No. 07-1015

IN THE
Supreme Court of the United States

JOHN D. ASHCROFT AND ROBERT MUELLER,

Petitioners,

v.

JAVAID IQBAL,

Respondent.

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

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Petitioners seek certiorari on two questions: (1) whether a "high-ranking official" may be subject to discovery in a *Bivens*[1] lawsuit based on a "conclusory" allegation that the official knew, condoned, or agreed to subject a plaintiff to unconstitutional acts carried out by subordinates; and (2) whether a supervisory official may be held liable because of the official's "constructive notice" of the unconstitutional acts of subordinates. Pet. (I). There is no circuit split as to the first question, and the Second Circuit's decision correctly applied relevant pleading jurisprudence. Petitioners never raised the second question below, and even had they raised it, it would have

[1] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

been unnecessary to reach because of the procedural posture of this case. Ultimately, then, the petition argues that the Second Circuit erred in applying Rule 8 pleading standards – an insufficient ground for certiorari. For these reasons and others that make this case a poor vehicle to address the questions sought to be presented by petitioners, respondent respectfully requests that the petition be denied.

STATEMENT

1. Beginning in January 2002, respondent Javaid Iqbal was held for more than 150 days in a maximum security unit in Brooklyn, New York's Metropolitan Detention Center ("MDC") that was known as the "ADMAX SHU"—short for Administrative Maximum Special Housing Unit. He was held there because he was presumptively categorized as "of high interest" to the September 11th investigations, solely because of his race, religion, and national origin, and for no legitimate reason. App. 164a-165a, 172a-173a (Compl. ¶¶ 48-53, 96). On the ADMAX SHU, Mr. Iqbal was subjected to solitary confinement, unnecessary and abusive strip searches, and beaten by correction officers, among other abusive conditions. *Id.* 166a, 170a-171a, 176a-177a, 181a-187a (Compl. ¶¶ 60, 63, 84, 87, 89, 113, 116-17, 120, 122, 137-148, 153-54, 158, 168, 171). The only reason respondent was confined in the ADMAX SHU was because of his race, religion, and national origin. *Id.* 172a-173a (Compl. ¶ 96.)

After he was deported, along with Ehab Elmaghraby,[2] Mr. Iqbal subsequently brought this lawsuit, seeking compensation for the central role that petitioners and other federal officials played in subjecting him to harsh conditions of confinement. Mr. Iqbal brought claims under *Bivens*, *supra*, for violations of his First, Fourth, Fifth, Sixth, and Eighth Amendment rights, as well as various statutory claims.

2. The complaint alleges that specific defendants crafted, directed, and implemented practices and procedures regarding the confinement of "high interest" detainees in the ADMAX SHU. Among these officers were petitioners, former Attorney General John D. Ashcroft and current Director of the Federal Bureau of Investigation ("FBI") Robert Mueller, who crafted, approved, and directed the implementation of the discriminatory policies challenged herein. *See infra* 11-12. Petitioners knew, condoned, and agreed "as a matter of policy" that detainees like respondent would be confined in the ADMAX SHU solely because of membership in protected classes. App. 172a-173a (Compl. ¶ 96).

3. Prior to engaging in discovery, in October 2004, several defendants and petitioners filed motions to dismiss respondent's complaint. Among other arguments, petitioners asserted that the complaint should be dismissed under Rule 12(b)(6) on ground of qualified immunity. The district court dismissed some of respondent's statutory claims, but

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[2] On behalf of all defendants, the United States settled claims with Mr. Elmaghraby for $300,000 prior to the Second Circuit's decision. Thus, it can hardly be said, as *amici* suggest, that the claims advanced here are "insubstantial." (Br. *Amici Curiae* of William P. Barr, et al., at 10).

permitted each of his *Bivens* claims to proceed. *Id.* 71a-150a. The court noted that "the post-September 11 context" supported respondent's assertion of petitioners' personal involvement, and that "some of the defendants, in disclaiming responsibility, suggest that other defendants (who also disclaim responsibility) were personally involved." *Id.* 116a-118a. Reasoning that Mr. Iqbal "should not be penalized for failing to assert more facts" given that the extent of defendants' respective "involvement is peculiarly within their own knowledge," *id.* 118a, the court concluded that the facts alleged in respondent's complaint were sufficient.[3] Eight defendants then noticed appeals to the Second Circuit Court of Appeals.

4. A panel of the Second Circuit affirmed the district court's opinion in large part. *Id.* 1a-70a. As to petitioners, the appellate court found that respondent's discrimination-based claims should proceed. *Id.* 58a-63a. The court rejected petitioners' argument that the complaint did not adequately state a discrimination claim because of the following allegations: (1) petitioners "specifically targeted" respondent for mistreatment because of his race, religion and national origin; (2) petitioners adopted the policies and practices challenged in the instant case; (3) the FBI's arrest of thousands of Arab Muslims was "under the direction of Defendant Mueller"; and (4) petitioners knew of, condoned and agreed to subject

[3] The district court also found support for respondent's allegations in the Government's own investigation of the treatment of September 11th detainees at the MDC. *Id.* 116a n.20. As the district court found, the April 2003 report suggested that petitioners were personally involved in "creating or implementing" the policies that led to respondent's confinement in the ADMAX SHU. *Id.*

respondent to harsh conditions of confinement solely because of his membership in protected classes and not for any legitimate reason. The court also held that petitioners were not "necessarily insulate[d]" from liability simply because subordinates classified respondent as "of high interest," because petitioners likely "concerned themselves with the formulation and implementation of policies dealing with the confinement of those . . . designated 'of high interest' in the aftermath of 9/11." *Id.* 59a, 62a.

The Court of Appeals also made several critical legal conclusions. First, the Second Circuit correctly interpreted this Court's decisions in *Leatherman*[4] and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) to mean that heightened pleading standards are inappropriate absent authorization from a statute or the Federal Rules. App. 162a-163a. Second, it interpreted this Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), to require a "pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Id.* 170a (emphasis in original). Third, to the extent that a defendant believes that *some* elements of a plaintiff's claim are based on "conclusory" allegations, the Second Circuit pointed to Fed. R. Civ. P. 12(e) as a remedy, consistent with this Court's suggestion in *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998).[5] App. 172a.

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[4] *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993).

