No. 07-1015

IN THE
Supreme Court of the United States

JOHN D. ASHCROFT, former Attorney General of the United States, and ROBERT MUELLER, Director of the Federal Bureau of Investigation,
Petitioners,
v.
JAVAID IQBAL, *et al.*,
Respondents.

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

BRIEF OF WILLIAM P. BARR, GRIFFIN BELL, BENJAMIN R. CIVILETTI, EDWIN MEESE III, WILLIAM S. SESSIONS, RICHARD THORNBURGH, AND WASHINGTON LEGAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Paul J. Larkin, Jr.
1314 Cleveland St.
Alexandria, VA 22302
(703) 931-1704

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Mass. Ave, NW
Washington, DC 20036
(202) 588-0302

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QUESTION PRESENTED

1. Whether a conclusory allegation that a cabinet-level officer or 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 individual-capacity claims against those officials under *Bivens*.

2. Whether a cabinet-level officer or other 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.

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INTERESTS OF *AMICI CURIAE*

The *amici curiae* are five former Attorneys General, a former Director of the FBI, and a public interest law firm.[1] They believe that the qualified immunity doctrine provides important legal protections to federal government officials; it allows officials to perform their duties without the distraction of having to defend damages claims filed against them in their personal capacity. They are concerned that the decision below restricts that doctrine to such an extent that government officials will be unable to win pre-discovery dismissal of insubstantial constitutional claims.

The Honorable William P. Barr served as Attorney General of the United States from 1991 to 1993. He also served as Assistant Attorney General for the Office of Legal Counsel from 1989 to 1990 and Deputy Attorney General from 1990 to 1991.

The Honorable Griffin Bell served as Attorney

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties – including all defendants who participated in proceedings before the appeals court – have consented to the filing of this brief; letters of consent have been lodged with the clerk.

General of the United States from 1977 to 1979. He also served as a federal judge on the United States Court of Appeals for the Fifth Circuit from 1961 to 1976.

The Honorable Benjamin R. Civiletti served as Attorney General of the United States from 1979 to 1981. He also served as Assistant Attorney General for the Criminal Division from 1977 to 1978 and as Deputy Attorney General from 1978 to 1979.

The Honorable Edwin Meese III served as Attorney General of the United States from 1985 to 1988. He also served as Counselor to President Ronald Reagan from 1981 to 1985.

The Honorable William S. Sessions served as Director of the Federal Bureau of Investigation (FBI) from 1987 to 1993. He also served as a federal judge on the United States District Court for the Western District of Texas from 1974 to 1987, serving as Chief Judge of that court from 1980 to 1987; and was the United States Attorney for the Western District of Texas from 1971 to 1974. From 1969 to 1971, he was the Chief of the Government Operations Section of the Justice Department's Criminal Division.

The Honorable Richard Thornburgh served as Attorney General of the United States from 1988 to 1991. He also served as Assistant Attorney General for the Criminal Division from 1975 to 1977 and Governor of Pennsylvania from 1979 to 1987.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50

States. It regularly appears in this and other federal courts to support the litigation immunity rights of public officials.

STATEMENT OF THE CASE

Respondent Javaid Iqbal is a citizen of Pakistan who has filed a civil action in United States courts, seeking to recover damages for alleged mistreatment while being held during 2002 at a federal detention facility in Brooklyn on federal criminal charges. Iqbal ultimately pleaded guilty to those charges and was removed to Pakistan following completion of his sentence. Among those he seeks to hold responsible for his alleged mistreatment are Petitioners John D. Ashcroft (the United States Attorney General at the time of Iqbal's detention) and Robert Mueller (who was then, and still is, Director of the Federal Bureau of Investigation). Iqbal does not allege that either Ashcroft or Mueller directed subordinates to take any specific actions with respect to Iqbal or that either was even aware of his case.

Iqbal alleges that he was arrested on federal charges on November 2, 2001 and was thereafter housed in the general population unit at the Metropolitan Detention Center in Brooklyn (MDC) until January 8, 2002. Pet. App. 169a, ¶¶ 80-81. From that date until the end of July 2002, Iqbal was housed in MDC's Admax special housing unit, a maximum-security unit created at MDC in the wake of the 9/11 terrorist attacks to house federal prisoners deemed "of high interest" in the post-9/11 terrorism investigation. *Id.* Iqbal was returned to MDC's general population in July 2002 after the FBI cleared him of involvement in terrorist activity.

Iqbal pleaded guilty to criminal charges (defrauding the United States) in April 2002, was sentenced in September 2002, and was released from the MDC in January 2003.

Following completion of his sentence and his removal to Pakistan, Iqbal filed suit in May 2004 against a large number of federal officials, including Ashcroft and Mueller. The suit included statutory claims as well as constitutional claims pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Iqbal complains both about the conditions of his confinement and about the initial decision to move him to the Admax unit. He alleges that he was assigned to Admax even though there was no evidence that he had links to terrorists and solely because of his religion (Islam), race, and/or nationality.

