No. 07-1015

# In the Supreme Court of the United States

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ROBERT MUELLER, DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, PETITIONERS

*v.*

JAVAID IQBAL, ET AL.

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

## REPLY BRIEF FOR PETITIONERS

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The court of appeals sustained the denial of petitioners' motion to dismiss on the ground of qualified immunity and thus held that the former Attorney General of the United States and current Director of the Federal Bureau of Investigation may be subjected to discovery and potentially a trial based on highly generalized and conclusory allegations that those high-ranking officials knew about, approved of, or condoned wrongs allegedly committed by federal officers much lower down on the bureaucratic chain of command. The court of appeals was unanimous in expressing reservation about that result. See Pet. App. 25a-27a. Judge Cabranes went further. He not only urged this Court to review its decisions in this area "at the earliest opportunity," but observed that the court of appeals' deci-

sion would supply a "blueprint" for "plaintiffs claiming to be aggrieved by national security programs and policies" to subject "officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes." *Id.* at 69a-70a (concurring opinion).

In his merits brief, respondent seems most interested in avoiding review of the important questions presented by this case. First, respondent implausibly asserts (Br. 1) that "[t]he issues presented by this case have no connection to qualified immunity." But as the Second Circuit correctly noted at the outset of its decision, this case raises "several issues concerning the defense of qualified immunity in the aftermath of the events of 9/11," Pet. App. 2a, and the decision before this Court squarely addresses those important qualified-immunity issues. Second, respondent makes his lead argument not a defense of the decision below, but the contention (Br. 12-21) that there is no appellate jurisdiction to review the questions presented at all. But it is established that an order denying qualified immunity is "immediately appealable" when it turns on an "issue of law," *Behrens* v. *Pelletier*, 516 U.S. 299, 311 (1996), and sufficiency of the pleadings is a quintessential question of law. And third, respondent simply refuses to address the supervisory-liability question because he insists (Br. 12-13) that—for the same reasons he unsuccessfully advanced at the certiorari stage (Br. in Opp. 10, 28)—the Court should have denied certiorari on that question. But litigants do not get to decide what questions are properly presented—the Court does. And the court of appeals' application of a now undisputedly incorrect legal standard with respect to the supervisory liability of high-ranking officials under *Bivens* alone requires vacatur of the decision below.

In actually addressing the first question presented, respondent refuses to give effect to this Court's longstanding

precedent requiring a "firm application" of the Federal Rules of Civil Procedure in considering motions to dismiss on the ground of qualified immunity. *Butz* v. *Economou*, 438 U.S. 478, 508 (1978). And respondent urges this Court not only essentially to disregard—or even undo—its most recent explication of the notice pleading standards imposed by the Federal Rules, but to conclude that petitioners—government officials who indisputably enjoy qualified immunity from suit—are entitled to *less* notice and protection from meritless claims at the pleading stage than routine civil defendants in an antitrust conspiracy case. See *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955 (2007). That effort is unavailing. A proper application of this Court's precedents before *Bell Atlantic* and the Federal Rules should have resulted in the dismissal of the claims against petitioner, but *Bell Atlantic* nevertheless underscores that the claims against petitioners must be dismissed because the bare and conclusory allegations at issue do not remotely cross "the line between possibility and plausibility of 'entitle[ment] to relief.'" *Id.* at 1966.

To hold that petitioners are entitled to qualified immunity because the allegations against them are legally insufficient, the Court need only faithfully apply its existing precedents; it need not, as respondent repeatedly suggests (Br. 10, 23-25, 31, 34, 36, 39, 44), adopt a heightened pleading standard. Nevertheless, as Judge Cabranes stressed, and the amici former Attorneys General and Director of the FBI have echoed, a proper application of the Federal Rules is especially important when it comes to the types of claims at issue, given the strong "national interest in enabling Cabinet officers with responsibilities in [the national security] area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation." Pet. App. 70a (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 541 (1985)

(Stevens, J., concurring in judgment)); see Barr Amicus Br. 6, 11-12, 15. The court of appeals' decision seriously threatens that vital "national interest" and should be reversed.

### A. The District Court's Order Denying Petitioners' Motion To Dismiss On Qualified-Immunity Grounds Is Appealable

At the outset, respondent argues (Br. 13-21) that there is generally no appellate jurisdiction to review a district court decision denying a motion to dismiss on qualified-immunity grounds when the issue on appeal involves the sufficiency of the pleadings. That argument should be rejected.

It is settled that "an order denying qualified immunity, to the extent it turns on an 'issue of law,' * * * is immediately appealable." *Behrens*, 516 U.S. at 311 (quoting *Mitchell*, 472 U.S. at 530). The sufficiency of the pleadings to state a claim for relief is a paradigmatic question of law. Moreover, the fundamental reason for permitting interlocutory appeals in this context is that qualified immunity protects public officials from unwarranted litigation demands by providing "an *immunity from suit* rather than a mere defense to liability"—an immunity that is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526; see Pet. Br. 17. Claims that do not even satisfy threshold pleading requirements are among those that *most* warrant prompt dismissal.