[5] The Second Circuit found that the allegations made against petitioners were not "conclusory" and were sufficient on their own, without any allegation of subsidiary facts, to establish respondent's entitlement to discovery on his discrimination claims. App. 62a.

Finally, the court provided explicit guidance to the district court to oversee discovery with an eye towards preserving the substance of the qualified immunity defense. App. 172a-173a (suggesting that district court examine responses to paper discovery prior to permitting depositions, defer discovery of high level officials until other defendants have testified, and permit motions for summary judgment on qualified immunity grounds after "carefully targeted discovery" aimed at discovering the personal knowledge and involvement of individual defendants). Petitioners have refused to avail themselves of the opportunities presented by the Federal Rules, and amplified by the Second Circuit, to obtain further specification of the basis for respondent's claims.

5. Petitioners' first question presented implicates the application of pleading standards to the complaint in the instant case. The longstanding federal rule, embodied by the decision below, is that complaints need only meet the standards set forth in Rule 8, unless a statute imposes a higher pleading standard, or the subject matter falls into the particularized requirements of Fed. R. Civ. P. 9. *Leatherman*, 507 U.S. at 168-169; *Swierkiewicz*, 534 U.S. at 514-515; *Erickson v. Pardus*, 127 S. Ct. 2197 (2007) (per curiam). As this Court has emphasized numerous times, "[s]pecific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts." *Hill v. McDonough*, 547 U.S. 573, 582 (2006). In the absence of a specific heightened pleading requirement, "ordinary pleading rules are not meant to impose a great burden." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). The Rule 8 standard is satis-

fied if a complaint gives "the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz*, 534 U.S. at 512 (internal quotation marks omitted). "Fair notice" is that which will enable the defendant to answer and prepare for trial. 5 Wright & Miller, Federal Practice & Proc. § 1215. In a garden variety negligence action, for example, it is sufficient to state that on a given date and a given place, "defendant negligently drove a motor vehicle against plaintiff." *Swierkiewicz*, 534 U.S. at 513 n.4 (*quoting* Fed. R. Civ. P. Form 9). In the more closely analogous Title VII context, it is sufficient to allege that an adverse employment action was taken "on account of" prohibited factors. *Swierkiewicz*, 534 U.S. at 514. Thus, under Rule 8, a complaint need not identify the exact nature or mechanism of the defendant's misfeasance to state a claim. And, critically, to the extent a complaint alleges a defendant's state of mind, such as knowledge or intent, it may be averred "generally," without any subsidiary facts. Fed. R. Civ. P. 9(b).

As the Second Circuit recognized, this Court's decision in *Bell Atlantic* did not alter these fundamental rules. *Bell Atlantic* reaffirmed *Swierkiewicz*, and with it the rejection of any heightened pleading standards imposed by judicial fiat. 127 S. Ct. at 1973-1974 & n.14. Rather than require detailed fact pleading, the Court simply held that the facts alleged, taken as true, have to plausibly suggest relief. *Id.* at 1964 (not requiring "detailed factual allegations"); *id.* at 1973 n.14. And where a complaint alleges facts that are consistent with both legal and illegal conduct, as did the complaint in *Bell Atlantic*, Rule 8 simply requires some additional allegation that pushes the complaint into the realm of "plausi-

bility." *Id.* at 1972-1973. Thus, *Bell Atlantic* disclaimed any intention to radically alter the Rule 8 pleading standard.

That *Bell Atlantic* worked no significant change to Rule 8 pleading standards is evidenced by the Court's per curiam disposition of a Section 1983 complaint in *Erickson*. In *Erickson*, the lower court had dismissed a prisoner's claim of deliberate indifference to serious medical needs because the prisoner had failed to allege that he suffered any particular harm as a result of a denial of medical treatment. 127 S. Ct. at 2199. The Court reversed this disposition, finding that an allegation that the denial of care was endangering the prisoner's life was sufficient, without more, to state a claim. *Id.* at 2200. In so doing, the Court reemphasized that such a contention, albeit lacking specifics, was not "too conclusory" to provide fair notice of the substance of the claim, and that "[s]pecific facts are not necessary." *Id.* (citing *Bell Atlantic* and *Swierkiewicz*).

6. Petitioners' second question presented implicates standards for supervisory liability in civil rights actions. Although this Court has not defined the precise contours of supervisory liability in *Bivens* or section 1983 actions, there are many areas of agreement between the parties in this case. First, it is undisputed that supervisory *Bivens* liability cannot be established solely on a theory of *respondeat superior*. Second, and relatedly, all agree that a supervisor must take some affirmative act (or legally actionable omission) that contributes to or causes the constitutional violation alleged by a plaintiff. App. 14a. Third, petitioners agree that a supervisor's knowing acquiescence to subordinates' unconstitutional conduct is enough to establish supervisory li-

ability. Pet. 29-31. Finally, if a supervisor takes affirmative steps to create a facially unconstitutional policy, to be applied by subordinates, this too will establish supervisory liability. *Cf.*, *Collins v. City of Harker Heights*, 503 U.S. 115, 121 (1992). As will be discussed below, the Second Circuit's decision is consistent with all of these principles.

REASONS FOR DENYING THE PETITION

Petitioners argue that certiorari is appropriate to resolve (1) whether a "conclusory allegation" that a "high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state" a *Bivens* claim; and (2) whether a "high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials." Pet. (I). Neither question is certworthy, for similar reasons. First, petitioners' questions implicitly concede that a complaint should not be dismissed if it adequately alleges petitioners' actual, subjective knowledge of and acquiescence to discrimination by subordinates. And because petitioners do not claim to argue for a new or different pleading standard to be applied in this *Bivens* action, the petition ultimately boils down to an argument that the Second Circuit did not properly apply *Bell Atlantic*'s "plausibility" standard to the allegations of actual knowledge in the complaint. In other words, the petition seeks error correction of the Second Circuit and nothing more, an inadequate ground for certiorari, espe-

cially because the Second Circuit's decision faithfully adhered to this Court's precedents.

Relatedly, the alleged circuit split as to the first question is nonexistent because petitioners do not show a split as to legal analysis. In fact, none of the circuits identified by petitioners has expressed disagreement with the Second Circuit's analysis in *Iqbal*. And the alleged circuit split on the second question – the standard for supervisory liability where constructive, rather than actual, knowledge is alleged in *Bivens* actions – is not implicated by this case because the motion to dismiss standard requires a court to take as true respondent's allegations of *actual subjective* knowledge. Thus, while petitioners do an admirable job of creating the suggestion of relevant circuit splits, any tension identified by petitioners is irrelevant in the context of this case.

