No. 07-__

IN THE

Supreme Court of the United States

KATHLEEN HAWK SAWYER,
MICHAEL COOKSEY, AND DAVID RARDIN,
Cross-Petitioners,

v.

JAVAID IQBAL,
Cross-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether conclusory allegations of tortious conduct by supervisory government officials can be maintained under 42 U.S.C. § 1985(3) where the same allegations, arising from the same underlying conduct, have been found insufficient to survive dismissal when pled directly under the relevant constitutional provisions.

PARTIES TO THE PROCEEDING

Petitioner Kathleen Hawk Sawyer is the former Director of the Federal Bureau of Prisons. Sawyer is a defendant in the district court and an appellant in the court of appeals. Petitioner Michael Cooksey is the former Assistant Director for Correctional Programs of the Bureau of Prisons. Cooksey is a defendant in the district court and an appellant in the court of appeals. Petitioner David Rardin is the former Director of the Northeast Region of the Bureau of Prisons. Rardin is a defendant in the district court and an appellant in the court of appeals.

Respondent Javaid Iqbal is plaintiff in the district court and appellee in the court of appeals.

The other respondents are all defendants in the district court and appellants in the court of appeals: John Ashcroft, former Attorney General of the United States; Robert Mueller, Director of the Federal Bureau of Investigation; Michael Rolince, former Chief of the Federal Bureau of Investigation's International Terrorism Operations Section, Counterterrorism Division; Kenneth Maxwell, former Assistant Special Agent in Charge of the Fedeal Bureau of Investigation's New York Field Office; Dennis Hasty, former Warden at the Metropolitan Detention Center in Brooklyn, New York.

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OPINIONS AND JUDGMENTS BELOW

On September 27, 2005, the United States District Court for the Eastern District of New York entered an order dismissing the majority but not all of the claims against petitioners. The opinion is unpublished but available as *Elmaghraby, et al. v. Ashcroft, et al.,* 04 CV 1409, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) and also reprinted in the Petition for Writ of Certiorari of Petitioners John Ashcroft and Robert Mueller ("App.") at 71a – 150a.[1] The United States

[1] Pursuant to Supreme Court Rule 12.5, appendix citations in this conditional cross-petition refer to materials appended to the Ashcroft and Mueller Petition for Writ of Certiorari.

Court of Appeals for the Second Circuit affirmed in part, reversed in part, and remanded the case on June 14, 2007; its opinion is reported at *Iqbal v. Hasty,* 490 F.3d 143 (2d Cir. 2007), and reprinted at App. 1a – 70a. Petitions for panel rehearing and rehearing en banc were denied by the Second Circuit on September 18, 2007. App. 151a – 52a.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and judgment on June 14, 2007, and denied rehearing on September 18, 2007. On December 7, 2007, Justice Ginsburg extended the time for petitioners John Ashcroft and Robert Mueller to file a petition for a writ of certiorari to January 16, 2008.[2] On January 4, 2008, Justice Ginsburg further extended that time to February 6, 2008. On that date, the Solicitor General filed a petition for writ of certiorari on behalf of petitioners Ashcroft and Mueller. This conditional cross-petition is submitted pursuant to Supreme Court Rule 12.5.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but

[2] Dennis Hasty filed a petition for a writ of certiorari on December 17, 2007.

> upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1985(3) of Title 42 of the United States Code provides:

> If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to

> vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

A. Factual Background

This *Bivens*[3] action was brought by Javaid Iqbal ("respondent"), a citizen of Pakistan, who asserts that he was arrested and detained following the September 11, 2001 terrorist attacks by agents of the Immigration and Naturalization Service ("INS") and the Federal Bureau of Investigation ("FBI"), and held at the Metropolitan Detention Center ("MDC") in Brooklyn, New York until on or about January 15, 2003. *See* App. 157a, 169a (First Am. Compl. ("Compl.") ¶¶ 9, 80). Respondent was then transferred to an INS detention facility and eventually deported. He neither denies that he was in the

[3] *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

United States illegally, nor challenges the grounds for his detention.

Respondent filed his initial complaint on May 3, 2004 in the United States District Court for the Eastern District of New York and an amended complaint on September 30, 2004. In his amended complaint, respondent claims that various of his constitutional and statutory rights were violated while he was held at the MDC. He sued the United States and numerous federal officials in their individual capacities, including petitioners, the former Director, Assistant Director and Regional Director of the Federal Bureau of Prisons ("BOP"), and three other supervisory officials who are currently seeking a writ of certiorari — Ashcroft, Mueller, and Hasty.

