No. 07-1015

IN THE

Supreme Court of the United States

JOHN D. ASHCROFT, former Attorney General of the United States, and ROBERT MUELLER, Director of the Federal Bureau of Investigations,

Petitioners,

v.

JAVAID IQBAL, *et al.*,

Respondents.

On Petition for Writ of Certiorari To the United States Court of Appeals For the Second Circuit

BRIEF OF WILLIAM P. BARR, EDWIN MEESE III, WILLIAM S. SESSIONS, RICHARD THORNBURGH, WILLIAM H. WEBSTER, AND WASHINGTON LEGAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Whether a conclusory allegation that a cabinet-level officer or high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*.

2. Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.

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BRIEF OF WILLIAM P. BARR, EDWIN MEESE III, WILLIAM S. SESSIONS, RICHARD THORNBURGH, WILLIAM H. WEBSTER, AND WASHINGTON LEGAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*

The *amici curiae* are three former Attorneys General, two former Directors of the FBI, and a public interest law firm.[1] They believe that the qualified immunity doctrine provides important legal protections to federal government officials; it allows officials to perform their duties without the distraction of having to defend damages claims filed against them in their personal capacity. They are concerned that the decision below restricts that doctrine to such an extent that government officials will be unable to win pre-discovery dismissal of insubstantial constitutional claims.

The Honorable William P. Barr served as Attorney General of the United States from 1991 to 1993. He also served as Assistant Attorney General for the Office of Legal Counsel from 1989 to 1990 and Deputy Attorney General from 1990 to 1991.

The Honorable Edwin Meese III served as

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for *amici* provided counsel for Respondent Iqbal with notice of intent to file. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

Attorney General of the United States from 1985 to 1988. He also served as Counselor to President Ronald Reagan from 1981 to 1985.

The Honorable William S. Sessions served as Director of the Federal Bureau of Investigations (FBI) from 1987 to 1993. He also served as a federal judge on the United States District Court for the Western District of Texas from 1974 to 1987, serving as Chief Judge of that court from 1980 to 1987; and was the United States Attorney for the Western District of Texas from 1971 to 1974. From 1969 to 1971, he was the Chief of the Government Operations Section of the Justice Department's Criminal Division.

The Honorable Richard Thornburgh served as Attorney General of the United States from 1988 to 1991. He also served as Assistant Attorney General for the Criminal Division from 1975 to 1977 and Governor of Pennsylvania from 1979 to 1987.

The Honorable William H. Webster served as Director of the FBI from 1978 to 1987. He also served as Director of the Central Intelligence Agency from 1987 to 1991. He served as a judge on the United States District Court for the Eastern District of Missouri from 1970 to 1973, and on the United States Court of Appeals for the Eighth Circuit from 1973 to 1978.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 States. It regularly appears in this and other federal courts to support the litigation immunity rights of public officials.

STATEMENT OF THE CASE

Respondent Javaid Iqbal is a citizen of Pakistan who has filed a civil action in United States courts, seeking to recover damages for alleged mistreatment while being held during 2002 at a federal detention facility in Brooklyn on federal criminal charges. Iqbal ultimately pleaded guilty to those charges and was removed to Pakistan following completion of his sentence. Among those he seeks to hold responsible for his alleged mistreatment are Petitioners John D. Ashcroft (the United States Attorney General at the time of Iqbal's detention) and Robert Mueller (who was then, and still is, Director of the Federal Bureau of Investigations). Iqbal does not allege that either Ashcroft or Mueller directed subordinates to take any specific actions with respect to Iqbal or that either was even aware of his case.

Iqbal alleges that he was arrested on federal charges on November 2, 2001 and was thereafter housed in the general population unit at the Metropolitan Detention Center in Brooklyn (MDC) until January 8, 2002. Pet. App. 169a, ¶¶ 80-81. From that date until the end of July 2002, Iqbal was housed in MDC's Admax special housing unit, a maximum-security unit created at MDC in the wake of the 9/11 terrorist attacks to house federal prisoners deemed "of high interest" in the post-9/11 terrorism investigation. *Id.* Iqbal was returned to MDC's general population in July 2002 after the FBI cleared him of involvement in terrorist activity. Iqbal pleaded guilty to criminal charges (defrauding the United States) in April 2002, was sentenced in September 2002, and was released from the MDC in January 2003.

