No. 15-1358

IN THE

Supreme Court of the United States

JAMES W. ZIGLAR, PETITIONER,
v.
AHMER IQBAL ABBASI, *ET AL.*

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

BRIEF OF PETITIONER JAMES W. ZIGLAR

WILLIAM ALDEN MCDANIEL, JR.
Counsel of Record
BALLARD SPAHR LLP
18th Floor
300 E. Lombard Street
Baltimore, Maryland 21202
410.528.5502
mcdanielw@ballardspahr.com

Counsel For Petitioner, James W. Ziglar

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Second Circuit, in finding that respondents' Fifth Amendment claims did not arise in a "new context" for purposes of implying a remedy under *Bivens v. Six Unknown Named Agents Of The Federal Bureau Of Narcotics,* 403 U.S. 388 (1971), err by defining "context" at too high a level of generality where respondents challenge the policy decisions taken in the immediate aftermath of the attacks of September 11, 2001, by petitioner James W. Ziglar, then the Commissioner of the United States Immigration And Naturalization Service, the then-Attorney General of the United States, and the then-Director of the Federal Bureau of Investigation regarding the conditions of confinement of persons illegally in the United States whom the FBI had lawfully arrested and detained in connection with its investigation of the September 11 attacks, each of whom came from the same part of the world as, and shared ethnic and religious affiliations with, the September 11 attackers (many of whom themselves were illegally in the United States), thereby implicating concerns regarding national security, immigration, and the separation of powers that strongly counsel against judicial creation of such a remedy?

2. Did the court of appeals, in denying qualified immunity to petitioner Ziglar for his official actions in the immediate aftermath of the attacks of September 11, 2001, err: (A) by defining "established law" at too high a level of generality, thereby failing to recognize that clearly-established law did not make it apparent to all but the plainly incompetent

or those who knowingly violate the law that Mr. Ziglar's specific conduct violated the rights of those detainees in the specific context of this case; and (B) by finding that even though the applicability of 42 U.S.C. § 1985(3) to the actions of federal officials like petitioner Ziglar was not clearly established at the time in question, respondents nevertheless could maintain a § 1985(3) claim against Mr. Ziglar so long as his conduct violated some other clearly established law?

3. Did the court of appeals err in finding that respondents' Fourth Amended Complaint meets the pleading requirements of *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), because that complaint relies on allegations of hypothetical possibilities, conclusional assumptions, and unsupported insinuations of discriminatory intent that, at best, are merely consistent with petitioner Ziglar's liability, but which are also consistent with the conclusion that Mr. Ziglar acted with a non-punitive and nondiscriminatory intent to detain in restrictive confinement aliens who were illegally in the United States and who had potential connections to those who had committed terrorist acts, thereby rendering respondents' claims implausible under *Iqbal*?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner in No. 15-1358, James W. Ziglar, was a defendant in the United States District Court for the Eastern District of New York, and a cross-appellee in the United States Court of Appeals for the Second Circuit.

Petitioners in No. 15-1359, John Ashcroft and Robert Mueller, were defendants in the district court and cross-appellees in the court of appeals.

Petitioners in No. 15-1363, Dennis Hasty and James Sherman, were defendants in the district court and appellants in the court of appeals.

Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Raj Bajracharya were plaintiffs and/or plaintiffs-intervenors in the district court, and appellees-cross-appellants in the court of appeals. They comprise the respondents in this Court.

Ibrahim Turkmen and Akhil Sachdeva were also plaintiffs in the district court and appellees-cross-appellants in the court of appeals. The court of appeals affirmed the district court's dismissal of their claims. Appendix to Petition for Writ of Certiorari, No. 15-1358, at 72a, 81a & 83a. Neither Mr. Turkmen nor Mr. Sachdeva filed a petition for a writ of certiorari to review that aspect of the judgment of the court of appeals. Respondents' Brief in Opposition to the petitions in Nos. 15-1358, 15-1359 & 15-1363, at 36 n.15.

Asif-Ur-Rehman Saffi, Syed Amjad Ali Jaffri, Shakir Baloch, Hany Ibrahim, Yasser Ebrahim, and Ashraf Ibrahim were plaintiffs in the district court, but none of them participated in the appeals relevant to these consolidated cases in this Court.

Omer Gavriel Marmari, Yaron Shmuel, Paul Kurzberg, Silvan Kurzberg, Javaid Iqbal, Ehab Elmaghraby, and Irum E. Shiekh were intervenors in the district court, but none of them participated in the appeals relevant to these consolidated cases in this Court.

Michael Zenk was a defendant in the district court and an appellant in the court of appeals.

Salvatore Lopresti was a defendant in the district court. He filed a notice of appeal from the judgment of the district court, but when he failed to pay the requisite fee or file a brief in the court of appeals, that court dismissed his appeal pursuant to Fed. Rule App. Pro. 31(c).

Joseph Cuciti, Christopher Witschel, Clemett Shacks, Brian Rodriguez, Jon Osteen, Raymond Cotton, William Beck, Steven Barrere, Lindsey Bledsoe, Howard Gussak, Marcial Mundo, Daniel Ortiz, Stuart Pray, Elizabeth Torres, Phillip Barnes, Sydney Chase, Michael Defrancisco, Richard Diaz, Kevin Lopez, Mario Machado, Michael McCabe, Raymond Mickens, Scott Rosebery, and James Cuffee were defendants in the district court, but none of them participated in the appeals relevant to these consolidated cases in this Court.

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The opinion of the United States Court of Appeals for the Second Circuit is reported at *Turkmen v. Hasty,* 789 F.3d 218 (C.A. 2 2015) (Pooler & Wesley, JJ.) (Raggi, J., concurring in the judgment in part and dissenting in part). App. to Pet. for Cert. 1a-156a. The order of the court of appeals denying rehearing and rehearing en banc is reported at *Turkmen v. Hasty*, 808 F.3d 197 (C.A. 2 2015) (Katzmann, C.J., not participating) (Pooler & Wesley, JJ., concurring)
(Jacobs, Cabranes, Raggi, Hall, Livingston & Droney, JJ., dissenting). App. to Pet. for Cert. 227a-240a.