In his amended complaint, respondent alleges that in January 2002, he was classified by defendants Rolince and Maxwell, as being "of high interest" to the government's investigation of the September 11 attacks. Respondent claims that as a consequence of this classification, he was housed in the MDC's Administrative Maximum Special Housing Unit ("ADMAX SHU") for approximately seven months. *See* App. 164a-65a, 169a (Compl. ¶¶ 51, 53, 81). He further asserts that while confined in ADMAX SHU, he was subjected to excessive physical force and verbal abuse; subjected to unlawful strip and body-cavity searches; denied medical treatment and adequate nutrition; detained unnecessarily in solitary confinement; denied adequate exercise; and denied the right to exercise his religious beliefs by the MDC staff because of his race, religion, and/or national origin. App. 170a-71a, 176a, 181a (Compl. ¶¶ 2, 87-89, 113, 136).

Respondent contends that the procedures that resulted in the alleged incidents of abuse were developed and implemented by defendants other than petitioners. *See* App. 165a (Compl. ¶ 58). He does not allege any facts to demonstrate that petitioners participated in, were notified about, or approved any of the alleged incidents of abuse. Further, respondent admits that defendants other than petitioners are responsible for his classification as "high interest," which resulted in his detention in the ADMAX SHU. *See* App. 164a-65a (Compl. ¶¶ 47-53).

Attempting to connect petitioners to these alleged violations, however, respondent makes only conclusory allegations that petitioners were "responsible for ensuring the safe and secure institutional environment" of the MDC, were "instrumental in the adoption, promulgation, and implementation" of the challenged "policies and practices," and "authorized, condoned, and/or ratified" them based solely on their supervisory positions within the Federal Bureau of Prisons ("BOP"). *See* App. 157a-58a (Compl. ¶¶ 14-16).

B. Proceedings Below

Various defendants, including petitioners, moved to dismiss the claims against them based on qualified immunity. The district court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1346(b), and 1350.

On September 27, 2005, the district court granted in part and denied in part petitioners' motions to dismiss. *See generally* App. 71a-150a. In relevant part, the district court dismissed respondent's Fourth Amendment claim (ninth cause of action), First Amendment claim (eleventh cause of action), Fifth

Amendment Equal Protection claim[4] (twelfth cause of action), Religious Freedom Restoration Act claim (thirteenth cause of action), and Alien Tort claims Act claim (twenty-first cause of action). The district court denied petitioners' motions to dismiss in regard to respondent's Fifth Amendment Due Process claim (second cause of action). Petitioners' motions to dismiss the claims asserted under 42 U.S.C. § 1985(3) (sixteenth and seventeenth causes of action) were granted in part and denied in part.

In his Section 1985(3) claims, respondent asserts that petitioners, among others, allegedly agreed "to deprive plaintiff[] of the equal protection of the laws and of equal privileges and immunities of the laws of the United States because of [his] sincere religious beliefs," and because of his "race and/or national origin" in violation of 42 U.S.C. § 1985(3). App. 206a, 208a (Compl. ¶¶ 247, 250); App. 90a. As the district court summarized with regard to petitioners, respondent had asserted the following conspiracy claims: (1) petitioners and other defendants "agreed to subject plaintiff[] to unnecessarily harsh conditions of confinement *without due process*"; and (2) petitioners and other defendants "agreed to subject plaintiff[] to unnecessary and extreme strip and body-cavity searches as a matter of policy." App. 90a (emphasis added).

The district court dismissed respondent's Section 1985(3) conspiracy claims to the extent that they related to the alleged strip and body-cavity searches,

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[4] The district court held that respondent failed sufficiently to allege petitioners' personal involvement, and hence petitioners were entitled to qualified immunity with regard to respondent's equal protection claims. App. 136a-37a.

noting that it had dismissed respondent's Fourth Amendment claim arising from the same alleged conduct on qualified immunity grounds. *Id.* at 145a ("plaintiff[] ha[s] not sufficiently alleged the personal involvement of the [petitioners] in subjecting them to 'unnecessary and extreme strip and body-cavity searches,' and the [petitioners'] motions [to dismiss on the basis of qualified immunity] are granted as to that alleged agreement"). Specifically with respect to this aspect of respondent's Section 1985(3) claims, the district court held that the "plaintiff[] ha[s] failed to adequately allege the involvement of [petitioners] in the challenged searches [under the 4th Amendment, and] . . . [a]s discussed in connection with plaintiffs' Fourth Amendment claim, plaintiffs have not sufficiently alleged the personal involvement of the [petitioners] in subjecting them to 'unnecessary and extreme strip and body-cavity searches,' and the [petitioners] motions are granted as to that alleged agreement." *Id.* at 145a; *see also id*. at 130a-31a.

