Nos. 15-1358, 15-1359, 15-1363

IN THE

Supreme Court of the United States

JAMES W. ZIGLAR,
Petitioner,

v.

AHMER IQBAL ABBASI, *et al.*,
Respondents.

(Caption continued on inside cover)

On Writs of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF OF FORMER U.S. ATTORNEYS GENERAL WILLIAM P. BARR, ALBERTO R. GONZALES, EDWIN MEESE III, and DICK THORNBURGH; AND WASHINGTON LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Richard A. Samp
(Counsel of Record)
Mark S. Chenoweth
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
202-588-0302
rsamp@wlf.org

Date: November 25, 2016

No. 15-1359

JOHN D. ASHCROFT, former U.S. Attorney General, and
ROBERT MUELLER, former Director of the FBI,
Petitioners,

v.

AHMER IQBAL ABBASI, *et al.*,
Respondents.

No. 15-1363

DENNIS HASTY and JAMES SHERMAN,
Petitioners,

v.

AHMER IQBAL ABBASI, *et al.*,
Respondents.

QUESTIONS PRESENTED

1. Whether the judicially inferred damages remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), should be extended to the novel context of this case, which seeks to hold the former Attorney General, former Director of the Federal Bureau of Investigation (FBI), and other senior federal government officials personally liable for policy decisions made about national security and immigration in the aftermath of the September 11, 2001 terrorist attacks.

2. Whether those senior officials are entitled to qualified immunity for their alleged role in the treatment of Respondents, because it was not clearly established that aliens legitimately arrested during the September 11 investigation could not be held in restrictive conditions until the FBI confirmed that they had no connections with terrorism.

3. Whether Respondents' allegations that those senior officials personally condoned the implementation of facially constitutional policies because of an invidious animus against Arabs and Muslims are plausible, as required by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), in light of the obvious alternative explanations–that the actions of the senior Justice Department officials were motivated by a concern that, absent fuller investigation, the government would unwittingly permit a dangerous individual to leave the United States, and that the actions of the heads of the Metropolitan Detention Center were motivated by a desire to comply with the FBI's terrorism designations.

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INTERESTS OF *AMICI CURIAE*

The *amici curiae* are four former Attorneys General and a public- interest law firm.[1] *Amici* 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. *Amici* 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. *Amici* also worry that the decision below inappropriately expands judicially inferred damages remedies against federal officials for alleged violations of constitutional rights, and it adopts a standard for what constitutes a "plausible" claim for relief that is far broader than the one established by this Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

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 Alberto R. Gonzales served as Attorney General of the United States from 2005 to 2007. He also served as White House Counsel to

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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. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

President George W. Bush from 2001 to 2005 and as a Justice on the Texas Supreme Court from 1999 to 2001.

The Honorable Edwin Meese III served as 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 Dick 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.

Washington Legal Foundation (WLF) is a non-profit public-interest law firm and policy center. It regularly appears in this and other federal courts to support appropriate enforcement of pleading standards in civil litigation.

Amici also filed an *amicus curiae* brief in support of the three certiorari petitions filed by Petitioners. Several of the former senior Justice Department officials who signed the earlier *amicus curiae* brief could not be contacted during Thanksgiving week to ascertain whether they wished to join this brief as well.

STATEMENT OF THE CASE

Petitioners in Nos. 15-1358 and 15-1359 are high-ranking federal officials who played a prominent role in directing the Government's investigation into the events of September 11, 2001, when al Qaeda's murderous and unprovoked attack on American

civilians caused nearly 3,000 deaths. Respondents are six aliens who were arrested for immigration violations and were detained in connection with that investigation, under highly restrictive conditions at the Metropolitan Detention Center (MDC) in Brooklyn.[2] They contend that the conditions of their detention violated their Fifth Amendment rights to substantive due process and equal protection of the laws.

Respondents allege that U.S. Attorney General John Ashcroft and FBI Director Robert Mueller, Petitioners in No. 15-1359, actively supervised the 9/11 investigation. They allege that Ashcroft and Mueller developed a policy whereby the federal government would arrest any Arab or Muslim man who, while being questioned in connection with the investigation, was determined to be in the country in violation of immigration laws. Pet. App. 245a.[3] They further allege that Petitioners established a "hold-until-cleared" policy, whereby aliens being detained because they were deemed "of interest" or "of high interest" to the investigation were not to be released until the FBI affirmatively cleared them of terrorist ties. *Id.* at 245a-246a. Ultimately, the Immigration and Naturalization Service (INS) placed 762 detainees on its Custody List

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[2] In using the term "Respondents," *amici* refer only to those six men. Several other plaintiffs/respondents were not detained at the MDC. The Second Circuit dismissed their claims, and they have not petitioned the Court for review of that dismissal. Petitioners in No. 15-1363 are the former Warden and Associate Warden at the MDC, Dennis Hasty and James Sherman.

[3] "Pet. App." refers to the Petition Appendix filed in No. 15-1363.