Even were the Court to overlook each of these failings, this interlocutory appeal is a poor vehicle for answering either question. Petitioners concede that they did not even raise the second question in the courts below, and there are additional substantial questions regarding the Court's jurisdiction to reach the issues presented. Moreover, even if the Court were to determine that the complaint's allegations provide insufficient notice to petitioners under the *Bell Atlantic* standard, ample facts have been uncovered through ongoing discovery to allow for a sufficiently detailed amendment to the pleadings. Therefore, in this particular case, granting the petition would only delay this case further to no apparent purpose.

I. THE SECOND CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT AND SISTER CIRCUITS CONCERNING THE ALLEGATIONS NECESSARY TO OVERCOME THE QUALIFIED IMMUNITY DEFENSE AT THE MOTION TO DISMISS STAGE

Petitioners make three arguments why this Court should address the question of what allegations are sufficient to establish actual subjective knowledge of a "high-ranking" official: that (1) the Second Circuit's decision that the complaint sufficiently alleges actual knowledge is inconsistent with *Crawford-El* and *Swierkiewicz*; (2) the decision below conflicts with four other courts of appeals "faced with similar facts"; and (3) the Second Circuit's approach deprives those defendants who most need them of the "important protections" of qualified immunity. Pet. 11. As will be shown below, the only real issue presented by petitioners' first question is whether the Second Circuit properly held that the allegations of petitioners' actual knowledge, acquiescence, and agreement are sufficient, drawing all inferences in favor of respondent. This amounts to error-correction, which is not a sufficient reason to grant certiorari, especially here where the Second Circuit's decision is painstakingly faithful to *Crawford-El* and *Swierkiewicz*. Furthermore, the courts of appeals decisions cited by petitioners ultimately are reconcilable with the Second Circuit's decision; indeed, no circuit court to discuss the decision below has expressed any disagreement with it. And finally, the "important protections" offered by the doctrine of qualified immunity are fully realized by the Second Circuit's decision.

a. Petitioners begin by mischaracterizing the decision below and the complaint in several ways: (1) by suggesting that the Second Circuit based its decision *solely* on the allegation that petitioners "knew about the unlawful conduct of their subordinates," Pet. 11; (2) by arguing that respondent alleged only that petitioners established a general policy of holding "high interest" detainees in restrictive conditions of confinement, but not that petitioners established a policy to discriminate on the basis of race, religion, and national origin, Pet. 12; and (3) by characterizing respondent's allegations as to petitioners' knowledge and intent to discriminate as "conclusory." Pet. 15. Even a cursory review of the complaint and the Second Circuit's ruling exposes the falsity of these assertions.

First, it is apparent from the Second Circuit's ruling that the court based its decision on more than petitioners' knowledge of unlawful discrimination by their subordinates. The court correctly noted that respondent alleged that he was kept in harsh conditions of confinement solely because of discrimination and that petitioners, among others, targeted respondent for mistreatment because of his race, religion and national origin. App. 59a. Additionally, the Second Circuit found that respondent specifically alleged that petitioners both condoned and agreed to this discrimination, and that no further subsidiary facts need be alleged. App. 62a. Petitioners' contention to the contrary cannot be reconciled with the plain language of the complaint:

- Petitioner Ashcroft was the "principal architect" of the policies challenged in this lawsuit. App. 157a (Compl. ¶ 10).

- Petitioner Mueller was "instrumental in the adoption, promulgation, and implementation" of the challenged policies. *Id.* (Compl. ¶ 11).
- The FBI, under the direction of petitioner Mueller, arrested and detained thousands of Arab Muslim men as part of its investigation into the events of September 11, 2001. *Id.* 164a (Compl. ¶ 47).
- Respondent was classified as "of high interest" to the September 11th investigation solely because of his race, religion, and national origin. *Id.* (Compl. ¶ 48).
- Petitioners approved a policy of holding "high interest" detainees in highly restrictive conditions of confinement until "cleared" by the FBI. *Id.* 168a (Compl. ¶ 69).
- Petitioners knew, condoned, and agreed to subject respondent to harsher conditions of confinement because of his race, religion, and national origin. *Id.* 172a (Compl. ¶ 96).
- Petitioners willfully designed a policy of confining individuals like respondent in the ADMAX SHU for arbitrary reasons. *Id.* 173a (Compl. ¶ 97).
- Petitioners adopted and promulgated a policy and practice of imposing harsher conditions of confinement on respondent because of respondent's religious beliefs, *id.* 201a, 106a (Compl. ¶¶ 232, 247), race, *id.* 202a, 208a

(Compl. ¶¶ 235, 250), and national origin, *id.* 208a (Compl. ¶ 250).

- Petitioners targeted respondent for mistreatment because of respondent's race, religion, and national origin. *Id.* 191a (Compl. ¶ 198).

The cited language conclusively shows that respondent alleged that petitioners were personally responsible for the discriminatory policy of classifying Arab and Muslim detainees as "high interest" solely because of their race, religion, and national origin – the complaint alleges that "high interest" detainees were classified as such for discriminatory reasons, that they were confined in the ADMAX SHU, and that petitioners approved of respondent being confined in the ADMAX SHU because of his race, religion, and national origin. But if any further confirmation were needed, one need look no further than the arguments petitioners themselves made below. In their appellate brief, petitioners acknowledged the complaint's allegation that petitioners "adopted and implemented a 'policy and practice of imposing harsher conditions of confinement' on plaintiffs because of their religious beliefs or race," and adopted the "hold-until-cleared" policy because of discriminatory animus. (Opening Appellate Br. for Petitioners at 47-48). Petitioners then argued that these allegations should be rejected, not because the complaint only alleged petitioners' *knowledge* of misconduct (as petitioners argue for the first time here), but for two different reasons: (1) one should expect that those suspected of involvement in September 11 would share the "religious and national origin background"

of the attackers; and (2) that the allegations as to discriminatory animus were "patently absurd." *Id.*[6]

