ORAL ARGUMENT HELD ON DECEMBER 4, 2008
DECISION ISSUED ON FEBRUARY 20, 2009

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-5080

SCOTT TOOLEY, Plaintiff/Appellant,

v.

JANET NAPOLITANO, Homeland Security Secretary, in Her Official Capacity, *et al.*, Defendants/Appellees.

On Appeal from the United States District Court for the District of Columbia

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AMICUS CURIAE'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPELLANT SCOTT TOOLEY

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DATED: June 4, 2009

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), Amicus Curiae certifies as follows:

A. Parties and Amici. Plaintiff/Appellant in this civil action is Scott Tooley. His suit initially named Defendants George W. Bush, President; Richard B. Cheney, Vice President; Alberto Gonzales, Attorney General; Michael Chertoff, Homeland Security Secretary; Kip Hawley, Administrator of the Transportation Security Administration; Michael Hayden, Lieutenant General, Director, National Security Agency; and Michael B. Mukasey, Attorney General. On appeal, the only remaining Defendants are Janet Napolitano, in her official capacity as Secretary of Homeland Security; Gale Rossides, in her official capacity as Acting Administrator of the Transportation Security Administration; and Eric D. Holder, in his official capacity as Attorney General of the United States.

This Court appointed Cassandra S. Bernstein to serve as Amicus Curiae counsel to Plaintiff/Appellant Tooley for the purposes of this appeal. Ms. Bernstein has since withdrawn from the case and was replaced by Gabriel K. Bell.

B. Ruling Under Review. The ruling under review is the panel opinion filed on February 20, 2009.

C. Related Cases. Counsel is not aware of any pending related cases.

Richard P. Bress /by GJS
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INTRODUCTION

Amicus Curiae in support of Appellant Scott Tooley respectfully submits this supplemental brief, pursuant to this Court's May 28, 2009 order directing the parties to address "the impact on this case of the Supreme Court's decision in *Ashcroft v. Iqbal*, No. 07-1015, 2009 WL 1361536 [556 U.S. ___, 129 S. Ct. 1937] (U.S. May 18, 2009)." As explained below, *Iqbal* confirms that the panel decided this case correctly and that this Court should deny the Appellees' ("the Government's") Petition for Rehearing or Rehearing *En Banc*.

On February 20, 2009, a panel of this Court, applying *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), held that Tooley's standing allegations were sufficiently "'plausible'" to satisfy Rule 8's notice pleading standard. *Tooley v. Napolitano*, 556 F.3d 836, 839-40 (D.C. Cir. 2009). In particular, the panel found that Tooley's specific factual allegations—including the Southwest Airlines ticket agent's paranoid reaction to Tooley's comments, the bugging of his phones (as evidenced by clicking sounds on the line), physical surveillance, extraordinary airport searches, placement on watch lists, and tracking devices hidden on his and his wife's cars—give rise to a plausible inference of illicit federal governmental surveillance. *Id.* at 837, 840.

The panel properly characterized Tooley's claims not as legal conclusions, but as "factual allegations" that "the district court was required to accept . . . as

true." *Id.* at 839. The panel also properly held that Tooley's allegations "suggest a 'plausible' scenario to 'sho[w] that the pleader is entitled to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). Judge Sentelle dissented because he thought the claims implausible, but he acknowledged that "the majority's opinion correctly describes the case before us and correctly identifies the controlling authorities." *Tooley*, 556 F.3d at 842 (Sentelle, J., dissenting).

The Supreme Court's recent decision in *Iqbal* should not affect the panel's judgment in this case. Contrary to the Government's prediction, *see* Reh'g Pet. 11, *Iqbal* does not change the law or otherwise warrant rehearing. *Iqbal* nowhere purports to change the *Twombly* rule, articulated a mere two terms ago, that a complaint must "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570; *Iqbal*, 129 S. Ct. at 1949. Rather, *Iqbal* applied *Twombly*'s "context-specific" inquiry to the pleadings in that case, *see Iqbal*, 129 S. Ct. at 1950, just as the panel did here, *see Tooley* 556 F.3d at 840 (examining all of the allegations "taken in combination"). Indeed, *Iqbal* consistently quotes *Twombly* approvingly, both for overarching principles and for doctrinal details. *See, e.g., Iqbal*, 129 S. Ct. at 1949 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim for relief that is plausible on its face.'" (quoting *Twombly*, 550 U.S. at 570)); *id.* at 1951 (relying on *Twombly* for the proposition that a "'formulaic recitation of the elements'" of a cause of action

is not a "factual allegation" entitled to an assumption of truth). Because *Iqbal* did not depart from *Twombly* and is fully consistent with the panel's analysis in this case, it provides no warrant for rehearing. The Government's rehearing petition should be denied.

