No. 15-1363

IN THE
Supreme Court of the United States

DENNIS HASTY AND JAMES SHERMAN,
Petitioners,

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 FOR PETITIONERS HASTY AND SHERMAN

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Respondents agree that this case involves "weighty issues implicating both this nation's security and its most core values." Br. in Opp. 36. So did the six Second Circuit judges who dissented from denial of rehearing en banc. As they observed, the case presents "questions of exceptional importance meriting further review." Pet. App. 232a. The importance of the issues is common ground.

With respect to petitioners Hasty and Sherman, the respondents' brief is otherwise largely an exercise in evasion. Respondents ignore the extraordinary nature of their *Bivens* claims against Hasty and Sherman. Respondents assert that Hasty and Sherman—local jailers—were constitutionally compelled to *disregard the FBI's terrorism designations*, and to unilaterally remove respondents from the restrictive confinement conditions those designations mandated. That was required, respondents allege, because Hasty and Sherman supposedly believed the FBI's designations were wrong. See, *e.g.*, Pet. 2, 11, 15-16, 19. No court has extended *Bivens* to a remotely analogous context. While respondents urge their claims are in "*Bivens*[']heartland," Br. in Opp. 24, because they assert "familiar constitutional claim[s] based on a familiar mechanism of injury," *id.* at 16, that underscores the defect in the Second Circuit's two-step "rights-injured"/"mechanism-of-injury" approach: It equates a case demanding that jailers contravene the FBI's terrorism designations with any ordinary conditions-of-confinement case. A decision holding that ground-level officials charged with implementing FBI terrorism designations can be held personally liable simply for *performing their job within the chain of command* is anything but "familiar." If there is to be a cause of action in these unique circumstances, Congress, not the courts, must create it.

Respondents commit the same mistake when they argue that the many special factors identified in the petition (at 24-26) should not preclude *Bivens* here. See Br. in Opp. 18-24. They gloss over that, under current Second Circuit law, that inquiry never gets made. Rather, under the Second Circuit's expansive "rights-injured"/"mechanism-of-injury" framework, no special-factors in-

quiry was conducted because this case is no different than any other conditions-of-confinement case to which *Bivens* has already been extended.

Respondents also ignore the Second Circuit's revision of this Court's precedents. Respondents urge that they have plausibly alleged that Hasty and Sherman had discriminatory intent under *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), because their Complaint alleges that petitioners knew the government had no evidence linking respondents to terrorism. See Br. in Opp. 25-29. But respondents ignore the far more plausible explanation: That Hasty and Sherman did not disregard the FBI's terrorism determinations because they lacked authority and expertise to do so. And, like the Second Circuit panel, respondents would rewrite the law of qualified immunity. While respondents can cite *general* legal standards governing ordinary situations, they can cite no clearly established law that required Hasty and Sherman to act on their subjective assessment of respondents instead of respecting the FBI's determinations. Yet under the decision below, petitioners are potentially subject to ruinous personal liability. And respondents offer only a half-hearted effort to deny the circuit splits on these issues—splits recognized by judges in multiple circuits, including six Second Circuit judges below. Contrast Pet. 20-24, with Br. in Opp. 24. Review is warranted.

I. THE CASE PRESENTS IMPORTANT QUESTIONS—AND CIRCUIT CONFLICTS—REGARDING *BIVENS*' SCOPE

A. The Second Circuit's Framework Nullifies Special-Factors Analysis

This Court's cases are clear: Courts must "'pay[] particular heed'" not to expand *Bivens* to a new context where "'special factors counsel[] hesitation.'" *Wilkie* v.

Robbins, 551 U.S. 537, 550 (2007). "Special factors" include, among other things, matters of national security, foreign affairs, intelligence, and immigration. See Pet. 16-24. For the past 35 years, this Court has repeatedly invoked special factors in refusing to "extend *Bivens* liability to any new context or new category of defendants." *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001).

Respondents do not deny that the Second Circuit bypassed the "special factors" analysis because, according to the panel, it was not extending *Bivens* at all. Under the Second Circuit's test, a context is not "new" if the "rights injured" and the "mechanism of injury" match those in prior *Bivens* actions. Pet. App. 24a-26a. Respondents theorize that that two-part test "leav[es] ample basis for courts to pause before endorsing exotic new theories." Br. in Opp. 15-16. "At a sufficiently high level of generality," however, even very different cases can be "analogized to some other claim for which a *Bivens* action is afforded." *Arar* v. *Ashcroft*, 585 F.3d 559, 572 (2d Cir. 2009) (en banc), cert. denied, 560 U.S. 978 (2010). And that is just what the Second Circuit's new test does here: It requires courts to look at *two* factors at a high level of generality—nature of right and mechanism of injury. That does not address special factors; it ignores them.

