ROSEMARY S. POOLER and RICHARD C. WESLEY, Circuit Judges, concurring in the denial of rehearing *en banc*:

Our dissenting colleagues lament that the majority opinion in this matter presents the first circuit decision in the country allowing a *Bivens* claim for an "executive policy" enacted in response to a national emergency. We disagree. The majority opinion acknowledges that *Iqbal* confirmed that it was constitutionally permissible for the Attorney General to subject detainees with suspected ties to terrorism to restrictive conditions of confinement. The majority opinion is unanimous in concluding that plaintiffs have no claim in that regard.

Our differences arise from the significance of what we conclude is a plausibly pled allegation that the Attorney General ratified the rogue acts of a number of field agents in carrying out his lawful policy. The Attorney General is alleged to have endorsed the restrictive detention of a number of men who were Arabs or Muslims or both—or those who appeared to fit those categories—that resulted from the fear and frenzy in greater New York following the 9/11 attacks in which suspicion was founded merely upon one's faith, one's appearance, or one's native tongue.

Moreover, the dissenters fail to note that two of the defendants in this case ran the Metropolitan Detention Center and are alleged to have filed false

documents with regard to the risk assessments of detainees and to have encouraged a dangerous environment for those detainees at the facility. As alleged in the complaint and documented by the Inspector General's report and national media, this included assaults, daily strip searches, and numerous other degrading acts. All of these actions, were they to have occurred in a regular prison environment and been employed against an inmate not suspected of posing any security risk, would have been considered unlawfully punitive. *See Bell v. Wolfish*, 441 U.S. 520, 539 (holding that particular conditions or restrictions of pretrial detention must be reasonably related to a legitimate governmental objective); *see also, e.g.*, *Stoudemire v. Mich. Dep't of Corrs.*, 705 F.3d 560, 574 (6th Cir. 2013) ("'[A] strip search, by its very nature, constitutes an extreme intrusion upon personal privacy, as well as an offense to the dignity of the individual.'" (quoting *Wood v. Clemons*, 89 F.3d 922, 928 (1st Cir. 1996)). This view accords not only with *Iqbal*, but also with both our own prior precedent and the views expressed by several of our sister circuits in the wake of *Iqbal*. *See, e.g.*, *Walker v. Schult*, 717 F.3d 119, 125 (2d Cir. 2013); *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010); *Starr v. Baca*, 652 F.3d 1202, 1208 (9th Cir. 2011).

This case has drawn this Court's attention now for over thirteen years. The majority opinion and dissent have analyzed many arguments (including Judge Raggi's *Bivens* concerns, which were not even advanced by the government) and hundreds of cases. The length of our efforts now fills many pages. In our view, it is time to move the case forward.