UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RAFIQ SABIR, *et al.*,	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 3:17-cv-749 (VAB)
	)	
D.K. WILLIAMS, WARDEN FCI	)	
DANBURY, *et al.*,	)	
Defendants.	)	September 14, 2018

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

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INTRODUCTION

In this lawsuit, federal inmates seek to recover money damages against two prison wardens, D.K. Williams and Herman Quay, because of an agency policy that does not permit unrestricted prayer in all areas of a federal prison "with the maximum number of practicing Muslims possible." Complaint ¶ 19. Claiming a constitutional right to group prayer, Plaintiffs pursue these claims despite acknowledging that (1) neither warden had any role in implementing the policy at issue; (2) the policy actually permits inmates of all faiths to pray in small groups of two "throughout [the prison]"; and (3) the policy permits inmates to pray in larger groups in the prison chapel. *Id.* ¶¶ 30, 39. In addition to their damages claims, Plaintiffs request an injunction from this Court, directing Warden Williams and the Director of the Federal Bureau of Prisons (in their official capacities) to allow inmate gatherings for group prayer in numbers apparently of Plaintiffs' choosing.

There are multiple reasons why Plaintiffs' claims fail as a matter of law. First, in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), the Supreme Court, in keeping with a long line of precedent stretching back decades, significantly curtailed the availability of personal-capacity damages claims against federal employees. The Court has repeatedly explained that the expansion of such claims into new contexts is "disfavored." Yet, Plaintiffs invite this Court to create a new damages remedy in a context that the Supreme Court itself has never approved, and in a policy arena that involves difficult and unique concerns impacting the day-to-day management and supervision of hundreds of federal prisoners. Second, Plaintiffs' personal-capacity claims are barred by the doctrine of qualified immunity because (1) there is no law clearly establishing an unrestricted right to pray in all areas of a federal prison "with the maximum number of practicing Muslims possible"; and (2) the complaint, in any event, fails to plead facts showing that

Williams or Quay personally created the policy or engaged in any conduct that violated Plaintiffs' rights. Finally, Plaintiffs' official-capacity claims fail because the complaint, on its face, acknowledges multiple opportunities for inmates of all faiths to participate in group prayer under the policy at issue, and therefore the complaint fails to plead facts showing that the policy substantially burdens Plaintiffs' exercise of religion. For these reasons, Plaintiffs' claims must be dismissed.

THE COMPLAINT'S ALLEGATIONS

Rafiq Sabir and James Conyers are federal inmates incarcerated at the Federal Correctional Institution in Danbury, Connecticut ("FCI Danbury"). Compl. ¶¶ 12-13. Plaintiffs are practicing Muslims. *Id.* D.K. Williams is currently the warden at FCI Danbury. *Id.* ¶ 14. Herman Quay was the warden at FCI Danbury from July 2014 until December 2015. *Id.* 15.[1] In this action, Plaintiffs challenge a policy at FCI Danbury that provides as follows:

> Congregate Prayer, outside of the Chapel, for all faith groups will follow the following guidance:
>
> a) Must get the approval of the location to pray from work supervisor, program supervisor, etc.
>
> b) Prayer individually or in pairs is permitted, however, group prayer of 3 or more is restricted to the Chapel.
>
> c) Prayers can be made at work detail sites, school, or units during break times.
>
> d) Prayer rug or clean towel is permitted to cover the floor.
>
> e) In case of institutional emergency or instructed by staff prayers will be terminated.

Id. ¶¶ 3, 30, Attachment A, FCI Danbury Institution Supplement No. DAN 5360.09F § 3(b)(2) (Mar. 28, 2014) ("Institution Supplement" or the "prayer policy").

[1] Williams and Quay are collectively referred to as "the Wardens."

Neither of the Wardens had any role in creating the policy. *Id.* ¶ 30. Plaintiffs allege that it was established on March 24, 2014, by then-warden Maureen Baird, who is not a defendant in this action.

Contrary to the complaint's conclusory allegations, the Institution Supplement does not "ban" group prayer, effectively or otherwise. To the contrary, the policy permits inmates of all faiths to pray in small groups of two "throughout the FCI Danbury complex." *Id.* ¶ 39. Larger groups may pray in the prison chapel, when the facility is available. *Id.* ¶¶ 3, 32. Plaintiffs allege that "incarcerated persons have sporadic access to the chapel facility." *Id.* ¶ 32. They acknowledge, however, that FCI Danbury reserves a room in the chapel for Muslim inmates on a weekly basis for the *Ju'muah* service, which Plaintiffs themselves say is the "[m]ost important prayer of the week." *Id.* ¶¶ 19, 32.

According to Plaintiffs, the policy is enforced by "many corrections officers and other prison officials at FCI Danbury." *Id.* ¶¶ 5, 37-40, 45. While Plaintiffs allege that FCI Danbury has "inconsistently enforced" the restriction on prayer by inmates in groups of three or more, Plaintiffs do not allege any facts suggesting any discrimination in how the prison applies the policy to inmates of different faiths. *Id.* ¶ 33. Rather, the crux of Plaintiffs' complaint is that the policy does not permit them to pray in all areas of the prison "with the maximum number of practicing Muslims possible." *Id.* ¶ 19.

In this action, Plaintiffs seek damages against the Wardens in their personal capacities merely because the policy, although not created by them, was in effect during their tenure at FCI Danbury. *Id.* ¶¶ 3, 5. Plaintiffs attempt to assert a *Bivens* claim against the Wardens for alleged violation of the First Amendment (Count I) and a second claim under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000(b), *et seq.* (Count II). Plaintiffs also sue Warden

Williams and BOP Director Hugh Hurwitz in their official capacities, seeking declaratory and injunctive relief against them under RFRA and the First Amendment.

THE RULE 12(b)(6) STANDARD

To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In considering a motion to dismiss for failure to state a claim, the Court should follow a "two-pronged approach" to evaluate the sufficiency of the complaint. *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010). "A court 'can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.'" *Id.* (quoting *Iqbal*, 556 U.S. at 679). "At the second step, a court should determine whether the 'well-pleaded factual allegations,' assumed to be true, 'plausibly give rise to an entitlement to relief.'" *Id.* (quoting *Iqbal*, 556 U.S. at 679).