Iqbal's claims alleging mistreatment while in Admax are directed primarily at defendants who were employed at MDC in 2002; these causes of action do not list Ashcroft and Mueller as defendants. Among the claims directed at those two defendants, three remain: (1) a *Bivens* claim that they violated his First Amendment rights by imposing harsher conditions of confinement because of his religion, Pet. App. 201a-202a; (2) a *Bivens* claim that they violated his Fifth Amendment rights to equal protection of the laws by imposing harsher conditions of confinement because of his race/nationality, *id.* 202a-203a; and (3) claims under 42 U.S.C. § 1985(3) that they conspired to deny him his civil rights because of his religion, race, and/or nationality. *Id.* 206a-209a.

The Second Circuit affirmed the denial of Ashcroft's and Mueller's immunity claims in relevant part. *Id.* 1a-70a. The appeals court recognized that "[q]ualified immunity is an immunity from suit and not just a defense to liability," *id.* 13a, and that some of Iqbal's allegations "suggest that some of [his] claims are based not on facts supporting the claim but, rather, on generalized allegations of supervisory involvement." *Id.* 25a. The court nonetheless concluded that Iqbal's allegations were sufficiently specific to withstand a motion to dismiss based on qualified immunity. *Id.* 58a-65a.

Judge Cabranes wrote a separate concurring opinion. *Id.* 67a-70a. While agreeing with the other panel members that existing precedents pointed toward the result reached by the appeals court, he warned:

> [L]ittle would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes.

Id. 69a-70a.

SUMMARY OF ARGUMENT

Qualified immunity not only provides government officials with a defense to liability; it also is "an entitlement not to stand trial or face *the other burdens of litigation.*" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis added). The Court has made clear

that the "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that "'insubstantial claims' [will] be resolved prior to discovery." *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987). Yet, the decision below calls into question the ability of high-level Executive Branch officials to win dismissal, on qualified immunity grounds, of even frivolous *Bivens* litigation filed by anyone claiming to be aggrieved by their official conduct. In the absence of dismissal, those officials face the prospect of discovery proceedings that are highly likely to distract them from their other responsibilities. As former senior Executive Branch officials, the individual *amici curiae* share Judge Cabranes's concerns regarding the disruptive effects of such discovery, and they are very concerned by the effects that such disruptions are likely to have on the ability of high-level officials to carry out their missions effectively.

I. Although the complaint alleges that Ashcroft and Mueller discriminated against Iqbal based solely on his religion, race, and/or national origin, it does so only in the most conclusory of terms. It does not allege that they directed others to take actions with respect to Iqbal or that they ever knew of his existence. Rather, it alleges that they were in some way responsible for policies mandating that those matching Iqbal's religious/racial/ethnic profile be subjected to discriminatory treatment. Remarkably, however, the complaint alleges no facts suggesting that Ashcroft and Mueller had any involvement in the adoption of such policies; indeed, it does not allege any facts indicating that the Department of Justice ever actually adopted a discriminatory policy of the sort described in the complaint.

The conclusory allegations of the complaint do not even meet the level of factual specificity required by Fed.R.Civ.P. 8(a) in order to "set[] forth a claim for relief" and thereby defeat a motion to dismiss. The Second Circuit held that a complaint is sufficient to withstand a motion to dismiss so long as allegations in the complaint – no matter how conclusory – render at least "plausible" a conclusion that the defendant violated the plaintiff's constitutional rights. That holding is not a fair reading of the Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), which interpreted Rule 8(a)(2) as requiring a complaint to make a "'showing,' rather than a blanket assertion, of an entitlement to relief." 127 S. Ct. at 1965 n.2.

In any event, Iqbal's claims do not even rise to the level of plausibility. The Second Circuit held that Iqbal made a sufficient "showing" of the personal involvement of Ashcroft and Mueller in the alleged religious, race, and nationality discrimination by alleging in general terms that they "were instrumental in adopting the policies and practices challenged here" and "maliciously agreed to subject [Iqbal] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin." Pet. App. 62a. Yet, the appeals court conceded that Iqbal "acknowledges" that subordinate FBI officials – not Ashcroft and Mueller – made the decision to classify Iqbal as a "high interest" detainee. *Ibid.* More importantly, wholly absent from the amended complaint are any factual allegations regarding what Ashcroft and Mueller did to merit being labeled "instrumental" in the adoption of the alleged policies and practices or to have "maliciously agreed" to Iqbal's placement in the Admax

unit. In other words, there are no factual allegations that answer such basic questions as "when," "where," "how," and "with whom" Ashcroft and Mueller are supposed to have involved themselves in the decision to subject Iqbal and/or others to harsh prison conditions based solely on their religion, race, and/or nationality. In the absence of such factual allegations, *Twombly* dictates that the complaint be dismissed for failure to set forth a claim for relief.

II. The deficiencies in the complaint are compounded when one takes into account that the motion to dismiss arises in connection with an assertion of qualified immunity. The qualified immunity doctrine is designed to ensure that public officials can carry out their governmental functions without fear that their time and reputations will later be squandered by vexatious lawsuits brought by those wishing to second-guess their good-faith decisions. It is not a mere defense to liability but an immunity from the burdens of litigation. It is effectively lost if the case is permitted to proceed through discovery and/or trial. Accordingly, the Court has repeatedly admonished that immunity questions be resolved at the earliest possible stage in litigation. *Saucier v. Katz,* 533 U.S. 194, 200-01 (2001).

