No. 07-1015

IN THE
Supreme Court of the United States

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

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

BRIEF OF 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

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QUESTIONS PRESENTED

I. Whether a conclusory allegation that a cabinet-level officer or other 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*.

II. 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.

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

STATUTES

STATEMENT OF THE CASE

This action was filed by plaintiff-respondent Javaid Iqbal ("Iqbal"), a citizen of Pakistan, seeking compensatory and punitive damages because of his alleged mistreatment at a federal detention facility following his arrest in New York City after the events of September 11, 2001. Iqbal was arrested by federal officials on November 2, 2001 and later confined at the Metropolitan Detention Center ("MDC") in Brooklyn. (First Amended Complaint ("Cmplt.") ¶¶80-81.) A criminal complaint was filed against Iqbal on November 5, 2001, charging him with conspiracy to defraud the United States and fraud in connection with identification documents (violations of 18 U.S.C. §§ 371 and 1028). *Iqbal v. Hasty*, 490 F.3d 143, 148 n.1 (2d Cir. 2007).

While at the MDC, Iqbal was initially housed with the general prison population. On January 8, 2002, he was transferred to the Administrative Maximum Security Special Housing Unit ("ADMAX SHU") of the MDC. (Cmplt. ¶81.) Iqbal pled guilty to the charges against him on April 22, 2002, and was sentenced to a sixteen month prison term. *Iqbal*, 490 F.3d 149. Iqbal was reassigned to the general prison population at the end of July 2002. *Id.* Iqbal was released on January 15, 2003, and was later removed to Pakistan. *Id.* at 149.

In May 2004, Iqbal filed suit against multiple federal officials from several different agencies, including petitioners Ashcroft and Mueller. Among the other defendants were respondents Michael Rolince, former Chief of the Federal Bureau of Investigation's ("FBI") International Terrorism Operations Section,

Counterterrorism Division ("Rolince"), and Kenneth Maxwell, former Assistant Special Agent in Charge, New York Field Office, FBI ("Maxwell") (collectively, "the FBI Supervisors"). Iqbal sought to hold the officials personally liable for purported statutory and constitutional violations pursuant to the implied judicial right of action created by *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Iqbal does not challenge his arrest, detention, conviction, or deportation. Rather, Iqbal challenges his conditions of confinement while at the MDC.

With respect to the claims before this Court, Iqbal alleges that in the months after September 11, 2001, the FBI arrested and detained thousands of Arab Muslim men as part of its investigation of the terrorist attacks. (Cmplt. ¶47.) Many of those men were allegedly classified by the FBI as "of high interest" to the government's investigation of the events of September 11 based on their race, religion and national origin, not because of evidence of their "involvement in supporting terrorist activity." (*Id.* at ¶¶47-48.) The complaint also alleges that "within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks – however unrelated the arrestee was to the investigation – were immediately classified as 'of interest' to the post-September 11th investigation." (*Id.* at ¶52.) Iqbal alleges that the FBI Supervisors "were responsible for making the initial determination as to whether detainees arrested within the New York area . . . were classified as 'high interest' to the government's investigation." (*Id.* at ¶50.)

"High interest" detainees were confined in the MDC's ADMAX SHU.[1] (*Id.* at ¶53.) While at the MDC, Iqbal alleges that he was badly mistreated. The complaint, however, does not allege that Ashcroft, Mueller or the FBI Supervisors participated in Iqbal's treatment at the MDC. It does allege – in conclusory fashion – that all of the defendants, including Ashcroft and Mueller, "were aware of, approved of, and willfully and maliciously created these unlawful conditions of confinement." (*Id.* at ¶195.) According to Iqbal: "Officials at FBI Headquarters in Washington, D.C., were aware that the BOP relied on the FBI classification to determine whether to detain prisoners in the ADMAX SHU at the MDC." (*Id.* at ¶73.)[2]

Iqbal's complaint asserted over twenty causes of action. Four claims remain against Ashcroft and Mueller: two *Bivens* claims that they violated his First Amendment and Fifth Amendment equal protection rights by subjecting Iqbal to harsh conditions of confinement based on Iqbal's religion and race (*Id.* at ¶¶231-36), and two Section 1985(3) claims that Ashcroft

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1. Iqbal also alleges that, after the detainees were transferred to the ADMAX SHU, the FBI Supervisors "failed to approve" the release of detainees to the general population "based simply on the detainees' race, religion, and national origin[.]" (Cmplt. ¶76.) The Second Circuit, however, did not treat these clearance allegations as relevant to the claims currently before this Court. Rather, the appellate court addressed those allegations in the context of Iqbal's due process claim, which it dismissed. *Iqbal*, 490 F.3d at 165-68.

