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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

v.

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

UNITED STATES,
Defendant/Cross-Appellee,

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

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

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs have presented two sets of claims. *See* SA 2. *First*, plaintiffs allege that harsh conditions of confinement violated the Constitution and were the product of a discriminatory policy. *Second*, plaintiffs challenge the length of their detention. According to plaintiffs, the government was required to release them or remove them from the country as soon as "removal could * * * be effectuated," Pl. Br. 26 (citation omitted). They argue that continuing to hold them while they were being cleared from the September 11th investigation was unconstitutional and based on discriminatory animus.

The district court dismissed the second set of claims, *see* SA 42-49, but refused to dismiss the first set of claims – the conditions-of –confinement/discrimination claims. In permitting those claims to go forward, the court relied on its prior decision in *Elmaghraby v. Ashcroft*, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005), which held that similar allegations adequately stated a supervisory liability claim. Further, again relying upon *Elmaghraby*, the court held that placement of the plaintiffs in the ADMAX-SHU without a hearing violated clearly established due process rights. The district court replicated those rulings in the present case. SA 42.

Both aspects of *Elmaghraby* relied upon by the district court here have now been reversed. As we explained in our prior supplemental brief (pp. 4-6), the ADMAX-SHU due process holding was reversed by this Court. *See Iqbal v. Ashcroft*, 490 F.3d 143, 167-168 (2d Cir. 2007). This Court, however, allowed the supervisory liability and discrimination claims to stand. Defendants Ashcroft and Mueller then petitioned to the Supreme Court to review this Court's rulings against them (*i.e.,* the supervisory liability and discrimination claims). *Id.* at 168-176. The Supreme Court granted the petition and reversed this Court's rulings against defendants Ashcroft and Mueller. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

As we detail below, the clear consequence of the Supreme Court's ruling is to require reversal of the district court's rulings against defendants Ashcroft and Mueller relating to the claims of conditions of confinement and discrimination. There is simply no material difference between the complaint the Supreme Court held lacked "any factual allegation sufficient" to plausibly state a claim against the former Attorney General and FBI Director, *see Iqbal,* 129 S. Ct. at 1952, and those found in the complaint here.

Finally, as we demonstrate below, *Iqbal* also further supports affirmance of the dismissal of the length of confinement claims.

A. Iqbal Requires Dismissal of the Claims Relating to Conditions of Confinement and Discrimination.

1. As in *Iqbal*, plaintiffs here contend that, while they were detained, guards and prison officials subjected them to inhumane conditions of confinement, treated them harshly based on their religion, race and national origin, and interfered with their religious practices. JA 93-96, 108-109. The complaint specifies by name the officers who allegedly committed these offenses (*e.g.*, JA 40-51, 53, 65, 71), but it never identifies defendants Ashcroft or Mueller. Instead, the complaint simply charges the former Attorney General was "a principal architect of the policies and practices challenged here;" that Director Mueller was "instrumental in the adoption, promulgation and implementation" of those policies; and that both the former Attorney General and the Director "authorized, condoned, and/or ratified the unreasonable and excessively harsh conditions" under which plaintiffs were detained. JA 100 (¶¶ 23-24).

Iqbal requires dismissal of the supervisory liability claims against defendants Ashcroft and Mueller. The Supreme Court unambiguously held that supervisory liability based on alleged knowledge or acquiescence does not apply in a *Bivens* action such as this. *Iqbal*, 129 S.Ct. at 1949 (supervisors "may not be held accountable for the misdeeds of their agents"); *id.* at 1948 ("a plaintiff must plead that each Government official defendant, through the official's own individual actions,

has violated the Constitution"). *See also id.* at 1957 (Souter, J., dissenting) ("the majority is * * * is eliminating *Bivens* supervisory liability entirely"). The Court expressly rejected the argument that defendants Ashcroft and Mueller could be held liable for their "knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees." *Iqbal*, 129 S.Ct. at 1949. The Court explained that "knowledge of his subordinate's discriminatory purpose" is inadequate to state a claim. *Ibid.* At bottom, "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Ibid.*

Thus, all claims here based on allegations of knowledge or acquiescence in the wrongdoing of others must be dismissed.