Yet, it is impossible to resolve the issues critical to deciding a qualified immunity motion to dismiss – *i.e.,* whether facts alleged by the plaintiff demonstrate that government officials violated his constitutional rights and whether those rights were clearly established at the time of the challenged action – unless the plaintiff has made specific factual allegations and not merely conclusory allegations that his constitutional rights were violated. As the Court made clear in *Anderson*,

qualified immunity is "a guarantee of immunity," not a mere "rule of pleading." *Anderson*, 483 U.S. at 639. Once a defendant has asserted a qualified immunity defense, it is incumbent on the plaintiff – in order to defeat a motion to dismiss – to make sufficient factual allegations to demonstrate that the defendant violated his clearly established constitutional rights. A generalized allegation of misconduct may be sufficient to meet the Fed.R.Civ.P. 8 pleading requirement if it provides a defendant with fair notice of the basis for the claim, but *Anderson* explained that a plaintiff responding to a qualified immunity defense may not avoid dismissal by responding at a high level of generality – such as asserting without accompanying factual allegations that the defendant discriminated against the plaintiff based on religious, racial, or ethnic animus. In the absence of factual allegations, a court is not in a position to determine whether *specific actions* that the defendant is alleged to have taken violated a clearly established constitutional right and thus that immunity is unwarranted.

In rejecting Ashcroft and Mueller's claim that Iqbal was required to provide factual allegations in order to defeat a motion to dismiss based on qualified immunity, the appeals court cited several decisions of this Court that have rejected imposition of heightened pleadings requirements in all but the limited categories of cases specified in Fed.R.Civ.P. 9(b). But virtually all of those cases did not involve qualified immunity claims. The only cited case that did involve qualified immunity – *Crawford-El v. Britton*, 523 U.S. 574 (1998) – is readily distinguishable. *Crawford-El* involved a prison inmate whose complaint included numerous factual claims regarding specific actions allegedly taken by prison

officials. The courts were thus in a position to determine whether the specific actions alleged violated a clearly established constitutional right. In contrast, Iqbal has pointed to no specific actions of either Ashcroft or Mueller but rather has made conclusory allegations that at some unspecified occasion they adopted a policy that ultimately resulted in his being treated in a discriminatory manner. Such conclusory allegations cannot be deemed sufficient to withstand a qualified immunity motion to dismiss.

III. The decision below is an unwarranted expansion of potential liability under *Bivens*. Ashcroft and Mueller – as well as Judge Cabranes in his concurring opinion below – have articulated numerous policy reasons why denial of qualified immunity under the facts of this case would impede the efficient operation of government. When qualified immunity defenses have arisen in the context of claims asserted against State and local government officials under 42 U.S.C. § 1983, the Court has expressed reluctance to base its decisions on such policy considerations in the absence of guidance from Congress. *See Crawford-El*, 523 U.S. at 597; *id*. at 601 (Kennedy, J., concurring). But *Bivens* actions, unlike suits filed under § 1983, are a judicial creation. Accordingly, it is wholly appropriate for the Court to determine the contours of a *Bivens* action. In order to ensure that federal officials are not deprived of the opportunity to have their qualified immunity claims decided at the earliest possible stage of a lawsuit, the Court should hold that a *Bivens* plaintiff – to survive a motion to dismiss based on qualified immunity – must provide factual allegations sufficient to demonstrate a violation of clearly established constitutional rights. A conclusory allegation that the

defendant violated constitutional rights cannot be sufficient. A federal official, before being required to defend a *Bivens* lawsuit, must be provided with sufficient details of his alleged misconduct to allow him to attempt to demonstrate that his alleged actions did not violate any clearly established rights.

IV. The Second Circuit held alternatively that Iqbal could prevail on his *Bivens* claims by demonstrating that Ashcroft and Mueller were "grossly negligent" in supervising subordinate officials within the Justice Department and the FBI, regardless whether they had actual knowledge of any constitutional violations committed by those subordinates. This Court has expressly rejected expansion of *Bivens* to encompass such supervisory liability. The purpose of *Bivens* is to deter federal officers from committing constitutional violations. *Correctional Services Corp. v. Malesko,* 534 U.S. 61, 70 (2001). But as the Court has explained, if *Bivens* is expanded to permit suit not only against the officer that has acted wrongfully but against his supervisor or employer as well, a *Bivens* plaintiff will be less likely to target the officer – thereby undercutting *Bivens*'s deterrent purpose. *Id.* at 70-71; *Federal Deposit Ins. Corp. v. Meyer,* 510 U.S. 471, 485 (1994).

ARGUMENT

I. THE DECISION BELOW IMPROPERLY PERMITS COMPLAINTS TO PROCEED TO DISCOVERY BASED ON MERE CONCLUSORY ASSERTIONS OF WRONGDOING

The Court has long recognized that significant burdens are imposed on government officials when they are required to defend damages claims filed against them in their individual capacities for actions taken in connection with their employment. As the Court explained in *Harlow*:

> Each such suit [against high-level government officials] almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discover[y] is wide-ranging, time-consuming, and not without considerable cost to the officials involved.

Harlow v. Fitzgerald, 457 U.S. 800, 817 n.29 (1982) (quoting *Halperin v. Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring)).

