13-0981-cv(L),

13-0999-cv(CON), 13-1002-cv(CON), 13-1003-cv(CON), 13-1662-cv(XAP)

United States Court of Appeals

for the

Second Circuit

IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, PURNA BAJRACHARYA, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees-Cross-Appellants,

– v. –

DENNIS HASTY, former Warden of the Metropolitan Detention Center, MICHAEL ZENK, former Warden of the Metropolitan Detention Center,

(For Continuation of Caption See Inside Cover)

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

PLAINTIFFS-APPELLEES-CROSS-APPELLANTS' COMBINED RESPONSE TO PETITIONS FOR REHEARING OR REHEARING *EN BANC*

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JAMES SHERMAN, former Metropolitan Detention Center Associate Warden for Custody,

Defendants-Appellants,

JOHN ASHCROFT, former Attorney General of the United States, ROBERT MUELLER, former Director, Federal Bureau of Investigation, JAMES W. ZIGLAR, former Commissioner, Immigration and Naturalization Service,

Defendants-Cross-Appellees,

SALVATORE LOPRESTI, former Metropolitan Detention Center Captain, JOSEPH CUCITI, former Metropolitan Detention Center Lieutenant,

Defendants.

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Plaintiffs-Appellees-Cross-Appellants ("Plaintiffs") were arrested shortly after the September 11, 2001 attacks and held as suspected terrorists, even though "they were unquestionably never involved in terrorist activity." Panel Majority Opinion (hereinafter "Op.") at 4. In the name of preventing future attacks, Defendants-Cross-Appellees John Ashcroft, Robert Mueller, and James Ziglar ("DOJ Defendants") created a policy to use civil immigration charges to detain Arab and Muslim non-citizens encountered during the terrorism investigation. Former Attorney General Ashcroft ordered that these "9/11 detainees" be retained in super-maximum security confinement, even though he knew there was no non-discriminatory reason to suspect the men of any terrorist connection. Former FBI Director Mueller and former INS Commissioner Ziglar followed along.

The detentions lasted long past the first few terrifying weeks after 9/11; Plaintiffs, and dozens of others like them, were subjected to extraordinarily harsh restrictions by Defendants-Appellants Dennis Hasty and James Sherman ("MDC Defendants") for up to eight months at the Metropolitan Detention Center ("MDC"), a federal prison facility in Brooklyn. As the panel majority held,

> Plaintiffs plausibly plead that the DOJ Defendants were aware that illegal aliens were being detained in punitive conditions of confinement in New York and further knew that there was no suggestion that those detainees were tied to terrorism except for the fact that they were, or were perceived to be, Arab or Muslim.

Op. at 40–41. After meticulous consideration, the panel held that Plaintiffs stated plausible claims for violations of substantive due process and equal protection. *Id.* at 60, 77.

Under the Federal Rules of Appellate Procedure, en banc rehearing is "not favored" and "ordinarily will not be ordered" unless necessary to "secure or maintain uniformity of the court's decisions" or to resolve "a question of exceptional importance." Fed. R. App. P. 35(a). The Second Circuit observes this presumption against en banc review scrupulously and has proceeded to "a full hearing en banc only in rare and exceptional circumstances." *Ricci v. DeStefano*, 530 F.3d 88, 89–90 (2d Cir. 2008) (Katzmann, J., concurring in the denial of rehearing en banc).

While DOJ Defendants may, by virtue of their high rank, be considered "exceptionally important," the legal questions presented and resolved by the panel are straightforward. *Cf. Watson v. Geren*, 587 F.3d 156, 160 (2d Cir. 2010) (per curiam) (en banc review is "limited generally to only those cases that raise issues of important *systemic consequences* for the development of the law and the administration of justice") (emphasis added).

DOJ Defendants primarily argue with the panel's application of *Ashcroft v. Iqbal's* plausibility standard. 556 U.S. 662 (2009). But assessing whether comprehensive, detailed factual allegations support a reasonable inference of

liability at the motion-to-dismiss stage is a routine judicial task that turns on judgment and deliberation. Mere disagreement with the manner in which the panel weighed the factual allegations should not deprive the panel opinion of its binding force. *See Ricci*, 530 F.3d at 89 (Katzmann, J.) (emphasizing the "longstanding tradition of general deference to panel adjudication – a tradition which holds whether or not the judges of the Court agree with the panel's disposition of the matter before it").

Nor is there reason to disturb the panel's conclusion that Plaintiffs' claims are ones for which relief is available under the doctrine of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The panel correctly determined that a challenge by federal immigration detainees to abuse by federal officers in a federal jail arises in the same context as prior challenges to abuse within the federal prison system, and thus requires no extension of *Bivens.* The opinion builds from, and is wholly consistent with, the circuit's explanation of context in *Arar v. Ashcroft*, 585 F.3d 559, 572 (2d Cir. 2009) (en banc). It is Defendants' argument—that executive policy creates a new context immune from judicial review—which is novel and contrary to established precedent.

Finally, the substantive legal principles underlying Plaintiffs' claims and the panel opinion are elementary. Plaintiffs' treatment was based on religious and ethnic profiling, rather than legitimate, evidence-based suspicion. Had the 9/11

detainees been identified as enemy combatants, arrested on terrorism charges, or even just suspected of dangerousness for any non-discriminatory reason, their detention in restrictive conditions would present a more difficult legal issue. But that is not this case. The panel's 109-page opinion is thorough and well-reasoned and does not conflict with any decision of this Court or the Supreme Court. Rather, it is consistent with the modern judiciary's rejection of race, religion, ethnicity and national origin as legitimate bases for suspicion. No further review is necessary.