To the extent that respondent's Section 1985(3) claims were based on an alleged procedural due process violation, the district court denied the petitioners' motion to dismiss because it had already concluded, when analyzing the Fifth Amendment due process claim in respondent's second cause of action, that respondent had sufficiently pled petitioners' personal involvement and that the law at the time of the events at issue was established with sufficient clarity to defeat petitioners' (and all other defendants') qualified immunity. App. 145a-46a.

Various defendants, including petitioners, appealed the district court's decision. Specifically, petitioners appealed the denial of qualified immunity with regard to respondent's Fifth Amendment due process

claim and his Section 1985(3) claims that sought remedy for the alleged due process violations. On appeal, the Second Circuit affirmed in part and reversed in part. App. 1a-70a. It directed dismissal of respondent's Fifth Amendment due process claim, finding that petitioners were entitled to qualified immunity, but affirmed with regard to respondent's Section 1985(3) claims, stating that such claims were alleged with sufficient particularity to survive a motion to dismiss. App. 46a, 65a.

Despite the court of appeals' finding that petitioners were entitled to qualified immunity with regard to the alleged due process violations and the district court's finding that petitioners were not personally involved in (and hence entitled to qualified immunity from) respondent's equal protection claims (*see supra*, note 4), the court of appeals nevertheless held that petitioners were not immune from respondent's Section 1985(3) claims. The disposition of the case thus far, however, leaves nothing on which respondent's Section 1985(3) claims can be based.

Further, the court of appeals expressed great concern regarding the pleading standard to be applied in a case addressing qualified immunity of government officials. After analyzing this Court's decisions in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993); *Crawford-El v. Britton*, 523 U.S. 574 (1998); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 163 (2002); and *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), it concluded that those decisions could not "be readily harmonized." App. 15a. The court acknowledged that it saw "some merit in the argument in favor of a heightened pleading standard" because (1) qualified immunity is an essential privilege that allows

government officials to perform their duties effectively without fear, and (2) a lesser standard, like the one the court of appeals ultimately applied, would allow some of respondent's claims, which were based largely on "generalized allegations of supervisory involvement," to survive a motion to dismiss, and therefore, facilitate "the very type of broad-ranging discovery and litigation burdens that the qualified immunity privilege was intended to prevent." App. 25a.

The court of appeals nevertheless concluded that it was bound by this Court's precedents and, drawing from this Court's recent decision in *Twombly*, applied what it described as a "more flexible 'plausibility standard.'" App. 25a-26a. The court of appeals ultimately held that, under this standard, respondent had sufficiently alleged Section 1985(3) claims, even though the court of appeals and the district court had determined that petitioners were entitled to qualified immunity on all of the underlying allegations that formed the bases of these Section 1985(3) claims.

Judge Cabranes, in his concurring opinion, noted the "uneasy" tension between this Court's interpretation of the general civil pleading requirements and the qualified immunity doctrine. He further emphasized that "some of the [Supreme Court's] precedents are less than crystal clear and fully deserve reconsideration by the Supreme Court at the earliest opportunity." App. 68a. Nevertheless, Judge Cabranes concurred in the majority's disposition of the appeal, which he concluded was "troubling," but nonetheless compelled by relevant precedent. App. 70a.

REASONS FOR GRANTING THE CROSS-PETITION

The Second Circuit's decision misreads 42 U.S.C. § 1985(3) so as to convert the statute from a procedural mechanism for the vindication of enumerated rights into a vehicle for circumvention of both the pleading standards governing tort claims asserted directly under the Constitution and the contours of the qualified immunity protecting federal officials from such claims. It thereby contravenes both this Court's consistent construction of Section 1985(3), which establishes that the statute confers no substantive rights but rather a remedy for violation of the rights it specifies, and this Court's recent articulation of minimum pleading standards. *Twombly*, 127 S.Ct. 1955. Review by this Court is therefore warranted.