The opinion of the United States District Court for the Eastern District of New York is reported at *Turkmen v. Ashcroft*, 915 F.Supp.2d 314 (E.D.N.Y. 2013) (Gleeson, J.). App. to Pet. for Cert. 157a-226a.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The United States Court of Appeals for the Second Circuit issued its opinion and judgment June 17, 2015. App. to Pet. for Cert. at 1a-2a. On December 11, 2015, the court of appeals denied Mr. Ziglar's timely petition for rehearing or rehearing en banc. *Id.* at 227a. On February 26, 2016, Justice Ginsburg in her capacity as Circuit Justice for the United States Court of Appeals for the Second Circuit extended the time for Mr. Ziglar to file his Petition For A Writ Of Certiorari to April 11,

2016. On April 4, 2016, Circuit Justice Ginsburg granted Mr. Ziglar's second motion to extend time, extending the time for Mr. Ziglar to file his Petition to May 9, 2016. Mr. Ziglar timely filed his Petition that day.

This Court granted Mr. Ziglar's Petition For A Writ Of Certiorari October 11, 2016. ___ U.S. ___ (2016), No. 15-1358, 2016 WL 2626263 (Mem.) (Sotomayor & Kagan, JJ., not participating). That same day, this Court granted petitions for writs of certiorari in two related cases and consolidated the three cases for disposition by this Court. *Ashcroft v. Turkmen,* ___ U.S. ___ (2016), No. 15-1359, 2016 WL 2653655 (Mem.) (Sotomayor & Kagan, JJ., not participating); *Hasty v. Turkmen,* ___ U.S. ___ (2016), No. 15-1363, 2016 WL 2653797, (Mem.) (Sotomayor & Kagan, JJ., not participating).

Upon the request of petitioners and respondents in these consolidated cases, the Court amended the caption in each of the three consolidated cases to substitute respondent Ahmer Iqbal Abbasi as the first-named respondent in place of the previously first-named respondent, Ibrahim Turkmen. Mr. Turkmen did not seek review in this Court of the court of appeals' judgment affirming the district court's dismissal of his claims, and so is not a party to these consolidated cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are set forth in the Appendix To Petition For Writ Of Certiorari filed by Mr. Ziglar in No. 15-1358, at 241a-243a.

STATEMENT OF THE CASE

Petitioner in No. 15-1358, James W. Ziglar, adopts by reference and incorporates herein the Statement of the Case set forth in the Brief for Petitioners Ashcroft and Mueller in No. 15-1359 and in the Brief for Petitioners Hasty and Sherman in No. 15-1363. In addition, he respectfully calls the Court's attention to the following.

Mr. Ziglar held the office of Commissioner of the United States Immigration And Naturalization Service ("INS") when terrorists struck the World Trade Center and other targets September 11, 2001. App. to Pet. for Cert. at 3a. Mr. Ziglar served as INS Commissioner throughout the months immediately following those attacks, the time period relevant to this case and one of the most extraordinary periods in our nation's history.

At that time, INS was a component of the Department of Justice. *Id.* at 6a-7a. Mr. Ziglar thus served under then-Attorney General John Ashcroft and with then-Director of the Federal Bureau of Investigation Robert Mueller in formulating the response to these unprecedented attacks on American citizens on American soil.

The perpetrators of these attacks comprised persons who were not U.S. citizens, a number of whom were not legally present in the United States, all of whom came from countries in the Middle East, and all of whom shared the same ethnic background (Arab) and same religious affiliation (Muslim).

Respondents, plaintiffs below, comprise six persons who on 9/11 also were not U.S. citizens, none of whom were legally present in the United States, all of whom came from countries in the Middle East, and all of whom shared the same ethnic background (Arab) and same religious affiliation (Muslim) with the 9/11 attackers.

During the 9/11 investigation, the United States arrested respondents for immigration violations and detained them for a period of time. *Id.* at 7a-9a. In the pleading now at issue in this Court, the Fourth Amended Complaint ("FAC"), respondents have on behalf of themselves and a class of similarly-situated persons asserted claims arising from the conditions of their detention, alleging constitutional torts and seeking money damages under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), and under 42 U.S.C. § 1985(3). Their FAC names as defendants Mr. Ziglar, petitioner in No. 15-1358, and petitioners in No. 15-1359, Mr. Ashcroft and Mr. Mueller (the "DOJ Defendants"), as well as petitioners in No. 15-1363, Dennis Hasty and James Sherman, employees of the Bureau of Prisons ("BOP") who worked at the Metropolitan Detention Center ("MDC") in New York

City where the government detained respondents. App. to Pet. for Cert. at 9a-10a.

A group of plaintiffs originally instituted this case in 2002 in the United States District Court for the Eastern District of New York. *Id.* at 172a. The case went through various iterations until, in 2009, the court of appeals remanded it for the district court to evaluate plaintiffs' claims under this Court's decision in *Ashcroft v. Iqbal,* 556 U.S. 662 (2009). *Turkmen v. Ashcroft,* 589 F.3d 542 (C.A.2 2009). On remand, two of the original plaintiffs (the others having settled) joined by six new plaintiffs filed the FAC, the pleading at issue in the matter now before this Court. App. to Pet. for Cert. at 5a.[1]

Claims One to Five and Seven of the FAC named the DOJ Defendants and five MDC Defendants, while Claim Six named only the MDC Defendants.[2] Insofar as it concerns the DOJ Defend-

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[1] As noted above, only six of those eight plaintiffs appear as respondents in this Court. The opinions below set out the lengthy procedural history of this case. App. to Pet. for Cert. at 4a-6a & 172a-175a.

