *Muniz* in a historical summary of private analogue decisions that also included the more recent holding in *Olson*." (Defs.' Br. 51 (citing *Liranzo*, 690 F.3d at 88-89)). Defendants are correct that in the portion of *Liranzo* they cite to, this Court placed *Muniz* in historical context. Defendants, however, ignore this Court's explicit reliance on *Muniz* in the later portion of its opinion finding that a private analogue exists for quintessentially federal immigration action. *See Liranzo* 690 F.3d at 97.

Defendants also seek to evade the force of *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471 (2d Cir. 2006), by arguing that this Court "expressly held that it resolved only one question – whether one of the claims there was barred by the FTCA's discretionary function exception." (Defs.' Br. 52). Contrary to Defendants' unsupported suggestion, *Triestman* specifically concluded that an allegation that a federal prison guard had failed to follow internal regulations was sufficient to state a claim for negligence. 470 F.3d at 476 (holding that allegations were sufficient under Rule 12(b)(6)).[10]

[10] This is enough to distinguish *Dorking Genetics v. United States*, 76 F.3d 1261 (2d Cir. 1996). Moreover, *Dorking* relies on *Feres* and not *Muniz*, *id.* at 1266, but *Liranzo* makes clear that in the area of federal prisons, *Muniz* still controls. 690 F.3d at 97

In response to Plaintiff's recitation of the numerous state law claims that have been based on the failure of a defendant to follow its own regulations, Defendants argues that those cases do not "recognize a separate New York tort cause of action for violation of the defendant's own rules." (Defs.' Br. 49-50). But Plaintiff need only show, to defeat the state law analogue argument, that private persons would be liable under "similar" circumstances. *Liranzo,* 690 F.3d at 94. Plaintiff maintains that a factfinder could infer, not must infer, negligence from the failure to adhere to its own regulations. The cases cited by Plaintiffs in his opening brief simply establish that duty and breach of duty may be inferred, not must be inferred, from the failure to follow internal rules. This is what *Triestman* held in the prison context, and what *Ingham v. E. Air Lines, Inc.*, 373 F.2d 227, 236 (2d Cir. 1967), held in the air travel regulation context. Defendants cannot distinguish *Triestman* and they ignore *Ingham*. For these reasons, the District Court's decision dismissing Plaintiff's negligence claim should be reversed.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the District Court's decision be reversed and the case be remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that, according to the word-count feature of the word processing program, this brief contains 6,938 words and therefore is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B).

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