Respondent appears to argue (*e.g.*, Br. 14-17) that the only qualified-immunity questions that are immediately appealable are those that relate narrowly to the abstract legal question whether an asserted right was clearly established at the relevant time, because only that question is completely separable from the underlying merits of a suit. But that position cannot be reconciled with this Court's decisions, which routinely assert interlocutory jurisdiction

in qualified-immunity cases to consider matters that overlap with the merits of a plaintiff's claims.

In *Hartman* v. *Moore*, 547 U.S. 250 (2006), for example, the Court determined that matters the plaintiff "must plead and prove in order to win" (there, the existence of probable cause) were "directly implicated by the defense of qualified immunity and properly before [the Court] on interlocutory appeal." *Id.* at 257 n.5. The Court later explained in *Wilkie* v. *Robbins*, 127 S. Ct. 2588 (2007), that "the same reasoning applies to the recognition of the entire cause of action." *Id.* at 2597 n.4. Similarly, *Siegert* v. *Gilley*, 500 U.S. 226 (1991), observed that "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of *whether the plaintiff has asserted a violation of a constitutional right at all*." *Id.* at 232 (emphasis added); see *Scott* v. *Harris*, 127 S. Ct. 1769, 1773 n.2 (2007).

Respondent's contention (Br. 14-15) that *Mitchell* and *Behrens* require a narrower focus is wrong. Indeed, *Behrens* explained that *Mitchell* "held" that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is [immediately] appealable." 516 U.S. at 306 (quoting *Mitchell*, 472 U.S. at 530); accord *id.* at 311. While respondent asserts (Br. 15) that *Mitchell* never discussed "the sufficiency of the pleadings in that case," the *Mitchell* Court *upheld* qualified immunity after determining that the question properly before it was "whether *the facts alleged* * * * support a claim of violation of clearly established law." 472 U.S. at 528 n.9 (emphasis added). *Mitchell* further explained that "immunity is separate from the merits of the underlying action for purposes of the [collateral-order doctrine] even though a reviewing court *must consider the plaintiff's factual allegations* in resolv-

ing the immunity issue." *Id.* at 528-529 (emphasis added). And *Behrens* likewise explained that, because the "denial of a motion to dismiss is conclusive as to th[e] right" "to avoid the burdens of 'such *pretrial* matters as discovery,'" it is appealable to the extent that it turns on a question of law. 516 U.S. at 308 (quoting *Mitchell*, 472 U.S. at 526).

Respondent points to (Br. 14) a passage in *Mitchell* stating that "[a]n appellate court reviewing the denial of the defendant's claim of immunity need not * * * determine whether the plaintiff's allegations actually state a claim." 472 U.S. at 528. When read in the context of the surrounding analysis, discussed above, that passage does not bear the weight respondent places on it. And, in any event, in subsequent cases like *Hartman*, *Wilkie*, and *Siegert*, this Court has asserted interlocutory jurisdiction to determine the legal sufficiency of a complaint's allegations.

Respondent's argument against jurisdiction is ultimately based on a misguided attempt to conflate a ruling concerning the sufficiency of the *evidence* at the summary-judgment stage (which is not appealable under *Johnson* v. *Jones*, 515 U.S. 304 (1995)) with a ruling concerning the sufficiency of the *pleadings* at the motion-to-dismiss stage (which is applicable in this context). The concern in *Johnson*, however, was not with "sufficiency" in the abstract, but with specific characteristics associated with a determination of the sufficiency of pre-trial evidence. See *id.* at 316-317; *Behrens*, 516 U.S. at 313 (explaining that *Johnson* addressed only factual, not legal, sufficiency). Here, by contrast, a motion to dismiss for failure to state a claim sufficient to overcome qualified immunity involves a purely legal issue that appellate courts are institutionally suited to decide, and the record on the question cannot improve as the lawsuit progresses, because the pleading question will continue to turn on the content of the complaint itself.

As the court of appeals recognized, this case presents a question about the "pleading standard to overcome a qualified immunity defense." Pet. App. 15a. In light of "the importance of resolving immunity questions at the earliest possible stage in litigation," *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (per curiam), this Court should decide that purely legal question on this interlocutory appeal.