In light of those costs, it is particularly important for federal courts to weed out insubstantial claims against high-level government officials before discovery commences, by dismissing those complaints that do not meet Fed.R.Civ.P. 8(a)'s requirement that they "set[] forth a claim for relief." The Second Circuit failed to fulfill that gatekeeping function in this case; it applied an overly lenient interpretation of Rule 8(a). Even without taking into consideration Ashcroft's and Mueller's qualified immunity defense, the complaint against them should not have been permitted to go forward.

Fed.R.Civ.P. 8(a)(2) requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." While that rule eliminated the requirement that a claimant "set out *in detail* the facts upon which he bases his claim," *Conley v. Gibson,* 355 U.S. 41, 47 (1957) (emphasis added), the rule:

> [S]till requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests. See 5 Wright & Miller § 1202, at 94, 95 (*Rule 8(a)* "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented" and does not authorize a pleader's "bare averment that he wants relief and is entitled to it").

Twombly, 127 S. Ct. at 1965 n.3.

Twombly held that Rule 8(a) requires a complaint to include sufficient "factual matter" to provide "plausible grounds" to infer that the allegations of the complaint are true. *Id*. at 1965. It held that requiring plausibility "reflects the threshold requirement of *Rule 8(a)(2)* that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Id*. at 1966. The Court explained that a test requiring plausibility is not so strict as to require "probability" but nonetheless requires more than that the allegations

are merely possible or conceivable. *Id.* at 1966, 1974.[2]

The Second Circuit was able to find that Iqbal met *Twombly*'s "plausible grounds" standard only by stripping that standard of all its heft. The amended complaint includes *no* factual assertions to support its conclusory allegations that Ashcroft and Mueller "knew of," "condoned," and "agreed to" the allegedly discriminatory treatment of Iqbal. While conceding that the amended complaint includes no "allegation of subsidiary facts," the appeals court deemed the claims

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[2] *Twombly* involved claims that several telecommunications companies had violated Sherman Act § 1, 15 U.S.C. § 1, by agreeing among themselves to oppose entry by rivals and not to enter each other's geographic territories. The Court held that the plaintiffs' claims did not meet Rule 8(a)'s pleadings standards. It began its analysis by noting that liability under Sherman Act § 1 requires proof of "a contract, combination, or conspiracy." 127 S. Ct. at 1963. The Court added that "an allegation of parallel conduct and a bare assertion of conspiracy," *id.* at 1966, does not constitute "a short and plain statement of the claim showing that the pleader is entitled to relief" under Fed.R.Civ.P. 8(a)(2). A plaintiff need not include "detailed factual allegations" in a complaint, but "more than labels and conclusions" are necessary, and "a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964. An allegation must cross two lines to be sufficient: "the line between the conclusory and the factual," and the line between "the factually neutral and the factually suggestive." *Id.* at 1966 n.5. The Court concluded that the principal fact asserted by the plaintiffs to support their conspiracy allegation – that the defendants had engaged in parallel conduct by failing to initiate competition in their rivals' geographic service areas – did not create "plausible grounds to infer agreement." *Id.* at 1965. *Twombly* said that where there is an "obvious alternative explanation" for the facts alleged other than a conspiracy, it is error to allow a complaint to go forward based on the notion that the facts allow the inference that there was an unlawful agreement. *Id.* at 1792.

against Ashcroft and Mueller to be plausible because of the importance placed by the Justice Department on its post-9/11 investigation.[3] In other words, instead of providing Executive Branch officials greater deference when national security issues are at stake, the Second Circuit cited the fact that the case raises important national security issues as a reason to permit *increased* judicial scrutiny of the conduct of high-level officials. It concluded that Iqbal's complaint was "plausible" based on nothing more than a supposition that Ashcroft and Mueller *might* have had some involvement in the decision to place him into restrictive conditions of confinement.

The Second Circuit's understanding of what constitutes a "plausible" claim cannot be squared with *Twombly*. *Twombly* made clear that the mere possibility that the allegations of a complaint are true is not sufficient to meet the requirements of Rule 8(a). While it is theoretically possible that Ashcroft and Mueller, while in the midst of directing the most massive anti-terrorist operation in American history, took the time to concern themselves with the precise criteria employed by underlings in determining which New York-area detainees should be deemed of "high interest" (and thus should be placed in MDC's Admax unit), Iqbal has included nothing in his complaint to suggest that that

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[3] The court deemed the allegations of personal involvement "plausible" in light of "the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated 'of high interest' in the aftermath of 9/11." Pet. App. 62a.

scenario is plausible.

Indeed, a number of facts alleged in the complaint undercut Iqbal's conclusory assertion of direct involvement by Ashcroft and Mueller. Iqbal admits that he was not deemed a "high interest" detainee and moved to the Admax unit until January 8, 2002, more than two months after his arrest and detention at MDC. If, at the direction of Ashcroft and Mueller, DOJ had adopted a policy that *all* detainees matching Iqbal's religious/racial/ethnic profile were to be designated "high interest" detainees and held in solitary confinement, then one would expect that Iqbal – whose profile was not a secret at the time of his arrest – would have been placed immediately into MDC's Admax unit. The fact that subordinate federal officials waited two months to designate him a "high interest" detainee and move him to that unit suggests that Ashcroft and Mueller had not issued such a blanket policy.