The Circuit's decision subjects senior Department of Justice officials to discovery and possibly trial on the basis of allegations that are indistinguishable from those the district court found insufficient to sustain claims pled directly under the relevant constitutional provisions, and that the Second Circuit itself held to be barred by those officials' qualified immunity. The Court of Appeals reached this anomalous, self-contradictory result by departing from this Court's rulings on the sufficiency of pleadings necessary to maintain claims brought pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Comparing respondent's Section 1985(3) claims to those at issue in *Twombly*, the Second Circuit erroneously concluded that those claims must be allowed to proceed.

As Judge Cabranes noted, this result affords a guide to future litigants on how to fashion *Bivens*

claims against federal officials charged with important law-enforcement and national-security responsibilities and will thereby unnecessarily subject those officials to the burdens of litigation. App. 70a. This result acquires heightened significance in the context presented in this case, where the claims are asserted against an entire Department of Justice chain of command extending from the Attorney General, through his senior Bureau of Prison directors, to institution-level supervisors and staff.

In order to state a cause of action under Section 1985(3), a complaint must allege that the defendants:

> did (1) "conspire or go in disguise on the highway or on the premises of another" (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." It must then assert that one or more of the conspirators (3) did, or cause to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States."

Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971) (quoting 42 U.S.C. § 1985(3)). This Court has held that "Section 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates." *Great Am. Fed. Sav. & Loan Ass'n v. Novotny,* 442 U.S. 366, 372 (1979). Those rights "must be found elsewhere" in the law. *United Bhd. of Carpenters & Joiners v. Scott,* 463 U.S. 825, 833 (1983).

Thus, in *Griffin*, the substantive rights found actionable pursuant to Section 1985(3) were the Thirteenth Amendment's absolute prohibition on slavery and the right to engage in interstate travel. 403 U.S. at 105-06; *see also, e.g., Hobson v. Wilson*, 737 F.2d 1, 21 (D.C. Cir. 1984) (political affiliation); *Ward v. Connor*, 657 F.2d 45, 47-48 (4th Cir. 1981) (members of Unification Church), *cert. denied*, 455 U.S. 907 (1982); *Hampton v. Hanrahan*, 600 F.2d 600, 623 & n.22 (7th Cir. 1979) (Black Panther Party), *cert. granted in part and rev'd in part on other grounds,* 446 U.S. 754 (1980). In *Novotny,* on the other hand, this Court concluded that rights "created by Title VII" of the 1964 Civil Rights Act could not be asserted "within the remedial framework of § 1985(3)." 442 U.S. at 377. And in *Carpenters,* the Court found that the statute could not reach a purely private conspiracy to deny First Amendment rights, because the First Amendment operated only as a limitation on governmental action. 463 U.S. at 830-31.

The necessity of an independently conferred right as a critical element of a claim under Section 1985(3) was reinforced in *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263 (1993):

> Our discussion in *Carpenters* makes clear that it does not suffice for application of § 1985(3) that a protected right be incidentally affected. A conspiracy is not 'for the purpose' of denying equal protection simply because it has an effect upon a protected right. The right must be "aimed at," 463 U.S. at 833 (emphasis added); its impairment must be a conscious objective of the enterprise.

Id. at 275. The "intent to deprive a right" element of the statute "demands that the defendant do more than merely be aware of a deprivation of right that he causes, and more than merely accept it; he must act at least in part for the very purpose of producing it." *Id.* at 276. An identified right, protected from infringement by the named governmental or private defendants, is thus an indispensable component of a viable claim under Section 1985(3).

Bray is instructive for the present case for an additional reason. The outcome in that case ultimately turned on this Court's determination that plaintiff's factual allegations lacked the requisite discriminatory animus to maintain an action under Section 1985(3). 506 U.S. at 274. Similarly, in this case, the district court found that respondent had failed to allege any facts to show that petitioners were personally involved in the classification of respondent and other detainees on the basis of their national origin or religion. App. 136a.[5]