(the "INS List"); those individuals were thereby made subject to the hold-until-cleared policy. *Id.* at 9a. James W. Ziglar, Petitioner in No. 15-1358, served as Commissioner of INS from 2001 to 2002.

Bureau of Prisons (BOP) policy required that those classified as "of interest" or "of high interest" were to be confined "in the most restrictive and secure conditions permitted by BOP policy." *Id.* at 49a. At the MDC, that meant detention in the facility's Administrative Maximum Special Housing Unit ("ADMAX SHU"), a unit in which the conditions of confinement were quite harsh. Respondents do not contend that the confinement policies adopted for the ADMAX SHU and applied to Respondents violated BOP policy. Respondents each were confined in ADMAX SHU for several months before being cleared of involvement in terrorism and deported. Respondents were among 84 unauthorized aliens housed in ADMAX SHU during 2001-02. The great majority of individuals detained due to their "of interest" or "of high interest" status were detained at non-federal facilities (such as the Passaic County Jail), where their conditions of confinement were far less harsh.

The Fourth Amended Complaint alleges that Petitioners violated Respondents' substantive due process rights by subjecting them to punitive conditions of confinement that allegedly served no valid governmental purpose. Although acknowledging that those conditions might have served a valid purpose if Petitioners had had reason to believe that the detainees were terrorists, Respondents allege that all Petitioners were aware that, for many of the aliens

designated "of interest" or "of high interest," the government lacked any evidence plausibly connecting them to terrorism. Petitioners are alleged to have violated Respondents' equal protection rights by singling them out for harsh treatment based on their race, religion, and/or ethnic or national origin. *Id.* at 335a.

The district court granted motions to dismiss filed by Ashcroft, Mueller, and Ziglar (the "DOJ Petitioners"). The court concluded that the complaint did not plausibly allege punitive intent, Pet. App. 189a, nor did it plausibly allege that they "directed the detention of the plaintiffs in harsh conditions of confinement due to their race, religion, or national origin." *Id.* at 200a. The court largely denied motions to dismiss filed by the MDC-based defendants, including Petitioners Hasty and Sherman. *Id.* at 190a-194a, 200a-202a, 219a-220a; 224a-225a. They filed an interlocutory appeal from the denial of their assertion of qualified immunity. Respondents appealed dismissal of claims against the DOJ Petitioners.

A divided Second Circuit reinstated the substantive due process and equal protection claims against the DOJ Petitioners and largely affirmed denial of the MDC Petitioners' motion to dismiss. Pet. App. 1a-156a. The appeals court first concluded that a *Bivens* remedy was available for each of Respondents' Fifth Amendment claims. *Id.* at 21a-29a. It held that Respondents' status as unauthorized aliens and the national security context of their detention was irrelevant to the *Bivens* analysis.

The appeals court also rejected Petitioners'

assertion of qualified immunity. *Id.* at 46a-47a, 55a-57a, 71a-72a, 80a-81a. The court concluded that federal case law as of 2001 clearly established that Petitioners' alleged conduct violated Respondents' constitutional rights.

The appeals court also concluded that the complaint adequately stated claims against all Petitioners. The Court recognized that the DOJ Petitioners did not create the allegedly punitive confinement conditions in question. *Id.* at 30a. It nonetheless held that they could be charged with responsibility for those conditions, because the complaint alleged that: (1) they were aware that the New York office of the FBI had designated many Arab/Muslim detainees as "of interest" or "of high interest" despite lacking any credible evidence of their ties to terrorism; and (2) they approved merging the New York FBI's list of detainees (the "New York List") with the INS List, thereby ensuring application of the hold-until-cleared policy to Arab/Muslim detainees whom they knew could not plausibly be tied to terrorism. Pet. App. 30a-46a, 59a-65a.

The MDC Petitioners similarly asserted that the complaint failed to state a claim against them for constitutional violations, arguing that the most plausible inference to be drawn from the complaint's allegations is that they placed the six Respondents in the ADMAX SHU not for punitive or discriminatory purposes (as alleged by Respondents) but because BOP policy required them to do so. The Second Circuit rejected that assertion, noting that the complaint alleged that the MDC Petitioners eventually learned that the FBI was designating Arab/Muslim men as "of

interest" and "of high interest" without any evidence of ties to terrorism. *Id.* at 48a-52a. The court concluded that the complaint adequately alleged claims against the MDC Petitioners by alleging that they continued to abide by the FBI's detainee classifications even after learning that those classifications lacked evidentiary support. *Ibid.*

Judge Raggi dissented. Pet. App. 83a-156a. She asserted that the courts should not recognize the claimed *Bivens* remedies against federal officials, when the claimed remedies challenge official "national security policy pertaining to the detention of illegal aliens in the aftermath of terrorist attacks by aliens operating within this country." *Id.* at 84a. Under those circumstances, she concluded, "Congress, not the judiciary, is the appropriate branch to decide whether the detained aliens should be allowed to sue executive policymakers in their individual capacities for money damages." *Ibid.*

She also concluded that Petitioners were entitled to qualified immunity. *Id.* at 84a-85a. She explained:

> The law did not [in 2001-02] clearly alert federal authorities responding to these challenges that they could not hold lawfully arrested illegal aliens—identified in the course of the 9/11 investigation and among the group targeted by al Qaeda—in restrictive (as opposed to general) confinement pending FBI-CIA clearance of any ties to terrorism unless there was prior individualized suspicion of a terrorist connection. Indeed, I am not

> sure that conclusion is clearly established even today.