[2] Respondents did not appeal to the court of appeals the district court's dismissal of Claims Four and Five. App. to Pet. for Cert. at 20a n.13. The court of appeals affirmed the district court's dismissal of Claim Three of the FAC as to the DOJ Defendants, and reversed the district court's refusal to dismiss that claim as to the BOP defendants. *Id.* at 27a. Respondents have not (continued...)

ants, only three of those claims remain at issue: Claim One, which alleged that the punitive conditions of respondents' confinement violated their Fifth Amendment substantive due process rights; Claim Two, which alleged that respondents were held in restrictive confinement because of their race, ethnicity, or national origin, in violation of their Fifth Amendment equal protection rights; and Claim Seven, which alleged a conspiracy among all the defendants to deprive respondents of their equal protection rights pursuant to 42 U.S.C. § 1985(3). *Id.* at 5a-6a.

Respondents rested each of these claims on their allegation that the alleged punitive conditions of confinement that the defendants imposed on respondents were unlawful because Mr. Ziglar and the other defendants lacked "information connecting [respondents] and class members to terrorism or raising a concern that they might pose a danger to the facility." *Id.* at 272.

(...continued)

sought review of that aspect of the court of appeals' judgment in this Court. Though, as noted, Claim Six did not name the DOJ Defendants, the district court held that "the factual allegations incorporated by reference into Claim One embrace the strip search allegations" of Claim Six, and therefore "deem[ed] Claim One to allege, *inter alia*, strip searches in violation of the Fifth Amendment against the DOJ Defendants." *Id.* at 184a n.9.

Specifically, respondents alleged that the FBI designated each of them as "of interest" or "of high interest" to its 9/11 investigation. *Id.* at 67a-68a. This classification, respondents claimed, meant that pursuant to its policy BOP placed them in "the most restrictive and secure conditions permitted." *Id.* at 49a. They alleged that pursuant to the FBI's "hold until cleared" policy, because of this classification none of them could be released, or placed in less-restrictive confinement, unless and until the FBI's 9/11 investigation concluded that they had no ties to terrorism. *E.g., id.* at 8a.

The FAC alleged that the DOJ Defendants received "detailed daily reports regarding arrests and detentions, *id.* at 35a-36a, and "were aware that the FBI had no information tying Plaintiffs and class members to terrorism prior to treating them as 'of interest' " to the 9/11 investigation. *Id.* at 36a (internal quotation marks omitted). It further alleged that Ashcroft ordered that all persons on a list that the FBI's New York City office had compiled (the "New York List") be treated as "of interest" and held until cleared, "despite a complete lack of any information or a statement of FBI interest" in these persons. *Id.* at 38a. Without citation to any facts, the FAC attributed to Mr. Ziglar (as well as to Mr. Mueller), Mr. Ashcroft's decision to hold the persons on the New York FBI list until cleared. Again, without citation to facts, it then alleged that Mr. Ziglar's "decision" in this regard rested on his "discriminatory notion that all Arabs and Muslims were likely to have been involved in the terrorist

attacks, or at least to have relevant information." *Id.* at 196a n.17 (quotation marks omitted). Respondents similarly alleged that Mr. Ziglar and Mr. Mueller shared this "discriminatory notion." *Ibid.*

Respondents incorporated into the FAC two reports prepared by the DOJ Office of Inspector General ("OIG") stating the results of its investigation into the conditions at MDC and the federal law enforcement response to 9/11 ("OIG Reports"). Respondents attempted to limit this incorporation by stating they were incorporating the OIG Reports "except where contradicted by the allegations" of the FAC, but did not specify what those contradictions might be. *Id.* at 246a n.1 & 247a-248a n.2.[3]

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[3] "There are two OIG reports. The first OIG report, published in June 2003, covers multiple aspects of law enforcement's response to 9/11. See U.S. Dep't of Justice, Office of the Inspector General, 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 'OIG Report'), available at http://www.justice.gov/oig/special/0306/full.pdf. The second OIG report, published in December 2003, focuses on abuses at the MDC. See U.S. Dep't of Justice, Office of the Inspector General, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York (Dec. 2003) (the 'Supplemental OIG Report'), available at http://www.justice.gov/oig/special/0312/final.pdf." App. to Pet. (continued...)

Mr. Ziglar, Mr. Ashcroft, and Mr. Mueller moved in the district court to dismiss the FAC for failure to state claims upon which relief can be granted, as did the MDC Defendants. The district court decided all the motions in its January 15, 2013, Memorandum & Order. *Id.* at 157a-226a. It first held that Claim One did "not plausibly plead that the DOJ defendants possessed punitive intent," an element of the respondents' substantive due process claim. *Id.* at 189a-191a. As to Claim Two, which alleged that the DOJ defendants "created and implemented the harsh confinement policy because of [respondents'] race, religion, and national origin," *id.* at 194a, the district court found that the FAC's averments, viewed together under the *Iqbal* standard, did "not plausibly suggest that the DOJ Defendants purposefully directed the detention of the plaintiffs in harsh conditions of confinement due to their race, religion, or national origin." *Id.* at 200a.

The district court observed that in *Iqbal,* this Court had found that the policy of holding high interest detainees until cleared in and of itself did not suggest discriminatory animus, and that, similarly, the fact that this policy disparately

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(...continued)

for Cert. 6a n.5. The first OIG Report appears at J.A. 34-335; the Supplemental Report appears at J.A. 336-416.

affected Muslims and Arabs did not so do, either. The district court conceded that respondents had "amplified their claim" in this regard by alleging that the DOJ Defendants knew that the FBI lacked information tying detainees to terrorism, and by alleging that non-Arab and non-Muslim detainees "were cleared quickly or moved into the general population without clearance." *Id.* at 199a-200a. But viewing the FAC as a whole, the district court said, it could not find these inferences sufficient to meet *Iqbal's* pleading requirements. *Id.* at 200.