**B. Respondent Has Failed To Allege Facts Sufficient To Overcome Petitioners' Assertion Of Qualified Immunity**

***1. A plaintiff's conclusory allegations cannot negate the qualified immunity of high-ranking government officials***

It is well settled that conclusory allegations are insufficient to defeat a motion to dismiss. Instead, as this Court recently emphasized, a complaint must contain "allegations plausibly suggesting" actionable conduct. *Bell Atl. Corp.*, 127 S. Ct. at 1966. To satisfy that standard, a complaint must contain sufficient "factual matter" to "raise a right to relief above the speculative level" and to "raise a reasonable expectation that discovery will reveal evidence of" illegal activity. *Id.* at 1965. Moreover, "factually neutral" allegations—*i.e.*, allegations that are consistent with lawful behavior—are inadequate to defeat a motion to dismiss. *Id.* at 1966 n.5. A proper application of that rule is especially critical in cases involving high-ranking government officials' qualified immunity. Otherwise, conclusory allegations could negate the immunity and produce all of the consequences that qualified immunity is supposed to prevent—consequences that could be particularly grave in cases involving national security. See Pet. Br. 16-21.

a. Respondent contends (Br. 37) that qualified immunity is wholly irrelevant here because the application of pleading standards should not vary depending on the identity of the defendant or the nature of the claims. It is impos-

sible, however, to determine whether particular allegations are factually suggestive of illegal conduct without considering the legal and factual context of a suit. Thus, the adequacy of the allegations in a complaint must be evaluated in the context of the type of claim it raises.

*Bell Atlantic* therefore recognized that allegations going to the existence of an antitrust conspiracy must be considered in the context of substantive antitrust law. See 127 S. Ct. at 1964. Indeed, this Court held that allegations of an antitrust conspiracy that relied entirely on the existence of parallel business conduct were insufficient to state a claim because "common economic experience" showed that there could be legitimate reasons for parallel conduct. *Id.* at 1971.

Respondent suggests (Br. 37-38) that *Bell Atlantic*'s discussion of the plausibility threshold was limited to the context of an "antitrust conspiracy claim." But as the Court's blanket disavowal of the "no set of facts" rule underscores, the Court's discussion of pleading standards was not confined to antitrust-conspiracy claims. See 127 S. Ct. at 1968-1970. At the same time, however, *Bell Atlantic* teaches that a court must consider substantive law and context when determining whether a particular complaint meets Rule 8(a)(2) of the Federal Rules. See *Phillips* v. *County of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008) (recognizing that "[f]air notice under Rule 8(a)(2) depends on the type of case"); see also Pet. Br. 27.

Just as substantive antitrust law was relevant to evaluating the allegations in *Bell Atlantic*, so too is substantive qualified-immunity doctrine, including the standard for supervisory liability, relevant to evaluating complaints against government officials. As demonstrated in petitioners' opening brief (Pet. Br. 17-19), the Court has set forth a number of substantive rules relating to qualified immunity that are relevant here, including that qualified immunity protects

government officials not simply from the burdens of standing trial but also from "the burdens of 'such pretrial matters as discovery.'" *Behrens*, 516 U.S. at 308 (quoting *Mitchell*, 472 U.S. at 526). This Court has thus insisted on a "firm application" of the Federal Rules of Civil Procedure in considering motions to dismiss on the ground of qualified immunity. *Butz*, 438 U.S. at 508.

Such a "firm application" of the Federal Rules means that a Court "must exercise its discretion in a way that protects the substance of the qualified immunity defense * * * so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings." *Crawford-El* v. *Britton*, 523 U.S. 574, 597-598 (1998). Among the discretionary measures a court must employ is "insist[ing] that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish * * * cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment." *Id.* at 598 (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in judgment)).

Respondent argues (Br. 35) that this Court's admonition that trial courts should require plaintiffs to "put forward specific, nonconclusory factual allegations that establish * * * cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment" (*Crawford-El*, 523 U.S. at 598 (quotation marks omitted)) was limited to the particular remedy of granting a motion for a more definite statement under Rule 12(e). But the Federal Rules also provide another obvious remedy for a deficient complaint: dismissal under Rule 12(b)(6) based on failure to meet the pleading standards of Rule 8(a)(2) in light of a qualified-immunity defense asserted in a motion to dismiss. See *Jones* v. *Bock*, 549 U.S. 199, 215-216 (2007) (recognizing that a defense can be a basis for dismissal for failure to state a claim). To the extent that respondent believed he could de-

feat the motion to dismiss by providing more detailed allegations, he could have sought leave to amend his complaint under Rule 15(a)(2), but he has not done so, and the allegations as to petitioners that are in his complaint are legally deficient.

Respondent's claims arise from an investigation launched immediately after the September 11 attacks that was unprecedented in size. "Within 3 days, more than 4,000 FBI Special Agents and 3,000 support personnel were assigned to work on the investigation," and "[b]y September 18, 2001, the FBI had received more than 96,000 leads from the public." Pet. App. 76a n.4. In ordinary times, the Attorney General and Director of the FBI are not personally involved in the operational decisions made by officers much lower down on the bureaucratic chain of command; the size of the September 11 investigation made such detailed involvement all the more infeasible. Especially given that context, it is not enough simply to allege conclusorily that the Attorney General or the FBI Director "knew of" or "condoned" (*id.* at 172a (Compl. ¶ 96)) particular acts by their subordinates, because such a claim requires additional subsidiary facts to move the complaint from being merely possible to being plausible. *Bell Atl. Corp.*, 127 S. Ct. at 1966. See Barr Amicus Br. 15-16 (explaining that this scenario is not plausible on the facts alleged).