Id. at 85a.

Judge Raggi also concluded that the complaint failed to adequately allege discriminatory treatment, stating that the complaint failed to allege facts from which one could reasonably infer that Petitioners acted "because of, not merely in spite of, the action's adverse effects" on Arabs/Muslims. *Id.* at 130a (quoting *Iqbal*, 556 U.S. at 681); *see also id.* at 142a-144a. She asserted, for example, that the complaint provides no factual basis for inferring that anyone decided to merge the New York List with the INS List "*because* it would keep [Respondents] in restrictive confinement." *Ibid.* Nor could the actions of the MDC Petitioners "plausibly imply discriminatory intent because they are obviously and most likely explained by reliance on the FBI's designations of each [Respondent] as a person 'of high interest,' or 'of interest,' to the ongoing terrorist investigation." *Id.* at 151a.

An equally divided Second Circuit denied rehearing *en banc*. Pet. App. 227a-240a. Judge Jacobs issued an opinion dissenting from the denial, joined by Judges Cabranes, Raggi, Hall, Livingston, and Droney. *Id.* at 231a-240a.

SUMMARY OF ARGUMENT

Amici agree that the Second Circuit's judgment should be reversed based on each of the three grounds urged by Petitioners. We write separately to focus particular emphasis on the qualified immunity

question. 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—by directing the district court to proceed with discovery in a case that is already *14 years old*—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 early dismissal, current and former government 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* are concerned by the disruptive effects of such discovery, and they are very concerned that such disruptions are likely to impair the ability of high-level officials to carry out their missions effectively. Such disruptions are impermissible under the terms of the qualified immunity doctrine and the pleading standards established by the Federal Rules of Civil Procedure, particularly when (as here) the challenged actions involve sensitive national security issues.

Respondents raise constitutional claims that are largely the same as those at issue in *Iqbal* and that arise from precisely the same underlying facts: the

detention of Arab/Muslim unauthorized aliens at the MDC under harsh conditions in 2001-02. *Iqbal* determined that the complaint at issue there did not adequately state a constitutional claim against Ashcroft and Mueller for their alleged role in the detentions. The Second Circuit decision, by reaching the opposite conclusion in connection with a complaint that added little in the way of new factual allegations, conflicts with *Iqbal*. The considerations that led the Court to overturn the Second Circuit's assessment of the adequacy of the pleadings in *Iqbal* should also persuade the Court to overturn the appeals court's similar assessment in this case. In particular, Respondents' complaint includes no factual allegations from which one can reasonably infer that Ashcroft, Mueller, and Ziglar played any role in determining the conditions of Respondents' confinement.

Similarly unwarranted is the Second Circuit's recognition of a judicially inferred damages remedy against senior Executive Branch officials for alleged infringement of Respondents' constitutional rights in the course of carrying out their national security responsibilities. The Second Circuit's unprecedented recognition of *Bivens* actions to challenge Executive Branch national security policy conflicts with decisions of this Court. The Court has cautioned against recognition of new *Bivens* remedies when, as here, "special factors" counsel hesitation. Those special factors include the national security and immigration-law aspects of this case (areas in which courts traditionally defer to the judgments of the elected branches), the availability of alternative remedies (*e.g.*, *habeas corpus* proceedings), the fact that the suit directly challenges policymaking decisions of the

Executive Branch, and the failure of Congress to provide an express damages remedy despite its considerable focus on detention-related issues arising in the course of the 9/11 investigation.

ARGUMENT

I. THE SECOND CIRCUIT'S QUALIFIED IMMUNITY RULING 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 v. Fitzgerald, 457 U.S. 800, 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.

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

Events proved Justice Stevens's prescience. Lawsuits seeking damages from senior Executive Branch officials for actions they took regarding

national security matters proliferated throughout the administrations of Presidents Barack Obama, George W. Bush, and Bill Clinton. *See, e.g.*, *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012) (suit against Defense Secretaries Leon Panetta and Donald Rumsfeld alleging mistreatment of military detainee); *Ashcroft v. Al-Kidd*, 563 U.S. 731 (2011) (suit against Attorney General alleging improper authorization of material-witness warrants to detain terrorism suspects); *Gonzalez v. Reno*, 325 F.2d 1228 (11th Cir. 2003) (suit against Attorney General arising from execution of an arrest warrant for six-year-old Elian Gonzalez).