The district court accordingly dismissed both Claims One and Two as to the DOJ Defendants, without reaching the issue of qualified immunity. *Id.* at 225a. It also dismissed Claim Three, respondents' free exercise claim, finding that it "fails to plausibly plead that the DOJ defendants intended to burden [respondents'] free exercise" rights. *Id.* at 219a. Finally, it dismissed Claim Seven, § 1985(3) conspiracy, because as to the DOJ Defendants, none of the underlying objects of the conspiracy had "survived the motion." *Id.* at 226a.

The court of appeals consolidated various appeals and cross-appeals from the district court's judgment. On June 17, 2013, a divided panel issued its opinion affirming in part and reversing in part (Pooler & Wesley, JJ.), *id.* at 2a-83a, over a lengthy opinion by Judge Raggi concurring in part in the judgment and dissenting in part. *Id.* at 83a-156a. The panel majority reversed the district court's dismissal of Claims One and Two, finding a *Bivens*

remedy to be appropriate in the circumstances and concluding that the FAC had plausibly alleged that the DOJ Defendants had acted with punitive and discriminatory intent.

The panel majority based its conclusion on a theory that respondents themselves had never advanced in the thirteen years of litigation of this matter, the so-called "lists-merger theory." *Id.* at 32a n.21. The panel majority posited that the FAC plausibly pleaded that Mr. Ziglar, along with Mr. Ashcroft and Mr. Mueller, knew that DOJ was detaining illegal aliens in punitive conditions of confinement even though there existed no suggestion that these detainees had any ties to terrorism, "except for the fact they were, or were perceived to be, Arab or Muslim." *Id.* at 31a. The panel majority found that the FAC plausibly alleged that the DOJ Defendants, while aware of respondents' status, "were responsible for a decision to merge" the New York List the FBI had compiled with a national list of detainees that INS had created. *Ibid.* The court stated that the INS national list "contained the names of detainees whose detention was dependent not only on their illegal immigration status and their perceived Arab or Muslim affiliation, but also a suspicion that they were connected to terrorist activities." *Ibid.* By contrast, the court of appeals continued, the FBI's New York List contained the names of detainees whom the New York FBI had not yet determined "had any connection with terrorist activity." *Id.* at 18a. The panel majority concluded the "merger ensured that" respondents–who were on

the New York List—"would continue to be confined in punitive conditions" even without any determination that they had any ties to terrorism, thereby stating a Fifth Amendment due process claim. *Id.* at 31a-32a.

The panel majority concluded that the FAC plausibly pleaded that it was Ashcroft who had made the decision to merge the lists in early November 2001, with knowledge that it would result in the confinement in the harshest possible conditions of persons the FBI had not linked to terrorism. *Id.* at 39a. It concluded also that the FAC plausibly pleaded that "Mueller and Ziglar complied with Ashcroft's [merger] order notwithstanding their knowledge that the government had no evidence linking [respondents] to terrorist activity." *Id.* at 46a. The panel majority held: "In this instance, [respondents] plausibly allege that Ashcroft's decision was facially invalid; it would be unreasonable for Mueller and Ziglar to conclude that holding ordinary civil detainees under the most restrictive conditions of confinement available was lawful." *Id.* at 42a. The court of appeals accordingly permitted respondents' substantive due process claim, Claim One, to proceed, subject to the limitation that liability could be found only after the decision to merge the lists, which had occurred November 2, 2016. *Id.* at 46a.

For the same reasons, the panel majority held that the FAC had plausibly alleged that the FBI had compiled a list "not based on individualized suspicion, but rather based on race, ethnicity,

religion, and/or national origin," and that with knowledge of this, the DOJ Defendants "condoned the New York FBI's discrimination by merging the New York List with the INS List, thereby ensuring that some of the individuals on the New York List would be subject to the challenged conditions of confinement." *Id.* at 59a.

The panel majority found that the FAC had plausibly pleaded that the DOJ Defendants had engaged in a conspiracy under 42 U.S.C. § 1985(3) to deprive respondents "of the equal protection of the laws" due to the DOJ Defendants' "racial" or "class-based invidiously discriminatory animus." *Id. a*t 77a-78a (citations and internal quotation marks omitted). The panel majority also found that the FAC had plausibly pleaded a tacit conspiracy among the DOJ Defendants and defendants Hasty and Sherman "to effectuate the harsh conditions of confinement with discriminatory intent." *Id.* at 78a.[4]

The panel majority conceded that the applicability of § 1985(3) to federal officials was an open question, but said that so long as the alleged

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[4] The panel majority rejected the argument of the MDC Defendants that the intracorporate conspiracy doctrine barred respondents' § 1985(3) conspiracy claim, App. to Pet. for Cert. at 79a-80a, finding it could not conclude at that stage of the case that the various defendants "acted as members of a single policymaking entity for purposes of [that] claim." *Id.* at 80a.

conspiracy violated some other established law, the defendants were not entitled to qualified immunity on that claim. App. to Pet. for Cert. at 81a.[5]

As to Mr. Ziglar, Mr. Ashcroft, and Mr. Mueller, then, the panel majority accordingly reversed the district court's dismissal of respondents' two conditions-of-confinement claims (Claim One, substantive due process, and Claim Two, equal protection), as well as the conspiracy claim (Claim Seven). It affirmed the district court's dismissal of Claim Three, free exercise, as to the DOJ Defendants. *Id.* at 83a.

Judge Raggi filed a lengthy opinion concurring in the judgment in part and dissenting in part. *Id.* at 83a-156a. After concluding that the case arose in a new context and that special factors militated against judicial implication of a remedy under *Bivens*, she carefully analyzed the factual averments of the FAC to test whether they met *Iqbal's* pleading standards.