Similarly, any claim that an official created a discriminatory policy must be based on factual allegations that suggest the existence of a policy of the type that such officials would be expected to issue. Thus, it is not sufficient simply to allege that a high-level officer was "instrumental" or a "principal architect" of a policy like the one respondent alleges. Instead, there must be an actual factual basis in the complaint for concluding that such a policy exists and was

handed down by such a high-level officer—here the Attorney General or Director of the FBI himself.

Respondent relies (Br. 3) on *Gomez* v. *Toledo*, 446 U.S. 635 (1980), for the proposition that a plaintiff need not anticipate the qualified-immunity defense in his complaint. *Gomez*, however, held only that a plaintiff need not allege that, in addition to violating the law, a defendant also acted in bad faith. *Id.* at 640. Now that this Court has replaced the bad-faith standard with an objective one for qualified immunity, see *Harlow* v. *Fitzgerald*, 457 U.S. 800, 815-818 (1982), that holding of *Gomez* is obsolete. Because the qualified-immunity and merits questions now turn on the same set of historical facts, the question under Rule 8(a)(2) is simply whether the plaintiff pleaded sufficient facts to make his claim plausible the context of the motion to dismiss asserting qualified immunity. Respondent has not done so.

b. Respondent does not dispute that, if his allegations are sufficient to subject high-ranking officials like the Attorney General and the Director of the FBI to the demands of litigation, then, as Judge Cabranes recognized, virtually any complaint challenging the alleged actions of lower-level officers could draw in such officials simply by "following the blueprint laid out by this lawsuit." Pet. App. 70a (concurring opinion); see Barr Amicus Br. 6. Indeed, respondent acknowledges (Br. 41) that his position "could result in some complaints with 'conclusory' allegations advancing to discovery" (citation omitted). But as this Court reinforced in *Bell Atlantic*, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions." 127 S. Ct. at 1964-1965. Instead, a plaintiff must provide "enough *fact* to raise a reasonable expectation that discovery will reveal evidence of" illegal conduct. *Id.* at 1965 (emphasis added).

If adopted, respondent's position would effectively return the Federal Rules to the unduly lax pleading regime adopted by many courts on the basis of *Conley* v. *Gibson*, 355 U.S. 41 (1957).[1] As explained in petitioners' opening brief (at 21-22), before *Bell Atlantic*, the courts of appeals had difficulty harmonizing the substantive rules of qualified immunity and the "accepted rule" that a complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46; see, *e.g.*, *Thomas* v. *Independence Twp.*, 463 F.3d 285, 299 (3d Cir. 2006). In *Bell Atlantic*, this Court declared that *Conley*'s "no set of facts" formulation—on which the district court relied in this case, Pet. App. 136a-137a, 146a—was "best forgotten as an incomplete, negative gloss on an accepted pleading standard." 127 S. Ct. at 1969.

Respondent contends (Br. 23-24) that petitioners' position is indistinguishable from the heightened pleading standards invalidated in *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), and *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506 (2002). That is incorrect. Petitioners do not ask the Court to adopt any heightened pleading standard. Rather, their position is that the lower courts failed to follow this Court's decisions in this area and give a "firm application" of the Federal Rules. Re-

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[1] Respondent's law-professor amici urge just such a retreat: "[I]mplausibility might be established if the plaintiff were to allege a state of affairs that was *so beyond the common understanding as to be virtually, if not literally, incredible*." Profs. of Civ. Pro. Br. 14 (emphasis added). That "incredibility" standard is indistinguishable from the standard that this Court squarely rejected in *Bell Atlantic* (127 S. Ct. at 1969) of allowing a complaint to survive "unless it appears beyond doubt that the plaintiff can prove no set of fact in support of his claim which would entitle him to relief." *Conley,* 355 U.S. at 45-46.

spondent's reliance (*e.g.*, Br. 32-33) on Rule 9(b), which makes clear that its heightened pleading standard does not apply to allegations of intent, is misplaced for the same reason. Rather than seeking a heightened pleading standard for *any* of respondent's allegations, petitioners argue that the normal Rule 8(a)(2) pleading standard must be considered—as *Bell Atlantic* reinforces—contextually with respect to matters such as the plausibility of an allegation.[2]