Following completion of his sentence and his removal to Pakistan, Iqbal filed suit in May 2004 against a large number of federal officials, including Ashcroft and Mueller. The suit included statutory claims as well as constitutional claims pursuant to *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Iqbal complains both about the conditions of his confinement and about the initial decision to move him to the Admax unit. He alleges that he was assigned to Admax even though there was no evidence that he had links to terrorists and solely because of his religion (Islam), race, and/or nationality.

Iqbal's claims alleging mistreatment while in Admax are directed primarily at defendants who were employed at MDC in 2002; these causes of action do not list Ashcroft and Mueller as defendants. Among the claims directed at those two defendants, three remain: (1) a *Bivens* claim that they violated his First Amendment rights by imposing harsher conditions of confinement because of his religion, Pet. App. 201a-202a; (2) a *Bivens* claim that they violated his Fifth Amendment rights to equal protection of the laws by imposing harsher conditions of confinement because of his race/nationality, *id.* 202a-203a; and (3) claims under 42 U.S.C. § 1985(3) that they conspired to deny him his civil rights because of his religion, race, and/or nationality. *Id.* 206a-209a.

The district court in large part denied the defendants' motions seeking dismissal on qualified immunity grounds. Pet. App. 71a-150a. The court held that it could not conclude that there was "no set of facts" on which Iqbal could recover from Ashcroft and

Mueller under his *Bivens* and § 1985(3) conspiracy claims. *Id.* 136a-137a, 146a.

The Second Circuit affirmed the denial of Ashcroft's and Mueller's immunity claims in relevant part. *Id.* 1a-70a.[2] The appeals court recognized that "[q]ualified immunity is an immunity from suit and not just a defense to liability," *id.* 13a, and that some of Iqbal's allegations "suggest that some of [his] claims are based not on facts supporting the claim but, rather, on generalized allegations of supervisory involvement." *Id.* 25a. The court nonetheless concluded that Iqbal's allegations were sufficiently specific to withstand a motion to dismiss based on qualified immunity. *Id.* 58a-65a. The court based that conclusion on allegations in the amended complaint that Ashcroft and Mueller were instrumental in adopting the "policies and practices challenged here," and that, although others made the determination that Iqbal was of "high interest," they "knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." *Id.* 62a.[3] The court

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[2] The court ordered dismissal of Iqbal's procedural due process claims, *id.* 29a-46a, and thus those claims are not part of the Petition. The court held that although the amended complaint adequately stated a claim for violation of Iqbal's procedural due process rights by Ashcroft and Mueller, *id.* 31a-43a, they were entitled to dismissal based on qualified immunity because those rights had not been clearly established in court decisions by 2002. *Id.* 43a-46a.

[3] The Second Circuit apparently was quoting from ¶¶ 10-11 and from ¶ 96 of the amended complaint, Pet. App. 157a, 172a-173a.

concluded that the amended complaint met the pleading standards of Fed.R.Civ.P. 8(a) (described by the court as a "plausibility standard"), even without any "allegation of subsidiary facts," in light of:

> [T]he likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated "of high interest" in the aftermath of 9/11.

Id.

The appeals court also held that Ashcroft and Mueller could bear "personal responsibility for the actions of their subordinates under the standards of supervisory liability outlined" in Second Circuit case law. *Id.* Under those standards, federal supervisors can be held liable for the constitutional torts of their underlings, even if they were unaware of the conduct, if they were "grossly negligent in supervising subordinates who committed the violation." *Id*. 14a. The court supported that legal conclusion by citing Second Circuit precedent that established supervisory liability of state and local officials under 42 U.S.C. § 1983. *Id.*

Judge Cabranes wrote a separate concurring opinion. *Id.* 67a-70a. He stated that some of the relevant Supreme Court and Second Circuit precedents were "less than crystal clear and fully deserve reconsideration by the Supreme Court at the earliest opportunity." *Id.* 68a. While agreeing that existing precedents pointed toward the result reached by the appeals court, he warned:

> [L]ittle would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes.

