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First *Korematsu* and Now *Ashcroft v. Iqbal*: The Latest Chapter in the Wartime Supreme Court's Disregard for Claims of Discrimination

DAWINDER S. SIDHU†

*"I see not the slightest probability in the foreseeable future that any conqueror can impose oppression upon us, [but] the dangers to our liberties . . . are those that we create among ourselves."*¹

INTRODUCTION

As a general matter, the body of Supreme Court law is a quite peculiar organism whose growth follows a somewhat predictable process. Its short-term gains are mainly inconspicuous, much like incremental changes in a person's height or weight that are relatively subtle and imperceptible up close.² It also possesses, by contrast, rather

† J.D., George Washington University; M.A., Johns Hopkins University; B.A., University of Pennsylvania. I was the sole author of an amicus brief in support of the respondent in this case, *Javid Iqbal*. This Article was completed while I held a visiting researcher position at Georgetown University Law Center. I wish to express my thanks to Alexander Reinert, lead counsel for *Iqbal*, and the Georgetown Law community, particularly Michael Seidman and Mariah Strauch-Nelson for their invaluable guidance and assistance. I also extend my gratitude to the staff of the Buffalo Law Review, especially Melanie Beardsley and Jonathan Lamberti, for improving the quality of this piece and for believing in its potential to make a meaningful contribution to the legal community. Any errors are to be attributed solely to me and are deeply regretted.

1. Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103, 104 (1951). Justice Jackson authored one of the three dissents in *Korematsu*. *Korematsu v. United States*, 323 U.S. 214, 242-48 (1944) (Jackson, J., dissenting).

2. This may be said of Congress, see, e.g., Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 609 (1983) ("[M]ost Supreme Court opinions never come to the attention of Congress."); Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 630 (1987) ("Members of Congress do not even closely follow cases directly involving or interpreting statutes that they have sponsored or in which they have an interest."), and of the public, see, e.g., Jason J. Czarnezki & William K. Ford,

distinct and interesting features, which stand like bold markers of advancement—where one can see clearly the point at which old ideas were discarded for fresh perspectives.³ On rare occasions, the Supreme Court's corpus is infected by harmful decisions.⁴ These developments are unfortunate because they are self-inflicted and are particularly regrettable when they result from the Court's failure to heed warnings from the legal community or learn from its own previous mistakes.

It is incumbent upon the legal academy to diagnose such decisions before their effect becomes too embedded to identify and difficult to reverse.⁵ A single case, left largely undetected and outshone by others, attains a degenerative power the longer it remains part of positive law—it becomes entrenched in social thinking and open to serving as a basis for other mischievous and misguided rulings.⁶ This Article is reflective of that professional code of responsibility to uphold the integrity of the rule of law. It is a modest attempt to recognize what may be a major error in recent Supreme Court decision making—one that resembles too uncomfortably one of the worst blemishes in the history of

The Phantom Philosophy? An Empirical Investigation of Legal Interpretation, 65 MD. L. REV. 841, 866 n.106 (2006); Michael Richard Dimino, Sr., *Counter-Majoritarian Power and Judges' Political Speech*, 58 FLA. L. REV. 53, 95 (2006) (“[M]ost members of the public are unaware of the existence of laws whose constitutionality is at issue in Supreme Court cases. Fewer still care very much about whether a particular law survives judicial review.”).

3. See R. George Wright, *The Distracting Debate over Judicial Review*, 39 U. MEM. L. REV. 47, 65 n.94 (2008) (enumerating Supreme Court cases that are in general viewed favorably and, therefore, would support the concept of judicial review, including *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), *Loving v. Virginia*, 388 U.S. 1 (1967), and *Brown v. Board of Education*, 347 U.S. 483 (1954)).

4. See *id.* at 67 n.95 (enumerating cases of “an opposite political valence,” including *Korematsu*, 323 U.S. 214 (1944), *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)).

5. See MODEL CODE OF PROF'L RESPONSIBILITY EC 8-1 (1980) (“Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system.”); Robert M. Palumbos, *Within Each Lawyer's Conscience a Touchstone: Law, Morality, and Attorney Civil Disobedience*, 153 U. PA. L. REV. 1057 (2005) (noting that the American Bar Association Model Code of Professional Responsibility “impose[s] on lawyers a duty to improve the law by seeking to make it more just”).

6. See, e.g., *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

the high court—and to suggest a different course of action moving forward.

The 2008-2009 Supreme Court Term follows this common profile: it consists of rather indistinguishable cases with several notable ones sprinkled in. More specifically, of the seventy-nine decisions issued by the Supreme Court in the 2008-2009 Term,⁷ most were of the former, garden variety.⁸ A small set, however, touched upon rather contentious issues of broader social interest, including whether the placement of certain religious monuments in a public park violated the First Amendment,⁹ or resolved questions of specific appeal to attorneys, including the extent to which two federal enactments preempted state legislation.¹⁰ The alluring cases of both breeds—those resonating with either the public at large or with attorneys—have effectively saturated the national consciousness, necessarily leaving other cases in the shadows.

As it turns out, one of the most important 2008-2009 cases is so dimmed as to be invisible on the nation's or academy's radars. Indeed, during a review of the Term, when a panel of Supreme Court experts were asked to name the single most important case that warranted greater attention, the oral advocates in both the aforementioned religious display case and the preemption cases themselves pointed to *Ashcroft v. Iqbal*.¹¹ Veteran Supreme Court reporter Lyle Denniston similarly observed that the “wide significance of the *Iqbal* decision” was becoming clear on the ground in the lower courts, despite the fact that the opinion

7. See Memorandum from Akin Gump Strauss Hauer & Feld LLP and SCOTUSblog.com on End of Term Statistical Analysis – October Term 2008 (June 30, 2009), available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/07/summary-memo-final.pdf>.

8. See, e.g., Justice Stephen G. Breyer, Address at Aspen Institute of Ideas (July 4, 2009) (commenting disappointingly, after the close of the 2008 October Term, that most of the Court's decisions were not reported or discussed).

9. *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125 (2009).

10. *Wyeth v. Levine*, 129 S. Ct. 1187 (2009); *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008).

11. David C. Frederick & Pamela Harris, Remarks, “Sizing Up the 2008-2009 Supreme Court Term: A Practitioner's View,” (July 6, 2009), transcript available at <http://www.c-spanvideo.org/program/287449-1>.

itself was “one of the Supreme Court’s too-little-noticed” cases of the last session.¹²

What, then, is *Iqbal*? *Iqbal* refers to the civil rights lawsuit brought by Javaid Iqbal, a Muslim male who was arrested on charges related to identity theft and detained in New York in the aftermath of the terrorist attacks of September 11, 2001.¹³ In his complaint,¹⁴ Iqbal alleged that he was identified as a person of “high interest” and subsequently segregated with “September 11 detainees” in federal prison solely because of his race, religion, and national origin.¹⁵ Iqbal sought relief from John D. Ashcroft (then the Attorney General of the United States), and Robert Mueller (Director of the Federal Bureau of Investigation), among others.¹⁶ Ultimately, the Supreme Court was called upon to determine whether or not Iqbal’s allegations of discrimination were sufficiently specific to survive a motion to dismiss.¹⁷ The Court, by a 5-4 vote, held they were not, thereby overruling the two federal courts

12. Analysis: New Obstacles to Wartime Challenges, <http://www.scotusblog.com/wp/analysis-new-obstacles-to-wartime-challenges/> (July 4, 2009, 16:09 EST).

13. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009); Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007); Elmaghraby v. Ashcroft, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005).

14. The initial complaint was filed on May 3, 2004. Initial Complaint at 44, Elmaghraby v. Ashcroft, 2004 WL 3756439 (E.D.N.Y. May 3, 2004) (No. 04-1809). The September 30, 2004 date corresponds with the amended complaint. Amended Complaint, Elmaghraby v. Ashcroft, 2004 WL 3756442 (E.D.N.Y. Sept. 30, 2004) (No. 04-1809) [hereinafter Complaint]. As this is the operative complaint for purposes of this Article, references to the “complaint” will signify the later filing.

