NO. 15-1358

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. THE COURT OF APPEALS IMPROPERLY EXTENDED THE BIVENS REMEDY

Looked at from a sufficiently high level of abstraction, a mouse shares the same "context" with an elephant: each is in the kingdom animalia, the phylum chordata, the subphylum vertebrata, and the

class mammalia. But no one seeking to determine whether these two animals truly share the same relevant "context" would analyze the situation at that level of abstraction: to do so would be to miss that relevant context entirely. In the same fashion, Respondents ask this Court to countenance the Panel Opinion's examination of 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), at a level of abstraction that is far too high.

Respondents' Brief in Opposition urges the same abstract and mechanistic approach to the *Bivens* issue that the Panel Opinion employed, focusing too narrowly on what the Panel Opinion called the "mechanism of injury" to analyze the *Bivens* claim in its proper context. Respondents strain to harmonize their wooden approach with this Court's decisions in *Chappell v. Wallace,* 462 U.S. 296 (1983), and *Minneci v. Pollard,* 132 S. Ct. 617 (2012). As to *Chappell,* they assert that it denied a remedy under *Bivens* because it involved a "novel mechanism of injury," that "mechanism" being "the military chain of command." Brief in Opposition, at 16.

But the "military chain of command" does not constitute a "mechanism of injury." The "mechanism" by which the defendants allegedly violated the plaintiffs' rights in *Chappell* consisted of straightforward employment discrimination on account of race. The plaintiffs there comprised five enlisted Navy men who sued several officers of the vessel on which they served. 462 U.S. at 297. Plaintiffs "alleged that because of their minority race [the officers] failed to assign them desirable duties,

threatened them, gave them low performance evaluations, and imposed penalties of unusual severity." *Ibid.* That is *how* the *Chappell* plaintiffs alleged that the officers had injured their rights, the "mechanism of injury," as it were. It was this "mechanism" of employment discrimination on account of race that they alleged "deprived [them] of [their] rights under the Constitution and laws of the United States, including the right not to be discriminated against because of [their] race, color or previous condition of servitude," and that stated a claim for "a conspiracy among [the officers] to deprive them of rights in violation of 42 U.S.C. § 1985." *Ibid.* (internal quotation marks and citation omitted).

Chappell denied the plaintiffs a remedy under *Bivens,* but not because the "mechanism of injury" was "novel." It was not: in *Davis v. Passman,* 442 U.S. 228 (1979), the Court had recognized a remedy under *Bivens* for a claim of employment discrimination against a government defendant (a Member of Congress). Indeed, the Court recognized that the "mechanism of injury" in *Chappell* was common in litigation in the civilian world, stating that it would analyze the issue before it as being whether to extend the *Bivens* " 'remedy to one sustaining "incident to [military] service" what under other circumstances would be an actionable wrong.' " 462 U.S. at 299 (quoting *Feres v. United States,* 340 U.S. 135, 138 (1950)). ("*Feres* guides our analysis" of whether to extend to members of the armed forces "the type of non-statutory damage remedy recognized in *Bivens.*" *Ibid.*). Following *Feres,* the Court found that the overall context of the claim, injury sustained

"incident to military service," required it to deny a remedy under *Bivens* even though the "mechanism of injury," employment discrimination, "under other circumstances"—that is, in another context—"would be an actionable wrong." 462 U.S. at 299 (internal quotation marks omitted).

Respondents reach in the same way to distinguish *Minneci v. Pollard,* again arguing that the Court denied a *Bivens* remedy in that case because the "mechanism of injury" was "novel," this time because it "involve[d] private prison employee[s]." Brief in Opposition, at 16. The plaintiff in *Minneci* had claimed that the staff at the privately-operated prison where he was serving his sentence had injured his rights under the Eighth Amendment when they denied him adequate medical care. 132 S. Ct. at 620-621. That denial of medical care constituted the "mechanism" by which the defendants had allegedly injured the plaintiff's constitutional rights in that case. The private prison setting in which that mechanism allegedly did so constituted the "context" of the claim, and the Court examined that context in detail, *id.* at 623-626, in determining that it "cannot imply a *Bivens* remedy" in such a setting. *Id.* at 626.