I. The Panel Correctly Found that Plaintiffs Alleged Plausible Due Process and Equal Protection Claims

Examining first the claims against the DOJ Defendants, the panel focused on three key facts, none of which were alleged in *Ashcroft v. Iqbal*: (1) DOJ Defendants were each personally involved in the decision to treat as terrorism suspects Arab and Muslim non-citizens who were encountered in the New York area during the 9/11 investigation despite the FBI's failure to indicate specific interest in the men; (2) DOJ Defendants were aware that this decision would result in Plaintiffs' and others' continued detention in highly-restrictive conditions of confinement; and (3) DOJ Defendants made this decision knowing that there was no rational, individualized basis to suspect Plaintiffs of any connection to terrorism. Op. at 39–55; *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The panel correctly concluded that DOJ Defendants' personal involvement in the continued confinement of civil immigration detainees in restrictive conditions without

individualized suspicion states a substantive due process claim under *Bell v. Wolfish*, 441 U.S. 520 (1979); Op. at 55–58.[1]

DOJ Defendants fail to credit the panel's thorough analysis of Plaintiffs' allegations, instead seeking reconsideration of the panel's judgment. They repeatedly insist that Plaintiffs' allegations are not supported by evidence, and thus are not "plausible." *See, e.g.*, Petition for Rehearing or Rehearing En Banc of Defendants-Cross-Appellees John Ashcroft and Robert Mueller (hereinafter "Ashcroft Pet.") at 9–10. But of course, a complaint need not recite the evidence upon which its allegations are based. That would be "not only unnecessary, but in contravention of proper pleading procedure." *Geisler v. Petrocelli*, 616 F.2d 636, 640 (2d Cir. 1980). This principle has not been affected by *Twombly* and *Iqbal*. *See Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120–21 (2d Cir. 2010) ("[W]e reject [the] contention that *Twombly* and *Iqbal* require the pleading of specific evidence or extra facts beyond what is needed to make the claim plausible.").

A. DOJ Defendants' Personal Involvement in the Merger of Lists

With respect to the first key fact, the panel recognized that Plaintiffs' complaint sets out DOJ Defendants' individual roles in the decision to continue the 9/11 detentions regardless of the lack of individual suspicion:

[1] Ashcroft and Mueller's Petition focuses on Plaintiffs' substantive due process claim, so we address those issues here. But as the panel recognized, the same factual allegations support Plaintiffs' equal protection claim. Op. at 76–85.

> Ashcroft, Mueller and Ziglar received detailed daily reports of the arrests and detentions and were aware that the FBI had no information tying Plaintiffs and class members to terrorism prior to treating them as "of interest" to the PENTTBOM investigation. Indeed, in October 2001 all three learned that the New York field office of the FBI was keeping a separate list of non-citizens, including many Plaintiffs and class members, for whom the FBI had not asserted any interest (or lack of interest). Against significant internal criticism from INS agents and other federal employees involved in the sweeps, Ashcroft ordered that, despite a complete lack of any information or a statement of FBI interest, all such Plaintiffs and class members be detained until cleared and otherwise treated as "of interest." Mueller and Ziglar were fully informed of this decision, and complied with it.

FAC ¶ 47 at A-135, *see also* FAC ¶ 67 at A-143.

Without any citation or support, Ziglar insists that this fact-laden allegation is "conclusory." Petition for Rehearing or for Rehearing *En Banc* of Defendant-Cross-Appellee James W. Ziglar ("Ziglar Pet.") at 6–8. But it is categorically unlike the "formulaic recitation of the elements of a . . . claim" that rendered *Iqbal*'s allegations "conclusory and not entitled to be assumed true." *Iqbal*, 556 U.S. at 680–81. The paragraph includes subordinate facts about when, how, and by whom a particular decision was reached. *Cf.*, *Bell Atlantic v. Twombly*, 550 U.S. 544, 557 (2007) ("a conclusory allegation of agreement at some unidentified point" required the support of some subordinate facts if it were to be taken as true at the motion to dismiss stage); *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (allegation that plaintiffs "have been deprived of a minimally adequate education" was conclusory because "[t]he petitioners do not allege that

schoolchildren in the Chickasaw Counties are not taught to read or write; they do not allege that they receive no instruction on even the educational basics; they allege no actual facts").

Paragraph 47 is a *factual* allegation. As such, "a court should assume [its] veracity." *Iqbal*, 556 U.S. at 679. And yet, both the panel dissent and Defendants question its *truthfulness*, discounting it as a "speculative assertion" (Ashcroft Pet. at 10), which is "plainly not based on personal knowledge" nor supported by the OIG report,[2] and thus insufficient to "ascribe [list] merger responsibility to any of the DOJ Defendants." Dissent at 45. This approach is incorrect.

An allegation is either factual and thus considered true on a motion to dismiss, or it is conclusory and entitled to no deference. *Iqbal*, 556 U.S. at 678. The only exception to this rule is that "[a] court may dismiss a claim as 'factually frivolous' if the sufficiently well-pleaded facts are 'clearly baseless'—that is, if they are 'fanciful,' 'fantastic[,]' or 'delusional.'" *Gallop v. Cheney*, 642 F.3d 364,

[2] Complaints about the 9/11 detentions prompted two in-depth investigations by the Office of the Inspector General. *See* U.S. Dep't of Justice, Office of Inspector General, "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks" (April 2003), *available at* http:/www.usdoj.gov/oig/special/ 0306/full.pdf (hereinafter "OIG Rep."); and U.S. Dep't of Justice, Office of Inspector General, "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York" (Dec. 2003), *available at* https://oig.justice.gov/special /0312/final.pdf. These reports were appended as exhibits to, respectively, the Second Amended Complaint and the Third Amended Complaint, and incorporated by reference in the Fourth Amended Complaint. *See* FAC ¶3 n.1, ¶5 n.2 at A-123–24.