"The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (internal quotations omitted). Providing the "grounds" for relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citations omitted). Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 557. "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.*

ARGUMENT

I. This Court Should Decline to Create an Implied Cause of Action for Damages Under *Bivens*.

At the outset, a *Bivens* remedy "is not an automatic entitlement no matter what other means there may be to vindicate a protected interest[.]" *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). Rather, "in most instances … a *Bivens* remedy [is] unjustified." *Id.* As discussed fully below, Plaintiffs' *Bivens* claims must be dismissed because alternative avenues exist for Plaintiffs to seek redress, and numerous special factors counsel hesitation against the judicial creation of a new damages remedy.

Congress has never enacted a statute authorizing the recovery of money damages for the violation of constitutional rights by a federal official. In 42 U.S.C. § 1983, Congress authorized a damages claim against *state officials* for civil rights violations, but elected not to pass an analogous law for plaintiffs with damages claims against federal officials. In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), with no statutory mandate from Congress, the Supreme Court took the unprecedented step of implying a damages remedy against federal officials directly from the Constitution. In *Bivens*, the Court created a cause of action under the Fourth Amendment against federal law enforcement officers for an allegedly unconstitutional search and seizure. *Bivens*, 403 U.S. at 397. In the four decades since *Bivens*, the Supreme Court has extended the remedy just twice. *See Davis* v. *Passman*, 442 U.S. 228 (1979) (recognizing a damages remedy under the Fifth Amendment's Due Process Clause for gender discrimination claims); *Carlson* v. *Green*, 446 U.S. 14 (1980) (recognizing a damages remedy under the Eighth Amendment for the failure to treat an inmate's asthma, resulting in his death). "These three cases—*Bivens*, *Davis*, and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself." *Abbasi*,

137 S. Ct. at 1855.

In *Abbasi*, the Supreme Court made crystal clear what it pronounced years before: "expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Id*. at 1857 (quoting *Iqbal*, 556 U.S. at 675). District courts evaluating whether to authorize a *Bivens* claim must first determine whether the case "presents a new *Bivens* context" different, even modestly, from the three cases in which the Supreme Court affirmatively approved the remedy. *Id*. at 1859. If the case seeks to expand the *Bivens* remedy into a new context, the court must then consider whether any alternative processes or other "special factors" counsel hesitation against the judicial creation of a free-standing damages remedy. *Id.* at 1860; *Wilkie*, 551 U.S. at 550 (setting forth the "familiar [two-step] sequence"). The alternative processes available to a plaintiff and the special factors counseling hesitation against authorizing a *Bivens* remedy, moreover, should be "taken together" and considered in the aggregate. *Chappell v. Wallace*, 462 U.S. 296, 304 (1983).

A. Plaintiffs' First Amendment Claims Seek to Expand *Bivens* Into a New Context.

When "the constitutional right at issue" in a *Bivens* case is not one that was previously recognized by the Supreme Court in *Bivens*, *Davis*, or *Carlson*, then by definition, the case seeks to expand the remedy into a new context. *Abbasi*, 137 S. Ct. at 1859-60.[2] Plaintiffs in this case assert a *Bivens* cause of action that the Supreme Court has never approved. *See Reichle v. Howards*, 566 U.S. 658, 665 n.4 (2012) ("We have never held that *Bivens* extends to First

[2] The Court listed several other "meaningful differences" that may reveal a new *Bivens* context, including: "the rank of the officers involved; … the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider." *Abbasi*, 137 S. Ct. at 1859-60. Several of these factors, including the legal mandate under which the officers were operating, and the presence of potential factors that previous *Bivens* cases did not consider, further underscore that Plaintiffs' claims present a new context.

Amendment claims.").

Prisoner "free exercise" claims are brought under the First Amendment, and courts presented with the question of whether such claims constitute a "new *Bivens* context" routinely hold that they do. *See, e.g.*, *Butts v. Martin*, 877 F.3d 571, 588 (5th Cir. 2017) (First Amendment *Bivens* claim that prisoner was threatened with discipline for wearing a yarmulke presented a new context); *Banks v. Cuevas*, No. 4:17-CV-2529, 2018 WL 2717269, at *3 (N.D. Ohio June 6, 2018) (First Amendment claim that prison officials interfered with inmate's practice of Wicca religion presented new *Bivens* context); *Crowder v. Jones*, 2:14-cv-00202, 2017 WL 5889717, at *2 (S.D. Ind. Nov. 29, 2017) (First Amendment and RFRA claims that officials denied prisoner's request for a kosher diet presented new *Bivens* context); *Cooper v. True*, No. 0:16-cv-02900, 2017 WL 6375609 at *3 (D. Minn. Nov. 2, 2017), *report and recommendation adopted by*, No. 0:16-cv-02900, 2017 WL 6372651 (D. Minn. Dec. 12, 2017) (First Amendment claim that prison officials denied inmate access to a Torah and a rabbi presented a new *Bivens* context). Because these claims seek to expand the *Bivens* remedy into a new context, this Court "*must*" analyze whether special factors counsel hesitation against authorizing such a remedy. *Abbasi*, 137 S. Ct. at 1857.

B. Alternative Processes Exist to Protect Plaintiffs' Interests.

When discussing the availability of alternative avenues for relief as a special factor in *Abbasi*, the very first observation the Supreme Court made was that "[i]t is of central importance … that this is not a case like *Bivens* or *Davis* in which it is damages or nothing." 137 S. Ct. at 1862 (internal quotation marks and citations omitted). In the limited circumstances where the Court has approved a *Bivens* remedy, it has done so "chiefly because the plaintiff lacked any other remedy for the alleged constitutional deprivation." *Corr. Servs. Corp. v. Malesko*, 534 U.S.

61, 67 (2001). In *Abbasi*, the Court declared that "when alternative methods of relief are available, a *Bivens* remedy usually is not." *Id.* at 1863 (citations omitted).

