No. 07-1015

In the Supreme Court of the United States

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL, ET AL., PETITIONERS

v.

JAVAID IQBAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The court of appeals held that the former Attorney General of the United States and the current Director of the FBI may be subjected to discovery and the demands of further litigation in this *Bivens* action, because the complaint "alleges broadly" (Pet. App. 62a) that they adopted, knew about, or condoned policies that led to the allegedly discriminatory actions of much-lower-level officials in the Department in responding to the unprecedented national-security crisis in the wake of the September 11, 2001 attacks. See Pet. 2-5, 12-15. As explained in the petition, that holding is at odds with this Court's qualified-immunity precedents and conflicts with the decisions of other circuits. That holding also threatens to compromise "the effectiveness of government as contemplated by our constitutional structure," *Harlow* v. *Fitzgerald*, 457 U.S. 800, 820 n.35 (1982), at

times when—as in the aftermath of September 11, 2001—effective government is most vital.

In response, respondent identifies various "vehicle" concerns (Br. in Opp. 2, 10, 33), suggests that the solution to the conclusory allegations in the complaint is simply to allow discovery against the former Attorney General and Director of the FBI to proceed (*id.* at 10, 18-19 n.8, 19, 23), and repeatedly claims that this case involves "nothing but error correction" (*id.* at 16; see *id.* at 9, 11). But as explained below, there is no vehicle problem with this case. This Court has emphasized that qualified-immunity doctrine seeks to ensure that "'insubstantial claims' * * * [will] be resolved *prior to* discovery." *Anderson* v. *Creighton*, 483 U.S. 635, 640 n.2 (1987) (emphasis added) (quoting *Harlow*, 457 U.S. at 818). And the court of appeals itself stated that this case presents an "unsettled question" concerning the "pleading standard to overcome a qualified immunity defense" (Pet. App. 15a) arising in an area of "[c]onsiderable uncertainty" (*id.* at 19a) in this Court's case law, and a matter "essential to the ability of government officials to carry out their public roles effectively without fear of undue harassment by litigation" (*id.* at 25a).

Indeed, in his separate opinion, Judge Cabranes observed that "little 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," Pet. App. 69a-70a, and urged this Court to "reconsider[]" its precedents in this area "at the earliest opportunity," *id.* at 68a. And the concerns expressed by Judge Cabranes are amplified by the amicus brief in

support of certiorari filed on behalf of the former Attorneys General and Directors of the FBI.

The petition should be granted.

I. There Is No Vehicle Problem

Respondent presents (Br. in Opp. 33-36) three reasons why he believes this case is a "poor vehicle" for certiorari. None is persuasive.

First, he suggests (Br. in Opp. 34) that appellate jurisdiction may be lacking. But this Court has made clear that an order denying qualified immunity—like the district court's order in this case—is "immediately appealable" "to the extent it turns on an 'issue of law.'" *Behrens* v. *Pelletier*, 516 U.S. 299, 311 (1996) (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985)). At this stage, petitioners' argument is not that there is insufficient *evidence* to support respondent's allegations, or that his allegations will ultimately prove to be false.[1] Instead, petitioners' position is that respondent's conclusory allegations about their personal involvement in the decision to classify him as being "of high interest" to the government's September 11th investigation are *legally* insufficient to permit his *Bivens* claims to survive a motion to dismiss. There is no bar to considering that legal challenge to the sufficiency of respondent's claims.

Second, respondent suggests (Br. in Opp. 34-35) that a grant of certiorari would be "premature" at this stage, because he has not had an opportunity for the discovery

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[1] Respondent suggests (Br. in Opp. 3 n.2) that his claims must have substance because the United States entered into a settlement with respondent's co-plaintiff "[o]n behalf of all defendants." In fact, the United States settled only the co-plaintiff's claims *against the United States* under the Federal Tort Claims Act, creating no inference about the strength of respondent's *Bivens* claims against *petitioners*.

that would ensue under the court of appeals' decision. This Court, however, has specifically recognized that one of the purposes of the qualified-immunity doctrine is to ward off insubstantial claims *before* discovery. *Anderson*, 483 U.S. at 640 n.2. And here, the court of appeals itself recognized that allowing respondent's claims to proceed "might facilitate the very type of broad-ranging discovery and litigation burdens that the qualified immunity privilege was intended to prevent." Pet. App. 25a; see also *id.* at 69a-70a (Cabranes, J., concurring) (discussing threat of "vexatious discovery").