368 (2d Cir. 2011) (quoting *Denton v. Hernandez*, 504 U.S. 25, 32–33 (1992)). As the Court explained in *Denton*, "a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible . . . . [A] complaint may not be dismissed, however, simply because the court finds the plaintiff's allegations unlikely." 504 U.S. at 33; *see also Iqbal*, 556 U.S. at 681 ("It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.").

The panel *does* take an extra step to explore the degree to which the OIG report supports Plaintiffs' factual allegation that Ashcroft ordered the list merger and Mueller and Ziglar were informed and complied; however, this is done in response to the dissent's argument that the OIG report *contradicts* Ashcroft's role as the decision-maker, not because a well-pled allegation requires an additional, independent, "factual basis in the record." Op. at 49–50. As the panel explained, the OIG report's statement that a government employee who was not the Attorney General communicated a decision does not indicate whether or not Ashcroft was involved in the decision. *Id.* at 53, *see also* OIG Rep. at 56 at A-285. The OIG report creates no conflict; thus Plaintiffs' factual allegation must be taken as true.[3]

[3] Although civil plaintiffs generally need not explain the source of their allegations at the pleading stage, it may be helpful to note that *Turkmen* Plaintiffs benefitted from five years of discovery against the United States prior to amending their complaint to its current form. Op. at 5–7. Thus Plaintiffs' personal knowledge and the OIG reports do not comprise the entire universe of evidence upon which the (continued…)

B. DOJ Defendants' Personal Involvement in Punitive Conditions of Confinement

Second, the panel found that Plaintiffs sufficiently alleged DOJ Defendants' personal involvement in the restrictive conditions of Plaintiffs' confinement. Op. at 42–44. As the panel recognized, Plaintiffs alleged that Mueller oversaw the 9/11 investigation from FBI headquarters (FAC ¶ 56 at A-138), and that DOJ Defendants received daily reports of the arrests and detentions. FAC ¶ 47 at A-135. Defendants ignore these (and other) well-pled allegations, arguing instead with the panel's interpretation of various supporting facts in the OIG report (*see* Ashcroft Pet. at 8–9). Although reasonable inferences from the OIG Report supplement the plausibility of Plaintiffs' claim, (*see* Op. at 42–44), the starting point must be Plaintiffs' factual allegations regarding DOJ Defendants' involvement in confinement conditions. *See*, Op. at 42–44 (*citing* FAC ¶¶ 47, 63–65 at A-135, 142). On this, Plaintiffs allege that:

> In the first few months after 9/11, Ashcroft and Mueller met regularly with a small group of government officials in Washington and mapped out ways to exert maximum pressure on the individuals arrested in connection with the terrorism investigation, including Plaintiffs and class members. The group discussed and decided upon a strategy to restrict the 9/11 detainees' ability to contact the outside world and delay their immigration hearings. The group also decided to spread the

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Fourth Amended Complaint is based. Prior to amending their complaint, for example, Plaintiffs deposed several government employees present at the list merger meetings and received notes and minutes from relevant meetings.

> word among law enforcement personnel that the 9/11 detainees were suspected terrorists, or people who knew who the terrorists were, and that they needed to be encouraged in any way possible to cooperate.
>
> Commissioner Ziglar was at many of these meetings, and he discussed the entire process of interviewing and incarcerating out-of-status individuals with Ashcroft and others.

FAC ¶¶ 61–62 at A-141–42.

These factual allegations support the inference that DOJ Defendants not only knew that Plaintiffs were being held in isolation, but intended it. Ashcroft and his small working group instructed that Plaintiffs be restricted from contacting the outside world; this restriction required that Plaintiffs be isolated in a Special Housing Unit, as a general population prisoner can enlist another prisoner, who has access to telephone calls and visits, to pass messages to the outside world. *See, e.g.*, *Mohammed v. Holder*, No.07-cv-02697, 2011 U.S. Dist. LEXIS 111571, at *6, *20–21 (D. Colo. Sept. 29, 2011) (noting that inmates subject to Special Administrative Measures are housed in isolation to ensure they do not have contact with other inmates, and thus find a way around their communications restrictions).[4]

[4] *See also, Saleh v. Fed. Bureau of Prisons,* No. 05-cv-02467, 2010 U.S. Dist. LEXIS 138642, at *13–14 (D. Colo. Dec. 29, 2010) (accepting Government's legitimate interest in 2001 in placing certain convicted terrorists in isolation to ensure they could not contact the outside world), *aff'd*, *Rezaq v. Nalley*, 677 F.3d 1001 (10th Cir. 2012).

C. DOJ Defendants' Knowledge of the Lack of Individualized Suspicion

Third, the panel properly credited Plaintiffs' factual allegations that DOJ Defendants knew there was no individualized reason to suspect Plaintiffs of ties to terrorism. Plaintiffs allege:

> While every tip was to be investigated, Ashcroft told Mueller to vigorously question any male between 18 and 40 from a Middle Eastern country whom the FBI learned about, and to tell the INS to round up every immigration violator who fit that profile. FBI field offices were thus encouraged to focus their attention on Muslims of Arab or South Asian descent. Both men were aware that this would result in the arrest of many individuals about whom they had no information to connect to terrorism. Mueller expressed reservations about this result, but nevertheless knowingly joined Ashcroft in creating and implementing a policy that targeted innocent Muslims and Arabs.

