Nos. 15-1358, 15-1359 & 15-1363

IN THE
Supreme Court of the United States

DENNIS HASTY, *et al.*,
Petitioners,

v.

IBRAHIM TURKMEN, *et al.*,
Respondents.

On Petitions for Writs Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF IN OPPOSITION

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(Additional Captions Listed on Inside Cover)

JOHN D. ASHCROFT, *et al.*,

Petitioners,

v.

IBRAHIM TURKMEN, *et al.*,

Respondents.

JAMES W. ZIGLAR,

Petitioner,

v.

IBRAHIM TURKMEN, *et al.*,

Respondents.

QUESTIONS PRESENTED

1. Whether this action, seeking damages from federal officials for violating the constitutional rights to due process of law and equal protection of the laws of persons detained in a federal correctional facility, presents a novel context for the remedy authorized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

2. Whether the detailed factual allegations in this case, which are supported by a Department of Justice Report and specifically exclude the "obvious alternative explanation" that was dispositive in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), state a claim under Federal Rule of Civil Procedure 12(b)(6).

3. Whether selecting certain non-citizens for solitary confinement and other punitive treatment based solely on their race, religion, ethnicity, or national origin, without any basis to suspect a connection to terrorism, violated these individuals' clearly established constitutional rights to due process of law and equal protection of the laws.

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INTRODUCTION

Respondents are non-citizens who were arrested on civil immigration charges and thereafter subjected to the most restrictive conditions of administrative segregation that exist in the federal prison system. *Cf. Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (noting the "terror and peculiar mark of infamy" experienced by prisoners in segregation (quoting *In re Medley*, 134 U.S. 160, 170 (1890))). Although they were detained in the weeks following the tragic attacks of September 11, 2001, Respondents were not actually suspected of terrorism. Nonetheless, under Petitioners' orders, they were treated "*as if* the FBI had reason to believe [they] had ties to terrorist activity," simply because they were (or appeared to be) Arab or Muslim, and were "encountered – even coincidentally – in the course of" a terrorism investigation. App. 36a (emphasis added).[1]

Respondents' allegations are detailed and substantiated. As the court of appeals noted, the Justice Department's own investigation supports the claim that Petitioners "knew of, and approved, [Respondents'] confinement under severe conditions, . . . notwithstanding their knowledge that the government had no evidence linking [them] to terrorist activity." App. 47a-48a. The court of appeals correctly concluded that dismissal on the

[1] "App." refers to the Appendix to the Petition for a Writ of Certiorari filed by Petitioners Ashcroft and Mueller (No. 15-1359).

pleadings would be improper, and that Respondents should be permitted to go forward and attempt to prove their case.

None of the considerations traditionally warranting certiorari are present. There is no circuit split requiring this Court's resolution, and no need to replicate the Second Circuit's careful, fact-bound review of the pleadings. The petitions instead boil down to a request for a new and remarkable form of immunity, one in which the clearly unconstitutional actions of federal officials are untouchable so long as they occur in temporal proximity to a national tragedy. Jarringly, Petitioners insist that they were entitled to hold Arab and Muslim men in the most restrictive conditions "*even 'in the absence of individualized suspicion of terrorist connections*.'" Ashcroft Pet. 23 (quoting App. 141a (Raggi, J., dissenting)) (emphasis added).

The Court should not entertain that request. "The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." *Boumediene v. Bush*, 553 U.S. 723, 798 (2008). Respondents allege that Petitioners knowingly and flagrantly deviated from that framework, without any legitimate justification. Of course, if the evidence does not support those allegations, Petitioners will prevail, potentially before any trial. But if Respondents can prove their allegations that Petitioners targeted them for mistreatment *knowing* that all they were "suspected" of was being a member of a particular race or religion, the talismanic

invocation of national security should not trump accountability before the law.

STATEMENT

Respondents are non-citizens who were detained on civil immigration charges, placed in solitary confinement for periods ranging from three to eight months, and otherwise mistreated before being deported.[2] App. 252a-53a; 280a (Compl. ¶¶ 1-2, 76). Although they were encountered in connection with the 9/11 investigation as a consequence of their ethnic and religious backgrounds, there was never any individualized, non-discriminatory basis to suspect Respondents of terrorism. *Id.* Petitioners nonetheless orchestrated Respondents' detention and mistreatment, knowing that they were subjecting individuals with no ties to terrorism to unnecessary and punitive conditions of confinement. App. 267a, 274a, 276a (Compl. ¶¶ 47, 61, 67).

Respondents filed this lawsuit to seek accountability and redress for this flagrant violation of their clearly established constitutional rights. Following this Court's application of stringent pleading requirements in *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009), Respondents amended their complaint to include detailed factual allegations,

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[2] Petitioners Ashcroft and Mueller assert that *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), also involved claims by "aliens who were arrested for immigration violations." Ashcroft Pet. 2. This is not accurate: unlike Respondents, Mr. Javaid Iqbal was arrested and detained on criminal charges. *Iqbal*, 556 U.S. at 666.

identifying the specific role played by each of the Petitioners and negating the "obvious alternative explanation" the Court had found present in *Iqbal*. In addition to relying on information gathered from earlier stages of discovery in this case and other sources, Respondents bolstered their allegations with two reports of the Justice Department investigating the misconduct at issue. *See* Office of Inspector Gen., U.S. Dep't of Justice, 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 (Apr. 2003), *available at* https://oig.justice.gov/special/0306/full.pdf ("OIG Rep."); Office of Inspector Gen., U.S. Dep't of Justice, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York (Dec. 2003), *available at* http://www.usdoj.gov/oig/special/0312/final.pdf ("Supp. OIG Rep."); *see also* App. 253a-54a (Compl. ¶¶ 3 n.1, 5 n.2) (incorporating by reference the two OIG reports except to the extent contradicted by allegations of the complaint).

The Second Circuit agreed that Respondents stated plausible claims for relief that should be permitted to move forward.

A. Round-Up Of Middle Eastern Men Irrespective Of Individualized Suspicion Of Terrorism

The United States suffered tragic terrorist attacks perpetrated by Al Qaeda on September 11, 2001 ("9/11"). In the wake of these attacks, the Federal Bureau of Investigation ("FBI") set up a tip

line for civilians to supply information. App. 265a (Compl. ¶ 40). Ninety-six thousand "tips" were received in the first week, most of them involving nothing more than generic suspicions of Arabs and Muslims. *Id.*; *see also* OIG Rep. 16-17. For example, one of the original plaintiffs in this case "came to the FBI's attention when his landlord called the FBI's 9/11 hotline and reported 'that she rented an apartment in her home to several Middle Eastern men, and she would feel awful if her tenants were involved in terrorism and she didn't call.'" App. 8a n.9 (quoting App. 334a (Compl. ¶ 251)).