A. The Qualified Immunity Doctrine Was Crafted to Reduce the Burden on Government Officials of Defending Against Damages Claims

The Court has adopted several measures designed to reduce the burdens imposed on government officials when they are required to respond to claims seeking an award of damages. In particular, 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." *Mitchell*, 472 U.S. 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.").

Qualified immunity shields a government official from liability in an individual capacity so long as the official has not violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. To overcome the defense of qualified immunity the plaintiff must show: (1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a statutory or constitutional right; and (2) the right was clearly established at the time of the deprivation. *Saucier*, 533 U.S. at 199. Courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Because Respondents cannot in any event satisfy the second of the two *Saucier* requirements—a showing that the constitutional rights they assert were "clearly established"—Petitioners are entitled to dismissal on the basis of qualified immunity.

B. Pre-2001 Case Law Did Not Clearly Establish that the Harsh Conditions Allegedly Imposed by Petitioners Violated Respondents' Due-Process Rights

The Second Circuit pointed to no pre-2001 decision whose holding directly supported its conclusion: that substantive due process prohibited federal officials from confining lawfully arrested unauthorized aliens in harsh conditions while

investigating their possible involvement in terrorism.[4] Instead, it merely cited *Bell v. Wolfish*, 441 U.S. 520 (1979), for the more general proposition that "a particular condition or restriction of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees." Pet. App. 47a.

But that citation does not begin to answer the qualified-immunity question raised by this case: did court decisions published by 2001 clearly establish that the harsh conditions of confinement at issue here are not reasonably related to a "legitimate governmental objective?" In 2001-02, federal officials concluded that imposing harsh conditions could assist the federal government in responding to a national-security crisis, by preventing detainees from communicating with the outside world, reducing the potential for violence, and increasing the likelihood that detainees might assist with ongoing terrorism investigations. In the absence of pre-2001 case law arising in similar factual settings and rejecting that conclusion, Petitioners are entitled to good-faith immunity from damages claims challenging the conclusion.

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[4] The Second Circuit did not contest that the harsh conditions adopted at the MDC could, in appropriate circumstances, be imposed on convicted felons. Indeed, it expressly acknowledged that imposing those conditions on "individuals with suspected ties to terrorism" could be justified based on "national security grounds." Pet. App. 45a. Nor did the court contest that federal immigration officials were entitled to detain Respondents and other unauthorized aliens under generally applicable prison conditions.

The Second Circuit's contrary holding sharply conflicts with this Court's qualified immunity case law. The Court has repeatedly explained that "[a] clearly established right is one that is sufficiently clear that *every* reasonable official would have understood that what he is doing violates that right. ... Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (emphasis added). Perhaps the best evidence that the substantive due process right asserted by Respondents was not "clearly established" is the Second Circuit's 6-6 vote denying rehearing *en banc* in this case. That half the judges on the Second Circuit concluded that Petitioners' alleged conduct did not violate the Due Process Clause is convincing evidence that the contrary view was not "clearly established." The fact that the former senior Justice Department officials who filed this brief find the alleged conduct constitutionally unobjectionable is further evidence that the Second Circuit's view was not clearly established in 2001.

The Second Circuit erred by examining the due process issue at too high a level of generality. This Court has "repeatedly told courts ... not to define clearly established law at a high level of generality. ... The general proposition, for example, that an unreasonable search and seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." *Al-Kidd*, 563 U.S. at 742. Similarly, the Second Circuit's general proposition—that the Due Process Clause prohibits imposing on pre-trial detainees punishment that is not reasonably related to a legitimate government objective—is of little help in

determining whether it was "clearly established" that the harsh conditions of confinement at issue here are not reasonably related to any legitimate objective.

As the D.C. Circuit has pointed out:

> It does no good to allege that police officers violated the right to free speech, and then conclude that the right to free speech has been "clearly established" in this country since 1791. Instead, courts must define the right to a degree that would allow officials "reasonably [to] anticipate when their conduct may give rise to liability for damages."

Int'l Action Ctr. v. United States, 365 F.3d 20, 25 (D.C. Cir. 2004) (Roberts, J.) (quoting *Anderson*, 483 U.S. at 639). Federal officials in 2001, based on then-existing case law, could not reasonably have anticipated that their decision to impose harsh conditions of confinement on unauthorized aliens (as a means of securing information about terrorist activity, preventing detainees from communicating with the outside world, and reducing the potential for violence) would give rise to liability for damages.

The Second Circuit's reliance on *Bell v. Wolfish* to support its no-qualified-immunity finding was misplaced. The plaintiffs in *Wolfish* were individuals being held in a federal detention facility as they awaited trial; they contended that the conditions of their confinement were overly harsh and thus violated their substantive due process rights. The Second Circuit agreed and enjoined more than 20 of the

facility's practices on constitutional grounds. In his opinion for the Court that reversed the Second Circuit, Justice Rehnquist stated that harsh conditions of confinement do not amount to proscribed "punishment" so long as those conditions are not "arbitrary and purposeless"; that is, they are "reasonably related to a legitimate governmental objective." *Wolfish*, 441 U.S. at 538-39.[5] Accordingly, *Wolfish* cannot plausibly be deemed to have provided government officials with clear guidance regarding constitutionally impermissible detention practices because each of the practices challenged in that case was *upheld*.