FAC ¶ 41 at A-133; *see also* FAC ¶¶ 48–51 at A-136. Ashcroft ordered that the individuals identified in this manner be detained, treated as "of interest" to the terrorism investigation, and held in restrictive confinement, despite the absence of any information tying them to terrorism. FAC ¶¶ 47, 60, 67 at A-135–36, 139–41, 143. DOJ Defendants received detailed daily reports of arrests and detentions of Plaintiffs and other members of the class, and they were aware that there was no basis other than religion, race and ethnicity for treating them as they were treated. FAC ¶¶ 47, 63, 64 at A-135–36, 142. As the panel recognized, the OIG Report supports and supplements these factual allegations. *See* Op. at 47–49.

D. Plaintiffs' Claims Against the DOJ Defendants are Plausible

The panel correctly concluded that these three key facts state a plausible substantive due process claim. This requires no "presum[ption]" that DOJ Defendants acted unconstitutionally. Ashcroft Pet. at 1. Civil detainees, about whom there is no evidence of a security concern, may not be placed in isolation or subjected to restrictive conditions. Such harsh confinement is "not reasonably related to a legitimate goal," but rather is "arbitrary," and thus the Court "permissibly may infer that the purpose of [DOJ Defendants' actions was] punishment that may not constitutionally be inflicted upon detainees *qua* detainees." Op. at 57; *Wolfish*, 441 U.S. at 539; *see also Iqbal v. Hasty*, 490 F.3d 143, 168–69 (2d Cir. 2007), *rev'd in part on other grounds, Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

DOJ Defendants disagree that Plaintiffs have plausibly alleged isolation and restrictive treatment that was arbitrary and thus unlawful, positing the "obvious alternative explanation" that the "Attorney General and FBI Director acted cautiously to ensure that all those detained in connection with the 9/11 investigation would be held until cleared." Ashcroft Pet. at 7. But this "alternative" glosses over the factual allegations that Plaintiffs were *not* detained based on legitimate suspicion of terrorism, but rather based on their religion, race, ethnicity, and national origin. *See* FAC ¶¶ 39–41, 43–47 at A-133–36.

Disagreement with the panel's conclusion here ultimately amounts to judicial endorsement of religious and racial profiling. *See* Dissent at 64–65 (positing the legitimacy of holding hundreds of Muslim non-citizens in restrictive conditions without individualized suspicion given the profile of the nineteen 9/11 hijackers). Contrary to Defendants' repeated assertions, *Iqbal* does not require such a discriminatory result. As the panel explained, *on the facts alleged in Iqbal* the Supreme Court found the 9/11 detentions were "likely lawful and justified by [Mueller's] nondiscriminatory intent to detain aliens . . . who had potential connections to those who committed terrorist acts." Op. at 82, *citing Iqbal*, 556 U.S. at 682. But the "obvious alternative explanation" credited in *Iqbal* is foreclosed here by Plaintiffs' factual allegations that they were detained *without* any suspicion of a link to terrorism, and that Defendants knew this. Op. at 83.[5]

Plaintiffs have alleged isolation and restrictive treatment imposed without legitimate security need, based instead on race, religion, ethnicity and national origin. These allegations state plausible substantive due process and equal

[5] It is no surprise that the *Turkmen* Fourth Amended Complaint contains significantly more factual detail than was alleged in *Iqbal*. The operative *Iqbal* complaint was filed in 2005, prior to significant discovery. After the Supreme Court's 2009 decision in *Iqbal*, *Turkmen* plaintiffs received permission to amend their complaint to add detail gathered through years of discovery, including over 100 depositions, for the very purpose of meeting *Iqbal's* pleading standard. Of course, the parties have not yet had the opportunity to conduct full discovery, which may yield additional evidence corroborating Plaintiffs' claims and which will permit Defendants an opportunity to explore their "alternative explanations."

protection claims. Defendants will be able to assert their "alternative explanations" when the case progresses beyond the pleading stage.

E. Plaintiffs' Claims Against the MDC Defendants are Plausible

Defendant Sherman, the Associate Warden of the prison where Plaintiffs were held in restrictive conditions and abused, also urges this Court to reconsider whether Plaintiffs adequately pled substantive due process and equal protection claims against him. As the panel's decision with respect to Sherman is consistent with prior circuit precedent, and not an issue of exceptional importance, it is unsuited for en banc review. Regardless, the panel's decision is plainly correct.

Sherman argues that following the BOP's directive to hold the detainees in restrictive custody could not, on its own, state a plausible claim for relief. Petition for Rehearing or Rehearing *En Banc* of Defendant-Appellant James Sherman ("Sherman Pet.") at 11. But that is not the extent of Plaintiffs' claim. Rather, Plaintiffs claim that MDC Defendants imposed restrictive conditions *knowing* there was no reason to suspect Plaintiffs of ties to terrorism. Op. at 64–65. The panel correctly concluded that the factual allegations plausibly support this claim: MDC Defendants "were aware that the FBI had not developed any information to tie the MDC Plaintiffs . . . to terrorism" because, "on a regular basis, an MDC intelligence officer received print-outs of the FBI and INS's 9/11 detainee lists and databases so that he could update [MDC Defendants] about the investigations. These regular

written updates included summaries of the reason each detainee was arrested, and *all evidence relevant to the danger* he might pose to the institution." FAC ¶ 69 at A-144 (emphasis added). For Plaintiff Khalifa, for example,

> MDC Defendants were informed only that he was arrested because he was "encountered by INS" while following an FBI lead and charged with a violation of the INA. They were further informed that Khalifa had no INS applications, petitions or extensions pending, and that the "FBI may have an interest" in him. No other information was provided.