It is well-settled that an available "remedy" does not necessarily mean a money damages claim. *See, e.g.*, *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (declining to authorize a *Bivens* remedy because the Social Security Act's comprehensive statutory scheme provided some avenue for redress, notwithstanding the absence of a compensatory remedy); *see also Gonzalez v. Hasty*, 269 F. Supp. 3d 45, 62 (E.D.N.Y. 2017) ("[T]here is no precedent suggesting that the unavailability of money is a factor that carries any weight in determining the expansion of a *Bivens* remedy."). Instead, "if Congress has created any alternative, existing process for protecting the injured party's interest that itself may amount to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Abbasi*, 137 S. Ct. at 1858 (internal quotation marks, alterations, and citation omitted); *accord Vega v. United States*, 881 F.3d 1146, 1154 (9th Cir. 2018) ("Alternative remedial structures can take many forms, including administrative, statutory, equitable, and state law remedies."(internal quotations and citation omitted)). Here, Plaintiffs' invitation to create an implied damages remedy under the First Amendment fails because Congress has provided multiple administrative and judicial avenues through which to challenge FCI Danbury's prayer policy, including ones which Plaintiffs rely on in this very case.

1. RFRA

RFRA is an alternative process that counsels against the judicial creation of a *Bivens* remedy in the free exercise arena. *See, e.g.*, *Turkmen v. Hasty*, 789 F.3d 218, 267 n. 3 (2d Cir. 2015) (Raggi, J., concurring), *rev'd in part and vacated and remanded in part sub nom. Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (observing that "Congress has provided alternative relief [to a

First Amendment *Bivens* claim] under [RFRA]"); *Crowder*, 2017 WL 5889717, at **2-3 (recognizing RFRA as an alternative avenue for relief for inmate's First Amendment claim alleging denial of a kosher diet). Notably, through RFRA, Congress strengthened legal protections for the exercise of religion beyond those traditionally afforded by the First Amendment. *See Korte v. Sebelius*, 528 F. App'x 583, 588 (7th Cir. 2012) ("RFRA protects the same religious liberty protected by the First Amendment, and it does so under a more rigorous standard of judicial scrutiny"). Plaintiffs' ability to pursue relief under RFRA thus counsels hesitation against the creation of an additional damages remedy under the First Amendment.

2. BOP administrative remedy program

As directed by Congress, the BOP maintains a comprehensive four-step administrative remedy program through which federal inmates may grieve any issue that touches upon their incarceration. 28 C.F.R. § 542.10 *et seq*. Plaintiffs had full access to the BOP's administrative remedy program and pursued relief at all the program's levels, raising the same challenges to FCI Danbury's prayer policy that form the basis of this lawsuit. *See* Compl. ¶¶ 51-54. Post-*Abbasi*, numerous federal courts have held that the BOP's administrative remedy program is an alternative avenue for relief that counsels against recognizing an implied damages remedy. *See, e.g., Muhhamad v. Gehrke*, No. 15-cv-334, 2018 WL 1334936, at *4 (S.D. Ind. Mar. 15, 2018); *Banks v. Rosado*, No. 4:17-cv-2499, 2018 WL 1933322 at *2 (N.D. Ohio Apr. 24, 2018); *Howard v. Lackey*, No. 7:16-129, 2018 WL 1211113 at *3 (E.D. Ky. Mar. 7, 2018); *Leibelson v. Collins*, No. 5:15-cv-12863, 2017 WL 6614102, at *10-11 (S.D.W. Va. Dec. 27, 2017); *Crowder*, 2017 WL 5889717, at **2-3; *Andrews v. Miner*, 301 F. Supp. 3d 1128, 1134 (N.D. Ala. Aug. 25, 2017).

3. Other avenues of judicial relief

Plaintiffs' access to alternative avenues of judicial relief also demonstrates that expansion of the *Bivens* remedy is unwarranted here. Courts have observed that access to habeas or injunctive relief (the latter of which Plaintiffs are currently pursuing) counsel against recognizing a *Bivens* remedy. *Abbasi*, 137 S. Ct. at 1863 (observing that a habeas action "would have provided a faster and more direct route to relief than a suit for money damages"); *Cf. Kahane v. Carlson*, 527 F.2d 492, 496 (2d Cir. 1975) (free exercise claim was cognizable under federal habeas corpus statute); *Winstead v. Matevousian*, No. 1:17-cv-00951, 2018 WL 2021040, at *3 (E.D. Cal. May 1, 2018), *objections overruled*, No. 1:17-cv-00951, 2018 WL 3357437 (E.D. Cal. July 9, 2018) (declining to extend *Bivens* to First Amendment claim in light of prisoner's opportunity to pursue injunctive relief). Plaintiffs also may have the avenue of seeking redress through a writ of mandamus, *see Waddell v. Alldredge*, 480 F.2d 1078 (3d Cir. 1973) (exercising jurisdiction under federal mandamus statute to consider a religious accommodation lawsuit by inmates to compel access to worship services and one pork-free meal a day), or to have a court address the constitutionality of the challenged policy under the Administrative Procedure Act. *See Storms v. United States*, No. 13-CV-811, 2015 WL 1196592, at *14 (E.D.N.Y. Mar. 16, 2015) ("The Court agrees with the courts that have considered this issue and finds that there is no *Bivens* remedy for a claim that is within the ambit of the APA, as the APA constitutes an alternative, existing process for relief."). Whether or not a plaintiff is ultimately successful under any alternative process is of no moment as to whether this Court should imply a *Bivens* remedy.

Defendants need not divine all conceivable avenues Plaintiffs may have available to raise their challenges to FCI Danbury's prayer policy. *See Liff v. Office of Inspector Gen. for U.S. Dep't of Labor*, 881 F.3d 912, 921 (D.C. Cir. 2018) (declining to imply *Bivens* remedy and

noting that courts need "not parse the specific applicability of th[e] web of . . . remedies" to a plaintiff's circumstances). It is the availability of an alternative procedure for seeking redress, not the ultimate outcome that controls the analysis. *See Malesko*, 534 U.S. at 69 ("So long as the plaintiff had an avenue for *some* redress," this can be enough.") (emphasis added); *see also Dotson v. Griesa*, 398 F.3d 156, 166-67 (2d Cir. 2005) ("*Chilicky* made clear that it is the overall comprehensiveness of the statutory scheme at issue, not the adequacy of the particular remedies afforded, that counsels judicial caution in implying *Bivens* actions."). Fundamentally, in light of Plaintiffs' access to multiple alternative avenues in which to press their free exercise claims, there is no reason for this Court to take the "disfavored" step of recognizing a new damages remedy under the First Amendment. *Abbasi*, 137 S. Ct. at 1857.

