No. 15-1359

In the Supreme Court of the United States

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL, AND ROBERT MUELLER, FORMER DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION, PETITIONERS

v.

AHMER IQBAL ABBASI, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

Page

I. Special factors counsel against extending the *Bivens* remedy to this novel context 2
   A. This case implicates the well-established principle that *Bivens* should not lightly be extended to new contexts 3
   B. The *Bivens* remedy should not be extended to high-level policy decisions that implicate both national security and immigration 6
II. Petitioners are entitled to qualified immunity because it was not clearly established in 2001 that aliens legitimately arrested during the September 11 investigation could not be maintained in restrictive conditions of confinement until they were cleared of any connections with terrorism 12
III. Respondents have not plausibly alleged that petitioners personally condoned the implementation of facially constitutional policies in a discriminatory or unreasonably harsh manner 15

TABLE OF AUTHORITIES

Cases:

Aamer v. *Obama*, 742 F.3d 1023 (D.C. Cir. 2014) 6
Ashcroft v. *al-Kidd*, 563 U.S. 731 (2011) 14
Ashcroft v. *Iqbal*, 556 U.S. 662 (2009) ..... *passim*
Bell v. *Wolfish*, 441 U.S. 520 (1979) 14
Bell Atl. Corp. v. *Twombly*, 550 U.S. 544 (2007) 19
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 1, 3
Block v. *Rutherford*, 468 U.S. 576 (1984) 14
Bush v. *Lucas*, 462 U.S. 367 (1983) 7, 11
Butz v. *Economou*, 438 U.S. 478 (1978) 8

Cases—Continued: Page

Carlson v. *Green*, 446 U.S. 14 (1980) 6
Chappell v. *Wallace*, 462 U.S. 296 (1983) 4, 5, 11
Correctional Servs. Corp. v. *Malesko*, 534 U.S. 61 (2001) 3, 7, 10
Davis v. *Passman*, 442 U.S. 228 (1979) 5
Department of the Navy v. *Egan*, 484 U.S. 518 (1988) 10
FDIC v. *Meyer*, 510 U.S. 471 (1994) 4
Florence v. *Board of Chosen Freeholders*, 132 S. Ct. 1510 (2012) 14
Kasten v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011) 20
Korematsu v. *United States*, 323 U.S. 214 (1944) 13
Minneci v. *Pollard*, 565 U.S. 118 (2012) 7
Mitchell v. *Forsyth*, 472 U.S. 511 (1985) 8
Schweiker v. *Chilicky*, 487 U.S. 412 (1988) 7, 11
United States v. *Stanley*, 483 U.S. 669 (1987) 7, 8, 10
United States Army Corps of Eng'rs v. *Hawkes Co.*, 136 S. Ct. 1807 (2016) 7
Vance v. *Rumsfeld*, 701 F.3d 193 (7th Cir. 2012), cert. denied, 133 S. Ct. 2796 (2013) 9, 10
Whitley v. *Albers*, 475 U.S. 312 (1986) 14
Wilkie v. *Robbins*, 551 U.S. 537 (2007) 7, 8, 9
Yee v. *City of Escondido*, 503 U.S. 519 (1992) 21

Constitution, statutes, and rules:

U.S. Const.:
Amend. I 11
Amend. IV 3
Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 6, 10
28 U.S.C. 2241 6
42 U.S.C. 1985(3) 15

Rules—Continued: Page

Fed. R. Civ. P. 8 16
Sup. Ct. R.:
Rule 14.1(a) 20
Rule 15.2 20

Miscellaneous:

Office of the 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) 9, 20, 22
Resp. Iqbal Br., *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009) (No. 07-1015) 19

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The court of appeals held that the former Attorney General of the United States and the former Director of the Federal Bureau of Investigation (FBI) may be subjected to discovery and potential damages liability for unintended consequences arising from the implementation of policy decisions they made during an unprecedented national-security crisis. The court reached that erroneous result without even addressing whether special factors counsel against extending the judicially inferred remedy under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to the extraordinary context of this suit.

The court of appeals found respondents' allegations plausible only by manufacturing its own "lists-merger theory" of liability. Pet. App. 32a n.21. Even under that theory, the decision to maintain respondents in

restrictive conditions of confinement while their potential connections to terrorism were still being investigated did not violate any constitutional rule that was clearly established in 2001. The court of appeals' conclusion that respondents have plausibly pleaded a due-process or equal-protection violation also cannot be reconciled with this Court's reasoning about materially identical allegations in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009).

