06-3745-cv(L)

06-3785-cv (CON); 06-3789-cv (CON); 06-3800-cv (CON); 06-4187-cv (XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IBRAHIM TURKMEN, ASIF-UR-REHMAN SAFFI, SYED AMJAD ALI JAFFRI, YASSER EBRAHIM, HANY IBRAHIM, SHAKIR BALOCH, AKHIL SACHDEVA, AND ASHRAF IBRAHIM,

Plaintiff–Appellee–Cross-Appellants,

v.

JOHN ASHCROFT, ROBERT MUELLER, JAMES ZIGLAR, DENNIS HASTY, AND JAMES SHERMAN,

Defendant–Appellant–Cross-Appellees,

UNITED STATES OF AMERICA,

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, AND SCOTT ROSEBERY,

Defendants.

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

SUPPLEMENTAL BRIEF FOR PLAINTIFF–APPELLEE–CROSS-APPELLANTS ON THE APPLICATION OF *ASHCROFT v. IQBAL*, 129 S.Ct. 1937 (2009)

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One could hardly tell from the new supplemental briefs of Defendants Ashcroft, Mueller, Hasty and Sherman that *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), is a decision addressing only a discrimination claim, and turning on an element of discrimination claims which is not found in the separate due process and freedom of expression claims that Defendants now say should be dismissed on the authority of *Iqbal*.

Defendants' arguments fail on the plain meaning of *Iqbal*. In *Iqbal*, the Supreme Court dismissed a claim of racial and religious discrimination because the plaintiff had not pleaded facts sufficient to support a plausible inference that the defendants acted with the discriminatory purpose required for such a claim. Though these two defendants were the high-ranking officers John Ashcroft and Robert Mueller, the Court was careful not to say that such officials are exempt from liability for unconstitutional conduct in their agencies. To the contrary, it affirmed that "an official [may be] charged with violations arising from his or her superintendent responsibilities," provided that when intent is required for liability

this must be the supervisor's own intent, not that of some subordinate. 129 S.Ct. at 1949.

As the Court said, "[t]he factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue." *Id.* at 1948. The Court did not consider claims other than discrimination claims, but the principles for pleading such claims are clear. Since the violation of due process or freedom of expression does not require specific intent to violate those rights, there is no need to plead such intent; the question presented by these claims here is simply whether the facts pleaded in the complaint support an inference that the Defendants, whether supervisors or not, were deliberately indifferent or grossly negligent. As we show in this supplemental brief, here the answer to that question is yes. The district court's order denying Defendants' motion to dismiss Plaintiffs' claims that their conditions of confinement denied their First, Fourth, and Fifth Amendment rights should be affirmed.

Moreover, since the discrimination claim asserted here is supported by factual allegations not present in the *Iqbal* complaint, the order denying Defendants' motion to dismiss that claim should also be affirmed.

I. *Iqbal* Confirms That Supervisors Are Responsible for the Exercise of Their Superintendent Responsibilities.

In *Iqbal*, the Court noted that in a *Bivens* action (as Iqbal had agreed), "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. Rather, "a federal official's liability 'will only result from his own neglect in not properly superintending the discharge' of his subordinates' duties." *Id.* (quoting *Dunlop v. Munroe*, 7 Cranch 242, 269 (1812)). Consistent with this, since a claim of "invidious discrimination" requires "that the plaintiff must plead and prove that the defendant acted with a discriminatory purpose," the required purpose is that of the defendant, not the defendant's subordinates. *Id.*

But the Court neither held nor hinted—as Defendants now claim—that superior officials are free from any *Bivens* liability in connection with their subordinates' acts or omissions; to the contrary, it expressly recognized, following *Dunlop*, that "an official [may be] charged with violations arising from his or her superintendent responsibilities." *Id.* at 1949.

While the Court rejected the term "supervisory liability," calling it "a misnomer" (*id.*), it did not issue supervisors a free pass. Supervision is what supervisors do, and if they could never be liable for how they do it, supervisors of all kinds and levels would in effect have absolute immunity from *Bivens* actions.