2. Here, as in *Iqbal*, plaintiffs seek to hold defendants Ashcroft and Mueller liable for the alleged harsh conditions based on allegations of a discriminatory policy. Like the complaint here (JA96, ¶ 8), the *Iqbal* complaint posited that defendants Ashcroft and Mueller each knew of, condoned, and willfully and maliciously agreed to subject respondent to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." 129 S.Ct. at 1951. As here (JA 100, ¶¶ 23-24), the *Iqbal* complaint named Ashcroft as the "principal architect" of the policy, and identifies

Mueller as "instrumental in [its] adoption, promulgation, and implementation." *Ibid.* As the Supreme Court explained: "To prevail on that theory, the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post September 11 detainees as 'of high interest' because of their race, religion, or national origin." *Id.* at 1952.

The *Iqbal* Court explained that conclusory allegations of unlawful acts or discriminatory motives are insufficient. Rather, a plaintiff must allege facts that plausibly support the legal conclusions. *Iqbal*, 129 S.Ct. at 1949 ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'"). Significantly, even when a complaint contains factual allegations that are "consistent with" illegal conduct, the complaint cannot survive a motion to dismiss when the allegations are "more likely" explained by legal conduct. *Id.* at 1950-51.

Plaintiffs' complaint here alleges in a conclusory manner that defendants Ashcroft, Mueller "and others have also engaged in racial, religious, ethnic, and/or national origin profiling." JA 96. Nowhere, however, does the complaint allege any "actual facts" regarding defendants Ashcroft and Mueller to supplement these bare-bones and conclusory allegations.

The *Iqbal* Court assessed the pleading there, which virtually mirrors the allegations here, and concluded that "[t]aken as true, these allegations are consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin." 129 S.Ct. at 1951. Nonetheless, the Court concluded that they were not sufficient to state a claim. The Court ruled that, even as to claims of discrimination and improper motive, "the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context." *Id.* at 1954. The Court held, "given more likely explanations [for defendants' conduct]," the allegations "do not plausibly establish" the discriminatory purpose. *Id.* at 1951.

The same context addressed in *Iqbal*, of course, equally applies here, and likewise renders the conclusory allegations of discrimination inadequate. The *Iqbal* Court explained, "[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the [September 11th] attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." 129 S.Ct. at 1951. The Court reasoned, under the facts alleged, "the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had

potential connections to those who committed terrorist acts." *Ibid.* The Court concluded, "[a]s between that 'obvious alternative explanation' for the arrests * * *, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion." *Id.* at 1951-52. That conclusion equally applies to the like allegations made here, and establishes that the claims here should also be dismissed.

As in *Iqbal*, the only "factual allegation against [Ashcroft and Mueller] accuses them of adopting a policy approving 'restrictive conditions of confinement' for post September 11 detainees until they were 'cleared' by the FBI." 129 S.Ct. at 1952. Beyond the conclusory allegations of improper motive, as in *Iqbal*, "the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin." *Ibid.* Rather, "[a]ll it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Ibid.* As the Supreme Court held in *Iqbal*, plaintiffs cannot argue "that such a motive would violate [their constitutional rights]." *Ibid.* At bottom, as in *Iqbal*, the complaint here "does not contain any factual allegation sufficient to plausibly suggest [a] discriminatory state of mind." *Ibid.*

3. Moreover, the OIG Report incorporated by plaintiffs here (and referenced in *Iqbal*, 129 S.Ct. at 1943) shows that it is not plausible that there was a policy of classifying all Arab Muslim men arrested on immigration charges as of "high interest" to the September 11 investigation and placing them in the ADMAX SHU. Indeed, the OIG report found that more than three quarters of those detained as part of the 9/11 investigation were not deemed "of high interest" to the investigation and were not held in a SHU. JA 377 (only 184 of 762 detained as part of the 9/11 investigation were deemed of "high interest" and placed in the SHU). The OIG report shows that these placements and designations were made on an individualized basis by the lower level law enforcement officials, and not the Attorney General or the FBI Director. Thus, the OIG report strongly buttresses the *Iqbal* Court's conclusion.

4. Finally, the Supreme Court, in refusing to permit the claims nearly identical to those asserted here to go forward, specifically rejected the argument asserted by plaintiffs here that the protections of qualified immunity could be afforded through the district court's careful management of limited and minimally intrusive discovery. 129 S.Ct. at 1953-54. The Court explained that promises of carefully managed or limited discovery "provide[] especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high level officials who must be neither deterred nor detracted from the vigorous

performance of their duties." *Id.* at 1954. Indeed, letting the claims go forward here, as in *Iqbal*, would be inconsistent with "the basic thrust of the qualified immunity doctrine" – "to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" *Id.* at 1953 (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring)).