***2. Respondent's allegations against petitioners are too conclusory to overcome a motion to dismiss***

As explained in petitioners' opening brief (Br. 30-38), respondent's conclusory allegations fall significantly short of stating a plausible claim for relief. See also Barr Amicus Br. 11-18. Although respondent lists (Br. 47-48) a number of allegations that supposedly suggest illegal conduct on the part of petitioners, whether taken singly or together, they

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[2] Respondent's heavy reliance (*e.g.*, Br. 24, 41) on *Swierkiewicz* is especially misplaced. *Swierkiewicz* was a suit against a private company under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, not a *Bivens* suit against high-level government officials. See Pet. Br. 38. In any event, as this Court noted, the plaintiff "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination." *Swierkiewicz*, 534 U.S. at 514. In the context of a suit against the company for actions taken by a plaintiff's superior, the allegations were adequately specific to make out a plausible claim of employment discrimination. Respondent's reliance (Br. 40-41) on *Erickson* v. *Pardus*, 127 S. Ct. 2197 (2007) (per curiam), is likewise misplaced because the complaint there included specific details, see Pet. Br. 39 n.7, and the fact in dispute—whether the plaintiff could suffer harm when prison officials discontinued his prescribed treatment program for hepatitis C, *Erickson*, 127 S. Ct. at 2200—had nothing to do with establishing the personal involvement or conduct of the defendants.

are not sufficient to cross "the line between the conclusory and the factual" (*Bell Atl. Corp.*, 127 S. Ct. at 1966 n.5) under this Court's precedents. They do not, in other words, "possess enough heft" to meet Rule 8(a)(2)'s requirement that a pleader "show[]"—as opposed merely to assert—that he "is entitled to relief." 127 S. Ct. at 1966.

a. Respondent advances (Br. 24, 45-46) two theories for liability. The first is that, as part of the investigations into the September 11 attacks, the Attorney General and the FBI Director designed a policy of classifying suspects as "of high interest" to the investigation and holding them in more restrictive conditions of confinement solely on account of their race, religion, or national origin. See Resp. Br. 49. As the district court here recognized, "the assertion that high-level executive branch members created an unconstitutional policy, without more, would be insufficient to state a claim." Pet. App. 116a (citing *Nuclear Transp. & Storage, Inc.* v. *United States*, 890 F.2d 1348, 1355 (6th Cir. 1989)). And respondent points to no factual allegations that support the existence of such a *discriminatory* policy. Instead, respondent relies (Br. 48), for instance, on the allegation that

> [t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were "cleared" by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.

Pet. App. 168a (Compl. ¶ 69). Respondent also highlights (Br. 48) his equally conclusory allegation that petitioners

> willfully and maliciously designed a policy whereby individuals such as [respondent] were arbitrarily designated to be confined in the ADMAX SHU without providing any individual determination as to whether such designation was appropriate or should continue.

Pet. App. 173a (Compl. ¶ 97). Neither of those allegations suggests in any way that petitioners were involved in invidious discrimination. The allegations of petitioners' involvement are conclusory, and in any event there is nothing inherently *discriminatory* about a general policy of holding suspects until cleared of any connection with the September 11 attacks, or with the alleged failure to provide an individual classification determination. See Pet. Br. 34-35.

Furthermore, respondent's other factual allegations contradict his claim that there was ever any national policy of classifying suspects as "of high interest" to the September 11 investigation solely because of their race, religion, or national origin. According to respondent, all of the alleged conduct was conducted by officials lower down on the chain of responsibility. He alleges that two lower-level officials "were responsible for making the initial determination as to whether detainees arrested within the New York area in the weeks and months after September 11 were classified as 'of high interest' to the government's investigation," and that those lower-level officials acted "*without specific criteria or a uniform classification system*." Pet. App. 164a (Compl. ¶¶ 48, 50) (emphasis added). Furthermore, not even respondent claims that all people of Muslim or Arab origin who were detained as part of the September 11 investigation were classified as being "of high interest," or that all such classifications were the result of unlawful discrimination. *Ibid.* (Compl. ¶¶ 47, 48) (alleging only that "[m]any" of the "thousands of Arab Muslim men" that were arrested as part of the September 11 investigation were classified "as high interest"); *ibid.* (Compl. ¶ 49) (alleging only that "[i]n many cases" was the classification made because of the race, religion, and national origin of the detainees).

If, as respondent claims (Br. 49), the Attorney General and FBI Director had personally mandated a "discrimina-

tory policy of classifying Arab and Muslim detainees as 'high interest' solely because of their race, religion, and national origin," one would have expected more than a fraction[3] of Arabs and Muslims held as part of the September 11 investigation to have been classified as "of high interest."[4] One would also have expected it to take much less than two months after his November 2001 arrest for respondent himself to be placed under more restrictive conditions. See Pet. App. 169a (Compl. ¶¶ 80-81). Thus, when the complaint is read as a whole, its allegations against petitioners are even less plausible than when taken in isolation.