Apart from the sole question of purpose, there was no issue in *Iqbal* of what constitutes a failure to exercise superintendent responsibilities, and accordingly the Court did not set out any general standards for that question. The wardens' claim (Hasty/Sherman Supp. Br. at 3 n.2) that the Court "effectively overrule[d]" *Williams v. Smith*, 781 F.2d 319, 323 (2d Cir. 1986), is consequently baseless; the Court did not refer to that decision or to any other on this subject. There is nothing in *Iqbal* to require revisiting *Williams* or the other precedents of this Circuit discussed in our initial brief at 118-19, other than the further requirement of discriminatory intent in equal protection claims.

II. Plaintiffs' Factual Allegations Show Improper Exercise of the Superintendent Responsibilities of Defendants Ashcroft, Mueller, Ziglar, Hasty and Sherman.

Under *Iqbal* and *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), a court considering a motion to dismiss must accept as true all

factual allegations in the complaint, but not "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 129 S.Ct. at 1949. Second, it must determine whether the factual allegations are sufficient to state a "plausible claim" for relief, a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950.

The Supreme Court is clear, however, that plausibility is not probability. "Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage . . . a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable . . . ." *Twombly*, 550 U.S. at 556.

A. Plaintiffs' Allegations are Sufficient to Show Defendants' Responsibility for Plaintiffs' Conditions of Confinement.

Plaintiffs allege that Defendants were personally responsible for the conditions of Plaintiffs' confinement, which violated multiple constitutional rights:

- Plaintiffs' First Amendment right to free exercise of religion (claim 7, JA 184-85);

- Plaintiffs' First Amendment right to access counsel and courts (claim 21, JA 196);
- Plaintiffs' Fifth Amendment right to due process (claims 3,[1] 8, 20, and 22, JA 182, 185-86, 195, 196-97); and
- Plaintiffs' Fourth Amendment right to freedom from unreasonable search and seizure (claim 23, JA 197-99).[2]

Unlike the discrimination claim considered in *Iqbal*, these claims require, at most, allegations which make it plausible that Defendants were deliberately indifferent to the unlawful conduct. *See Benjamin v. Fraser*, 343 F.3d 35, 51 (2d Cir. 2003); *Iqbal v. Hasty*, 490 F.3d 133, 169 (2d Cir. 2007) *rev'd on other grounds, Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009). Discriminatory intent is not required.

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[1] The wardens have not appealed on claim 3; Defendant Hasty's motion to dismiss this claim (and others not at issue here) was denied by the district court on Dec. 3, 2004 (JA 486-489), and he did not appeal. Defendant Sherman appeals "only those claims relating to him and Defendant Hasty." Hasty/Sherman Initial Br. at 30.

[2] This claim is only brought against the wardens, not Ashcroft, Mueller, or Ziglar. JA 197 (¶ 405).

Under *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995), superintendent responsibility for a constitutional wrong is established where the defendant:

- Directly participated in the wrong;
- Failed to remedy the wrong after being informed of it;
- Created a policy or custom under which the unconstitutional practice occurred;
- Was grossly negligent in supervising subordinates who committed the wrong; or
- Exhibited deliberate indifference by failing to act on information that unconstitutional acts were being committed.

While none of these grounds for liability substitutes for the individual discriminatory intent required for an equal protection claim, they state well-established failures of superintendent responsibility which support claims not dependent on discrimination.

Plaintiffs have adequately alleged each Defendant's responsibility for each alleged violation in one or more of these ways.

1. Allegations Against Ashcroft, Mueller and Ziglar

Plaintiffs make multiple factual allegations in their complaint setting forth the involvement of Ashcroft, Mueller, and Ziglar in Plaintiffs' unconstitutional conditions of confinement.