FAC ¶ 70 at A-144.

Sherman counters that, to "credit" this allegation, one must "assume the FBI was busily faxing into the prison *all* the potentially sensitive information obtained in a global terrorism investigation for local jailors to review," which he finds "implausible." Sherman Pet. at 12. But Defendants cannot dispute factual allegations at the pleading stage based on their own view of what is credible. Plaintiffs allege that the FBI *was sharing* with the jail *all* information relevant to each detainee's threat, and that allegation is entitled to a presumption of truth at this stage in the proceedings.

Similarly, Defendant Hasty—the former Warden of MDC—asks what he could possibly have done in the face of orders from his superiors to hold these civil immigration detainees in ultra-restrictive confinement. Petition for Rehearing or Rehearing En Banc of Defendant-Appellant-Cross-Appellee Dennis Hasty, Former Warden of the Metropolitan Detention Center (MDC) ("Hasty Pet.") at 10. But,

the answer is simple: subordinates must not follow facially invalid and unreasonable orders. This does not require a choice between blind obedience and instant insubordination; Hasty had *months* to raise concerns up the chain of command about appropriate detention conditions at the prison he was charged to oversee. Op. at 65, 67–68, FAC ¶ 24, 73–74 at A-128, 145. He declined to do so.

II. Plaintiffs' Allegations State Proper *Bivens* Claims

The panel also correctly found that Plaintiffs' substantive due process, equal protection, and Fourth Amendment claims require no extension of *Bivens*.[6] Defendants' request for full court review of this analysis is not primarily based on a conflict with Circuit or Supreme Court precedent; instead Ashcroft and Mueller suggest novel *Bivens* immunity for executive policy. Not only is this a new legal proposition, but it would effectively grant them the absolute immunity which the Supreme Court rejected long ago for another former Attorney General. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985). Defendants Ziglar, Hasty and Sherman seek to avoid a *Bivens* claim by arguing that virtually every factual variation creates a new, unprecedented "context" in which a *Bivens* claim should not be allowed. Even if the full court's attention to such factual variation were merited,

[6] The panel reversed Judge Gleeson's decision to recognize Plaintiffs' *Bivens* claims for violation of the Free Exercise clause, concluding that such claims do arise in a new context and are accordingly not viable. Op. at 38. Plaintiffs respectfully disagree with the Court's conclusion, but do not seek en banc review of this aspect of the panel's ruling.

the variations they point to are either irrelevant to any material issue, or simply raise issues to be addressed by the qualified immunity doctrine.

A. Defendants' Protection Lies in Qualified Immunity, Not Absolute Immunity

DOJ Defendants claim that "high-ranking policy-makers" should be immune from *Bivens* liability for unconstitutional conditions of confinement, even, apparently, if the policy-makers adopt a policy dictating unconstitutional conditions of confinement. Ashcroft Pet. at 12, Ziglar Pet. at 12. Under Defendants' novel proposal, subordinates who carried out the policy would be liable under *Bivens*, but policy-makers would not.[7] However, such a de facto grant of absolute immunity is in direct contradiction to *Mitchell*, 472 U.S. at 524, and ignores *Iqbal*, in which the Supreme Court expressed doubt over the existence of a *Bivens* First Amendment religious discrimination claim, but expressed no concern

[7] Ashcroft and Mueller suggest, at 1, that the policies at issue here were "facially reasonable," so perhaps their proposed policy-makers' privilege would apply only to "facially reasonable" policies. In that case a policy-maker would be liable if, for example, a policy prohibited prisoners in a special housing unit from receiving medical attention; but the test would be the policy's facial reasonableness, rather than the established test for qualified immunity. What criteria would trigger the application of this novel privilege as compared to the traditional one? The "facial" lawfulness or validity of an order is a standard for determining whether a subordinate government employee *following* such an order is entitled to qualified immunity. *See, e.g.*, *Varrone v. Bilotti*, 123 F.3d 75, 82 (2d Cir. 1997). In such a case, facial validity is sufficient for one following a superior's order or policy, who need not inquire whether the superior had an ulterior motive. It is not a standard suited to the superior, whose intent and motive, whether or not facially obvious, may form the basis of liability.

over plaintiff's Fifth Amendment equal protection *Bivens* challenge to executive-level actions. *Iqbal,* 556 U.S. at 675.

If, at later stages of the case, it is determined that the challenged actions were constitutional, or that Defendants reasonably believed them to be constitutional, Defendants will be entitled to qualified immunity. There is no reason to depart from the application of these well-established principles.

B. Neither Differences in "Context" Nor "Special Factors" Preclude Plaintiffs' *Bivens* Claims

Defendants Ziglar, Hasty and Sherman offer a two-part argument against permitting a *Bivens* action here, but the two parts essentially repeat the same points: first, that Plaintiffs' claims arise in a different "context" than previous *Bivens* claims in several respects, and second, that certain "special factors" counsel against allowing *Bivens* claims here; but these "special factors" are also the points which are said to create a new "context." According to Defendants, there are three such context-creating special factors: (1) that this case involves a challenge to "policy"; (2) that it involves national security; and (3) that Plaintiffs are non-citizens who were subject to deportation.

