NO.

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES W. ZIGLAR,

Petitioner,

v.

IBRAHIM TURKMEN, AKHIL SACHDEVA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, AND PURNA BAJRACHARYA,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals, in finding that Respondents' Fifth Amendment claims did not arise in a "new context" for purposes of implying a remedy under *Bivens v. Six Unknown, Named Agents Of The Federal Bureau Of Narcotics,* 403 U.S. 388 (1971), err by defining "context" at too high a level of generality where Respondents challenge the actions taken in the immediate aftermath of the attacks of September 11, 2001, by Petitioner James W. Ziglar, then the Commissioner of the United States Immigration And Naturalization Service, the then-Attorney General of the United States, and the then-Director of the Federal Bureau of Investigation regarding the detention of persons illegally in the United States whom the FBI had arrested in connection with its investigation of the September 11 attacks, thereby implicating concerns regarding national security, immigration, and the separation of powers?

2. Did the Court of Appeals, in denying qualified immunity to Petitioner Ziglar for actions he took in the immediate aftermath of the attacks of September 11, 2001, regarding the detention of persons illegally in the United States whom the FBI had arrested in connection with its investigation of those attacks, err: (A) by failing to focus on the specific context of the case to determine whether the violative nature of Mr. Ziglar's specific conduct was at the time clearly established, instead defining the "established law" at the high level of generality that this Court has warned against; and (2) by finding that even though the applicability of 42 U.S.C. § 1985(3) to the actions of federal officials like Petitioner Ziglar was not

clearly established at the time in question, Respondents nevertheless could maintain a § 1985(3) claim against him so long as his conduct violated some other clearly established law?

3. Did the Court of Appeals err in finding that Respondents' Fourth Amended Complaint met the pleading requirements of *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), and related cases, because that complaint relied on allegations of hypothetical possibilities, conclusional assumptions, and unsupported insinuations of discriminatory intent that, at best, are merely consistent with Petitioner Ziglar's liability, but fall short of stating plausible claims?

PARTIES TO THE PROCEEDINGS BELOW

Ibrahim Turkmen, Akhil Sachdeva, Ahmer Iqbal Abbasi, Anser Mehmood, Benamar Benatta, Ahmed Khalifa, Saeed Hammouda, and Purna Raj Bajracharya were plaintiffs and/or plaintiffs-intervenors in the United States District Court for the Eastern District of New York, and appellees-cross-appellants in the United States Court of Appeals for the Second Circuit.

Asif-Ur-Rehman Saffi, Syed Amjad Ali Jaffri, Shakir Baloch, Hany Ibrahim, Yasser Ebrahim, and Ashraf Ibrahim were plaintiffs in the District Court, but none of them participated in the appeals pertinent to this Petition.

Omer Gavriel Marmari, Yaron Shmuel, Paul Kurzberg, Silvan Kurzberg, Javaid Iqbal, Ehab Elmaghraby, and Irum E. Shiekh were intervenors in the District Court, but none of them participated in the appeals pertinent to this Petition.

Petitioner James W. Ziglar, John Ashcroft, and Robert Mueller were defendants in the District Court, and cross-appellees in the Court of Appeals.

Dennis Hasty, Michael Zenk, and James Sherman were defendants in the District Court and appellants in the Court of Appeals.

Salvatore Lopresti was a defendant in the District Court. He filed a notice of appeal from the ruling of the District Court, but when he failed to pay the requisite fee or file a brief in the Court of Appeals, that court dismissed his appeal pursuant to Fed. Rule App. Pro. 31(c).

Joseph Cuciti, Christopher Witschel, Clemett Shacks, Brian Rodriguez, Jon Osteen, Raymond

Cotton, William Beck, Steven Barrere, Lindsey Bledsoe, Howard Gussak, Marcial Mundo, Daniel Ortiz, Stuart Pray, Elizabeth Torres, Phillip Barnes, Sydney Chase, Michael Defrancisco, Richard Diaz, Kevin Lopez, Mario Machado, Michael McCabe, Raymond Mickens, Scott Rosebery, and James Cuffee were defendants in the District Court, but none of them participated in the appeals pertinent to this Petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James W. Ziglar ("Ziglar") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Turkmen v. Hasty,* 789 F.3d 218 (C.A. 2 2015) (Pooler & Wesley, JJ.) (Raggi, J., concurring in the judgment in part and dissenting in part). Pet. App. 1a-156a. The order of the Court of Appeals denying rehearing and rehearing en banc is reported at *Turkmen v. Hasty*, 808 F.3d 197 (C.A. 2 2015)(Katzmann, C.J., not participating)(Pooler & Wesley, JJ., concurring)(Jacobs, Cabranes, Raggi, Hall, Livingston & Droney, JJ., dissenting). Pet. App. 227a-240a. The opinion of the United States District Court for the Eastern District of New York is reported at *Turkmen v. Ashcroft*, 915 F. Supp.2d 314 (E.D.N.Y. 2013)(Gleeson, J.). Pet. App. 157a-226a.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The United States Court of Appeals for the Second Circuit issued its opinion and judgment June 17, 2015. *Id.* at 1a-2a. On December 11, 2015, the Court of Appeals denied Ziglar's petition for rehearing or rehearing en banc. *Id.* at 227a. On February 26, 2016, Justice Ginsburg in her capacity as Circuit Justice for the Court of Appeals for the Second Circuit extended the time for Ziglar to

file his Petition for a Writ of Certiorari to April 11, 2016. On April 4, 2016, Circuit Justice Ginsburg granted Ziglar's second motion to extend time, to May 9, 2016.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are set forth in the Appendix. *Id.* at 241a-243a.

STATEMENT OF THE CASE

The six judges of the Court of Appeals who dissented from the denial of rehearing in this case observed that the panel majority opinion "raise[s] a serious concern" in that it "fail[s] to adhere to controlling Supreme Court precedent," and does so "in three areas of law:" (1) recognition of a *Bivens* remedy; (2) qualified immunity; and (3) pleading standards under *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), and related cases. Pet. App. at 239a. The panel majority's erroneous decision as to each of those areas of law, the rehearing dissenters noted, "raises questions of exceptional importance meriting further review." *Id.* at 232a. The more so given the context in which this case arose.