2. This allegation necessarily excludes Maxwell, who was based in New York City, and does not identify Rolince, who was one of hundreds of officials at FBI Headquarters at the time.

and Mueller conspired to violate Iqbal's civil rights because of his religion and national origin. (*Id.* at ¶¶246-51.) Only the two *Bivens* claims remain against the FBI Supervisors.

The Second Circuit readily acknowledged that "some of the allegations in the Plaintiff's complaint, although not entirely conclusory, suggest that some of the Plaintiff's claims are based not on facts supporting the claim but, rather, on generalized allegations of supervisory involvement[,]" *Iqbal*, 490 F.3d at 158. The court nonetheless partially denied Ashcroft, Mueller, and the FBI Supervisors' motions to dismiss based on qualified immunity.

The court stated that Ashcroft and Mueller could be personally liable for their subordinates' constitutional violations because of their supervisory capacity, even if they did not participate in the violation and were unaware that such a violation occurred, if Ashcroft and Mueller were "grossly negligent" in supervising their subordinates. *Id.* at 152, 175. Likewise, although the Second Circuit acknowledged that the FBI Supervisors were also supervisory officials, *id.* at 152, the court denied their motion to dismiss based on qualified immunity as well.

SUMMARY OF ARGUMENT

I. Conclusory allegations in a *Bivens* action that high-ranking supervisory officials had knowledge of and condoned the alleged constitutional violations of subordinates and others are insufficient to withstand a motion to dismiss based on qualified immunity. Iqbal's allegations regarding the supervisory liability of Ashcroft and Mueller are not plausibly supported by the facts alleged in his complaint, nor do the allegations demonstrate Iqbal's entitlement to relief.

High-ranking non-cabinet supervisory officials such as Rolince and Maxwell should be treated no differently. Because FBI officials are also subject to frivolous lawsuits, qualified immunity is as important to those supervisors as it is to cabinet-level officials. Iqbal's allegations against Rolince and Maxwell are based on their status as supervisory officials at the FBI, not on plausible allegations that they personally violated Iqbal's constitutional rights. The Second Circuit acknowledged that "[a]ll of the appealing Defendants are supervisory officials." *Iqbal*, 490 F.3d at 152. Indeed, other than the allegation that the FBI Supervisors were responsible for the high-interest designation, the allegations against the FBI Supervisors are the same as the allegations against Ashcroft and Mueller. Moreover, unlike the conclusory allegations against Ashcroft, there are no allegations that Rolince and Maxwell were responsible for the decisions of the BOP, the MDC, or their personnel.[3]

3. Of course, Iqbal's conclusory claims regarding Maxwell and Rolince, like those regarding Ashcroft and Mueller, are merely allegations, not statements of fact.

Under *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), a plaintiff must provide "more than labels and conclusions" in his complaint to withstand a motion to dismiss, and "a formulaic recitation of the elements of a cause of action will not do[.]" *Id.* at 1964-65. While a plaintiff's factual allegations should be taken as true when ruling on a motion to dismiss, a court is not required to accept a "legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Similarly, the Court also has stated that a plaintiff should be required to "put forward specific, nonconclusory factual allegations" to withstand a prediscovery dispositive motion based on qualified immunity. *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)).

Iqbal's complaint fails to meet this standard. As the Second Circuit acknowledged, Ashcroft and Mueller are high-level government officials "against whom broad-ranging allegations of knowledge and personal involvement are easily made." *Iqbal*, 490 F.3d at 158. The same is true of Rolince and Maxwell. Qualified immunity is an immunity from suit, and this Court has already rejected the Second Circuit's direction to the district court to permit limited discovery as an unworkable approach. *Bell Atlantic*, 127 S. Ct. at 1967.

II. Established principles in analogous areas of civil rights law dictate the result here. The Court has rejected a constructive notice theory based on *respondeat superior* for purposes of Section 1983 actions against state officials. In *Rizzo v. Goode*, 423 U.S. 362 (1976), the Court required an "affirmative link" between

the supervisors' actions and the subordinates' misconduct. In other words, the supervisors' "own conduct" played "no affirmative part" in the alleged constitutional violations, such that the supervisors were not "direct[ly] responsib[le]" for the violations. *Id.* at 371, 376-377; *see also Monell v. Dep't of Soc. Servs. of New York City*, 436 U.S. 658, 694 n.58 (1978) (*Rizzo* held that "mere right to control" cannot support supervisory liability under Section 1983).

