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.	)	November 16, 2018

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

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Wardens D.K. Williams and Herman Quay, (the "Wardens") and Bureau of Prisons Director Hugh Hurwitz respectfully submit this Reply Memorandum in further support of their motion to dismiss Plaintiffs' Second Amended Complaint.

ARGUMENT

I. Defendants Are Entitled to Judgment of Dismissal on Plaintiffs' First Amendment *Bivens* Claim.

1. Plaintiffs' First Amendment *Bivens* claim must be dismissed for the simple reason that Plaintiffs' brief in opposition to Defendants' motion to dismiss makes clear that they are not invoking *Bivens* to recover damages against the Wardens, which is the essential purpose of the *Bivens* remedy. Although the Second Amended Complaint appears to assert a stand-alone *Bivens* claim for an alleged First Amendment violation,[1] Plaintiffs' opposition brief clearly states that "Plaintiffs need not and do not resort to [*Bivens*] and its progeny to seek damages against the Wardens." Pls.' Br. at 2. Rather, Plaintiffs clarify that they are pursuing damages against the Wardens only under RFRA. *Id.* A *Bivens* action is "by definition a claim for money damages," *Polanco v. U.S. Drug Enf't Admin.*, 158 F.3d 647, 652 (2d Cir. 1998), and "[t]he only remedy available in a *Bivens* action is an award for monetary damages in their individual capacities." *Higazy v. Templeton*, 505 F.3d 161, 169 (2d Cir. 2007). Accordingly, since Plaintiffs clearly state that they are not pursuing damages on their *Bivens* theory, which is the only remedy available for such a claim, Defendants are entitled to dismissal of Plaintiffs' First Amendment *Bivens* claim.

2. Even if Plaintiffs' opposition brief did not clearly state that they are not pursuing a *Bivens* remedy, Plaintiffs' First Amendment *Bivens* claim should be dismissed in any event.

[1] *See* Second Amended Complaint ("SAC"), "First Cause of Action" ¶¶ 55-57.

Defendants' opening brief sets forth the arguments and authorities demonstrating that Plaintiffs' First Amendment claim would unquestionably extend the *Bivens* remedy to a new context; that Plaintiffs had access to alternative avenues through which to challenge FCI Danbury's congregate prayer policy; and that several special factors counsel hesitation against authorizing a judicially-implied damages remedy in the novel context presented by this case. *See* Defs.' Br. at 5-15. Plaintiffs have failed to address any of these arguments in their opposition brief, and have therefore conceded those arguments for purposes of Defendants' motion to dismiss. *See Miller v. Hous. Auth. of New Haven*, No. 3:13-cv-1855, 2014 WL 2871591, at *11 (D. Conn. June 24, 2014) ("When a plaintiff's specific claim is attacked in a motion to dismiss, a plaintiff must rebut the defendant's argument against that claim or it shall be deemed abandoned."); *Davis v. Globe Life & Acc. Ins. Co.*, No. 3:12-CV-01583, 2013 WL 5436907, at *9 (D. Conn. Sept. 27, 2013) ("[Plaintiff] has failed to respond to [defendant's] argument for dismissal in any way in her opposition brief…. Thus, the Court deems this claim to be abandoned.").

3. Finally, as discussed more fully below, even if an implied remedy under the Constitution were available, Defendants would be entitled to qualified immunity because neither the Supreme Court nor the Second Circuit has ever recognized -- under the First Amendment or RFRA -- an unlimited "right" of federal inmates to engage in congregate prayer five times daily "with the maximum number of practicing Muslims possible." Complaint ¶ 19.

II. Qualified Immunity Bars Plaintiffs' Damages Claims Under RFRA.

1. Plaintiffs simply cannot escape the fact that no Supreme Court or Second Circuit decision has ever recognized the particular constitutional or statutory right they are advocating in this case—namely, the right of federal inmates to pray five times daily, without restriction, "with the maximum number of practicing Muslims possible." Complaint ¶ 19. As demonstrated in

Defendants' opening brief, because there was no case law in 2014 placing the Wardens on notice that similar time, place, and manner restrictions on inmates' freedom to participate in group prayer violated RFRA or the First Amendment, the Wardens cannot be held personally liable in damages under the doctrine of qualified immunity. *See* Defs.' Br. at 16-19.

Plaintiffs counter generally that "First Amendment and RFRA principles protecting the free exercise of religion were clearly established and render Defendants' conduct objectively unreasonable." Pls.' Br. at 8. Citing *Salahuddin v. Goord*, 467 F.3d 263, 275-76 (2d Cir. 2006) -- a decision that is distinguishable from the instant case[2] -- Plaintiffs contend that the Wardens may be held personally liable in damages because "it was clearly established … that prison officials may not substantially burden inmates' right to religious exercise without some justification …." Pls.' Br. at 8.