Petitioner James W. Ziglar held the office of Commissioner of the United States Immigration And Naturalization Service ("INS") when terrorists struck the World Trade Center and other targets September 11, 2001. *Id.* at 3a. He served as INS Commissioner throughout the months immediately following those attacks, the time period relevant to this case and one

of the most extraordinary periods in our nation's history.

At that time, INS was a component of the Department of Justice. *Id.* at 6a-7a. Ziglar thus served under then-Attorney General John Ashcroft and with then-Director of the Federal Bureau of Investigation Robert Mueller in formulating the response to these unprecedented attacks on American citizens on American soil. The perpetrators of these attacks comprised persons who were not U.S. citizens, a number of whom were not legally present in the United States.

Respondents, plaintiffs below, comprise eight persons who, on 9/11, also were not U.S. citizens and also were not legally present in the U.S. During the 9/11 investigation, the United States arrested each of them for immigration violations and detained them for a period of time. *Id.* at 7a-9a. As the case now stands, Respondents have asserted claims on behalf of themselves and a class of similarly-situated persons alleging constitutional torts and seeking money damages under *Bivens v. Six Unknown, Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), and conspiracy under 42 U.S.C. § 1985(3), naming as defendants Ziglar, Ashcroft and Mueller (the "DOJ Defendants"), as well as several employees of the Bureau of Prisons ("BOP") who worked at the Metropolitan Detention Center ("MDC") in New York City where Respondents were detained (the "MDC Defendants".) *Id.* at 9a-10a.

In reversing the District Court and upholding the sufficiency of these claims against the DOJ and MDC Defendants, the Court of Appeals extended the reach of *Bivens* far beyond any context approved by

this Court, deep into the realm of national security, a context at least four other U.S. Courts of Appeals have found inappropriate for implication of a *Bivens* remedy. The Court of Appeals went astray in this regard by analyzing context at an impermissibly "high level of generality" at which "any claim can be analogized to some other claim for which a *Bivens* action is afforded." *Arar v. Ashcroft,* 585 F.3d 559, 572 (C.A. 2 2009) (*en banc*), *cert. denied,* 560 U.S. 978 (2010). Indeed, the Court of Appeals defind the context of this case—which arose out of actions by the highest-level executives of the Department of Justice to address pressing national security, law enforcement, and immigration concerns during a national emergency unprecedented in our nation's history—as no more than a run-of-the mill inmate case: "federal detainee Plaintiffs, housed in a federal facility, allege that individual federal officers subjected them to punitive conditions." Pet. App. at 24a.

That characterization fails to capture the true context of this case, which asks the federal courts to create an implied constitutional remedy to evaluate and judge national security decisions made at the very highest levels of the national government in matters entrusted peculiarly to the executive branch of government during a in the immediate aftermath of the greatest attack on American lives on American soil by foreign terrorists. Looked at in its proper context, everything about this case presents a powerful case for ***not*** extending *Bivens.* For good reason, this Court (like every other federal Court of Appeals that has considered the question) "has never implied a *Bivens* remedy in a case involving . . .

national security." *Doe v. Rumsfeld*, 683 F.3d 390, 394 (C.A.D.C. 2012). The opinion of the Court of Appeals here flies in the face of this Court's *Bivens* jurisprudence, as well as that of all other federal courts of appeals that have addressed this issues, and should not be permitted to stand.

The Court of Appeals similarly failed in refusing, in the teeth of this Court's numerous precedents, to extend qualified immunity to Ziglar, and in finding that the sparse allegations of Respondents' pleading as to him met the requirements of *Iqbal*.

I. RESPONDENTS' FOURTH AMENDED COMPLAINT

A group of plaintiffs instituted this case in 2002. Pet. App. at 172a. The case went through various iterations until, in 2009, the Court of Appeals remanded it for the District Court to evaluate plaintiffs' claims under *Iqbal*. *Turkmen v. Ashcroft,* 589 F.3d 542 (C.A.2 2009). On remand, two of the original plaintiffs (the others having settled) joined by six new plaintiffs (together making up the eight Respondents) filed a Fourth Amended Complaint ("FAC"), the pleading at issue in the matter now before this Court. Pet. App. at 5a.[1]

Claims One to Five and Seven of the FAC named the DOJ Defendants and five MDC

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[1] The opinions below set out the lengthy procedural history of this case. Pet. App. at 4a-6a & 172a-175a.

Defendants, while Claim Six named only the MDC Defendants.[2] Insofar as it concerns Ziglar, only three of those claims remain at issue: Claim One, which alleged that the punitive conditions of Respondents' confinement violated their Fifth Amendment substantive due process rights; Claim Two, which alleged that Respondents were held in restrictive confinement because of their race, ethnicity, or national origin, in violation of their Fifth Amendment equal protection rights; and Claim Seven, which alleged a conspiracy among all the defendants to deprive Respondents of their equal protection rights pursuant to 42 U.S.C. § 1985(3). *Id.* at 5a-6a.

Respondents rested each of these claims on the same base: the alleged punitive conditions of confinement that the defendants imposed on Respondents were unlawful because Ziglar and the other defendants lacked "information connecting

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[2] Respondents did not appeal the District Court's dismissal of Claims Four and Five. Pet. App. 20a n.13. Holding that Claim Three, a free-exercise claim, arose in a new *Bivens* context, the Court of Appeals affirmed the District Court's dismissal of that claim as to the DOJ Defendants, and reversed the District Court's refusal to dismiss that claim as to the BOP defendants. *Id.* at 27a. As noted, Claim Six did not name Ziglar as a defendant, but the District Court held that "the factual allegations incorporated by reference into Claim One embrace the strip search allegations" of Claim Six, and therefore "deem[ed] Claim One to allege, *inter alia*, strip searches in violation of the Fifth Amendment against the DOJ Defendants." Pet. App. at 184a n.9.

[Respondents] and class members to terrorism or raising a concern that they might pose a danger to the facility." *Id.* at 272.

Specifically, Respondents alleged that the FBI designated each of them as "of interest" or "of high interest" to its 9/11 investigation. *Id.* at 67a-68a. This classification, Respondents claimed, meant that pursuant to its policy BOP placed them in "the most restrictive and secure conditions permitted." *Id.* at 49a. They alleged that pursuant to the FBI's "hold until cleared" policy, because of this classification none of them could be released, or placed in less-restrictive confinement, unless and until the FBI 9/11 investigation found they had no ties to terrorism. *E.g., id.* at 8a.