Thus, we are left with petitioners' argument that respondent's claim "that petitioners 'knew of, condoned, and willfully and maliciously agreed' to subject him to unlawful discrimination" is a "legal conclusion" that the Court is not bound to accept as true at the motion to dismiss stage. Pet. 15. The difficulty with this argument is that the complaint does not use the term "unlawful discrimination" – the only possible "legal conclusion" to which the petition could be referring (as Fed. R. Civ. P. 9(b) specifically allows states of mind to be averred generally).[7] In fact, the paragraph of the complaint referred to by petitioners alleges that petitioners agreed to subject respondent to particular conditions of confinement in the ADMAX SHU solely because of his religion, race and national origin and not for any legitimate reason. App. 172a (Compl. ¶ 96). The complaint further alleges that petitioners implemented a policy and practice of imposing harsher conditions of confinement on respondent because of respondent's religion and race. App. 201a-202a (Compl. ¶¶ 232, 235). These are facts under Rules 8 and 9(b) – not legal conclusions – that establish respondent's claim of unlawful discrimination. Petitioners cannot summarize these

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[6] Petitioners' first argument is a remarkable concession to unlawful discrimination. And their second argument requires the assumption that individuals in high positions of authority are somehow immune from Anti-Arab and Muslim discrimination, an assumption that is inappropriate at this stage of the proceedings and belied by the facts alleged in the complaint.

[7] Indeed, the word "discrimination" is used once in the complaint's preliminary statement, and then only to describe particular causes of action. App. 154a (Compl. ¶ 1).

facts, attach a legal conclusion to them, and then accuse respondent of alleging only "legal conclusion[s]."

b. Shorn of its mischaracterization of the complaint, the petition simply argues that certain of respondent's allegations are legal conclusions that mandate the pleading of subsidiary facts. This seeks nothing but error correction, which is not an appropriate basis for certiorari. And petitioners' invocation of this Court's decisions in *Crawford-El* and *Swierkiewicz* does not alter this conclusion. To the contrary, to the extent those decisions suggest anything about what must be contained in a plaintiff's discrimination complaint, the Second Circuit's decision is loyal to them.

Crawford-El does not even address relevant pleading standards, or the relationship between pleading standards and qualified immunity. Rather, the Court considered and forcefully rejected a judicially-created heightened *burden of proof* that had been imposed on civil rights plaintiffs in which the motive of the defendant was an element of the cause of action. 523 U.S. at 592-594. To the extent that a defendant believes that there is insufficient factual pleading in a complaint, the *Crawford-El* Court stated in *dicta*:

> When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense . . . so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings. The dis-

> trict judge has two primary options prior to permitting any discovery at all. First, the court may . . . grant the defendant's motion for a more definite statement under Rule 12(e). Thus, the court may insist that the plaintiff put forward specific, nonconclusory factual allegations that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment.

Id. at 597-598 (internal quotation marks omitted).

Here, petitioners neither answered the complaint nor moved for a more definite statement. Petitioners thus effectively foreclosed the possibility of the court invoking the corrective mechanisms articulated in *Crawford-El*.

Petitioners' reliance on *Swierkiewicz* is also misguided. *Swierkiewicz* is significant for what it says about sufficiency of pleadings as a general matter and in cases such as this that involve allegations of discriminatory motive. As for pleadings in general, *Swierkiewicz* confirmed the minimal nature of notice pleading, by approving a complaint in a negligence case that alleged only that a defendant "negligently" hit a plaintiff with a motor vehicle on a particular street at a particular time. *Swierkiewicz*, 534 U.S. at 513 n.4. As for pleadings in discrimination cases, *Swierkiewicz* held that it is sufficient to allege that a plaintiff suffered an adverse employment consequence (the "what"), the events leading to that adverse consequence (the "when"), the identities and

protected-class status of some of the individuals involved (the "who"), and that the defendant took the adverse employment action "on account of" a plaintiff's protected class status. 534 U.S. at 514. The Court found these allegations sufficient, even though it acknowledged that its holding could result in complaints with "conclusory" allegations advancing to discovery. *Id.*

With this understanding of *Swierkiewicz* in mind, the complaint in the instant case easily alleges the what, when, who, and where elements: (1) the "what" is the use of harsh conditions of confinement on detainees solely because of their protected class status; (2) the "when" is the period that respondent was subjected to discriminatory classification and treatment; (3) the "who" are each of those individuals involved in different ways in respondent's confinement in the ADMAX SHU; (4) and the "where" is both Washington, D.C. and New York City. As such, the complaint states the "conduct, time, place, and persons responsible." *Evancho v. Fisher*, 423 F.3d 347, 353 (3d Cir. 2005).

Petitioners would fault respondent for not having access at the time of filing to additional information establishing petitioners' liability, but the motion to dismiss standard does not require such particularity. *Bell Atlantic*, 127 S. Ct. at 1964 (not requiring "detailed factual allegations"). Insisting on such specificity here is particularly disingenuous, because petitioners and their codefendants found the complaint specific enough to lay blame for the conduct alleged therein at the feet of other defendants.[8] Moreover,

[8] Petitioner Ashcroft's various arguments regarding his responsibility as compared to other defendants in this lawsuit demonstrate added difficulty with petitioners' argument. He

petitioners have far more control over respondent's access to information than do most defendants. Indeed, as recently as April 28, it was revealed for the first time that petitioner Ashcroft authored a memorandum to subordinates such as Michael Rolince, also a defendant in the instant case, outlining how the classification system at issue in this litigation was to be carried out. (*See* Tr. Of 4/28/08 Status Conference at 19, Docket No. 539). Without the discovery process, respondent would have no ability to lawfully obtain this document. It is presumably for this reason that this Court recognized in *Crawford-El* the well-established principle that discovery is the proper means for plaintiffs to amplify allegations in a complaint. 523 U.S. at 599-600. The teachings of *Swierkiewicz* and *Crawford-El* therefore confirm rather than conflict with the Second Circuit's decision.