At the certiorari stage, respondents relied on the lists-merger theory. See Br. in Opp. 26, 28 & n.10. They now seek (Br. 50-59) to revive, as an alternative ground for affirmance, their original theory of liability: that petitioner Ashcroft's policy was unconstitutional from the outset, not just in how it was implemented. That argument is outside the scope of the question presented and, in any event, is even less compatible with *Iqbal* than is the lists-merger theory, as the court of appeals and district court both recognized.

I. Special Factors Counsel Against Extending The *Bivens* Remedy To This Novel Context

As our opening brief explains (Ashcroft Br. 18-30), the court below adopted a blinkered approach to defining the "context" of respondents' *Bivens* claims. The court erroneously concluded that this extraordinary case "stands firmly within a familiar *Bivens* context," Pet. App. 25a, and it extended the judicially inferred *Bivens* remedy without addressing whether any special factors counsel hesitation, *id.* at 29a n.17.

A. This Case Implicates The Well-Established Principle That *Bivens* Should Not Lightly Be Extended To New Contexts

1. Respondents contend (Br. 21-23) that Congress has "ratified" the private damages remedy against federal officials that this Court first recognized in its 1971 decision in *Bivens*. The statutory provisions that respondents invoke (Br. 22), however, were enacted in 1974, 1988, and 1996 and have not prevented the Court from "consistently and repeatedly recogniz[ing]" the need to exercise "caution toward extending *Bivens* remedies into any new context." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001).

Even if Congress had implicitly ratified *Bivens* in 1974, 1988, or 1996, it could not have endorsed further expansions without regard for the special-factors analysis that the court of appeals failed to conduct in this case. In recognizing a remedy for a Fourth Amendment violation, the Court in *Bivens* noted the lack of "special factors counselling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396. Since 1983, the Court has repeatedly identified the presence of special factors as a reason not to approve further extensions. See Ashcroft Br. 19 (citing decisions declining to extend *Bivens* between 1983 and 2012). Congress therefore has provided no reason for the Court to abandon its well-established "reluctan[ce] to extend *Bivens* liability 'to any new context or new category of defendants.'" *Iqbal*, 556 U.S. at 675 (quoting *Correctional Servs. Corp.*, 534 U.S. at 68).

2. As our opening brief explains (Ashcroft Br. 20-23), the court of appeals erroneously treated as a "familiar" context (Pet. App. 25a) a combination of circumstances that was wholly unprecedented both in *Bivens*

jurisprudence and in our Nation's history. Rather than continue to defend the court of appeals' flawed approach directly, respondents now seek to salvage its outcome by contending that the context of a *Bivens* claim is novel only if the claim (1) asserts "a new constitutional right," (2) involves "a new category of defendant," or (3) "creates previously unexplored separation of powers concerns." Resp. Br. 24 (internal quotation marks omitted).

Respondents' first two categories are clear examples of new contexts where courts must be reluctant to extend *Bivens*. Even as to those categories, however, respondents do not refute the observation that a context is novel when, as here, a court must "mix and match" a constitutional right in one earlier case with a category of defendant from another. Pet. App. 95a (Raggi, J., dissenting in relevant part); see *FDIC* v. *Meyer*, 510 U.S. 471, 484 n.9 (1994) ("[A] *Bivens* action alleging a violation of the Due Process Clause of the Fifth Amendment may be appropriate in some contexts, but not in others.").

Respondents' third category—claims that "create[] previously unexplored separation of powers concerns" (Br. 24)—conflates the threshold question whether a claim arises in a new context with the ultimate determination whether to extend *Bivens*. In *Chappell* v. *Wallace*, 462 U.S. 296 (1983), for instance, the *context* of the plaintiffs' employment-discrimination claims was novel because those claims were brought by enlisted military personnel against their superior officers. *Id.* at 297. Whether that difference from earlier cases was a sufficient reason not to extend *Bivens* was a different question, which the Court answered by concluding that "the unique disciplinary structure of the Military Es-

tablishment and Congress' activity in the field constitute[d] 'special factors'" that made the application of *Bivens* "inappropriate." *Id.* at 304.

3. With respect to the threshold question whether the context of this case is a new one, respondents ultimately resort—as did the court of appeals (see Ashcroft Br. 20)—to describing their claims at a high level of generality. Respondents assert that they "challenge their mistreatment in federal custody" (Br. 25) and bring "an equal protection conditions-of-confinement claim" (Br. 27). But it could equally have been said in *Chappell* that the plaintiffs, like the plaintiff in *Davis* v. *Passman*, 442 U.S. 228 (1979), had brought an equal protection employment-discrimination claim. The *Chappell* Court instead described the claim before it with more specificity and accordingly found that special factors associated with the particular context of that claim compelled a different result than in *Davis*. See Ashcroft Br. 21.