Prior decisions of the Second Circuit reflected an understanding of Section 1985(3) that comported with this Court's jurisprudence. *See*, *e.g., Sherlock v. Montefiore Med. Ctr.,* 84 F.3d 522, 527 (2d Cir. 1996) ("[Section 1985(3)] creates no substantive rights but merely 'provides a remedy for violation of the rights it designates'") (quoting *Novotny,* 442 U.S. at 372); *Spencer v. Casavilla,* 903 F.2d 171, 174 (2d Cir. 1990) ("[I]n order to state a claim under § 1985(3), [a plaintiff] must allege . . . [deprivation] of a right covered by the Constitution or other laws."). Other circuits have done the same. *See, e.g., Federer*

[5] The district court's favorable resolution of this question meant that the issue was not presented to the Second Circuit.

v. Gephardt, 363 F.3d 754, 758 (8th Cir. 2004) ("[P]laintiff must allege that an independent federal right has been infringed. Section 1985(3) is a statute which provides a remedy, but it grants no substantive stand-alone rights. The source of the right or laws violated must be found elsewhere."); *Dixon v. City of Lawton,* 898 F.2d 1443, 1448 (10th Cir. 1990) (Section 1985 is a "procedural statute[] which provide[s] a remedy for deprivation of existing rights"); *Harrison v. KVAT Food Mgmt.*, 766 F.2d 155, 162 (4th Cir. 1985) (same); *Hobson*, 737 F.2d at 15 ("The rights protected by section 1985(3) exist independent of the section and only to the extent the Constitution creates them.").

Notwithstanding its own prior decisions and the consistent rulings of other circuits, the Second Circuit's decision in this case gives life to claims under Section 1985(3) that are indistinguishable from those determined by the Circuit itself and the district court to lack viability when pled directly under the pertinent constitutional provisions. The second cause of action in the amended complaint alleges that petitioners had subjected respondent to unnecessarily harsh conditions of confinement in violation of his right to procedural due process under the Fifth Amendment. The district court found that the complaint alleged a violation of a constitutional right, holding that a protectable liberty interest existed; that the right had been clearly established at the time of the alleged violations; that the objective reasonableness of petitioners' actions could not be addressed until after discovery; and that petitioners' personal involvement had been sufficiently alleged to warrant limited discovery. App. 113a-18a. The sixteenth and seventeenth cause of action set out

respondent's claims brought under Section 1985(3). As the district court noted, App. 142a, the Section 1985(3) claims identified three rights allegedly infringed by petitioners and other defendants: respondent's right to procedural due process; his right against unreasonable searches and seizures; and his right to engage in the free exercise of his religion. The religious exercise component of these claims was not pled against petitioners. App. 142a. The strip search component was found deficient as to petitioners by the district court for the same reason that it found wanting the claims pled directly under the Fourth Amendment in the ninth cause of action: a failure to plead sufficient facts to show the personal involvement of petitioners. App. 130a-31a, 145a. This left only the procedural due process facet of the 1985(3) claims. The district court sustained that portion of the two claims without detailed discussion. App. 145a-146a.

On appeal, the Second Circuit held that the Fifth Amendment procedural due process claim asserted in the second cause of action was barred as to all defendants by their qualified immunity. App. 46a. Nevertheless, it concluded that the claims asserted against petitioners under Section 1985(3) in the sixteenth and seventeenth cause of action survived petitioners' motions to dismiss. App. 65a. This result cannot be reconciled with this Court's construction of that statute and the need for plaintiffs to identify independent sources of actionable rights. It has the effect of making Section 1985(3) a mechanism for avoiding the pleading standards otherwise applicable to *Bivens* claims, and thereby depriving federal officials of qualified immunity to which they would otherwise be entitled.

Careful review of its decision reveals that the district court clearly recognized these fundamental principles. As noted above, in denying petitioners' motion to dismiss the second cause of action, the district court found that the complaint alleged a violation of a constitutional right and that the right had been clearly established, and addressed the objective reasonableness of the petitioners' actions. In denying the motion to dismiss with respect to the Section 1985(3) claims, however, the district court did not address the questions of whether a violation of a constitutional right had been alleged insofar as the complaint asserted that petitioners had conspired to deny respondent procedural due process, or whether that right had been clearly established — the heart of the qualified-immunity analysis — because it had already answered those questions with respect to the underlying right at issue in the course of sustaining the second cause of action.[6]

Similarly, in granting petitioners' motion to dismiss the Section 1985(3) claims insofar as they alleged a conspiracy to violate respondent's by subjecting him to strip and body-cavity searches, the district court did not address the questions of whether a constitutional violation had been alleged or whether the right at issue had been clearly established. Rather, it simply referred to the earlier portion of its decision where it had dismissed respondents' ninth cause of action, which directly alleged a violation of his Fourth Amendment rights. *See* App. 145a.