By claiming that this broad abstract principle—completely divorced from any factual context—justifies imposing personal damages liability on the Wardens, Plaintiffs are committing the classic error of defining the right in question "at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Controlling Supreme Court precedent, however, instructs that Defendants are shielded by qualified immunity unless the right asserted by Plaintiffs in this case was so clearly established with respect to the "*particular* conduct" and the "specific context" here that every reasonable official would have understood that his conduct was unlawful.

[2] *Salahuddin* involved a free-exercise claim against prison officials for allegedly requiring Shi'ite and Sunni Muslims to conduct Ramadan services jointly. The factual context in *Salahuddin* is so far removed from the policy at issue here that the decision could not possibly have placed "beyond debate" the question of whether time, place, and manner restrictions on congregate prayer by inmates violate RFRA or the First Amendment. *Coollick v. Hughes*, 699 F.3d 211, 220 (2d Cir. 2012). Indeed, as demonstrated in Defendants' opening brief, a number of courts after *Salahuddin* observed that it was (and still is) not clearly established that inmates are entitled to participate in group prayer anywhere in a federal correctional facility. *See* Defs.' Br. at 16-17.

Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (emphasis in original) (internal quotation marks omitted). While this does not require a case directly on point, abstract legal principles devoid of factual context (like the one Plaintiffs assert here) are too general to be controlling in the qualified immunity analysis. Instead, the Supreme Court has repeatedly instructed that "clearly established law must be particularized to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

The Supreme Court's decision in *Anderson* illustrates perfectly why Plaintiffs' approach invites error. There, the lower court denied qualified immunity, citing a clearly established "right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances." *Id.* at 640. Reversing the denial of immunity, the Supreme Court held that the lower court's generic formulation failed to address the "fact-specific" question at issue: "whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." *Id.* at 641; *see also Brosseau v. Haugen*, 543 U.S. 194, 200 (2004) (holding it was not clearly established, in a particularized sense, that officer violated the Fourth Amendment where no previous court had found such a violation in circumstances like the "situation [the defendant] confronted"). Here, the abstract legal principle that Plaintiffs assert -- "that prison officials may not substantially burden inmates' right to religious exercise without some justification" -- can no more establish the law sufficient to subject the Wardens to personal damages liability than the generic legal principle the Supreme Court found to be insufficient in *Anderson*.

This is especially true given the decisions from courts in this Circuit upholding similar restrictions on congregate prayer against RFRA and First Amendment challenges. *See* Defs.' Br.

at 18-19. The decision in *Johnson v. Killian*, No. 07-cv-6641, 2013 WL 103166 (S.D.N.Y. Jan. 9, 2013) is particularly instructive. That case involved a RFRA and First Amendment challenge to a policy that permitted inmates to pray in groups of three at various locations within the prison, but limited larger groups to the prison chapel. In granting immunity, the court explained that "the defendant's implementation of FCI-Otisville's group prayer policy was not objectively unreasonable, because it was not 'clearly established' in 2007 that Muslim inmates were entitled to participate in group prayer *anywhere* in the correctional facility, including in their housing units." *Id.* at *4 (emphasis added) (citations omitted). Among other decisions, the district court in *Johnson* relied on *Shabazz v. Coughlin*, 852 F.2d 697, 700 (2d Cir. 1988), which had previously acknowledged that "there was a legitimate question as to whether a prisoner had a right to engage in group prayer" and thus prison officials were entitled to qualified immunity when they restricted such prayer in the prisons recreation yard. Given the state of the law in this Circuit in 2014 -- again, *Johnson* was decided only one year before the events at issue in this case -- the Wardens could not possibly have known that their alleged conduct potentially exposed them to damages liability under RFRA or the First Amendment. Importantly, "[t]he question is not what a lawyer would learn or intuit from researching case law, but what a reasonable person in the defendant's position should know about the constitutionality of the conduct." *McCullough v. Wyandanch Union Free Sch. Dist.*, 187 F.3d 272, 278 (2d Cir. 1999). In light of the decisions upholding similar restrictions on group prayer by inmates, and the absence of any caselaw affirmatively finding a right of federal inmates to engage in group prayer anywhere within a correctional facility, the Wardens' alleged conduct in this case was objectively reasonable, and accordingly they are entitled to qualified immunity as a matter of law.