The FAC alleged that the DOJ Defendants received "detailed daily reports regarding arrests and detentions, *id.* at 35a-36a, 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 9/11 investigation. *Id.* at 36a (quotation marks omitted). It further alleged that Ashcroft ordered that all persons on a list that the FBI's New York City office had compiled be treated as "of interest" and held until cleared, "despite a complete lack of any information or a statement of FBI interest" in these persons. *Id.* at 38a. Without citation to any facts, the FAC then alleged that "Ashcroft, Mueller, and Ziglar's decision to hold" the persons on the FBI list until cleared "was based on their discriminatory notion that all Arabs and Muslims were likely to have been involved in the terrorist attacks, or at least to have relevant

information." *Id.* at 196a n.17 (quotation marks omitted).

Respondents incorporated into the FAC two reports prepared by the DOJ Office of Inspector General stating the results of its investigation into the conditions at MDC and the federal law enforcement response to 9/11 ("OIG Reports"). Respondents attempted to limit this incorporation by stating they were incorporating the OIG Reports "except where contradicted by the allegations" of the FAC, but did not specify what those contradictions might be. *Id.* at 246a n.1 & 247a-248a n.2.[3]

II. THE DISTRICT COURT'S DECISION

Ziglar, Ashcroft, and Mueller moved to dismiss the FAC for failure to state claims upon which relief can be granted, as did the MDC Defendants. The

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[3] "There are two OIG reports. The first OIG report, published in June 2003, covers multiple aspects of law enforcement's response to 9/11. See U.S. Dep't of Justice, Office of the 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) (the 'OIG Report'), available at http://www.justice.gov/oig/special/0306/full.pdf. The second OIG report, published in December 2003, focuses on abuses at the MDC See U.S. Dep't of Justice, Office of the Inspector General, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York (Dec. 2003) (the 'Supplemental OIG Report'), available at http://www.justice.gov/oig/special/0312/final.pdf." Pet. App. 6a n.5. Portions of the first OIG Report appear at Pet. App. 342a-477a.

District Court decided all the motions in its January 15, 2013, Memorandum & Order. *Id.* at 157a-226a. In that opinion, the District Court analyzed the motions filed by Ziglar, Ashcroft, and Meuller as a group under the rubric "DOJ defendants" without distinguishing among the three motions, and analyzed the MDC Defendants' motions in the same way (as did the Court of Appeals).

The District Court first rejected Ziglar's argument that recognition of potential *Bivens* liability under Claim One, regarding conditions of confinement, would extend *Bivens* to a new context. *Id.* at 184a-185a n.10. It then held that Claim One did "not plausibly plead that the DOJ defendants possessed punitive intent," an element of the Respondents' substantive due process claim. *Id.* at 189a-191a. "The DOJ defendants," the District Court said, "were entitled to expect that their subordinates would implement their directions lawfully." *Id.* at 190a. Therefore, the District Court held, it could "not reasonably infer that the failure to make that expectation explicit suggests punitive intent." *Ibid.* It therefore dismissed Claim One as to the DOJ Defendants.

As to Claim Two, which alleged that the DOJ defendants "created and implemented the harsh confinement policy because of [Respondents'] race, religion, and national origin," *id.* at 194a, the District Court found that the FAC's averments, viewed together under the *Iqbal* standard, did "not plausibly suggest that the DOJ Defendants purposefully directed the detention of the plaintiffs in harsh conditions of confinement due to their race, religion, or national origin." *Id.* at 200a. In so ruling, the

District Court noted that "[b]ecause of the broad powers of the political branches in the areas of immigration and naturalization, in that one setting discrimination on grounds of race, religion and national origin is not invidious." *Id.* at 197a-198a. This conclusion made the District Court "reluctant to allow allegations of lawful conduct to support an inference that the DOJ Defendants" acted in violation of the equal protection guarantee of the Fifth Amendment. It said that the FAC's allegation that the DOJ Defendants "created the alleged overtly discriminatory harsh confinement policy" at issue "require[d] inference upon inference," and "each of those inferences [but] very weakly suggested." *Id.* at 198a.

The District Court noted that the allegation that the DOJ Defendants "were aware that Arab and Muslim noncitizens encountered during the [9/11] investigation were, without individualized assessment, treated as 'of interest' potentially raises an inference these defendants harbored discriminatory animus." *Ibid.* But it found "this allegation standing alone would be insufficient to render plaintiffs' equal protection claim plausible" because "the same allegation is also consistent with a policy to treat everyone encountered during the [9/11] investigation as 'of interest.' " *Ibid.*

The District Court observed that in *Iqbal,* this Court had found that the policy of holding high interest detainees until cleared in and of itself did not suggest discriminatory animus, and that, similarly, the fact that this policy disparately affected Muslims and Arabs did not so do, either. The District Court conceded that Respondents had

"amplified their claim" in this regard by alleging that the DOJ Defendants knew that the FBI lacked information tying detainees to terrorism, and by alleging that non-Arab and non-Muslim detainees "were cleared quickly or moved into the general population without clearance." *Id.* at 199a-200a. But viewing the FAC as a whole, the District Court said, it could not find these inferences sufficient to meet *Iqbal's* pleading requirements (though it found "the issue to be a close one." *Id.* at 200.

The District Court accordingly dismissed both Claims One and Two as to the DOJ Defendants, and did so without reaching the issue of qualified immunity. *Id.* at 225a. It also dismissed Claim Three, Respondents' free exercise claim, finding that it "fails to plausibly plead that the DOJ defendants intended to burden [Respondents'] free exercise" rights. *Id.* at 219a. Finally, it dismissed Claim Seven, § 1985(3) conspiracy, because as to the DOJ Defendants, none of the underlying objects of the conspiracy had "survived the motion." *Id.* at 226a.

As for the motion of the MDC Defendants, the District Court dismissed Claims Four and Five (which had not named the DOJ Defendants), but denied their motion with respect to the claims based on the alleged harsh conditions of confinement and unlawful strip searches (Claims One, Two, and Six), their free exercise claim (Claim Three), and the § 1985(3) conspiracy claim. *Id.* at 225a.

In so ruling, the District Court denied the MDC Defendants' claim they were entitled to qualified immunity. *Id.* at 220a, 223a & 225a. The MDC Defendants took an interlocutory appeal from that judgment. At Respondents' request, the District

Court then entered final judgment as to the DOJ Defendants pursuant to FED. RULE CIV. PRO. 54(b), and Respondents cross-appealed the dismissal of the claims against the DOJ Defendants. *Id.* at 19a-20a.