First, Plaintiffs allege that Ashcroft, Mueller, and Ziglar "ordered and/or condoned" the placement of Plaintiffs in "extremely restrictive confinement." JA 117 (¶ 83). Ashcroft, Mueller and Ziglar acknowledge that this allegation is factual (Ashcroft/Mueller Supp. Br. at 8), like the almost identical allegation in *Iqbal*. 129 S.Ct. at 1951 (identifying as factual, not conclusory, Iqbal's allegation that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement . . . was approved by Defendants ASHCROFT and MUELLER . . .").

Second, Plaintiffs allege that as an aspect of this restrictive confinement, Ashcroft, Mueller, and Ziglar imposed a communications blackout under which Plaintiffs were unable to communicate with the outside world, including their attorneys, consular officers, and families. JA 111-12 (¶¶ 71-73).

Third, Plaintiffs allege that Ashcroft, Mueller, and Ziglar further violated their rights to legal counsel and access to the

courts by adopting, promulgating, and implementing a policy of "not serving Notices to Appear on a timely basis," "imposing an initial communications blackout," and "assigning certain Plaintiffs to the ADMAX SHU." JA 94-95 (¶ 5).

Fourth, the OIG Report incorporated within the complaint records the statements of numerous individuals regarding Ashcroft, Mueller, and Ziglar's orders and awareness of the challenged conditions of confinement. *See* Plaintiffs' Initial Br. at 127-28.

These factual allegations, which must be accepted as true on a motion to dismiss, support a plausible inference that Ashcroft, Mueller, and Ziglar directly participated in the alleged wrongs challenged in claims 3, 8, and 20-22 (JA 182, 185-86, 195-97), by ordering that Plaintiffs be placed in restrictive conditions of confinement, with limited opportunities for communication. Defendants were responsible for claim 7 (JA 184-85), because they created a policy under which unconstitutional practices occurred. These allegations provide fair notice of Plaintiffs' claims, listing specific ways in which Defendants facilitated and condoned the wrongs, and disclosing who was harmed, at what place, and at

what time. In addition, Plaintiffs have shown that discovery is likely to uncover evidence of illegal conduct by, for example, identifying specific individuals with personal knowledge of Defendants' wrongful acts. JA 279, 285-86.

2. Allegations Against Hasty and Sherman

Defendants Hasty and Sherman were present and in command at the MDC throughout the period that Plaintiffs were subjected to the harsh conditions of confinement alleged in this action. JA 101 (¶ 26), JA 102 (¶ 28). The suggestion that it is *implausible* to think they were responsible for those conditions is absurd; the wardens stand well outside the scope of the Supreme Court's concerns expressed in *Iqbal*.

The wardens' assertions that, under *Iqbal*, the complaint fails to adequately allege their personal involvement in claims 7, 8, and 20-23 are meritless.[3] As to claims 20–22, the complaint contains plentiful factual allegations regarding the wardens' direct

[3] In their initial brief and reply, Wardens Hasty and Sherman did not challenge the pleading of their personal involvement in claims 20, 21, and 22 (initial brief at 30, reply at 20), and thereby waived that defense. *See EDP Med. Computer Sys., Inc. v. United States*, 480 F.3d 621, 625 n.1 (2d Cir. 2007); *Dixon v. Miller*, 293 F.3d 74, 80 (2d Cir. 2002). Here, we show that their arguments, even if not waived, are mistaken.

violation of Plaintiffs' rights by holding them in the ADMAX SHU without any individualized assessment or process (claim 20, JA 195), and blocking their ability to communicate with the outside world (claims 21 & 22, JA 196-97). Similarly, Plaintiffs have adequately alleged that the wardens failed in their superintendent duties by creating polices that allowed for interference with religious practice (claim 7, JA 184-85), punitive strip searches (claim 23, JA 197-99), and confiscation of personal property (claim 8, JA 185-86), and by condoning this abuse.