The Court also has rejected *respondeat superior* liability based on constructive notice when determining a local governmental entity's liability in a Section 1983 action. A rigorous standard of causation is required – at a minimum, a municipality must have acted with "conscious disregard" to the "known or obvious consequences " of its actions, that action must have reflected "deliberate indifference" to a known risk that a constitutional violation would occur, and there must be a direct causal link between the action and the alleged injury. *Bd. of County Comm'rs of Bryan County, Ok. v. Brown*, 520 U.S. 397, 407, 410, 411 (1997). This Court should require a standard for supervisory liability that is at least as rigorous as the standard for municipal liability. Without the requirement of actual knowledge, a supervisor's liability becomes mere *respondeat superior* liability.

In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Court held that supervisory prison officials were not liable in a *Bivens* action filed by a prisoner for being subjected to dangerous prison conditions in violation of the Eighth Amendment absent the officials' actual knowledge of inhumane conditions and their deliberate indifference to those conditions. *Id.* at 837.

The same principles should apply here. A high level governmental official should not be liable in a judicially implied *Bivens* action based on a theory of constructive notice or negligence with respect to his official responsibilities. Rather, in the absence of direct personal involvement in a constitutional violation, actual knowledge of a risk of unconstitutional conduct by a subordinate and deliberate indifference to that knowledge should be required to hold a supervisory official liable in a *Bivens* action. Any lower standard is equivalent to imposing vicarious or *respondeat superior* liability. This Court has never permitted such an action, and it should not do so now.

ARGUMENT

I. Conclusory allegations in a *Bivens* action that an official knew of, condoned, or agreed to subject a plaintiff to unconstitutional acts by a subordinate do not entitle a plaintiff to relief.

Iqbal's claims against the FBI Supervisors are not plausibly supported by the factual allegations in his complaint. In *Bell Atlantic*, this Court stated that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" *Id.* at 1964-65 (quoting *Papasan*, 478 U.S. at 287). "Factual allegations," in turn, "must be enough to raise a right to relief above the speculative level," *id.* at 1965, although a court is "not bound to accept as true a legal conclusion couched as a factual allegation" when ruling on a motion to dismiss. *Papasan*, 478 U.S. at 287. Recognizing the concerns

raised by actions against government officials in their personal capacity, the Court has also suggested, in the qualified immunity context, that a plaintiff "put forward specific, nonconclusory factual allegations" to survive a motion to dismiss or for summary judgment prior to discovery. *Crawford-El*, 523 U.S. at 598 (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in judgment)).

Like the allegations regarding Ashcroft and Mueller, Iqbal's broad conclusory allegations regarding the FBI Supervisors do not meet this "requirement of plausibility." *Bell Atlantic*, 127 S. Ct. at 1968. First, the complaint broadly alleges that the FBI Supervisors, by virtue of their positions, were "instrumental in the implementation of the policies and practices challenged here" (Cmplt. ¶¶12, 13), and that they "were aware of, approved of, and willfully and maliciously created these unlawful conditions of confinement." (*Id.* at ¶195.) Similarly, the complaint generally alleges that the FBI Supervisors "by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of imposing harsher conditions of confinement on Plaintiffs because of Plaintiffs' [race and sincere religious beliefs] violated Plaintiffs' rights under the [First and Fifth Amendments]." (*Id.* ¶¶232, 235.) The Complaint does not allege the FBI Supervisors – any more than Ashcroft or Mueller – participated in actually creating the conditions of confinement.

Second, Iqbal alleges that all Arab Muslim men in the New York area who had been arrested on criminal or immigration charges were classified as "of high interest" by the FBI Supervisors "following an investigative lead into the September 11th attacks."

(Cmplt. ¶52; *see also id.* at ¶¶50-51.) The only alleged link between the "high interest" designation and the alleged unlawful conditions of confinement, however, is that unspecified "[o]fficials at FBI Headquarters in Washington, D.C., were aware that the BOP relied on the FBI classification to determine whether to detain prisoners in the ADMAX SHU at the MDC." (*Id.* at ¶73.) Iqbal does not allege that the FBI Supervisors played any role in the mistreatment he suffered while in custody of the MDC and the BOP.