ARGUMENT

IQBAL CONFIRMS THAT TOOLEY'S STANDING ALLEGATIONS MEET THE RULE 8 PLEADING STANDARD

In *Iqbal*, the Supreme Court elaborated on its opinion in *Twombly* and articulated a clear formula for evaluating the sufficiency of a pleading that is consistent with the panel decision here. Because *Iqbal* reinforces the panel's analysis, it provides no grounds for rehearing. *See, e.g., Lowry v. Bankers Life & Cas. Retirement Plan*, 871 F.2d 522, 525 (5th Cir. 1989) (denying petition for rehearing where intervening Supreme Court precedent clarified the law, but did not affect the original panel analysis); *Candiano v. Moore-McCormack Lines, Inc.*, 386 F.2d 444, 449 (2d Cir. 1967) (Moore, J., concurring in denial of rehearing) (explaining that where "intervening cases would only strengthen the conclusion" adopted by the earlier panel, "a rehearing by the Court would serve no useful purpose").

The plaintiff in *Iqbal* had brought an implied *Bivens* action for damages, alleging that, "as part of [the] investigation of the events of September 11," former Attorney General John Ashcroft and Federal Bureau of Investigation ("FBI")

Director Robert Mueller had "approved" a policy whereby "thousands of Arab Muslim men" were detained on account of their "race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution." *Iqbal*, 129 S. Ct. at 1944 (internal quotation marks and citation omitted). The plaintiff further alleged that the defendants "'knew of, condoned, and willfully and maliciously agreed to subject' [him] to harsh conditions of confinement" on a discriminatory basis and "'for no legitimate penological interest.'" *Id.* (citation omitted). Defendants Ashcroft and Mueller moved to dismiss the complaint, asserting qualified immunity and arguing that the plaintiff had not adequately provided "sufficient allegations to show [defendants'] own involvement in clearly established unconstitutional conduct." *Id.*

The Supreme Court began its analysis by quoting *Twombly* for the basic proposition that, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim for relief that is plausible on its face.'" *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 570). The Court then elaborated upon "[t]wo working principles" that "underlie [its] decision in *Twombly*." *Id.* "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* Under this principle, the Court explained, "threadbare recitals of the elements of a cause of action" are not entitled to the assumption of truth at the pleading stage.

Id. The Court applied this principle to discredit the plaintiff's "legal conclusions" that the defendants "knew of, condoned, and willfully and maliciously agreed" to impose harsh detention conditions for the purpose of invidious discrimination and not for any "legitimate penological interest." *Id.* at 1951. "Second, only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 1950. Under this "context-specific" inquiry, the Court stated that the remaining factual allegations must "permit the court to infer more than the mere possibility of misconduct" to survive a motion to dismiss. *Id.* The Court assumed as true the plaintiff's remaining allegations: that "thousands of Arab Muslim men" were detained in "highly restrictive conditions of confinement until they were 'cleared' by the FBI" and that this policy was personally approved by the Attorney General and the Director of the FBI. *Id.* at 1951 (internal quotation marks and citation omitted). However, the Court found that the "obvious" explanation lay not in invidious discrimination but instead in the fact that "[t]he September 11 attacks were perpetrated by 19 Arab Muslim hijackers who [were] members . . . of al Qaeda, an Islamic fundamentalist group." *Id.* Thus , the Court held that the plaintiff's inferences of unlawful discrimination were unreasonable and his complaint was not sufficiently plausible under *Twombly*. *Id.* at 1951-52.

A. Tooley's Allegations Are Plausible Under *Iqbal*

The panel here considered these same core principles when it found that Tooley's allegations satisfy the requirements of Rule 8. First, the panel declined the Government's repeated invitations to label Tooley's allegations as "conclusory," *see, e.g.,* Appellees' Br. 14, and instead credited them as "factual allegations" that "the district court was required to accept . . . as true," *Tooley*, 556 F.3d at 839. The panel's analysis is perfectly consistent with *Iqbal*'s standard for distinguishing "factual allegations" from "legal conclusions." In *Iqbal*, the Supreme Court labeled allegations as "legal conclusions" when they constituted "nothing more than a formulaic recitation of the elements of a constitutional discrimination claim." *Iqbal*, 129 S. Ct. at 1951 (internal quotation marks and citations omitted). Tooley's complaint goes well beyond merely reciting the elements of the constitutional violations at issue. He does not, for example, baldly assert that the defendants conducted unlawful searches and seizures. Instead, as the panel found, he "alleges harm from specific events, arguably linked to government conduct," as factual matter for the district court's consideration. *Tooley*, 556 F.3d at 840.[1]

Second, the panel here, like the Supreme Court in *Iqbal*, considered whether "the factual allegations in [the] complaint . . . plausibly suggest an entitlement to

[1] Nothing in *Iqbal* suggests it is no longer permissible to credit allegations pled on information and belief, as the panel did here. *Tooley*, 556 F.3d. at 837.