The Court's references to "context" involve that term's ordinary meaning: the "interrelated conditions" in which a claim arises, or the "[s]etting or environment" of that claim. Ashcroft Br. 22 (quoting dictionary definitions). Here, the "setting" of respondents' conditions-of-confinement claims is novel, not familiar. Because respondents seek to challenge (1) high-level policy decisions that implicate both (2) national security and (3) immigration, the case involves three separate contextual factors, each of which has been identified by other courts as requiring analysis of whether *Bivens* should be extended. Ashcroft Br. 22-23 & n.7. Respondents identify no case with those attributes in

which a court considered whether *Bivens* applied and found no need to conduct special-factors analysis.[1]

The *sui generis* nature of respondents' claims warrants an evaluation of whether special factors counsel against an extension of the *Bivens* remedy.

B. The *Bivens* Remedy Should Not Be Extended To High-Level Policy Decisions That Implicate Both National Security And Immigration

1. Respondents contend (Br. 32) that the presumed absence of any other meaningful remedy for their constitutional claims "counsels strongly in favor of finding a *Bivens* remedy here." Even assuming that respondents lacked a meaningful alternative remedy,[2] that would not "strongly" favor an extension of *Bivens*.

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[1] Respondents repeatedly suggest (Br. 25-26, 27, 28) that this Court in *Iqbal* implicitly endorsed application of *Bivens* to an equal-protection claim like theirs. But because the defendants in *Iqbal* had not argued against an extension of *Bivens*, see 556 U.S. at 675, the *Iqbal* Court's *sua sponte* discussion was understandably inconclusive. The Court's failure to address what, other than a different constitutional right, would constitute "any new context" for a *Bivens* claim (*ibid.* (citation omitted)) should not prevent the Court from rejecting the decontextualized approaches proffered by respondents and the decision below.

Respondents note (Br. 28) that one defendant in *Carlson* v. *Green*, 446 U.S. 14 (1980), was the Director of the Bureau of Prisons. But the Court's discussion of potential liability did not focus on the Director's role as a policymaker. *Id.* at 16 n.1, 19.

[2] As respondents acknowledge, it is unclear whether a challenge to their conditions of confinement could have been brought under 28 U.S.C. 2241. See Resp. Br. 34 (citing *Aamer* v. *Obama*, 742 F.3d 1023, 1031-1032 (D.C. Cir. 2014), which permitted conditions-of-confinement claims). The habeas petitions filed by other September 11 detainees were mooted when those detainees were released. See *ibid.* (citing J.A. 198-201). Respondents also argue (Br. 38) that they could not bring a challenge under the Adminis-

Respondents' presumption flouts the "familiar" two-step sequence that the Court has described for evaluating whether *Bivens* should be extended to a new context. *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007). The possibility of an alternative remedy is only the first step of that analysis. When there *is* such a remedy, that alone can "amount[] to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Ibid.* But "even in the absence of an alternative [remedy]," the second step of the analysis calls for an evaluation of "any special factors counselling hesitation." *Ibid.* (citation omitted); see *Minneci* v. *Pollard*, 565 U.S. 118, 123 (2012) (quoting same passage from *Wilkie*). At that step, "it is irrelevant * * * whether the laws currently on the books afford [the plaintiff] an 'adequate' federal remedy for his injuries." *United States* v. *Stanley*, 483 U.S. 669, 683 (1987). The Court has previously declined to extend *Bivens* in circumstances where alternative remedies would be inadequate. See, *e.g.*, *Schweiker* v. *Chilicky*, 487 U.S. 412, 425 (1988); *Bush* v. *Lucas*, 462 U.S. 367, 372 (1983).

The two decisions that respondents cite (Br. 32-33) do not support their presumption. In *Correctional Services Corp.*, the presence of alternative remedies meant that the analysis could end at the first step. 534 U.S. at 72-73. In *Wilkie*, the Court found that a

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trative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, because the hold-until-cleared policy (and the lists-merger decision) were unwritten. Whether those policies were final agency action under the APA depended on whether they reflected the consummation of the agency's decisionmaking process, from which legal consequences would flow, see *United States Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016), not on whether they were written or unwritten.