Iqbal's allegations regarding the "high interest" designation do not plausibly show that Iqbal is entitled to relief against the FBI Supervisors. *See Bell Atlantic*, 127 S. Ct. at 1965 n.3 ("Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief."). Nor does Iqbal plead enough factual allegations, even taken as true, "to raise a reasonable expectation that discovery will reveal" evidence that the FBI Supervisors violated Iqbal's constitutional rights. *Id.* at 1965. The complaint does not allege any communications between the FBI Supervisors and the MDC or BOP. (Cmplt. ¶195.) *See generally Bell Atlantic*, 127 S. Ct. at 1971 n.10 (complaint's description of agreement did not give notice required by Rule 8 because "the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies"). Iqbal's allegations lack detail and simply rely on what Iqbal speculates the FBI Supervisors should have known by virtue of their alleged official responsibilities. (*See*, *e.g.*, Cmplt. ¶¶12, 13.) Indeed, there are no facts in Iqbal's complaint plausibly suggesting that Rolince and Maxwell were named as defendants other than because of their high-level supervisory positions at the FBI.

Although *Bell Atlantic* involved claims under the Sherman Act, its holding applies more broadly. Indeed, the Court specifically rejected its earlier broad pronouncement in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) that "a complaint should not be dismissed for failure to state a claim 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." *Bell Atlantic*, 127 S. Ct. at 1969.

The Second Circuit reasoned that two cases decided before *Bell Atlantic* – *Crawford-El* and *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002) – compelled the court to find Iqbal's conclusory allegations regarding the defendants' racial, ethnic, and religious discrimination and their knowledge and involvement in Iqbal's mistreatment sufficient to withstand a motion to dismiss. *Iqbal*, 490 F.3d at 175-76. The parties in *Crawford-El* and *Swierkiewicz*, however, alleged plausible actions taken by the defendants and provided notice to them regarding the alleged conduct giving rise to liability. There was no need to assert additional facts supporting improper intent.[4] *See Crawford-El*, 523 U.S. at 578-79, 579 n.1, 592 (alleging "specific incidents" of retaliatory conduct and specific statements demonstrating animus); *Swierkiewicz*, 534 U.S. at 508-09, 513-15 (plausibly

4. *Bell Atlantic* specifically rejected the argument that *Swierkiewicz* is contrary to *Bell Atlantic*'s holding. The Court stated that *Swierkiewicz* simply rejected a heightened pleading standard "by insisting that Swierkiewicz alleged 'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to relief." *Bell Atlantic*, 127 S. Ct. at 1973-74. In contrast, *Bell Atlantic* requires "enough facts to state a claim for relief that is plausible on its face." *Id.* at 1974.

alleging specific discriminatory acts in Title VII claim, including "detail[ing] the events leading to his termination, provid[ing] relevant dates, and includ[ing] the ages and nationalities of at least some of the relevant persons involved with his termination"). Here, in contrast, Iqbal pleads no specific actions affirmatively linking the FBI Supervisors to Iqbal's mistreatment at the MDC.

Moreover, as with Ashcroft and Mueller, the FBI Supervisors "are current or former members of the Government, against whom broad-ranging allegations of knowledge and personal involvement are easily made." *Iqbal*, 490 F.3d at 158. Although the Second Circuit directed the district court to engage in limited discovery and provide the defendants "ample opportunity" to seek summary judgment, *id.* at 158-59, this Court rejected that approach in *Bell Atlantic*:

> It 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 . . . given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. . . And it is self-evident that the problem of discovery abuse cannot be solved by careful scrutiny of evidence at the summary judgment stage . . .

Bell Atlantic, 127 S. Ct. at 1967 (internal quotations omitted); *see also Anderson v. Creighton*, 483 U.S. 635, 653 n.5 (1987) (threshold question of whether reasonable

officer could have believed his actions lawful must be answered before allowing even limited discovery); *Siegert*, 500 U.S. at 236 (1991) (Kennedy, J., concurring in judgment) (The "avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.").

Qualified immunity provides "immunity from suit," and is designed to minimize "the expenses of litigation, the diversion of official energy from pressing public issues and the deterrence of able citizens from acceptance of public office." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); *see also Scott v. Harris*, 127 S. Ct. 1769, 1774 n.2 (2007) (qualified immunity should be resolved "at the earliest possible stage in litigation" (internal quotation omitted)); *Saucier v. Katz*, 533 U.S. 194, 200-201 (2001) (qualified immunity is "an *immunity from suit* rather than a mere defense to liability," and "an entitlement not to stand trial or face the other burdens of litigation") (emphasis in original) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Iqbal's complaint does not plausibly entitle Iqbal to relief against the FBI Supervisors, and they are accordingly entitled to qualified immunity.