With respect to claims 20 through 22, the complaint sets forth the wardens' involvement in the communications blackout and restrictions. *See* JA 94-95 (¶ 5). The OIG Report, adopted in the complaint, states that David Rardin, the BOP's Northeast Regional Director, ordered Northeast Region wardens (including Hasty) to block all communications for 9/11 detainees. JA 379. Not only were these orders followed, but the OIG Report provides evidence that the wardens implemented a policy of limiting access to attorneys and consular officials that went beyond that authorized by the BOP, and continued after any order to do so was rescinded. JA 379-80; JA 122-23 (¶¶ 97-99).

The wardens acknowledge that the OIG report evidences their involvement in the challenged polices, arguing in their opening brief that their actions in doing so were objectively reasonable. Initial Br. at 22 ("Upon receiving the "of high interest" September 11 detainees, MDC officials, *including the wardens,* received and complied with BOP orders to place them in the ADMAX SHU and initiate a communications blackout.")(emphasis added).

As to claims 7, 8, and 23, the wardens were present daily at the MDC, where Plaintiffs were kept from practicing their religion, and subjected to abusive strip searches. The wardens acknowledge that the complaint "alleges in great detail the names and acts committed by the wardens' subordinates" (Hasty/Sherman Supp. Br. at 10); it also alleges the wardens' failure to respond to these abuses. JA 136 (¶ 136).

Furthermore, MDC policy set by the wardens barred 9/11 detainees from retaining inmate handbooks, the detainees' only guide to MDC's grievance process. JA 134 (¶ 130); JA 414-15. These decisions, blocking Plaintiffs' access to both the outside world—including legal counsel—and the prison's own internal grievance process, made possible the abusive interference with

religious practice (JA 133-34, ¶ 128), and humiliating strip searches (JA 127-29 ¶¶ 111-16), that followed.

In the end, the wardens' supplemental brief seeks the same implausible middle ground as their initial brief: too far below the true policymakers to be responsible for creating the environment that allowed abuse to flourish, yet too far above the actual abusers to have any responsibility for allowing it to continue. The law no more countenances this naked attempt to evade their responsibilities after *Iqbal* than it did before. At the very least, this characterization of their role raises factual issues that cannot be resolved on a motion to dismiss. By alleging facts supporting the wardens' active role in implementing the challenged policies and their failure to protect detainees in their custody from the resulting abuse, the complaint adequately alleges the wardens' personal involvement, including their superintendent responsibility.

B. Plaintiffs' Allegations are Sufficient to Show Defendants' Discriminatory Purpose.

Plaintiffs also allege that they were subjected to punitive conditions of confinement because of their race and religion, in violation of their right to equal protection of the law. While a

similar claim was dismissed in *Iqbal*, here Plaintiffs' claim is supported by factual allegations absent from Mr. Iqbal's complaint, and suggestive of invidious discrimination.

1. Allegations Against Ashcroft, Mueller and Ziglar

Following the Supreme Court's analysis in *Iqbal*, we acknowledge that Plaintiffs' allegations of discrimination at JA 95-96 (¶ 8) and JA 100-01 (¶¶ 23-25) are conclusory, and that factual allegations are needed to support a plausible inference of discrimination. In *Iqbal*, the Supreme Court accepted as factual the allegation that "thousands of Arab Muslim men" were arrested in the September 11 investigation, but concluded that this did not plausibly imply discrimination because it could be accounted for by "a legitimate policy directing law enforcement to arrest and detain individuals *because of their suspected link to the attacks*." 129 S.Ct. at 1951 (emphasis added). This "would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims [but rather] to detain aliens present in the United States . . . who had potential connections to those who committed terrorist acts." *Id.*

But here, Plaintiffs' factual allegations exclude this alternative explanation. Unlike Iqbal, Plaintiffs allege that they were detained so that law enforcement officials could "determine whether they had any ties to terrorism . . . *even where Defendants had no affirmative evidence of a connection to terrorism.*" JA 93 (¶ 2) (emphasis added). Under this policy, Plaintiffs were deemed potential terrorists based on "vague suspicions rooted in racial, religious, ethnic, and/or national origin stereotypes rather than hard facts." JA 109 (¶ 65), 112 (¶ 74).