"patchwork" of alternative remedies was equivocal *at step one*, 551 U.S. at 554, and then proceeded to the step-two analysis it had already said would be necessary "in the absence of an alternative" remedy, *id.* at 550, ultimately concluding that "any damages remedy * * * may come better, if at all, through legislation," *id.* at 562.

2. At the second step of the analysis, special factors counsel decisively against an extension of *Bivens* here. See Ashcroft Br. 23-30.

a. Respondents do not dispute that, at least with respect to petitioners Ashcroft, Mueller, and Ziglar, they challenge high-level policy decisions, rather than the unauthorized actions of rogue officers that have been the traditional targets of *Bivens* actions. See Ashcroft Br. 24. Respondents nevertheless suggest that *Bivens* liability is "*more* vital" to "ensur[ing] accountability" in this context because high-level policy decisions may take effect "'on a massive scale.'" Resp. Br. 37 (quoting *Butz* v. *Economou*, 438 U.S. 478, 506 (1978)). They also persist in suggesting (Br. 29, 38) that declining to extend *Bivens* to policy decisions would "effectively overturn[]" the denial of absolute immunity for the Attorney General in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985).

Since *Butz* and *Mitchell*, however, the Court has reiterated that special-factors analysis is separate from the scope-of-immunity question. See *Stanley*, 483 U.S. at 684-686; see also Ashcroft Br. 25-26. Moreover, individual damages liability is not the only, or even the best, way to foster accountability, especially for policy decisions. See *Stanley*, 483 U.S. at 683 (explaining that "redress designed to halt or prevent [a] constitutional violation" need not take the form of an "award of

money damages"). The larger the scale of any unconstitutional policy decisions, the more likely, and more beneficial, a legislative response would be. And, of course, the larger the policy, the larger the potential damages award against the defendant. See *Vance* v. *Rumsfeld*, 701 F.3d 193, 205 (7th Cir. 2012) (en banc) (noting, as reason for skepticism of *Bivens* liability for policy decisions, the potential for a regulation to "impose[] billions of dollars in unjustified costs before being set aside"), cert. denied, 133 S. Ct. 2796 (2013). Congress is better positioned than a court to "tailor any remedy to the problem perceived," *Wilkie*, 551 U.S. at 562, including by taking account of sensitivities associated with litigation about the subject. See Ashcroft Br. 27 (describing statutory safeguards for national-security interests in certain kinds of litigation).

Respondents do not dispute that high-level policy decisions will more likely be scrutinized by Congress or an Inspector General, and hence by the public. Seeking to minimize the import of such scrutiny in this case, respondents state (Br. 38-39) that the Inspector General Report on which the claims in their Fourth Amended Complaint critically rely was "motivated by, among other things, *this lawsuit*." The Inspector General's investigation, however, began in March 2002—weeks *before* the initial complaint in this lawsuit was filed. Compare Office of the 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* 5 (Apr. 2003) (*OIG Report*) (reprinted at J.A. 49), with J.A. 17 (docket entry for April 17, 2002 filing of complaint).

Finally, the Court has already explained that it has "never considered" the "*Bivens* remedy" to be "a proper vehicle for altering an entity's policy." *Correctional Servs. Corp.*, 534 U.S. at 74. The "proper means for preventing entities from acting unconstitutionally" would instead be "injunctive relief." *Ibid.* Even where Congress has authorized such relief under, for instance, the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, individual-capacity *Bivens* claims have not been seen as appropriate additions to APA suits challenging unconstitutional policy decisions. See *Vance*, 701 F.3d at 205 ("[T]he normal means to handle defective policies and regulations is a suit under the [APA] or an equivalent statute, not an award of damages against the policy's author.").

b. Judicial caution about extending *Bivens* is particularly appropriate here because the challenged policy decisions involved both national security and immigration. See Ashcroft Br. 26-30. Respondents suggest (Br. 43) that "national security" concerns are limited to "the discrete sphere of the military." But courts' traditional "reluctan[ce] to intrude" has applied to "military *and national security* affairs." *Department of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988) (emphasis added). Here, as in the military context, there is a constitutional commitment of authority to Congress and the President. The special factor counselling hesitation is "not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion * * * by the judiciary is inappropriate." *Stanley*, 483 U.S. at 683. The exercise of common-law rulemaking through a judicial damages remedy is not appropriate because courts lack the expertise to tailor such a remedy. And this is an

area in which the risk of over-deterrence—especially for potential damages resulting from broad policy decisions—could have substantial consequences for the security of the Nation. Those consequences should be left for Congress to evaluate.