II. A supervisory official may only be liable in a *Bivens* action if he has actual knowledge of a risk of unconstitutional conduct by his subordinates, he is deliberately indifferent to that knowledge, and an affirmative link exists between the supervisor's actions and the alleged constitutional violation.

Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. While this case involves claims against federal officials pursuant to the implied judicial right of action first allowed in *Bivens*, the qualified immunity analysis is identical to the qualified immunity analysis for 42 U.S.C. § 1983 claims against state and local governmental officials. *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

For a government official to be liable for damages, the official must have violated a constitutional right, and that right must have been "clearly established." *Anderson*, 483 U.S. at 640. "Clearly established," in turn, means 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.* Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

When performing a qualified immunity analysis, before determining whether a constitutional right was clearly established, a court "must first determine

whether the plaintiff has alleged the deprivation of an actual constitutional right at all[.]" *Wilson*, 526 U.S. at 609 (quoting *Conn. v. Gabbert*, 526 U.S. 286, 290 (1999)).

A. A government official is not personally liable under a *respondeat superior* theory.

What the plaintiff must plead, of course, is closely related to what the plaintiff must prove to prevail on his claims. This Court has never recognized an implied *Bivens* action against federal officials for *respondeat superior* or vicarious liability. Moreover, this Court has "responded cautiously" to any expansion of *Bivens*. *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988); *see*, *e.g.*, *Wilkie v. Robbins*, 127 S. Ct. 2588, 2597, 2605 (2007) (no *Bivens* action against employees of Bureau of Land Development; "in most instances we have found a *Bivens* remedy unjustified"); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) (the Supreme Court has "consistently rejected invitations to extend *Bivens*"); *F.D.I.C. v. Meyer*, 510 U.S. 471, 484-85 (1994) (declining to extend *Bivens*; noting the purpose of *Bivens* is to deter "the officer" who "allegedly violated his rights").

> In 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct.

Malesko, 534 U.S. at 70 (emphasis in original).

A constructive notice theory based on *respondeat superior* or vicarious liability for supervisors in Section 1983 actions – *Bivens*'s "analog to suits brought against state officials," *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006) – has been rejected by this Court. In *Rizzo*, the plaintiffs brought a Section 1983 action against Philadelphia's mayor, city managing director, police commissioner, and two other police department supervisors alleging a "pervasive pattern of illegal and unconstitutional police treatment of minority citizens in particular and Philadelphia residents in general." 423 U.S. at 362. The "principal antagonists" of the police mistreatment were not named as defendants. Rather, only the supervisory defendants were named and "charged with conduct ranging from express authorization or encouragement of this mistreatment to failure to act in a manner so as to assure that it would not recur in the future." *Id.* at 367.

The record before the Court established several instances of the unnamed individual police officers violating citizens' constitutional rights, and that the police department's procedures may have had "a tendency to discourage the filing of civilian complaints and to minimize the consequences of police misconduct." *Id.* at 368-69. But, notwithstanding that evidence, the Court reversed because "there was *no affirmative link* between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [the supervisors] express or otherwise *showing their authorization or approval* of such misconduct." *Id.* at 371 (emphasis added). The Court also rejected the "amorphous proposition[]" that the supervisors had a constitutional duty "to 'eliminate' future police

misconduct," absent "a showing of direct responsibility" for the police misconduct." *Id.* at 375-76. The claims were dismissed because the supervisor's "own conduct" played "no affirmative part" in the alleged constitutional violations. *Id.* at 377.

Thus, *Rizzo* "appear[ed] to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise" cannot support supervisory liability under Section 1983. *Monell*, 436 U.S. at 694 n.58.

Here, the "affirmative link" is even more tenuous than that in *Rizzo* – there is no serious contention that the FBI Supervisors controlled the operations of the BOP or the MDC. Iqbal's only allegation is that some unnamed BOP official relied on the FBI's "high interest" designation when determining whether to place detainees in the ADMAX SHU. (Cmplt. at ¶73.) This is not the type of "affirmative link" the Court required in *Rizzo*.

B. Municipalities may not be liable under a *respondeat superior* theory.

The Courts of Appeals have looked to municipal liability to determine whether a supervisory official may be liable in a Section 1983 or *Bivens* action. "The legal elements of an individual's supervisory liability and a political subdivision's liability . . . are similar enough that the same standards of fault and causation should govern." *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 453 (5th Cir. 1994); *see also Sample v. Diecks*, 885 F.2d 1099, 1118 (3d Cir. 1989) ("[W]e are confident that,

absent official immunity, the standard of individual liability for supervisory public officials will be found to be no less stringent than the standard of liability for the public entities that they serve.").