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argued in the district court that lower level MDC officials were not responsible for the placement of respondent in restrictive conditions of confinement because that decision "was driven by national security and foreign threat concerns which wardens and prison officials were in no position to second guess." (Ashcroft District Ct. Br. at. 13 (*cited* at App. 118a)). Petitioner Ashcroft would apparently now argue that, not only were such decisions not made at the lowest levels of the MDC, nor were they made at the highest levels of the Department of Justice, placing responsibility squarely on his codefendants Rolince and Maxwell. Pet. 12-13. At the same time, petitioners' codefendants have suggested that petitioners bear ultimate responsibility for the discriminatory policies challenged here. (*See* Tr. Of 4/28/08 Status Conference at 19, Docket No. 539; Hasty Appellate Br. 43-44). In this situation, respondent cannot be expected to discern, prior to discovery, the precise roles and responsibilities exercised by each defendant when they themselves have important disagreements.

c. Nor is there any conflict between the circuit court cases cited by petitioners and the Second Circuit's decision. Pet. 18-21. Petitioners do not rest their argument on a split in the legal standard used by each of the circuits. Nor could they, because all but one of the decisions they cite were announced prior to *Bell Atlantic*. The substance of petitioners' claim is simply that different circuits have reached different results when reviewing arguments for dismissing different complaints. In the absence of any argument that courts of appeals are applying different standards, this is hardly evidence of a circuit split calling for the Court's intervention especially considering the critical factual differences between each of the cases identified by petitioners and the instant case.

In *Marrero-Gutierrez v. Molina*, 491 F.3d 1 (1st Cir. 2007), the only post-*Bell-Atlantic* case cited in the petition, the complaint was "limited to stating that [plaintiff] was badly treated at work and that her political party was mocked"; it failed to specifically allege that the defendants took adverse action against her because of her political affiliations. *Id.* at 9-10. In the absence of such an allegation, the Court found it "speculative" to believe that she had stated a claim. *Id.* Here, by contrast, respondent has alleged both an injury and that petitioners caused that injury because of their discriminatory animus. S*upra* 11-12. Thus, there is no conflict between the First Circuit's approach and that of the Second Circuit.[9]

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[9] The First Circuit has yet to discuss *Iqbal*, but lower courts in the First Circuit indicate agreement with the Second Circuit's interpretation of *Bell Atlantic*. *See Nickerson-Malpher v. Baldacci*, No. 07 Civ. 136, 2008 WL 696806 (D. Me. March 07, 2008); *Sanchez-Laureano v. Puerto Rico*, No. 07 Civ. 1172, 2008

The remaining decisions identified by petitioners predate *Bell Atlantic*, and therefore are of limited utility in establishing that the Second Circuit's interpretation of this Court's 2007 decision is in conflict with that of other circuits. They also are distinguishable on their facts. The Third Circuit's decision in *Evancho*, for instance, affirmed the dismissal of a complaint alleging an unlawful employment transfer because it did not state the "conduct, time, place, and persons responsible." 423 F.3d at 353. It did not even allege any action or knowledge by the defendant. *Id.* Unlike the complaint in *Evancho*, the allegations against petitioners are not just based on their position as heads of their department. *Id.* at 354. Significantly, the Third Circuit, in *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008), adverted to *Iqbal* without expressing any disagreement with its analysis.

Nor does the Sixth Circuit support the distinction suggested by petitioners. The Sixth Circuit has firmly rejected any heightened pleading standard, let alone a special pleading standard for "high level" officials. *Goad v. Mitchell*, 297 F.3d 497, 503 (6th Cir. 2002). Therefore, petitioners' citation to *Nuclear Transport & Storage, Inc. v. United States*, 890 F.2d 1348 (6th Cir. 1989), which petitioners acknowledge applied an abandoned heightened pleading standard, is of no moment. And yet again, petitioners ignore Sixth Circuit authority which has cited to *Iqbal* with approval. *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 540-542 (6th Cir. 2007) (noting that almost all district courts in the circuit had agreed with *Iqbal*'s

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WL 542962 (D.P.R. February 25, 2008); *Brown v. Sweeney*, 526 F.Supp.2d 126 (D. Mass. 2007).

"close[] analy[sis]" of *Bell Atlantic*).

Finally, the Eleventh Circuit's decision in *Gonzalez v. Reno*, 325 F.3d 1228 (11th Cir. 2003), is a pre-*Bell Atlantic* decision that applied a heightened pleading standard that petitioners themselves, when arguing before the Second Circuit, expressly disclaimed. (Petrs.' Reply Br. at 4).[10] Moreover, the *Gonzalez* Court found the complaint in that case insufficient because the plaintiffs did not allege facts which established a causal connection between the defendants' instruction to effectuate an arrest warrant and the unconstitutional way in which the warrant was carried out. 325 F.3d at 1235. Here, by contrast, respondent has alleged that petitioners knew, approved, and agreed to have subordinates behave in an unconstitutional manner, not just that they directed subordinates to apply a race- and religion-neutral policy.

d. Petitioners finally claim that the Second Circuit's decision eviscerates the protections of qualified immunity, arguing that the qualified immunity doctrine affords immunity from suit itself, and therefore *any* discovery undermines qualified immunity. But

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[10] *Gonzalez* was briefed and argued prior to this Court's decision in *Swierkiewicz*. Since *Gonzalez* was decided, the Eleventh Circuit has neither cited nor discussed *Swierkiewicz* or *Erickson* in cases in which a "heightened pleading" standard was applied. *Epps v. Watson*, 492 F.3d 1240 (11th Cir. 2007); *Swann v. Southern Health Partners, Inc.*, 388 F.3d 834 (11th Cir. 2004); *Osburn v. Cox*, 369 F.3d 1283 (11th Cir. 2004); *Omar ex rel. Cannon v. Lindsey*, 334 F.3d 1246 (11th Cir. 2003); *Dalrymple v. Reno*, 334 F.3d 991 (11th Cir. 2003); *Cottone v. Jenne*, 326 F.3d 1352, 1362 n.7 (11th Cir. 2003). Until the Eleventh Circuit addresses these decisions, its heightened pleading standard, as applied in *Gonzalez*, is an insufficient basis for finding a split here.

petitioners cannot mean to suggest that the blanket assertion of qualified immunity affords them immunity from discovery in every instance. When a qualified immunity defense cannot be resolved at the motion to dismiss stage, a district court has no choice but to permit discovery. *Crawford-El*, 523 U.S. at 593 n.14.