C. Other Special Factors Counsel Against Recognition of an Implied Cause of Action under the First Amendment.

1. Appropriate deference is due to Congress's primary role in regulating federal prisons and establishing protections for religious rights.

"Congress is in a far better position than a court to evaluate the impact of a new species of litigation, … [a]nd Congress can tailor any remedy to the problem perceived, thus lessening the risk of raising a tide of suits threatening legitimate initiative on the part of the Government's employees." *Wilkie*, 551 U.S. at 562 (internal quotations and citation omitted). Therefore, "legislative action suggesting that Congress does not want a damages remedy is itself a factor counseling hesitation." *Abbasi*, 137 S. Ct. at 1865.

Congress's enactment of RFRA and its companion statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA), illustrate that Congress has been particularly active in protecting religious rights. The rights and protection of religious freedom available to Plaintiffs under RFRA and RLUIPA reflect those that Congress, in its judgment, has chosen to provide in

this arena. Appropriate deference to the Congress's primary role in policymaking counsels against creating a judicial damages remedy where Congress has not. *See* Schweiker, 487 U.S. at 423 (noting that "the concept of special factors counselling hesitation in the absence of affirmative action by Congress has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent.").

Additionally, in passing the Prison Litigation Reform Act ("PLRA") fifteen years *after* *Carlson* was decided, Congress did "not provide for a standalone damages remedy against federal jailers," which supports that "Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment." *Abbasi*, 137 S. Ct. at 1865.[3] Congress passed the PLRA with the goal of "reduc[ing] the quantity of inmate suits," *Jones v Block*, 549 U.S. 199, 223 (2007), and included a provision in the statute that expressly prohibits the recovery of damages for mental or emotional injury in cases where no physical injury is shown. *See* 42 U.S.C. § 1997e(e). Congress's enactment of the PLRA—including the absence of a damages remedy against prison officials and the physical-injury requirement—strongly suggest that the judicial creation of damages remedy under the First Amendment (where physical injury is seldom if ever at issue) would be unwarranted and inappropriate in this context.

2. Challenging federal policy is not an appropriate use of the *Bivens* remedy.

The purpose of a *Bivens* claim is to address individual wrongdoing, *F.D.I.C. v. Meyer*, 510 U.S. 471, 485 (1994), not the alleged shortcomings of an agency's policy. *Abbasi*, 137 S. Ct.

[3] *See also* Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247 (HR 10), May 23, 1980, 94 Stat. 349 (CRIPA)(vesting Attorney General with authority to institute an action for "equitable relief" against *state* officials to redress "egregious or flagrant conditions" in state facilities, id. § 3A, but explicitly declining to authorize private litigation by "parties other than the United States" to enforce legal rights, id. § 12, or create new, individually enforceable rights); S. REP. 96-416, at 8 (1979), reprinted in 1980 U.S.C.C.A.N. 787, 790 (CRIPA "creates no new substantive rights.").

at 1860 ("[A] *Bivens* action is not 'a proper vehicle for altering an entity's policy.'") (quoting *Malesko*, 534 U.S. at 74. In this case, the complaint itself, and the administrative grievances that Plaintiffs attached to their Second Amended Complaint confirm their primary goal in this action of overturning FCI Danbury's policy on congregate prayer. *See* Compl., Attachment C (stating "This policy must change" and "I am being harmed due to the policy, and so I want that policy rescinded.")). Given that Plaintiffs' claims are fundamentally a challenge to policies prescribed by the BOP and FCI Danbury—as opposed to an action seeking redress for individual wrongdoing—this Court should decline to recognize a *Bivens* remedy.

3. Additional separation-of-powers principles counsel hesitation against a *Bivens* remedy.

Congress has explicitly and repeatedly delegated the management of federal prisons including the protection and discipline of federal inmates to the BOP. *See* 18 U.S.C. § 4042(a)(3); 18 U.S.C. § 4001(b)(1)("The control and management of Federal penal and correctional institutions, . . . shall be vested in the Attorney General. . ."). Separation of powers concerns arising from that delegation, and the involvement of courts in the day-to-day management of federal prisons, counsel hesitation against implying a *Bivens* remedy. *See Abbasi*, 137 S. Ct. at 1857 ("When a party seeks to assert an implied cause of action under the Constitution itself … separation-of-powers principles are or should be central to the analysis.").

In the federal prison context, the Supreme Court has recognized that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform…. Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner v. Safley*, 482 U.S. 78, 84-85 (1987) (internal citations and quotation marks omitted). The management of federal prisons requires training and

expertise that are uniquely "within the province of the legislative and executive branches of government," *id*., and absent a clear invitation from Congress, federal courts should decline invitations to supervise "the day-to-day functioning" of prisons. *Meachum v. Fano*, 427 U.S. 215, 228 (1976). By contrast, Plaintiffs in this suit seek to involve this Court in daily decisions regarding when, where, and how many inmates are permitted to pray in what areas of a federal prison.

4. The systemwide costs of expanding the *Bivens* remedy into a new context counsel hesitation.

Finally, "[t]he impact on governmental operations systemwide," including "the burdens on Government employees who are sued personally, as well as the projected costs and consequences" of introducing a new damages remedy is yet another reason not to authorize a *Bivens* remedy in this case. *Abbasi*, 137 S. Ct. at 1858. These burdens and costs are high particularly in the federal prison context. The sheer volume of potential suits arising from the creation of a new *Bivens* remedy indicates that balancing the pros and cons of creating such a remedy should be left to Congress. There are currently more than 183,000 inmates in BOP custody and nearly 37,000 BOP employees.[4] *Cf. Hernandez v. United States*, 34 F. Supp. 3d 1168, 1181-82 (D. Colo. 2014) (expressing doubt that Congress intended to "permit lawsuits arising from the TSA's millions of daily screenings") (citing H. Res. No. 156, 113th Cong. (2013)). According to Plaintiffs, FCI Danbury houses more than 800 inmates, approximately 150 of whom are adherents of the Islamic faith. Compl. ¶ 27. Indeed, the operational burdens associated with authorizing a *Bivens* remedy and approving the accommodation Plaintiffs seek on behalf of all of FCI Danbury's Muslim inmates does not account for the religious

[4] Fed. Bureau of Prisons, *About Our Agency*, https://www.bop.gov/about/agency (last visited September 5, 2018).

accommodation requests that could (and likely would) be raised by inmates of various other faiths. Careful consideration must also be given to the strain on prison operations that may result from encouraging further litigation by inmates, who typically "stand[] to gain something and lose nothing" from filing unmeritorious complaints. *Cruz v. Beto*, 405 U.S. 319, 326-27 (1972) (Rehnquist, J., dissenting).