Thus, while *Wolfish* established at a high level of generality that at some point conditions of confinement can become so extreme that they cross the line into proscribed punishment, the decision cannot legitimately be relied on by Respondents as a basis for denying qualified immunity to Petitioners. The only other decision relied on by the Second Circuit as grounds for denying qualified immunity to the DOJ Petitioners was *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev'd on other grounds sub nom.*, *Ashcroft v. Iqbal* , 556 U.S. 662 (2009). Even if this Court were to accept the continued validity of *Iqbal v. Hasty*, that decision provides no support for the Second Circuit's qualified-immunity ruling because it was handed down more than five years *after* Respondents were released from custody. Government officials are entitled to

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[5] The Court concluded, for example, that the facility's "double bunking" practice (housing two inmates in cells designed for only one) did not violate due process rights because the practice was adopted to accommodate increases in the inmate population, not to punish inmates. *Id.* at 541-42.

qualified immunity unless they have violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. The Second Circuit's 2007 pronouncements regarding due-process limits on conditions of confinement would, of course, have been unknown to a "reasonable person" in 2001-02.

C. Under the Second Circuit's Ruling, Virtually Every Alleged Violation Would Be Deemed "Clearly Established"

Qualified immunity provides government officials with "an entitlement not to stand trial or face *the other burdens of litigation*." *Mitchell*, 472 U.S. at 526 (emphasis added). Yet, if the Second Circuit's formulation of qualified immunity is upheld, that essential purpose of the doctrine will be rendered a nullity: motions to dismiss on the pleadings will be denied whenever a detainee complaining about the conditions of his confinement asserts that the restrictions imposed on him are not reasonably related to a legitimate governmental objective.

Respondents allege that the harsh conditions imposed on them could not possibly have served any legitimate governmental objective, but they have pointed to no case law clearly establishing that proposition. While the Fourth Amended Complaint (FAC) asserted that Petitioners intended that their policies would arbitrarily "sweep up many individuals ... with no reason to suspect them of terrorism," Opp. Cert. Br. at 5, it included no specific factual allegations to support that bare assertion.

The FAC incorporates by reference the findings of a 2003 report prepared by the Justice Department's Office of Inspector General ("OIG Report").[6] The OIG Report concluded that the DOJ Petitioners did not direct anyone to engage in the mass incarceration of aliens from the Middle East determined to be in the United States in violation of immigration laws. Rather, the FBI instructed its agents that "if during the course of the investigation, aliens were encountered who had violated the law, they should be charged with appropriate violations, particularly if the alien had a relationship to the ... attacks." OIG Report at 13, Joint Appendix (J.A.) 61. The INS instructed its agents to "exercise sound judgment" and to detain only those unauthorized aliens in whom the FBI had "an interest." *Id.* at 44, J.A. 108. Although Respondents allege that the FBI designated some unauthorized aliens (including themselves) as "of interest" or "of high interest" in the 9/11 investigation despite the absence of individualized evidence tying them to terrorism, Respondents do not allege that those designations were the product of any actions by either the DOJ Petitioners or the MDC Petitioners. Indeed, it is uncontested that many unauthorized aliens questioned by the FBI in connection with the 9/11 investigation were *not* designated "of interest" or "of high interest," and thus were subjected to neither the hold-until-cleared policy nor the harsh conditions of confinement imposed on unauthorized aliens held in the MDC's ADMAX SHU.

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[6] *See* Office of the Inspector General, U.S. Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003).

The Second Circuit nonetheless concluded that Petitioners were not entitled to qualified immunity, Pet. App. 46a-47a, 55a-57a, thereby subjecting them to the burdens of litigation from which the qualified-immunity doctrine is intended to protect government officials. It did so based on nothing more than naked allegations that the restrictions imposed on Respondents were not reasonably related to a legitimate governmental objective. Any detainee can make an identical allegation with respect to the fact-specific conditions of confinement imposed on him.[7] If the Second Circuit's qualified-immunity standard is upheld, it is difficult to envision any such lawsuit being dismissed at the pleadings stage based on a qualified-immunity defense.

II. RESPONDENTS' COMPLAINT DOES NOT SATISFY THE PLEADING STANDARDS ARTICULATED BY *IQBAL* AND *TWOMBLY*

Even if harsh conditions of confinement under which a detainee is held fully comply with due-process constraints, federal officials may not impose those conditions on an individual for the purpose of

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[7] The Second Circuit accepted Petitioners' assertion that the ADMAX SHU's harsh conditions of confinement are constitutionally permissible when government officials possess individualized evidence linking a detainee to terrorism. *See* Pet. App. 31a, 46a. Respondents, while contending that that issue "is not relevant to these Petitions," state that they disagree with that assertion. Opp. Cert. Br. 29 n.11. Respondents cite no case law to support their contrary position. Yet, Respondents apparently are prepared to argue that qualified immunity would not bar their due process claims even if the FBI had possessed individualized evidence linking them to terrorism.

discriminating against him on the basis of religion or ethnicity. But Respondents have not alleged any facts that render plausible their intentional discrimination claims against Petitioners. Accordingly, Petitioners are entitled to dismissal of the claims that they violated Respondents' equal protection rights.

