13-981-cv(L)

13-1662-cv(XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IBRAHIM TURKMEN, AKIL SACHVEDA, AHMER IQBAL ABBASI, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, PURNA BAJRACHARYA, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees-Cross-Appellants,

v.

[caption continued on inside cover]

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

PETITION FOR REHEARING OR REHEARING EN BANC OF DEFENDANTS-CROSS-APPELLEES JOHN ASHCROFT AND ROBERT MUELLER

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

VINCENT H. COHEN, JR. (Acting)
DANA J. BOENTE
United States Attorneys

BARBARA L. HERWIG
(202) 514-5425
H. THOMAS BYRON III
(202) 616-5367
Attorneys, Appellate Staff
Civil Division, Room 7260
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

[caption continued]

DENNIS HASTY, former Warden of the Metropolitan Detention Center, MICHAEL ZENK, former Warden of the Metropolitan Detention Center, JAMES SHERMAN, former Metropolitan Detention Center Associate Warden for Custody,

Defendants-Appellants-Cross-Appellees,

JOHN ASHCROFT, former Attorney General of the United States, ROBERT MUELLER, former Director, Federal Bureau of Investigations, JAMES W. ZIGLAR, former Commissioner, Immigration and Naturalization Service,

Defendants -Cross-Appellees,

SALVATORE LoPRESTI, former Metropolitan Detention Center Captain, JOSEPH CUCITI, former Metropolitan Detention Center Lieutenant,

Defendants.

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 1

STATEMENT 2

ARGUMENT 6

I. Plaintiffs Failed To Plausibly Allege That The Attorney General And FBI Director Acted Unconstitutionally 6

II. *Arar* Precludes Using A *Bivens* Claim To Challenge Executive Branch Policy 11

III. The Former Attorney General and FBI Director Are Entitled To Qualified Immunity 13

CONCLUSION 15

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

Attachments:

Majority Opinion (Op.)

Dissent (Diss.)

TABLE OF AUTHORITIES

Cases:

Arar v. *Ashcroft*, 585 F.3d 559 (2d Cir. 2009) 1, 5-6, 11-12, 13

Ashcroft v. *Iqbal*, 556 U.S. 662 (2009)... 1, 2, 3, 6-7, 9

Bell v. *Wolfish*, 441 U.S. 520 (1979)..14

Bell Atlantic Corp. v. *Twombly*, 550 U.S. 544 (2007)..7

Crocker v. *Piedmont Aviation, Inc.*, 49 F.3d 735 (D.C. Cir. 1995)................. 11-12

Eichorn v. *AT&T Corp.*, 484 F.3d 644 (3d Cir. 2007) 11

Kessler v. *Nat'l Enters., Inc.*, 203 F.3d 1058 (8th Cir. 2000)...............................11

Kingsley v. *Hendrickson*, 135 S.Ct. 2466 (2015)... 14-15

Okoro v. *Callaghan*, 324 F.3d 488 (7th Cir. 2003) 12

Turkmen v. *Ashcroft*, 589 F.3d 542 (2d Cir. 2009) 2

Turkmen v. *Ashcroft*, 915 F. Supp. 2d 314 (E.D.N.Y. 2013) 3, 6

INTRODUCTION AND SUMMARY

The panel majority held that the former Attorney General and FBI Director can be sued for damages based on their policy decisions during the investigation into the attacks against the United States on September 11, 2001, despite the absence of plausible allegations that each defendant personally violated plaintiffs' clearly established constitutional rights. The panel majority's analysis and reasoning conflict with the Supreme Court's decision in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), and this Court's decision in *Arar* v. *Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc). The panel decision also presents the following question of exceptional importance: Whether plaintiffs may presume that federal officials acted unconstitutionally when adopting facially reasonable policies in an effort to protect the nation during a turbulent time. Moreover, as Judge Raggi's dissent explains, the decision here conflicts with four other Circuits, which have declined to recognize *Bivens* claims against Executive Branch officials in the wake of the September 11 attacks. Diss. 1 n.1.