III. THE COURT OF APPEALS

The Court of Appeals consolidated the various appeals. On June 17, 2013, a divided panel issued its opinion affirming in part and reversing in part (Pooler & Wesley, JJ.), *id.* at 2a-83a, over a lengthy opinion by Judge Raggi concurring in part in the judgment and dissenting in part. *Id.* at 83a-156a.

1. ***Bivens.*** The panel majority first addressed whether Respondents could avail themselves of a *Bivens* remedy in this case. It noted this Court's numerous decisions " 'warn[ing] that the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in new contexts.' " *Id.* at 22a (quoting *Arar,* 585 F.3d at 571). If the underlying claims do indeed extend *Bivens* to a new context, the panel majority said, the court must consider, first, whether there exists an alternative remedial scheme available to the Respondents, and second, even if there is not, whether "special factors counsel hesitation in creating a *Bivens* remedy." *Ibid.* (quotation marks omitted).

The panel majority observed that it need not consider alternative remedies or special factors if it decided that the "context" for the underlying claims was not "new." *Ibid.* Following *Arar,* the panel majority stated that it would look "to both the rights injured and the mechanism of the injury to determine the context." *Id.* at 23a. The panel majority stated:

> "In our view, setting the context of the *Bivens* claims here as the national response in the wake of 9/11 conflates the two-step process dictated by this Court in *Arar*. The reasons why Plaintiffs were held at the MDC as if they were suspected of terrorism do not present the 'context' of their confinement—just as the reason for Arar's extraordinary rendition did not present the context of his claim. Without doubt, 9/11 presented unrivaled challenges and severe exigencies—but that does not change the 'context' of Plaintiffs' claims." *Ibid.*

The panel majority then found it "plain" that the underlying claims in this case arose "firmly within a familiar *Bivens* context," that being the mundane claim of "federal detainee Plaintiffs, housed in a federal facility, alleg[ing] that individual federal officers subjected them to punitive conditions." *Id.* at 24a. The panel majority accordingly recognized a *Bivens* remedy for Respondents' substantive due process and equal protection conditions-of-confinement claims. *Id.* at 27.[4]

By thus defining the context at a "high level of generality," *Arar,* 585 F.3d at 572, the panel

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[4] The panel majority did not, however, extend *Bivens* to Respondents' free exercise clause claims. It accordingly reversed the District Court's refusal to dismiss this claim as to the MDC Defendants, and affirmed the District Court's dismissal of it as to the DOJ Defendants. Pet. App. 27a.

majority avoided examining whether the Respondents enjoyed alternative remedies, such as those Congress has established under the immigration laws, and even if not, whether special factors—for example, national security, the national emergency surrounding 9/11, the primacy of executive and legislative branches in immigration matters, the failure of Congress to establish a private remedy even though it had known for years of the Respondents' claims—counseled against implying a remedy under the Constitution in this case. Pet. App. at 29a n.17.

2. *Substantive Due Process: Claim One.* The panel majority then turned to Claim One, Respondents' substantive due process challenge to the conditions of their confinement. It noted that Respondents had conceded that none of the DOJ Defendants had created "the particular conditions in question." *Id.* at 30a. It then rejected Respondents' claim that "Ashcroft's initial arrest and detention mandate required subordinates to apply excessively restrictive conditions to civil detainees against whom the government lacked individualized suspicion of terrorism," *id.* at 30a, because that policy was facially valid and "the DOJ Defendants had a right to presume that subordinates would carry it out in a constitutional manner." *Id.* at 30a-31a.

The panel majority then created out of whole cloth a theory to sustain Claim One that Respondents themselves had never advanced in the thirteen years of litigation of this matter, the so-called "list-merger theory." *Id.* at 32a n.21. The panel majority first posited that the FAC plausibly

pleaded that the DOJ Defendants knew that DOJ was detaining illegal aliens in punitive conditions of confinement even though there existed no suggestion that these detainees had any ties to terrorism, "except for the fact they were, or were perceived to be, Arab or Muslim." *Id.* at 31a. While aware of this fact, the panel majority continued, the DOJ Defendants "were responsible for a decision to merge" a list of detainees that the New York office of the FBI had created (called the "New York List") with a national list that INS had created. *Ibid.* The INS national list "contained the names of detainees whose detention was dependent not only on their illegal immigration status and their perceived Arab or Muslim affiliation, but also a suspicion that they were connected to terrorist activities." *Ibid.* The FBI's New York List, by contrast, contained the names of detainees whom the New York FBI could not determine "had any connection with terrorist activity." *Id.* at 18a. The panel majority concluded the "merger ensured that [Respondents] would continue to be confined in punitive conditions," and this sufficed to state a Fifth Amendment substantive due process claim. *Id.* at 31a-32a.

The panel majority concluded that the FAC plausibly pleaded that it was Ashcroft who had made the decision to merge the lists in early November, 2001, with knowledge that it would result in the confinement of persons the FBI had not linked to terrorism in the harshest possible conditions. *Id.* at 39a. It concluded also that the FAC plausibly pleaded that "Mueller and Ziglar complied with Ashcroft's [merger] order notwithstanding their knowledge that the government had no evidence

linking [Respondents] to terrorist activity." *Id.* at 46a. The panel majority held: "In this instance, [Respondents] plausibly allege that Ashcroft's decision was facially invalid; it would be unreasonable for Mueller and Ziglar to conclude that holding ordinary civil detainees under the most restrictive conditions of confinement available was lawful." *Id.* at 42a. It accordingly permitted Respondents' substantive due process claim, Claim One, to proceed, subject to the limitation that liability could be found only after the decision to merge the lists, which had occurred November 2, 2016. *Id.* at 46a.