Respondent also relies (Br. 47-48) on a number of broad and conclusory allegations related to general supervisory responsibility that simply do not provide "enough fact to

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[3] According to the Office of Inspector General Report, of the 762 individuals held on immigration charges for suspected links to the September 11 attacks, only 184 were deemed to be "of high interest" to the investigation and held under special conditions of confinement. See Pet. Br. 33 n.4.

[4] Respondent also urges (Br. 53) that alleged discriminatory animus with regard to the decision to classify other suspects as merely "of interest" to the investigation would support his claims against petitioners. To begin with, even if that claimed discrimination took place, the complaint would still be fatally flawed because it fails to provide sufficient factual matter to make plausible the personal involvement of petitioners in any discriminatory decision. But in any event, respondent's allegations are focused not on any decision to classify other suspects as "of interest" but of the decision to classify him as "of high interest" (and thus house him under more secure conditions of confinement). See Pet. App. 201a (Compl. ¶ 232) (raising cause of action based on "policy and practice of imposing harsher conditions of confinement on Plaintiffs because of Plaintiffs' sincere religious beliefs"); *id.* at 202a (Compl. ¶ 235) (same regarding race discrimination). The court of appeals similarly focused on the allegation that respondent was classified as "of high interest" to the investigation "solely because of his race, ethnicity, and religion." *Id.* at 59a.

raise a reasonable expectation that discovery will reveal evidence of" a discriminatory policy. *Bell Atl. Corp.*, 127 S. Ct. at 1965. Conclusory allegations that the head of an agency was "instrumental" or a "principal architect" of everything in a complaint, see Pet. App. 157a (Compl. ¶¶ 10, 11) would be tantamount to extending *respondeat superior* liability to *Bivens* claims. Similarly, the entirely conclusory allegation that petitioners "adopt[ed] * * * a policy and practice" of illegally discriminating against respondent or "agreed to deprive" him of equal protection and privileges and immunities, *id.* at 201a, 202a, 208a (Compl. ¶¶ 232, 235, 250), cannot plausibly suggest illegal conduct absent some factual basis for those claims. To the extent respondent alleges (Br. 47) that the September 11 investigation generally focused on suspects who shared the common characteristics of the September 11 hijackers, that allegation does not materially advance the specific claim that the Attorney General and FBI director directed lower-level officials to classify suspects as "of high interest" to the investigation and confine them in more restrictive conditions solely because of their race, religion, and national origin.

b. Respondent's second theory of liability—that petitioners knew of and acquiesced in "their subordinates' use of discriminatory criteria to make classification decisions among detainees" (Resp. Br. 45-46)—fares no better. The Attorney General and the FBI Director generally do not involve themselves in the granular operational decisions of their subordinates. And respondent's suggestion that petitioners engaged in this sort of micro-management during one of the largest criminal and national-security investigations in United States history is particularly implausible. See Barr Amicus Br. 15-16. Especially given the context in which these claims have been raised, respondent was required to come forward with "specific, nonconclusory factual

allegations" to establish petitioner's knowledge of and acquiescence in alleged discrimination by lower level officials. *Crawford-El*, 523 U.S. at 598 (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in judgment)).

Not only did respondent fall well short of that obligation, the complaint is wholly devoid of any factual support for respondent's claim. To demonstrate knowing acquiescence in unconstitutional conduct by petititioners' subordinates, respondent relies heavily on his conclusory allegation that petitioners "knew of, condoned, and willfully and maliciously agreed to subject" respondent to the more restrictive detention conditions "solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Pet. App. 172a-173a (Compl. ¶ 96). But that allegation does nothing to suggest why, contrary to usual practice, petitioners would have actual knowledge of the classification decisions being made by lower level officials.[5] Moreover, the

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[5] Respondent states (Br. 43) that "in the lower courts, defense counsel have suggested that petitioner Ashcroft authored a memorandum to subordinates * * * outlining how the classification system * * * was to be carried out." As explained in our reply brief at the certiorari stage (at 4 n.2), the apparent document cannot bear the speculative weight that respondent places upon it. More important, whatever has been stated in later proceedings in the case, *the complaint* fails to allege any direct communication between petitioners and lower-level officials responsible for classification decisions.

For the same reasons, the sufficiency of the allegations in respondent's *complaint* is not affected by extra-record materials that amici claim they have discovered. See Turkmen Amicus Br. 20. A complaint must cross the line between the possible and the plausible before discovery is appropriate, and neither respondent nor his amici can overcome the deficiencies in the complaint at issue by pointing to material described in an amicus brief. Although other amici contend that an exception should be made when facts are in the defendants' possession (Amer. Ass'n for Justice Amicus Br. 19-25; Nat'l Civ. Rights Orgs. Amicus Br. 5, 30; Japanese American Citizens League Amicus Br. 37),

vast majority of Arab and Muslim men who were arrested on immigration or criminal charges as part of the September 11 investigation were *not* classified as being "of high interest." See note 3, *supra*. Not only does that fact suggest a lack of discriminatory animus at any level of government, it makes respondent's claim that petitioners were aware of supposed discrimination even less plausible: Even if petitioners knew the demographic particulars of those being arrested and detained, there would have been no reason for them to draw the conclusion that lower-level subordinates were using discriminatory criteria to classify suspects. Thus, without further "factual matter," respondent's complaint fails to "raise a right to relief above the speculative level." *Bell Atl. Corp.*, 127 S. Ct. at 1965.