STATEMENT

The claims and allegations in this case mirror those in *Iqbal*. In both cases, plaintiffs allege that they were detained for immigration violations after September 11, 2001, and that they were mistreated during that detention in violation of their constitutional rights. There is no dispute that the detentions themselves were lawful, as plaintiffs were aliens subject to arrest and removal due to their immigration status. Op. 4 & n.1; *Iqbal*, 556 U.S. at 682; *Turkmen* v. *Ashcroft*, 589 F.3d 542, 549-550 (2d Cir. 2009) (*Turkmen II*). And this Court previously held that the length of detention did not violate any clearly established constitutional right. *Turkmen II*, 589 F.3d at 550. The remaining claims focus on the treatment of some plaintiffs at one facility, the Metropolitan Detention Center (MDC), and in particular the conditions in a particular housing unit at MDC (the ADMAX SHU).

The complaint does not allege that former Attorney General Ashcroft and former FBI Director Mueller themselves specified or required the particular conditions of detention alleged here, or that they directed that any particular individuals be held in one location or another. Indeed, most

New York detainees were not held at the MDC ADMAX SHU. Diss. 43-44 n.28, 51. Plaintiffs nevertheless contend that their rights were violated because the former Attorney General and FBI Director directed that immigration detainees designated "of interest" to the 9/11 investigation should be held until they were cleared of any connection to terrorism, a decision the Supreme Court in *Iqbal* described as "a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks." 556 U.S. at 682.

The panel held that the former Attorney General and FBI Director could be sued for alleged violations of plaintiffs' substantive due process and equal protection rights.[1] The panel rejected plaintiffs' theory of liability, holding that the detention of plaintiffs in the ADMAX SHU did not "plausibly plead a substantive due process claim against the DOJ

---

[1] The panel unanimously held that plaintiffs' Free Exercise claim is not cognizable. Op. 35-36; Diss. 7 n.3. Plaintiffs did not appeal the dismissal of their First Amendment claims concerning communications limits. *Turkmen* v. *Ashcroft*, 915 F. Supp. 2d 314, 339-340, 347-351 (E.D.N.Y. 2013). And plaintiffs did not name Ashcroft and Mueller in the claim seeking damages for alleged strip searches. Op. 95 n.41.

Defendants coextensive with the entire post-9/11 investigation and reaching back to the time of Plaintiffs' initial detention." Op. 59; see also Op. 40 (recognizing "the mandate's facial validity," and acknowledging that "the DOJ Defendants had a right to presume that subordinates would carry it out in a constitutional manner"); Diss. 42-43. Nevertheless, the majority developed its own theory to allow the suit to proceed—focusing on a subsequent decision to "merge" two separate lists of detainees: one nationwide list, and another based on FBI investigations in New York. Op. 49-55, 59-60. Like plaintiffs, the majority selectively relied on conclusions in reports by the Justice Department's Office of Inspector General (OIG). The majority acknowledged that there was no basis in the OIG reports for plaintiffs' bald assertion that Attorney General Ashcroft personally decided to merge those lists, or for their claim that he knew there was no basis to link some of the individuals on the New York list to terrorism. But the majority nevertheless inferred the possibility that the Attorney General acted in a nefarious manner, and held that the suit could proceed because plaintiffs alleged that "Ashcroft approved, or at least endorsed," the list-

merger decision, at a time when he allegedly had "knowledge of the conditions at the ADMAX SHU and the lack of any form of verified suspicion for a large number of those detainees on the New York List." Op. 49; see also Op. 54 (noting allegation that Mueller complied with the list-merger decision, despite alleged awareness that it was unreasonable).

The panel majority concluded that it was plausible to infer that the Attorney General and FBI Director acted with "punitive intent" because—assuming that they knew about the specific conditions of confinement that plaintiffs now identify, and assuming that they knew that some individuals were being held in the absence of particularized suspicion concerning a link to terrorist activity—no other explanation would justify merging the lists. Op. 55-58. The majority also rejected qualified immunity, Op. 60-62, and allowed plaintiffs' equal protection and conspiracy claims to proceed, based on similar allegations, Op. 76-85, 100-106.