2. *Johnson* also exposes the flaw in Plaintiffs' argument that Defendants' motion asserting qualified immunity is premature. Pls.' Br. at 7. Plaintiffs suggest that qualified immunity "would be best decided at a later stage in the litigation"—presumably, after discovery. *Id.* As support, Plaintiffs contend (incorrectly) that the district court in *Johnson* did not rule on the immunity defense until after discovery and "on a full factual record." *Id.* at 11. To the contrary, the defendants in *Johnson* filed a pre-answer motion to dismiss and for summary judgment prior to any discovery on the issue of qualified immunity. *See Johnson*, 2013 WL 103166, at *3. Much like Plaintiffs do here, "Johnson contend[ed] that he would benefit from discovery on the question of qualified immunity." *Id.* However, the district court rejected the argument that the qualitied immunity motion was premature, observing that whether the prison's policy violated clearly established law was a pure legal question that required no discovery. *Id.* at *3 (citing *Lennon v. Miller*, 66 F.3d 416, 421 (2d Cir. 1995) ("[T]he ultimate legal determination whether a reasonable [federal official] should have known he acted unlawfully is a question of law better left for the court to decide.")). 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), and unless the complaint on its face alleges a violation of clearly established law, "a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *accord Main St. Legal Servs., Inc. v. Nat'l Sec. Council*, 811 F.3d 542, 567 (2d Cir. 2016) ("A plaintiff who has failed adequately to state a claim is not entitled to discovery."). No amount of discovery will change the fact that at the time of the events in this case, it was not clearly established that inmates were entitled to participate in group prayer anywhere in a federal correctional facility. Qualified immunity therefore protects the Wardens from damages liability

as a matter of law.

3. Qualified immunity also precludes the recovery of damages against the Wardens because, in 2014, it was not clearly established in this Circuit that RFRA authorizes personal-capacity damages claims against federal officials. *See* Defs.' Br. at 19 n.6. Although Plaintiffs cite the Second Circuit's recent decision in *Tanvir v. Tanzin*, 894 F.3d 449 (2d Cir. 2018),[3] it is axiomatic that decisions rendered after the events in question cannot retroactively establish the law for purposes of the qualified immunity analysis. *See Brousseau*, 543 U.S. at 200 n.4 (explaining that decisions issued after the defendant's conduct "could not have given fair notice to [the defendant] and are of no use in the clearly established inquiry").

Without citation to any authority, Plaintiffs suggest that immunity does not apply where the availability of a damages remedy was not clearly established. *See* Pls.' Br. at 8 n.4. However, Plaintiffs overlook the fact that a central purpose of qualified immunity is to enable federal officials to reasonably predict when their conduct may lead to a suit *against them personally for damages*. *See Anderson*, 483 U.S. at 639-40 ("The general rule of qualified immunity is intended to provide government officials with the ability reasonably to anticipate when their conduct may give rise to liability for damages.") (citations, internal quotations, and alteration omitted); *cf. Abbasi*, 137 S. Ct. at 1867-77 (federal officials entitled to qualified immunity on civil conspiracy claims given legal uncertainty and lack of fair notice to defendants of their potential liability under 42 U.S.C. § 1985(3)). At the time of the events in this case, reasonable officials in the Wardens' position could not have predicted that their alleged conduct could give rise to a damages lawsuit against them personally under RFRA, and thus qualified

[3] The defendants have petitioned for rehearing *en banc* of the panel's decision in *Tanvir*. *See Tanvir v. Tanzin*, No. 16-1176 (2d Cir. Aug. 17, 2018).

immunity precludes the recovery of damages here.

4. Finally, the Wardens are entitled to qualified immunity due to the complaint's scant allegations of personal involvement. Plaintiffs are attempting to recover damages against the Wardens under RFRA solely because a policy—implemented by a predecessor—remained in place during their tenure at FCI Danbury. Compl. ¶¶ 3, 5. However, as explained in Defendants' opening brief, this theory of liability is no different from suing the Wardens in their *official* capacities simply based on their position as high-level supervisors, in which case damages are not recoverable from them. Defs.' Br. at 23-25. Plaintiffs' opposition brief is notably silent with respect to this problem. Instead, they contend that merely responding to a prisoner's administrative grievance is sufficient personal involvement on which to predicate a claim for damages. For support, Plaintiffs rely on a case involving a district court's decision to deny a *pro se* prisoner leave to amend his complaint to state sufficient allegations of personal involvement. *See* Pls.' Br. at 14 (citing *Grullon v. City of New Haven*, 720 F.3d 133 (2d Cir. 2013)). In *Grullon*, the Second Circuit reaffirmed the unremarkable principle that "when a *pro se* plaintiff brings a colorable claim against supervisory personnel, and those supervisory personnel respond with a dispositive motion grounded in the plaintiff's failure to identify the individuals who were personally involved, under circumstances in which the plaintiff would not be expected to have that knowledge, dismissal should not occur without an opportunity for additional discovery." *Grullon*, 720 F.3d at 141. That principle has no relevance to the sufficiency of Plaintiffs' allegations of personal involvement in this case.

