Nos. 06-3745-cv, 06-3785-cv, 06-3789-cv, 06-3800-cv, 06-4187

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IBRAHIM TURKMEN, ASIF-UR-REHMAN SAFFI, SYED AMJAD ALI JAFFRI, AKIL SACHVEDA, SHAKIR BALOCH, HANY IBRAHIM, YASSER EBRAHIM, ASHRAF IBRAHIM,
Plaintiffs-Appellees/Cross-Appellants,

v.

JOHN ASHCROFT, Former U.S. Attorney General, DENNIS HASTY, Former Warden of MDC, JAMES W. ZIGLAR, Commissioner, Immigration and Naturalization Service, JAMES SHERMAN, ROBERT MUELLER,
Defendants-Appellants/Cross-Appellees,

UNITED STATES,
Defendant/Cross-Appellee,

JOHN DOES 1-20, MDC Corrections Officers, MICHAEL ZENK, Warden of MDC, CHRISTOPHER WITSCHEL, CLEMETT SHACKS, BRIAN RODRIGUEZ, JON OSTEEN, RAYMOND COTTON, WILLIAM BECK, SALVATORE LOPRESTI, STEVEN BARRERE, LINDSEY BLEDSOE, JOSEPH CUCITI, HOWARD GUSSAK, MARCIAL MUNDO, DANIEL ORTIZ, STUART PRAY, ELIZABETH TORRES, PHILLIP BARNES, SYDNEY CHASE, MICHAEL DEFRANCISCO, RICHARD DIAZ, KEVIN LOPEZ, MARIO MACHADO, MICHAEL MCCABE, RAYMOND MICKENS, SCOTT ROSEBERY,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

SUPPLEMENTAL REPLY BRIEF FOR JOHN ASHCROFT, ROBERT MUELLER AND THE UNITED STATES ADDRESSING *ASHCROFT v. IQBAL*, 129 S.Ct. 1937 (2009)

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I. Iqbal Requires Dismissal of the Conditions of Confinement Claims.

A. Plaintiffs incorrectly contend that *Iqbal*'s holdings regarding pleading standards and supervisory liability have no application beyond invidious discrimination claims.

1. As to pleading requirements, the Supreme Court was clear – it was addressing the requirements of Rule 8, and not imposing a heightened standard for motive based claims. The Court explained, "Rule 8 * * * does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009). Under Rule 8, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Ibid.* The Court emphasized this pleading standard applies to "*all civil actions*." *Id.* at 1953 (emphasis added). Thus, it is nonsense to suggest that the standards announced were limited to discrimination claims.

Indeed, the Court recognized that discrimination claims are subject to the general Rule 8 standards. 129 S.Ct. at 1954. Whether there is a claim of discrimination or not, the rule is the same: "The Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context." *Ibid.* For all civil claims, "Rule 8 does not empower respondent

to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ibid.*

2. Similarly, *Iqbal*'s holding regarding supervisory liability was not limited to discrimination claims. The Court spoke to the standard for all *Bivens* actions: "In the limited settings where *Bivens* does apply, * * * Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior." 129 S.Ct. at 1948. The Court held, "[b]ecause vicarious liability is inapplicable to *Bivens* * * * suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ibid.* This holding plainly speaks to all *Bivens* actions.

Further, *Iqbal* made clear that defendants Ashcroft and Mueller could not be subjected to supervisory liability based on alleged knowledge or acquiescence of the misdeeds of others. 129 S.Ct. at 1948. In *Iqbal*, the plaintiff argued that defendants Ashcroft's and Mueller's alleged "knowledge of his subordinate's" imposition of harsh conditions and treatment based upon discriminatory purpose amounted "to the supervisor's violating the Constitution." *Id.* at 1949. The Court rejected that argument, but not on any ground limited to discrimination claims. *Ibid.* Rather, the Court explained that the effort to impose liability based on

knowledge of wrongdoing by others could not be reconciled with the rule that, in a *Bivens* action, supervisors "may not be held accountable for the misdeeds of their agents." *Ibid.* Whether the claim involves alleged discriminatory motive or not: "Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Ibid.*

B. Plaintiffs are correct that the "factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue." 129 S.Ct. at 1948. As to claim 5 here (the discrimination claim; JA 94-95, 183), the governing rule is set out in *Iqbal*: Plaintiffs "must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin." 129 S.Ct. at 1948-49. As discussed in our opening supplemental brief, *Iqbal*'s reasoning and holding, finding the conclusory allegations there inadequate, control as to the similar allegations here.