The majority further held that a *Bivens* remedy is available, despite *Arar*'s emphasis on the Supreme Court's admonition "that the *Bivens* remedy is an extraordinary thing that should rarely if ever be applied in

new contexts." 585 F.3d at 571, quoted in Op. 29. The dissent disagreed, explaining the need for a careful assessment of the context and the special factors counseling against implying a *Bivens* cause of action. Diss. 1-37.

ARGUMENT

I. PLAINTIFFS FAILED TO PLAUSIBLY ALLEGE THAT THE ATTORNEY GENERAL AND FBI DIRECTOR ACTED UNCONSTITUTIONALLY.

The district court correctly recognized that the Supreme Court's decision in *Iqbal* requires dismissal of plaintiffs' claims against former Attorney General Ashcroft and former FBI Director Mueller, as well as former INS Commissioner Ziglar. *Turkmen* v. *Ashcroft*, 915 F. Supp. 2d 314, 339-340, 344-345 (E.D.N.Y. 2013).[2] The panel majority reached a contrary conclusion by assuming that the Nation's highest-ranking law-enforcement officials must have been aware of these specific conditions of confinement, and that they similarly must have known that some individuals on one list of detainees were allegedly targeted on an ethnic basis and lacked demonstrated ties to terrorism. That approach flies in the face of *Iqbal*'s

[2] Although the former INS Commissioner is separately represented, the arguments set forth in this petition apply equally to him.

holding that the plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." 556 U.S. at 678. Not only does the panel majority's analysis find no support in plaintiffs' allegations or the OIG reports, it also reflects an attribution of ill intent that the Supreme Court held to be inappropriate when an "obvious alternative explanation" exists that is inconsistent with liability. *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 567 (2007), quoted in *Iqbal*, 556 U.S. at 682. The obvious explanation is that the Attorney General and FBI Director acted cautiously to ensure that all those detained in connection with the 9/11 investigation would be held until they were cleared. That reasonable policy judgment does not support a *Bivens* claim. See Diss. 58-60.

Iqbal held that a complaint must do more than "plead[] facts that are 'merely consistent with' a defendant's liability." 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557); see also *id.* at 676 (*Bivens* plaintiffs must "plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution"). The panel majority's new list-merger theory is based on speculation, assumption, and leaps of

logic that cannot withstand scrutiny. For example, in order to attribute personal knowledge of specific conditions of confinement to Ashcroft and Mueller, the majority relies on a statement in the OIG report that "an allegation of mistreatment was called to the Attorney General's attention." Op. 42-43. But Justice Department officials had no specific knowledge about the conditions of confinement complained of here. See OIG Report 20. And the single allegation of mistreatment relied on by the majority led Attorney General Ashcroft to "call for a staff inquiry, hardly action implying punitive intent." Diss. 56 (citing OIG report).[3] The majority refers to findings concerning others within the Department—but not the Attorney General or FBI Director—as well as "media attention," to bolster its view that "not only was Ashcroft's *office* aware of some of the conditions imposed, but affirmatively supported them," and that "it *seems implausible* that the public's concerns did not reach the DOJ Defendants' desks." Op.

[3] Moreover, it is inconsistent with qualified immunity principles to allow a former Attorney General to be saddled with the burdens of suit based on allegations about events that took place nearly fourteen years ago.

43-44 (emphasis added). That approach is inconsistent with *Iqbal*'s requirement that a plaintiff must plead plausible allegations of each defendant's individual misconduct.