15. See Complaint, *supra* note 14, ¶¶ 48-49, 232-235.

16. The remaining defendants are: Michael Rolince, Former Chief of the FBI’s International Terrorism Operations Section, Counterterrorism Division; Kenneth Maxwell, Former Assistant Special Agent in Charge, New York Field Office, FBI; Kathleen Hawk Sawyer, former Director of the Bureau of Prisons (BOP); David Rardin, Former Director of the Northeast Region of the BOP; Michael Cooksey, Former Assistant Director for Correctional Programs of the BOP; former and current Wardens of the Metropolitan Detention Center (“MDC”); and certain MDC officers and personnel. *Id.* ¶¶ 10-44.

17. See Petition for Writ of Certiorari, Ashcroft v. Iqbal, 2008 WL 336225, at *I (Feb. 6, 2008) (No. 07-1015) (questions presented); Ashcroft v. Iqbal, 128 S. Ct. 2931 (2008) (granting certiorari).

below which decided that the complaint was adequate for pleading purposes.¹⁸

This Article is concerned with shedding light on *Iqbal*. It will argue that this relatively obscure legal opinion may be one of the most infamous and harmful to American jurisprudence and individual rights of this generation. In particular, it will argue that (1) the *Iqbal* Court misapplied the traditional pleading standards that govern motions to dismiss for failure to state a claim in finding *Iqbal*'s particular complaint deficient and, in doing so, functionally and needlessly heightened those standards;¹⁹ and (2) the Court erred in finding unremarkable *Iqbal*'s allegations that the government engaged in blanket racial profiling of Muslims and Arabs because this evaluation of the merits of *Iqbal*'s allegations is improper at the motions to dismiss stage and the comment itself is substantively problematic, particularly in consideration of *Korematsu v. United States*,²⁰ an infamous opinion from another wartime setting. As a result of these doctrinal missteps, the case, as a practical consequence, will provide the government with greater latitude to institute security programs and policies that are discriminatory, and conversely, will increase the burden on alleged victims of those programs and policies to seek redress for violations of their constitutional rights. In sum, it is the central contention of this Article that the Court in *Iqbal*, to put it simply, got it wrong.

Before exploring the *Iqbal* decision, I need to set the scene. Accordingly, Part I provides an overview of the basic facts and procedural history of the case. Part II discusses the significant arguments offered before the Supreme Court—some of which attempted to guard the Court against the very outcome it ultimately reached—once certiorari was granted. Part III summarizes the most salient points of the

18. See *Iqbal*, 129 S. Ct. at 1937.

19. It is perhaps the ruling's procedural contents that help explain why the press took little relative notice of *Iqbal*: procedural rulings generally are not of interest to the public and it is difficult, as a result, to convince the public that a technical conclusion by the Court warrants its attention. As will be explained in this Article, those procedural miscues are significant to civil litigants and, in any case, there are other elements of the case that are sufficiently troublesome to justify the use of press accounts and other media devices to inform the public about *Iqbal*.

20. 323 U.S. 214 (1944).

Court's opinion with respect to the government's pleas for qualified immunity and Iqbal's claims that his rights were violated. Part IV contains a critical examination of the *Iqbal* Court's application of the pleading standards and assessment of Iqbal's causes of action, and on the latter score will more fully compare *Iqbal* to *Korematsu*. I also propose an alternative legal standard by which the sufficiency of civil complaints containing claims of wartime discrimination may be adjudged when and if *Iqbal* is revisited.

A note on what this Article will not do. The Court in *Iqbal* was reviewing a ruling on a motion to dismiss and thus ascertained whether the allegations in the complaint were sufficiently plead to advance to the next stage of litigation—it did not issue a final disposition of the case. Commensurately, this Article will not speculate as to whether Iqbal was entitled to relief, but rather will probe whether the complaint was truly adequate within the meaning of the motion to dismiss requirements.

Prior to doing so, it is important to address why an examination of *Iqbal* is necessary so soon after it was handed down. First, as Mr. Denniston suggested, lower courts are already grappling with the rulings from the case.²¹ This Article may be helpful to those practitioners and judges attempting to make sense of *Iqbal* in respect of their own particular matters. Second, the need for such guidance is clear: there is an absence of substantive examinations of what *Iqbal* means²² despite the fact that, just four months since the decision, *Iqbal* has already been cited over 5600 times by all three levels of the federal court system.²³ Third,

21. See, e.g., *Tooley v. Napolitano*, 556 F.3d 836 (D.C. Cir. 2009), *vacated*, 586 F.3d 1006 (granting rehearing in light of *Iqbal*); *Bayer v. Monroe County Children & Youth Serv.*, 577 F.3d 186, 191 n.5 (3d Cir. 2009) (citing *Iqbal*, 129 S. Ct. at 1949) (“In light of the Supreme Court’s recent decision in *Ashcroft v. Iqbal*, it is uncertain whether proof of such personal knowledge, with nothing more, would provide a sufficient basis for holding [a certain public employee] liable with respect to plaintiffs’ Fourteenth Amendment claims under § 1983.”) (internal citation omitted).

22. As of this writing, a Westlaw search uncovered no legal journals with any articles dedicated to comprehensively discussing the procedural *and* substantive import of *Iqbal*.

23. A Westlaw search conducted on February 20, 2010, containing the Supreme Court reporter citation to *Iqbal*, yielded 5639 hits in the federal case database. The Seventh Circuit observed that *Twombly* was “becoming the

the meaning of *Iqbal* is proving elusive to these courts. For example, a circuit court, referring to *Iqbal*, admitted that it was “proceed[ing] cautiously in light of the rapidly changing contours of the pleadings standard,”²⁴ and some lower courts unreservedly relying on *Iqbal* are arguably mischaracterizing or misinterpreting it²⁵—even within the same circuit.²⁶ Fourth, and relatedly, federal courts are

citation du jour in Rule 12(b)(6) cases,” *Smith v. Duffey*, 576 F.3d 336, 339-40 (7th Cir. 2009) (Posner, J.), however, *Iqbal* may now supplant *Twombly* as the preferred citation in a recounting of the Rule 12(b)(6) legal standard.

24. *Panther Partners Inc. v. Ikanos Commc’ns, Inc.*, No. 08-3398-cv, slip op. at *4 (2d Cir. Sept. 17, 2009); see also *Courie v. Alcoa Wheel & Forged Prod.*, 577 F.3d 625, 630 (6th Cir. 2009) (commenting on the pleading standard as articulated in *Iqbal*, “[e]xactly how implausible is ‘implausible’ remains to be seen, as such a malleable standard will have to be worked out in practice”).

25. See, e.g., *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 308 (6th Cir. 2009) (citing *Iqbal*, 129 S. Ct. at 1949) (contending that “all allegations” in the complaint as true for purposes of a motion to dismiss); *Shomo v. City of N.Y.*, 579 F.3d 176, 183, (2d Cir. 2009) (same); *Avon Pension Fund v. GlaxoSmithKline PLC*, No. 08-4363-cv, 2009 WL 2591173, at *1 (2d Cir. Aug. 24, 2009) (citing *Iqbal*, 129 S. Ct. at 1949-50) (noting that an appeal of a dismissal of a complaint pursuant to Rule 12(b)(6) is reviewed “accepting all allegations in the complaint as true”); *O’Neil v. Simplicity, Inc.*, 574 F.3d 501, 503 (8th Cir. 2009) (citing *Iqbal*, 129 S. Ct. at 1949-50) (same); *Chambers v. U.S. Dep’t of Interior*, 568 F.3d 998, 1006 (D.C. Cir. 2009) (citing *Iqbal*, 129 S.Ct. at 1949). However, *Iqbal* does not state that “all allegations” must be credited as true and instead holds that allegations may be accepted as true only under certain, prescribed conditions. See, e.g., *McKeeman v. United States*, No. 09-194C., 2009 WL 2905742, at *1 (Fed. Cl. Sept. 9, 2009) (citing *Iqbal*, 129 S. Ct. at 1949) (“[A court is not] required to give credence to implausible allegations.”); *Brooks v. Citibank (South Dakota), N.A.*, No. 08-35574, 2009 WL 2870046, at *1 (9th Cir. Sept. 8, 2009) (quoting *Iqbal*, 129 S. Ct. at 1949) (holding that assertions that were “nothing more than a ‘[t]hreadbare recital[] of the elements of a cause of action, supported by [a] mere conclusory statement[]’ . . . was . . . properly rejected by the district court” (alterations in original)).