1. Plaintiffs' Claims Do Not Present a New *Bivens* Context

The panel majority set a clear standard, consistent with *Arar v. Ashcroft*, for the context of a *Bivens* claim: "the rights injured and the mechanism of the injury . . . determine the context." Op. at 30; *see also Arar*, 585 F.3d 559, 572 (2d Cir.

2009) (defining "context" as a "potentially recurring scenario that has similar legal and factual components"). The context for the claims here is "federal detainee Plaintiffs, housed in a federal facility, alleg[ing] that federal officers subjected them to punitive conditions." Op. at 31–32. For this, there is an established right to *Bivens* relief. *Id.* at 32.

Neither Defendants nor the dissent succeed in establishing an alternative standard for determining context.[8] The dissent describes the cases establishing a *Bivens* right for federal prisoners injured in confinement as based on "the prisoner's particular medical needs," as though that defined the context of the claim. Dissent at 11–12. But the Supreme Court precluded this narrow interpretation of context in *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 72 (2001): "If a federal prisoner in a BOP facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer, subject to the defense of qualified immunity."

The dissent, at 12–13, objects that *Malesko* should not be read "to sweep well beyond prior cases," because that would be "extraordinary." Here the dissent misses the significance of its own point. It *would* be extraordinary for the Court to expand prior law without comment; but what this shows is precisely that the Court

[8] Defendant Hasty observes, "Context is a flexible term, and its application depends on . . . context." Hasty Pet. at 6.

did *not* go beyond prior cases; rather, it merely restated the prior cases on a prisoner's right to a *Bivens* claim, which was never limited to medical claims alone. The Supreme Court and this Court have applied this principle for years.[9]

There may be circumstances in which factors other than the right injured and the mechanism of injury indicate a new context; but no such circumstance is present here. As Defendants and the dissent note, the right to a *Bivens* claim for employment discrimination recognized in *Davis v. Passman*, 442 U.S. 228 (1979), was subsequently denied to sailors in the Navy, *Chappell v. Wallace*, 462 U.S. 296 (1983); the military setting both made a new context for the claim and constituted a "special factor" counseling hesitation. But the difference between civilian employment and service in the military is not only obvious; allowing soldiers and sailors to sue their commanding officers in civilian courts would have a significant impact on the military. The Court in *Chappell* relied not on other *Bivens* cases, but on cases addressing the special status and needs of the military. By contrast, the Attorney General and FBI Director are not a constitutionally distinct arm of the

[9] *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825 (1994) (in which the Supreme Court expressed no concerns about the viability of a *Bivens* claim brought for an alleged Eighth Amendment violation outside of the narrow context of deliberate indifference to medical needs); *Walker v. Schult*, 717 F.3d 119, 121–22, 123 n.5 (2d Cir. 2013) (reversing dismissal of a *Bivens* action regarding overcrowded, unsanitary, and dangerous prison conditions); *Hathaway v. U.S. Attorney Gen.*, 491 F. App'x 207, 208 (2d Cir. 2012) (recognizing *Bivens* claim based on federal officials causing prisoner to be transferred to small cell in state prison where temperature exceeded 110 degrees).

government. If the adjudication of a *Bivens* claim could be expected to have an impact radically different from that of previous claims, as in *Chappell*, that suggests a new context. But this case presents no comparable impact.

2. No Special Factors Bar Plaintiffs' Claims

Even if this case is considered a new context for *Bivens* claims, the "special factors" enumerated by Defendants do not provide reasons to deny a hearing to Plaintiffs. First, most of these special factors are presented as justifications for the Defendants' conduct. If they in fact justified that conduct, Plaintiffs' claims will fail at later stages of the case. But possible justifications cannot be a reason for refusing to consider the claims. Rather, special factors counseling against considering a *Bivens* claim ought to show harm that could result from the mere consideration of the claim, even if the claim were rejected, as was the case with the claims of sailors suing their commanding officer in a civilian court in *Chappell*. *See also Arar*, 585 F.3d at 576 (stressing "foreign affairs implications" of the suit)

Second, each of the special factors Defendants suggest has particular deficiencies. One of these—the "policy-makers" defense—we have already discussed above. And while *Arar* raises the *question* of whether a defendant's status as a policymaker might qualify as a special factor counseling hesitation, the decision stops far short of holding that all decisions by high-ranking officials be

considered "executive policy" immune from an individual damage claim. 585 F.3d at 574. We assess three others below.

National Security: Defendants Ziglar (at 13) and Hasty (at 6–7) raise national security as a reason not to consider Plaintiffs' claims. But it is unclear what national security concerns could possibly arise from the case. Unlike *Arar*, the executive actions challenged here are solely domestic, and occur within an established and judicially familiar context—the conditions of confinement for individuals present in the United States and held in a federal jail. Judicial consideration of domestic jail conditions does not raise any of the national security and foreign affairs concerns the Court identified when considering the secretive, extra-judicial policy of extraordinary rendition. 585 F.3d at 575–76.

Notably, the United States, representing Ashcroft and Mueller, does not assert that a *Bivens* claim here would have any deleterious impact on the government, but simply argues that executive policy presents a new context requiring further examination. Nor do the other Defendants actually identify a single national security concern which might arise from examination of Plaintiffs' treatment. Rather, Defendants' argument is wholly circular: judicial review of the 9/11 detentions would raise national security concerns because the detainees were *treated as though* they raised national security concerns. But the specter of national security cannot function, without any real analysis, to foreclose judicial scrutiny of

executive level action. *See Mitchell*, 472 U.S. at 523 ("[T]he label of 'national security' may cover a multitude of sins. . . . The danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is sufficiently real to counsel against according such officials an absolute immunity.")