Id. 69a-70a.

REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance. Qualified immunity not only provides government officials with a defense to liability; it also is "an entitlement not to stand trial or face *the other burdens of litigation.*" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis added). The Court has made clear that the "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that "'insubstantial claims' [will] be resolved prior to discovery." *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987). Yet, the decision below calls into question the ability of high-level Executive Branch officials to win dismissal, on qualified immunity grounds, of even frivolous *Bivens* litigation filed by anyone claiming to be aggrieved by their official conduct. In the absence of dismissal, those officials face the prospect of discovery proceedings that are highly likely to distract them from their other responsibilities. As former senior Executive Branch officials, the individual *amici curiae* share Judge Cabranes's concerns regarding the disruptive effects of such discovery, and they are very concerned by the effects that such disruptions are likely to have on the ability of high-level officials to carry out their missions

effectively. Review is warranted to determine whether such disruptions are required under the terms of the Federal Rules of Civil Procedure, particularly when (as here) the challenged actions involve sensitive national security issues.

Review is also warranted to resolve the conflict that has developed among the federal appeals courts regarding the level of factual specificity required in a complaint by Fed.R.Civ.P. 8(a) in order to "set[] forth a claim for relief" and thereby defeat a motion to dismiss based on a government official's claim to qualified immunity. The Second Circuit held that a complaint is sufficient to withstand a qualified immunity dismissal motion so long as allegations in the complaint – no matter how conclusory – render at least "plausible" a conclusion that the defendant violated the plaintiff's constitutional rights. That holding is not a fair reading of the Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), which interpreted Rule 8(a)(2) as requiring a complaint to make a "'showing,' rather than a blanket assertion, of an entitlement to relief." 127 S. Ct. at 1965 n.2.

The Second Circuit held that Iqbal made a sufficient "showing" of the personal involvement of Ashcroft and Mueller in the alleged religious, race, and nationality discrimination by alleging in general terms that they "were instrumental in adopting the policies and practices challenged here" and "maliciously agreed to subject [Iqbal] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin." Pet. App. 62a. Yet, the appeals court conceded that Iqbal "acknowledges" that subordinate FBI officials – not Ashcroft and Mueller –

made the decision to classify Iqbal as a "high interest" detainee. *Id.* More importantly, wholly absent from the amended complaint are any factual allegations regarding what Ashcroft and Mueller did to be labeled "instrumental" in the adoption of the alleged policies and practices or to have "maliciously agreed" to Iqbal's placement in the Admax unit. In other words, there are no allegations that answer such basic questions as "when," "where," "how," and "with whom" Ashcroft and Mueller are supposed to have involved themselves in the decision to subject Iqbal and/or others to harsh prison conditions based solely on their religion, race, and/or nationality. Review is warranted to resolve the conflict between *Twombly* and the decision below.

Review is also warranted to resolve the conflict that has developed among the federal appellate courts regarding when a government official can be held liable for the acts of subordinates. The Second Circuit held that Iqbal could prevail on his *Bivens* claim by demonstrating that Ashcroft and Mueller were "grossly negligent" in supervising subordinate officials within the Justice Department and the FBI, regardless whether they had actual knowledge of any constitutional violations committed by those subordinates. Other circuits have rejected efforts to impose such derivative liability on high-level government officials.