The appeals court also cited, as "additional factual support" for Iqbal's discrimination claims, the amended complaint's allegation that "'within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following investigative leads into the September 11th attacks – however unrelated the arrestee was to the investigation – were immediately classified as "of interest" to the post-September 11 investigation.'" Pet. App. 61a (quoting amended complaint ¶ 52). But even if true, that allegation provides no support for Iqbal's claims. It took a finding that an MDC detainee was "of *high* interest" – not merely "of interest" – before the detainee was placed in MDC's Admax unit. Accordingly, the

alleged policy of which Iqbal complains does not add plausibility to his claim that he was transferred to the Admax unit for discriminatory reasons.[4] More importantly, the allegation that such a policy existed tends to undercut the allegation of direct involvement by Ashcroft and Mueller. If senior DOJ officials based in Washington, D.C. had adopted a detailed policy regarding which federal detainees were to be deemed "of high interest" in the post-September 11 investigation, one would expect that policy to apply uniformly nationwide. Iqbal's allegation that Arab Muslim men were treated in a discriminatory manner *in the New York area* therefore suggests that the alleged official policy of discrimination originated among federal officials based in New York, not out of Ashcroft's and Mueller's offices in Washington.

In determining that the amended complaint met Rule 8(a)'s pleading standards, the Second Circuit relied principally on two recent decisions of this Court: *Crawford-El* and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). Neither decision is apposite. *Swiekiewicz* held that when a Title VII plaintiff alleges that he was discharged based on discriminatory animus, he meets the requirements of Rule 8(a) without having to assert specific facts to support the claim of discriminatory motive; it is enough that he clearly alleges the discriminatory act in question (in that case, discharge from employment). 534 U.S. at 515. *Crawford-El* held

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[4] Moreover, Iqbal is a citizen of Pakistan and not of Arab descent. Thus, an allegation that federal investigators were discriminating against Arabs because of their racial/ethnic background does not support an allegation that Iqbal himself was discriminated against.

that when an inmate alleges that a prison official took adverse action against him in retaliation for the inmate's exercise of First Amendment rights, the inmate need not assert facts demonstrating that the defendant harbored retaliatory intent; it was enough that the prisoner identified the specific adverse action allegedly taken by the prison official. 523 U.S. at 592. The Second Circuit concluded that *Swierkiewicz* and *Crawford-El* required it to accept at face value Iqbal's allegation that Ashcroft and Mueller acted with discriminatory intent. Pet. App. 61a.

That conclusion misses the mark. The issue is not whether Ashcroft and Mueller harbored discriminatory motives when they took action with respect to Iqbal. Rather, the issue is whether they took any actions *at all* with respect to Iqbal. In the absence of any factual allegations rendering it more than a theoretical possibility that Ashcroft and Mueller were directly involved in the decision to place Iqbal into the Admax unit, the amended complaint fails to meet Rule 8(a)'s pleading requirements, and *Twombly* requires dismissal of the complaint.

II. THE COURTS BELOW ERRED IN FAILING TO ORDER DISMISSAL BASED ON QUALIFIED IMMUNITY

The deficiencies in the complaint are compounded when one takes into account that the motion to dismiss arises in connection with an assertion of qualified immunity. The qualified immunity doctrine is designed to ensure that public officials can carry out their governmental functions without fear that their time and reputations will later be squandered by vexatious

lawsuits brought by those wishing to second-guess their good-faith decisions. It is not a mere defense to liability but an immunity from the burdens of litigation. Accordingly, when a suit seeks to hold a government official personally liable for injuries incurred as a result of performance of a discretionary function, the district court must ensure that the plaintiff has included sufficient factual allegations to demonstrate both that the complaint meets the minimum pleading requirements established by *Twombly* and that the alleged misconduct is sufficiently egregious to warrant rejection of the government official's immunity defense.

Since *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), it has been firmly settled that government officials exercising discretionary authority are shielded from personal damages liability and suit insofar as their conduct does not violate the plaintiff's "clearly established" constitutional rights. Four principles guide the answer to the question of whether the law was "clearly established" at the time of the challenged action and thus whether a government official is entitled to a qualified immunity defense.

First: the *Harlow* qualified immunity standard is an objective one that does require consideration of the state of mind of the defendant government official. Inquiry into a government official's state of mind imposes special costs on the individuals involved, their colleagues, and the government as well.[5] For that rea-

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[5] *Harlow* explained:

> [I]t now is clear that substantial costs attend the litigation of the subjective good faith of government officials. Not

son, *Harlow* made clear that "government officials performing discretionary functions generally 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." 457 U.S. at 818; *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

Second: The objective reasonableness of a government official's conduct is to be analyzed in light of the specific facts confronting him – not at the wholesale level by abstractly considering the relevant legal issue (e.g., "Are warrantless searches generally lawful?"), but at the retail level by considering the specific facts facing the particular decisionmaker (e.g., "Is this warrantless search clearly unlawful?). *Anderson*, 483 U.S. at 640; *Harlow*, 457 U.S. at 819. "The relevant, dispositive inquiry in determining 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) (emphasis added); *Mitchell v. Forsyth*, 472 U.S. at 528 (officials are immune unless "the law clearly proscribed the actions" they took). The upshot is that qualified immunity does not sanction knowing illegality, but does protect "all but the plainly incompetent or those who knowingly violate

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> only are there the general costs of subjecting officials to the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to 'subjective' inquiries of this kind.