This Court has rejected *respondeat superior* or vicarious liability when determining whether liability attaches to local governmental entities in a Section 1983 action. "Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, *rigorous standards* of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Brown*, 520 U.S. at 405 (emphasis added); *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 122 (1992) ("The city is not vicariously liable under § 1983 for the constitutional torts of its agents: It is only liable when it can be fairly said that the city itself is the wrongdoer."). "[A] municipality cannot be held liable *solely* because it employs a tortfeasor – or, in other words, a municipality cannot be held liable under § 1982 on a respondeat superior theory." *Monell*, 436 U.S. at 691 (emphasis in original); *see also Brown*, 520 U.S. at 403 (same).

Rather, "[t]he plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." *Brown*, 520 U.S. at 404. This requires that a plaintiff establish a "direct causal link" between the municipality and "the alleged constitutional deprivation." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989); *Brown*, 520 U.S. at 404 (same). "[A] court must carefully test the link between the policymaker's inadequate decision and the

particular injury alleged." *Brown*, 520 U.S. at 410; *see also Canton*, 489 U.S. at 391 (city's failure to train "must be closely related to the ultimate injury").

Municipal liability also requires a showing of deliberate indifference – that is, the municipality acted with "conscious disregard" to the "known or obvious consequences" of its actions. *Brown*, 520 U.S. at 407. "A showing of simple or even heightened negligence will not suffice." *Id.* Stated differently, a plaintiff must show that a municipality's action "reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision." *Id.* at 411; *see also Canton*, 489 U.S. at 389 (municipality may be liable only "where a failure to train reflects a 'deliberate' or 'conscious' choice"). And although deliberate indifference is "tantamount to intent," inaction by a municipality in the face of an obvious substantial risk of harm, such as a "policymaker sit[ting] on his hands after repeated acts of subordinate officers," may also be "equivalent" to the intentional action required by the deliberate indifference standard. *Brown*, 520 U.S. at 410, 418-19. Adopting any standard of fault and causation less rigorous than deliberate indifference "would result in *de facto respondeat superior* liability," which has been rejected by this Court. *Canton*, 489 U.S. at 391-92; see also *Canton* at 393-94 (O'Connor, J., concurring in part and dissenting in part) (agreeing that deliberate indifference standard should apply and that any lower standard would "open municipalities to unprecedented liability under § 1983" (internal quotation omitted)).

Here, the Court should apply a standard for supervisory liability that is at least as rigorous as the standard for municipal liability – actual knowledge and deliberate indifference to that knowledge. The reason for having a rigorous standard is primarily the same – liability should be based on one's own culpable actions, not the actions of others.

C. Many circuits have required actual knowledge and deliberate indifference to that knowledge to state a *Bivens* or Section 1983 claim against a supervisory official.

The Seventh Circuit requires that a supervisory official who was not directly involved in the constitutional violation at issue must have actual knowledge of a subordinate's conduct to be liable under Section 1983. "Supervisors who are simply negligent in failing to detect and prevent subordinate misconduct are not personally involved." *Gossmeyer v. McDonald*, 128 F.3d 481, 495 (7th Cir. 1997). Rather, a supervisor will be liable if, "with knowledge of the subordinates conduct, approves of the conduct and the basis for it." *Id.* "The supervisors must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate, reckless indifference." *Jones v. City of Chicago*, 856 F.2d 985, 992-93 (7th Cir. 1988). The Third Circuit also requires that a supervisor either directly participated in the constitutional violation or "had knowledge of and acquiesced in his subordinates' violations." *Baker v. Monroe Tp.*, 50 F.3d 1186, 1190-91 (3d Cir. 1995).