relief." *Iqbal*, 129 S. Ct. at 1951; *see Tooley*, 556 F.3d at 839-40 (applying plausibility standard). Answering in the affirmative, the panel held that, "taken in combination," Tooley's specific factual allegations—including the Southwest Airlines ticket agent's paranoid reaction to Tooley's comments, the bugging of his phones (as evidenced by clicking sounds on the line), physical surveillance, extraordinary airport searches, placement on watch lists, and tracking devices hidden on his and his wife's cars—do indeed give rise to a plausible inference of illicit federal governmental surveillance. *Tooley*, 556 F.3d at 837, 840. The panel correctly recognized that "plausibility" does not mean absolute certainty. In light of *Twombly*'s admonition that a court cannot dismiss a well-pleaded complaint "'even if it strikes a savvy judge that . . . recovery is very remote and unlikely,'" *id.* at 839 (quoting *Twombly*, 550 U.S. at 556), the panel found Tooley's complaint sufficient even though "it is altogether possible that Tooley was the subject of entirely lawful wiretaps," *id.* at 838 (internal quotation marks and citations omitted).

The Government argues to the contrary that *Iqbal* requires dismissal of Tooley's complaint because there are "'more likely' explanations" for the facts alleged. Appellees' 28(j) Letter 1-2 (quoting *Iqbal*, 129 S. Ct. at 1951). This argument ignores the Supreme Court's express teaching that Rule 8's "plausibility standard is not akin to a 'probability requirement.'" *Iqbal*, 129 S. Ct. at 1949

(quoting *Twombly*, 550 U.S. at 556). It also ignores the unique 9/11 context in which the *Iqbal* Court found a more likely penological "explanation" for the restrictive confinement of Muslim men, and overlooks the contrast that the panel explicitly drew between Tooley's plausible claims and the sorts of "speculative" inferences that were rejected in *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984). The panel observed that in *United Presbyterian* allegations of "interrupted mail service and . . . disruption of speaking engagements" could not plausibly give rise to a reasonable inference of "'unlawful surveillance,'" as the more likely cause was inconvenient but perfectly lawful activity. *Tooley*, 556 F.3d at 840 (quoting *United Presbyterian*, 738 F.2d at 1380). By contrast, Tooley's claims, "[e]specially when taken in combination, ... create links to government surveillance that are more specific than the mere loss of mail," and "suggest a 'plausible' scenario" of unlawful governmental activity entitling Tooley to relief. *Id.* at 839, 840. *Iqbal* nowhere requires allegations to be evaluated in isolation, as opposed to considering the allegations "in combination" in the context of the complaint as a whole. *Id.* at 840.

Furthermore, as the panel explained, when assessing *standing*, a court's analysis "'in no way depends on the merits'" of the claims. *See id.* at 839 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)); *see also La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 368 (D.C. Cir. 1998) ("[W]hether a plaintiff has a legally

protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits. Otherwise, every unsuccessful plaintiff will have lacked standing in the first place.") (internal quotation marks and citations omitted).

B. Tooley's Allegations Are Not Patently Insubstantial Under *Iqbal*

Iqbal also undermines the Government's assertion that Tooley's claims are "'extravagantly fanciful'" or "patently insubstantial." *See* Appellees' 28(j) Letter 2 (citation omitted); Reh'g Pet. 13-14. The Supreme Court expressly declined to dismiss the plaintiff's claims in *Iqbal* under that standard: "To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. . . . It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth." *Iqbal*, 129 S. Ct. at 1951. Tooley's allegations here are likewise a far cry from the sorts of claims deemed "patently insubstantial" or "extravagantly fanciful," and the panel correctly declined to expand those categories here. *See* Reh'g Resp. 9-11 & n.4 (cataloging patently insubstantial allegations involving, *e.g.*, government's use of UFO technology, mind manipulations, combination of human and reptile DNA, and insertion of computer chips into a person's head); *accord Iqbal*, 129 S. Ct. at 1959 (Souter, J., dissenting) (noting that "extravagantly fanciful" claims warranting dismissal are those that are "sufficiently fantastic to

defy reality," such as "claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel").

CONCLUSION

Nothing in *Iqbal* suggests that the panel erred in its assessment of Tooley's complaint, regarding the sufficiency of his factual allegations, the plausibility of his inferences, or the realistic nature of his allegations. If anything, *Iqbal* arguably strengthens the panel's conclusions on these issues. As *Iqbal* would not have changed the outcome in *Tooley*, the finality of the panel's decision should not be disturbed. *See, e.g.*, *Lowry*, 871 F.2d at 525; *Candiano*, 386 F.2d at 449 (Moore, J., concurring in denial of rehearing). The Government's Petition for Rehearing or Rehearing *En Banc* should be denied.

DATED: June 4, 2009

Respectfully submitted,

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