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 earlier requirements 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.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 n.3 (2007).

Twombly held that Rule 8(a)(2) requires a complaint to include sufficient "factual matter" to provide "plausible grounds" to infer that the allegations of the complaint are true. *Id.* at 556. 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 557. 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 557, 570.

Iqbal applied the Rule 8 pleading standards to claims substantially identical to those raised by Respondents. The plaintiff in *Iqbal* (a citizen of Pakistan arrested following 9/11 for violating immigration laws) sued Ashcroft, Mueller, and other federal officials for the harsh conditions he endured while incarcerated in ADMAX SHU. Reversing the Second Circuit, this Court determined that Iqbal had inadequately pleaded that Ashcroft and Mueller violated his Fifth Amendment rights to substantive due process and equal protection. *Iqbal*, 556 U.S. at 682-83. The Court concluded that although Iqbal claimed that they adopted a policy of detaining individuals in ADMAX SHU "because of their race, religion, or national origin," his *factual* allegations were insufficient to state a plausible discrimination claim. *Ibid.* The Court rejected his assertion that one could infer intentional discrimination from DOJ's hold-until-cleared policy, stating, "All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.* at 683.

Iqbal's logic requires Rule 8 dismissal of Petitioners' claims. The same considerations that led the Court to overturn the Second Circuit's assessment of the adequacy of the pleadings in *Iqbal* should persuade the Court to once again reverse the appeals

court.

In concluding that Respondents satisfied the Rule 8 pleading standard, the Second Circuit focused primarily on a single factual allegation on which *Iqbal* had not focused: the decision of DOJ officials to merge the New York List with the INS List. The appeals court concluded that the merger decision ensured prolonged detention for those on the New York List because they would thereafter be subjected to DOJ's hold-until-cleared policy. Pet. App. 37a-42a, 59a-62a. It concluded that one could plausibly infer discriminatory intent (as well as an intent to punish without any legitimate governmental objective) from the DOJ Petitioners' approval of the merger because they were aware that: (1) the FBI's New York office had placed many individuals on the New York List despite lacking evidence connecting them to terrorism; and (2) the merger could result in those individuals' being subjected to harsh conditions of confinement for a prolonged period. *Ibid.*

The merging of the two lists will not bear the weight the Second Circuit assigns to it, even putting aside the substantial evidence (catalogued by Judge Raggi in her dissent) that Ashcroft, Mueller, and Ziglar played no role in the merger decision. Even if one assumes that they were aware that some Arab/Muslim men would suffer prolonged detention in ADMAX SHU as a result of merging the lists, the Court has repeatedly cautioned that intentionally invidious discrimination is not demonstrated by showing that a defendant is aware that members of a specific religious or ethnic group will be adversely affected by a challenged decision. As the Court explained in

concluding that Iqbal had inadequately alleged intentional discrimination by Ashcroft and Mueller on the basis of race, religion, or national origin:

> Under extant precedent purposeful discrimination requires more than intent as volition or intent as awareness of consequences. It instead involves a decisionmaker's undertaking a course of action because of, not merely in spite of, [the action's] adverse effect on an identifiable group. It follows that, to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

Iqbal, 556 U.S. at 676-77 (citations omitted).

By far the most plausible inference one can draw from the decision to merge the lists is that federal officials sought to ensure a thorough review of all potential suspects, thereby minimizing the possibility that any terrorists could slip through the cracks. Petitioners may have been aware, of course, that their decision would result in some Arab/Muslim unauthorized aliens enduring prolonged detention. But while Respondents allege that Petitioners knew that some of those on the New York List were not plausible suspects, there is no allegation that they had

any short-term means of distinguishing such individuals from others who really were associated with terrorist activity. The only means of doing so without risking the release of dangerous individuals was to mandate a thorough review of all those on the New York List—a review that was facilitated by merging the two lists. Because this better-safe-than-sorry rationale is a far more plausible explanation of Petitioners' conduct than is the Second Circuit's intentional-discrimination theory, the factual allegations of Respondents' complaint are insufficient to state a claim for intentional racial, religious, or national-origin discrimination.[8]

The FAC claims that Petitioners were sufficiently familiar with Respondents' individual cases that they knew that "there was no reason to suspect" that the six Respondents had "any connection to terrorism." Opp. Cert. Br. 25 (citing FAC ¶¶ 39-44, 47, 61, and 67). But Respondents have not included any supporting factual allegations that could lend plausibility to their claims regarding Petitioners' knowledge. In the absence of such supporting information, the allegation that the DOJ Petitioners knew that there was no evidence linking Respondents