Indeed, the conflict among the federal appeals courts regarding supervisory liability calls into question the entire basis for permitting Iqbal's suit to go forward on that theory. Qualified immunity is intended to protect government officials from personal liability for their official actions unless those actions violated a law

that "was clearly established at the time [the] action[s] occurred." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). *Amici* submit that the existence of a circuit conflict on the supervisory liability issue means that there is not now – nor could there have been in 2002 – a "clearly established" standard on supervisory liability based on gross negligence, sufficient to defeat Ashcroft's and Mueller's qualified immunity claim. Moreover, even within the Second Circuit, there appears not to have been any "clearly established" standard regarding *Bivens* actions seeking to impose supervisory liability on federal officials – the decision below relied solely on Second Circuit precedent regarding supervisory liability of state and local government officials under 42 U.S.C. § 1983. Whether the federal courts should recognize an implied *Bivens* cause of action against federal officials for supervisory liability raises a host of policy questions not relevant in cases asserting supervisory liability under § 1983. Review is warranted on the second Question Presented not only to resolve the conflict among the federal appeals courts regarding supervisory liability of government officials, but also to resolve the conflict between the decision below and the decisions of this Court that mandate immunity for high-level federal government supervisory personnel when, as here, it has not previously been "clearly established" that the federal courts recognize an implied *Bivens* action for deficient supervision.

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW THREATENS THE ABILITY OF FEDERAL OFFICIALS TO AVOID THE BURDENS OF LITIGATION IMPOSED BY INSUBSTANTIAL CLAIMS

The Court has long recognized that significant burdens are imposed on government officials when they are required to defend damages claims filed against them in their individual capacities for actions taken in connection with their employment. As the Court explained in *Harlow*:

> Each such suit [against high-level government officials] almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discover[y] is wide-ranging, time-consuming, and not without considerable cost to the officials involved.

Harlow, 457 U.S. at 817 n.29 (quoting *Halperin v. Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring)).

The burdens can be particularly pronounced among officials working on national security matters, where the high level of public passion can result in increased levels of litigation. As Justice Stevens explained:

> The passions aroused by matters of national security and foreign policy and the high profile of Cabinet officers with functions in that area make them "easily identifiable [targets] for suits for civil damages." *Nixon v. Fitzgerald*, 457 U.S. [731,] 753 [(1982)]. Persons of wisdom and honor

> will hesitate to answer the President's call to serve in these vital positions if they fear that vexatious and politically motivated litigation associated with their public decisions will squander their time and reputation, and sap their personal financial resources when they leave office. The multitude of lawsuits filed against high officials in recent years only confirms the rationality of this anxiety. The availability of qualified immunity is hardly comforting when it took 13 years for the federal courts to determine that the plaintiff's claim in this case was without merit.

Mitchell, 472 U.S. at 541-42 (Stevens, J., concurring in the judgment).

In an effort to reduce such costs, the Court has crafted a qualified immunity doctrine designed to provide government officials with not only a defense to liability but also an "immunity from suit." *Id.* at 526. The "driving force" behind creation of the doctrine was a desire to ensure that "'insubstantial claims [will] be resolved prior to discovery.'" *Anderson*, 483 U.S. at 640 n.2. *See also Saucier v. Katz*, 533 U.S. 194, 200 (2001) ("Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive."); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) ("[W]e repeatedly have stressed the importance of resolving immunity

questions at the earliest possible stage in litigation.").[4]

Notwithstanding those directives, the Second Circuit has denied Petitioners' motion to dismiss based on qualified immunity, and has permitted the case to go forward on the barest of allegations of wrongdoing. It has done so despite its frank admissions that "some of the Plaintiff's claims are based not on facts supporting the claim but, rather, on generalized allegations of supervisory involvement," Pet. App. 25a, and that denying Petitioners' motion "might facilitate the very type of broad-ranging discovery and litigation burdens that the qualified immunity provision was intended to prevent." *Id.* Indeed, the appeals court has permitted discovery to go forward under those circumstances in a case raising national security issues of the highest importance: the Justice Department's investigation into terrorist activity following the most deadly terror attack in American history.