This Court's decisions recognize this critical fact. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), never suggested, as petitioners maintain, that *any* discovery at all undermines the qualified immunity defense. Instead *Harlow* focused on the harm of allowing "broad-ranging" discovery against government officials based solely on bare allegations of malice. 457 U.S. at 817-818. For this reason, *Harlow* abandoned the good-faith immunity standard of *Wood v. Strickland*, 420 U.S. 308 (1975), in favor of the objective reasonableness standard of qualified immunity that governs this case. *Harlow*, 457 U.S. at 818-819. Thus, this Court concluded that the proper way to protect officials from broad-ranging discovery was not to adjust the pleading standard, but to permit a defense based on the objective reasonableness of the defendant's conduct in light of clearly established law. The decision below is wholly consistent with this choice. The Second Circuit fully addressed petitioners' argument regarding objective reasonableness and clearly established law, and petitioners do not ask this Court to review the Second Circuit's resolution of those questions.

Crawford-El reaffirmed the distinction in *Harlow* between broad-ranging discovery and more limited discovery, recognizing that in certain circumstances, discovery necessary to resolve the issues of qualified immunity would be appropriate and would not viti-

ate the qualified immunity defense. *Crawford-El*, 593 n.14 ("Discovery involving public officials is indeed one of the evils that *Harlow* aimed to address, but neither that opinion nor subsequent decisions create an immunity from all discovery.").

Nor does the possibility that some individuals may use a lawsuit to "distract the attention of high-ranking officials in carrying out policies with which they disagree" justify petitioners' arguments here. Pet. 22. That risk is always present, regardless of the standards used to review pleadings. And this Court has given government officials a powerful tool in the face of such complaints: the argument that their conduct was objectively reasonable or that they did not violate clearly established law, and the opportunity to pursue that argument on interlocutory appeal. Government officials also may move for a more definite statement under Rule 12(e) if they desire amplified factual pleadings. It is only after a court has concluded that a plaintiff has stated a claim for constitutional violations, that the defendant's conduct as alleged was not objectively reasonable, and that the defendant's alleged conduct violated clearly established law that discovery be allowed to proceed. *Crawford-El*, 523 U.S. at 591 (there is nothing unfair about "holding one accountable for actions that he or she knew, or should have known, violated the constitutional rights of the plaintiff"). Petitioners' implication that they were "effectively precluded" from raising their qualified immunity defense because of the complaint's alleged lack of detail is disingenuous when petitioners forcefully raised below both issues of objective reasonableness and lack of clearly established law, only to have them properly rejected. Pet. 22, App. 59a-60a.

Invoking the specter that litigants might use the legal system to file vexatious lawsuit ultimately proves too much, especially here where the Second Circuit clearly cabined the district court's discretion to control discovery.[11] App. 172a-173a. The Second Circuit carefully limited its "plausibility" holding to the September 11 context, in which one would expect individuals like Ashcroft and Mueller to be aware and involved in developing the detention policies, so that there was no fear that its opinion would mean that "every prisoner complaining of a denial of rights while in federal custody anywhere in the United States can survive a motion to dismiss simply by alleging that the Attorney General knew of or condoned the alleged violation." App. 43a.

e. Finally, it is germane to consider what relevance petitioners' status as "high-level" officials has when considering the sufficiency of allegations in respondent's complaint. Petitioners invoke the label throughout their petition like a talisman, perhaps hoping that it will result in an application of a heightened pleading standard without actually requesting that such a standard be applied. There are good reasons, however, that petitioners do not explicitly ask for a heightened pleading standard. As established above, *supra* 8-10, this Court has never approved a heightened pleading standard in the absence of authority from legislation or the Federal Rules. Petitioners explicitly disclaimed any reliance on a heightened pleading standard in the courts be-

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[11] Petitioners' and *amici curiae*'s reliance on Justice Stevens' concurrence in the judgment in *Mitchell* is passing strange, because Justice Stevens believed, contrary to the majority, that the Attorney General should have received absolute immunity. 472 U.S. at 542.

low, effectively conceding that there is no basis for applying such a standard here. (Petrs.' Reply Br. at 4). Petitioners do not identify any circuit court of appeals that has distinguished between "high-level" officials and other government employees for the purposes of pleading standards. And keying a pleading standard to the invocation of an affirmative defense like qualified immunity is nonsensical, because it requires plaintiffs to anticipate the invocation of an affirmative defense. *Jones v. Bock*, 127 S. Ct. 910, 921 (2007); *Crawford-El*, 523 U.S. at 595; *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). For all these reasons, petitioners should not be permitted to rely on their "high-level" status to erect additional pleading barriers prior to discovery.

Nor can petitioners' invocation of their status within the Government's hierarchy support a claim that somehow their claim to immunity should be considered differently from any other officer's. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). As the *Mitchell* Court held, despite his Cabinet-level status, the Attorney General is entitled to the same qualified immunity as any other government official, even when he claims that his allegedly unconstitutional actions were taken to protect national security. *Id.* at 520-524. As this Court firmly declared, "the security of the Republic" will not be threatened if petitioners "on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States." *Id.* at 524 . There is thus no support for petitioners' implication that either the pleading standard or the qualified immunity standard is affected by their status as "high-level" officials.

In short, the Second Circuit's decision properly took account of each of this Court's most relevant decisions – *Crawford-El*, *Swierkiewicz*, *Bell Atlantic*, and *Erickson* – by giving them all force. The Second Circuit paid close attention to *Crawford-El*'s admonition that district courts use controls on discovery to mediate the space between Rule 8 pleading standards and the protections necessary for qualified immunity. App. 172a-173a. The decision below recognized that *Swierkiewicz* established the baseline for minimal pleading standards that are met in the instant case, while applying the "plausibility" standard articulated in *Bell Atlantic*. App. 19a-27a.[12] And the Second Circuit recognized that *Erickson* confirmed that *Bell Atlantic* did not mark a substantial departure from this Court's well-established pleading jurisprudence. App. 23a-24a. For these reasons, certiorari is not appropriate to address the first question presented by petitioners.

II. NO GROUNDS EXIST TO GRANT CERTIORARI ON THE QUESTION OF QHETHER "HIGH-RANKING" OFFICIALS MAY BE HELD LIABLE BASED ON A CONSTRUCTIVE NOTICE THEORY

Petitioners also argue that certiorari is appropriate to consider whether "high-ranking" officials can be held liable under *Bivens* on a constructive notice theory. There are several reasons why the Court should not consider this question.