These special factors—whether evaluated independently, or "taken together" and considered in the aggregate—provide ample reason for this Court to decline to create a free-standing damages remedy under the First Amendment. *Chappell*, 462 U.S. at 304; *see also Free v. Peikar*, No. 1:17-cv-159, 2018 WL 1569030, at *2 (E. D. Cal. Mar. 30, 2018) ("Nationwide, district courts seem to be in agreement that, post-Abbasi, prisoners have no right to bring a *Bivens* action for violation of the First Amendment"). Plaintiffs' *Bivens* claims should be dismissed.

II. Qualified Immunity Bars Plaintiffs' Personal-Capacity First Amendment and RFRA Claims against Defendants Williams and Quay.

A. The Qualified Immunity Standard

Under the qualified immunity doctrine, government officials are immune from civil liability when their conduct "does not violate clearly established *statutory or constitutional rights* of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added). The doctrine reflects the judicial recognition that "officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated." *Davis v. Scherer*, 468 U.S. 183, 195 (1984). "The scope of qualified immunity is broad, and it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Martel v. Town of S. Windsor*, 562 F. Supp. 2d 353, 359 (D. Conn. 2008) (quoting *Malley v. Briggs*, 475 U.S. 335,

341 (1986)).

The qualified immunity analysis is a two-part inquiry, examining whether (1) the plaintiff has alleged a violation of a constitutional or statutory right; and (2) the right was clearly established at the time of the defendant's conduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Golodner v. Berliner*, 770 F.3d 196, 201 (2d Cir. 2014). Once a defendant asserts qualified immunity in a motion dismiss, "the burden is on the plaintiff to establish that immunity does not apply." *Webster v. Moquin*, 175 F. Supp. 2d 315, 324 (D. Conn. 2001) (citing *Davis*, 468 U.S. at 197). "[C]ourts have discretion to decide which of the two prongs of qualified-immunity analysis to tackle first." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). Because qualified immunity provides "an immunity from suit rather than a mere defense to liability," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), the Supreme Court has "repeatedly … stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam). Unless a plaintiff alleges a violation of clearly established law, "a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell*, 472 U.S. at 526.

B. There Is No Law Clearly Establishing a Right to Pray in All Areas of a Federal Prison "With the Maximum Number of Practicing Muslims Possible."

This Court should exercise its discretion to decide the issue of qualified immunity under the second prong of the analysis. When the second step of the qualified immunity analysis appears to be dispositive of a plaintiff's claim, courts may simply rule on that basis without "resolv[ing] difficult and novel questions of constitutional or statutory interpretation that will have no effect on the outcome of the case." *al–Kidd*, 563 U.S. at 735 (internal quotations omitted). Under the second prong, a right is not clearly established unless "at the time of the

challenged conduct, the contours of [the] right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Coollick v. Hughes*, 699 F.3d 211, 220 (2d Cir. 2012) (internal quotations omitted). While "[t]here is no need for a case on point … existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (internal quotations omitted). The Supreme Court has "repeatedly told [lower] courts … not to define clearly established law at a high level of generality." *al-Kidd*, 563 U.S. at 742. "For a right to be clearly established, it must have been recognized in a particularized rather than a general sense." *Farid v. Ellen*, 593 F.3d 233, 244 (2d Cir. 2010) (internal quotation marks and citation omitted).

Here, the right in question, defined at the appropriate level of specificity, is the alleged right of inmates to pray in all areas of a federal prison together "with the maximum number of practicing Muslims possible." Compl. ¶¶ 19, 41. In 2014, there was no Supreme Court or Second Circuit decision placing the Wardens on notice that that the limited restrictions on group prayer set forth in the Institution Supplement violated either the First Amendment or RFRA. To the contrary, it was not objectively unreasonable for the Wardens to "ke[ep] in place"[5] the prayer policy at FCI Danbury because the Second Circuit and its district courts have repeatedly upheld time, place, and manner restrictions on group prayer by federal inmates. In *Shabazz v. Coughlin*, 852 F.2d 697 (2d Cir. 1988), a Muslim inmate brought an action under 42 U.S.C. § 1983, alleging that he was disciplined for violating regulations prohibiting group prayer on the prison recreation yard. After the district court denied the defendants' motion asserting qualified immunity, the Second Circuit reversed, holding that "there was a legitimate question as to

[5] Compl. ¶ 3. As discussed below, *infra* pp. 21-25, the mere allegation that the prayer policy remained in effect during the Wardens' tenure is insufficient to demonstrate their personal involvement in the alleged violation of Plaintiffs' constitutional or statutory rights.

whether a prisoner had a right to engage in group prayer," and that "it [was] far from clear that the restrictions on prayer at issue in [*Shabazz*] violate[d]" the First Amendment. *Id.* at 700-01.