Petitioner Robert Mueller, then the Director of the FBI, ordered each of those tips investigated, even if the sole basis of "suspicion" was the individual's religion, ethnicity, country of origin, or race. App. 265a (Compl. ¶ 40). Petitioner John Ashcroft, then the Attorney General, directed Mueller to vigorously question any male aged 18 to 40 from a Middle Eastern country whom the FBI learned about. App. 265a (Compl. ¶ 41). He further instructed the Immigration and Naturalization Service ("INS"), headed by then Commissioner Petitioner James Ziglar, to round up every immigration violator who fit this profile. *Id.*

Ashcroft, Mueller, and Ziglar (together, the "DOJ Petitioners") understood and expected that their directives would sweep up many individuals in the targeted religious and ethnic groups with no reason to suspect them of terrorism. Indeed, each of them received daily reports of the arrests and detentions and were aware of the lack of information tying Respondents to terrorism. App. 265a, 267a-268a, 275a (Compl. ¶¶ 41, 47, 63-64).

One important aspect of the investigation that the DOJ Petitioners learned about in October 2001 was a list of individuals designated "of interest" to the 9/11 investigation by the New York field office of the FBI (the "New York List"). App. 267a-68a (Compl. ¶¶ 44, 47). They learned that individuals were placed on the New York List without vetting, and "without a determination by any FBI or other law enforcement officer that the non-citizen had engaged in any suspicious behavior, or identification of any reason to believe [that] the individual had information about terrorism or was involved in the 9/11 attacks." *Id.*; *see also* OIG Rep. 41-42, 53-57. Despite knowing of these flaws, Ashcroft ordered that everyone on this list be treated as "of interest" to the broader terrorism investigation, with the restrictive treatment that followed. *Id.* He made this decision despite significant internal criticism. *Id.*

As a result of the sweeps, at least 762 men were arrested, far exceeding the capacities of federal detention centers in the New York area. App. 268a (Compl. ¶ 49); OIG Rep. 20. Accordingly, many detainees were sent to non-federal facilities, but 84, including Respondents, were sent to the Metropolitan Detention Center ("MDC"), a federal jail in Brooklyn. OIG Rep. 111.

B. Harsh And Punitive Conditions Of Detention

In the weeks after 9/11, Petitioners Ashcroft and Mueller "met regularly with a small group of government officials in Washington and mapped out ways to exert maximum pressure" on the men

arrested as a result of their orders. App. 274a-75a (Compl. ¶ 61); *see also* OIG Rep. 39-40. The group decided to restrict detainees' ability to contact the outside world and delay their immigration hearings. App. 274a-75a (Compl. ¶ 61); *see also* OIG Rep. 19-20, 112-13. The DOJ Petitioners also directed that officers responsible for interacting with the detainees be told that they were suspected terrorists who "needed to be encouraged *in any way possible* to cooperate." App. 274a-75a (Compl. ¶ 61) (emphasis added).

Since Respondents' contact with the outside world could not be restricted in a general population unit at the MDC, Respondents were placed in an Administrative Maximum Special Housing Unit ("ADMAX SHU"). App. 276a-277a (Compl. ¶ 68). The ADMAX SHU was a solitary confinement unit[3] with the harshest conditions in the federal prison system, including: 23 to 24 hour-a-day lockdown in a cell; handcuffs, shackles, a waist chain, and the physical grip of at least three guards whenever a detainee was taken from his cell; redundant and humiliating strip searches; heavy restrictions on all forms of communication; denial of recreation; inadequate provision of hygiene and religious items;

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[3] Consistent with many "solitary" confinement units, some of the 9/11 detainees had cellmates. *See* U.S. Dep't of Justice, Report and Recommendations Concerning the Use of Restrictive Housing (Final Report), at 3 (Jan. 2016), *available at* https://www.justice.gov/dag/file/815551/download (noting that the term "solitary confinement" is defined by segregation from the general prison population, and lockdown in a cell, alone or with one other prisoner ("double-celling"), for 22 hours or more per day).

constant light in their cells; sleep deprivation; exposure to temperature extremes; and interference with religious practice. App. 279a-282a, 292a-300a (Compl. ¶¶ 76, 79, 83, 112-39); *see also* OIG Rep. 118-119, 152-56; *id.* at 121-24 (photographs of the ADMAX SHU). These conditions were prepared and imposed at the direction of Petitioners Dennis Hasty, then Warden of the MDC, and James Sherman, then Associate Warden for Custody (together, the "MDC Petitioners"). App. 279a-80a (Compl. ¶¶ 75-76).

Respondents were also abused in various ways by MDC guards (App. 290a (Compl. ¶105)), who had been informed that Respondents were connected to the September 11 attacks (App. 274a-75a (Compl. ¶ 61)). Petitioner Hasty facilitated this abuse by referring to Respondents as "terrorists" among MDC staff, barring them from normal grievance and oversight procedures, and purposely avoiding the unit. App. 280a-81a, 301a (Compl. ¶¶ 77, 140). As a result, correctional officers at MDC engaged in widespread and patterned physical, verbal, and religious abuse of the detainees, including slamming the handcuffed and shackled detainees into the wall during transports (breaking Respondent Mehmood's hand), stepping on their shackles and twisting their hands and fingers, calling them "fucking Muslims" and "camels," and shouting to interrupt prayer. *See* App. 290a-92a, 300a, 307a (Compl. ¶¶105, 109-10, 136, 162); *see also* Supp. OIG Rep. 28, 30. Though Hasty sought to avoid witnessing the implementation of his policies, he was made aware of the abuse nonetheless. App. 259a-60a (Compl. ¶ 24). Petitioner Sherman was frequently present on the ADMAX unit, yet he too failed to correct the abuses

he witnessed or learned of. App. 260a (Compl. ¶ 25). Videotapes that likely showed abuse were destroyed. App. 291a (Compl. ¶ 107); *see also* Supp. OIG Rep. 41-42.