In addition, Plaintiffs allege specific facts that support their allegations of these Defendants' discriminatory purpose and contradict the alternative explanation found in *Iqbal*. *See* JA 113-14 (¶ 76). These factual allegations include Ashcroft's discriminatory comparison of Islam and Christianity, that "Islam is a religion in which God requires you to send your son to die for him. Christianity is a faith in which God sends his son to die for you," identifying one religion with the acts of a tiny minority of fanatical followers, and the other with its central theological claim. *Id.* It also includes the crucial fact that the policies of the 9/11 investiga-

tion were not applied to non-Muslims and non-Arabs who violated the immigration law. *Id.*

Taken together, Plaintiffs' factual allegations suggest that, in a time of crisis, the country's top law enforcement officials formulated and directed the execution of a policy singling out Arab and Muslim non-citizens for investigative detention without any individualized evidence of a connection to terrorism, based on their own discriminatory notion that Arabs and Muslims were likely to be terrorists. JA 93 (¶ 2), 109 (¶ 65), 112 (¶ 74), 113-114 (¶ 76), 117 (¶ 83). No other explanation can plausibly account for the arrest of hundreds of Arab and Muslim men without a shred of evidence to connect them to terrorism.

One more step is necessary. Plaintiffs' equal protection claim, like Iqbal's, does not challenge their arrest, but their placement in the ADMAX SHU. *See* 129 S.Ct. at 1952. Because Iqbal alleged that officials other than defendants were responsible for his discriminatory classification as "high interest," he failed to plausibly connect Ashcroft and Mueller to his discriminatory detention in the ADMAX SHU. *Id.*

But Plaintiffs here make no such allegation. Rather, they affirmatively allege that Ziglar, Mueller and Ashcroft ordered or condoned their placement in the ADMAX SHU. JA 117 (¶ 83). And while Plaintiffs have not specifically alleged that Ashcroft, Mueller or Ziglar ordered them placed in the ADMAX due to their race, religion or ethnicity, the same discriminatory animus that led to their arrest provides the only plausible explanation for their confinement under restrictive and abusive conditions, notwithstanding the absence of any evidence of involvement in terrorism.[4] Given *these* factual allegations, it is no answer to hypothesize that Ashcroft, Mueller and Ziglar ordered 9/11 detainees placed in restrictive confinement because they were "suspected terrorists" (129 S.Ct at 1952), because this suspicion was itself based entirely on impermissible racial and religious discrimination.

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[4] This claim does not become implausible merely because not every Arab and Muslim man arrested in the investigation was placed in the ADMAX SHU. There are many possible explanations for the difference in treatment; one likely explanation supported by Plaintiffs' experience is that individuals arrested early on in the investigation went to MDC, but when that facility ran out of room, 9/11 detainees were placed, out of necessity, in other, less secure, locations. Discovery is needed to explore these events.

2. Allegations Against Hasty and Sherman

Defendants Hasty and Sherman's arguments require little additional discussion. Plaintiffs' equal protection claim against the wardens is not based on the policy of placing 9/11 detainees in the ADMAX SHU, but rather on the harsh treatment to which Plaintiffs were subjected during their detention, including physical abuse, verbal abuse and repeated strip searches, summarized in our initial brief at 9-12. As the Supreme Court recognized in *Iqbal*, "allegations of discrete wrongs—for instance beatings—by lower level Government actors . . . if true and condoned by petitioners, could be the basis for some inference of wrongful intent on petitioners' part." 129 S.Ct. at 1952. Here Plaintiffs' factual allegations describe systematic abuse, condoned by the wardens, explicitly directed at the detainees' religion, race, and ethnicity. JA 124-36. Discriminatory intent is a plausible inference, especially in the absence of an alternative explanation for the wardens' tolerance of this activity.

III. *Iqbal* Has No Impact on Plaintiffs' Challenges to Their Detention for Criminal Investigation.

Finally, Defendants' seek to rely on *Iqbal* to support the dismissal of Plaintiffs' unlawful detention claims. None of their arguments holds up.