Similarly, district court decisions as recently as 2013 have demonstrated that there is no clearly established right to engage in group prayer anywhere within a correctional facility. For example, in *Johnson v. Killian*, No. 07-civ-6641, 2013 WL 103166 (S.D.N.Y. Jan. 9, 2013), a case closely paralleling the facts of the instant case, a federal inmate sued prison officials under the First Amendment and RFRA, challenging a policy that permitted inmates to pray in groups no larger than three at various locations within the prison, but limited prayer in larger groups to the prison chapel. *Id.* at *2. The court dismissed the plaintiff's claims on qualified immunity grounds, holding that, "[i]n light of the preexisting case law, the defendants had a reasonable basis to believe that implementation of the group prayer policy" did not violate the First Amendment or RFRA. *Id.* at *5. *See also Smith v. Artus*, No. 9:07-CV-1150, 2010 WL 3910086, at *29 (N.D.N.Y. Sept. 30, 2010), *vacated in part on other grounds by*, 522 F. App'x 82 (2d Cir. 2013) (surveying the case law and determining that "it still does not appear well established" that an inmate has the right to engage in demonstrative group prayer on a prison recreation yard); *Vega v. Lantz*, No. 304-CV-1215, 2009 WL 3157586 at *10 (D. Conn. Sept. 25, 2009) (regulation prohibiting daily group prayer but permitting inmates to pray individually in their cells and at a weekly congregate service was in furtherance of the compelling interest of maintaining security and order, and was the least restrictive means of furthering that interest); *Sweeper v. Taylor*, No. 906-CV-379, 2009 WL 815911, at *7 (N.D.N.Y. March 27, 2009) (stating that the current case law did not "clearly establish" the plaintiff's "right to pray together with six other inmates in a work area during his working hours"); *Withrow v. Bartlett*, 15 F. Supp. 2d 292, 294-98 (W.D.N.Y. 1998) (prison officials did not violate prisoner's First

Amendment rights by enforcing policy that "[c]ongregate or group prayer may only occur in a designated religious area during a religious service or at other time authorized by the Superintendent").

In light of these decisions and the lack of any contrary authority, controlling or otherwise, a reasonable warden would not have understood that the prayer policy at FCI Danbury (created during another warden's tenure) supposedly violated Plaintiffs' rights under the First Amendment or RFRA. It was not "clearly established" that FCI Danbury's policy violated RFRA or the First Amendment, particularly since the policy afforded meaningful opportunities for group prayer throughout the prison complex. *See Withrow*, 15 F. Supp. 2d at 296 (dismissing free exercise claim where plaintiff "had many reasonable, alternative ways in which to exercise his religious freedom, aside from conducting a group demonstrative prayer in the prison yard."). Given the state of the law in the Second Circuit on the right of federal inmates to engage in group prayer, the Wardens did not transgress any "bright lines" by not revoking the prayer policy implemented by Warden Baird (herself a nonparty to this case). *Coollick*, 699 F.3d at 221 (internal quotations omitted), and therefore they are entitled to qualified immunity and the dismissal of the Plaintiffs' *Bivens* and RFRA claims against them.[6]

C. Defendants' Alleged Personal Conduct Did Not Violate Any Constitutional or Statutory Right.

Because this Court enjoys discretion to decide which of the two qualified immunity

[6] Additionally, in 2014, the state of the law in the Second Circuit was that RFRA did not authorize personal-capacity claims for damages against federal officials. *See Tanvir v. Lynch*, 128 F. Supp. 3d 756, 778 (S.D.N.Y. 2015), *reversed and remanded by Tanvir v. Tanzin*, 894 F.3d 449 (2d Cir. 2018). Thus, at the time of the events alleged in this complaint, it was not clearly established that Defendants potentially faced personal damages liability for their alleged conduct, and qualified immunity therefore bars Plaintiffs' RFRA damages claims against the Wardens. *See Padilla v. Yoo*, 678 F.3d 748, 757 (9th Cir. 2012) (dismissing RFRA claim on qualified immunity grounds); *Lebron v. Rumsfeld*, 670 F.3d 540, 557 (4th Cir. 2012) (same).

prongs to tackle first, *al-Kidd*, 563 U.S. at 735, and the second prong is potentially dispositive of Plaintiffs' personal-capacity claims, the Court need not resolve the somewhat more involved question of whether the Wardens' alleged conduct violated the First Amendment or RFRA. *See id.* Nevertheless, as demonstrated below, the Wardens are entitled to qualified immunity under the first prong of the analysis as well.

1. Standard of law for First Amendment and RFRA claims in the federal prison context.

As a general matter, inmates do not forfeit "protections afforded by the First Amendment" during their incarceration. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987). However, "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Id.* Because "courts [] owe prison officials substantial deference" in determining how best to manage their institutions, *Chatin v. Coombe*, 186 F.3d 82, 89-90 (2d Cir. 1999), prison officials may lawfully restrict inmates' exercise of religion as long as the regulations are "reasonably related to legitimate penological interests." (citation and internal quotations omitted.) *Benjamin v. Coughlin*, 905 F.2d 571, 574 (2d Cir. 1990). This "'reasonableness' test [is] less restrictive than that ordinarily applied" to alleged infringements of fundamental rights. *Salahuddin v. Goord*, 467 F.3d 263, 274 (2d Cir. 2006) (citation and internal quotations omitted). Courts consider three factors in determining "reasonableness": 1) whether there is a rational relationship between the action and the legitimate government interests asserted; 2) whether there are alternative means of exercising the right to religious expression that remain open to prison inmates; and 3) the impact that accommodation of the right will have on the prison system. *Turner*, 482 U.S. at 89; *Benjamin*, 905 F.2d at 576-77.

RFRA mandates that the "Government shall not substantially burden a person's exercise

of religion even if the burden results from a rule of general applicability" unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb–1(a), (b). RFRA authorizes any "person whose religious exercise has been burdened" in violation of the statute to "assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief...." 42 U.S.C. § 2000bb–1(c). To adjudicate a RFRA claim, the Court applies a burden-shifting analysis. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428-29 (2006). A plaintiff must first establish that the government has substantially burdened a sincere exercise of religion. The burden then shifts to the defendant to demonstrate that the conduct or regulation at issue furthers a compelling governmental interest and is the least restrictive means available. *Id.* RFRA strengthens federal protection of religious freedom. *See Muhammad v. City of New York Dep't of Corr.*, 904 F. Supp. 161, 196 (S.D.N.Y. 1995) (compared to the First Amendment's "lower standard," government restrictions on religious exercise must pass a "heightened standard" under RFRA). Thus, if a plaintiff cannot state a claim under RFRA's "substantial burden" standard, any claim the plaintiff asserts under the First Amendment necessarily fails.

2. The *Bivens* claims against the Wardens must be dismissed because the Complaint fails to allege facts showing that the Wardens were personally involved in, or responsible for, the creation of the policy at issue.