Like the original decision to round them up in connection with the 9/11 investigation, Respondents' assignment to the ADMAX SHU was not based on any indication of a connection to terrorism. App. 253a-54a (Compl. ¶ 4). Petitioner Ashcroft ordered that respondents were to be held in these conditions (and their deportations delayed) until they were cleared of any connection to terrorism. App. 270a, 274a (Compl. ¶¶ 55, 61). Petitioner Mueller oversaw the clearance operation, and would not authorize release of Respondents even after the New York field office cleared them, awaiting a CIA name check. App. 271a (Compl. ¶ 57). Respondents and others languished for months in solitary confinement even after they had been cleared. *Id.*

C. Respondents' Experiences

Respondents' arrests and subsequent treatment were consistent with a general pattern identified by the Justice Department's Office of the Inspector General. *See* OIG Rep. 40-42.

Respondents Ahmer Iqbal Abbasi and Anser Mehmood are Pakistani Muslims related by marriage. App. 256a (Compl. ¶¶ 13, 14). Both came to the attention of the FBI through an anonymous tip that a false social security card had been left at the New Jersey Department of Motor Vehicles by a "male[,] possibly Arab" using Abbasi's address; the card was left by a houseguest of Abbasi, but Abbasi was arrested for an immigration violation as a result.

App. 302a, 305a (Compl. ¶¶ 143, 152). While arresting Abbasi, the FBI came across the name of his sister Uzma, Mehmood's wife. App. 306a (Compl. ¶ 158). Uzma was caring for their infant son, so Mehmood requested that he be arrested in her place, and the FBI agreed, telling Mehmood that he faced only minor immigration charges and would be released shortly. App. 306a-07a (Compl. ¶ 159). Both Abbasi and Mehmood were detained for four months in the ADMAX SHU. App. 307a, 310a (Compl. ¶¶ 162, 170).

Respondent Benamar Benatta is an Algerian Muslim. App. 256a-57a (Compl. ¶15). He was detained by Canadian officials before September 11 while trying to enter Canada from the United States to seek refugee status (which was later granted). *Id.*; App. 310a-11a (Compl. ¶¶ 172-73). On September 12, 2001, Canadian officials reported Benatta's profile and presence in Canada to the FBI, and transported him to the United States. App. 310a-11a (Compl. ¶ 173). Benatta was detained in the ADMAX SHU for over seven months. App. 311a, 315a-16a (Compl. ¶¶ 174-75, 188). The conditions there had a profound effect on Benatta's mental health; while in custody he twice made serious attempts to injure himself. App. 312a-14a (Compl. ¶¶ 179-82).

Respondent Ahmed Khalifa is a Muslim from Egypt who came to the United States for a vacation from his medical studies. App. 257a, 318a (Compl. ¶¶ 16, 194). He and his roommates were arrested on immigration charges following a tip that several Arabs living at Khalifa's address were renting a post-office box, and perhaps sending out large quantities

of money. App. 318a (Compl. ¶ 195). He was detained in the ADMAX SHU for close to four months. App. 318a-19a, 322a (Compl. ¶¶ 197, 211).

Respondent Saeed Hammouda is also an Egyptian Muslim. He is the only respondent who still does not know what led to his arrest and detention. App. 257a (Compl. ¶ 17). He was held in the ADMAX SHU for eight months. App. 324a, 327a (Compl. ¶¶ 217, 227).

Respondent Purna Raj Bajracharya is a Nepalese Buddhist who overstayed a visitor visa to work in the United States and send money home to his wife and sons in Nepal. App. 257a, 327a (Compl. ¶¶ 18, 229). He came to the attention of the FBI when filming New York streets to show his wife and children. App. 328a (Compl. ¶ 230). A Queens County District Attorney's office employee told the FBI that an "Arab male" was videotaping outside a building that contained offices of the DA and the FBI, leading to Bajracharya's arrest and detention in the ADMAX SHU for three months. App. 328a, 329a, 332a (Compl. ¶¶ 232, 234, 244).

Others swept up in the 9/11 detentions who did not fit Ashcroft's profile had very different experiences. For example, five Israelis detained for allegedly celebrating on 9/11 were held in the MDC, but were allowed visits before Respondents or any other detainees, and were among the first released from the ADMAX SHU, without a clearance letter from FBI headquarters. App. 266a (Compl. ¶ 43). Other obviously non-Arab and non-Muslim arrestees were released immediately. *Id.*

D. Decision Below

This *Bivens* action was filed by a different group of plaintiffs in April 2002, who had been detained at the MDC (the "MDC Plaintiffs") or the Passaic County Jail (the "Passaic Plaintiffs"). Following amendments, plaintiffs asserted claims on behalf of themselves and a putative class against thirty-one individual defendants, as well as claims against the United States.[4]

The district court dismissed plaintiffs' challenges to their detention and its duration, but allowed their conditions-of-confinement claims to proceed. *Turkmen v. Ashcroft*, No. 02 CV 2307, 2006 WL 1662663 (E.D.N.Y. June 14, 2006). Both sides appealed, and during the appeal the MDC Plaintiffs settled their claims against the United States for $1.26 million, agreeing to withdraw their claims against the individual defendants. The court of appeals (finding that the appeal was not moot) affirmed the dismissal of the unlawful detention claims, and remanded for the district court to consider leave to amend the complaint to add new MDC plaintiffs, and to satisfy the pleading standard articulated in *Iqbal*. *Turkmen v. Ashcroft*, 589 F.3d 542 (2d Cir. 2009).

Following the amendments and joinder of Respondents, the defendants again moved to dismiss. The district court dismissed all claims by the Passaic Plaintiffs as well as Respondents' claims against

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[4] Plaintiffs sought class certification in 2005, but the motion was stayed.

Petitioners Ashcroft, Mueller, and Ziglar. The court denied the other defendants' motions. Respondents, the Passaic Plaintiffs, and Petitioners Hasty and Sherman, appealed.

The court of appeals affirmed the dismissal of the Passaic Plaintiffs' claims, but held that Respondents' claims survived the motions to dismiss. Although the DOJ Petitioners did not challenge the existence of a *Bivens* remedy on appeal (App. 21a), the Second Circuit addressed the issue, holding that a claim of punitive treatment in federal detention "stands firmly within a familiar *Bivens* context." App. 25a.

The court of appeals next canvassed the voluminous allegations and found that Respondents "plausibly plead" constitutional violations. The complaint alleged that the DOJ Petitioners were "aware" that immigration detainees were "being detained in punitive conditions of confinement in New York," and also knew that "there was no suggestion that those detainees were tied to terrorism except the fact that they were, or were perceived to be, Arab or Muslim." App. 31a-32a. The court concluded that the OIG Report "supports the reasonable inference that [the lack of suspicion for many detainees], known by other DOJ officials, came to the attention of the DOJ [Petitioners]." App. 37a. Without "individualized suspicion," the harsh conditions imposed on Respondents were "arbitrary or purposeless" in violation of the Due Process Clause. App. 58a.