First, we have shown above that Plaintiffs have plausibly alleged Defendants' personal involvement in the discriminatory decision to hold Plaintiffs in investigative detention.

Second, *Iqbal*'s endorsement of detaining individuals whom the government has evidence to suspect of ties to terrorism does not apply to the very different proposition urged by Defendants and wrongly endorsed by the district court—that law enforcement may single out individuals of a certain race or religion, without any evidence of wrongdoing, because of a discriminatory belief that individuals of that race or religion are likely to be terrorists.

Third, Defendants argue that *Iqbal* counsels against recognition of a *Bivens* remedy for Plaintiffs' challenge to their detention. Neither *Iqbal* nor Defendants present anything new with respect to this argument; we refer the court to Plaintiffs' Reply Brief at 27-31.

Fourth, Defendants Ashcroft, Mueller and Ziglar argue that under *Iqbal*, Plaintiffs' allegation that they were detained for a criminal investigation and not for an "immigration purpose" is a legal conclusion, and thus not entitled to the presumption of truth. Ashcroft/Mueller Supp. Br. at 12. But this allegation is not the "formulaic recitation of the elements of a cause of action" which concerned the Court in *Iqbal* (129 S.Ct. at 1949, quoting *Twombly*, 550 U.S. at 555); who had what purpose is a question of fact. Moreover, Defendants miss the basic point of both *Iqbal* and *Twombly*, which was to weed out implausible claims. Do Defendants actually claim it is *implausible* that, in the middle of the PENTTBOM investigation, their policies and actions were governed by the needs of criminal investigation and prosecution, rather than the deportation of visa violators caught up—often incidentally—in the investigation?

In fact, *immigration officials* opposed the hold-until-cleared policy (JA 321, 327-328, 366-370), and Defendant Ashcroft himself stated that policy in terms clearly addressed to holding people for prosecution, and for as long as possible, rather than deporting them:

> "Let the terrorists among us be warned. If you overstay your visa even by one day, we will arrest you. If you violate a local law, you will be put in jail and kept in custody *as long as possible*. We will use every available statute. *We will seek every prosecutorial advantage*."

JA 278 (emphasis added).

The criminal law purpose of Plaintiffs' detention is also supported by the OIG's analysis of the 9/11 immigration arrests:

> It is unlikely that most if not all of the individuals arrested would have been pursued by law enforcement authorities for these immigration violations but for the PENTTBOM investigation.

JA 307.

While alternative theories can be hypothesized to recast Defendants' actions as "immigration related," these theories are inconsistent with Plaintiffs' factual allegations, including the OIG information reported above. These facts rule out any supposition that the INS delayed Plaintiffs' deportation out of concern for their safety should they arrive home with the label "suspected terrorist." Instead, the facts support the plausible inference that Plaintiffs and other 9/11 detainees were held long past the time needed to deport them for the purpose of a criminal investigation, and not for any

immigration purpose, and thus meet *Iqbal*'s requirements for stating a *Bivens* claim against Defendants Ashcroft, Mueller and Ziglar.

Finally, even if *Iqbal* barred this *Bivens* claim, that would have no impact on Plaintiffs' substantially equivalent FTCA claim for false imprisonment (claim 24, JA 199-200), which seeks damages from the United States rather than any government officer, and therefore has no qualified immunity defense.

CONCLUSION

Defendants' appeals should be denied. Plaintiffs' cross-appeal should be granted.

Dated: New York, New York
July 21, 2009

Respectfully submitted,

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1. This brief complies with the type-volume limitations of this Court's Order entered June 17, 2009, because it contains 3,898 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Bookman Old Style.

Dated: New York, New York
July 21, 2009

s/ Michael Winger

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Dated: New York, New York
July 21, 2009

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Certificate of Service

I hereby certify that on July 21, 2009, I caused the attached Supplemental Brief for Plaintiff–Appellee–Cross-Appellants on the Application of *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) to be served upon the following counsel.

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