Harlow, 457 U.S. at 816-17.

the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Third: The inquiry is whether a defendant acted reasonably in the particular course that he chose, not whether another reasonable person could have acted differently or whether there is another reasonable action that this defendant could have pursued. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). Courts should determine whether the defendant reasonably could have believed that his conduct was lawful, not whether there was a less restrictive way to accomplish the same goal or whether another official would have chosen a different path.[6] The qualified immunity doctrine does not demand that government officials choose among several reasonable alternative views of the law or foresee future legal developments. As the Court explained, on the one hand, if the law at the time an action occurred was not "clearly established," then "an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818. On the other hand, if the law was "clearly established," then the defense ordinarily should fail, "since a reasonably competent public official should know the law governing his conduct." *Id*. at 818-19. "[W]hether an official

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[6] Application of qualified immunity does *not* mean that damages never will be available. For instances in which claims of qualified immunity have been rejected, *see*, *e.g*., *Groh v. Ramirez*, 540 U.S. 551, 563-66 (2004); *Hope v. Pelzer*, 536 U.S. 730, 742-46 (2002). A senior government official who directs adoption of a policy that is facially unconstitutional (*e.g.*, a wholly arbitrary policy such as one directing agents to "round up the usual suspects") would not be entitled to qualified immunity in a case brought by one injured by that policy.

protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective reasonableness of the action assessed in light of the legal rules that were clearly established at the time it was taken." *Anderson*, 483 U.S. at 639 (citation and punctuation omitted). "The general rule of qualified immunity is intended to provide government officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages.' Where that rule is applicable, officials can know that they will not be held personally liable as long as their actions are reasonable in light of current American law." *Id.* at 646 (citation omitted).

Fourth: A claim of qualified immunity can and should be resolved early in the process, almost always before trial, as part of a motion to dismiss or for summary judgment. *Harlow*, 457 U.S. at 818 ("Until this threshold immunity question is resolved, discovery should not be allowed."). "In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence. Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.' . . . The privilege is 'an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.' As a result, 'we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.'" *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001) (citations omitted).

This case involves an important corollary to those principles: namely, a qualified immunity claim cannot be defeated simply by broad allegations that a government official, particularly a Cabinet-level federal official, was generally responsible for the allegedly unconstitutional actions of a subordinate. As explained below, the issue is not simply whether a plaintiff has alleged sufficient facts to satisfy the Fed.R.Civ.P. 8(a) requirements necessary to state a claim, but whether a supervisory official can be denied qualified immunity absent a clear allegation that he committed, authorized, or approved specific misconduct by a subordinate. On the facts alleged here, Ashcroft and Mueller cannot be denied such immunity. When a complaint, as here, does no more than make conclusory allegations that senior officials approved a policy that ultimately resulted in the plaintiff being treated in a discriminatory manner, the complaint has failed to demonstrate that they acted in violation of "clearly established" constitutional rights in light of the specific facts confronting the officials.

The Court's decision in *Anderson v. Creighton* is instructive on this issue. *Anderson* involved a *Bivens* action against an FBI agent who conducted a warrantless search of an occupied house in the belief that a bank robbery suspect might be found inside. Reversing an appeals court decision to the contrary, the Court held that the FBI agent would be entitled to judgment as a matter of law on his qualified immunity claim without regard to whether the search was lawful, so long as he could establish as a matter of law that a reasonable officer could have believed the search to be lawful. *Anderson*, 483 U.S. at 644. The plaintiffs claimed that Fourth Amendment case law "clearly established" that warrantless searches were unlawful

unless: (1) there was probable cause for the search; and (2) exigent circumstances excused the failure to obtain a warrant. The Court responded that the plaintiff was approaching the "clearly established law" issue at far too high a level of generality, noting that when viewed at that level of generality, *any* action that violates the Constitution can be said to violate a "clearly established right." *Id.* at 639. The Court explained:

> But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading.

Ibid. Rejecting that approach, the Court said, "[O]ur cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640.

Anderson makes clear that resolution of a qualified immunity defense requires a reviewing court to determine whether the plaintiff alleges that the defendant took specific actions that a reasonable official would have understood, based on specific facts known to the official at the time of his actions, violated the

plaintiff's rights. A particularized inquiry of that type is impossible, of course, unless the complaint sets forth factual allegations with sufficient specificity to allow the reviewing court to determine "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier,* 533 U.S. at 202. Accordingly, in the absence of such factual allegations, it cannot be demonstrated that the government officer acted in a manner that he should have understood was in violation of the plaintiff's rights. Under those circumstances, *Anderson* requires dismissal of the complaint prior to discovery. 483 U.S. at 646 n.6. In that way, *Anderson* safeguards the benefits of the qualified immunity doctrine by mandating that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." *Id.* at 640 (emphasis added).