26. Compare *Carpenter v. Ashby*, No. 08-4021, slip op. at 2 (3d Cir. Sept. 10, 2009) (citing *Iqbal*, 129 S. Ct. at 1949) (stating, without qualification, that “[w]e accept as true all factual allegations in the complaint”); *Banks vs. Court of Common Pleas FJD*, No. 09-1145, slip op. at 1 (3d Cir. Aug. 17, 2009) (accepting, without qualification, all factual allegations as true in reviewing a motion to dismiss under Rule 12(b)(6) and citing *Iqbal*, 129 S. Ct. at 1949); *Shelley v. Wilson*, No. 09-1193, slip op. at 1 (3d Cir. Aug. 3, 2009) (citing *Iqbal*, 129 S. Ct. at 1949-50) (same), with *Miles v. Township of Barnegat*, No. 08-1387, slip op. at 2 (3d Cir. Sept. 4, 2009) (“The assumption of truth does not apply, however, to legal conclusions couched as factual allegations or to ‘[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.’”) (quoting *Iqbal*, 129 S. Ct. at 1949) (alterations in original);

citing to *Iqbal*, not for tangential propositions, but for the actual legal standard that complaints are subject to when challenged by a motion to dismiss.²⁷ Accordingly, courts are struggling with the holdings of the case, where those holdings implicate fundamental aspects of litigation, namely the very requirements that all civil complaints must comply with to proceed past the dismissal stage, and where scholarship is virtually non-existent on *Iqbal*.

Fifth, *Korematsu* is universally recognized as one of the worst decisions in Supreme Court history and this Article argues that *Iqbal* approaches *Korematsu* in the spectrum of Supreme Court jurisprudence. This bold charge, that the Supreme Court committed an error of this significant magnitude, warrants serious consideration. Last, both *Korematsu* and *Iqbal* deal with discrimination in times of national crisis and both, individually and in tandem, carry undeniable precedential weight as Supreme Court rulings.²⁸ If substantive aspects of *Iqbal* should be reconsidered, it is important to point that out before the case is invoked in wartime situations. It took decades for the nation to come to grips with the wrongful character of the *Korematsu* opinion.²⁹ Harmful parts of *Iqbal* should not be permitted to persist and solidify, as rights may be infringed upon in the

McTernan v. City of York, Pa., 577 F.3d 521, 533 (3d Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1949) (“[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”) (alterations in original).

27. See, e.g., *McTernan*, 577 F.3d at 533; *Shahin v. Del. Dep’t of Finance*, No. 09-1656, slip op. at 1 (3d Cir. Sept. 14, 2009) (per curiam); *Richardson v. Sherrer*, No. 09-1966, slip op. at 1 (3d Cir. Sept. 11, 2009) (per curiam).

28. See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

29. See An Act to Implement Recommendations on Wartime Relocation and Internment of Civilians, 50 U.S.C. § 1989a (2006) (apologizing for internment of individuals of Japanese ancestry); *Korematsu v. United States*, 584 F. Supp. 1406, 1409 (N.D. Cal. 1984) (vacating *Korematsu*’s conviction for “being in a place from which all persons of Japanese ancestry were excluded pursuant to Civilian Exclusion Order No. 34”).

interim. Now is the time to remonstrate with the legal community by way of this academic instrument.³⁰

A final note on why I am in a proper position to write this Article. In the aftermath of the 9/11 attacks, I engaged in a number of efforts to help understand, spread awareness of, and combat discrimination against Muslims, Arabs, South Asians, and Sikhs. For example, I co-founded a research initiative that examines the human consequences of the mistreatment of these groups,³¹ oversaw the preparation of or authored several scholarly reports in the subject,³² and co-authored a legal textbook on the post—9/11 civil rights experiences of Sikh-Americans.³³ Based on these and other activities, I recognized that *Iqbal* had the potential to alter the legal landscape with respect to claims

30. Indeed, federal courts are already citing to *Iqbal* for decisions condoning profiling and dismissing resulting claims of discrimination. *See, e.g.*, *Monroe v. City of Charlottesville, Va.*, 579 F.3d 380, 389 (4th Cir. 2009) (citing *Iqbal*, 129 S. Ct. at 1951) (affirming dismissal of African-American plaintiff's equal protection cause of action because the local police's search for a serial rapist, where random African-American men were approached for DNA samples, merely had an "incidental" impact on African-American men in the area), *cert. denied*, 78 U.S.L.W. 3418 (Mar. 8, 2010); *see id.* at 390 ("Even though thousands of Arab-Muslim men were investigated in [sic] *Iqbal*, the Supreme Court deemed this insufficient to render a legitimate investigatory process unconstitutional."); *see also* *Brown v. JP Morgan Chase Bank*, 334 F. App'x 758, 759 (7th Cir. 2009) (affirming the dismissal of a discrimination suit brought under 42 U.S.C. § 1985(3), relying in large part on *Iqbal* in doing so); *Atherton v. Dist. of Columbia Office of Mayor*, 567 F.3d 672 (D.C. Cir. 2009) (same); *Lopez v. Beard*, 333 F. App'x 685 (3d Cir. 2009) (affirming the dismissal of a discrimination suit brought under 42 U.S.C. § 12132, relying in large part on *Iqbal* in doing so); *Maldonado v. Fontanes*, 568 F.3d 263 (1st Cir. 2009) (dismissing Fourteenth Amendment substantive due process claims, relying in large part on *Iqbal* in doing so).

31. *See* The Pluralism Project: Discrimination and National Security Initiative, <http://www.dnsi.org> (last visited Jan. 20, 2010).

32. *See, e.g.*, Neha Singh Gohil & Dawinder S. Sidhu, *The Sikh Turban: Post-911 Challenges to this Article of Faith*, RUTGERS J.L. & RELIGION, Spring 2008, at i; Dawinder S. Sidhu, *The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslim-Americans*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 375 (2007); JUNE HAN, DISCRIMINATION & NAT'L SEC. INITIATIVE, WE ARE AMERICANS TOO: A COMPARATIVE STUDY OF THE EFFECTS OF 9/11 ON SOUTH ASIAN COMMUNITIES, DISCRIMINATION AND NATIONAL SECURITY INITIATIVE (2004).

33. DAWINDER S. SIDHU & NEHA SINGH GOHIL, CIVIL RIGHTS IN WARTIME: THE POST-9/11 SIKH EXPERIENCE (2009).

of wholesale discrimination in wartime—it had the opportunity to take a different path than that traversed by the *Korematsu* Court. Accordingly, I was the sole author of an amicus brief in *Iqbal* in support of the plaintiff, which was joined by seven leading Muslim, Arab, South Asian, and Sikh advocacy groups and coordinated the just-mentioned research initiative. Hopeful that the Court would consider our arguments and give *Iqbal* the opportunity to demonstrate that his rights were violated, the Court did the exact opposite.

What follows is a story of why the Court's ultimate analysis is unfaithful not only to our clear warnings, but more importantly, to the basic principles of equality, fairness, and justice, that undergird the American legal system, even in times of war.

I. BACKGROUND

The purpose of this section is to introduce the reader to the relevant facts and the judicial proceedings that occurred before the case reached the Supreme Court level. As the circuit court opinion is what was reviewed by the Supreme Court and formed the basis for its ultimate ruling, this section devotes commensurately disproportionate attention to the circuit court's decision.

A. *Preliminary Facts*

On September 11, 2001, nineteen Muslim men, aged 20-38, used hijacked commercial airplanes to attack the World Trade Center in New York and the Pentagon in Virginia.³⁴ On November 2, 2001, Javaid Iqbal—a Muslim male and citizen of Pakistan—was arrested in New York by agents of the Federal Bureau of Investigation (“FBI”) and the Immigration and Naturalization Service (“INS”).³⁵ The charges were related to identity theft—specifically, he was alleged to have violated 18 U.S.C. § 371 (conspiracy to defraud the United States) and 18 U.S.C. § 1028 (fraud with

34. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 511 (2004) (“On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks.”).