Immigration: Defendant Ziglar also suggests that "the immigration authority of the executive branch" counsels against a *Bivens* remedy here. Ziglar Pet. at 11–12. This is spurious. There are no immigration issues left in this case, as Plaintiffs do not contest that they were subject to deportation, and confinement incident to deportation.

Classified Information: Finally, Defendant Sherman suggests that the mere consideration of Plaintiffs' claims might injure the public interest, through the disclosure of classified information and intelligence. Sherman Pet. at 10–11. These concerns are entirely unsupported. This action is now thirteen years old, and the only event Sherman can point to is the existence of a protective order and the concern of Plaintiff's counsel about obeying it. *Id.* at 11. No issue is presented here that cannot be dealt with by an appropriate protective order (in fact already in place), or, if necessary and appropriate, the state secrets privilege.

III. Defendants are Not Entitled to Qualified Immunity

The panel also correctly found that Defendants are not entitled to qualified immunity. *See* Op. at 60–62, 72–75, 93–95, 99–100. Defendants Ashcroft and Mueller argue that the panel erred because the constitutional rights that Ashcroft and Mueller are alleged to have violated were not clearly established. Ashcroft Pet. at 13–15. Defendants Hasty and Sherman argue that the panel majority erred because Hasty and Sherman were merely following the instructions of their supervisors. Hasty Pet. at 10–11; Sherman Pet. at 13–15. Both arguments fail.

A. The Panel's Analysis Is Consistent with *Kingsley v. Hendrickson*

DOJ Defendants cite a recent Supreme Court decision, *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), to argue that the panel undertook the wrong analysis in determining that Defendants' actions violated clearly established law. Ashcroft Pet. at 15. They assert that the proper legal analysis under *Kingsley,* "is not whether a court can infer evidence of punitive intent, but whether each individual defendant's conduct was itself objectively unreasonable." *Id*.

This completely misapprehends *Kingsley*, which ultimately makes the substantive due process bar lower, not higher. There, the Court found that rather than having to establish a prison official's subjective state of mind, *e.g.*, whether the official intended to use force he knew was unreasonable, "a pretrial detainee

must show *only* that the force purposely or knowingly used against him was objectively unreasonable." *Id*. at 2473 (emphasis added).

Kingsley did not change the fact that it is unlawful to subject a pretrial detainee to overly restrictive (and therefore punitive) conditions, and in fact reaffirmed that "pretrial detainees (unlike convicted prisoners) cannot be punished at all." *Id.* at 2475. All *Kingsley* did was clarify that "in the absence of an expressed intent to punish," a pretrial detainee may still prevail by showing that the detention officer's actions were objectively unreasonable. *Id* at 2473.

Contrary to Ashcroft and Mueller's contentions (at 15), *Kingsley* explicitly endorsed the continued vitality of the *Bell v. Wolfish* analysis, on which the panel relied.135 S. Ct. at 2473 (citing and relying on *Bell v. Wolfish*, 441 U.S. 520, 538 (1979) to show that *Kingsley* is "consistent with our precedent"); Op. at 61, 73. *Bell v. Wolfish* conclusively established that placement of a detainee in conditions that are objectively unreasonable is punitive, and thus unlawful. That law was clearly established as of 2001 and continues to be clear after *Kingsley.*

B. Hasty and Sherman Cannot Avoid Responsibility by Hiding Behind Their Supervisor's Orders

Defendants Hasty and Sherman argue that they are protected by qualified immunity because they had an "objectively reasonable" belief that their actions were lawful. Hasty Pet. at 10–11; Sherman Pet. at 13–15. They complain that it was the FBI that made the determinations as to whether Plaintiffs were "of

interest", and that Hasty and Sherman could not "second-guess" the determinations made by "their superiors" because they had "neither the competence nor authority to overrule FBI determinations." Sherman Pet. at 14.

However, it is undisputed that qualified immunity does not protect subordinates following orders that are facially invalid. *See Diamondstone v. Macaluso*, 148 F.3d 113 (2d Cir. 1998); *Sorenson v. City of New York*, 42 F. App'x 507, 511 (2d Cir. 2002). The cases cited by Hasty on this point only confirm that qualified immunity extends only to subordinates following facially valid orders. *See* Hasty Pet. at 10 n.1, *citing Varrone v. Bilotti*, 123 F.3d 75, 81–82 (2d Cir. 1997) (finding that qualified immunity protected officials following an order that was "not facially invalid"); *Anthony v. City of New York*, 339 F.3d 129, 138 (2d Cir. 2003) (finding that qualified immunity protected officials following an "apparently valid order" where under the circumstances, it was reasonable to conclude that there was a legal basis for the order)).

Pahls v. Thomas, 718 F.3d 1210, 1242 (10th Cir. 2013), cited by Defendant Sherman (at 14 n.3), also misses the point. In *Pahls*, the Tenth Circuit found that a local law enforcement official who was aware of, but did not take any action to implement or deter a CIA agent's decision to move protesters away from the President (a decision that itself did not violate clearly-established constitutional rights), was entitled to qualified immunity. *Pahls*, 718 F.3d at 1241.