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[12] Unlike the complaint in *Bell Atlantic,* there is no plausible reading of the allegations in respondent's complaint that could establish the lawfulness of petitioner's conduct, given the factual allegations contained therein.

a. The first barrier is a substantial one: as petitioners concede, they did not raise below the issue of actual versus constructive knowledge. Pet. 4 n.6. Petitioners claim that addressing the issue would have been futile "[i]n light of established circuit precedent," but they cite no authority for the proposition that their waiver can be excused for this reason. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (argument is waived if not raised below). This in itself is a sufficient reason for the Court to deny certiorari.

Moreover, the Second Circuit did not base its decision on the "constructive knowledge" theory. The Second Circuit found, in permitting respondent's equal protection claim to proceed, that petitioners actually knew and approved of the unconstitutional conduct of their subordinates as a matter of policy. App. 62a. Petitioners' quote from Judge Cabranes' concurrence itself reflects concern that petitioners will have to answer questions regarding their "possible knowledge" of subordinates' conduct, clearly referring to their subjective, actual knowledge, not to constructive knowledge. Pet. 32 (*quoting* App. 69a).

Petitioners fail to identify any part of the Second Circuit's opinion that rests on constructive notice. The Second Circuit's opinion does not even contain the words "constructive knowledge" or "constructive notice." Petitioners cite to only two portions of the Second Circuit's opinion in support of their assertion that the court below relied on a constructive notice theory of supervisory liability. Pet. 26 & n.6 (*citing* App. 14a & 62a). The first reference, App. 14a, was the Second Circuit's cursory recitation of its standard for supervisory liability, which allows for personal involvement to be shown by five alternative means.

Petitioners refer only to the fourth theory identified by the Second Circuit, "gross negligence" in supervising subordinates, as resting on constructive knowledge. But the Second Circuit nowhere declares that it allowed claims against petitioners to go forward based on their grossly negligent supervision of subordinates. And the second portion of the opinion cited by petitioners, App. 62a, discusses the complaint's allegations about petitioners' involvement in the *policy* of discriminating against Arabs and Muslims, involvement which relates to a different theory of supervisory liability identified by the Second Circuit: "creat[ing] a policy or custom under which the violation occurred." App. 14a.

There is an obvious explanation for why petitioners did not raise the issue below, and why the Second Circuit had no need to rely on a constructive knowledge theory of liability: this case arises at the motion to dismiss stage, where respondent's allegation that petitioners had actual knowledge of their subordinates' unconstitutional conduct is accepted as true. Absent a theory of liability that would hold petitioners accountable for their constructive, but not their actual, knowledge, there was no reason for petitioners to raise, or for the Second Circuit to discuss, the issue of constructive knowledge. Thus, petitioners seek certiorari on a question that they did not raise below, that the Second Circuit did not pass on, and that is not even implicated by the complaint in the instant case.

b. Understanding the motion to dismiss posture in which this case arises clarifies the irrelevance of the circuit split alleged by petitioners. All of the circuit court decisions cited by petitioners in support of a split as to the second question presented were de-

cided at *summary judgment* or *after trial*, when the plaintiff cannot rest on the allegations in the complaint but must provide evidence to support either actual or constructive notice. *See Rodriguez-Garcia v. Municipality of Caguas*, 495 F.3d 1, 10-11 (1st Cir. 2007) (reviewing dismissal of case after trial); *Carter v. Morris*, 164 F.3d 215, 220-221 (4th Cir. 1999) (reviewing record on summary judgment); *Hall v. Lombardi*, 996 F.2d 954, 961 (8th Cir. 1993) (same); *Baker v. Monroe Twp.*, 50 F.3d 1186, 1194 (3d Cir. 1995) (same); *Woodward v. City of Worland*, 977 F.2d 1392, 1399 (10th Cir. 1992) (same).[13] And although petitioners imply that the D.C. Circuit is in conflict with the Second Circuit, in fact, then-Judge Roberts' opinion for the D.C. Circuit explained that a claim would be dismissed in the absence of an allegation that the supervisory defendants "had actual or constructive knowledge of past transgressions." *International Action Ctr. v. United States*, 365 F.3d 20, 28 (D.C. Cir. 2004). Thus, the only cases that petitioners rely on in which constructive knowledge of subordinate misconduct was deemed insufficient to establish supervisory liability were decided at the summary judgment stage, when a plaintiff's allegation of actual knowledge need not be taken as true.

Therefore, any split of authority on the issue suggested by petitioners is not implicated in this case,

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[13] The Seventh Circuit cases cited by petitioners do not address the issue presented by the petition. *Gossmeyer v. McDonald*, 128 F.3d 481, 495 (7th Cir. 1997) (holding that defendant cannot be held liable for simple negligence, a proposition with which the Second Circuit has no quarrel); *Kelly v. Municipal Courts*, 97 F.3d 902, 909 (7th Cir. 1996) (establishing general rule that defendant be personally involved in constitutional violation, including by acquiescing in subordinates' unconstitutional conduct).

because the issue of constructive knowledge simply has not yet arisen. More to the point, the circuit courts that petitioners claim are in conflict with the Second Circuit would undoubtedly agree with the judgment below, because respondent alleged that petitioners condoned and agreed to respondent being subjected to unconstitutional treatment. *Baker*, 50 F.3d at 1194 (requiring actual knowledge and acquiescence); *Woodward*, 977 F.2d at 1399 (same); *Gossmeyer*, 128 F.3d at 495 (requiring actual knowledge and approval of unconstitutional conduct of subordinates). Thus, there is no meaningful conflict between the Second Circuit's approach and that of its sister circuits with respect to the allegations in the complaint.

c. Finally, contrary to petitioners' contention, there is no tension between the Second Circuit's supervisory liability standard and this Court's decisions. Accepting *arguendo* that the Second Circuit has at least implied that constructive knowledge would be sufficient to establish supervisory liability in civil rights actions, this would not be inconsistent with *Rizzo v. Goode*, 423 U.S. 362 (1976). The theory of liability accepted by the lower court and rejected by this Court in *Rizzo* had nothing to do with constructive knowledge, but with the proposition that supervisory officials have an affirmative duty to eliminate misconduct of subordinate officials, a duty which is breached whenever some pattern of misconduct has occurred. *Id.* at 376. The district court's error in *Rizzo* was to enter judgment against defendants who had "played no affirmative part" in depriving anyone of any constitutional rights. *Id.* at 377. The Second Circuit also does not permit supervisory liability to be imposed absent some involvement in a

constitutional violation. *Poe v. Leonard*, 282 F.3d 123, 140 (2d Cir. 2002).