Amici respectfully submit that review is warranted in light of the substantial impediments to effective government imposed by the decision below. Numerous commentators have catalogued the massive societal costs of failing to maintain adequate limitations on the personal liability of government officials for

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[4] Resolving a qualified immunity claim is a two-step inquiry. First, the court must determine whether the facts alleged by the plaintiff demonstrate that a defendant violated a constitutional right. Assuming the violation is established, the court must then determine whether that right was clearly established at the time of the challenged action. *Saucier*, 533 U.S. at 200-01. A right is deemed "clearly established" if "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id*. at 202.

damages allegedly flowing from their actions. *See, e.g.,* Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages,* 1980 S. CT. REV. 281 (1980); H. Allen Black, *Balance, Band-Aid, or Tourniquet: The Illusion of Qualified Immunity for Federal Officials*, 32 WM. & MARY L. REV. 733 (1991). Yet, as Judge Cabranes cogently explained in his concurring opinion, Iqbal's complaint is a "blueprint" that "other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government" can use to ensure that their complaints survive a motion to dismiss and to engage high-level government officials in "prolonged and vexatious discovery processes." Pet. App. 69a-70a.

Qualified immunity doctrine is designed to ensure that such disruptions are rare exceptions. But as interpreted by the Second Circuit, the doctrine provides no such protection because it can easily be circumvented by general allegations that high-level government officials "knew of," "condoned" or "agreed to" a course of conduct allegedly carried out by lower-level employees. *Amici* recognize that public policies underlying the qualified immunity doctrine must be balanced against the need to provide citizens with a "realistic avenue for vindication of constitutional guarantees," *Harlow*, 457 U.S. at 814, and that requiring too much specificity from plaintiffs who have not yet had access to discovery could result in dismissal of meritorious claims. It is readily apparent, however, that the appeals court has struck a balance that provides government officials with few if any of the protections that the qualified immunity doctrine was designed to provide. Review is warranted in light of the

significant strains on effective government operations imposed by the Second Circuit's standard.

II. THE DECISION BELOW IMPROPERLY PERMITS COMPLAINTS TO PROCEED TO DISCOVERY BASED ON MERE BLANKET ASSERTIONS OF WRONGDOING

Review is also warranted to resolve the conflict that has developed among the federal appeals courts regarding the level of factual specificity required in a complaint by Fed.R.Civ.P. 8(a) in order to "set[] forth a claim for relief" and thereby defeat a motion to dismiss based on a government official's claim to qualified immunity.

Petitioners have thoroughly explained how the decision below conflicts with the decisions of at least four other federal appeals courts regarding the necessary factual specificity. Pet. 18-21. *Amici* will not repeat that discussion here. *Amici* are writing separately to point out how the decision below also conflicts with the decisions of this Court.

Fed.R.Civ.P. 8(a)(2) requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." While that rule eliminated the requirement that a claimant "set out *in detail* the facts upon which he bases his claim," *Conley v. Gibson,* 355 U.S. 41, 47 (1957) (emphasis added), the rule:

> [S]till requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on

> which the claim rests. See 5 Wright & Miller § 1202, at 94, 95 (*Rule 8(a)* "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented" and does not authorize a pleader's "bare averment that he wants relief and is entitled to it").

Twombly, 127 S. Ct. at 1965 n.3.

Twombly held that Rule 8(a) requires a complaint to include sufficient "factual matter" to provide "plausible grounds" to infer that the allegations of the complaint are true. *Id*. at 1965. It held that requiring plausibility "reflects the threshold requirement of *Rule 8(a)(2)* that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Id.* at 1966. The Court explained that a test requiring plausibility is not so strict as to require "probability" but nonetheless requires more than that the allegations are merely possible or conceivable. *Id.* at 1966, 1974.[5]

The Second Circuit was able to find that Iqbal met *Twombly*'s "plausible grounds" standard only by stripping that standard of all its heft. The amended

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[5] *Twombly* held that antitrust plaintiffs failed to meet that plausibility standard when they alleged, without adequate factual support, that the defendants (providers of local telephone service) had unlawfully conspired not to compete with one another. The principal fact asserted by the plaintiffs to support their conspiracy allegation was that the defendants had engaged in parallel conduct – each had failed to initiate competition in its rivals' geographic service areas. The Court concluded that that factual assertion was insufficient to render "plausible" the conspiracy allegation, because "[w]ithout more, parallel conduct does not suggest conspiracy." *Id.* at 1966.