3. *Qualified Immunity: Substantive Due Process.* Relying largely on its substantive due process analysis, the panel majority held that Ziglar (like Ashcroft and Mueller) had no entitlement to qualified immunity because the FAC plausibly pleaded that he had personally violated Respondents' well-established rights. *Id.* at 47a. It cited *Bell v. Wolfish,* 441 U.S. 520 (1979), as support for its conclusion that conditions of pretrial detention "not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of the detainees," and no reasonable government official could have thought otherwise. *Id.* at 47a. The panel majority then rejected the contention "that the post-9/11 context warranted qualified immunity even if it were not otherwise available "because a pretrial detainee's right to be free from punishment does not vary with the surrounding circumstances." *Ibid.*

4. *Equal Protection.* Relying again largely on its substantive due process analysis, the panel majority found that the FAC plausibly pleaded that the DOJ Defendants acted with the requisite discriminatory purpose to state an equal protection claim. It reasoned that the FAC plausibly alleged that the FBI had compiled a list "not based on individualized suspicion, but rather based on race, ethnicity, religion, and/or national origin," and that with knowledge of this, the DOJ Defendants "condoned the New York FBI's discrimination by merging the New York List with the INS List, thereby ensuring that some of the individuals on the New York List would be subject to the challenged conditions of confinement." *Id.* at 59a

5. *Qualified Immunity: Equal Protection.* The panel majority denied Ziglar, Ashcroft, and Mueller qualified immunity on the equal protection claim. it first found that they had violated Respondents' rights. It then concluded that it had been "clearly established at the time of [Respondents'] detention that it was illegal to hold individuals in harsh conditions of confinement and otherwise target them for mistreatment because of their race, ethnicity, religion, and/or national origin." *Id.* at 71a.

6. *Conspiracy.* The panel majority found that the FAC had plausibly pleaded that the DOJ Defendants had engaged in a conspiracy under 42 U.S.C. § 1985(3) to deprive Respondents "of the equal protection of the laws" due to the DOJ Defendants' "racial" or "class-based invidiously discriminatory animus." *Id. a*t 77a-78a (citations and quotation

marks omitted). The panel majority also found that the FAC had plausibly pleaded a tacit conspiracy among the DOJ Defendants and defendants Hasty and Sherman "to effectuate the harsh conditions of confinement with discriminatory intent." *Id.* at 78a.[5]

7. *Conspiracy: Qualified Immunity.* Citing *Iqbal v. Hasty*, 490 F.3d 143 (C.A. 2 2007), the panel majority conceded that the applicability of § 1985(3) to federal officials remains an open question, but said that so long as the alleged conspiracy violated some other established law, the defendants were not entitled to qualified immunity. Pet. App. at 81a.

As to Ziglar, Ashcroft, and Mueller, then, the panel majority accordingly reversed the District Court's dismissal of Respondents' two conditions-of-confinement claims (Claim One, substantive due process, and Claim Two, equal protection), as well as the conspiracy claim (Claim Seven). It affirmed the District Court's dismissal of Claim Three, free exercise, as to the DOJ Defendants. *Id.* at 83a.

It also affirmed the District Court's denial of the MDC Defendants' motion to dismiss, except as to Claim Three, free exercise, which it held the District Court should have dismissed, and except to find that

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[5] The panel majority rejected the argument of the MDC Defendants that the intracorporate conspiracy doctrine barred Respondents' § 1985(3) conspiracy claim, Pet. App. at 79a-80a, finding it could not conclude at this stage of the case that the various defendants "acted as members of a single policymaking entity for purposes of [that] claim." *Id.* at 80a.

the FAC stated no claims as to defendant Zenk. (It also affirmed the dismissal of claims brought by plaintiffs who had been held at the federal detention facility in Passaic, New Jersey.) *Ibid.*

8. *Judge Raggi's Opinion.* Judge Raggi filed a lengthy opinion concurring in the judgment in part and dissenting in part. *Id.* at 83a-156a. She began by noting that the Court of Appeals in this case had become "the first to hold that a *Bivens* action can be maintained against the nation's two highest ranking law enforcement officials" for "policies propounded to safeguard the nation in the immediate aftermath of the infamous al Qaeda terrorist attacks of September 11, 2001." *Id.* at 84a. Her opinion cited four decisions of other courts of appeals that "have declined to extend *Bivens* to suits against executive branch officials for national security actions taken after the 9/11 attacks." *Id.* at 84a n. 1.[6]

As to *Bivens,* Judge Raggi found the majority's narrow focus on the "rights injured" and the "mechanism of injury," to the exclusion of other factors, had led it to define "context" too broadly. *Id.* at 90a. Existing precedent, she reasoned, required an "unqualified" and "careful, holistic examination of all legal and factual components of the 'scenario' in

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[6] Her opinion cited *Vance* v. *Rumsfeld*, 701 F.3d 193 (C.A. 7 2012) (en banc); *Mirmehdi* v. *United States*, 689 F.3d 975 (C.A. 9 2012); *Doe* v. *Rumsfeld*, 683 F.3d 390 (C.A.D.C. 2012); *Lebron* v. *Rumsfeld*, 670 F.3d 540 (C.A. 4 2012); *Ali* v. *Rumsfeld*, 649 F.3d 762 (C.A.D.C. 2011); and *Rasul* v. *Myers*, 563 F.3d 527 (C.A.D.C. 2009). Pet. App. at 84a n.1

which a claim arises to see if it is, indeed, a recurrent example of a previously recognized *Bivens* context." *Ibid.*

Accordingly, Judge Raggi would have had the court conduct a more full analysis of all the legal and factual circumstances of Respondents' claims to determine whether those claims truly arose in an established *Bivens* context. She found that "because rights and mechanisms of injury can arise in a variety of circumstances, presenting different legal and factual components, these two factors cannot alone identify context except at an impermissibly high level of generality." *Id.* at 91a. She saw the context of this case as consisting of "lawfully arrested illegal aliens challeng[ing] an executive confinement policy, purportedly made at the cabinet level in a time of crisis, and implicating national security and immigration authority." *Ibid.* "In the absence of a judgment made in *that* context," she continued, "the majority cannot conclude that a *Bivens* remedy is available to these plaintiffs simply because they assert rights and mechanisms of injury present in some other *Bivens* cases." *Ibid.* (emphasis in original).

Judge Raggi then proceeded to consider whether special factors counseled hesitation before recognizing a new *Bivens* remedy. She identified four such factors: "(1) plaintiffs challenge an official executive policy (rather than rogue action), implicating (2) the executive's immigration authority, (3) as well as its national security authority, and (4) Congress has afforded no damages remedy to 9/11 detainees despite awareness of the concerns raised here." *Id.* at 97a-98a. These factors,

she concluded, required that the court not extend *Bivens* to the context of this case. *Id.* at 98a-113a.