Because the complaint provides insufficient support to the claim that petitioners had personal involvement in any discriminatory decision, respondent is left with only his allegations that petitioners exercised ultimate supervisory responsibility over the lower-level officials who were responsi-

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that would also have been true about the allegedly illegal agreement between the defendants in *Bell Atlantic*.

Moreover, the Turkmen amici concede that, even with the information in their proposed lodging, "[m]ore investigation is required to determine whether petitioners directed that Muslim and Arab men be treated as 'of interest' to the terrorism investigation." Amicus Br. 4. None of the information they point to (*id.* at 10-14) shows that petitioners were "aware" of discriminatory classification decisions. The fact that daily reports submitted to the Attorney General listed specific connections to the September 11 hijackers for some detainees but not others (*id.* at 13-14) would not have signaled that the others (who were still being investigated) were of "interest" to the FBI only because of their race, religion, or nationality. Similarly, even if proven, their allegation (*id.* at 15-16) that the Attorney General caused certain suspects (not including respondent) to be placed on a list of those whose potential connections to the September 11 investigation were still being investigated, would not show *discriminatory* intent.

ble for classification and confinement decisions, as part of their responsibility for investigating and prosecuting violations of federal criminal law. See Pet. App. 157a, 164a (Compl. ¶¶ 10, 11, 47). But, as explained below (see Pt. C, *infra*), and as petitioners do not dispute, mere supervisory responsibility and constructive knowledge of wrongdoing by subordinates cannot be an adequate basis for holding petitioners personally liable under *Bivens*.

c. Respondent's speculation (Br. 38-39) that affirming the court of appeals will not burden petitioners because of the instruction to the district court to limit discovery is incorrect and beside the point. As this Court has stressed, "[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management.'" *Bell Atl. Corp.*, 127 S. Ct. at 1967. That principle has all the more force in the qualified-immunity context, as discussed above, and in cases against high-ranking government officials who could be subjected to multiple discovery requests if such generalized and conclusory allegations are sufficient to obtain discovery. See Pet. App. 67a-70a & n.1.[6]

Respondent also argues (Br. 43, 55) that his complaint is sufficient because petitioners are able to file an answer that generally denies the general averments of the complaint. But the ability to give a general denial of general allegations

[6] Respondent's suggestion (Br. 11) that it will only be the "rare" case in which "officials like petitioners may properly be subject to discovery" is belied by other courts that have already invoked the decision below in allowing implausible claims to proceed. See, *e.g.*, *Twitty* v. *Ashcroft*, No. 3:04-CV-410 (RNC), 2008 WL 346124, at *1 (D. Conn. Feb. 4, 2008) (refusing, in light of decision below, to dismiss prisoner's claim that Attorney General Ashcroft and other federal officials were personally involved in the decision to transfer him from a federal penitentiary in Illinois to a Connecticut state prison in retaliation for filing lawsuits and grievances).

in a complaint is not the determinant of the sufficiency of the pleadings; rather, as this Court has made clear, the allegations must also be sufficiently factual and plausible to "raise a reasonable expectation that discovery will reveal evidence of" illegal activity. *Bell Atl. Corp.*, 127 S. Ct. at 1965. Respondent's allegations do not pass that threshold.[7]

### C. Respondent Does Not Dispute That Supervisory Liability Under *Bivens* May Not Be Premised On Constructive Notice

The second question on which this Court granted review is whether a "high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials." Pet. (i). As explained in our opening brief (at 44-47), that question goes directly to the proper scope of the cause of action inferred in *Bivens*. Indeed, this Court has refused to extend the *Bivens* remedy to suits against anyone other than the individual officers responsible for the alleged constitutional violation. See, *e.g.*, *FDIC* v. *Meyer*, 510 U.S. 471 (1994).