Similarly, petitioners' citation to the numerous admonitions from this Court that supervisory liability (in the Section 1983 or *Bivens* contexts) may not be based on a theory of *respondeat superior* is noncontroversial, and fully incorporated in the Second Circuit's jurisprudence. *Id.* The court below did not rest on a *respondeat superior* theory.

This leaves petitioners' reliance on *Farmer v. Brennan*, 511 U.S. 825 (1994), which described the standard for liability in the very specific context of a supervisory prison official's failure to protect a prisoner from harm inflicted by other prisoners. *Id.* at 829. As *Farmer* made explicit, it required a standard of actual knowledge because it was interpreting the Eighth Amendment, which requires the imposition of a punishment. 511 U.S. at 837-838. Indeed, *Farmer* recognized that the standard for municipal liability, which petitioners explicitly adopt here, uses the term "deliberate indifference" but allows for liability based on constructive notice. *Farmer*, 511 U.S. at 840-841 (explaining that constructive notice was appropriate in the Section 1983 municipal failure to train context but not in the prison context, even though the standard used in both settings is called "deliberate indifference"). Because petitioners' equal protection claims here do not arise under the Eighth Amendment, *Farmer*'s requirement of actual knowledge is inapposite.

Nonetheless, despite the different contexts, petitioners insist that the Eighth Amendment deliberate indifference standard should apply to this case involving violations of the Equal Protection Clause and First Amendment. The only rationale offered by pe-

titioners is their particular status as Attorney General and Director of the FBI. Pet. 28. However, this Court has never before suggested that the contours of *Bivens* liability will depend on the *status* of a particular defendant. The *Mitchell* Court did not purport to apply a different Fourth Amendment standard simply because the defendant was the Attorney General. 472 U.S. at 530-535. To tolerate such a distinction would undermine *Mitchell*'s basic principle that even defendants such as petitioners must conform their conduct to the same law that every other government official follows. *Id.* at 524.

Here, like any discrimination claim, liability will be established by showing discriminatory animus plus disparate treatment or effect. *Washington v. Davis*, 426 U.S. 229, 240-241 (1976). Applying this well established standard, respondent's complaint adequately alleges sufficient facts with respect to petitioners' conduct. *Supra 11-12*. In this light, petitioners' reference to the difference between actual and constructive knowledge is a non sequitur. Petitioners' knowledge, constructive or otherwise, of their subordinates' discriminatory conduct is irrelevant where respondent has alleged both that petitioners intended to discriminate, and in fact created a policy that accomplished that discriminatory purpose. For these reasons, the Court should deny certiorari as to petitioners' second question.

III. EVEN IF THE QUESTION PRESENTED WERE CERTWORTHY, THIS CASE, IN ITS CURRENT POSTURE, IS A POOR VEHICLE

Even were the Court inclined to grant certiorari on the questions presented, this case is a poor vehicle

for addressing the issue. First, there is a substantial question as to whether there is even jurisdiction to consider the questions presented. Interlocutory appeals, although disfavored, are permitted in limited circumstances for appeals of the denial of a motion to dismiss or for summary judgment asserting the defense of qualified immunity, as an iteration of the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Not every denial of qualified immunity is subject to interlocutory appeal, however. *Johnson v. Jones*, 515 U.S. 304, 314 (1995). The exception for interlocutory appeals of qualified immunity decisions permits appellate courts to decide abstract issues of law, "typically, the issue whether the federal right allegedly infringed was 'clearly established.'" *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996). When bringing such an appeal, however, the defendant must accept the *plaintiff's* version of the facts as presented in the district court, for in those circumstances the appellate court can review the district court's determination of the "purely legal issue what law was 'clearly established,'" and need not consider the correctness of the plaintiff's version of the facts. *Johnson*, 515 U.S. at 313. Here, petitioners are not arguing that the law was not "clearly established," but have instead refused to accept as true the facts alleged in respondent's complaint.[14]

Relatedly, granting certiorari would be premature. Consistent with this Court's admonition in

[14] *Amici curiae* attempt to argue that the standards for supervisory liability were not clearly established in 2001. Not only have petitioners not sought certiorari on that question, but petitioners also did not even raise that argument below.

Crawford-El, the Second Circuit remanded to the district court to permit limited discovery regarding the qualified immunity defense raised by petitioners, among others. App. 172a-173a. The purpose of so doing was to protect petitioners and their co-defendants from the "broad-reaching" discovery with which *Harlow* was concerned. *Crawford*-El, 523 U.S. at 593 n.14. Therefore, contrary to petitioners' suggestions, they have yet to be confronted with answering discovery that undermines the interests behind the qualified immunity defense. *Id.* The court of appeals envisioned a reasonable progression of discovery, from limited written discovery targeted to the qualified immunity issues before even depositions were permitted of petitioners.

Finally, even if the Court grants certiorari here and ultimately disagrees with the Second Circuit's assessment of the complaint, respondent will be able to amend his complaint to allege subsidiary facts that establish petitioners' more direct involvement in discriminatory treatment. The Second Circuit and district court adverted to the existence of such evidence outside of the pleadings, which petitioners attempt to minimize by arguing that those specific facts do not appear in the complaint and should therefore be disregarded. Pet. 14-15. Whatever the merits of that argument for the purposes of assessing the complaint as filed, the availability of those facts counsel against granting certiorari . Additionally, since the complaint was filed, respondent has obtained discovery from the United States and other defendants that confirms different aspects of the roles that petitioners played in the unconstitutional conditions of confinement experienced by respondent. And most recently defendant Rolince, who reported

directly to petitioner Mueller, has indicated that he intends to rely on a memorandum issued by petitioner Ashcroft to show that he was acting consistent with petitioner Ashcroft's direction. (*See* Tr. Of 4/28/08 Status Conference at 19, Docket No. 539). Thus, the existence of evidence, from many sources, to support an amendment that would cure any possible pleading defect in respondent's complaint illustrates the ultimate futility of petitioners' arguments here.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for certiorari.

Respectfully submitted,

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