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[6] Instead, the district court focused on the issues of whether (1) section 1985(3) applied to federal officials; and (2) the respondent had sufficiently alleged personal involvement on the part of petitioners in the alleged conspiracy. See App. 142a-45a.

In short, although the district court did not explicitly address the issue, the methodology it employed demonstrates that it understood the law to be that violation of an independently conferred right is a prerequisite for a Section 1985(3) claim. It is thus apparent that the only reason that the district court did not dismiss the portion of the Section 1985(3) claims at issue here was that it had not dismissed the second cause of action, which directly alleged a violation of the underlying constitutional right to procedural due process.

This Court recently held that in order to survive a motion to dismiss, a complaint must allege more than "labels and conclusions." *Twombly,* 127 S.Ct. at 1965. The factual allegations "must be enough to raise a right to relief above the speculative level . . . ." *Id.* (citing *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 508 n.1 (2002)); *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (other citations omitted). For the Sherman Act conspiracy claims at issue in *Twombly,* there was a "need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement" between the defendants. 127 S. Ct. at 1966. Measuring the complaint at issue there against this standard, this Court found that "plaintiffs' claim of conspiracy in restraint of trade comes up short." *Id.* at 1970. Scrutiny of statements suggesting direct evidence of agreement revealed that, "on fair reading, these are merely legal conclusions resting on the prior allegations." *Id.* More broadly, apart from alleging a seven-year time frame for the alleged violations, the complaint "mentioned no specific time, place, or person involved in the alleged conspiracies." *Id.* at n.10.

But with respect to respondent's Section 1985(3) claim in the present case, petitioners are not confronted with allegations even "consistent with," let alone plausibly suggestive of, unlawful conspiratorial conduct on their part. *Id.* at 1966. As the district court found, they are not alleged to have participated in the classification of respondent and other detainees on the basis of national origin, ethnicity or religion. App. 136a. *A fortiori,* the allegations against them do not, and cannot, rise to the level of plausibility required by *Twombly*.

The Second Circuit's reliance on this Court's opinion in *Crawford-El v. Britton,* 523 U.S. 574 (1998), was also misplaced. In *Crawford-El*, the plaintiff alleged specific acts of misconduct by defendant and included in his allegations specific statements of that defendant from which an unconstitutional motive could be inferred. *Id.* at 579 & n.1. Here, as the district court found, no such particularized allegations put petitioners into the midst of the alleged conspiracy under Section 1985(3).

Moving beyond the threshold elements of respondent's Section 1985(3) claims, additional deficiencies emerge. For resolution of the strip-search component of those claims, the district court looked to its analysis of respondent's Fourth Amendment allegations set forth in the ninth cause of action. It had found that the Amended Complaint had failed to allege adequately the personal involvement of the petitioners in that claim. App. 145a.[7] The district court acknowl-

[7] It was unclear to the district court whether the claim was even asserted against petitioners Cooksey and Rardin, but to the extent it was, dismissal was proper in the district court's view for the same reason that mandated dismissal of the claim

edged that petitioners' involvement in the strip searches was alleged "in conclusory fashion" but found that "those boilerplate allegations" conflicted with other, specific allegations set forth elsewhere in the Amended Complaint that attributed the development of procedures for handling respondent (and other detainees) to other defendants. App. 130a-31a.

Applying this reasoning to respondent's Section 1985(3) claims predicated on alleged strip and body-cavity searches, the district court stated that "[a]s discussed in connection with plaintiffs' Fourth Amendment claim, [respondent has] not alleged the personal involvement of [petitioners] in subjecting [him] to 'unnecessary and extreme strip and body-cavity searches,'" and, therefore, ruled that the parallel claim asserted under Section 1985(3) was dismissed. App. 145a.[8]

This favorable ruling for petitioners was not squarely at issue before the Second Circuit in the interlocutory appeal from the denial of petitioners' immunity defense to other claims. Yet the Circuit's determination that respondent's Section 1985(3) claims survived dismissal undercuts the district court's determination relating to the strip-search component of those claims. That outcome is squarely at odds with this Court's construction of the pleading requirements necessary to survive dismissal.