Respondents' attempts to distinguish *Chappell* and *Minneci* demonstrate that their mechanical application of the test used by the Panel Opinion—identifying whether prior cases extending the *Bivens* remedy have recognized the same "rights injured" and the same "mechanism of injury"—does not work to determine whether a given *Bivens* claim arises in a "new context or [against a] new category of defendants," *Correctional Services Corp. v. Malesko,*

534 U.S. 61, 68 (2001), and so requires consideration of whether "special factors" counsel against judicial implication of the remedy.

Like the Panel Opinion, Respondents' Brief in Opposition invokes "mechanism of injury" as a sort of talisman to divert analysis from the totality of the circumstances, and thus from the determination whether there exist "any special factors counselling hesitation before authorizing a new kind of federal litigation." *Bush v. Lucas,* 462 U.S. 367, 378 (1983). This Court's *Bivens* jurisprudence has eschewed such a narrow approach, and instead has looked broadly at the circumstances of each case to determine whether, taking into account all those circumstances, the *Bivens* claim has arisen in a new context. In taking the approach they have in this case, the Court of Appeals and Respondents have departed from this Court's *Bivens* jurisprudence.

Respondents also attempt to break down the context of this case into various factors, then examine each factor to conclude that it alone does not justify denying a *Bivens* remedy. Brief in Opposition, at 18-24 ("Immigration," "National Security," and "Policymak[ing]"). Analyzing each of these aspects of the context in isolation, Respondents argue that none of them alone suffices to show that the case arises in a new context.

For example, Respondents argue that the case does not involve immigration matters, but only "their mistreatment in custody, which had nothing to do with their immigration proceedings." *Id.* at 18. That views the context of this case with blinkers. Challenging Mr. Ziglar's actions in performing those duties surely implicates the manner in which the

Executive Branch carries out its responsibilities in enforcing the administering the immigration laws, including how it does so in a national emergency, a context where courts have deferred to the Executive Branch in large measure.

So, too, do the alleged actions of the DOJ Defendants at issue in this case implicate national security. Mr. Ziglar, like Mr. Ashcroft and Mr. Mueller, took the actions Respondents attribute to him in the context of discharging his responsibilities to keep the Nation safe in the immediate aftermath of 9/11. Respondents' argument regarding national security does not use blinkers: it wears a blindfold.

II. *IQBAL* REQUIRES DISMISSAL OF RESPONDENTS' FOURTH AMENDED COMPLAINT

Nothing in Respondents' Fourth Amended Complaint plausibly alleges that Mr. Ziglar (or the other DOJ Defendants) knew that the FBI's New York list was over-inclusive, or intended that any Respondent be held in restrictive conditions, or even knew about the conditions of confinement at the Metropolitan Detention Center.

But even assuming the Fourth Amended Complaint could be read to plausibly allege these matters, it cannot be read as plausibly alleging that it was more likely that Mr. Ziglar acted because of, and not in spite of, some discriminatory purpose. The factual averments of the Fourth Amended Complaint are, to say the least, consistent with an "obvious alternative explanation," *Iqbal,* 556 U.S. at 682 (internal quotation marks omitted), namely that whatever he is alleged to have done, Mr. Ziglar acted out of concern that persons illegally in the United

States who had been lawfully arrested and detained in the 9/11 terrorist investigations, and "who had potential connections to those who committed terrorist acts," *ibid.,* could leave the country or engage in activities in furtherance of terrorist objectives if not detained in restrictive conditions until cleared. *Iqbal* so held on facts indistinguishable from those in this case, and the Court of Appeals erred in not following *Iqbal* here.