Judge Raggi also would have extended qualified immunity to all of the defendants, because she could not conclude that any of the defendants here "were plainly incompetent or defiant of established law." *Id.* at 115.

9. *Rehearing.* Ziglar filed a timely petition for rehearing and rehearing en banc. (Ashcroft and Mueller filed a joint petition.) The Court of Appeals denied those petitions on a 6-6 vote (Chief Judge Katzmann not participating). *Id.* at 227a-229a. The panel majority filed a brief concurrence, *id.* at 229a-231a, while the six dissenters filed a longer opinion. The dissent found that the panel majority had failed "to adhere to controlling Supreme Court precedent," *id.* at 239a, "in three areas of law," *id* at 239: the implication of a *Bivens* remedy, *id.* at 232a-236a; qualified immunity, *id.* at 236a-237a; and the sufficiency of the FAC's factual allegations under *Iqbal* to state claims. *Id.* at 238a-239a. It emphasized that these concerns were heightened because they arose "in a case requiring a former Attorney General and FBI Director, among other federal officials, to defend against claims for money damages based on a detention policy applied to illegal aliens in the immediate aftermath of a terrorist attack on this country by aliens." *Id.* at 239a.

REASONS FOR GRANTING THE WRIT

I. THE OPINION OF THE COURT OF APPEALS CONTRADICTS THIS COURT'S *BIVENS* JURISPRUDENCE AND CONFLICTS WITH THE DECISIONS OF FOUR OTHER COURTS OF APPEALS.

"Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability to any new context or new category of defendants." *Iqbal*, 556 U.S. at 675 (quotation marks omitted). This Court has warned repeatedly that federal courts must pay "particular heed" not to expand *Bivens* to a new context where "special factors counse[l] hesitation." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)(quotation marks omitted). "But where a proposed *Bivens* claim presents legal and factual circumstances that were not present in an earlier *Bivens* case, a new assessment is necessary because no court has yet made the requisite 'judgment' that a judicially implied damages remedy is 'the best way' to implement constitutional guarantees in that context.' " Pet. App. at 91a (quoting *Wilkie*, 551 U.S. at 550).

Indeed, for more than 30 years this Court has "refused to extend *Bivens* liability to any new context or new category of defendants," *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001), though during that time "it has reversed more than a dozen appellate decisions that created new actions for damages." *Vance v. Rumsfeld,* 701 F.3d at 198. In the 38 years since *Bivens,* this Court has extended it twice only: for claims of employment discrimination in violation of the Due Process Clause, *Davis v. Passman,* 442 U.S. 228 (1979); and for Eighth

Amendment violations by prison officials, *Carlson v. Green,* 446 U.S. 14 (1980).

Since *Carlson* in 1980, this Court has declined to extend the *Bivens* remedy to any claim. It has in that time rejected extending *Bivens* to claims of violations of employees' First Amendment rights by their employers, *Bush v. Lucas,* 462 U.S. 367 (1983); for injuries suffered incident to military service, *United States v. Stanley,* 483 U.S. 669 (1987); *Chappell v. Wallace,* 462 U.S. 296 (1983); for denials of Social Security benefits, *Schweiker v. Chilicky,* 487 U.S. 412 (1988); against federal agencies, *FDIC v. Meyer,* 510 U.S. 471 (1994); against private corporations operating under federal contracts, *Malesko,* 534 U.S. at 68; and for retaliation by federal officials against private landowners, *Wilkie,* 551 U.S. at 562.

And this Court has "never implied a *Bivens* remedy in a case involving. . . national security." *Doe v. Rumsfeld*, 683 F.3d at 394.

The panel majority, by looking only at "the rights injured and the mechanism of the injury" to determine whether Respondents' *Bivens* claims arose in a "new context," focused too narrowly to meet the requirements of these precedents. As this same Court of Appeals recognized in *Arar*, context must be defined as a "potentially recurring scenario that has similar legal and factual components," 585 F.3d at 572, and that requires an "unqualified" and "careful, holistic examination of all legal and factual components of the 'scenario' in which a claim arises to see if it is, indeed, a recurrent example of a previously recognized *Bivens* context." Pet. App. at 90a. The panel majority put the matter at a

impermissibly "high level of generality" at which "any claim can be analogized to some other claim for which a *Bivens* action is afforded," *Arar,* 585 F.3d at 572, and helps little in determining whether the particular claim at issue arose in a new context. To the contrary, it invites courts to recognize a *Bivens* remedy in "every sphere of legitimate government action." *Wilkie,* 551 U.S. at 561.

The panel majority's cramped focus led it to define the context of this case as a run-of-the mill complaint by an inmate about jail conditions. That falls far short of capturing the context of this case. Respondents were citizens of foreign nations illegally present in the United States at a time when foreign nationals, some also illegally present in the United States, attacked and killed thousands of American citizens by acts of terror. Many of the Respondents had come from the same nations as those who killed thousands of American citizens. The FBI detained them in the immediate aftermath of those terrorist attacks, at a time of heightened national crisis pursuant to executive branch decisions made at the highest levels of the government. That is the context this case presents. It "fundamentally differ[s] from anything recognized in *Bivens* or subsequent cases." *Malesko,* 534 U.S. at 70. As Judge Raggi's dissent demonstrated, "[i]n the absence of a judgment made in *that* context, the majority cannot conclude that a *Bivens* remedy is available to these plaintiffs simply because they assert rights and mechanisms of injury present in some other *Bivens* cases." Pet. App. at 91a (emphasis in original).

Because the context of this case is indeed new, the panel majority erred by not evaluating those

powerful special factors that here compel the court to deny a *Bivens* remedy: (1) Respondents challenge executive branch policy made at the highest level. Extending *Bivens* to "challenges [to] policies promulgated and pursued by the executive branch, [and] not simply [to] isolated actions of individual federal employees" would be "without precedent and implicate[s] questions of separation of powers as well as sovereign immunity." *Arar,* 585 F.3d at 578. (2) The question whether a *Bivens* remedy is the best way to vindicate the rights of aliens illegally in the country raises issues bound up with the immigration authority of the executive and legislative branches. The Nation's " 'policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government,' " and these " 'matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.' " *Arar,* 585 F.3d at 570 (quoting *Harisiades v. Shaughnessy,* 342 U.S. 580, 588–589 (1952)). The special circumstances surrounding the immediate aftermath of 9/11 mandate extra caution in this regard. (3) Respondents seek to challenge the executive branch's exercise of its authority in the arena of national security, an arena in which courts have little expertise or experience, and which lies at the core of the executive's authority and competence.