35. See Complaint, *supra* note 14, ¶¶ 1, 80.

identification).³⁶ He pleaded guilty and was sentenced to a 16-month term of imprisonment.³⁷

On or around November 5, 2001, Iqbal was brought to the Metropolitan Detention Center (“MDC”) in Brooklyn, New York, and housed in its general population unit.³⁸ Iqbal was subsequently designated a person of “high interest” and, as a result, on or around January 8, 2002, was housed in MDC’s Administrative Maximum (“ADMAX”) Special Housing Unit (“SHU”)—a unit created after 9/11 to hold post-September 11 detainees.³⁹ After spending over 150 days in the ADMAX SHU, Iqbal was reassigned to the MDC’s general population unit in July of 2002.⁴⁰ He was released and deported on or around January 15, 2003.⁴¹

In April of 2003, the Department of Justice, Office of the Inspector General, reviewed the cases of 762 of the “September 11 detainees” in the MDC.⁴² This OIG Report found that the detainees were “almost exclusively men,” most were between 26 and 40 years of age, and most were of Pakistani origin.⁴³ The report determined that, in New York, the FBI and INS “made little attempt” to differentiate between detainees connected to terrorism and those detainees who had no such ties.⁴⁴ Similarly, it noted that the process of ascertaining which detainees were persons of “high interest” was both inconsistent and imprecise.⁴⁵ The September 11 detainees’ conditions of confinement in the

36. See *Elmaghraby v. Ashcroft*, No. 04-CV-01809, 2005 WL 2375202, at *1 n.1 (E.D.N.Y. Sept. 27, 2005).

37. See *id.*

38. See Complaint, *supra* note 14, ¶ 81.

39. See *id.* ¶¶ 51, 54, 81.

40. See *id.* ¶¶ 9, 80, 81.

41. See *id.* ¶ 9.

42. See 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 (2003) [hereinafter OIG REPORT], available at <http://www.justice.gov/oig/special/0306/press.pdf>.

43. *Id.* at 20-21.

44. See *id.* at 69.

45. See *id.* at 158.

MDC raised “serious questions” about how the detainees were treated, according to the report.⁴⁶

B. *The Complaint*

On September 30, 2004,⁴⁷ Iqbal⁴⁸ filed suit against Ashcroft, Mueller, and others,⁴⁹ challenging his classification as a person of “high interest” and consequent placement in the ADMAX SHU with other “September 11 detainees.”⁵⁰ Specifically, Iqbal argued that he was designated to be a person of “high interest” and thereafter sent to the ADMAX SHU solely because of his race, religion, and national origin—not because of any tie to terrorism or for any other legitimate penological purpose.⁵¹ Iqbal also contended that ADMAX SHU detainees were subject “to highly restrictive conditions of confinement” that were abusive and “[m]arkedly different from the conditions in the MDC’s general population.”⁵² For example, Iqbal alleged that he was:

▪ “kept in solitary confinement, not permitted to leave [his] cell[] for more than one hour each day with few exceptions, verbally and physically abused, routinely subjected to humiliating and unnecessary strip and body—cavity searches, denied access to basic medical care, denied access to legal counsel, denied adequate exercise and

46. *Id.* The OIG released a supplementary report in December of 2003. See OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES’ ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK (2003) [hereinafter SUPP. OIG REPORT], available at <http://www.justice.gov/oig/special/0312/final.pdf>. This report was discussed only in a footnote of the district court’s opinion, specifically in regards to the arbitrary nature of the MDC’s strip search policy. See *Elmaghraby v. Ashcroft*, No. 04-CV-01809, 2005 WL 2375202, at *27 n.25.

47. The initial complaint was filed on May 3, 2004. The September 30, 2004 date refers to the amended complaint.

48. Iqbal filed suit with Ehad Elmaghraby, a Muslim male. See Complaint, *supra* note 14, ¶¶ 8-9. The United States settled Elmaghraby’s claims for \$300,000. See *Iqbal v. Hasty*, 490 F.3d 142, 147 (2d Cir. 2007). Therefore, Respondent Iqbal remains the only plaintiff in this action.

49. See *supra* note 16.

50. See Complaint, *supra* note 14, ¶¶ 1-2.

51. See *id.* ¶¶ 3, 51, 52, 96.

52. *Id.* ¶¶ 60, 63.

nutrition, and subjected to cruel and inhumane conditions of confinement[;]”⁵³

▪ “housed in small cells with the lights on almost 24 hours per day until in or about March 2002. MDC staff deliberately turned on the air conditioner throughout the winter months, and turned on the heat during the summer months[;]”⁵⁴

▪ “not provided with adequate bedding and personal hygiene items Mr. IQBAL was never provided with pillows or more than one blanket[;]”⁵⁵

▪ “called a terrorist . . . , a terrorist and a killer . . . , a Muslim bastard . . . , and a Muslim killer[;]”⁵⁶

▪ “rarely permitted to exercise, and the conditions under which [he was] permitted to exercise were punitive in effect and intent. For instance, when permitted to exercise in the winter, [Iqbal was] taken to the recreation areas in the ADMAX SHU, which were on the top floor of the MDC in the open—air, in early winter mornings without proper jackets and shoes[;]”⁵⁷

▪ “[taken] to the recreation areas for exercise, and [when on days when it rained was] left . . . in the open-air for hours until he was completely drenched. When Mr. IQBAL was brought back to his cell, the officers deliberately turned on the air conditioner, causing him severe physical discomfort.”⁵⁸

Iqbal’s complaint pressed twenty-one constitutional and statutory claims.⁵⁹ The complaint asserted, in relevant part, that Ashcroft and Mueller violated the First Amendment⁶⁰ by subjecting Iqbal to harsher conditions of confinement because of his religious beliefs, and the equal protection guarantee of the Fifth Amendment⁶¹ by subjecting him to

53. *Id.* ¶ 82.

54. *Id.* ¶ 84.

55. *Id.* ¶ 85.

56. *Id.* ¶ 87.

57. *Id.* ¶ 88.

58. *Id.* ¶ 89.

59. *See id.* ¶¶ 201-270.

60. U.S. CONST. amend. I.

61. U.S. CONST. amend. V.

harsher conditions of confinement because of his race.⁶² These claims were made pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,⁶³ which recognized that an implied cause of action may be maintained against federal officials for violations of federal constitutional rights.⁶⁴

In order to draw a link between Ashcroft and Mueller and the policies that led to Iqbal's designation as a person of "high interest" and placement in the ADMAX SHU, Iqbal argued that:

- "Ashcroft was the principal architect of the policies challenged in this lawsuit[;]"⁶⁵

- "Mueller was instrumental in the adoption, promulgation, and implementation' of the challenged policies[;]"⁶⁶

- "[f]rom its inception, the September 11 investigation targeted men based on their race, religion, and national origin[;]"⁶⁷

- Iqbal and others "were classified as of high interest to the September 11th investigation solely because of [their] race, religion, and national origin . . . and not because of any evidence of [their] involvement in terrorism[;]"⁶⁸

62. See Complaint, *supra* note 14, ¶¶ 204-06, 231-36.

63. 403 U.S. 388 (1971).

64. *Id.* at 389 ("[V]iolation of [a constitutional command, in this case the Fourth Amendment's prohibition against unreasonable searches and seizures] by a federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct."). *Bivens* is thus known as the federal complement to suits brought under 42 U.S.C. § 1983, which enables persons to sue state actors for constitutional violations. See, e.g., *Hartman v. Moore*, 547 U.S. 250, 254 n.2 ("[A] *Bivens* action is the federal analog to suits brought against state officials under . . . 42 U.S.C. § 1983.").

65. Brief for Respondent Javaid Iqbal at 47, 129 S. Ct. 1937 (2009) (No. 07-1015) [hereinafter Response Brief] (citing Complaint, *supra* note 14, ¶ 10) (internal quotes omitted).

66. *Id.* (citing Complaint, *supra* note 14, ¶ 11) (internal quotes omitted).

67. *Id.* (citing Complaint, *supra* note 14, ¶ 47) (footnote omitted).

68. *Id.* at 48 (citing Complaint, *supra* note 14, ¶¶ 48, 49) (internal quotes omitted).