complaint includes *no* factual assertions to support its conclusory allegations that Ashcroft and Mueller "knew of," "condoned" and "agreed to" the allegedly discriminatory treatment of Iqbal. While conceding that the amended complaint includes no "allegation of subsidiary facts," the appeals court deemed the claims against Ashcroft and Mueller to be plausible because of the importance placed by the Justice Department on its post-9/11 investigation.[6] In other words, instead of providing Executive Branch officials greater deference when national security issues are at stake (as some have suggested is appropriate), the Second Circuit cited the fact that the case raises important national security issues as a reason to permit *increased* judicial scrutiny of the conduct of high-level officials. It concluded that Iqbal's complaint was "plausible" based on nothing more than a supposition that Ashcroft and Mueller *might* have had some involvement in the decision to place him into restrictive conditions of confinement.

The Second Circuit's understanding of what constitutes a "plausible" claim cannot be squared with *Twombly*. *Twombly* made clear that the mere possibility that the allegations of a complaint are true is not sufficient to meet the requirements of Rule 8(a). While it is theoretically possible that Ashcroft and Mueller, while in the midst of directing the most massive anti-

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[6] The court deemed the allegations of personal involvement "plausible" in light of "the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated 'of high interest' in the aftermath of 9/11." Pet. App. 62a.

terrorist operation in American history, took the time to concern themselves with the precise criteria employed by underlings in determining which New York-area detainees should be deemed of "high interest" (and thus should be placed in MDC's Admax unit), Iqbal has included nothing in his complaint to suggest that that scenario is plausible.

The Second Circuit felt compelled to reach its decision based on two recent decisions of this Court: *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); and *Crawford-El v. Britton*, 523 U.S. 574 (1998). Neither decision is apposite. *Swiekiewicz* held that when a Title VII plaintiff alleges that he was discharged based on discriminatory animus, he meets the requirements of Rule 8(a) without having to assert specific facts to support the claim of discriminatory motive; it is enough that he clearly alleges the discriminatory act in question (in that case, discharge from employment). 534 U.S. at 515. *Crawford-El* held that when an inmate alleges that a prison official took adverse action against him in retaliation for the inmate's exercise of First Amendment rights, the inmate – in order to defeat a motion to dismiss based on qualified immunity – need not assert facts demonstrating that the defendant harbored retaliatory intent; it was enough that the prisoner identified the specific adverse action allegedly taken by the prison official. 523 U.S. at 592. The Second Circuit concluded that *Swierkiewicz* and *Crawford-El* required it to accept at face value Iqbal's allegation that Ashcroft and Mueller acted with discriminatory intent. Pet. App. 61a.

That conclusion misses the mark. The issue is not whether Ashcroft and Mueller harbored

discriminatory motives when they took action with respect to Iqbal. Rather, the issue is whether they took any actions *at all* with respect to Iqbal. Review is warranted because the Second Circuit's interpretation of Rule 8(a)'s pleading requirements conflicts with *Twombly*.

III. THE DECISION BELOW IMPROPERLY DENIES QUALIFIED IMMUNITY FROM *BIVENS* CLAIMS THAT ASSERT SUPERVISORY LIABILITY

Review is also warranted to resolve the conflict that has developed among the federal appellate courts regarding when a government official can be held liable for the acts of subordinates. The Second Circuit held that Iqbal could prevail on his *Bivens* claim by demonstrating that Ashcroft and Mueller were "grossly negligent" in supervising subordinate officials within the Justice Department and the FBI, regardless whether they had actual knowledge of any constitutional violations committed by those subordinates. Pet. App. 14a, 62a. That holding appears to have played a role in the appeals court's denial of the motion to dismiss. Other circuits have rejected efforts to impose such derivative liability on high-level government officials.

The Petition describes in detail the "clear and well-developed split among the circuits on the question whether a government official may be held personally liable based on constructive notice of actual wrongdoing or the risk of wrongdoing by subordinates." Pet. 29. Accordingly, *amici* will not repeat that description here. Instead, *amici* write separately to emphasize that the

conflict among the federal appeals courts regarding supervisory liability calls into question the entire basis for permitting Iqbal's suit to go forward on that theory.