Similarly, in order to conclude that Ashcroft must have known that detainees were improperly included on the New York List, the majority points to plaintiffs' conclusory allegation that "regular, detailed reporting on arrests" must have informed the Attorney General of the lack of individualized suspicion. Op. 46. The majority also points to bits of information apparently known by others within the Justice Department, but not the Attorney General or FBI Director, simply assuming that "this information, known by other DOJ officials, came to the attention of the DOJ Defendants" because of regular meetings. Op. 47; see also Op. 48 ("It seems quite *plausible* that DOJ officials would confer with the Attorney General and the Director of the FBI * * * about the problem of the New York List and the hundreds of detainees picked up in contravention of Ashcroft's stated policy."). The majority likewise concluded that the Attorney General and FBI Director could be sued on equal protection

grounds, theorizing that they must have been aware of allegations that individuals had been targeted based on their ethnicity or religion because a different Justice Department official expressed a concern that some detainees were being held based on their ethnicity. Op. 79. There is no plausible allegation that Ashcroft and Mueller knew that any individual plaintiff was free from suspicion and was mistreated.

Each step of the majority's explanation requires further speculation and assumption. The majority attributes the list-merger decision to the Attorney General himself, based on a speculative assertion by plaintiffs (that finds no support in the OIG report) and on the further assumption that he essentially should have known, "[g]iven the importance of the merger and its implications for how his lawful original order was being carried out." Op. 51; see also Op. 49-55 (disagreeing with dissent's alternative interpretation of events described in OIG Report). And the majority speculates that the Attorney General must have had punitive intent because each of the prior assumptions and speculations, when added together, purportedly deprive the decision to merge the lists of any

possible legitimate basis. Op. 55-58. By presuming ill intent, the majority impermissibly shifts plaintiffs' burden of pleading a constitutional violation (sufficient to overcome qualified immunity). The dissent explains these and other errors at length. Diss. 44-58, 73-84.[4]

II. *ARAR* PRECLUDES USING A *BIVENS* CLAIM TO CHALLENGE EXECUTIVE BRANCH POLICY.

As the dissent observes, the majority decision here is also inconsistent with this Court's emphasis on the proper reluctance of courts to apply *Bivens* to new claims. See Diss. 1-37.[5] In *Arar*, the en banc Court

---

[4] The majority attributes to the Attorney General's imagined contemporaneous decision-making many of the retrospective conclusions of the OIG report. But the Attorney General could not have known, in the weeks following the September 11 attacks, each of the facts later assembled by the OIG with the benefit of hindsight, based on extensive analysis and investigation. And an OIG investigation should not be a one-way ratchet, permitting plaintiffs to incorporate findings that support their theory while ignoring other findings that exonerate defendants. See Op. 49-50; Diss. 46.

[5] This issue is a proper basis for rehearing because the majority ruled on it adversely to Ashcroft and Mueller. See also Diss. 7 n.4. In any event, appellees need not raise every possible alternative supporting affirmance. See, *e.g.*, *Eichorn* v. *AT&T Corp.*, 484 F.3d 644, 657–58 (3d Cir. 2007) (appellees "were not required to raise all possible alternative grounds for affirmance to avoid waiving those grounds") (citing *Kessler* v. *National Enters., Inc.*, 203 F.3d 1058, 1059 (8th Cir. 2000); *Crocker* v. *Piedmont Aviation,*

Continued on next page.

distinguished between the well-recognized cause of action under *Bivens*—under which a plaintiff may challenge "isolated actions of individual federal employees" that allegedly violate constitutional standards—and the improper theory asserted in that case (as here), which sought to use individual liability as a means to "challenge policies promulgated and pursued by the executive branch." *Arar*, 585 F.3d at 578. "Such an extension of *Bivens* is without precedent and implicates questions of separation of powers as well as sovereign immunity." *Ibid.*

The majority brushed past *Arar*'s warning by asserting that previous cases have entertained *Bivens* claims involving allegedly unconstitutional conditions of confinement. See Op. 30-35. But that approach does not support plaintiffs' claims against high-ranking policymakers in the Executive Branch, who were concededly not the "individual federal officers [who allegedly] subjected them to punitive conditions." Op. 31-32.

Inc., 49 F.3d 735, 741 (D.C. Cir. 1995)); *Okoro* v. *Callaghan*, 324 F.3d 488, 489 (7th Cir. 2003) (appellees "were not obligated to defend the district court's judgment in their favor on every possible ground").