Respondents further contend (Br. 29, 39-42) that immigration-law concerns were irrelevant to their detention, and they caricature our position as reflecting the view that aliens lack constitutional rights against mistreatment. The unavailability of a *Bivens* remedy, however, does not alter the scope of the underlying constitutional protections. The relevant point for special-factors purposes is not that the boundaries of unconstitutional conditions of confinement are defined differently for aliens than for U.S. citizens, but that Congress has established a detailed scheme governing claims of unlawful immigration detention, which (even if it falls short for these plaintiffs) discountenances judicial creation of an additional remedy in damages under *Bivens*.[3]

That is true when the suit in question challenges high-level policy decisions that were already more likely to be subjected to non-judicial scrutiny. And it is especially true when the suit challenges the re-

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[3] Respondents' reasoning would have allowed the First Amendment claim in *Bush*, 462 U.S. at 380, the equal-protection claim in *Chappell*, 462 U.S. at 297, or the due-process claim in *Schweiker* v. *Chilicky*, 487 U.S. at 414, because those substantive areas of constitutional law did not change in the contexts of civil-service personnel actions, the military chain of command, or social-security-disability benefits. Here, consistent with the analysis in those cases, the immigration component is relevant because of the political branches' heightened control over the area and the intricate nature of the scheme that Congress has established. Ashcroft Br. 29.

sponses to an unprecedented national-security crisis. The political branches are not immune from judicial review. But policymakers should not be subject to potentially massive personal liability for the difficult policy judgments they made in the course of responding to the worst terrorist attack in our Nation's history.

II. Petitioners Are Entitled To Qualified Immunity Because It Was Not Clearly Established In 2001 That Aliens Legitimately Arrested During The September 11 Investigation Could Not Be Maintained In Restrictive Conditions Of Confinement Until They Were Cleared Of Any Connections With Terrorism

The court of appeals also erred in holding that petitioners Ashcroft and Mueller are not entitled to qualified immunity. See Ashcroft Br. 30-40. Respondents still have identified no decision indicating, much less clearly establishing, that in the unprecedented circumstances of this case, continuing to apply the hold-until-cleared policy to them was so arbitrary as to constitute a punitive or discriminatory act.

1. Respondents contend that, because petitioners allegedly knew that "there was no reason to suspect *these men* of terrorism, [r]espondents were no different than any ordinary immigration detainee," Br. 71 (emphasis added), and therefore could not be subjected to the restrictions associated with the Administrative Maximum Special Housing Unit (ADMAX SHU) at the Metropolitan Detention Center (MDC). But petitioners could not have known that there was no reason to suspect "these men," or any particular September 11 detainees. At most, they knew that "*many* detainees were arrested without any articulable interest," Resp. Br. 62, and that "many" of those arrested before September 22, 2001, "might not have a nexus to

terrorism." Resp. Br. 58 (quoting J.A. 109-110). Despite that knowledge, however, there remained reason to suspect that at least some of the detainees *did* have potential connections to terrorism, and further investigation was needed to determine which detainees fell within that category. The merger of the New York List and the national INS List, combined with the continued application of the hold-until-cleared policy, effectively decided that the further investigation would take the form of the already-established clearance process. Respondents identify no judicial decision clearly establishing as of 2001 that such an approach was unconstitutional.

Respondents analogize (Br. 71-72) their case to *Korematsu* v. *United States*, 323 U.S. 214 (1944), in which all persons of Japanese ancestry in designated military areas were relocated and then detained. But even respondents' complaint did not allege that the policy decisions challenged in this case meaningfully resemble the invidious race-based classification at issue there. Respondents do not claim that all aliens of Arab or Muslim origin in the New York region were arrested and detained (let alone U.S. citizens, as in *Korematsu*). Nor is it accurate for respondents to describe (Br. 71) themselves as being indistinguishable from "any ordinary immigration detainee—except they appeared to be Arab or Muslim." Unlike ordinary immigration detainees, respondents had been arrested in connection with the September 11 investigation, and they were in the small minority of such arrestees who had been selected by arresting agents for detention in the ADMAX SHU rather than in a less-restrictive facility such as the Passaic County Jail. See Ashcroft Br. 4-5. The decision to preserve the status quo while

the clearance process continued therefore was not the equivalent of selecting a pretrial prisoner for solitary confinement at "random[]" or solely because of his race. Resp. Br. 68.