Likewise, this Court has held that the "possibility of presenting an immunity defense on summary judgment" does not preclude an "appeal at the motion-to-dismiss stage." *Behrens*, 516 U.S. at 307. If petitioners are entitled to prevail at the current stage of the litigation, further review cannot be rendered "premature" simply because they might otherwise prevail before trial—after subjecting petitioners to discovery. That would contradict this Court's repeated articulations of "the importance of resolving qualified immunity questions at the earliest possible stage in litigation," *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (per curiam) (citing cases), because qualified immunity is an "immunity from suit," *Mitchell*, 472 U.S. at 526 (emphasis omitted).

Third, respondent asserts (Br. in Opp. 35-36) that, since filing the complaint, he has acquired sufficient "evidence, from many sources, to * * * cure any possible pleading defect in [his] complaint."[2] But respondent

[2] By way of new "evidence," respondent mentions (Br. in Opp. 36) a recent status conference in which counsel for defendant Michael Rolince predicted that further discovery would disclose a memorandum from petitioner Ashcroft, which respondent characterizes (*id.* at 19) as "outlining how the classification system at issue in this litigation was to

has not sought to amend his complaint (and at this point does not have a right to amend it, see Fed. R. Civ. Proc. 15(a)(2)), and the possibility that he may seek to amend his complaint in the future provides no basis for denying review of the decision below, which erroneously holds that the extant complaint is not subject to dismissal under the qualified-immunity doctrine.

II. This Court Should Resolve When Pleading Allegations Are Sufficient To Vitiate High-Ranking Officials' Qualified Immunity From Suit In *Bivens* Actions

When it comes to the questions presented, respondent provides no persuasive reason to deny review. Rather, the bulk of his response focuses on his view of the merits and defense of the decision below.

a. As explained in the petition (at 11-18), the court of appeals' decision allowing the complaint to proceed past the dismissal stage conflicts with this Court's pre-

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be carried out." Rolince's counsel said she "ha[d] not seen that document" and did not "know what's in the document," but described it as "a memorandum, apparently from the [A]ttorney [G]eneral of the United States to, among other people, our clients, describing the procedure to be followed, which was apparently followed." 4/28/08 Tr. 20 (E.D.N.Y.) (No. 04-1809). Petitioners are not aware of any document meeting respondent's speculative description. Petitioners are, however, aware of a memorandum from the Attorney General about the September 11th investigation that went to Rolince and others, but that document has been available on the Internet for years, and did not address the classification system at all. Instead, it gave instructions for interviewing certain persons in the country on non-immigrant visas who were not "suspected of any criminal activity" and were to be treated "as potential witnesses" because they "might have knowledge of foreign-based terrorists." Memorandum from the Attorney General to All United States Attorneys and All Members of the Anti-Terrorism Task Forces, *Interviews Regarding International Terrorism* 2 (Nov. 9, 2001) <http://www.usdoj.gov/ag/readingroom/terrorism1.htm>.

cedents governing both the pleading standards for reviewing a motion to dismiss and the standards governing a motion to dismiss on the ground of qualified immunity. For example, this Court has explained that, to "protect[] the substance of the qualified immunity defense," district courts must require plaintiffs to "'put forward specific, nonconclusory factual allegations' * * * in order to survive a prediscovery motion for dismissal or summary judgment." *Crawford-El* v. *Britton*, 523 U.S. 574, 597-598 (1998) (quoting *Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)). The Court's subsequent decisions similarly stress that, to survive a motion to dismiss, a complaint must contain "more than labels and [legal] conclusions." *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955, 1965 (2007). The conclusory and bare-bones allegations against petitioners fail to cross that important threshold.