The court of appeals likewise concluded that the allegations stated a plausible claim to relief under the Equal Protection Clause. The complaint

and OIG Report "g[a]ve rise to . . . reasonable inferences" that the FBI in New York targeted individuals "based on race, ethnicity, religion and/or national origin," and Petitioners knowingly merged the New York List with the nationwide list, subjecting individuals suspected of nothing to face the challenged conditions of confinement. App. 61a; *see also* App. 80a-81a. "[U]nlike in *Iqbal*, there was no legitimate reason to detain [Respondents] in the challenged conditions," and thus "no obvious, more likely explanation" for Petitioners' actions. App. 65a-66a.

The Second Circuit recognized that "[d]iscovery may show that" Petitioners "are not personally responsible for detaining [Respondents] in [the alleged] conditions," or that "national security concerns motivated the [Petitioners] to take action." App. 84a-85a. But "at this stage," the court could not conclude that individuals "caught up in the hysteria" by reasons of their "perceived faith or race" could constitutionally be subjected to "[t]he suffering [they] endured." *Id.* Without further development of the facts, the court of appeals could not assume that "violation[s] of the constitutional rights on which this nation was built" were justified. App. 85a.

REASONS FOR DENYING THE PETITIONS

I. Respondents' *Bivens* Claims Arise In A Familiar Context That Does Not Warrant Review.

Petitioners ask this Court to adopt striking new limitations on a traditional *Bivens* action challenging unconstitutional conditions of

confinement in a federal prison. Their crabbed approach to *Bivens* is not justified by decisions of this Court or supported by any of the circuit authority they cite. The Second Circuit's recognition of a *Bivens* remedy in this case does not merit review.

The basis of Respondents' claims is that Petitioners subjected them to harsh and punitive conditions of confinement in violation of their substantive due process and equal protection rights. The availability of *Bivens* claims for such constitutional violations is well-settled. *See Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) ("[W]e have allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause." (citing *Davis v. Passman*, 442 U.S. 228 (1979))); *Corr. Servs. 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"); *Dickerson v. United States*, 530 U.S. 428, 441-42 (2000) (describing a *Bivens* substantive due process claim as "available" for FBI misconduct during custodial interrogation); *Sell v. United States*, 539 U.S. 166, 193 (2003) (Scalia, J, dissenting) (*Bivens* action "is available to federal pretrial detainees challenging the conditions of their confinement").

The Second Circuit did not hold that a *Bivens* claim is automatically available so long as the right, framed at a high level of generality, has been previously recognized. Rather, the court recognized that the right *and* the "mechanism of injury" must be familiar, leaving ample basis for courts to pause

before endorsing exotic new theories. App. 27a; *see Chappell v. Wallace*, 462 U.S. 296, 300-04 (1983) (novel mechanism of injury involving the military chain of command); *Minneci v. Pollard*, 132 S. Ct. 617 (2012) (novel mechanism of injury involving private prison employee). Here, however, the mechanism of injury is familiar: by treating Respondents as suspected terrorists when they had no grounds for suspicion beyond race or religion, Petitioners mistreated federal prisoners, imposing "punitive conditions [of confinement] without sufficient cause." App. 25a; *see, e.g.*, *Carlson v. Green*, 446 U.S. 14, 17-20 (1980).

Petitioners disagree. They would have this Court reject *Bivens* liability for a familiar constitutional claim based on a familiar mechanism of injury, because previous *Bivens* decisions of this Court have not concerned the same class of plaintiffs (immigration detainees) or precisely the same factual circumstances (putative connection to a terrorism investigation). They would even erect a new form of immunity against *Bivens* claims for high-level officials who make a "policy" decision to violate the Constitution. This effort to slice and dice a *Bivens* claim has no foundation in this Court's precedents.

Notably, this Court in *Iqbal* questioned one novel *Bivens* claim (for First Amendment violations) *without* doubting the viability of an equal protection claim for mistreatment of detainees directed by high-level officials in the post-9/11 investigation. 556 U.S. at 669, 675. Indeed, this Court has had several opportunities to question *Bivens*' application to facts similarly distinct from prior *Bivens* cases, and has

not done so. *See Ashcroft v. al-Kidd*, 563 U.S. 731 (2011) (raising no question as to availability of *Bivens* Fourth Amendment challenge to pretextual detention as material witness); *Will v. Hallock*, 546 U.S. 345 (2006) (raising no question as to availability of *Bivens* claim for deprivation of property without due process); *Groh v. Ramirez*, 540 U.S. 551 (2004) (raising no question as to availability of *Bivens* Fourth Amendment unlawful search claim); *Wilson v. Layne*, 526 U.S. 603 (1999) (raising no question as to availability of *Bivens* Fourth Amendment challenge to media involvement in execution of search warrant);[5] *Farmer v. Brennan*, 511 U.S. 825 (1994) (raising no question as to availability of *Bivens* Eighth Amendment failure to protect claim). While Petitioners emphasize this Court's reluctance to "extend" *Bivens* into "any new context" (Ashcroft Pet. 13; Hasty Pet. 15; Ziglar Pet. 22), they ignore the many times this Court has allowed an application of *Bivens* to new facts to pass unremarked.[6]

Apart from these basic flaws in Petitioners' attempt to narrowly re-define "context," their specific

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[5] These Fourth Amendment decisions make it all the more remarkable that Petitioners Hasty and Sherman, going beyond the DOJ Petitioners' arguments, argue that repeated and abusive strip searches present a new context to which *Bivens* should not be extended. Hasty Pet. 22, 26.

[6] During this same period, the Court repeatedly questioned the availability of a *Bivens* First Amendment claim. *See Iqbal,* 556 U.S. at 675; *Wood v. Moss*, 134 S. Ct. 2056, 2066 (2014); *Reichle v. Howards*, 132 S. Ct. 2088, 2093 n.4 (2012).

reasons why *Bivens* should not apply to the facts of this case are unpersuasive.

1. *"Immigration" Context.* Petitioners assert that no *Bivens* remedy should be recognized because Respondents' claims "implicate . . . immigration." Ashcroft Pet. 17. That is an odd way of describing a case that does not challenge any immigration proceeding or raise any question of immigration law. Respondents object to their mistreatment in custody, which had nothing to do with their immigration proceedings. What Petitioners mean is that this case implicates *immigrants*, and that non-citizens who are mistreated in a federal prison present a distinct "context" and should be denied a remedy.