2. This Court has repeatedly sustained the application of restrictive conditions to entire groups of detainees when those restrictions were reasonably related to a legitimate governmental objective. Ashcroft Br. 35-36 (discussing *Florence* v. *Board of Chosen Freeholders*, 132 S. Ct. 1510, 1523 (2012); *Whitley* v. *Albers*, 475 U.S. 312, 316 (1986); *Block* v. *Rutherford*, 468 U.S. 576, 587 (1984); *Bell* v. *Wolfish*, 441 U.S. 520, 558 (1979)). Rather than contest the general proposition that circumstances may support a particular group-wide restriction, respondents make (Br. 73) the following two assertions: "Plainly no prison system could place all of its civil detainees in solitary confinement. And it certainly could not decide which detainees to subject to solitary confinement arbitrarily, or on the basis of race." But the government did not adopt either of those two approaches in its post-September 11 investigation, and preventing the subgroup of September 11 detainees who were at the MDC from potentially communicating with others while the clearance process continued was not so "arbitrary or purposeless to national security" as to be clearly unconstitutional. Pet. App. 141a (Raggi, J., dissenting in relevant part). That decision was, at worst, the kind of "reasonable but mistaken judgment[] about open legal questions" that "[q]ualified immunity gives government officials breathing room to make." *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 743 (2011).

The Court should conclude, as did six members of the Second Circuit (Pet. App. 241a, 246a-247a), that

the court of appeals erred in denying qualified immunity to petitioners Ashcroft and Mueller for respondents' constitutional claims.

3. Even if respondents had adequately alleged a violation of constitutional equal-protection rights that were clearly established as of late 2001, the defendants in this case would be entitled to qualified immunity from liability under 42 U.S.C. 1985(3). Respondents contend (Br. 91-93) that any clear violation of constitutional equal-protection principles protected by Section 1985(3) suffices to establish a clear violation of the statute. But because the qualified-immunity analysis is right-specific, proof that a defendant violated one clearly established right does not negate his immunity for a different claimed violation. See Ashcroft Br. 39 (citing cases). The defendants therefore are entitled to qualified immunity from respondents' Section 1985(3) claims unless it was clear in late 2001 that their alleged conduct violated *that statute*. Respondents cannot make that showing, since they do not contest that "it was unclear in 2001 that [S]ection 1985(3) applied to federal officials." Resp. Br. 91.

III. Respondents Have Not Plausibly Alleged That Petitioners Personally Condoned The Implementation Of Facially Constitutional Policies In A Discriminatory Or Unreasonably Harsh Manner

As our opening brief explains (at 47-49), respondents have not plausibly alleged that petitioner Ashcroft or Mueller acted with a discriminatory or punitive intent in approving or implementing the decision, several weeks into the September 11 investigation, to keep detainees from the New York List in the facilities where they had previously been sent, pending their clearance of any connection with terrorism. As in

Iqbal, it remains more likely that such a decision was motivated by the obvious alternative intent to prevent a dangerous individual from being released, and that it was made *in spite of*, rather than because of, any concerns that some (but not all) of the initial arrests and classification decisions reflected discrimination by others. See 556 U.S. at 677, 682-683.

1. Respondents seek to curtail pleading-plausibility analysis in two principal ways. The Court should reject those arguments.

a. Respondents contend (Br. 48) that *Iqbal*'s disavowal of a "probability" standard relieves a plaintiff of any obligation to "show that her claims are *more* plausible than any other possible explanation for the facts alleged." That argument is both misleading and irrelevant. The *Iqbal* Court's admonition that "[t]he plausibility standard is not akin to a 'probability requirement'" means only that courts should not reduce to a mathematical exercise the "context-specific" inquiry under Rule 8 of the Federal Rules of Civil Procedure. 556 U.S. at 678, 679 (citation omitted). "[T]he well-pleaded facts" still must "permit the court to infer more than the mere possibility of misconduct." *Id.* at 679. Even when a factual allegation might raise an inference of discriminatory intent, it does not ineluctably follow that the suit can go forward. "Determining whether a complaint states a plausible claim for relief will * * * be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ibid.*

b. Respondents also attempt to shrink the category of allegations that should be disregarded as "conclusory" by distinguishing between "factual" allegations (which in respondents' view cannot be conclusory and

"must be accepted as true even without corroboration," Br. 60-61) and "mere conclusory statements that mirror the elements of a cause of action," Br. 47. Respondents describe (Br. 60) a "factual" allegation as one that "can be verified or not through typical means of proof." But that definition is inconsistent with *Iqbal*, in which the Court rejected as conclusory the allegation that Ashcroft and Mueller "knew" that Iqbal was being subjected to harsh conditions of confinement "solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." 556 U.S. at 680 (brackets in original) (quoting the complaint in that case). That allegation would have been verifiable through "typical means of proof." So, too, would have been the allegation (also rejected by the Court as conclusory) that Ashcroft was the "principal architect" of the allegedly invidious policy. *Ibid.* Under the Court's approach, what matters is not whether a question can be described as "factual," but whether the factual allegations and the underlying claim "present one of 'those contexts' requiring amplification." *Id.* at 670. Whether allegations merely restate the elements of a cause of action is part of that inquiry but not the end of it.