With regard to respondents' punitive confinement claim, her detailed review of the FAC led

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[5] The panel majority refused to extend qualified immunity to the DOJ Defendants (an issue the district court had not been required to reach given its disposition of the case) on the ground that the law at issue, to be free from punitive confinement and discriminatory treatment, had been clearly established as of the dates at issue. App. to Pet. for Cert. at 47a-48a, 71a-72a & 80a-81a

her to several conclusions. First, she found that the FAC failed "to plead a sufficient factual basis for ascribing the merger decision to" Mr. Ziglar or any of the other two DOJ Defendants. *Id.* at 119a; *id.* at 119a-125a. Second, she concluded that even if the FAC could be read as pleading such a factual basis, respondents still had failed "to plead that" Mr. Ziglar or the other DOJ Defendants "thereby intended for [respondents] to be held in the MDC's ADMAX SHU." *Id.* at 125a; *id.* at 125a-126a. Third, Judge Raggi found that respondents had not even alleged that Mr. Ziglar and the other two DOJ Defendants " 'were even aware' of the challenged restrictive confinement conditions at the MDC." *Id.* at 126a (quoting *Turkmen v. Ashcroft, supra,* 915 F.Supp.2d at 340); *id.* at 126a-129a. Fourth, she found that the FAC failed to plead that Mr. Ziglar or the other DOJ Defendants had agreed to the merger of the lists "because of, not merely in spite of the action's adverse effects," as *Iqbal* required. *Id.* at 130a (internal quotation marks omitted). Finally, she found that respondents had failed "plausibly to allege facts admitting an inference that their continued MDC restrictive confinement after November 2001 was 'arbitrary or purposeless' to any legitimate objective, so that [Mr. Ziglar's and the DOJ Defendants'] real intent must have been punitive." *Id.* at 130a (quoting *Bell v. Wolfish,* 411 U.S. 520, 539 (1979)); *id.* at 130a-139a. She concluded:

> "That inference is, I submit, foreclosed by the 'obvious' and 'more likely' explanation for the challenged action:

> the DOJ Defendants' determination to identify and apprehend anyone involved in the 9/11 attacks and to safeguard the nation from further terrorist attacks." *Id.* at 130a.

With regard to respondents' claim of discriminatory confinement, Judge Raggi again closely analyzed the FAC to conclude that it also failed plausibly to plead such a claim. She first found the FAC's averments on these issues "not materially different from those considered" by this Court in *Iqbal,* and therefore inadequate to plead a claim of discriminatory intent. *Id.* at 144a-145a. Second, for the reasons she had identified with regard to respondents' substantive due process claim, she found the FAC failed to plead sufficient facts to make out a claim of discriminatory intent. She added that the inference of such intent was weakened by the fact the lists-merger decision applied not only to MDC detainees, but also to those detainees housed at the Passaic, New Jersey facility, which included the majority of those on the New York List, who were not subject to harsh conditions of confinement "even though they shared the same racial, religious, and national identities as" respondents. *Id.* at 146a; *id.* at 146a-148a. Third, Judge Raggi's opinion concluded that *Iqbal* had already held that a claim of discriminatory intent based on a lack of individualized suspicion failed to plead a claim for relief where, in the aftermath of the 9/11 terrorist attacks, pressing considerations of national security constituted a plausible alternative

explanation for the challenged detention. *Id.* at 148a-149a.

Mr. Ziglar filed a timely petition for rehearing and rehearing en banc, as did Mr. Ashcroft and Mr. Mueller. The court of appeals denied those petitions on a 6-6 vote (Chief Judge Katzmann not participating). *Id.* at 227a-229a. The panel majority filed a brief concurrence, *id.* at 229a-231a, while the six en banc dissenters filed a longer opinion. With regard to the *Iqbal* issue, the en banc dissent noted that "the majority's identification of viable claims, particularly policy-challenging claims against the Attorney General and FBI Director, frequently relies only on hypothesized possibilities, or on conclusory assumptions or insinuations of discriminatory purpose that the Supreme Court has already rejected" in *Iqbal*. *Id.* at 238a (footnote omitted). *See id.* at 239a n.16 (analysis applies to Mr. Ziglar as well).

SUMMARY OF ARGUMENT

1. In holding that respondents' Fifth Amendment claims did not arise in a "new context" for purposes of implying a remedy under *Bivens v. Six Unknown Named Agents Of The Federal Bureau Of Narcotics,* 403 U.S. 388 (1971), the court of appeals departed from settled precedent of this Court and the decisions of other federal courts of appeals. It did so by myopically focusing only on the rights injured and the mechanism of injury, which led it to define the context of the case as "federal detainee Plaintiffs,

housed in a federal facility, alleg[ing] that individual federal officers subjected them to punitive conditions"—a far too generalized definition of context. *Id.* at 24a.

Respondents challenge the actions taken in the context of the immediate aftermath of the attacks of September 11, 2001, by petitioner Ziglar, then the Commissioner of the INS, the then-Attorney General of the United States and the then-Director of the Federal Bureau of Investigation regarding the detention of persons illegally in the United States whom the FBI had lawfully arrested in connection with its investigation of the September 11 attacks. This Court has never extended *Bivens* to that context, and every other federal court of appeals that has considered the issues has declined to do so.

In this new context, numerous special factors counsel against extension of the *Bivens* remedy to this case, including, for example, concerns regarding: national security decisions made at the highest levels of government during a time of unprecedented national emergency; the administration of the nation's immigration laws; the constitutional separation of powers; the failure of Congress to provide a remedy to respondents despite its knowledge over many years of respondents' claims; and the existence of a complex administrative scheme governing the deportation of person illegally in the United States.

2. In denying qualified immunity to petitioner Ziglar for actions he took in the immediate aftermath

of the attacks of September 11, 2001, the court of appeals erred in two ways.

First, it failed to focus on the specific context of the case to determine whether the violative nature of Mr. Ziglar's alleged specific conduct was at the time clearly established. Instead, the court of appeals defined "established law" for purposes of evaluating a claim of qualified immunity at too high a high level of generality. It should have asked whether, in the context of the specific circumstances relating to the national emergency of 9/11, a reasonable person in Mr. Ziglar's position would clearly have understood that persons illegally in the country, whom the FBI had lawfully arrested and detained in connection with its investigation of 9/11, who shared geographic origins, ethnic backgrounds, and religious affiliations with the 9/11 attackers, but whom the FBI had not linked to any terrorist activity, could not be detained in restrictive conditions until cleared of any possible link to terrorism by the FBI. That understanding of the law was not clearly established at the time of 9/11, entitling Mr. Ziglar to qualified immunity for respondents' claims in this case.