Amici are unaware of any prior federal appellate decision – and the Second Circuit has pointed to none – in which a high-level Executive Branch official has been held to answer in a *Bivens* action asserting liability based on constructive notice of wrongdoing by his/her subordinates. The Court recently explained that litigants alleging violation of their constitutional rights by federal officials are not necessarily entitled to a *Bivens* cause of action. To the contrary, the Court explained:

> [A]ny freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* remedy unjustified.

Wilkie v. Robbins, 127 S. Ct. 2588, 2597 (2007).

The Court explained that the decision regarding whether to recognize a *Bivens* action for alleged violations of constitutional rights requires examination of two factors. First, a court must examine "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* at 2598. Second, "'the federal courts must make the kind of remedial

determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.'" *Id.* (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

Amici submit that both of those factors counsel against recognition of a *Bivens* action against high-level Executive Branch officials based on alleged inadequate supervision of their subordinates, at least under the facts as alleged here.[7] But regardless how those two factors are resolved, the Second Circuit's holding is highly problematic. Qualified immunity is intended to protect government officials from personal liability for their official actions unless those actions violated a law that "was clearly established at the time [the] action[s]

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[7] *Amici* note that Iqbal, as a criminal defendant with access to counsel, had available to him numerous administrative and judicial avenues for challenging the conditions of his confinement during the six months he was held in MDC's Admax unit. *Amici* also submit that the extraordinary national security crisis facing the Justice Department in the relevant time period constitutes a "special factor[] counselling hesitation."

Moreover, recognizing a *Bivens* action based on supervisory liability under the circumstances of this case cuts against the central purpose of *Bivens* liability, which is to cause a federal official to hesitate if faced with a decision that jeopardizes a party's clearly established constitutional rights. That deterrence rationale is inapplicable to supervisory liability claims, in which the federal supervisor failed to detect and prevent wrongdoing by others. Under those circumstances, the threat of *Bivens* liability deters nothing, because there are no actions to deter. Imposing *Bivens* liability in such circumstances amounts to *respondeat superior* or vicarious liability, a basis for liability repeatedly rejected by federal courts. *See, e.g., International Action Center v. United States*, 365 F.3d 20, 27 (D.C. Cir. 2004) (Roberts, J.).

occurred." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). *Amici* submit that the existence of a circuit conflict on the supervisory liability issue means that there is not now – nor could there have been in 2002 – a "clearly established" standard on supervisory liability based on gross negligence, sufficient to defeat Ashcroft's and Mueller's qualified immunity claim.

Indeed, even within the Second Circuit, there appears not to have been any "clearly established" standard regarding *Bivens* actions seeking to impose supervisory liability on federal officials – the decision below relied solely on Second Circuit precedent regarding supervisory liability of state and local government officials under 42 U.S.C. § 1983. *See, e.g.,* Pet. App. 14a (citing *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995). Whether the federal courts should recognize an implied *Bivens* cause of action against federal officials for supervisory liability raises a host of policy questions – as set forth in *Wilkie* – not relevant in cases asserting supervisory liability under § 1983. The Court in *Farmer v. Brennan*, 511 U.S. 825 (1994), tacitly recognized a *Bivens* cause of action seeking to impose supervisory liability against a federal prison warden for violating an inmate's Eighth Amendment rights by allegedly taking inadequate steps to protect the inmate from assault. But *Farmer* does not address the availability of a *Bivens* action against high-level Executive Branch officials many steps removed from the prisoner, nor does it address the availability of a *Bivens* action in a case raising national security issues.

Review is warranted on the second Question Presented not only to resolve the conflict among the federal appeals courts regarding supervisory liability of

government officials, but also to resolve the conflict between the decision below and the decisions of this Court that mandate immunity for high-level federal government supervisory personnel when, as here, it has not previously been "clearly established" that the federal courts recognize an implied *Bivens* action for deficient supervision.

CONCLUSION

Amici curiae request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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