In light of the conclusory nature of the allegations against Ashcroft and Mueller, they are entitled to qualified immunity. They are alleged to have adopted an unspecified policy that led to Iqbal being placed into solitary confinement because of his religion, race, and nationality. But by failing to answer such basic questions as "when," "where," "how," and "with whom" Ashcroft and Mueller are supposed to have involved themselves in the decision to subject Iqbal to harsh prison conditions, the complaint does not adequately allege that they violated clearly established law. Iqbal cannot reasonably argue that Ashcroft and Mueller were flatly prohibited from taking religion, race, and nationality into account in deciding who should be deemed "of high interest." For example, given that all those involved in the September 11 attacks were Muslims, reasonable officials in Ashcroft's

and Mueller's positions would have had no reason to doubt the legality of a policy of giving closer scrutiny to Muslims than to non-Muslims. The conclusory allegations of the complaint are deficient because they fail to demonstrate that it should have been clear to Ashcroft and Mueller that their conduct was unlawful in the context of the specific situation they confronted.[7]

A requirement that a plaintiff offer a reasonable factual basis for the allegation that a senior federal official authorized or approved specific misconduct by a subordinate is not tantamount to the type of "heightened pleading standard" that this Court rejected in *Leatherman v. Tarrant County Narcotics & Intelligence Unit*, 507 U.S. 163 (1993), and *Swierkiewicz*. Neither ruling involved the issue of qualified immunity under *Harlow*, so neither decision is controlling. As *Anderson* makes clear, a rule guaranteeing immunity to government officials is not to be deemed the equivalent of "a rule of pleading" and may not be converted "into a rule of virtually unqualified liability simply by alleging

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[7] *Crawford-El*, in which the Court overturned dismissal of claims against prison officials alleged to have improperly retaliated against an outspoken prisoner, is factually distinguishable. The plaintiff in that case made numerous factual allegations that provided support for a claim that reasonable officials would have known that the alleged conduct violated clearly established constitutional rights – including circumstantial evidence that they diverted the plaintiff's property in retaliation for his having exercised First Amendment rights. 523 U.S. at 598. Indeed, the Court explicitly authorized courts, before permitting such suits against a government official to continue into the discovery phase, to "insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury." *Ibid*. (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)).

violation of extremely abstract rights." 483 U.S. at 639.

III. THE DECISION BELOW IS AN UNWARRANTED EXPANSION OF POTENTIAL LIABILITY UNDER *BIVENS*

No federal statute creates a private right of action for alleged violation of one's federal constitutional rights under color of federal law. Instead, Iqbal asks the Court to "imply" a private right of action in this case under the line of cases that began with *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). But in recent decades the Court has repeatedly expressed reluctance to expand the scope of *Bivens* actions in the absence of guidance from Congress. In a 2001 decision, the Court noted that since 1980 it had "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Malesko,* 534 U.S. at 68. The Court recently explained that creation of "any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee; it is not an automatic entitlement no matter what other means there may be to vindicate a protected interest, and in most instances we have found a *Bivens* action unjustified." *Wilkie v. Robbins*, 127 S. Ct. 2588, 2597 (2007).

For all the reasons articulated by Judge Cabranes in his concurring opinion, *amici* respectfully submit that this is an appropriate case to refrain from extending *Bivens* to create a private right of action under the circumstances of this case. As Judge Cabranes explained, if a private right of action is recognized under these circumstances:

> [I]t is possible that the incumbent Director of the Federal Bureau of Investigation and a former Attorney General of the United States will have to submit to discovery, and a possible jury trial, regarding Iqbal's claims. If so, these officials – FBI Director Robert Mueller and former Attorney General John Ashcroft – may be required to comply with inherently onerous discovery requests probing, *inter alia,* their possible knowledge of actions taken by subordinates at the Federal Bureau of Investigation and the Federal Bureau of Prisons at a time when Ashcroft and Mueller were trying to cope with a national and international security emergency unprecedented in the history of the American Republic. . . . Even with the discovery safeguards carefully laid out in Judge Newman's opinion, it seems that little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes.

Pet. App. 69a-70a.

The Court has never before considered whether assertion of a qualified immunity defense should bar recognition of a *Bivens* action against high-level federal officials in the absence of detailed factual allegations of misconduct by those officials. When the issue arose in the context of damage claims against State and local government officials brought pursuant to 42 U.S.C.

§ 1983, the Court expressed reluctance to expand the qualified immunity defenses of such officials as a means of preventing the distractions created by the many insubstantial suits filed under § 1983, stating that any such expansion should be initiated by Congress. *Crawford-El*, 523 U.S. at 597. The Court nonetheless recognized that there were sound reasons for such expansion in cases hinging on proof of an improper motive. As Justice Kennedy (who provided the fifth vote for the majority in *Crawford-El*) acknowledged in his concurring opinion, the dissent raised "serious concerns" about the ability of artful § 1983 pleaders to nullify the qualified immunity defense;[8] he stated that the proliferation of insubstantial § 1983 suits "foster[s] disrespect for our laws" and "disdain for the judicial system." *Crawford-El*, 523 U.S. at 601 (Kennedy, J., concurring). But because it was Congress that created the § 1983 right of action against State and local government officials, Justice Kennedy stated that any solution to those serious concerns "lies with the Legislative Branch, not with us." *Ibid.*