Respondents' Brief in Opposition concedes that *Iqbal* would require that Respondents' claims against the DOJ Defendants be dismissed, but for a solitary saving grace: Respondents argue that their latest pleading escapes the *Iqbal* fate solely because Respondents have added one additional factual averment, that is, the allegation that the DOJ Defendants " 'knew of and approved, [Respondents'] confinement under severe conditions' " even though those defendants also knew that " 'the government had no evidence linking [Respondents] to terrorist activity.' " Brief in Opposition, at 28 (quoting Panel Opinion, Pet. App. at 47a-48a (emphasis omitted)).[1]

Respondents recognize that "[t]he problem in both [*Bell Atlantic Corp. v.*] *Twombly* [, 550 U.S. 544 (2007),] and *Iqbal* was that the plaintiffs had failed

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[1] Respondents' Brief in Opposition cited to the Appendix To the Petition For A Writ Of Certiorari that Mr. Ashcroft and Mr. Mueller filed with their joint Petition For A Writ Of Certiorari in No. 15-1359. This Reply's citations to the Appendix refer to that same source.

to plead facts that would 'ten[d] to exclude' an alternative 'explanation for defendants' ' conduct." Brief in Opposition, at 27 (quoting *Twombly*, 550 U.S. at 552 (citation omitted by quoting brief)). Respondents also recognize that "[i]n *Iqbal*, the 'obvious alternative explanation' the plaintiff had not excluded was a 'nondiscriminatory intent to detain aliens who were illegally present in the United States and *who had potential connections to those who committed terrorist acts*.' " *Id.* at 27-28 (quoting *Iqbal*, 556 U.S. at 682 (emphasis added by quoting brief)).

Respondents claim their Fourth Amended Complaint has supplied what the *Iqbal* pleading lacked, that is, an allegation of "facts excluding that [obvious alternative] explanation." *Ibid.* They say this new saving allegation consists of the averment that Mr. Ziglar and the DOJ Defendants knew of and approved the confinement of Respondents under restrictive conditions despite " 'their knowledge that the government had *no evidence linking [Respondents] to terrorist activity*.' " *Id.* at 28 (quoting Panel Opinion, Pet. App. at 48a (emphasis added by quoting brief)).

Respondents' attempt to distinguish *Iqbal* thus rests on the premise that this single new allegation excludes the "obvious alternative explanation" that sank the pleading in *Iqbal,* that those defendants acted, not for discriminatory reasons, but to detain aliens illegally present in the United States " '*who had potential connections to those who committed terrorist acts*.' " *Id.* at 28 (quoting *Iqbal,* 556 U.S. at 682 (emphasis added by quoting brief)).

But *Iqbal* did not identify the "obvious alternative explanation" as being that the DOJ Defendants acted to detain only aliens as to whom " 'the government had . . . *evidence linking [them] to terrorist activity*.' " *Id.* at 28 (quoting Panel Opinion, Pet. App. at 48a (emphasis added by quoting brief)). This Court in *Iqbal* said something materially different: it characterized that "obvious alternative explanation" as a "nondiscriminatory intent to detain aliens illegally present in the United States and ***who had potential connections to those who committed terrorist acts***," *Iqbal,* 556 U.S. at 682 (emphasis added). That is not the same as requiring that the government have "evidence" in hand that "links" the detainees themselves "to terrorist activity."

The "alternative explanation" here is as "obvious" as it was in *Iqbal.* Even with knowledge that the government had no "evidence" linking Respondents themselves "to terrorist activity," it is just as likely that the DOJ Defendants here acted because Respondents—aliens illegally in the United States who had come to this country from the same geographical area and who had the same cultural background as the 9/11 terrorists, each of whom had been lawfully arrested on probable cause as part of the 9/11 investigations—also had the same "potential connections to those who committed terrorist acts" that this Court in *Iqbal* found sufficient to provide a nondiscriminatory basis for the detention there at issue.

As Judge Raggi's dissent observed, "the discrimination allegations [that *Iqbal*] deemed implausible in light of the more likely national security explanation for defendants' actions included

assertions that the MDC Plaintiffs' restrictive confinement was not supported by 'any individual determination' that such restrictions were 'appropriate or should continue.' " Pet. App. at 155a (quoting *Iqbal* First Amended Complaint ¶ 97). For this reason, the dissent concluded, it could not be suggested that the Court in *Iqbal* "did not understand that plaintiffs were complaining of the lack of prior individualized suspicion," exactly as Respondents do here. *Ibid.*

Iqbal makes that clear. As in this case, the plaintiff's complaint in *Iqbal* "challenge[d] neither the constitutionality of his arrest nor his initial detention in the MDC." 556 U.S. at 682. As in this case, in *Iqbal* the plaintiff complained only that he had been discriminated against by being placed in the most restrictive conditions of confinement because of his race, religion, or natural origin. *Ibid.* His "only factual allegation against [Mr. Ashcroft and Mr. Mueller] accuse[d] them of adopting a policy approving restrictive conditions of confinement for post-September-11 detainees until they were 'cleared' by the FBI." *Id.* at 683 (internal quotation marks omitted). And the "restrictive conditions" Mr. Iqbal alleged are the same as those Respondents here allege. *Id.* at 668.