This case illustrates the defect in that approach. The Second Circuit declined to consider special factors because it deemed both the constitutional rights at issue ("substantive due process," "equal protection," and "Fourth Amendment" violations) and the mechanism (*e.g.*, "punitive conditions without sufficient cause") familiar. Pet. App. 24a, 28a; see Br. in Opp. 15. But that ignores every aspect of "context" that matters. The "new context" analysis requires more: "It demands considera-

tion of *all factors* counseling for and against an implied damages action in the *specific legal and factual circumstances presented*." Pet. App. 91a. (Raggi, J., dissenting) (emphasis added). A test that does not even acknowledge the differences between a run-of-the-mill conditions-of-confinement case and respondents' allegations—that local jailers were required to disregard the FBI's terrorism designations and impose less restrictive conditions based on their own subjective assessment—is no test at all. No context would be new, and special-factors analysis would be a dead letter. By eliminating that safeguard, the Second Circuit "invite[s]" *Bivens*' expansion into "every sphere of legitimate governmental action." *Wilkie*, 551 U.S. at 561.

B. Respondents' Special-Factors Analysis Underscores the Need for Review

Respondents argue there are no "special factors" that preclude *Bivens* here. Br. in Opp. 18-24. But the panel below dispensed with that inquiry entirely. See Pet. App. 21a-29a. The propriety of doing so is precisely the issue before this Court.

Respondents' special-factors arguments, moreover, illustrate the necessity of addressing those factors expressly. Respondents acknowledge that factors "related to national security" may "counsel[ ] hesitation," as Congress, not the courts, should decide when to create new causes of action touching on such matters. Br. in Opp. 21. Invoking the Complaint's allegation that Hasty and Sherman "knew there was no reason to suspect [respondents] of any connection to terrorism," however, respondents deny that this case raises any national-security issues; it is improper, they assert, to contradict the Complaint. *Id.* at 20-21. Respondents miss the point. Special-factors analysis must consider the effect of the litigation that

would result, including when defendants seek to refute the Complaint's allegations on the merits. And on the merits, "the executive's exercise of national security authority" would be "*the* critical focus" of this case. Pet. App. 104a. Petitioners potentially would need to produce evidence showing why they *did* have reason to suspect respondents of connection to terrorism and why the FBI's designations were warranted. Whatever respondents' pleadings say, *litigating* those allegations would "require judicial intrusion into matters of national security and sensitive intelligence information." *Wilson* v. *Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008) (emphasis added). That special factor counsels hesitation. See *Meshal* v. *Higgenbotham*, 804 F.3d 417, 425-426 (D.C. Cir. 2015); *Arar*, 585 F.3d at 576.

Respondents likewise dispute that this case implicates special factors relating to immigration. Br. in Opp. 18. Their nationality and status, they assert, is irrelevant because they do not "challenge any immigration proceeding or raise any question of immigration law." *Ibid.* But "the 9/11 hijackers were all foreign nationals," and the panel below conceded that the government's response "carrie[s] a major immigration law component." Pet. App. 8a. And "immigration issues 'have the natural tendency to affect diplomacy, foreign policy, and the security of the nation'" and "often involve 'the disclosure of foreign-policy objectives and * * * foreign-intelligence products.'" *Mirmehdi* v. *United States*, 689 F.3d 975, 982-983 (9th Cir. 2011). But the panel did not address that or any other special factor. The fact that the Second Circuit's test excuses courts from considering such factors underscores the necessity of this Court's review.