The Fifth, Sixth, Ninth, Tenth, and District of Columbia Circuits have also rejected constructive knowledge based on mere supervisory status or negligence as a basis for liability. *See*, *e.g.*, *Atteberry v. Nocona General Hosp.*, 430 F.3d 245, 255 (5th Cir. 2005) ("The test for deliberate indifference is subjective, rather than objective, in nature because 'an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.'" (quoting *Farmer*, 511 U.S. at 836); *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999) ("At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers."; rejecting liability based on respondeat superior, "the right to control employees," or the mere failure to act); *Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997) (supervisor liable if he "knew of the violations and failed to act to prevent them" (quoting *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989))); *Oona R.S. v. McCaffrey*, 143 F.3d 473, 477 (9th Cir. 1998) (supervisor must be "aware of a specific risk of harm to the plaintiff" (internal quotation omitted)); *Woodward v. City of Worland*, 977 F.2d 1392, 1399 n.10 (10th Cir. 1992) (actual knowledge "must be alleged and proved"); *Serna v. Col. Dept. of Corr.*, 455 F.3d 1146, 1154-1155 (10th Cir. 2006) ("Deliberate indifference requires that the official both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (internal quotation marks and citations omitted)); *Int'l Action Ctr. v. United States*, 365 F.3d 20, 28 (D.C. Cir. 2004) (Roberts, J.) (general failure to

act or negligence is insufficient; rather, the supervisor "must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what might see" (quoting *Jones*, 856 F.2d at 992)).

D. The FBI Supervisors were not personally involved in, and had no actual knowledge of, the claimed statutory and constitutional violations.

Iqbal's complaint contains no allegations that Ashcroft, Mueller or the FBI Supervisors were personally involved in the alleged mistreatment that he endured at the MDC. He does not allege that Ashcroft, Mueller or the FBI Supervisors knew about but failed to prevent Iqbal's treatment by MDC and BOP officials. Nor does he allege that Ashcroft, Mueller or the FBI Supervisors designated Iqbal for administrative detention or directed the BOP to place Iqbal in the ADMAX SHU.

1. Iqbal seeks relief for his treatment at the MDC, not his alleged "high interest" designation.

A fair reading of Iqbal's claims for discrimination in violation of the First and Fifth Amendments is that they are based on his punitive conditions of confinement at the MDC, including confinement in the ADMAX SHU, not the initial high interest classification that allegedly was made by the FBI Supervisors.

> Defendants ASHCROFT, MUELLER, ROLINCE, MAXWELL . . . by adopting,

> promulgating, failing to prevent, failing to remedy, and/or implementing a *policy and practice of imposing harsher conditions of confinement on Plaintiffs* because of Plaintiffs' sincere religious beliefs violated Plaintiffs' rights under the First Amendment to the United States Constitution.

(Cmplt., ¶232).

This is how the Second Circuit read the complaint, too. The court held that the alleged high interest designation states a claim sufficient to survive a motion to dismiss based on qualified immunity only "*when combined* with the Plaintiff's allegation that, under the policy created and implemented by the Defendants, he was singled out for unnecessarily punitive conditions of confinement[.]" *Iqbal*, 490 F.3d at 175 (emphasis added). But there is no allegation the FBI Supervisors had anything to do with the policy or practice of imposing punitive conditions of confinement.

2. Iqbal fails to link the FBI Supervisors to his treatment at the MDC.

There is no affirmative link between the high interest designation and the alleged constitutional violations suffered by Iqbal. The pertinent allegations are as follows:

- The FBI Supervisors were "instrumental in the implementation of policies and practices challenged here" (Cmplt. ¶¶12, 13.)

- The FBI Supervisors were "aware of, approved of, and willfully and maliciously created these unlawful conditions of confinement" (*Id.* at ¶195.)

- Unspecified FBI officials were aware that the BOP relied on the FBI's classification to determine whether to detain prisoners in the ADMAX SHU: "Officials at FBI Headquarters in Washington, D.C., were aware that the BOP relied on the FBI classification to determine whether to detain prisoners in the ADMAX SHU at the MDC." (*Id.* at ¶73.)

The first two allegations are general conclusory allegations of, at most, supervisory involvement. In any event, the complaint does not allege how high-level officials in a different agency could be "instrumental in implementing" the policies and practices of the BOP/MDC. Nor does the complaint allege, factually, how the FBI Supervisors "maliciously created" the conditions of confinement at issue when there is no mention of a single communication between the FBI Supervisors and the BOP or MDC.

The third allegation simply states that certain FBI officials were aware that the BOP relied on the high interest classification.[5] There is no allegation that the

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5. Moreover, the Second Circuit incorrectly interpreted Iqbal's complaint as alleging he was classified as high interest "solely" because of his race, ethnicity, and religion, *Iqbal*, 490 F.3d at 148, even though the complaint does not make that allegation. Rather, the complaint alleges Arab Muslim men

(Cont'd)

FBI Supervisors directed the BOP with respect to how high interest designees should be housed or treated. Alleging that the BOP relied on the FBI Supervisors' classification, and even alleging some unnamed FBI officials in Washington were aware of that reliance, is quite different from alleging facts plausibly showing how the FBI Supervisors are affirmatively linked to the punitive conditions of confinement endured by Iqbal.