That principle explains why the Court should not credit respondents' mainstay allegation (Br. 53) that Ashcroft and Mueller personally knew that there was no "legitimate reason to suspect [respondents] of ties to terrorism." See also Resp. Br. 20, 30, 45-46, 55, 60, 62, 70-72. Respondents frame that allegation as an analytical predicate of their (concededly conclusory) allegation that Ashcroft and Mueller acted with improper intent. Respondents view that pair of allega-

tions as sufficient to *foreclose* the possibility that Ashcroft and Mueller had lawful motives.

That approach cannot be reconciled with this Court's decision in *Iqbal*. Respondents attempt (Br. 52) to distinguish the two cases on the ground that Iqbal had made no "factual allegations linking [Ashcroft and Mueller] to the decision to subject Muslim and Arab detainees *without suspected ties to terrorism* to restrictive conditions." In fact, the complaint in *Iqbal* specifically alleged that Ashcroft and Mueller "'*knew of* * * * and willfully and maliciously agreed to subject'" Iqbal 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.'" 556 U.S. at 680 (emphasis added; brackets in original) (quoting the complaint). If respondents' analytical approach were correct, the Court should have presumed that Iqbal's allegation as to Ashcroft and Mueller's *knowledge* was true. The Court deemed the allegation conclusory, however, because it "amount[ed] to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim." *Id.* at 681.

2. Under the plausibility analysis that *Iqbal* prescribes, respondents' allegations do not support the lists-merger theory of liability. Respondents contend (Br. 53) that, "[b]ased on years of discovery, they were able to allege what was missing in *Iqbal*": that there was a policy "to target Muslims and Arabs regardless of whether there was a legitimate reason to suspect them of ties to terrorism" and to "subject them to harsh restrictions." But there is ultimately no material difference between the allegations in *Iqbal* and those in respondents' complaint.

Respondents assert (Br. 54 n.14) that, "unlike Mr. Iqbal, [they] do not allege that they were placed in restrictive confinement based on a law enforcement officer's determination that they were of 'high interest' to the terrorism investigation." But Iqbal himself contended that "he was presumptively characterized as 'of high interest' * * *, solely because of his race, religion, and national origin, and for no legitimate reason." Resp. Iqbal Br. at 3, *Iqbal*, *supra* (No. 07-1015); *id.* at 52 n.9 (referring to alleged "blanket policy that Muslims, Arabs, and South Asians were presumptively suspicious"). The few details that respondents add to Iqbal's allegations do not detract from the Court's obligation to "draw on its judicial experience and common sense" in performing the "context-specific task" of "[d]etermining whether a complaint states a plausible claim for relief." *Iqbal*, 556 U.S. at 679.

Like those of the plaintiff in *Iqbal*, respondents' claims fail that test. Even assuming the truth of their allegation that petitioner Ashcroft or Mueller knew of no connection between respondents and terrorism, that state of affairs was still "merely consistent with" an unlawfully discriminatory or punitive intent. *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007)). The absence of knowledge of any connection to terrorism is not equivalent to knowledge of the absence of such a connection.

Taking respondents' allegations in context, petitioners also knew that respondents had been arrested in connection with the September 11 investigation and that they were part of the small minority of such arrestees who had been selected by arresting officers for detention under the most secure conditions. Moreover, there was reason to suspect that *at least some* of

the individuals on the New York List did have potential connections to terrorism. See pp. 12-13, *supra*. Thus, as in *Iqbal*, it is still most likely that the decision to merge the lists and keep respondents in custody at the MDC during the clearance investigation was motivated, as the *OIG Report* concluded, by a reasonable desire to protect against the "unwitting[]" release of "a dangerous individual." Pet. App. 19a (quoting *OIG Report* 53 (J.A. 123)); see *Iqbal*, 556 U.S. at 682-683.[4]