In defending the court of appeals' decision, respondent attempts (Br. in Opp. 12-16) to demonstrate that his allegations of petitioners' personal involvement are not "conclusory" by quoting several places in the complaint where he generally alleges—without any specific supporting allegations—that petitioners were personally involved in decisions affecting how he was treated. Thus, he calls petitioner Ashcroft the "principal architect" of unwritten policies and says petitioner Mueller was "instrumental" in the "adoption, promulgation, and implementation" of those unwritten policies. *Id.* at 12-13 (quoting Pet. App. 157a (Compl. ¶¶ 10-11)). He further claims that all of the defendants (including petitioners) "knew of, condoned, and willfully and maliciously agreed" to treat him harshly because of his race and religion, and that all of the defendants "targeted [him] for mistreatment." *Id.* at 13-14 (citing Pet. App. 172a,

191a (Compl. ¶¶ 96, 198)). But repetition and rephrasing do not make respondent's bare-bones allegation of petitioners' personal involvement any less conclusory. And without the requisite subsidiary factual allegations, respondent has not met his "obligation to provide the 'grounds' of his 'entitle[ment] to relief.'" *Bell Atl. Corp.*, 127 S. Ct. at 1964-1965.

Moreover, while respondent unabashedly defends the result reached by the Second Circuit, that court candidly acknowledged that it struggled in applying this Court's precedents and expressed concern over the result—allowing this case to proceed against petitioners—that it ultimately believed this Court's decisions compelled. See Pet. App. 15a, 25a; *id.* at 69a-70a (Cabranes, J., concurring). At a minimum, review is warranted to clarify the "[c]onsiderable uncertainty" (Pet. App. 19a) that the Second Circuit perceived in this Court's case law.

b. In attempting to deny the existence of a circuit conflict, respondent claims that decisions "announced prior to *Bell Atlantic*" cannot be used to establish any conflict. Br. in Opp. 20. But regardless of how one assesses the impact of *Bell Atlantic*, the Court's decision surely did not *lessen* the burden that a plaintiff bears in pleading a valid claim. Thus, where courts of appeals found allegations to be *inadequate* in pre-*Bell Atlantic* decisions, those same allegations would, *a fortiori*, be equally inadequate after *Bell Atlantic*. Similarly, the fact that other courts agree with the Second Circuit that *Bell Atlantic* applies outside the context of antitrust conspiracy allegations, *id.* at 21-22 (citing *Weisbarth* v. *Geauga Park Dist.*, 499 F.3d 538, 540-542 (6th Cir. 2007)), or that the Eleventh Circuit may continue to apply a heightened pleading standard, *id.* at 22 & n.10, does not diminish the conflict on the first question.

Furthermore, respondent's specific attempts to distinguish the conflicting decisions described in the petition are simply mistaken. For example, he claims that the complaint in *Marrero-Gutierrez* v. *Molina*, 491 F.3d 1 (1st Cir. 2007), is distinguishable because it "failed to specifically allege that the defendants took adverse action against [the plaintiff] because of her political affiliations." Br. in Opp. 20. But the complaint *did* allege that the plaintiff's supervisors had "performed, fostered, and encouraged the continuous persecution, harassment, transfers, reprisals and demotions" of the plaintiff "*because of*" her political affiliation. *Gutiérrez* v. *Molina*, 447 F. Supp. 2d 168, 175 (D.P.R. 2006) (emphasis added), aff'd, 491 F.3d 1 (1st Cir. 2007). Yet because the complaint lacked specific, supporting allegations making that conclusion something other than speculative, the First Circuit held that the complaint was deficient. *Marrero-Gutierrez*, 491 F.3d at 9-10. Thus, in conflict with the decision below, the First Circuit held that *Bell Atlantic* is not satisfied by a conclusory allegation that an injury resulted from the defendants' discriminatory animus.

Similarly, respondent claims that the allegations in *Evancho* v. *Fisher*, 423 F.3d 347 (3d Cir. 2005), were insufficient because they "did not even allege any action or knowledge by the defendant." Br. in Opp. 21. In fact, the complaint specifically alleged that the plaintiff's termination "was carried out by underlings reporting directly to the attorney general and/or *by the attorney general himself*." *Evancho*, 423 F.3d at 354 (emphasis added). That conclusory allegation was not held sufficient to overcome dismissal of the claim against the attorney general. *Ibid*. (refusing to credit "bald assertion" of attorney general's involvement).

c. Finally, respondent claims (Br. in Opp. 25-27) that petitioners' "status as 'high-level' officials" is irrelevant to pleading standards and qualified immunity. That claim ignores reality. Adherence to pleading standards and qualified-immunity doctrine is always important, but it is particularly critical in the case of high-ranking officials, who could face countless suits due to their supervisory responsibilities if all it takes to subject such an official to discovery or the demands of litigation is a conclusory allegation that he knew about, approved, or condoned actions taken by much-lower-level officials.