C. The Circuits Are in Conflict

Finally, the decision below has spawned multiple circuit splits on *Bivens* issues. See Pet. 20-24. Respondents state that there is "no circuit split," Br. in Opp. 2, 24, calling petitioners' arguments "unpersuasive," *id.* at 34. But it is not just petitioners—multiple judges have acknowledged the conflicts. In *De La Paz* v. *Coy*, 804 F.3d 1200 (5th Cir. 2015), Judge Prado concluded that the Fifth Circuit's decision "reache[d] the opposite conclusion" as *Turkmen* and "put[ ] [the Fifth Circuit] in conflict with" the Second. *Id.* at 1202 (Prado, J., dissenting). Similarly, in *Meshal*, Judge Pillard noted conflict between the D.C. Circuit's decision and the Second Circuit's decision here. See 804 F.3d at 443 (Pillard, J., dissenting) (noting that the "law enforcement investigations in *Turkmen* * * * were at least as related to the investigation of suspected terrorism as the investigation" in *Meshal*, "but the Second Circuit found no bar to *Bivens* claims"). And the six Second Circuit judges who dissented from denial of rehearing en banc observed that the panel decision placed the Second Circuit "at odds" with four "sister circuits" and made it the first circuit to imply "a *Bivens* damages action * * * for actions taken to safeguard our country in the immediate aftermath of the 9/11 attacks." Pet. App. 231a, 233a. Respondents do not even address their analysis.

II. The Second Circuit's Decision Defies Settled Qualified Immunity Principles

The Second Circuit's decision to deny Hasty and Sherman qualified immunity reflects the same errors embedded in its extension of *Bivens*—it assessed respondents' claims at a high level of generality without regard for the particular context. See Pet. 27-30. Respondents simply repeat the error.

To defeat qualified immunity, a plaintiff must show the defendant violated "clearly established" rights. *Wood* v. *Moss*, 134 S. Ct. 2056, 2061 (2014). An official violates "clearly established" rights when, "at the time of the challenged conduct, '[t]he contours of [the] right [were] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2083 (2011). The rights thus cannot be evaluated at "a high level of generality," *id.* at 2084, but must account for the "'*particular* conduct'" in the "'specific context'" at issue, *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015).

The Second Circuit here denied qualified immunity, finding it clearly established "that a particular condition or restriction of pretrial detention not reasonably related to a legitimate government objective is punishment in violation of the constitutional rights of detainees." Pet. App. 47a. But that just states the general legal standard—it does not address the perspective of a reasonable officer in the specific conditions he confronted. See Pet. 28-30. Rather than retreat from the Second Circuit's genericized mode of analysis, respondents double down on it. They claim that "[f]ew legal rules are as securely and precisely established as the prohibition on deprivations of rights motivated by race, religion, ethnicity or national origin." Br. in Opp. 31. And they claim the Constitution clearly proscribes special detention absent "any individualized basis to find [respondents] more dangerous than any ordinary civil detainee." *Id.* at 30.[1]

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[1] Respondents claim they "do not agree * * * 'that the restrictive conditions of confinement * * * could be lawfully imposed on anyone for whom the government had individualized suspicion of terrorism.'" Br. in Opp. 29 n.11 (quotation marks omitted). But they con-

Respondents, however, cannot merely recite the relevant principle in the abstract. They must show that every "'reasonable official'" facing the circumstances *Hasty and Sherman confronted here* would have understood his conduct to be unlawful. *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). Respondents identify no precedent establishing that jailers are constitutionally obligated to disregard *FBI terrorism designations* with which they disagree. Respondents retort that the Court should not "define the legal rights at issue so narrowly as to be virtually coterminous with the precise facts of the case." Br. in Opp. 31. The test under this Court's cases, however, is whether any reasonable officer, confronted by the "'specific context'" at issue, would necessarily understand that his particular conduct is unlawful. *Mullenix*, 136 S. Ct. at 308. Neither the Second Circuit nor respondents attempted to make such a showing.

Respondents likewise make no effort to reconcile the Second Circuit's holding regarding § 1985(3) with this Court's precedents. See Pet. 30-31. The Second Circuit's rule—under which plaintiffs may proceed if the conduct clearly violates *some* provision of law, even if it is not the one the plaintiff invokes for his cause of action—defies *Elder* v. *Holloway*, 510 U.S. 510, 515 (1994), and *Davis* v. *Scherer*, 468 U.S. 183, 194 n.12 (1984).

III. THE DECISION BELOW EVISCERATES *IQBAL*'S PLAUSIBILITY REQUIREMENT

Finally, the decision below renders *Iqbal*'s plausibility requirement a virtual nullity. While respondents contend

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cede the issue is not relevant, *ibid.*, as their claim turns on the alleged absence of individualized suspicion—not a general rule about permissible conditions, see Pet. App. 49a-52a.

otherwise, the "detailed factual allegations" they invoke in response do not address Hasty and Sherman at all. See Br. in Opp. 25-29.