Second, the court of appeals erred in concluding that, even though the applicability of 42 U.S.C. § 1985(3) to the actions of federal officials like Mr. Ziglar was not clearly established at the time in question, respondents nevertheless could maintain a § 1985(3) claim against him so long as his conduct violated some other clearly-established law. In *Davis v. Scheuer,* 468 U.S. 183 (1984), this Court held that

the defendants had an entitlement to immunity because the claims against them were based on due process and § 1983, which did not clearly prohibit the alleged misconduct, though that conduct clearly violated a regulation. This Court held that "officials sued for violations of rights conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some other statute or regulation." *Id.* at 194 n.12. For that reason, Mr. Ziglar was entitled to qualified immunity for respondents' § 1985(3) claims as well.

3. The court of appeals also committed error in finding that respondents' Fourth Amended Complaint met the pleading requirements of this Court's decision in *Ashcroft v. Iqbal, supra.* The FAC here at issue relied on allegations of hypothetical possibilities, conclusional assumptions, and unsupported insinuations of discriminatory intent that, at best, are merely consistent with petitioner Ziglar's liability, but fall short of stating plausible claims against him.

On allegations indistinguishable from those in this case, this Court in *Ashcroft v. Iqbal* held that the actions of officials of the executive branch in restrictively confining an Arab Muslim who was illegally in the United States at the time of the 9/11 attacks were just as likely to be based on the officials' non-punitive and nondiscriminatory intent to detain aliens who were illegally present in the United States on 9/11 and who had the same national

origins and religious affiliations as the 9/11 attackers, on the ground they had potential connections to those who committed terrorist acts. For that reason, this Court in *Iqbal* held that the pleading at issue there, even though its allegations were consistent with punitive or discriminatory intent, failed plausibly to plead such intent because of the existence of this equally-likely and non-discriminatory explanation for the officials' actions.

The allegations of the complaint in *Iqbal* cannot be distinguished from the allegations of the FAC in this case. *Iqbal's* holding thus applies with equal force to respondents' claims against Mr. Ziglar in this case.

ARGUMENT

I. THE OPINION OF THE COURT OF APPEALS CONTRADICTS THIS COURT'S *BIVENS* JURISPRUDENCE AND CONFLICTS WITH THE DECISIONS OF FOUR OTHER COURTS OF APPEALS.

Mr. Ziglar adopts by reference and incorporates herein the arguments set forth in the Brief For Petitioners Ashcroft and Mueller in the consolidated case, No. 15-1359, regarding why a remedy under *Bivens* should not be extended to the context of this case. With regard to this issue, Mr. Ziglar stands in exactly the same position as Mr. Ashcroft and Mr. Mueller, and the arguments they set forth in their Brief on this point apply to him with equal force. This ground furnishes an adequate and independent reason why this Court should

reverse the judgment of the court of appeals as to Mr. Ziglar.

II. THE DECISION OF THE COURT OF APPEALS CONTRADICTS THIS COURT'S DECISIONS REGARDING QUALIFIED IMMUNITY.

Mr. Ziglar adopts by reference and incorporates herein the arguments set forth in the Brief For Petitioners Ashcroft and Mueller in the consolidated case, No. 15-1359, regarding why the doctrine of qualified immunity shields the DOJ Defendants from liability in this case. With regard to this issue, Mr. Ziglar stands in exactly the same position as Mr. Ashcroft and Mr. Mueller, and the arguments they set forth in their Brief on this point apply to him with equal force. This ground also furnishes an adequate and independent reason why this Court should reverse the judgment of the court of appeals as to Mr. Ziglar.

III. THE COURT OF APPEALS ERRED IN FINDING THAT THE ALLEGATIONS OF THE FOURTH AMENDED COMPLAINT SUFFICE UNDER *IQBAL* TO STATE A PLAUSIBLE CLAIM FOR RELIEF.

Mr. Ziglar adopts by reference and incorporates herein the arguments set forth in the Brief For Petitioners Ashcroft and Mueller in the consolidated case, No. 15-1359, regarding why the FAC fails to meet the pleading requirements of this Court's decision in *Iqbal*. He respectfully adds the following additional argument on this issue.

The panel majority sustained Count One of respondents' FAC, the substantive due process claim, on a theory of liability that respondents had never advanced in the thirteen-year history of this litigation, the "lists-merger" theory. The panel majority found that respondents had plausibly pleaded that Ashcroft made the decision to merge the New York list with the INS national list, thereby ensuring that those detainees on the New York FBI list who were held at the MDC "would continue to be confined in punitive conditions" and treated as "of interest" until the FBI cleared them of ties to terrorists or terrorist activity, App. to Pet. for Cert. at 32a; that Mr. Ziglar and Mr. Mueller knew of and complied with Mr. Ashcroft's decision in this regard, *id.* at 42a*;* and that the DOJ Defendants took these actions because of the race, religion, or national origin of respondents, and not for any legitimate penological interest. *Id.* at 44a.

Judge Raggi's opinion thoroughly analyzed the panel majority's approach, and demonstrated that no plausible factual averments supported respondents' substantive due process claims. *Id.* at 117a-139a. She noted that the FAC's allegations in this regard "are plainly not based on [respondents'] personal knowledge," *id.* at 120a, but on the panel majority's reading of the OIG Reports, Reports that belied the FAC's very allegations. *Ibid.*

Judge Raggi began with the panel majority's conclusion that Mr. Ashcroft had ordered the merger of the two lists of detainees, the threshold finding

upon which the panel majority based its conclusions. She correctly noted that the OIG Report "states quite clearly that it was Associate Deputy Attorney General Stuart Levey"–not Mr. Ashcroft, not Mr. Mueller, and most certainly not Mr. Ziglar–who "decided that all the detainees on the New York list would be added to the INS Custody List and held without bond." *Ibid.* (internal quotation marks omitted).