▪ Ashcroft and Mueller “approved the policy of holding high interest detainees in highly restrictive conditions of confinement until cleared by the FBI[;]”⁶⁹

▪ Ashcroft and Mueller “knew, condoned, and agreed that respondent and others like him be subjected to these harsher conditions of confinement as a matter of policy, solely on account of their religion, race, and/or national origin[;]”⁷⁰

▪ Ashcroft and Mueller “willfully . . . designed a policy of confining individuals like respondent in the ADMAX SHU for these arbitrary reasons[;]”⁷¹

▪ Ashcroft and Mueller “adopt[ed], promulgat[ed], and implement[ed] a policy and practice of imposing harsher conditions of confinement on respondent and others because of respondent’s religious beliefs, race, and national origin.”⁷²

C. *District Court Proceedings*

Prior to discovery, Ashcroft and Mueller (along with a subset of the other defendants) moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the theory that qualified immunity shielded them from liability and specifically that the allegations in the complaint were insufficient under Rule 8(a)(2) to overcome the qualified immunity defense.⁷³ Under Rule 12(b)(6), a party may seek dismissal of a complaint for “failure to state a claim upon which relief can be granted,”⁷⁴ while Rule 8(a)(2) requires a complaint to contain “a short and plain statement of the claim showing that the pleader is entitled to relief[.]”⁷⁵ Qualified immunity generally protects

69. *Id.* (citing Complaint, *supra* note 14, ¶ 69) (internal quotes omitted).

70. *Id.* (citing Complaint, *supra* note 14, ¶ 96) (internal quotes omitted).

71. *Id.* (citing Complaint, *supra* note 14, ¶ 97) (internal quotes omitted).

72. *Id.* (citing Complaint, *supra* note 14, ¶¶ 232, 235, 247, 250) (internal quotes omitted).

73. See Reply Brief for Petitioners at 9, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015), 2008 WL 5009266 [hereinafter Reply Brief] (summarizing the ultimate question whether dismissal is appropriate “under Rule 12(b)(6) based on failure to meet the pleading standards of Rule 8(a)(2) in light of a qualified-immunity defense asserted in a motion to dismiss”).

74. FED. R. CIV. P. 12(b)(6).

75. FED. R. CIV. P. 8(a)(2).

government officials from civil damages liability “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁷⁶ The basic purpose of the qualified immunity doctrine is to allow “government officers to do their jobs without worrying about being sued.”⁷⁷

On September 27, 2005, the U.S. District Court for the Eastern District of New York ruled on the motion, noting that dismissal of a complaint is appropriate under Rule 8(a)(2) if, taking the factual allegations as true, it is clear that no set of facts would entitle the plaintiff to relief.⁷⁸ Applying this standard, the district court denied the motion as to the constitutional claims against Ashcroft and Mueller.⁷⁹

In the course of its ruling, the district court addressed the national security context within which the constitutional wrongdoing allegedly took place. The district court observed that “our nation’s unique and complex law enforcement and security challenges in the wake of the September 11, 2001 attacks do not warrant the elimination of remedies for the constitutional violations alleged here.”⁸⁰ The court further stated that while context is relevant to a qualified immunity determination, “the qualified immunity standard will not allow the Attorney General to carry out his national security functions wholly free from concern for his personal liability[.]”⁸¹ And, while the Attorney General “may on occasion have to pause to consider whether a

76. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

77. Samuel P. Tepperman-Gelfant, Note, *Constitutional Conscience, Constitutional Capacity: The Role of Local Governments in Protecting Individual Rights*, 41 HARV. C.R.-C.L. L. REV. 219, 235 (2006); *see id.* at 235-36 (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967) (“A policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.”)).

78. *See Elmaghraby v. Ashcroft*, No. 04-CV-01809, 2005 WL 2375202, at *9 (E.D.N.Y. Sept. 27, 2005).

79. *See id.* at *35.

80. *Id.* at *14; *see id.* at *18 (“[T]he proposition . . . that, as a matter of law, constitutional and statutory rights must be suspended during times of crisis, is supported neither by statute nor the Constitution.”).

81. *Id.* at *14.

proposed course of action can be squared with the Constitution,” he “*should* be made to hesitate.”⁸²

In addition, the district court stated that “the post—September 11 context provides support for plaintiffs’ assertions that defendants were involved in creating and/or implementing the detention policy under which” Iqbal was confined.⁸³ In the eyes of the district court, the OIG Report “suggests the involvement of [Ashcroft and Mueller] in creating or implementing a policy under which plaintiffs were confined in restrictive conditions until cleared by the FBI from involvement in terrorist activities.”⁸⁴

D. Circuit Court Proceedings

Ashcroft and Mueller filed an interlocutory appeal to the U.S. Court of Appeals for the Second Circuit, objecting to the district court’s disposition of the motion to dismiss.⁸⁵ Subsequently, on May 27, 2007, the Supreme Court issued *Bell Atlantic Corp. v. Twombly*,⁸⁶ a watershed case that revised the pleading requirements of Rule 8(a)(2).

Twombly concerned a motion to dismiss a complaint alleging a violation of Section 1 of the Sherman Act, which declares illegal “[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce.”⁸⁷ In *Twombly*, the Court “retired” a previous statement on the pleading standards of Rule 8(a)(2) from *Conley v. Gibson*, which held that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim

82. *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)).

83. *Id.* at *20.

84. *Id.* at *20 n.20 (citing OIG REPORT, *supra* note 42, at 37-38, 39, 42, 49, 60 112-13, 116).

85. *See Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007) (“Ashcroft, Mueller, and FBI Defendant Rolince seek review of the denial of their motion to dismiss for lack of personal jurisdiction, arguing that the issue of personal jurisdiction is available for review on this interlocutory appeal because the issue is inextricably intertwined with that of qualified immunity.”).

86. 550 U.S. 544 (2007).

87. 15 U.S.C. § 1 (2006).

which would entitle him to relief.”⁸⁸ The Court in *Twombly* restated the applicable pleading standard for Rule (8)(2): whether a complaint contained facts, if taken as true, presented “plausible grounds” to infer legal wrongdoing, specifically a violation of an antitrust conspiracy.⁸⁹ The Court held that the complaint was insufficient – while the plaintiffs had alleged the existence of an unlawful conspiracy, they had alleged parallel conduct that was consistent with lawful behavior and as such there was no basis upon which to conclude that their claims of an illicit accord were plausible.⁹⁰ While *Twombly* may have resolved the matter at hand, it left lower courts and practitioners unsure as to how the ruling applied beyond the facts of that single case.⁹¹

As *Twombly* was decided after the district court’s opinion, the Second Circuit was compelled to make sense of whether, and if so how, the pleading standards had changed with the Supreme Court’s new pronouncement. The Second Circuit determined that *Twombly* did not institute heightened pleading requirements, but rather clarified the meaning of the pleading requirements – it dispensed with the “no set of facts” standard and instead obligated a

88. *Twombly*, 550 U.S. at 561 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

89. *Id.* at 556.

90. *Id.* at 570.

91. See, e.g., *al-Kidd v. Ashcroft*, 580 F.3d 949, 977 (9th Cir. 2009) (“Post-*Twombly*, . . . courts face greater uncertainty in evaluating complaints.”); *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 967 (9th Cir. 2009) (“Much confusion accompanied the lower courts’ initial engagement with *Twombly*.”) (comparing *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 n.5 (9th Cir. 2008), and *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 58 (1st Cir. 2008), with *Aktieselskabet AF 21. November 2001 v. Fame Jeans*, 525 F.3d 8, 15 & n.3 (D.C. Cir. 2008)); *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (“The issues raised by *Twombly* are not easily resolved, and likely will be a source of controversy for years to come.”); see also Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 113 (2009) (“Almost immediately after it was handed down, lower courts and scholars began struggling to identify the true reach and meaning of the *Twombly* opinion.”); Michael C. Dorf, *The Supreme Court Wreaks Havoc in the Lower Federal Courts--Again*, FINDLAW’S WRIT, Aug. 13, 2007, <http://writ.news.findlaw.com/dorf/20070813.html> (“How should *Twombly* be understood? That question has perplexed the hundreds of federal judges who have already had to confront dismissal motions citing *Twombly*.”).

pleader “to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.”⁹² With this understanding of the pleading requirements and upon accepting the allegations in the complaint as true for purposes of a motion to dismiss,⁹³ the Second Circuit affirmed, except with respect to a procedural due process claim.⁹⁴

As with the district court, the relevance of the post-9/11 context was integral to court’s examination of the complaint. The Second Circuit remarked that the defendants’ arguments regarding qualified immunity were permeated by the contention that “the immediate aftermath of the 9/11 attack created a context in which the defense must be assessed differently and, from their standpoint, favorably.”⁹⁵ The circuit court maintained, however, that “most of the rights that the Plaintiff contends were violated do not vary with surrounding circumstances” and that “[t]he strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times.”⁹⁶ Indeed, the right “not to be subjected to ethnic or religious discrimination [was] clearly established prior to 9/11, and . . . remain[s] clearly established even in the aftermath of that horrific event.”⁹⁷

With respect to the link between the high level officials and the challenged policies, the Second Circuit held that it is “plausible” to believe that Ashcroft and Mueller “would be aware of policies concerning the detention of those arrested by federal officers in the New York City area in the aftermath of 9/11 and would know about, condone, or otherwise have personal involvement in the implementation of those policies.”⁹⁸ As to the claims of discrimination, the Second Circuit noted that the “allegation that [Ashcroft and Mueller] condoned and agreed to the discrimination . . . satisfies the plausibility standard” of Rule 8(a)(2) “because

92. *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007).