Congress's failure to afford these Respondents a damages remedy also counsels against extending *Bivens.* In the thirteen years since this case was filed, Congress has repeatedly demonstrated its awareness that persons detained in connection with

9/11 have alleged that the government violated their constitutional rights. But Congress has never provided those persons, Respondents included, a damages remedy. Pet. App. at 109a-113a. This congressional inaction cannot be seen as anything other than intentional, and it strongly counsels against recognizing a new cause of action. *Lebron v. Rumsfeld,* 670 F.3d at 551-552. For this reason, as well, the Court of Appeals erred in recognizing a *Bivens* remedy in this case.

By narrowly focusing on "rights injured" and the "mechanism of injury" the Court of Appeals bypassed the special factors enquiry entirely. There can be little doubt that any court examining the special factors present here would conclude that they strongly disfavor an extension of *Bivens* to Respondents' underlying claims. An analysis that permits a court to avoid this enquiry altogether in circumstances where the special factors weigh so strongly against recognizing a *Bivens* remedy is a strong indicator that the court has defined "context" at too abstract a level.

This Court's decisions in *Davis v. Passman* and *Chappell v. Wallace* illustrate how sharply the Court of Appeals' approach in this case conflicts with this Court's *Bivens* jurisprudence. In *Davis,* the Court recognized a *Bivens* cause of action for employment discrimination based on gender brought by a former congressional staff member against her employer, a congressman. *Chappell* also involved claims by public employees alleging employment discrimination, but this time the claims were brought by sailors in the U.S. Navy.

Under the approach of the Court of Appeals in this case, *Chappell* would be found to have arisen in the same context as *Davis,* resulting in recognition of a *Bivens* claim. In those two cases, the right injured, the right to be free from discrimination under the Fifth Amendment, and the mechanism of injury, employment discrimination, were the same.

But to the contrary, this Court declined to recognize a *Bivens* remedy in *Chappell.* It found that because *Chappell* arose in a military context, it was fraught with special factors that did not exist in *Davis,* including the need for military discipline, the special constitutional power of Congress and the President in military matters, the specialized nature of the judgments made about military service members as opposed to civilian employees, and the existence of a separate system of justice in the military created by Congress. 462 U.S. at 298-304. All of these factors led this Court to deny a *Bivens* remedy, despite the similarity with *Davis* on the two factors of "rights injured" and "mechanism of injury."

The panel decision conflicts with the decisions of a number of other Courts of Appeals, as well. In *Mirmehdi,* the Court of Appeals for the Ninth Circuit considered whether to recognize a *Bivens* claim for damages arising from unlawful detention in connection with deportation proceedings. The Ninth Circuit took a broader approach that the Court of Appeals did here, however, concluding that deportation proceedings indeed constituted a context "unique from other situations where an unlawful detention may arise." 689 F.3d at 981. It then found that Congress's failure to provide a damages remedy could not have been inadvertent, given the frequent

and extensive changes it had made to the immigration laws and the availability of habeas corpus. *Id.* at 982.

Turning to "special factors," the Court of Appeals noted that "immigration issues 'have the natural tendency to affect diplomacy, foreign policy, and the security of the nation,' " and that these factors " 'counse[l] hesitation' in extending *Bivens*." *Id.* at 982 (quoting *Arar,* 585 F.3d at 574). It noted that these concerns "always mitigate against 'subjecting the prosecutor's motives and decisionmaking to outside inquiry.' " *Id.* at 983 (quoting *Reno v. American-Arab Anti-Discrimination Comm.,* 525 U.S. 471, 490 (1999)). The court observed that such cases often result, not in the "mere 'disclosure of normal domestic law-enforcement priorities and techniques,' " but "often involve 'the disclosure of foreign-policy objectives and (as in this case) foreign-intelligence products.' " *Ibid.* (quoting *Reno,* 525 U.S. at 490-491. It accordingly held "the unique foreign policy considerations implicated in the immigration context" to be a particularly inappropriate setting to imply a remedy under *Bivens*. *Ibid.*

At least four other federal appellate decisions, cited in n. 6, above, also have refused to create a remedy under *Bivens* based on concerns for national security.

This case cries out with special factors that require that the federal courts refrain from implying a damages remedy. And it presents circumstances of "exceptional importance." This Court should grant certiorari to review and to correct this erroneous extension of *Bivens*.

II. THE DECISION OF THE COURT OF APPEALS CONTRADICTS THIS COURT'S DECISIONS REGARDING QUALIFIED IMMUNITY.

The Court of Appeals rulings as to qualified immunity do not comport with this Court's qualified immunity decisions. *Wilson v. Lane,* 526 U.S. 603 (1999), held that the "right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Id.* at 615. The "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). The "unlawfulness must be apparent." *Ibid.* For this reason, this Court has "repeatedly told courts . . . not to define clearly established rights at a high level of generality" for purposes of evaluating a claim of qualified immunity." *Ashcroft v. al-Kidd,* 563 U.S. 731, 742 (2011). "The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." *Ibid.*

"Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' " *Mullenix v. Luna,* 136 S.Ct. 305, 308 (2015). "The dispositive question is whether the violative nature of *particular* conduct is clearly established." *Ibid.* (quotation marks omitted). And "[t]his inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Ibid.* (quotation marks omitted).

The Court of Appeals here did not adhere to these admonitions. It defined the "established law" at the high level of generality that this Court has warned against. With regard to Respondents' substantive due process claim, the panel majority said that "*Wolfish* made clear that a particular condition or restriction of pretrial detention not reasonably related to a legitimate governmental objective is punishment in violation of the constitutional rights of detainees." Pet. App. at 47a. But it did not focus on the particular conduct of Ziglar in the specific circumstances of this case. The Court of Appeals should have asked whether, in the context of the specific circumstances relating to the national emergency of 9/11, a reasonable person in Ziglar's position would clearly have understood that persons illegally in the country, whom the FBI had arrested in connection with its investigation of 9/11, but whom the FBI had not yet linked to any terrorist activity, could not be detained in restrictive conditions until cleared of any possible link to terrorism by the FBI.