Significantly, Iqbal does not allege that the FBI Supervisors had authority over, or were responsible for, the decisions or policies of the BOP, the MDC, or their personnel. *See Serna*, 455 F.3d at 1154 ("[F]ailure to supervise is only actionable under § 1983 against a defendant who had a duty to supervise."); *Hernandez v. Gates*, 100 F. Supp. 2d 1209, 1218 (C.D. Cal. 2000) ("To succeed on a claim of supervisor liability, plaintiff must establish that defendants were directly responsible for overseeing the performance of the wrongdoer."). Nor does Iqbal allege that the FBI Supervisors had access

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(Cont'd)

(1) "within the New York area," (2) who were "arrested on criminal or immigration charges," were so classified (3) only "while the FBI was following an investigative lead into the September 11th attacks." (Cmplt. ¶52.) The complaint plausibly alleges that, at most, Iqbal's race, ethnicity, or religion were factors in his high interest designation. In any event, such a classification is not unlawful, *cf. United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975); *United States. v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982), especially given the context of the classification. As Judge Cabranes observed, these actions occurred during "a national and international security emergency unprecedented in the history of the American Republic." *Iqbal*, 490 F.3d at 179 (Cabranes, J., concurring).

to or knowledge of the underlying regulatory framework and prison procedures governing administrative detention. There are no allegations that the FBI Supervisors (or Ashcroft and Mueller) had any contact with prison officials concerning the conditions of Iqbal's confinement. Other than the "high interest" designation for investigative purposes, there was no direct or affirmative action by the FBI Supervisors with respect to the designation decisions of post-September 11 detainees.

In *Farmer*, the Court held that supervisory prison officials were not liable in a *Bivens* action filed by a prisoner for being subjected to inhumane prison conditions in violation of the Eighth Amendment absent the officials' actual knowledge of inhumane conditions and his deliberate indifference to those conditions. "[A] prison official cannot be found liable . . . unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must draw the inference." 511 U.S. at 837.

Similarly, to hold a supervisor personally liable in a judicially implied *Bivens* action the Court should require that a supervisor have actual knowledge of a risk of unconstitutional conduct by others, act with deliberate indifference to that risk, and an affirmative link must exist between the supervisor's inaction and the alleged constitutional violation. Holding supervisors liable simply because their official responsibilities may have given them constructive notice of their subordinates' actions – let alone the actions of officials in a separate

governmental agency over whom they do not have supervisory authority or control – is inconsistent with the decisions of this Court and the restraint traditionally exercised in interpreting *Bivens* actions.

3. Allowing actions against federal supervisory officials based on constructive knowledge is bad policy.

Permitting *Bivens* actions against high-level federal officials for what is effectively *respondeat superior* liability exposes officials to personal liability with little social benefit. An official without actual knowledge of potential wrongdoing cannot often meaningfully address or correct those issues. Moreover, it would be difficult for a high-level official to control the actions of lower level officials – especially those in a different agency. *See Iqbal*, 490 F.3d at 178 (Cabranes, J.) (concurring) ("But most, if not all, of the assertedly unlawful actions in [Iqbal's] complaint – including the decision to place plaintiff in the ADMAX SHU and the abuses which purportedly ensued there – are alleged to have been carried out by defendants much lower in the chain of command.").

"Competent persons could not be found to fill positions . . . if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person." *Robertson v. Sichel*, 127 U.S. 507, 515 (1888); *see also Harlow*, 457 U.S. at 814 ("Finally, there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most

irresponsible [public officials], in the unflinching discharge of their duties." (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

If constructive notice were all that was required, courts would be flooded with specious claims against high-ranking government officials. Indeed, as Judge Cabranes noted in his concurring opinion in the court below: "[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." *Iqbal*, 490 F.3d at 179.

Although Rolince and Maxwell obviously are beneath petitioners Ashcroft and Mueller, they are nevertheless high-level supervisory officials subject to claims predicated on constructive knowledge or responsibility for acts perpetrated by others. The importance of qualified immunity is just as crucial to the FBI Supervisors as it is to Ashcroft and Mueller.

CONCLUSION

Rolince and Maxwell respectfully request that this Court reverse the Second Circuit's decision affirming the district court's denial of Ashcroft and Mueller's and Rolince 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,

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