Plaintiffs also cite *Allah v. Annucci*, No. 16-cv-1841, 2018 WL 4571679, at *7-9 (S.D.N.Y. Sept. 24, 2018), for the proposition that a prison official who denies an inmate's grievance is personally involved in the deprivation of the inmate's rights where the grievance

"complained of *ongoing* violations which [defendant] could remedy." *Id.* (emphasis added) (internal quotations omitted). However, as noted in Defendants' opening brief, Plaintiff Sabir alleges only a single instance (and Plaintiff Conyers none) of the policy being applied to him in 2014. *See* Defs.' Br. 26. Finally, it is simply far from clear that, in the Second Circuit, a prison warden's mere denial of an inmate's administrative remedy request is sufficient personal involvement on which to hold the warden personally liable in damages. *See Jusino v. Mark Frayne*, 16-cv-961, 2016 WL 4099036, *5 (D. Conn. Aug. 2, 2016) (denial of grievance insufficient to establish personal involvement of supervisory defendant); *Joyner v. Greiner*, 195 F. Supp. 2d 500, 506 (S.D.N.Y. 2002) (responding to a grievance does not create personal involvement); see also *Green v. Maldonado*, No. 3:17-CV-00957 (CSH), 2018 WL 2725445, at *6 (D. Conn. June 6, 2018) ("[A]ffirming the administrative denial of a prison inmate's grievance by a high-level official is insufficient to establish personal involvement"). These decisions reflect the reality that high-ranking prison officials, like the Wardens, are charged with overseeing federal correctional facilities housing hundreds of inmates. Given the scope of their responsibilities, it is simply not plausible to conclude that they are rendered personally involved in an alleged deprivation of rights merely by discharging their official duty to respond to inmate grievances.

III. The Complaint Fails to State a RFRA or First Amendment Claim Against the Defendants in Their Official Capacities.

1. Without invoking the doctrine by name, Plaintiffs suggest that the Court's initial screening of Plaintiff's Sabir's proposed Amended Complaint under 28 U.S.C. § 1915A is law of the case for purposes of Defendants' Rule 12 motion to dismiss Plaintiffs' official-capacity claims. *See* Pls.' Br. at 1, 4-7. This argument is incorrect. The law of the case doctrine "is not an inviolate rule," *United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1991), but "at best, a

discretionary doctrine ….” *Tischmann v. ITT/Sheraton Corp.*, 145 F.3d 561, 564 (2d Cir. 1988).

Moreover, there is no valid reason to construe an initial screening order as the last dispositive word on the sufficiency of Plaintiffs’ claims. As required by the Prison Litigation Reform Act, the Court reviewed Sabir’s proposed Amended Complaint *sua sponte* before Defendants could appear and be heard on important legal defenses and also prior to Plaintiff securing counsel.[4] The screening also involved an earlier version of the complaint and different allegations than the complaint that is the subject of Defendants’ motion. Under these circumstances, the law of the case doctrine simply does not apply to the initial screening order. *See Paladino v. Newsome*, 2013 WL 3270987, *4 (D.N.J. June 27, 2013) (“The right of a defendant to bring a motion to dismiss for failure to state a claim . . . is not foreclosed by a district court’s prior finding, during *sua sponte* screening of a civil action filed by an in forma pauperis prisoner, that the prisoner stated a claim.”); *Wilson v. Med. Unit Officials*, 2011 WL 6780934, *1 n.2 (E.D.N.Y. Dec. 27, 2011) (“initial screening” under § 1915A “does not preclude a later dismissal of the complaint, in whole or part, under [Rule] 12(b)(6)”).

2. Defendants respectfully maintain that the arguments and authorities set forth in Section II.C.3 of their opening brief are fully dispositive of Plaintiff’s official-capacity claims. Additionally, it is important to note that although Plaintiffs claim that prisoners are permitted to gather in large groups for sports and other activities, Plaintiffs do not allege that inmates are permitted to gather in these groups at any time or place they choose, or without obtaining prior permission. Plaintiffs allegations thus fail to state a claim under RFRA.

[4] Indeed, this Court noted that *pro se* complaints “must be construed liberally and interpreted to raise the strongest arguments that they suggest.” *Sabir v. Williams*, No. 3:17-cv-749 (VAB), 2017 WL 6514694, *4 (D. Conn. Dec. 19, 2017) (citations and internal quotations omitted). That special solicitude afforded to *pro se* litigants is not extended when plaintiffs are represented by counsel.

CONCLULSION

For the foregoing reasons, Defendants respectfully request that this Court grant their motion to dismiss Plaintiffs' Second Amended Complaint.

Dated: November 16, 2018

Respectfully submitted,

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CERTIFICATION

I hereby certify that on November 16, 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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