That understanding of the law was not clearly established at the time of 9/11. The nation had never faced such a situation in its entire history. The DOJ Defendants were faced with the need to act quickly. They were faced with the imperative not to make a catastrophic mistake that could result in more deaths, for example, by prematurely releasing from restrictive custody a person who— like many of the 9/11 hijackers—was not a citizen and not legally in the country, whom the FBI had arrested in its 9/11 investigation, and whose links to terrorism might be too covert for ready discovery, the DOJ Defendants

reasonably could have taken the view that in the circumstances it was legally appropriate for them to detain such a person in restrictive custody until the FBI could clear him.

In taking such a view, they were neither "plainly incompetent" nor "knowingly violat[ing] the law." And as such, they are entitled to qualified immunity from a suit against them for money damages arising from these actions.

So, too, the Court of Appeals defined the law too abstractly with regard to Respondents' equal protection claim. It said that the DOJ Defendants reasonably understood that "it was illegal to hold individuals in harsh conditions of confinement and otherwise target them for mistreatment because of their race, ethnicity, religion, and/or national origin." Pet. App. at 71a. Stated as an abstract principle of the law, that statement raises no concerns. But it does not put the focus on the particular conduct of the DOJ Defendants in the circumstances they faced in the immediate aftermath of 9/11. The question rather is whether a reasonable officer in the particular position of the DOJ Defendants would have known that it was plainly illegal to detain Respondents in restrictive confinement until cleared by the FBI. For the reasons stated above, the answer to that question is no.

The Court of Appeals also erred in its analysis of this issue with regard to Respondents' § 1985(3) claims. It recognized that there had been no definitive ruling within the jurisdiction of the Second Circuit as to whether § 1985(3) even applied to federal officials such as the DOJ Defendants. But it held that for purposes of qualified immunity, the

issue was not whether the DOJ Defendants reasonably knew their conduct violated § 1985(3), but whether they more generally " 'could have reasonably believed that it was legally permissible for them to conspire with other federal officials to deprive a person of the equal protection of the laws.' " *Id.* at 81a (quoting *Iqbal v. Hasty,* 490 F.2d at 177).

In *Davis v. Scheuer,* 468 U.S. 183 (1984), this Court held that the defendants had an entitlement to immunity because the claims against them were based on due process and § 1983, which did not clearly prohibit the alleged misconduct, though that conduct clearly violated a regulation. This Court held that "officials sued for violations of rights conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some other statute or regulation." *Id.* at 194 n.12.

Given the uncertainty whether § 1985(3) applies to the acts of federal officials, it cannot be said that it was clearly established that anything the DOJ Defendants did violated that statute. Therefore, the DOJ Defendants are entitled to qualified immunity for suits brought under § 1985(3). They do not lose that immunity because they allegedly violated some other clearly established law, such as, in this case, the Fifth Amendment's equal protection clause. This Court clearly so held in *Davis,* and the Court of Appeals' decision flatly contradicts that ruling.

III. THE COURT OF APPEALS ERRED IN FINDING THE VAGUE AND CONCLUSIONAL ALLEGATIONS OF THE FOURTH AMENDED COMPLAINT SUFFICIENT UNDER *IQBAL* TO STATE A CLAIM FOR RELIEF.

The panel majority sustained Respondents' FAC on a theory of liability that Respondents had never advanced in the thirteen-year history of this litigation, the "list-merger" theory. The panel majority found that Respondents had plausibly pleaded that Ashcroft made the decision to merge that list with the INS national list, thereby ensuring that those detainees on the New York FBI list who were held at the MDC "would continue to be confined in punitive conditions," and that Ziglar and Mueller condoned that act. Pet. App. at 41.

The FAC's allegations in this regard "are plainly not based on [Respondents'] personal knowledge." Pet. App. at 120a. And nothing in the OIG Reports so much as "indicates that [the list-]merger decision was ever ordered or endorsed by [Ashcroft, Mueller, or Ziglar], or even communicated to them." *Id.* at 120a. To the contrary, the OIG Report "states quite clearly that it was Associate Deputy Attorney General Stuart Levey," and not Ashcroft, not Mueller, and most certainly not Ziglar who "decided that all the detainees on the New York list would be added to the INS Custody List and held without bond." *Ibid.* (quotation marks omitted). This contradiction on the fundamental point of the merger of the two lists of detainees renders Respondents' claims against the DOJ Defendants implausible. *E.g., Beauvoir v. Israel,* 794 F.3d 244, 248 n.4 (C.A. 2 2015) ("It is well established that

documents that are attached to the complaint or incorporated in it by reference are deemed part of the pleading." (Citation and quotation marks omitted)). In such cases, "the document controls and the allegation is not accepted as true." *Amidax Trading Group v. S.W.I.F.T. SCRL*, 671 F.3d 140, 147 (C.A. 2. 2011), *cert. denied,* 133 S.Ct. 1586 (2013)(FED. RULE CIV. PRO. 12(b)(1)).

As the rehearing dissent noted, the "majority's hypotheses as to possible involvement of" the DOJ Defendants "in [the] challenged detentions are actually belied by record facts." Pet. App. at 238a n.14. (1) Respondents pleaded no facts showing that Ziglar intended for them to be held in restrictive custody, *id.* at 125a; (2) Respondents never alleged that Ziglar was "even aware" of the restrictive conditions of confinement, *id.* at 126a (quotation marks omitted); (3) Respondents failed sufficiently to plead that he acted " 'because of,' not merely 'in spite of' the action's adverse effects," *id.* at 130a (quoting *Iqbal,* 556 U.S. at 681); (4) Respondents failed plausibly to allege that their restrictive confinement was arbitrary or purposeless to any legitimate objective such that Ziglar's intent must have been punitive, *id.* at 117a; and (5) "the pleadings provide no factual basis to conclude that anyone made the merger decision *because* it would keep [Respondents] in restrictive confinement." *Id.* at 130a (emphasis in original). *See id.* at 117a-139a.

The FAC "relies only on hypothesized possibilities, or on conclusory assumptions or insinuations of discriminatory purpose that [this] Court has already rejected" in *Ashcroft v. Iqbal*. *Id.* at 238. Its allegations as to Petitioner Ziglar are not

plausible. For this additional reason, this Court should grant the writ of certiorari.

CONCLUSION

The court should grant James W. Ziglar's Petition For A Writ Of Certiorari To Review The Judgment Of The United States Court of Appeals For The Second Circuit.

Respectfully Submitted,

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