But *Bivens* actions, unlike suits filed under § 1983, are a judicial creation. Accordingly, it is wholly appropriate for the Court to determine the contours of a *Bivens* action. *Wilkie v. Robbins*, 127 S. Ct. at 2597 (judicial recognition of such actions "has to represent a judgment about the best way to implement a constitutional guarantee"). In order to ensure that

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[8] *See Crawford-El*, 523 U.S. at 605 (Rehnquist, C.J., dissenting) ("any minimally competent attorney (or *pro se* litigant) can convert any adverse decision into a motive-based tort, and thereby subject government officials to some measure of intrusion into their subjective worlds.").

federal officials are not deprived of the opportunity to have their qualified immunity claims decided at the earliest possible stage of a lawsuit, the Court should hold that a *Bivens* plaintiff – to survive a motion to dismiss based on qualified immunity – must provide factual allegations sufficient to demonstrate a violation of clearly established constitutional rights. A conclusory allegation that the defendant violated constitutional rights cannot be sufficient. A federal official, before being required to defend a *Bivens* lawsuit, must be provided with sufficient details of his alleged misconduct to allow him to assert his qualified immunity by demonstrating that his alleged actions did not violate any clearly established rights.

To be sure, a defendant in a *Bivens* action must plead qualified immunity as an affirmative defense, *Gomez v. Toledo,* 446 U.S. 635 (1980), but he is not required to prove that he acted lawfully. On the contrary, senior federal officials like Ashcroft and Mueller are entitled to the benefit of the presumption that government officials have acted lawfully. *See, e.g., Reno v. ARAC*, 525 U.S. 471, 489-90 (1999); *United States v. Armstrong*, 517 U.S. 456, 463-65 (1996); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). Absent a plaintiff's detailed factual allegations to the contrary, such officials are entitled to pre-discovery dismissal of a *Bivens* claim based on qualified immunity.

IV. SUPERVISORY FEDERAL OFFICIALS MAY NOT BE HELD LIABLE UNDER *BIVENS* FOR THE MISCONDUCT OF THEIR SUBORDINATES

The Second Circuit held alternatively that Iqbal could prevail on his *Bivens* claim by demonstrating that Ashcroft and Mueller were "grossly negligent" in supervising subordinate officials within the Justice Department and the FBI, regardless whether they had actual knowledge of any constitutional violations committed by those subordinates. This Court has expressly rejected expansion of *Bivens* to encompass such supervisory liability.[9]

The purpose of *Bivens* is to deter federal officers from committing constitutional violations. *Malesko*, 534 U.S. at 70. But as the Court has explained, if *Bivens* is expanded to permit suit not only against the officer that

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[9] Despite Iqbal's assertions to the contrary, the supervisory liability issue is properly before the Court. Iqbal asserted in his brief opposing the petition for certiorari that Ashcroft and Mueller had waived the issue by failing to raise it in their Second Circuit brief. But the appeals court explicitly relied on supervisory liability as an alternative basis for its affirmance of the district court's denial of the qualified immunity motion to dismiss. Pet. App. at 14a, 62a (it did not matter that Iqbal admitted that Ashcroft and Mueller were not the ones who made the determination that he was of "high interest," because that admission "d[id] not necessarily insulate Ashcroft and Mueller from personal responsibility for the actions of their subordinates under the standards of supervisory liability outlined" in the appeals court's decision.). Ashcroft and Mueller thereafter made the supervisory liability issue the focus of the second Question Presented in the petition, and the Court granted review on that question. Accordingly, the supervisory liability issue is properly before the Court.

has acted wrongfully but against his supervisor or employer as well, a *Bivens* plaintiff will be less likely to target the officer – thereby undercutting *Bivens*'s deterrent purpose. *Id.* at 70-71; *Federal Deposit Ins. Corp. v. Meyer,* 510 U.S. at 485. Barring *Bivens* actions against federal supervisors alleged to have failed to properly supervise subordinate officials who violated a plaintiff's constitutional rights will not leave the plaintiff without recourse for the wrong inflicted on him – he will still be permitted to seek recovery from the subordinate official. More importantly, barring *Bivens* suits based on claims of inadequate supervision will ensure that high-level Executive Branch officials will not face the prospect of discovery proceedings that are highly likely to distract them from their other responsibilities.

Moreover, *amici* are unaware of any prior federal appellate decision – and the Second Circuit has pointed to none – in which a high-level Executive Branch official has been held to answer in a *Bivens* action asserting liability based on constructive notice of wrongdoing by his/her subordinates. In the absence of such precedent, Ashcroft and Mueller are entitled to dismissal of any claim based on supervisory liability, because *Bivens* liability based on such claims cannot be said to have been "clearly established" at the time of Iqbal's detention in the Admax unit in 2002.

CONCLUSION

Amici curiae request that the Court reverse the decision of the court of appeals.

Respectfully submitted,

Paul J. Larkin, Jr.
1314 Cleveland St.
Alexandria, VA 22302
(703) 931-1704

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Mass. Ave, NW
Washington, DC 20036
(202) 588-0302

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