Whether something is a novel context for a *Bivens* claim must take account of more than simply a description of plaintiffs' claims at the highest level of generality, which disregards the significant differences between this case and those relied on as analogues. See *Arar*, 585 F.3d at 572 (defining "context" as "a potentially recurring scenario that has similar legal and factual components"), quoted in Diss. 8.

III. THE FORMER ATTORNEY GENERAL AND FBI DIRECTOR ARE ENTITLED TO QUALIFIED IMMUNITY.

Even if plaintiffs could otherwise bring a plausible *Bivens* claim concerning the policies at issue here, the former Attorney General and FBI Director are entitled to qualified immunity because they did not violate any clearly established constitutional rights. The policy at issue here was lawful by any measure: Plaintiffs were aliens properly subject to detention and arrested in conjunction with a lawful investigation into the September 11 attacks, and they could be held until they were cleared of any connection to terrorism. Even under the majority's new list-merger theory, plaintiffs have alleged only that the former Attorney General and FBI Director should have known that some detainees lacked an individualized

connection to suspicions of terrorism and that a concern had been raised about one detainee's conditions of confinement. That is insufficient to demonstrate a violation of clearly established constitutional rights.

The majority rejected the claims of qualified immunity on the ground that plaintiffs had a clearly established right to be free from particular conditions of confinement—characterized as punitive—in the absence of individualized suspicion. Op. 61 (citing *Bell* v. *Wolfish*, 441 U.S. 520 535-539 & n.20 (1979)). Like the majority's *Arar* analysis, that approaches the question at too high a level of generality, as the dissent explains. Diss. 60-69, 83. And plaintiffs do not allege and cannot show that the Attorney General and FBI Director knew at the time the lists were merged that any individual plaintiff was both free of any individualized suspicion and subjected to the particular conditions of confinement complained of here.

The Supreme Court's recent decision in *Kingsley* v. *Hendrickson*, 135 S. Ct. 2466 (2015), confirms that the majority undertook the incorrect legal analysis. *Kingsley* held that "a pretrial detainee must show only that the force purposely or knowingly used against him was objectively

unreasonable." 135 S. Ct. at 2473 (citing and distinguishing *Wolfish*). The appropriate measure of plaintiffs' constitutional claims must turn on the objective reasonableness of a defendant's actions, not whether "punitive intent" can be inferred. *E.g.*, Op. 39, 42, 55-58. The Supreme Court's clarification of the appropriate standard does not simply lower the relevant standard. It confirms that the panel majority here looked at the Attorney General's and FBI Director's policy decisions through the wrong lens: the question is not whether a court can infer evidence of punitive intent, but whether each individual defendant's conduct was itself objectively unreasonable. Because the law governing treatment of pretrial detainees (and civil immigration detainees as well, see Op. 39 n.19) was unsettled even at the time of the decision in this case, the majority was wrong to find that the rights in question were clearly established in 2001. Diss. 61-62.

CONCLUSION

The panel or the full Court should rehear this case and, at minimum, affirm the judgment of the district court dismissing the claims against the former Attorney General and FBI Director.

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

RONALD C. MACHEN JR. (Acting)
DANA BOENTE
United States Attorneys

/s/ *H. Thomas Byron III*

BARBARA L. HERWIG
(202) 514-5425
H. THOMAS BYRON III
(202) 616-5367
Attorneys, Appellate Staff
Civil Division, Room 7260
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

AUGUST 2015

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32

Pursuant to Fed. R. App. P. 32(c)(2), I hereby certify that this petition complies with the requirements of Fed. R. App. P. 32(a). The petition has been prepared in 14-point Palatino Linotype, a proportionally spaced font, with margins of 1 inch on all sides.

/s/ *H. Thomas Byron III*
H. THOMAS BYRON III

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2015, I electronically filed the foregoing Petition for Rehearing or Rehearing En Banc Of Defendants-Cross-Appellees John Ashcroft And Robert Mueller with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ *H. Thomas Byron III*
H. THOMAS BYRON III