The panel majority's response to Judge Raggi's argument in this regard highlights the weakness of its analysis. The panel majority said that the OIG's conclusion that ADAG Levey made the lists-merger decision, not Mr. Ashcroft, did not absolve Mr. Ashcroft of responsibility for that decision because "the OIG Report gives no indication that anybody asked him." *Id.* at 38a. As Judge Raggi's opinion recognized, the panel majority's response "hardly supplies a factual basis for inferring Ashcroft's responsibility" for the lists-merger decision. *Id.* at 120a. Moreover, "the OIG's detailed 198-page, single-spaced report, which includes a careful discussion of when, how and by whom the merger decision was made" belied the panel majority's speculation on this point. *Id.* at 120a-121a.

Judge Raggi's opinion went on to demonstrate that the panel majority's conclusion as to the identity of the official who decided to merge the lists rested on speculation, conclusional assertions, and inaccurate readings of the OIG Reports. *Id.* 121a-125a. Her close reading of the FAC's allegations in this

regard led to the conclusion that "the pleadings, even with incorporation of the OIG Report, do not 'contain sufficient factual matter' plausibly to ascribe the lists-merger decision to the DOJ Defendants." *Id.* at 124a-125a (quoting *Iqbal,* 556 U.S. at 678).

Nor did the FAC plausibly allege that the DOJ Defendants intended, or even knew, that the result of the lists-merger would be the continued confinement of respondents in the ADMAX SHU. *Id.* at 125a-129a. The panel majority's conclusion in this regard rested on the allegation that Mr. Ziglar "received detailed daily reports of the arrests and detentions." *Id.* at 32a (internal quotation marks omitted). These reports, coupled with Mr. Ziglar's "central role" in the 9/11 investigation and "media coverage of conditions at the MDC" led the panel majority to conclude that the FAC plausibly alleged that Mr. Ziglar knew about the circumstances under which the detainees from the New York List were being held. *Id.* at 34a.

But the FAC did not allege what those "daily reports" contained: it alleged only that they were about "arrests and detentions." It provided no more detail. No more did it allege that the media specifically conveyed information about restrictive confinement of MDC detainees. Nor did the FAC allege plausible facts tending to establish that Mr. Ziglar's role in the 9/11 investigation, as Commissioner of INS, working long hours on a myriad of pressing problems in Washington, D.C., provided him with information about the conditions

of confinement of a limited number of detainees at the MDC in New York City. As Judge Raggi correctly observed, these allegations did not plausibly allege that Mr. Ziglar knew that the detainees were being held in restrictive confinement, or that the lists-merger decision had led to that result, the more so because those detainees on the FBI's New York List whom the government incarcerated at the Passaic County Jail–and that was most of the persons on the New York List–were held in general, not restrictive, confinement. *Id.* at 125a.

The FAC also failed to allege that Mr. Ziglar acted as he allegedly did " 'because of,' not merely 'in spite of' the action's adverse effects upon an identifiable group." *Iqbal*, 556 U.S. at 681. The factual averments of the FAC are, to say the least, consistent with an "obvious alternative explanation," *Iqbal,* 556 U.S. at 682 (internal quotation marks omitted), namely, that whatever he is alleged to have done, Mr. Ziglar acted out of concern that persons illegally in the United States who had been lawfully arrested and detained in the 9/11 terrorist investigations, and "who had potential connections to those who committed terrorist acts," *ibid.,* could leave the country or engage in activities in furtherance of terrorist objectives if not detained until cleared in restrictive conditions that limited their ability to communicate with other persons.

In their Brief in Opposition to the petitions for certiorari, respondents recognized that "[t]he

problem in both [*Bell Atlantic Corp. v.*] *Twombly* [, 550 U.S. 544 (2007),] and *Iqbal* was that the plaintiffs had failed to plead facts which would 'ten[d] to exclude' an alternative 'explanation for defendants' ' conduct." Brief in Opposition, at 27 (quoting *Twombly*, 550 U.S. at 552 (citation omitted by quoting brief)). Respondents also recognized that "[i]n *Iqbal*, the 'obvious alternative explanation' the plaintiff had not excluded was a 'nondiscriminatory intent to detain aliens who were illegally present in the United States and *who had potential connections to those who committed terrorist acts*.' " *Id.* at 27-28 (quoting *Iqbal*, 556 U.S. at 682 (emphasis added by quoting brief)). They claimed they had supplied allegations that negated that obvious alternative explanation by pleading in this case that the DOJ Defendants " 'knew of and approved, [respondents'] confinement under severe conditions' " even though those defendants also knew that " 'the government had no evidence linking [respondents] to terrorist activity.' " Brief in Opposition, at 28 (quoting Panel Opinion, App. to Pet. for Cert., No. 15-1359, at 47a-48a (emphasis omitted)).[6]

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[6] Respondents' Brief in Opposition cited to the Appendix To the Petition For A Writ Of Certiorari that Mr. Ashcroft and Mr. Mueller filed with their joint Petition For A Writ Of Certiorari in No. 15-1359.

Respondents cannot distinguish *Iqbal* on that ground. Exactly as in this case, the plaintiff's complaint in *Iqbal* "challenge[d] neither the constitutionality of his arrest nor his initial detention in the MDC." 556 U.S. at 682. As in this case, in *Iqbal* the plaintiff complained only that he had been placed in the most restrictive conditions of confinement because of his race, religion, or natural origin, and not because the government had linked him to terrorism. *Ibid.* In *Iqbal,* the "complaint posit[ed] that [Ashcroft and Mueller] 'each knew of, condoned, and willfully and maliciously agreed to subject' respondent to harsh conditions of confinement 'as a matter of policy, ***solely*** on account of [his] religion, race, and/or national origin and ***for no legitimate penological interest.***' " *Id.* at 669 (quoting *Iqbal* complaint ¶ 96) (emphasis added).