Here, by contrast, and as the panel correctly found, the orders followed by Hasty and Sherman were not facially valid, and any reasonable officer in Hasty and Sherman's position would have concluded that the highly restrictive conditions under which they were ordered to hold Plaintiffs were "not reasonably related to a legitimate goal." Op. at 74–75. No reasonable official could think it lawful to ignore BOP regulations, and instead place civil detainees in isolation for months on end without conducting any inquiry into their individualized dangerousness. *See* FAC ¶ 68 at A-143. And qualified immunity only protects officials "who act with a good faith belief that their behavior comports with constitutional and statutory directives." *Tellier v. Fields*, 280 F.3d 69, 85–86 (2d Cir. 2000), *citing Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The record is replete with allegations that Hasty and Sherman affirmatively knew that their actions were unconstitutional and contrary to BOP policy. Hasty and Sherman received "regular written updates [that] included summaries of the reason each detainee was arrested, and *all evidence relevant to the danger he might pose to the institution*." FAC ¶ 69 at A-144 (emphasis added). Hasty and Sherman independently recognized "after a few months of interacting" with Plaintiffs and other class members, "that they were not terrorists, but merely immigration detainees." FAC ¶ 74 at A-145. That Defendants could have reasonably believed it lawful to hold these civil detainees in restrictive conditions for so long is belied by

the document they prepared, falsely claiming that the executive staff at MDC "had classified the 'suspected terrorists' as 'high security' based on an individualized assessment of their 'precipitating offense, past terrorist behavior, and inability to adapt to incarceration,'" when in reality none of the MDC Defendants saw or considered information in any of these categories in deciding to place or keep the 9/11 detainees in restrictive confinement. *Id*.

For these reasons, Hasty and Sherman cannot evade potential liability at the pleading stage.

IV. The Panel's Decision on Plaintiffs' § 1985(3) Conspiracy Claim Is Consistent with Supreme Court Precedent

Finally, Defendants Hasty and Sherman argue they are entitled to qualified immunity on Plaintiffs' conspiracy claim, and that the panel's decision in allowing this claim is inconsistent with *Davis v. Scherer*, 468 U.S. 183 (1984) and *Elder v. Holloway*, 510 U.S. 510 (1994). *See* Hasty Pet. at 14–15; Sherman Pet. at 15 n. 4.[10] They argue that, even if it was clear in 2001 that federal officials could not deprive a person of his equal protection rights, the illegality of conspiring to do so was not clear, as it was not clearly established whether 42 U.S.C. § 1985(3) applied to federal officials. *Id.* Neither *Davis* nor *Elder* leads to such a conclusion.

[10] Defendant Hasty also argues "there is no basis to infer discriminatory intent." Hasty Pet. at 14 and n.2. Hasty merely disputes the plausible allegations of the complaint, and he ignores other allegations, including those allegations noted in the panel's decision (*see* Op. at 102).

In *Davis*, the Supreme Court held that an official's violation of a *state* regulation that was not itself the basis of the suit—and was "irrelevant to the merits" of the underlying constitutional claim—was not determinative of the official's entitlement to qualified immunity. 468 U.S. at 191–96. The Supreme Court emphasized its cases "had made clear that, under the 'objective' component of the good-faith immunity test, an official would not be held liable in damages under § 1983 unless the *constitutional right* he was alleged to have violated was 'clearly established' at the time of the violation." *Id.* at 194 (internal quotations and citations omitted) (emphasis added).

In *Elder*, the Supreme Court clarified the correct inquiry, explaining that it "held in *Davis* that an official's clear violation of a state administrative regulation does not allow a § 1983 plaintiff to overcome the official's qualified immunity." 510 U.S. at 515. In other words, an official's violation of "*any* clearly established duty," such as a state regulation, does not defeat qualified immunity for the federal right giving rise to the claim. *See id.*

The panel's decision follows the Supreme Court's rule. The panel concluded that Plaintiffs' rights to equal protection were clearly established, and that federal officials could not have reasonably believed the law allowed them to conspire to violate such rights. Op. at 105. "[W]here the officials' conduct, alleged to have accomplished the discriminatory object of the conspiracy, would violate the Equal

Protection Clause," *Hasty*, 490 F.3d at 177, the officials could not have been reasonable in believing such illegal conduct would be legal if accomplished by conspiracy. This conclusion is consistent with *Davis* and *Elder*.[11]

Defendant Hasty also suggests qualified immunity applies to Plaintiffs' conspiracy claim, because "whether the intra-corporate conspiracy doctrine precludes such a claim" is an "open question." Hasty Pet. at 14. However, whether "Defendants resemble the single policymaking body of a corporation" and can invoke the doctrine (Op. at 104) raises no questions about whether the constitutional rights giving rise to Plaintiffs' claim were clearly established. As the panel correctly concluded, they were.

Conclusion

For all the reasons set forth above, Plaintiffs urge this Court to deny Defendants' Petitions for Rehearing or Rehearing en banc.

[11] This conclusion is also consistent with the circuit court decisions Defendant Hasty cites. *See* Hasty Pet. at 15. None of those cases involved a conspiracy claim. In *Rioux v. City of Atlanta*, 520 F.3d 1269 (11th Cir. 2008) and *Doe v. Delie*, 257 F.3d 309 (3d Cir. 2001), the question was whether the federal right giving rise to plaintiff's claim was clearly established (right to equal protection in *Rioux*, rights under Title IX in *Delie*). In *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447 (9th Cir. 1995), plaintiff asserted his Fourteenth Amendment right to privacy in his medical information but argued that a *state* statute clearly established this federal privacy right. The court, citing *Davis*, concluded the state statute did not clearly establish the federal right giving rise to plaintiff's claim.

Dated: New York, New York
September 11, 2015

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Dated: New York, New York
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Certificate of Service

I hereby certify that on September 11, 2015, I electronically filed the foregoing Combined Response to Defendants' Petitions for Rehearing or Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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