To state a claim for damages against a government official in his or her personal capacity, a plaintiff must allege facts demonstrating the defendant's personal involvement in a specific wrongful act. *See Abbasi*, 137 S. Ct. at 1860 ("[A] *Bivens* claim is brought against the individual official for his or her own acts, not the acts of others."); *Iqbal*, 556 U.S. at 676 ("Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each

Government-official defendant, through the official's own individual actions, has violated the Constitution."); *Arar v. Ashcroft*, 585 F.3d 559, 569 (2d Cir. 2009) ("[A] plaintiff in a *Bivens* action is required to allege facts indicating that the defendants were personally involved in the claimed constitutional violation."). The question of whether the complaint sufficiently pleads that a defendant was personally involved in a claimed constitutional or statutory violation is an aspect of the first step of the qualified immunity inquiry, as the first step of the analysis focuses on whether "the facts alleged show *the officer's conduct* violated a constitutional [or statutory] right." *Saucier*, 533 U.S. at 201 (emphasis added); *see also Kwai Fun Wong v. United States*, 373 F.3d 952, 966-67 (9th Cir. 2004) (analyzing the sufficiency of the complaint's allegations of personal participation at the first stage of the *Saucier* analysis); *Trulock v. Freeh*, 275 F.3d 391, 402 (4th Cir. 2001) (same). If a plaintiff has not alleged that a defendant directed any conduct at him, he has not alleged that the defendant violated his constitutional or statutory rights, let alone any clearly established rights.

The "personal involvement" requirement is particularly important when determining whether supervisory officials—such as a warden of a large prison facility—are entitled to qualified immunity. The doctrine of respondeat superior does not apply in personal-capacity actions against federal officials, and holding a high-ranking position is not alone enough to trigger liability. *See Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) (prison official cannot be "held personally responsible simply because he was in a high position of authority in the prison system"). Indeed, when suing federal officials personally, "the term 'supervisory liability' is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Iqbal*, 556 U.S. at 677. A plaintiff must demonstrate "an affirmative causal link" between the supervisor's conduct and the plaintiff's

injury. *Poe v. Leonard*, 282 F.3d 123, 140 (2d Cir. 2002); s*ee also Spencer v. City of Stamford*, No. 3:06-cv-1209, 2007 WL 1186042, at *2 (D. Conn. Apr. 19, 2007) (dismissing complaint that failed to "allege an affirmative causal link between any action by [supervisory defendant] and [plaintiff's] claimed injuries").

In this case, the complaint fails to allege any conduct by the Wardens that allegedly violated Plaintiffs' right to freely exercise their religion. The subject of Plaintiffs' complaint is a policy governing congregate prayer that was established by someone other than the Defendants—specifically, a former warden at FCI Danbury, Compl. ¶¶ 3, 30, and is allegedly enforced by "many corrections officers and other prison officials" at the institution. *Id.* ¶¶ 5, 37-40, 45. By contrast, the complaint's sole allegation against the Wardens is that the prayer policy remained in effect during their tenure. *Id.* ¶¶ 3, 5.

Personal liability against a federal official cannot be predicated on the mere allegation that a policy—implemented by a predecessor—remained in place during a supervisory official's tenure. Plaintiff's theory of liability seems to rest on the mere fact that the Wardens were in charge of the prison when the prayer policy was in place. Compl. ¶¶ 3, 5. Plaintiff's allegations of Defendants' passive involvement thus fail to demonstrate a causal link between any conduct by the Wardens and plaintiff's injury. *See Allah v. Annucci*, No. 16-CV-1841, 2017 WL 3972517, at *8 (S.D.N.Y. Sept. 7, 2017) (allegations that supervisory officials "did not correct a policy of unequal treatment of inmates based on their religion" were conclusory allegations insufficient to state a claim where plaintiff "[did] not claim that these Defendants participated in the alleged deprivation … and Plaintiff's theory of liability appear[ed] to be grounded in the mere fact that Defendants were in charge of the prison."); *Smith*, 2010 WL 3910086, at *25 (allegations that prison supervisors were "responsible for the policy [prohibiting inmates

incarcerated in the special housing unit] from attending congregate religious services" because supervisors were in a position of authority, and that supervisors "didn't take any actions to correct it" were conclusory allegations that "failed to demonstrate personal involvement").

Second, the allegation that a challenged policy remained in place "on the Wardens' watch" is not a sufficient allegation of personal involvement because holding the Wardens personally liable on this basis would be the same as imposing damages liability on them solely because of the position they held. Such an action would be indistinguishable from suing the Wardens in their *official* capacities, for which damages are not recoverable against them. *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (discussing "the practical and doctrinal differences between personal and official capacity actions"). Notably, Plaintiffs' allegation that each warden, during their tenure, was "legally responsible for the operation of FCI Danbury and for the welfare of all incarcerated persons in that prison" does, in fact, suggest an effort by Plaintiffs to predicate personal damages liability against the Wardens solely because they held a position of authority. Compl. ¶ 14. As noted above, however, it is well-settled that there is no vicarious liability in suits like this against federal officials, and personal damages liability cannot be based merely on a defendant's high-ranking position. *Iqbal*, 556 U.S. at 677.

Finally, imposing personal liability on the Wardens simply because a policy—that neither of them implemented—remained in effect during their tenure would contradict the well-established rule that "a *Bivens* action is not 'a proper vehicle for altering an entity's policy.'" *Abbasi*, 137 S. Ct. at 1860 (quoting *Malesko*, 534 U.S. at 74. Rather, "the purpose of *Bivens* is to deter *the officer*" from engaging in conduct that violates statutory or constitutional rights. *Meyer*, 510 U.S. at 485 (emphasis in original). As noted above, the claims asserted by Plaintiffs in this action fundamentally call into question the development of broad-based agency policy regarding

the accommodation of federal inmates' religious practices. Accordingly, the mere allegation that the Wardens were in charge of FCI Danbury when the prayer policy was in effect fails to demonstrate the Defendants' personal involvement in the alleged violation of the Plaintiffs' rights, and therefore the personal-capacity damages claims against the Wardens must be dismissed for want of sufficient personal participation.[7]

3. Plaintiffs have not alleged facts demonstrating that FCI Danbury's Institution Supplement substantially burdens their religion and have therefore failed to allege facts showing that the policy violates RFRA or the First Amendment's less restrictive standard.