But it is well-established that a federal detainee who is mistreated in custody has a *Bivens* claim. *See supra* p. 15. That cannot be the rule for citizens but not non-citizens. As Judge Easterbrook wrote for the *en banc* Seventh Circuit rejecting such a distinction under *Bivens*, "[i]t would be offensive to our allies, and it should be offensive to our own principles of equal treatment, to declare that this nation systematically favors U.S. citizens over Canadians, British, Iraqis, and our other allies when redressing injuries." *Vance v. Rumsfeld*, 701 F.3d 193, 203 (7th Cir. 2012); *see also Hernandez v. United States*, 757 F.3d 249, 276 (5th Cir. 2014) (status as alien not a special factor counseling hesitation before recognizing *Bivens* remedy), *rev'd on other grds,* 785 F.3d 117 (5th Cir. 2015) (en banc).

Petitioners rely on three inapposite cases that arose from immigration proceedings. These cases took care *not* to imply that a non-citizen immigration

detainee has no *Bivens* conditions-of-confinement remedy. *See De La Paz v. Coy*, 786 F.3d 367, 373-74 (5th Cir. 2015) (acknowledging and distinguishing prior *Bivens* cases addressing physical abuse of non-citizens in immigration detention); *Alvarez v. U.S. Immig. and Customs Enf.,* 818 F.3d 1194, 1208 n.6 (11th Cir. 2016) (distinguishing *Turkmen* conditions-of-confinement challenge)*; Mirmehdi v. United States*, 689 F.3d 975, 979-80, 986 (9th Cir. 2012) (Silverman, J, concurring) (emphasizing that the "case does not present the issue of whether illegal immigrants could *ever* bring a *Bivens* action"). Of critical importance in these cases was that the plaintiffs' complaints "[could] be addressed in civil immigration removal proceedings," *De La Paz*, 786 F.3d at 369 – something that is plainly not true for Respondents' claims, which have nothing to do with their removal. Whether or not the Immigration and Naturalization Act offers an adequate alternative remedy in cases to which it applies, it has no application here. *Cf. Minneci v. Pollard*, 132 S. Ct. 617, 620 (2012) (highlighting the availability of "adequate alternative damages action" as the reason for not extending *Bivens* to a new context). Notably, although the Solicitor General here suggests that the decision below contradicts *De La Paz*, elsewhere he has expressly acknowledged that it "does not conflict with *Turkmen*." Br. in Opp., *De La Paz v. Coy*, No. 15-888, 2016 WL 2866091, at *28 (May 13, 2016).

2. *"National Security" Context.* Petitioners also argue that the instant claims present a new "context" that should be excluded from *Bivens* because they "implicate . . . national security." Ashcroft Pet. 17. That characterization is misleading

and requires Petitioners to contradict the complaint: a fundamental allegation is that Respondents were detained in restrictive conditions even though Petitioners knew there was no reason to suspect them of any connection to terrorism. Respondents complain of their domestic detention under conditions of confinement directed by the Justice Department and implemented in the federal Bureau of Prisons, imposed notwithstanding the lack of any evidence tying them to terrorism. Applying well-established constitutional rules to such mistreatment is a familiar task for federal courts, not a novel "context."

When courts have declined to extend *Bivens* to the "national security" context, they have meant something much more specific. Petitioners misleadingly claim that other circuits have rejected *Bivens* claims concerning the treatment of "federal detainees" in a "range of sensitive contexts," Ashcroft Pet. 16, but omit a crucial fact: these cases involve *military* detention. *Vance*, 701 F.3d at 198-203 (wartime torture by military contractors in Iraq); *Doe v. Rumsfeld*, 683 F.3d 390, 393-397 (D.C. Cir. 2012) (wartime torture by military personnel in Iraq); *Lebron v. Rumsfeld*, 670 F.3d 540, 552-556 (4th Cir. 2012) (abuse of enemy combatant held in military custody in United States); *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011) (wartime torture by military personnel in Iraq and Afghanistan); *Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (torture of Guantanamo detainees by military personnel).

In each of these cases, the mechanism of injury was abuse in military detention, which presents a different context than abuse in a Bureau

of Prisons facility in New York. Similarly, in *Meshal v. Higgenbotham*, 804 F.3d 417, 424 (D.C. Cir. 2015), the mechanism of injury was a "[criminal] terrorism investigation conducted *overseas*." *Id.* (emphasis added); *see id.* at 430 (Kavanaugh, J, concurring) ("[N]ever before has a federal court recognized a *Bivens* action for conduct by U.S. officials abroad. *Never*.").

Expanding *Bivens* into a new context justifies an inquiry into special factors counseling hesitation, including those related to national security. But a *Bivens* claim for mistreatment in a federal jail in New York where "punitive conditions [were imposed] without cause" presents no such concerns. App. 24a-25a. If an individual is actually charged and convicted of a terrorist offense, and then mistreated in prison, he would surely have a *Bivens* remedy. *See Carlson v. Green*, 446 U.S. 14 (1980) (recognizing Eighth Amendment *Bivens* claim without considering prisoner's crime of conviction). A pre-trial detainee charged with a terrorist offense, held and abused in the same facility, would also have a *Bivens* claim. *See e.g.*, *Bistrian v. Levi*, 696 F.3d 352 (3d Cir. 2012) (recognizing pre-trial detainee's claim without considering nature of criminal charge); *Thomas v. Ashcroft,* 470 F.3d 491 (2d Cir. 2006) (same); *Papa v. United States*, 281 F.3d 1004 (9th Cir. 2002) (same for immigration detainee). It would be remarkable to conclude that Respondents, who were never actually suspected of anything relating to terrorism beyond sharing a "suspect" race or religion, have no remedy for their mistreatment.

Even if the relationship of this case to the 9/11 investigation were sufficient to transform a

traditional *Bivens* context into a "new" one, there would still be no special factors counseling hesitation. There is no danger of "congressionally uninvited intrusion into military affairs by the judiciary." *Vance*, 701 F.3d at 200 (quoting *Chappell*, 483 U.S. at 683). Petitioners' argument that "national security" is still at issue is circular: they treated Respondents *as though* they raised national security concerns even though they did not, and on that basis claim that "national security" insulates their actions. This Court has warned that "the label of 'national security' may cover a multitude of sins," and that is just what Petitioners attempt here. *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985) (denying absolute immunity to Attorney General in *Bivens* challenge to national security wiretap).

3. *Immunity for "Policymakers."* Finally, Petitioners suggest that high-level officials' "policies" that violate the Constitution are exempt from *Bivens* liability. Ashcroft Pet. 17. This theory has no support, and would lead to plainly untenable results.