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against petitioner Sawyer — lack of sufficient allegations of personal involvement. App. 131a n.24.

[8] The procedural due process element of respondent's Section 1985(3) claims survived the motions to dismiss, but that was consistent with the district court's treatment of the corresponding procedural due process claim asserted under the Fifth Amendment and set forth in the second cause of action.

The Second Circuit's ruling on respondent's Section 1985(3) claims also has the effect of depriving petitioners of their right to qualified immunity, a right confirmed by the Second Circuit itself in directing dismissal of respondent's Fifth Amendment procedural due process claim on immunity grounds. Government officials enjoy qualified immunity from suit and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow,* 457 U.S. at 818. Qualified immunity has been held to protect federal officials even if constitutional violations have occurred. *See, e.g., Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) ("Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted."); *Wilson v. Layne*, 526 U.S. 603, 614 (1999); *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

In *Wilson v. Layne*, this Court held that law enforcement officers violated the Fourth Amendment by bringing members of the media into a home while executing an otherwise valid warrant when the media's presence was not in aid of the execution of the warrant. 526 U.S. at 614. However, this Court also held that while the constitutional right at issue was violated, it was not clearly established, and therefore the officers were entitled to qualified immunity. *Id.* at 614-17. That result was mandated because "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Id.* at 615; *accord Brosseau*, 543 U.S. at 199. The relevant test of "whether a right is clearly established is whether it

would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001); *Wilson*, 526 U.S. at 615; *Anderson* 483 U.S. at 640. This inquiry must be made within "'the *specific context of the case*, not as a broad general proposition.'" *Brosseau*, 543 U.S. at 198 (quoting *Saucier*, 533 U.S. at 201-02) (emphasis added); *Wilson*, 526 U.S. at 615; *Anderson* 483 U.S. at 640; *see also Gittens v. LeFevre*, 891 F.2d 38, 42 (2d Cir. 1989) ("[t]he inquiry is not whether plaintiff has alleged a violation of an abstract legal standard, but whether under the particular circumstances alleged, defendants could have reasonably believed that they did not violate plaintiff's constitutional rights").

The Second Circuit properly determined here that the contours of Fifth Amendment due process jurisprudence were not established with sufficient clarity to overcome petitioners' qualified immunity. App. 46a. Inexplicably, however, it effectively ignored that determination in holding the Section 1985(3) claim — which as to petitioners by then included only a procedural due process claim indistinguishable from that alleged under the Fifth Amendment — sufficient to survive dismissal, thereby negating the very immunity protection it had already accorded petitioners.

This outcome undermines the fundamental purpose of the qualified-immunity doctrine, which was formulated precisely to guarantee "the vigorous and fearless performance" of law enforcement duties "essential to the proper functioning of the criminal justice system." *Imbler v. Pachtman*, 424 U.S. 409, 427-28 (1976); s*ee also Harlow*, 457 U.S. at 814 (*Bivens* suits impose a heavy cost "not only to the defendant officials, but to society as a whole," includ-

ing "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office"); *Owen v. City of Independence*, 445 U.S. 622, 655 (1980) (the doctrine avoids "introduc[ing] an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment."); *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974) ("[T]he danger that the threat of [ ] liability would deter [an official's] willingness to execute his office with the decisiveness and the judgment required by the public good.").

These concerns have special significance in the unprecedented national security and law enforcement settings in which this case arises. This Court has expressly left open the possibility that "terrorism or other special circumstances" may provide "special arguments" for preventive detention and for "heightened deference to the judgments of the political branches with respect to matters of national security." *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001). The Second Circuit properly determined that the law, for purposes of qualified immunity, was not clearly established at the time the events in this case took place. App. 46a; s*ee also Wilson*, 526 U.S. at 616 (observing that there were "no judicial opinions holding that [a media ride-along] became unlawful when it entered a home," and therefore, the law was not clearly established). That determination should not be negated by a construction of Section 1985(3) that renders it a substitute vehicle for asserting a violation of the underlying right supposedly violated, judged by some lesser pleading standard and capable of defeating official immunity more easily than

identical claims fashioned under pertinent provisions of the Constitution.

CONCLUSION

For the foregoing reasons, Kathleen Hawk Sawyer, Michael Cooksey and David Rardin respectfully submit that if this Court grants the petition for a writ of certiorari in Docket No. 07-1015, it should also grant this conditional cross-petition.

Respectfully submitted.

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