Respondent simply refuses (at 12-13) to address the merits of that question. As a result, respondent does not dispute that the court of appeals articulated an incorrect

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[7] Respondent also suggests (Br. 39) that the government's settlement with Ehab Elmaghraby is itself proof that his claims are not "insubstantial." But that was a settlement of Elmaghraby's claims *against the United States* under the Federal Tort Claims Act that he had been physically abused by prison guards and negligently denied adequate medical treatment. See 04-CV-1809 Docket entry No. 404 (E.D.N.Y. Mar. 15, 2006) (Stipulation for Compromise Settlement and Release of Federal Tort Claims Act Claims Pursuant to 28 U.S.C. § 2677). Because Elmaghraby recovered nothing on his *Bivens* claims, his settlement does not enhance the viability of respondent's claims against the former Attorney General and current FBI Director.

legal standard and that petitioners could not be held liable unless they had actual knowledge of the assertedly discriminatory nature of the classification of suspects as being "of high interest" and they were also deliberately indifferent to that discrimination. See Pet. Br. 42-52. The court of appeals' undisputed application of an incorrect legal standard suffices by itself to require vacatur of the decision below.

Instead of briefing the second question presented on the merits, respondent simply renews (Br. 12-13) his petition-stage argument that certiorari was not warranted: that the question is not properly presented here because respondent has not alleged a constructive-knowledge theory of liability and the court of appeals, notwithstanding its articulation of such a theory, did not actually rely on it. See Br. in Opp. 10, 28. That contention is refuted by the record.

In arguing that petitioners had sufficient personal involvement in the alleged constitutional violations, respondent specifically contended in the court of appeals that such involvement "may be established" where "the official was grossly negligent in supervising subordinates who committed the wrongful acts." Resp. C.A. Br. 30 (quoting *Johnson* v. *Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 254 (2d Cir. 2001)); see *id.* at 31 n.10 (arguing that "sufficient personal involvement may be stated by means of allegations that a defendant created a policy under which unconstitutional practices occurred, allowed the continuation of allegedly unlawful policies within the defendant's supervisory responsibility, or exhibited gross negligence or deliberate indifference to actual or constructive notice of unconstitutional practices" (internal citations omitted)). The court of appeals therefore recognized that respondent's claims rest in part on "generalized allegations of supervisory involvement." Pet. App. 25a.

More important, the court of appeals expressly adopted—as the controlling legal standard—a constructive-notice theory of liability. Pet. App. 14a. And at the culmination of its discussion of respondent's discrimination claims, the court specifically invoked its permissive standards for supervisory liability in concluding that petitioners may be held personally liable "for the actions of their subordinates under the standards of supervisory liability outlined above" in its opinion. *Id.* at 62a. The court thereby relied on a legal standard that respondent does not defend.

Respondent claims (Br. 13) that petitioners "conced[ed] the validity of the very theory they now challenge" when their court of appeals brief quoted the court of appeals' well-established standard for supervisory liability. The court of appeals noted, however, that petitioners "argue[d] that [respondent] failed to allege their personal involvement in any discrimination" and therefore failed to state a claim on which relief could be granted. Pet. App. 62a. The court went on to reject that argument, holding that—notwithstanding respondent's own acknowledgment that petitioners were not involved in any individual classification decisions—petitioners could have "personal responsibility for the actions of their subordinates" under the Second Circuit's broad standards of supervisory liability. *Ibid*. As the government's petition-stage filings explained, this Court may review an issue that was either pressed or passed upon in the court of appeals. *United States* v. *Williams*, 504 U.S. 36, 41-43 (1992); Pet. Reply 10-11. Respondent is merely rehashing arguments that were briefed at the petition stage and that this Court presumably rejected in deciding to grant review of the second question presented.

Respondent also claims (Br. 12-13) that this Court lacks "jurisdiction" over the second question. But that argument is similarly unavailing: there is a live dispute between the

parties in this case, this Court granted review of the second question, and the supervisory liability standard is actually antecedent to the question whether respondent adequately pleaded claims against petitioners. A *respondent's* failure to join issue on a question as to which the Court granted certiorari provides no reason for the Court to refrain from deciding it on the merits, particularly when, as here, the question is important and recurring. See Pet. 25-33.

More fundamentally, respondent has ignored the centrality of the supervisory-liability standard for the qualified-immunity determination. Officials risk liability only when *they* violate clearly established rights, and this Court has long protected government supervisors from liability for the conduct of subordinates. Pet. Br. 44. Even more than during the nineteenth century, see *Parish* v. *United States*, 100 U.S. 500, 504 (1880), executing the law requires multiple officers—in this case, many subordinate components, many with their own headquarters and field offices, each exercising a portion of the broad responsibility vested in a department head. The court of appeals' standard disregards the complexities of levels of responsibility in government, increases the personal exposure that our most senior executive officials undertake when they accept their responsibilities of office, and extends the inferred *Bivens* remedy well beyond its intended purposes as well as beyond the express cause of action in 42 U.S.C. 1983. See Pet. Br. 44-50.

The court of appeals' reliance on an undisputedly erroneous legal standard in allowing the *Bivens* claims against petitioners to proceed is alone fatal to its judgment.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be

reversed and the case should be remanded with instructions to dismiss the remaining claims against petitioners.

Respectfully submitted.

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*Solicitor General*

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