3. As an alternative ground for affirmance, respondents reprise (Br. 50-59) their original theory of liability, contending that the September 11 investigation and the hold-until-cleared policy were unconstitutional from the outset, not just after the lists-merger decision. That argument provides no sound basis for affirming the judgment below.

a. As an initial matter, respondents' alternative theory is outside the scope of the question presented, which explicitly assumes that the policies in question were "facially constitutional." Pet. i; see Sup. Ct. R. 14.1(a). Respondents' brief in opposition (at 26, 28 & n.10) defended the narrower lists-merger theory, but it did not assert that respondents' broader theory "properly would be before the Court if certiorari were granted." Sup. Ct. R. 15.2. Those considerations provide sufficient grounds for the Court to disregard respondents' alternative argument. See *Kasten* v. *Saint-*

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[4] Respondents suggest (Br. 64) that our argument on this score applies only to their discrimination claim, not to their substantive-due-process claim. But as respondents note (*ibid.*), "the court of appeal[s'] approach" to both claims "largely flowed from th[e] same analysis." So does our response. The more-likely alternative intent (*i.e.*, to protect the public against the unwitting release of dangerous individuals) renders the allegations of a discriminatory and a punitive intent equally implausible. See Ashcroft Br. 43.

Gobain Performance Plastics Corp., 563 U.S. 1, 16-17 (2011); *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992).

b. In any event, respondents' broader theory of liability is even less compatible with *Iqbal* than is the lists-merger theory. The court of appeals majority held that respondents had "fail[ed] to plead 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." Pet. App. 31a; see also *id.* at 238a-239a (Pooler and Wesley, JJ., concurring in denial of rehearing en banc). The dissenting judge agreed. See *id.* at 122a-123a (Raggi, J.). So did the district court, which noted respondents' concession at oral argument that their theory required the court to infer a punitive intent on the part of petitioners Ashcroft, Mueller, and Ziglar from their "failure to specify that the harsh confinement policy should be carried out *lawfully*." *Id.* at 198a.

Even in their merits brief, respondents do not explain why it is plausible to infer that, from the outset, the hold-until-cleared policy required not just the arrest and detention of persons who were in violation of the immigration laws, but also the imposition of conditions of confinement that would be unconstitutionally punitive or discriminatory. Respondents acknowledge that petitioners Ashcroft, Mueller, and Ziglar "did not create the particular conditions in question," Br. 57, but view that fact as irrelevant because "Ashcroft and his small working group instructed that [r]espondents be restricted from contacting the outside world, and such restriction could only be accomplished by placement in a Special Housing Unit," Br.

55 (citation omitted). As support, however, respondents cite a passage from the *OIG Report*, which described the desire that prison authorities "limit, as much as possible *within their lawful discretion*, the detainees' ability to communicate with other inmates and with people outside the MDC." *Ibid.* (emphasis added) (quoting J.A. 72).[5]

Respondents also criticize (Br. 58) the court of appeals for relying on a September 22 order "discourag[ing] arrests in cases that were 'clearly of no interest in furthering the investigation of the terrorist attacks,'" Pet. App. 17a (quoting *OIG Report* 45 (J.A. 110)). In respondents' view, the September 22 order "reflect[ed] an awareness that arrests were being made on the basis of religion, race and ethnicity." Resp. Br. 58. But if respondents were correct about the intentions underlying the original policy, there would have been no reason to issue the September 22 order, because it would not have been any cause for concern that "many of the people arrested . . . might not have a nexus to terrorism." *Ibid.* (quoting J.A. 109-110).

Finally, respondents criticize (Br. 58) the court of appeals for relying on the fact that the FBI's New York field office implemented the mandate in a different fashion than did law-enforcement officials in the rest of the country. Respondents view (*ibid.*) that disparity as irrelevant because "there is no indication" that the differences were "in violation of orders from headquarters." In practical effect, respondents ask the

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[5] The district court dismissed the claims that restrictions on respondents' ability to communicate were unconstitutional, Pet. App. 211a-220a, and respondents did not include those claims in their cross-appeal, *id.* at 20a n.13.

Court to infer a punitive or discriminatory intent from petitioners' failure to specify affirmatively that detentions should be carried out lawfully. That argument ignores *Iqbal*'s admonition that "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." 556 U.S. at 676.

If the Court reaches respondents' alternative theory, it should uphold the court of appeals' conclusion that "the DOJ Defendants had a right to presume that subordinates would carry out [the arrest and detention mandate] in a constitutional manner." Pet. App. 31a.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals against petitioners Ashcroft and Mueller should be reversed.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General

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