Petitioners quote *Malesko* for the proposition that *Bivens* is not "a proper vehicle for altering an entity's policy." 534 U.S. at 74. But they wrest that language from its context. The issue in *Malesko* was not whether *Bivens* applied to constitutional violations done as a matter of policy, but to claims against a non-public *entity*. In deciding that it did not, the Court noted that prisoners at private facilities had access to *both* a tort remedy under state law *and* actions for injunctive relief to alter the prison's policies. *Id.* at 72-74. Nowhere did the Court suggest that a plaintiff with no alternative remedy could lose access to *Bivens* simply because

the constitutional violation was done as a matter of policy.[7]

Petitioners' suggestion is especially unfounded in light of this Court's approach to *Iqbal*. There too the plaintiff sued the former Attorney General and FBI director, but the Court never intimated that these officials' "policymaking" responsibilities immunized them from a *Bivens* claim. To the contrary, the Court cast doubt on only one of two *Bivens* claims in the case, for a First Amendment violation, while indicating that an Equal Protection *Bivens* claim against those defendants was proper. 556 U.S. at 675; *see also Carlson v. Green*, 446 U.S. 14, 19 (1980) ("Petitioners [including the director of the BOP] do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate.").

Barring *Bivens* suits for clearly unconstitutional policies would effectively grant high-ranking officials absolute immunity – the opposite of what this Court decided in *Mitchell*. 472 U.S. at 522-23 (refusing Attorney General's request for absolute immunity from *Bivens* claim). High-level officials act by setting policy. When the Attorney General orders his subordinates to engage in racial or religious profiling, or to hold immigration

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[7] Petitioners (Ashcroft Pet. 18) also quote *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc), which merely *questioned* whether status as a policymaker might qualify as a special factor. It does not hold or even suggest that all decisions by high-ranking officials are "executive policy" that are immune from *Bivens*. *Id.* at 574.

detainees in solitary confinement as if they were terrorists without any suspicion that they are, he may be setting "policy," but he is also a federal officer violating clearly established constitutional rights. If anything, it is even *more* vital to our system of government to ensure accountability for the high-ranking official who orders clearly unconstitutional treatment, and not just lower-level "rogue" officers. *See Butz v. Economou*, 438 U.S. 478, 505-506 (1978) ("It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house in pursuit of evidence, but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority."). In asking for immunity nonetheless, Petitioners would have this Court abandon the principle that "[n]o man in this country is so high that he is above the law." *United States v. Lee*, 106 U.S. 196, 220 (1882).

* * *

Respondents' claims reside firmly in the *Bivens* heartland. The court of appeals' recognition of their *Bivens* remedy "provide[s] an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally," *Malesko*, 534 U.S. at 70 (emphasis omitted), and the federal courts have extensive expertise in evaluating the claims in question. *See Davis,* 442 U.S. at 245; *Wilkie v. Robbins*, 551 U.S. 537, 554 (2007). Petitioners' objections are supported by no decision of this Court, and implicate no split of authority among the circuit courts. Review of the Second Circuit's application of *Bivens* to the facts of this case is unnecessary.

II. The Court Of Appeals' Fact-Intensive Evaluation Of The Pleadings Does Not Warrant Review.

Petitioners further argue that this Court should grant review because they disagree with the court of appeals' application of well-established pleading requirements. That fact-bound decision does not warrant review, and in any event is correct.[8]

Respondents allege – with specificity, and with support from the Justice Department's OIG Report – that Petitioners knowingly subjected them to unnecessary, punitive, and discriminatory conditions of confinement. Specifically, they allege that the DOJ Petitioners personally devised a plan to hold Arab and Muslim immigration detainees in unnecessarily restrictive conditions, knowing that there was no reason to suspect many such detainees (including Respondents) of any connection to terrorism. App. 265a-68a, 274a, 276a (Compl. ¶¶ 39-44, 47 61, 67). And they allege that the MDC Petitioners implemented that strategy of treating Respondents as if they were terrorists by subjecting them to cruel mistreatment. App. 276a-81a (Compl. ¶¶ 68-78.

Petitioners disagree with the Second Circuit's carefully reasoned conclusion that Respondents'

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[8] Petitioners address qualified immunity before assessing the sufficiency of the pleadings. Their apparent reason for doing so is that a key to their plea for immunity is ignoring the actual allegations in the complaint. *See infra* § III. Respondents begin with the logically prior question of the adequacy of the allegations.

detailed factual allegations state a plausible claim, attempting to pick apart the "premises" of the court of appeals' decision. Ashcroft Pet. 28-29. What Petitioners deride as speculative "premises" are actually factual allegations and reasonable inferences – ones not present in *Iqbal* – which must be "accepted as true." *Iqbal*, 556 U.S. at 678:

- The first "premise" Petitioners criticize is that Petitioners "made or approved the decision to merge" the New York List into the broader INS Custody List. Ashcroft Pet. 28. That premise is based on the Complaint. App. 267a-68a (Compl. ¶ 47).
- The second "premise" Petitioners criticize is that they acted despite knowing that the list included individuals detained "because of their ethnicity or religion . . . without a determination that there was a reason to suspect them of links to terrorism." Ashcroft Pet. 28. That premise is based on the Complaint. App. 265a, 275a-76a (Compl. ¶¶ 41, 63-64, 67); *see also* OIG Rep. 45, 47 ("soon became evident that many of the people arrested" were not suspected of ties to terrorism).
- The third and fourth "premises" Petitioners criticize are that they knew that some detainees "were being detained in the ADMAX SHU," and that they knew how restrictive such detention was. Ashcroft Pet. 28. Those premises are also based on the Complaint. App. 275a-76a (Compl. ¶¶ 61, 65, 67); *see also* OIG Rep. 2, 5, 19-20, 112-13 (further support that high-level DOJ officials were aware of

detention in the ADMAX SHU). Given the unusually close attention Petitioners paid to detainees such as Respondents, it would have been "implausible [that] they did *not*" know. App. 38a (emphasis altered).[9]

Unable to deny that these "premises" are supported by the Complaint, the OIG Report, and the reasonable inferences to which a plaintiff is entitled on a motion to dismiss, Petitioners attempt to minimize them as "pure speculation," and question whether they are based on personal knowledge. Ashcroft Pet. 29 (quoting App. 129a (Raggi, J., dissenting)); Ziglar Pet. 33 (quoting App. 120a (Raggi, J., dissenting)). That is not the standard. This Court has emphasized that specific factual allegations cannot be ignored simply because "actual proof of those facts [seems] improbable," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007), or even "extravagantly fanciful," *Iqbal*, 556 U.S. at 681, to the reviewing judge.