While there are other claims that do not present issues of discrimination, as discussed above, however, the *Iqbal* pleading standard applies equally to those claims. Allegations of knowledge or acquiescence are not enough. There must be a plausible showing that Ashcroft and Mueller, "through the official's own individual actions," violated plaintiffs' constitutional rights. 129 S.Ct. at 1948.

There is not sufficient space here to fully reiterate why plaintiffs' other claims against defendants Ashcroft and Mueller were conclusory, implausible and deficient.[1] We note, however, in regard to claims 3, 5, 7, and 23, the complaint specifies by name those who allegedly committed the alleged offenses (*e.g.*, JA 129-140, 142, 154, 160), but never identifies Ashcroft or Mueller. The complaint has only boilerplate statements that Ashcroft and Mueller "authorized, condoned, and/or ratified the unreasonable and excessively harsh conditions." JA 100-101. Under *Iqbal*, this sort of conclusory allegation is not sufficient to show a plausible constitutional violation.

Likewise, claim 8 (JA 95-97) is a threadbare pleading and does not present a plausible claim that Ashcroft or Mueller had any involvement with plaintiffs' personal property.

Finally, the temporary "communications blackout" claims (JA 107-108) speak only generally of "Defendants," and do not specify Ashcroft or Mueller. The only thing tying these defendants to these claims is another general boilerplate assertion accusing defendants Ashcroft and Mueller of "adopting, promulgating,

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[1] *See* Ashcroft/Mueller Br. 26-35; Ashcroft/Mueller Reply Br. 54-56. In addition, as we have explained, Claim 20 (discussed in plaintiffs' latest brief at 8) is controlled by this Court's ruling in *Iqbal* granting qualified immunity for the same claim asserted there. *See* Ashcroft/Mueller Supp. Br. 4-6 (filed August 6, 2007). Thus, there is no need to reach the pleading issue as to that claim.

and implementing this policy and practice." JA 95. Under *Iqbal*, such conclusory allegations are not sufficient to support a plausible claim.

Thus, all of the conditions of confinement claims fail under *Iqbal.*

II. *Iqbal* Supports Affirmance of the Dismissal of the Claims Relating to the Length of Detention.

In our opening supplemental brief, we argued that *Iqbal* supports affirmance of the dismissal of the length of detention claims. In response, plaintiffs argue that, even after *Iqbal*, a court must accept their conclusory allegation that the delay in removal served no legitimate immigration purpose. Under *Iqbal*, however, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." 129 S.Ct. at 1949. The Executive's immigration powers are a matter of law and cannot be pled away.

As we explain in our cross-appellees' brief (pp. 11-13, 18-21, 34-36), detaining plaintiffs to complete a terrorism investigation before removing them to a foreign nation was consistent with the Immigration and Nationality Act (INA) and the foreign policy interests reflected in it. Under immigration law, the Executive has discretion to look for a country to which the alien can be removed. This necessarily includes the power to investigate whether removal to a country would be "prejudicial" or "inadvisable." 8 U.S.C. § 1231(b)(2)(C)(iv), (b)(2)(E)(vii). Plaintiffs assert that there is no immigration purpose served by

being able to make an informed decision where to send an alien, and in being able to tell the receiving country what, if any, terrorism connections an alien may have. Such a construction of the INA makes no sense and would have grave foreign policy consequences. For the reasons fully set forth in our earlier brief, this Court should reject plaintiffs' argument.

III. The Claims Should Be Dismissed, Not Remanded.

Notably, plaintiffs do not request a remand to replead. Here, where plaintiffs have filed a third amended complaint (with the benefit of the OIG report), the policies of qualified immunity strongly support bringing this action to a close.

CONCLUSION

For the reasons set forth above and in our prior briefs, this Court should affirm the district court on the issues raised in plaintiffs' cross-appeal and reverse on the issues raised in defendants' appeal.

Respectfully submitted,

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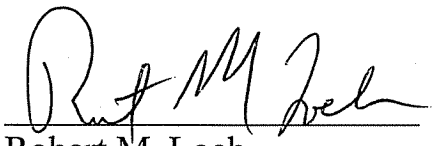
CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and Second Circuit Rule 32(a)(2), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 1,250 words, which is within the 1,250 word limit set by this Court's order.



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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2009, I filed and served the foregoing supplemental brief by causing an original and fourteen copies to be delivered to the Court via FedEx overnight delivery (and e-mail delivery) and to counsel of record via first-class mail or FedEx overnight delivery (and e-mail delivery):

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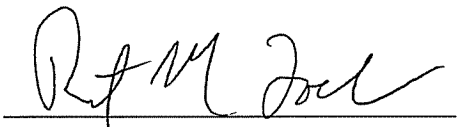

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