93. *See id.* at 152.

94. *See id.* at 177-78.

95. *Id.* at 151.

96. *Id.* at 159.

97. *Id.* at 160.

98. *Id.* at 166.

of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated ‘of high interest’ in the aftermath of 9/11.”⁹⁹

The Second Circuit remanded the case with the order that discovery against the petitioners should take place only if other discovery indicated that discovery against the petitioners was necessary.¹⁰⁰

Judge Cabranes filed a concurring opinion in which he expressed fear that this case would lead to a flood of suits from those allegedly aggrieved by the government’s national security initiatives. “[L]ittle would prevent,” he wrote, “other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the *blueprint* laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes.”¹⁰¹ Judge Cabranes also doubted whether district judges could effectively manage discovery in these cases.¹⁰²

II. THE ARGUMENTS

The purpose of this part is to provide an overview of the main arguments made at the certiorari, merits, and oral argument stages of the Supreme Court proceedings. These arguments, collectively, form the substantive information that the Court was armed with when determining whether it should hear the case and, if so, how it should be resolved. The presentation of these arguments generally tracks the four main areas of contention between the two parties: the sufficiency of Iqbal’s allegations under *Twombly*, the link between the high-level officials and the challenged policies, the relevance of the post-9/11 context, and Judge Cabranes’s pragmatic concerns.

99. *Id.* at 175-76.

100. *Id.* at 159.

101. *Id.* at 175-76 (emphasis added).

102. *Id.* at 179.

A. *Certiorari Stage*

On February 6, 2008, Ashcroft, Mueller, and six other defendants named in the action¹⁰³ asked the Supreme Court to take a hard look at the Second Circuit's opinion.¹⁰⁴ The petitioners took *Twombly* to mandate the following standard: "to defeat a motion to dismiss, the allegations in a complaint must contain 'more than labels and [legal] conclusions' and must 'raise a reasonable expectation that discovery will reveal evidence' that the defendants engaged in unlawful conduct."¹⁰⁵ Put differently, under *Twombly*, "a complaint must allege facts sufficient to make an inference of unlawful conduct plausible" where "allegations that are fully consistent with lawful behavior do not 'raise a right to relief above the speculative level.'"¹⁰⁶

Based on this understanding of *Twombly*, the petitioners stated that Iqbal may not rely on "conclusory allegations as the purported basis for holding petitioners potentially liable for alleged unlawful discrimination and conspiracy . . . to deprive respondent of his civil rights."¹⁰⁷ In the petitioners' view, this is exactly what Iqbal did: his allegations that the petitioners "knew of, condoned, and willfully and maliciously agreed" to discriminate him is not an actionable factual allegation, but instead a conclusory legal conclusion.¹⁰⁸

With respect to Ashcroft and Mueller's personal involvement in any wrongful conduct, Iqbal alleges that the

103. Michael Cooksey, former Assistant Director for Correctional Programs of the Bureau of Prisons, David Rardin, former Director of the Northeast Region of the Bureau of Prisons, Michael Rolince, former Chief of the Federal Bureau of Investigation's International Terrorism Operations Section, Counterterrorism Division, Kathleen Hawk Sawyer, former Director of the Federal Bureau of Prisons, Kenneth Maxwell, former Assistant Special Agent in Charge, New York Field Office, Federal Bureau of Investigation, and Dennis Hasty, former Warden of the MDC. See Petition for Writ of Certiorari at II, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015).

104. *Id.*

105. *Id.* at 12 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)) (alteration in original).

106. See *id.* at 14 (quoting *Twombly*, at 555).

107. *Id.* at 10-11.

108. *Id.* at 15 (quoting Complaint, *supra* note 14, at ¶ 96).

petitioners “approved” of the policy describing the identification of persons of “high interest,” however the petitioners contend that Iqbal did not allege that the policy itself is discriminatory.¹⁰⁹ At most, in the eyes of the petitioners, Iqbal alleged that a general policy was discriminatorily applied by subordinates, but this is insufficient to give rise to liability as to Ashcroft and Mueller.¹¹⁰ In other words, “the mere fact of supervisory authority is not an adequate basis for holding petitioners personally liable for alleged wrongdoing committed by others” as Iqbal would need to allege “facts showing that they had actual knowledge of a substantial risk of wrongdoing and that their failure to take action was the proximate cause of respondent’s alleged injuries.”¹¹¹ That is, Iqbal did not allege that the policy itself is discriminatory or that the petitioners themselves engaged in wrongful actions. As a result, in petitioners’ estimation, the allegations are consistent with lawful behavior and as such the complaint does not survive a motion to dismiss pursuant to *Twombly*.¹¹²

With respect to the context of the case, the petitioners disagreed with the Second Circuit that it is “plausible” to allege that Ashcroft and Mueller “would be aware of policies concerning the detention of those arrested by federal officers in the New York City area in the aftermath of 9/11 and would know about, condone, or otherwise have personal involvement in the implementation of those policies,” finding this conclusion purely speculative.¹¹³ For the petitioners, the post-9/11 environment cut the other way—the “unprecedented size of the investigation” in response to 9/11 suggests that Ashcroft and Mueller’s ability to be personally involved in particular cases was very limited.¹¹⁴

Finally, the petitioners, echoing Judge Cabranes’s concurrence, claimed that the Second Circuit’s analysis will “significantly undermine the protections afforded by qualified immunity,” generally and especially in the area of

109. *See id.* at 13.

110. *See id.*

111. *Id.* at 14.

112. *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

113. *Id.*

114. *Id.* at 15.

national security, “by potentially subjecting high-level government officials to discovery and even a trial based merely on conclusory allegations that such officials knew of or condoned alleged wrongdoing by subordinate officials.”¹¹⁵

On May 9, 2008, Iqbal filed a response to the petition, arguing that Supreme Court review was not necessary on the grounds asserted by the petitioners.¹¹⁶ According to Iqbal, “the only real issue presented” in the petition “is whether the Second Circuit properly held that the allegations of petitioners’ actual knowledge, acquiescence, and agreement are sufficient”—an issue that “amounts to error-correction, which is not a sufficient reason to grant certiorari.”¹¹⁷

To the extent that the Court decided to take a look at the Second Circuit’s ruling, Iqbal stated that affirmance was appropriate—he expressed the view that the Court “correctly noted that [he] alleged that he was kept in harsh conditions of confinement solely because of discrimination and that petitioners, among others, targeted respondent for mistreatment because of his race, religion and national origin.”¹¹⁸ Moreover, to Iqbal, the Second Circuit correctly found that he “specifically alleged that petitioners both condoned and agreed to this discrimination, and that no further subsidiary facts need be alleged.”¹¹⁹

On May 29, 2008, the petitioners availed themselves of their opportunity to reply to Iqbal’s objections. The petitioners discounted Iqbal’s purported attempts to clarify or reframe his allegations—the petitioners claimed specifically that Iqbal’s “repetition and rephrasing do not make respondent’s bare-bones allegation of petitioners’ personal involvement any less conclusory.”¹²⁰ “[W]ithout the requisite subsidiary factual allegations,” the petitioners continued, Iqbal “has not met his obligation to provide the

115. *Id.* at 10.