The problem in both *Twombly* and *Iqbal* was that the plaintiffs had failed to plead facts which would "ten[d] to exclude" an alternative "explanation for defendants'" conduct. *Twombly*, 550 U.S. at 552 (citation omitted). In *Iqbal*, the "obvious alternative explanation" the plaintiff had not excluded was a

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[9] Indeed, the DOJ Petitioners' specific decision to restrict Respondents' "ability to contact the outside world" (App. 275a (Compl. ¶ 61)), necessitated restrictive detention of the sort imposed in the ADMAX SHU. *See Mohammed v. Holder*, No. 07-cv-02697, 2011 U.S. Dist. LEXIS 111571, at *6, *20-21 (D. Colo. Sept. 29, 2011) (housing inmates in isolation so that other inmates cannot relay messages for them).

"nondiscriminatory intent to detain aliens who were illegally present in the United States and *who had potential connections to those who committed terrorist acts*." 556 U.S. at 682 (emphasis added). Here, by contrast, Respondents have pleaded facts excluding that explanation: their "well-pleaded allegations, in conjunction with the OIG Report's documentation of events such as the New York List," plausibly plead that the DOJ Petitioners "knew of, and approved, [Respondents'] confinement under severe conditions," "notwithstanding their knowledge that the government had *no evidence linking [Respondents] to terrorist activity*." App. 47a-48a (emphasis added).[10]

Petitioners respond that they intended only to prevent "dangerous individual[s]" from leaving the country. Ashcroft Pet. I, 30. Perhaps the evidence will bear that out. But the Federal Rules do not entitle Petitioners to dismissal simply because they disagree with the detailed allegations in the complaint. Respondents allege that Petitioners imposed on them an especially restrictive form of confinement knowing what those conditions were, (App. 274a-75a (Compl. ¶61)), and knowing that there was no reason to suspect them of terrorism, or anything else that might conceivably justify those constraints (App. 265a (Compl. ¶ 41)). In other words, the complaint specifically alleges that

[10] It is misleading to say, as Petitioners do, that the court of appeals rejected Respondents' theory of liability and created its own. The list merger which the court of appeals emphasized has been part of Respondents' case since the Complaint was filed in 2010. *See* App. 267a-68a (Compl. ¶ 47).

Respondents were not, and Petitioners *knew* that they were not, "dangerous individual[s]."[11]

Petitioners also accuse the Second Circuit of imposing *respondeat superior* liability based on the discriminatory purpose of their subordinates. Ashcroft Pet. 30. Again, Petitioners simply have a factual disagreement with the pleadings and with the inferences that should be drawn. Few will readily admit to discriminatory or otherwise improper intent, so it is commonplace to resort to reasonable inferences at the pleading stage. It was certainly appropriate for the court of appeals to infer a discriminatory motive from Petitioners' own decision to knowingly subject detainees to unduly harsh treatment, knowing that the only reason for "suspecting" them was their race or religion. App. 39a, 63a-64a.

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[11] Though it is not relevant to these Petitions, Respondents do not agree that there is "no dispute . . . that the restrictive conditions of confinement at the ADMAX SHU could be lawfully imposed on anyone for whom the government had 'individualized suspicion of terrorism.'" Ashcroft Pet. 22 (citation omitted). Nor is this what the court of appeals held. Ashcroft Pet. 7 (citing App. 31a). Likewise, Respondents' detention under the immigration law for purpose of a criminal investigation, long after they could have been deported, was not "undisputedly lawful." Ashcroft Pet. 4. The Second Circuit found no clearly established right to avoid pretextual immigration detention; the constitutionality of the detentions was never determined. *See Turkmen v. Ashcroft*, 589 F.3d 542, 550 (2d Cir. 2009).

III. Petitioners' Request For Qualified Immunity Does Not Warrant Review.

Petitioners seek this Court's review of their equally fact-bound claim of qualified immunity. In evaluating a claim of qualified immunity at the pleading stage, the alleged facts must be considered in the light most favorable to plaintiffs. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The question, therefore, is whether ordering the confinement of civil immigration detainees in highly restrictive conditions for months based on their race, religion, ethnicity or national origin alone, without any individualized basis to find them more dangerous than any ordinary civil detainee (or indeed, dangerous at all), is a violation of clearly established constitutional rights. Unless Petitioners would have this Court resurrect the discredited result of *Korematsu v. United States*, 323 U.S. 214 (1944), the answer is plainly yes.

This Court has, as Petitioners note, cautioned against defining the relevant right at "[too] high [a] level of generality," such as the "general proposition . . . that an unreasonable search or seizure violates the Fourth Amendment." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). But Petitioners make the opposite mistake, believing that "official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (Court need only find that "[t]he contours of the right . . . [are] sufficiently clear that a reasonable official would understand that what he was doing violates that right"). Petitioners would have this

Court define the legal rights at issue so narrowly as to be virtually coterminous with the precise facts of the case.[12] At the same time, Petitioners' descriptions of the right at issue minimize or directly contradict the allegations in the complaint. Petitioner Ziglar, for example, frames the issue in distinctly Orwellian terms: whether he was entitled to subject to harsh treatment civil detainees "not *yet* linked to any terrorist activity." Ziglar Pet. 30 (emphasis added).

Few legal rules are as securely and precisely established as the prohibition on deprivations of rights motivated by race, religion, ethnicity or national origin. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). That rule is no less applicable in the prison and law enforcement contexts, and it demands that officers act on the basis of their suspicions of an individual, not a race or religion. *See Johnson v. California*, 543 U.S. 499, 505 (2005) (racial classifications for penological purposes, such as controlling gang activity in prison, are subject to strict scrutiny); *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975) (while law criminalizing illegal entry at the border permits stops based on

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[12] *See, e.g.*, Ashcroft Pet. 22-23 (arguing that the qualified immunity question is "whether all aliens on the New York List (each of whom has been legally arrested and detained in conjunction with the September 11 investigation) had a clearly established right to be immediately released from restrictive conditions of confinement merely because it came to light that, in some instances, arresting officers had failed to conduct the same initial vetting that detainees on the national INS list had received").

reasonable suspicion of alienage, law enforcement need "does not justify stopping all Mexican-Americans to ask if they are aliens"); *Whren v. United States*, 517 U.S. 806, 813 (1996) ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race."); *Batson v. Kentucky*, 476 U.S. 79, 98 (1986) (state must have individualized, non-race-based reason for striking juror).