Under the decision below, high-level officials—up to and including Cabinet officers—can be subjected to discovery based solely on such conclusory allegations. In this context, the failure to "'put forward specific, non-conclusory factual allegations'" raises special concerns about "protect[ing] the substance of the qualified immunity defense," *Crawford-El*, 523 U.S. at 597-598 (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in judgment)), both because litigants may have political reasons for targeting high-level officials, and because the potential harm to government effectiveness arising from frivolous claims is correspondingly greater. See Pet. 21-24; Pet. App. 70a & n.1 (Cabranes, J., concurring). Those concerns are borne out by the former Attorneys General and FBI Directors who support petitioners here. See Barr Amicus Br. at 10-14.

For similar reasons, the fact that this case arises in "the September 11 context" (Br. in Opp. 25) cuts in favor of—and not against—giving effect to this Court's qualified-immunity precedents. Indeed, qualified-immunity principles should be most carefully followed when law-enforcement officers are responding to novel and extraordinary threats. The court of appeals, however,

reached the perverse conclusion that the Attorney General and FBI Director are *more* exposed to the burdens of litigation when they are overseeing such an unusually important law-enforcement investigation. The protections of qualified immunity should not wane at exactly those moments when high-level officials are faced with the most urgent and daunting national-security crises. Yet, as Judge Cabranes suggested, that is the upshot of the decision below.

III. This Court Should Address Whether High-Ranking Officials May Be Personally Liable Based On Constructive Notice Of Their Subordinates' Actions

As explained in the petition (at 25-33) this case presents a second, related question on which the circuits are also split, namely, whether government supervisors may be held personally liable under *Bivens* for wrongdoing of which they lacked actual knowledge on the theory that their official responsibilities gave them constructive notice of their subordinates' actions.

Respondent contends (Br. in Opp. 28) that this question has been waived because, in light of the extant Second Circuit precedent, petitioners did not brief the actual knowledge issue in the court of appeals. See Pet. 26 n.6. This Court, however, may review "an issue not pressed [in a federal court of appeals] so long as it has been passed upon," especially when the issue is "important" and the case is not one in which the petitioner "reversed its position" after "losing in the [c]ourt of [a]ppeals." *United States* v. *Williams*, 504 U.S. 36, 41-43 (1992) (internal quotation marks omitted). Here, the court of appeals expressly acknowledged that respondent's claims rest in part on "generalized allegations of supervisory involvement," Pet. App. 25a, and specifically

invoked its permissive standards for supervisory liability in holding that respondent has adequately alleged petitioners' personal involvement, Pet. App. 62a (concluding that Ashcroft and Mueller may be held personally liable "for the actions of their subordinates under standards of supervisory liability outlined above"). For example, under the Second Circuit's supervisory-liability standard, a defendant with no knowledge of the actions of lower-level officials may be held personally liable if he is found "grossly negligent in supervising subordinates who committed the violation." Pet. App. 14a. Under the decision below, therefore, constructive notice is enough.

Rather than dispute the existence of a split or the importance of the question, respondent claims (Br. in Opp. 31) that "the issue of constructive knowledge has not yet arisen" in this case because he has *alleged* that petitioners had actual knowledge of discriminatory conduct. That argument is unpersuasive because, as discussed above, it depends entirely on the assumption that respondent's conclusory allegations are sufficient to establish for current purposes petitioners' personal involvement and knowledge. If those allegations are not sufficient to plead actual knowledge, then respondent is left only with a constructive-knowledge theory.

On the merits of the constructive-knowledge question, respondent suggests (Br. in Opp. 32) that the deliberate-indifference standard from *Farmer* v. *Brennan*, 511 U.S. 825 (1994), should be limited to the Eighth Amendment context. But particularly in light of this Court's traditional reluctance to expand the scope of personal liability under *Bivens*, see generally *Wilkie* v. *Robbins*, 127 S. Ct. 2588 (2007), it would be appropriate to conclude that, unlike corporate municipalities, indi-

vidual federal officers may be held liable only on the basis of an objective standard of knowledge and their own culpable conduct. Pet. 26-28.

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For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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