116. Brief in Opposition, *Ashcroft v Iqbal*, 128 S. Ct. 2931 (2008) (No. 07-1015), 2008 WL 2095715.

117. *Id.* at 11.

118. *Id.* at 12.

119. *Id.*

120. Reply Brief for the Petitioners at 7, *Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2008) (No. 07-1015), 2008 WL 2277915.

grounds of his entitlement to relief.”¹²¹ The petitioners did not support the use of limited discovery to bolster the allegations, citing the Supreme Court’s previous statements that qualified immunity questions should be “resolved prior to discovery”¹²² and at the earliest possible moment in the litigation.¹²³

A single amicus brief was filed at the certiorari stage.¹²⁴ In it, three former Attorneys General, two former directors of the FBI, and the Washington Legal Foundation reinforced Judge Cabranes’s practical considerations. The *amici* contended that robust qualified immunity protection is required in order to ensure that high-level government officials are not distracted from their duties by lawsuits, especially frivolous ones.¹²⁵ The brief argued that the Second Circuit’s decision should be reviewed in order for the Court “to determine whether such disruptions are required under the terms of the Federal Rules of Civil Procedure, particularly when (as here) the challenged actions involve sensitive national security issues.”¹²⁶

On June 16, 2008, the Supreme Court granted certiorari.¹²⁷ In doing so, the Court agreed to decide:

Whether a conclusory allegation that a cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly

121. *Id.* (internal quotes and alteration omitted) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)).

122. *Id.* at 2 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987)).

123. *Id.* at 4 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)).

124. Brief of William P. Barr et al. as Amici Curiae in Support of Petitioners, *Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2008) (No. 07-1015), 2008 WL 659528.

125. *See id.* at 7-8 (“[T]he decision below calls into question the ability of high-level Executive Branch officials to win dismissal, on qualified immunity grounds, of even frivolous *Bivens* litigation filed by anyone claiming to be aggrieved by their official conduct. In the absence of dismissal, those officials face the prospect of discovery proceedings that are highly likely to distract them from their other responsibilities.”).

126. *Id.* at 8.

127. *Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2008).

committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*.¹²⁸

B. *Merits Stage*

1. *The Opening Briefs.* The first salvo after certiorari was granted came from the petitioners on August 29, 2008.¹²⁹ To satisfy *Twombly*, the petitioners noted, a plaintiff must “‘put forward specific, nonconclusory factual allegations’ that establish . . . cognizable injury, before allowing a suit ‘to survive a pre-discovery motion for dismissal or summary judgment.’”¹³⁰ Relying on *Twombly*, which the petitioners did not believe issued a heightened pleading standard,¹³¹ the petitioners stated that “a complaint” must “allege sufficient facts to . . . cross ‘the line between possibility and plausibility.’”¹³² Iqbal fell short of this standard, in the petitioners’ view, because he had not described the “who,” “what,” “where,” or “when” of any specific wrongdoing by Ashcroft and Mueller.¹³³

As to what Iqbal did assert, the petitioners disputed whether Ashcroft and Mueller’s personal involvement in the alleged wrongdoing of the low-level officials is plausible (not

128. Petition for a Writ of Certiorari, *supra* note 17, at I. The Court also agreed to hear a question concerning constructive notice. *Id.* (“Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.”). As this question was disavowed by Iqbal as a matter of dispute at the Supreme Court level, *see* Response Brief, *supra* note 65, at 1 (acknowledging that the question of supervisory liability or respondeat superior based on a constructive knowledge theory “is not even implicated by respondent’s allegations against petitioners”), I will not address it.

129. Brief for the Petitioners, *Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2008) (No. 07-1015), 2008 WL 4063957 [hereinafter Opening Brief].

130. *Id.* at 12 (quoting *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998)).

131. *See id.* at 28.

132. *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007)).

133. *Id.* at 39 (“Respondent does not allege the *what* of liability (*i.e.*, any particular steps that the Attorney General or FBI Director took to approve, condone, or ratify the discriminatory selection of respondent as a ‘high interest’ detainee). Respondent does not allege *when* this conduct allegedly took place, *who* was allegedly involved, or *where* it allegedly occurred.”).

just possible or beyond anything other than mere suspicion).¹³⁴ To wit, the petitioners pointed out that most of Iqbal's claims concerned mistreatment by "prison employees."¹³⁵ The only alleged nexus between the conduct of the low-level officials to Ashcroft and Mueller, the petitioners' argument goes, is that Ashcroft and Mueller "approved" of and were responsible for the implementation of a general policy with respect to the designation of individuals of high interest and their subsequent placement in highly restrictive conditions of confinement.¹³⁶ This general policy, according to petitioners, was non-discriminatory in purpose. Specifically, individuals designated as persons "of high interest," including Iqbal, were placed in higher conditions of confinement in the ADMAX SHU for "protective" reasons—that is, to "prevent[] them from communicating with any co-conspirators,"¹³⁷ not, as Iqbal suggests, as a punitive measure.

The petitioners also noted that, while Iqbal contended that Ashcroft and Mueller "approved" of a policy, he did not claim that the policy itself [was] discriminatory on its face.¹³⁸ Nor could he, "to the extent that investigators were focused on individuals . . . who bore characteristics similar to the September 11 hijackers, that hardly establishes an invidious discriminatory intent."¹³⁹ In other words, "any focus on individuals . . . who might share the same radical ideology as the attackers would have been a sensible means of limiting the investigation without violating equal-protection guarantees."¹⁴⁰ A "high proportion" or predominance of people of Arab or Muslim background categorized as "high interest", as the petitioners state, does not alone reveal discriminatory intent.¹⁴¹

Even assuming the discriminatory application of a general policy, the petitioners state, the context of the case

134. *See id.* at 13, 23.

135. *Id.* at 3.

136. *Id.* at 5.

137. *Id.* at 3.

138. *See id.* at 30-31.

139. *Id.* at 31.

140. *Id.* at 34.

141. *See id.* at 35.

renders the petitioners' personal involvement in any wrongdoing less plausible. According to Ashcroft and Mueller, they acted in "response to an unprecedented national-security crisis," "were deluged with official demands," and "headed the largest investigation in American history, involving thousands of law-enforcement agents."¹⁴² In light of the atmosphere within which Ashcroft and Mueller were operating, it is plausible that Ashcroft and Mueller at most approved of a general policy.¹⁴³ Conversely, Iqbal's "conclusory" allegations that Ashcroft and Mueller "knew of," "condoned," or otherwise had personal involvement with the application of a particular policy in a national security whirlwind involving many people and many decisions is implausible.¹⁴⁴ In short, the petitioners argue that Iqbal merely posited that the low-level officials applied the policy in a discriminatory fashion as to Iqbal.¹⁴⁵ The petitioners' approval of a general policy is, as with *Twombly*, consistent with lawful behavior.¹⁴⁶

The petitioners reminded the Court that there is a strong public interest in ensuring that government officials are not distracted from their duties and are not deterred from providing the necessary guidance and judgment required of their office.¹⁴⁷ They also reiterated that this public interest is enhanced when national security is implicated¹⁴⁸ and is even more pressing when officials of the Ashcroft and Mueller's stature are involved.¹⁴⁹ Because of the importance of qualified immunity, the petitioners asserted that the existence of such immunity is to be decided at the earliest possible moment in litigation and that the pleading requirements are to be firmly applied.¹⁵⁰

142. *Id.* at 13.

143. *See id.* at 36-37.

144. *Id.* at 13, 19; *see id.* at 36 (commenting on the size of the investigation after 9/11).

145. *See id.* at 13; *see also id.* at 32 ("All of the alleged conduct here was purportedly committed by officers down the chain of command from petitioners.").

146. *See id.* at 33.

147. *See id.* at 11.

148. *See id.* at 11-12.

149. *See id.* at 40-41.

150. *See id.* at 16-19.