The Second Circuit did not dispute that respondents were lawfully detained. Pet. App. 237a. It did not deny that respondents were designated by the FBI as "'of interest'" to the 9/11 investigation and thus, under BOP policy, had to be held under the most restrictive conditions permissible. *Id.* at 17a-19a. But the panel deemed it plausible that Hasty and Sherman "knew" the "FBI lacked any individualized suspicion for many of the detainees," knew that the FBI's designations were wrong, and thus imposed the conditions punitively. Pet. App. 50a. That does not meet *Iqbal*'s requirement of "facial plausibility," as it does not "'ten[d] to exclude' an alternative 'explanation for defendants'' conduct." Br. in Opp. 27 (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 552 (2007)).

Petitioners identified the "'obvious'" and "more likely" explanation, *Iqbal*, 556 U.S. at 681-682, for respondents' restrictive confinement—that Hasty and Sherman deferred to the terrorism designations made by the FBI, an agency with far more national-security experience and likely more information than it shared with Hasty and Sherman. See Pet. 32. Respondents' contrary interpretation—that Hasty and Sherman believed the FBI was faxing all confidential information it had on terrorism suspects into the prison for petitioners to review—is facially implausible. Respondents offer no response.[2]

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[2] Nor do respondents say anything persuasive about the adequacy of their allegations regarding the unofficial conditions. Pet. 33-34. Respondents assert in their statement (but not their argument) that

IV. THE ISSUES ARE IMPORTANT AND RECURRING

Respondents do not dispute the importance of the questions presented in this case. To the contrary, they acknowledge this case raises "weighty issues implicating both this nation's security and its most core values." Br. in Opp. 36. Respondents nonetheless claim that the issues are too important for decision while the Court has only eight members. *Ibid.* The Court, however, should have no difficulty garnering a majority for the correct result with its current composition. The Court has ably functioned with fewer than nine Justices at times throughout its history. A six-Justice Court decided *Marbury* v. *Madison*, 5 U.S. 137 (1803). See Judiciary Act of 1789, ch. 20, §1, 1 Stat. 73. There is no reason the Court cannot capably resolve cases like this with eight members today.

* * * * *

"Sherman was frequently present on the ADMAX unit, yet he * * * failed to correct the abuses he witnessed or learned of." Br. in Opp. 8-9. But respondents omit that the panel found those allegations too "general," "conclusory," and "tenuous" to satisfy *Iqbal*. Pet. App. 55a. Indeed, the Complaint failed to allege that Sherman *ever* observed any specific instance of abuse, much less that he condoned or failed to act on one. Respondents assert that Hasty "facilitated" abuse by referring to detainees as "terrorists," limiting grievance procedures, and purposely avoiding the ADMAX unit. Br. in Opp. 8. But there is no evidence that Hasty observed, directed, or ratified any misconduct. Instead, respondents generally assert that Hasty "ignored some evidence" of abuse, or was "made aware," Pet App. 252a-253a (¶24)—the same type of allegation the Second Circuit dismissed as to Sherman, *id.* at 55a. Compare *id.* at 252a-253a (¶24), with *id.* at 253a (¶26). These allegations are so devoid of factual content that they do not come close to meeting *Iqbal*'s requirements. See Pet. 33-34.

For the reasons above and in the petition, the petition for a writ of certiorari should be granted. The other petitions arising out of this case—filed by former Attorney General John Ashcroft and former FBI Director Robert Mueller in No. 15-1359, and by former INS Commissioner James Ziglar in No. 15-1358—likewise raise weighty issues. But the differences in perspective are significant. While Ashcroft, Mueller, and Ziglar *determined* policy, Hasty and Sherman were tasked with *implementing* it. Under the decision below, ground-level officials like Hasty and Sherman now must choose between following official policy and determinations, such as FBI terrorism designations and the conditions of confinement they mandate, or risk personal liability. The Court thus would benefit from reviewing the issues raised by petitioners Hasty and Sherman—the boots on the ground—as a critical complement to the views of officials at the policy-making level.[3]

CONCLUSION

The Court should grant this petition and, if it also grants the petitions of Ashcroft and Mueller (No. 15-1359) and Ziglar (No. 15-1358), consolidate the cases for argument.

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[3] Respondents complain that Ashcroft, Mueller, and Ziglar did not raise the *Bivens* issue before the Second Circuit. Br. in Opp. 13. Respondents overlook that petitioners Hasty and Sherman argued *Bivens* at all stages. Pet. App. 21a. Hasty and Sherman likewise pressed the § 1985(3) issues in the court of appeals. See Hasty C.A. Br. 49-50; Sherman C.A. Br. 57-61.

Respectfully submitted.

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