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[8] The Second Circuit's intentional-discrimination inference is further undercut by the fact that a significant majority of Arab/Muslim males on the FBI List were incarcerated at the Passaic County Jail or other non-federal facilities and thus were not subjected to the harsh conditions experienced by those assigned to the MDC. Pet. App. 147a-148a. It is not plausible to suggest that the DOJ Petitioners intended to discriminate against Respondents *because of* their race, religion, or national origin when a large percentage of similarly situated Arab/Muslim detainees were not subjected to similarly harsh conditions.

to terrorism (or even knew that Respondents were being detained at the MDC) is utterly implausible. Throughout the relevant time period, the DOJ Petitioners were devoting their energies to protecting the Nation during its gravest national security crisis in decades. It defies reason to assert (without supporting factual allegations) that they had the time to become personally familiar with Respondents' cases and had concluded that Respondents were among the aliens added to the New York List despite the absence of evidence suggesting a link to terrorism. Without a plausible factual allegation explaining how, despite all odds, Petitioners acquired such specific knowledge of Respondents' circumstances, Respondents have not adequately pled that the DOJ Petitioners discriminated against them *because of* their race, religion, or national origin.

Respondents assert that their equal protection claim should survive a motion to dismiss because the FAC alleges that they were detained "because of their ethnicity or religion" and because Rule 8 requires that that allegation "must be accepted as true." Opp. Cert. Br. 26 (citing FAC ¶¶ 41, 63-64, 67). But Rule 8 does not require a court ruling on a motion to dismiss to accept at face value bare allegations of discriminatory intent when the facts alleged are more plausibly explained by a nondiscriminatory motive. As *Twombly* explained, Rule 8(a)(2) requires a complaint to include sufficient "factual matter" to provide "plausible grounds" to infer that the allegations of the complaint are true. 550 U.S. at 556.

Thus, the Court in *Twombly* declined to accept at face value the plaintiffs' bald allegation that the

defendants had conspired to restrain trade, because the plaintiffs alleged no corroborating facts, and the facts alleged were consistent with the defendants' innocent explanation of their conduct. *Id.* at 564-67. In *Iqbal*, the Court declined to credit the plaintiff's bald allegation of discriminatory intent (an allegation the Court labeled "conclusory") because the alleged facts surrounding the plaintiff's arrest and incarceration at the ADMAX SHU were more consistent with a nondiscriminatory motivation. *Iqbal*, 556 U.S. at 680-82. So too, the FAC's conclusory allegation that Respondents were the victims of intentional discrimination need not be credited in the absence of corroborating factual allegations and in light of other information rendering implausible the claim that the DOJ Petitioners acted with an intent to discriminate.

The complaint's factual allegations with respect to the MDC Petitioners are similarly deficient. In upholding the discrimination claim against the MDC Petitioners, the Second Circuit pointed to allegations that they eventually learned that the FBI was designating Arab/Muslim men as "of interest" and "of high interest" without any evidence that they had ties to terrorism. But even if they thus became aware that the detention policy was having a disparate impact on Arab/Muslim men, one cannot plausibly infer from those allegations that they continued to hold such men in ADMAX SHU *because* they intended to discriminate against Arab/Muslim men. Rather, by far the most plausible inference is that they did so because they were required to do so under BOP Policy.

The Second Circuit's rationale could have serious negative impacts on national security. The implication

of the appeals court's decision is that once the MDC Petitioners became convinced that there was little credible evidence of terrorist ties for some of the unauthorized aliens designated as "of interest" or "of high interest" by the FBI, they should have deliberately disobeyed BOP Policy and removed those individuals from the ADMAX SHU. *Amici* respectfully submit that it is wholly inappropriate for federal courts to interfere with the Executive Branch chain of command in that manner, interference that could potentially disrupt the ability of senior officials to direct subordinates in responding to national-security threats.

This Court has stated unequivocally that "[p]olice are charged to enforce laws until and unless they are declared unconstitutional." *Michigan v. DeFillippo*, 443 U.S. 31, 37-38 (1979). The Court observed, "Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement." *Ibid.* Accordingly, even if (as alleged by Respondents) the MDC Petitioners became convinced (based on the limited data shared with them by the FBI) that some of the unauthorized aliens being held in the ADMAX SHU were not plausibly suspected of terrorism despite their "of interest" or "of high interest" classifications, the MDC Petitioners were under no constitutional obligation to disobey BOP policy and alter the conditions of confinement of those individuals.[9]

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[9] Respondents also allege that Petitioner Hasty was deliberately indifferent to mistreatment allegedly inflicted on some

Finally, the Second Circuit upheld Respondents' claims that Petitioners' allegedly discriminatory actions violated 42 U.S.C. § 1985(3), which makes it unlawful for "two or more persons" to "conspire ... for the purpose of depriving ... any person or class of persons of the equal protection of the laws." In the absence of any plausible allegations that Respondents were denied "the equal protection of the laws," the FAC's conspiracy claim is equally implausible.