While plaintiffs give little weight to the importance of the immunity and the requirement of resolving claims prior to discovery, if at all possible, the Supreme Court recognized the "serious and legitimate reasons," *Iqbal*, 129 S.Ct. at 1953, for the provision of the right of such immunity:

> If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. The costs of diversion are only magnified when Government officials are charged with responding to, as Judge Cabranes aptly put it, "a national and international security emergency unprecedented in the history of the American Republic."

Ibid.

Thus, in *Iqbal*, the Court recognized that this was not a case to excuse the want of pleading by plaintiff and to provide plaintiff the opportunity to fill the voids and

omissions through discovery. Likewise, here, plaintiffs have not stated adequate claims against defendants Ashcroft and Mueller and dismissal, not discovery, is the proper result.

B. *Iqbal* Provides Further Grounds for Affirmance of the Dismissal of the Claims Relating to the Length of Detention.

As we explain in our cross-appellees brief, the district court properly dismissed plaintiffs' claims aimed at the length of their immigration detention. *Iqbal* provides further support for affirming the dismissal of those claims.

1. Plaintiffs allege that the lengths of their immigration detentions were based on an improper purpose and animated by discrimination. Plaintiffs, however, fail to adequately plead the personal involvement of the former Attorney General and the FBI Director. *See* Ashcroft Cross-Appellee Br. 46-58. As discussed above, under *Iqbal*, the supervisory liability claims and conclusory allegations of discriminatory policies cannot stand.

2. As we explain in our prior briefs to this Court, the alleged policy itself – delaying the removal of aliens deemed of interest to the terrorism investigation until cleared – is perfectly lawful and non-discriminatory. And as the district court recognized, "subject[ing] to greater scrutiny aliens who shared characteristics" with the hijackers is not invidious discrimination. SA 48. *Iqbal* fully supports this

position. *See* 129 S.Ct. at 1951 ("[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the [September 11th] attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims").

3. Plaintiffs argue that legitimate foreign policy considerations relating to removal must be ignored because the complaint avers that there was no legitimate immigration purpose supporting their detention. Pl. Br. at 34-36. Under *Iqbal* that argument must be rejected. Plaintiffs cannot unilaterally determine the scope of the Executive's immigration powers in a pleading. Those powers are a matter of statutory and constitutional law, and they cannot be pled away in a complaint by simply alleging that the motive was improper. *See Iqbal*, 129 S.Ct. at 1949 ("the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions").

4. Finally, *Iqbal* supports the argument that a *Bivens* claim should not be recognized as to the length of immigration detention claims. *Iqbal* states that "implied causes of action are disfavored" and that "the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" 129 S.Ct. at 1948. This observation further supports finding that a court should not provide a

Bivens remedy here, where Congress has established an elaborate regulatory and remedial scheme to handle a particular category of disputes with the federal government. *See* Ashcroft Opening Br. 56-57, and Supp Br. 40-44.

CONCLUSION

For the reasons set forth in our opening and cross-appellees/reply briefs and first supplemental brief, and for the reasons set forth above, this Court should affirm the district court on the issues raised in plaintiffs' cross-appeal and reverse the district court on the issues raised in defendants' appeal.

Respectfully submitted,

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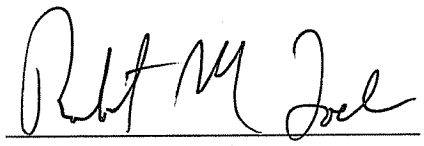
CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and Second Circuit Rule 32(a)(2), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 2,497 words, which is within the 2,500 word limit set by this Court's order.



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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2009, I filed and served the foregoing supplemental brief by causing an original and fourteen copies to be delivered to the Court via FedEx overnight delivery (and e-mail delivery) and to counsel of record via hand delivery or FedEx overnight delivery (and e-mail delivery):

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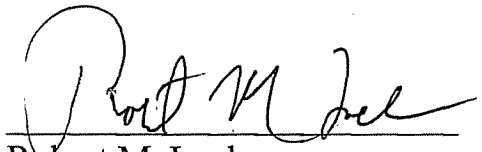

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