Nothing in *Iqbal* suggests that when it subjected Mr. Iqbal to restrictive confinement " 'the government had [any] evidence linking [Mr. Iqbal] to terrorist activity.' " Brief in Opposition, at 28 (quoting Panel Opinion, Pet. App. at 48a) (emphasis omitted). To the contrary: this Court's opinion makes it clear that Mr. Iqbal had alleged that the government held him in " '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 669 (internal quotation marks omitted) (emphasis added).

Iqbal held that while these allegations were consistent with purposeful discrimination, there existed an alternative explanation that rendered this claim of discriminatory purpose implausible. It found that the acts of Mr. Ashcroft and Mr. Mueller in *Iqbal* "were likely lawful and justified by [their] nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." *Id.* at 682. For that reason, this Court held that "discrimination [was] not a plausible conclusion." *Ibid.*

Nor is it a plausible conclusion here, and for the same reasons as in *Iqbal.*

III. THE COURT OF APPEALS IMPROPERLY DENIED MR. ZIGLAR QUALIFIED IMMUNITY

As it did in addressing the *Bivens* issue, Respondents' Brief in Opposition tries to characterize the rights they contend were clearly established for qualified immunity purposes as abstractly as possible. They identify those rights as the right to be free from "deprivations of rights motivated by race, religion, ethnicity, or national origin," Brief in Opposition, at 31, and the "substantive due process right to be free from arbitrary or purposeless conditions of confinement—that is, conditions not reasonably related to any legitimate governmental objective." *Id.* at 32 (internal quotation marks omitted).

Respondents sail too far above the facts of this case. They ignore "the *particular* conduct" of Mr. Ziglar (and the other DOJ Defendants) "in light of the *specific* context of this case." Pet. App. at 247a (emphasis in original). Here, just as in *Iqbal,* the "particular conduct" and the "specific context" sharpen the focus regarding qualified immunity: did Respondents have a clearly-established right to be free from restrictive confinement when they were in the United States illegally, the government had lawfully arrested and detained them in the course of its investigation of the terrorist attacks of 9/11, they shared many traits with the 9/11 terrorists (such as country of origin, religious affiliation, and cultural background), and they "***had potential connections to those who committed terrorist acts***"? *Iqbal,* 556 U.S. at 682 (emphasis added).

When the enquiry is phrased this way, as it should be, it cannot be said that Respondents had a clearly-established right to be free from restrictive confinement such that only "the plainly incompetent or those who knowingly violate the law" would have so confined them. *Malley v. Briggs,* 475 U.S. 335, 341 (1986). Respondents' Brief in Opposition cites no case law that comes close to establishing the unlawfulness of Mr. Ziglar's alleged conduct. He is entitled to qualified immunity.

Nor should this Court defer resolution of this issue, as Respondents suggest. Brief in Opposition, at 35 (quoting *Brosseau v. Haugen,* 543 U.S. 194, 201 (2004)). The Court there did not question its holdings in cases such as *Saucier v. Katz,* 533 U.S. 194 (2001), that "[q]ualified immunity is an entitlement not to stand trial or face the other

burdens of litigation," constitutes "an *immunity from suit* rather than a mere defense to liability," and should be resolved "at the earliest possible stage in litigation." *Id.* at 200-201 (internal quotation marks and citations omitted) (emphasis in original). Respondents have pointed to no facts that justify a departure from those precedents in this case. If Mr. Ziglar is entitled to qualified immunity, he is entitled to it now, so he may avoid the burdens of this litigation.

CONCLUSION

Petitioner, James W. Ziglar, respectfully requests that the Court grant his Petition For A Writ Of Certiorari to review the judgment of the United States Court of Appeals For The Second Circuit in this matter.

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