Plaintiffs have failed to allege facts showing that the Defendants substantially burdened their exercise of religion. The government substantially burdens religion when it "puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." *McEachin v. McGuinnis*, 357 F.3d 197, 202 n. 4 (2d Cir. 2004). Even assuming, solely for the purposes of this motion, the truth of Plaintiffs' allegations, FCI Danbury's Institution Supplement does not substantially burden Plaintiffs' free exercise of religion by limiting their ability to engage in congregate prayer with other Muslim inmates. Plaintiffs acknowledge that the policy permits inmates of all faiths to pray in small groups of two inmates "throughout the FCI Danbury

[7] *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995), in which the Second Circuit discussed ways a plaintiff may plead the personal involvement of a supervisory defendant in an action brought under 42 U.S.C. § 1983, is not to the contrary. First, *Colon* was an action under Section 1983, not *Bivens*. Although aspects of *Bivens* and Section 1983 have been considered analogs for some purposes, "the Supreme Court has never expressly held that the contours of *Bivens* and § 1983 are identical." *Holly v. Scott*, 434 F.3d 287, 292 (4th Cir. 2006) (footnote, alteration, and quotations omitted). Allegations that may be sufficient under Section 1983—such as creating, or allowing to continue, a "policy or custom" that leads to unconstitutional conduct—are not sufficient under *Iqbal* because they cannot be reconciled with "*Iqbal's* 'active conduct' standard [which] only imposes liability on a supervisor … if that supervisor *actively had a hand* in the alleged constitutional violation." *Bellamy v. Mount Vernon Hosp.*, No. 07-civ-1801, 2009 WL 1835939, at *6 (S.D.N.Y. June 26, 2009). Second, *Colon* was decided before *Iqbal*, and *Iqbal* makes clear that, in *Bivens* actions, plaintiffs must allege facts demonstrating the direct and personal involvement of supervisors in the alleged unconstitutional conduct to survive a motion to dismiss. *See Iqbal*, 556 U.S. at 676. A *Colon*-type statutory standard, based on the particular language Congress chose in enacting § 1983, could also not survive *Abbasi* in the *Bivens* arena.

complex" with the approval of staff who are assigned to supervise inmates in those areas. Compl. ¶¶ 30, 39. The policy further provides that inmates may pray in groups of three or more in the prison chapel. *Id.* ¶ 30. And Plaintiffs acknowledge that FCI Danbury has reserved a room in the chapel on a weekly basis so that Muslim inmates may congregate for *Ju'muah*, which Plaintiffs consider "[t]he most important prayer of the week." *Id.* ¶¶ 19, 32.

Plaintiffs allege that "it is their sincerely-held religious belief that if two or more Muslims are together at a time of required prayer, they must pray together behind one prayer leader, and that it is not permissible to break up into smaller groups." *Id.* ¶ 23. But they do not allege that they actually find themselves in a group of more than two Muslims at a time of required prayer, nor do they allege that their beliefs require them to do more to find other Muslims (and they are allowed to regularly assemble for group prayer for *Ju'muah*). Indeed, Plaintiff Sabir alleges only a single instance (and Plaintiff Conyers none) of the policy being applied against him back in 2014, *id.* ¶ 35, and even then the reason for his being in a group at the time of prayer is not described in the complaint. Accordingly, Plaintiffs have not alleged a plausible claim that the policy actually hinders the performance of their religious obligations. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570.

III. Plaintiffs' Official-Capacity Claims Fail to State a Claim Upon Which Relief Can Be Granted.

A. Sovereign Immunity Bars the Recovery of Damages on Plaintiffs' Official-Capacity Claims.

The United States has not waived its sovereign immunity from suits for damages based on assertions that its employees' conduct violated the Constitution. *See Meyer*, 510 U.S. at 483-86. Thus, to the extent that Plaintiffs attempt to assert a damages claim against the United States or against any of the defendants in their official capacities, those claims are barred by sovereign

immunity. *See Graham*, 473 U.S. at 167; *Brandon v. Holt*, 469 U.S. 464, 471 (1985) (holding official capacity suit against federal official, in reality, seeks to impose liability on the United States); *Farmer v. Perrill*, 275 F.3d 958, 963 (10th Cir. 2001) (internal citations omitted) ("Because a *Bivens* claim may not be brought directly against the United States as such, an 'official capacity *Bivens* suit' would be an oxymoron.); *accord Brazelton v. Holt*, 462 F. App'x 143, 145-46 (3d Cir. 2012); *Bunn v. Conley*, 309 F.3d 1002, 1009 (7th Cir. 2002)*; Ruiz Rivera v. Riley*, 209 F.3d 24, 28 (1st Cir. 2000) ("A *Bivens* action only may be brought against federal officials in their individual capacities."). Without a waiver of sovereign immunity, Plaintiffs' damages claims against Defendants in their official capacities must fail. Defendants Williams and Hurwitz are employees of the United States being sued in their official capacities. Compl. ¶¶ 14, 16. Sovereign immunity therefore bars all damages claims against these official capacity defendants.

B. Plaintiffs' Official-Capacity Claims Under RFRA and the First Amendment Must Be Dismissed Because the Complaint Fails to Allege Facts Showing a Substantial Burden on the Free Exercise of Religion.

As discussed in Section II.C.3., *supra* pp. 25-26, FCI Danbury's Institution Supplement does not "ban" group prayer. To the contrary, the complaint, on its face, concedes that inmates of all faiths are afforded multiple avenues for participating in congregate prayer and worship. The complaint thus fails to plead facts showing that the policy substantially burdens the exercise of religion. The argument and authorities set forth in Section II.C.3 as to the individual-capacity claims are equally dispositive of the official-capacity claims, and Defendants respectfully adopt them as if fully set forth herein.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court grant this

motion and dismiss the Second Amended Complaint in its entirety.

Dated: September 14, 2018

Respectfully submitted,

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CERTIFICATION

I hereby certify that on September 14, 2018, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by electronic mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated in the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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