Nothing in the *Iqbal* complaint suggested that the government had any information linking him to terrorist activity. To the contrary, the complaint before this Court in *Ashcroft v. Iqbal* alleged, just as the FAC in this case alleges, that government officials subjected Mr. Iqbal to restrictive confinement without any suspicion that he had engaged in any terrorist activity whatsoever. As the court of appeals opinion in that case stated, the complaint in *Iqbal* alleged that many of those arrested in connection with the FBI's 9/11 investigation, "including the Plaintiff, were classified as 'of high interest' solely because of their race, religion and national origin ***and not because of any involvement in terrorism***." *Iqbal v. Hasty,* 490

F.3d 143, 148 (C.A. 2 2007) (emphasis added) (footnote omitted). Indeed, the *Iqbal* complaint also alleged that "[i]n the New York City area, ***all Arab Muslim men*** arrested on criminal or immigration charges while the FBI was investigating a 9/11 lead were classified as 'of high interest,' " and held "in highly restrictive conditions until they were 'cleared' by the FBI." *Ibid.* (emphasis added). The district court similarly summarized the *Iqbal* complaint as alleging that the government officials he sued had classified Mr. Iqbal as " 'of high interest' to the government's terrorism investigation" and held him in "highly restrictive conditions" in the MDC ADMAX SHU "based solely on [his] race, religion and national origin, ***and not on any evidence of [his] involvement in supporting terrorist activities***." *Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG, Sept. 27, 2005, 2005 WL 2375202 *2 (E.D.N.Y.) (emphasis added).

The allegations in *Iqbal* thus cannot be distinguished from those in the FAC in this case. This Court in *Iqbal* held that, even accepting the truth of the allegations of the *Iqbal* complaint, "[a]ll 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." *Iqbal,* 556 U.S. at 683. When read in the context of the specific allegations of the *Iqbal* complaint, which alleged that Mr. Iqbal had been detained in "harsh conditions of confinement as

a matter of policy, ***solely*** on account of [his] religion, race, and/or national origin and ***for no legitimate penological interest,***" *id.* at 669 (emphasis added) (internal quotation marks omitted), "***and not because of any involvement in terrorism,***" *Iqbal v. Hasty,* 490 F.3d at 148 (emphasis added), this Court's ruling in *Iqbal* forecloses respondents' claims in this case. *Iqbal* found that the allegations of the complaint in that case identical to those here before the Court did not "contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post–September–11 detainees as 'of high interest' because of their race, religion, or national origin." *Iqbal,* 556 U.S. at 662. Just as in *Iqbal,* the allegations of discriminatory intent fail "to 'nudg[e respondents'] claim of purposeful discrimination 'across the line from conceivable to plausible.' " *Id.* at 683 (quoting *Twombly,* 550 U.S. at 570).

Just as *Iqbal,* there exists an alternative explanation of Mr. Ziglar's alleged actions in implementing Mr. Ashcroft's decision to merge the New York List with the INS List. The FAC itself alleges Mr. Ziglar knew that the FBI had detained each and every person on the New York List in connection with its investigation of 9/11. He knew that each person on the New York List had been arrested upon probable cause. He knew that the FBI was properly detaining each person on the New York List, because each was an alien illegally in the United States at the time of the 9/11 attacks. And he knew that the persons on the New York List shared the same national origin, race, and religion with the

9/11 attackers, many of whom had also been in the United States illegally at the time of the attacks.

On these allegations, there exists an obvious alternative explanation for the actions that the FAC alleges that Mr. Ziglar took which, exactly as in *Iqbal,* renders the respondents' claims of unconstitutional motive implausible: "his nondiscriminatory intent to detain aliens who were illegally in the United States and who had potential connections to those who committed terrorist acts." *Iqbal*, 556 U.S. at 683. As Judge Raggi concluded with regard to respondents' substantive due process claims:

> "[G]iven (1) the inherent difficulty in identifying in advance of an FBI-CIA investigation who, among such a group of illegal aliens, might have terrorist connections; (2) the serious risk of murderous harm posed by persons with such connections (even while incarcerated); and (3) events following 9/11 fueling fears of further imminent attacks, I cannot conclude . . . [as to] the INS Commissioner [Mr. Ziglar] that, in the absence of individualized suspicion of terrorist connections, it was arbitrary or purposeless to national security to hold such illegal aliens in restrictive, rather than general, confinement

> pending clearance." App. to Pet. for Cert. at 135a (footnotes omitted).

Similarly, with regard to respondents' equal protection claims, the FAC's allegations that Mr. Ziglar and the other DOJ Defendants "maintained the challenged restrictive confinement after learning that the FBI designations were not based on individualized suspicion of terrorist threats are also inadequate to conclude that [Mr. Ziglar was] not more likely concerned with ensuring national and prison security" than with discriminating on the basis of race, national origin, or religion. *Id.* at 148a (internal quotation marks omitted).

For these reasons, the FAC failed to state a plausible claim that Mr. Ziglar deprived respondents of their fifth amendment substantive due process rights by subjecting them to restrictive conditions of confinement "for no legitimate penological interest." *Iqbal,* 556 U.S. at 669 (internal quotation marks omitted). Nor did the FAC plausibly state a claim that Mr. Ziglar violated respondents' fifth amendment equal protection rights by sub-subjecting them to restrictive confinement because of their race, national origin, or religion.

On this adequate and independent ground also, the Court should reverse the judgment of the court of appeals as to Mr. Ziglar in No. 15-1358.

CONCLUSION

The Court should reverse the judgment of the United States Court of Appeals For The Second Circuit as to petitioner, James W. Ziglar, in No. 15-1358.

Respectfully Submitted,

WILLIAM ALDEN MCDANIEL, JR.
Counsel of Record
BALLARD SPAHR LLP
18th Floor
300 East Lombard Street
Baltimore, Maryland 21202
410.528.5502
mcdanielw@ballardspahr.com

Counsel For Petitioner,
James W. Ziglar