It is just as well-settled that prisoners have a substantive due process right to be free from "arbitrary or purposeless" conditions of confinement – that is, conditions not "reasonably related" to any "legitimate governmental objective." *Bell v. Wolfish*, 441 U.S. 520, 539 (1979). Prisons may have good cause to impose non-punitive "regulatory restraints" across the board, *id*. at 537, 558-60, but that does not allow federal officials to selectively apply harsh treatment on grounds of race or religion. In arguing that this principle was violated, Respondents do not resort to highly generalized and contested principles like "the history and purposes of the Fourth Amendment." *Al-Kidd*, 563 U.S. at 742 (citation omitted). They simply rely on the concrete framework set forth in *Wolfish*, and the even more fundamental proposition that classifications based on race, religion, ethnicity or national origin are presumptively unconstitutional.

Unable to dispute that holding an immigration detainee who poses no security risk in solitary confinement is clearly unconstitutional, Petitioners insist in vague terms that Respondents' detention

was not "divorced from security concerns." Ashcroft Pet. 25; *see also* Ziglar Pet. 31 (claiming that the issue is whether it was "plainly illegal to detain Respondents"). Petitioners go so far as to claim that it is not arbitrary to hold a civil immigration detainee in solitary confinement for months "*even 'in the absence of individualized suspicion of terrorist connections*.'" Ashcroft Pet. 23 (quoting App. 141a (Raggi, J., dissenting)) (emphasis added). The court of appeals had no trouble recognizing what Petitioners are reluctant to make explicit: such an argument "presumes, in essence, that all out-of-status Arabs or Muslims were potential terrorists until proven otherwise. It is built on a perception of a race and faith that has no basis in fact." App. 45a; *cf. Korematsu*, 323 U.S. at 240 (Murphy, J., dissenting) ("[T]o infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights.").

Petitioners claim that they were justified in "err[ing] on the side of caution" in the wake of 9/11. Ashcroft Pet. 23 (citation omitted).[13] Perhaps they will be able to present evidence that they were merely being justifiably cautious, but "caution" does not justify what is alleged: that Petitioners *knowingly* subjected Respondents to mistreatment *without* having a basis for security concerns, save the clearly impermissible grounds of race or religion.

[13] Notably, Ashcroft did not make a similar suggestion in *al-Kidd* – also a case arising from post-9/11 terrorism concerns.

This Court has rejected the notion that "the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985); *see also Korematsu*, 323 U.S. at 247 (Jackson, J., dissenting) (courts "can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of [executive] policy"); *Patrolmen's Benevolent Ass'n. of City of N.Y. v. City of N.Y.*, 310 F.3d 43, 53-54 (2d Cir. 2002) ("[U]nconditional deference to a government agent's invocation of 'emergency' to justify a racial classification has a lamentable place in our history." (citing *Korematsu*, 323 U.S. at 223)). Petitioners' invitation for the Court to reexamine that fundamental rule-of-law premise should not be accepted.

IV. The Court Should Not Decide This Case At An Early Stage Of Proceedings Without A Nine-Justice Court.

Apart from their unpersuasive claim of a circuit split on one of the three questions presented, Petitioners seek this Court's intervention simply because they disagree with the application of settled law to the facts of this case. That is not a request this Court ordinarily grants.

The subtext of the Petitions is not so much that the questions presented are sufficiently important to warrant review, but that *Petitioners themselves* are sufficiently important. Even if this Court agrees, it does not follow that it should grant review *now*. This Court often postpones review of important questions when they arise in an

"interlocutory posture." *See, e.g.*, *Mt. Soledad Mem. Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (statement of Alito, J., respecting the denial of certiorari). The present case, despite long delays, is at the earliest such posture, denial of a motion to dismiss.

There are sound reasons for the Court to adhere to its cautious approach here. Much of Petitioners' argument, including its legal arguments for restricting *Bivens* liability, depends on their skepticism of Respondents' allegations. For example, this Court might assess Petitioners' plea for a "national security" exception to *Bivens* differently depending on whether they can show some non-racial or religious ground for their treatment of Respondents, or otherwise rebut the allegation that Petitioners knew there was no connection between Respondents and terrorism. Similarly, when this Court evaluates a claim of qualified immunity, "the result depends very much on the facts of each case." *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004). Moreover, anything the Court says on these matters could well influence future officials' "incentives to abide by clearly established law," *Mitchell*, 472 U.S. at 524, including in future "extraordinary times" where "[l]iberty and security [must] be reconciled. . . within the framework of the law." *Boumediene v. Bush*, 553 U.S. 723, 798 (2008). Prudence counsels providing such guidance on a fuller record.[14]

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[14] These considerations are not overcome by the general purpose of qualified immunity to "free officials from the concerns of litigation." Ashcroft Pet. 27 (quoting *Iqbal*, 556 U.S. (continued…)

Yet another reason for declining review at this early stage is that the Court might have to decide the case with an eight-Justice or even seven-Justice Court.[15] In light of the weighty issues implicating both this nation's security and its most core values, this Court should ensure that it can resolve such questions at a time and in a case where it is not short-handed. *Cf. Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184, 1212 (2013) (Thomas, J., dissenting) (criticizing the "fraud on the market" presumption adopted by "four Justices of a six-Justice Court").

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at 685). Before any trial, Petitioners will have an opportunity to move for summary judgment, potentially leading to an appeal and a further opportunity to seek review in this Court. *See Johnson v. Jones*, 515 U.S. 304, 313-19 (1995) (legal issues concerning denial of summary judgment for party claiming qualified immunity are immediately appealable).

[15] Respondents briefly note an unusual aspect of this case. When the Second Circuit considered an earlier appeal in 2009, the panel originally included Justice Sotomayor, who was elevated to this Court and did not participate in the decision. *Turkmen v. Ashcroft*, 589 F.3d 542 (2d Cir. 2009). None of the 2009 plaintiffs remain in the case today. By the time of the remand, the original six MDC Plaintiffs had either settled or withdrawn their claims; the amended complaint presented the claims of a separate group of MDC Plaintiffs who had not been involved in the Second Circuit proceeding. The Passaic Plaintiffs' claims have been dismissed and are not before this Court. *See* Ashcroft Pet. 2 n.1. Respondents' claims are based on a new complaint, and present essentially a distinct case from the original *Turkmen* case (and indeed could have been filed separately rather than as an amendment). Respondents offer no opinion on whether Justice Sotomayor should be recused under these circumstances, but provide this background in the event Justice Sotomayor considers it relevant.

CONCLUSION

For the foregoing reasons, the petitions should be denied.

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