III. THE SECOND CIRCUIT'S DECISION TO RECOGNIZE A JUDICIALLY INFERRED DAMAGES REMEDY FOR RESPONDENTS' CONSTITUTIONAL CLAIMS CONFLICTS WITH DECISIONS OF THIS COURT

Petitioners have ably demonstrated that the Second Circuit's unprecedented recognition of a *Bivens* action to challenge Executive Branch national security policy conflicts with decisions of this Court. *Amici* concur with Petitioners' arguments that Respondents' efforts to expand *Bivens* in this manner are unwarranted; we will not repeat those arguments here. *Amici* write separately to emphasize several facets of the issue.

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detainees by individual guards. But Respondents have failed to provide any additional factual allegations to support a claim that Hasty was even aware of complaints. In particular, they have failed to include any allegations to rebut Hasty's much more plausible explanation: that his position as Warden required him to supervise a very large number of activities and that he had properly delegated oversight of detainee complaints to subordinates.

The Court's authority to recognize a new constitutional tort is anchored in its general jurisdiction to decide all cases "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. However, the Court has exercised that authority only sparingly. *Bivens* (decided in 1971) marked the first time that the Court did so. It has done so on only two other occasions (most recently in 1980), and since then has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001).

The reluctance to extend *Bivens* is grounded in separation-of-powers concerns. Deciding whether to extend *Bivens* focuses not on "the merits of the particular remedy sought, but on who should decide whether such a remedy should be provided." *Bush v. Lucas*, 462 U.S. 367, 380 (1983). The answer is generally Congress, because "Congress is in a far better position than a court to evaluate the impact of a new species of litigation against those who act in the public's behalf." *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007).

The Court's *Bivens* case law suggests that it is particularly appropriate to turn to Congress, rather than the courts, to decide whether to recognize a right of action for Respondents' constitutional claims. Those claims implicate important national security issues. As the Court has repeatedly recognized, "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981). Congress may ultimately determine that a damages

remedy would provide an appropriate check against overly harsh treatment of unauthorized aliens who are properly subject to detention and are being investigated for possible connection to terrorism. But Congress has not done so to date, despite its adoption of numerous post-9/11 statutes addressing detention policy. The Second Circuit overstepped judicial bounds by recognizing Respondents' right to assert their constitutional claims.

The Second Circuit held that its recognition of Respondents' right to assert damages claims against Petitioners did not involve a "context" different from that of previously recognized *Bivens*-type actions. According to the appeals court:

> We think it plain that the [Respondents'] conditions of confinement claims are set in the following context: [Respondents], housed in a federal facility, allege that individual officers subjected them to punitive conditions. This context takes account of both the rights injured (here, substantive due process and equal protection rights) and the mechanism of injury (punitive conditions without sufficient cause). The claim—that individual officers violated detainees' constitutional rights by subjecting them to harsh treatment with impermissible intent or without sufficient cause—stands firmly within a familiar *Bivens* context. Both the Supreme Court and this Circuit have recognized a constitutional challenge to conditions of confinement.

Pet. App. 24a (footnote omitted).

But this Court has made clear that the "context" of a proposed *Bivens* action encompasses more than the precise constitutional right being asserted and the "mechanism of injury." For example, the Court has recognized a *Bivens* action asserting that invidious employment discrimination against a congressional staffer violated her equal protection rights. *Davis v. Passman*, 442 U.S. 228 (1979). But the Court later declined to recognize a *Bivens* action asserted by a member of the armed forces asserting invidious employment discrimination. *Chappell v. Wallace*, 462 U.S. 296 (1983). It refused to do so even though the plaintiff in *Chappell* alleged the same constitutional violation and the same "mechanism of injury" (employment discrimination) as the plaintiff in *Davis*. The Court explained that the context was different because of the different setting (the military, with its unique command structure) within which *Chappell* arose. The Second Circuit's refusal to recognize that this case arises in a unique context (the federal government's response to a national security emergency) cannot be squared with *Chappell*.

Because it concluded that this case arose "within a familiar *Bivens* context," the Second Circuit deemed it unnecessary to consider whether any "special factors" counsel hesitation in recognizing Petitioners' right of action. Had it paused to consider such factors, it likely would have realized that recognizing this right of action raises serious national security concerns. Among other things, the threat of being sued for damages might well cause those responsible for responding to future emergencies to shy away from

decisive actions they might otherwise deem necessary to protect national security. If Congress decides that granting increased protections to individual rights (in the form of actions for damages) outweighs those national security concerns, it is authorized to adopt legislation creating a right of action. But such decisions are properly made by Congress, not the courts.

CONCLUSION

The Court should reverse the judgment of the court of appeals against Petitioners.

Respectfully submitted,

Richard A. Samp
(Counsel of Record)
Mark S. Chenoweth
Washington Legal Found.
2009 Massachusetts Ave, NW
Washington, DC 20036
202-588-0302
rsamp@wlf.org

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