

No. 07-1015

---

---

IN THE  
**Supreme Court of the United States**

---

JOHN D. ASHCROFT, former Attorney General, *et al.*,  
*Petitioners,*  
*v.*  
JAVOID IQBAL, *et al.*,  
*Respondents.*

---

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

---

---

**REPLY BRIEF FOR RESPONDENTS MICHAEL ROLINCE, FORMER CHIEF  
OF THE FEDERAL BUREAU OF INVESTIGATION'S INTERNATIONAL  
TERRORISM OPERATIONS SECTION, COUNTERTERRORISM DIVISION, AND  
KENNETH MAXWELL, FORMER ASSISTANT SPECIAL AGENT IN  
CHARGE, NEW YORK FIELD OFFICE, FEDERAL BUREAU OF  
INVESTIGATION IN SUPPORT OF REVERSAL**

---

---

LAUREN J. RESNICK  
FERNANDO A. BOHORQUEZ, JR.  
BAKER & HOSTETLER LLP  
45 Rockefeller Plaza  
New York, NY 10111  
(212) 589-4200

THOMAS D. WARREN  
KARL FANTER  
BAKER & HOSTETLER LLP  
3200 National City Center  
1900 East 9th Street  
Cleveland, OH 44114-3485  
(216) 621-0200

*Attorneys for Michael Rolince*

---

---

LESLIE R. CALDWELL  
MORGAN, LEWIS & BOCKIUS LLP  
101 Park Avenue  
New York, NY 10178  
(212) 309-6260

BRETT M. SCHUMAN\*  
MORGAN, LEWIS & BOCKIUS LLP  
One Market, Spear Street Tower  
San Francisco, CA 94105  
(415) 442-1000

*Attorneys for Kenneth Maxwell*

\* *Counsel of Record*

**ARGUMENT****RESPONDENTS MICHAEL ROLINCE AND  
KENNETH MAXWELL ARE PARTIES TO THE  
PROCEEDING ENTITLED TO SEEK AND  
OBTAIN RELIEF.**

Contrary to the argument in footnote six on page 45 of respondent Javaid Iqbal's brief, respondents Michael Rolince and Kenneth Maxwell may seek and obtain relief from this Court based on the questions presented by petitioners John Ashcroft and Robert Mueller.

**A. ROLINCE AND MAXWELL MAY OBTAIN  
RELIEF FROM THIS COURT.**

As parties to the proceedings below, Rolince and Maxwell are respondents under Sup. Ct. R. 12.6 to this proceeding and are entitled to relief from this Court. Sup. Ct. R. 12.6 states in relevant part: "All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court. . . . Parties who file no document will not qualify for any relief from this court."

In *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 783 n.14 (1980), the Court stated that a party in the proceeding below is "automatically joined as a respondent" when another party seeks certiorari, and, "in that capacity, he may seek reversal of the judgment of the Court of Appeals on any ground urged in [the

circuit] court.”<sup>1</sup> *Id.* In *O’Bannon*, the Third Circuit reversed the district court’s judgment in favor of two defendants – the Department of Health, Education, and Welfare (“HEW”) and the Pennsylvania Department of Public Welfare (“DPW”). Only the DPW, however, filed a petition for a writ of certiorari, which was granted. *Id.* at 783. Nonetheless, because HEW was joined as a respondent, the Court reversed the Third Circuit’s judgment with respect to both the DPW and HEW. *Id.* at 783 n.14, 790; *see also Dir., Office of Workers’ Comp. Programs, U.S. Dep’t Labor v. Perini*, 459 U.S. 297, 304-305 n.12 (1983) (respondent still had a “sufficient interest” in the question presented before the Court, such that he had standing to address the merits of the Court of Appeals decision, even though he had not filed a petition for certiorari).

Here, Rolince and Maxwell were parties to the Second Circuit proceedings, and they have a significant interest in both questions presented as fellow high-ranking Federal Bureau of Investigation (“FBI”) supervisors potentially subject to personal liability under *Bivens*. They are seeking reversal of the ruling below on the same grounds – qualified immunity – as they (and petitioners) did in the Court of Appeals.

---

<sup>1</sup> *O’Bannon* addressed the predecessor to Sup. Ct. R. 12.6.

**B. ROLINCE AND MAXWELL HAVE ADDRESSED ONLY THE QUESTIONS PRESENTED IN THE WRIT OF CERTIORARI AND ARE NOT EXPANDING THE ISSUES BEFORE THE COURT.**

Without citation to any authority, Iqbal states that “the questions presented are limited to whether the lower courts properly determined that respondent had adequately alleged claims against [Ashcroft and Mueller]” and that “no Rule permits respondents to expand the questions presented to the Court so as to encompass the sufficiency of the allegations made against each respondent individually.” Respondent Iqbal Br. 45. Rolince and Maxwell, however, did not raise additional questions in their opening brief or alter the substance of the questions presented in Ashcroft’s and Mueller’s petition for writ of certiorari. Rolince and Maxwell, like petitioner Mueller, are high-ranking FBI supervisory officials and are entitled to be held to the same standards to which Mueller is held. In any event, under Sup. Ct. R. 24(1)(a), “[t]he phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari or the jurisdictional statement, but the brief may not raise additional questions or change the substance of the questions already presented in those documents.” Rolince’s and Maxwell’s merits brief argues the same questions as those presented in Ashcroft’s and Mueller’s petition for a writ of certiorari.

Moreover, as the Solicitor General explains in Ashcroft’s and Mueller’s petition for a writ of certiorari, Ashcroft and Mueller properly raised the issues encompassed in the questions presented in the Court

of Appeals. Rolince and Maxwell also raised these issues in the Second Circuit and joined Ashcroft's and Mueller's briefing there to the extent it was applicable to Rolince and Maxwell. Reply Brief of Defendants-Appellants at 2 n.1, *Elmaghraby et al. v. Hasty et al.*, 490 F.3d 143 (2d Cir. 2007) (No. 05-5768-cv(L)).

### CONCLUSION

Rolince and Maxwell may seek and obtain relief under Sup. Ct. R. 12.6 and relevant precedent. Accordingly, for the reasons set forth in their opening brief, Rolince and Maxwell respectfully request that this Court reverse the Second Circuit's decision affirming the district court's denial of Ashcroft's and Mueller's, and Rolince's and Maxwell's, motions to dismiss Iqbal's First Amended Complaint and direct entry of judgment in favor of Ashcroft, Mueller, Rolince, and Maxwell.

Respectfully submitted,

LAUREN J. RESNICK  
 FERNANDO A. BOHORQUEZ, JR.  
 BAKER & HOSTETLER LLP  
 45 Rockefeller Plaza  
 New York, NY 10111  
 (212) 589-4200

THOMAS D. WARREN  
 KARL FANTER  
 BAKER & HOSTETLER LLP  
 3200 National City Center  
 1900 East 9th Street  
 Cleveland, OH 44114-3485  
 (216) 621-0200

*Attorneys for  
 Michael Rolince*

LESLIE R. CALDWELL  
 MORGAN, LEWIS & BOCKIUS LLP  
 101 Park Avenue  
 New York, NY 10178  
 (212) 309-6260

BRETT M. SCHUMAN\*  
 MORGAN, LEWIS & BOCKIUS LLP  
 One Market,  
 Spear Street Tower  
 San Francisco, CA 94105  
 (415) 442-1000

*Attorneys for  
 Kenneth Maxwell*

\* *Counsel of Record*