The petitioners also noted that permitting additional discovery would be neither in keeping with these principles nor workable given the district judges' limited capacity to minimize the harm and costs to government officials in prolonged litigation.¹⁵¹

Relatedly, the petitioners contended that more practical costs are at issue, namely allowing conclusory allegations to survive a motion to dismiss would subject other high-ranking officials to suit based on bare-bones claims—a concern reflected in Judge Cabranes's concurring opinion.¹⁵²

On the same day, three other defendants in the case filed briefs in support of the petitioners. Michael Rolince, the Former Chief of the FBI's International Terrorism Operations Section, and Kenneth Maxwell, former Assistant Special Agent in Charge of the FBI's New York field office, filed a brief together.¹⁵³ The third defendant that filed a brief was Dennis Hasty, former warden of the MDC.¹⁵⁴ They principally argued that they were not personally involved in any mistreatment that Iqbal allegedly suffered while he was detained and that they were entitled to qualified immunity as high-level officials.¹⁵⁵

2. *The Response.* On October 24, 2008, Iqbal returned fire.¹⁵⁶ As to the proper pleading requirements under Rule 8(a)(2), Iqbal interpreted *Twombly* to suggest that *Conley's* "any set of facts" rubric allowed room for a confusing and misleading reading of what passes muster under Rule 8(a)(2)—rather than look to a court's imagination to determine if any set of facts could entitle the complainant to relief, *Twombly* indicated that 1) the facts, taken as true, in the complaint and facts to be ascertained at discovery were to form the universe of facts to be assessed for sufficiency

151. *See id.* at 25-26.

152. *See id.* at 20.

153. Brief of Respondents Michael Rolince and Kenneth Maxwell in Support of Reversal, *Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2008) (No. 07-1015), 2008 WL 4063958 [hereinafter Rolince and Maxwell Brief].

154. Brief of Dennis Hasty as Respondent Supporting Petitioners, *Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2008) (No. 07-1015), 2008 WL 4063959 [hereinafter Hasty Brief].

155. *See* Rolince and Maxwell Brief, *supra* note 153, at 5,9,10,12; Hasty Brief, *supra* note 154, at 5, 7, 11, 17, 21, 23.

156. Response Brief, *supra* note 65.

purposes,¹⁵⁷ and 2) such facts should not be a mere “recitation of the elements of a cause of action” and should rise “above a speculative level.”¹⁵⁸

Accordingly to Iqbal, *Twombly* did not represent an attempt to “radically alter” the pleadings requirements of Rule 8.¹⁵⁹ However the petitioners’ arguments essentially amount to a belief that Ashcroft and Mueller are entitled to a heightened pleading standard because they are high-level officials and the case implicates national security.¹⁶⁰ Iqbal noted that heightened pleading standards cannot be made by judicial ruling¹⁶¹ and the pleading standard does not fluctuate based on context.¹⁶² Iqbal admitted that qualified immunity must be resolved at the “earliest stage possible,”¹⁶³ but rejected the notions that the pleading standard is different and is dependent upon the identity of the defendants or the nature of the case.¹⁶⁴ Moreover, according to Iqbal, the pleading standard is not impacted by the existence of qualified immunity, as a complainant is not required to respond to a qualified immunity defense and adjust his factual allegations as a consequence.¹⁶⁵

As the pleading standards are constant, in Iqbal’s estimation the petitioners’ “only quarrel with the decisions below is its holding that the complaint adequately connected petitioners to these allegations.”¹⁶⁶ Responding to the petitioners’ belief that he did not proffer a sufficient link between Ashcroft and Mueller and the wrongdoing, Iqbal says this “is refuted by the complaint’s clear statement that petitioners ‘designed,’ ‘approved,’ ‘condoned,’ and ‘agreed’ with the policy of classifying detainees for confinement under restrictive conditions based upon their race, religion,

157. *See id.* at 37 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561-62 (2007)).

158. *Id.* at 38 (citing *Twombly*, 127 S. Ct. at 1965).

159. *Id.* at 37.

160. *Id.* at 9, 23, 26.

161. *See id.* at 36 (citing *Twombly* 550 U.S. at 545, 569 n.14).

162. *See id.* at 37.

163. *Id.* at 26.

164. *See id.* at 9-10, 23, 25-31.

165. *See id.* at 10-11.

166. *Id.* at 38.

and national origin.”¹⁶⁷ Put differently, the petitioners created discriminatory classification and detention policies and then either knew about or acquiesced to the discriminatory application of that very policy.¹⁶⁸ Indeed, Iqbal cited the OIG report which found that Ashcroft and Mueller met to discuss the detainees, detentions were made pursuant to DOJ policy, detention decisions were based largely on membership in protected classes, and ninety-five percent of the detainees were from the Middle East or South Asia.¹⁶⁹ Relatedly, Iqbal posited that “it is virtually inconceivable that petitioners were not involved in the wide-ranging and politically significant decision that detainees of a particular race, religion, and national origin were automatically considered ‘of high interest’ to the September 11th investigation.”¹⁷⁰

As to the profiling of members of these targeted communities, Iqbal likened the petitioners’ argument—that one should expect targeting of individuals who share the same background as the September 11 attackers—to be “a remarkable concession to unlawful discrimination” and “an argument that their discriminatory policy was justified under the circumstances.”¹⁷¹ More to the point, to Iqbal, the policy of presuming that individuals from this background are suspected terrorists clearly states a cognizable cause of

167. *Id.* at 2 (quoting Complaint, *supra* note 14, ¶¶ 69, 96-97); *see also id.* at 4 (referring to Iqbal’s complaint that Ashcroft and Mueller “crafted, approved, and directed, ‘as a matter of policy’ that detainees like respondent would be confined in the ADMAX SHU solely because of membership in protected classes.” (quoting Complaint, *supra* note 14, ¶¶ 96-97)); *id.* at 47-48.

168. *See id.* at 45-46. Iqbal conceded that he does not allege that Ashcroft and Mueller themselves made detention decisions with respect to him. *See id.* at 49 (“[R]espondent has not alleged that petitioners personally classified Mr. Iqbal, but instead that Mr. Iqbal’s classification was a result of petitioners’ categorical policy of discrimination on the basis of race, religion, and national origin.”).

169. *See id.* at 4-5 (citing OIG REPORT, *supra* note 42, at 12-13, 16, 21, 118); *see also id.* at 52 n.9 (“In many cases, the ‘high interest’ designation was based on race, religion, and national origin” (quoting Opening Brief, *supra* note 129, at 30)). Iqbal argued that he need not prove that every classification was discriminatory, it was enough that he pleaded that the classification system was pervaded by discriminatory animus and that, in his case, he was classified on a discriminatory, non-legitimate basis. *See id.*

170. *Id.* at 54.

171. *Id.* at 50.

action in accordance with Rule 8.¹⁷² In short, Iqbal contended that the situation in *Twombly*—wherein the alleged illegal conduct “was drawn entirely from lawful parallel conduct”¹⁷³—is not present in his case, as the allegations of discrimination are not consistent with lawful conduct.¹⁷⁴

As to the petitioners’ belief that Iqbal did not proffer the basics necessary to satisfy Rule 8, Iqbal enumerated the essential aspects of his claims:

(1) the ‘what’ for these petitioners is the policy of categorizing detainees as “of interest” and ‘of high interest’ based solely on their protected class status; (2) the ‘when’ is the period that respondent was subjected to discriminatory classification and treatment; (3) the ‘who’ are each of those individuals involved in different ways in respondent’s confinement in the ADMAX SHU; (4) and the ‘where’ is both Washington, D.C. and New York City.¹⁷⁵

In any event, according to Iqbal, as a general matter a complaint need not contain such specifics according to *amici*, a complainant simply has to put the defendant on notice of the claims and grounds for relief such that defendant can answer and prepare for trial.¹⁷⁶ A plaintiff is not required, either, to enhance his factual allegations simply because the allegations concern the petitioners’ state of mind (i.e., scienter) as to the discriminatory treatment of detainees, Iqbal continued.¹⁷⁷

Finally, Iqbal tried to assuage the Court’s possible concerns with respect to the petitioners’ pragmatic argument that government officials should be optimally protected from the burdens of discovery. Iqbal noted that the limited discovery permitted by the Second Circuit would likely only entail deposition testimony¹⁷⁸ and in any case,

172. *See id.* at 53-54 n.10.

173. *See id.* at 37-38.

174. *See id.* at 38.

175. *Id.* at 41-42.

176. *See id.* at 39-41.

177. *See id.* at 10-11, 30-34.

178. *Id.* at 38-39.

would not eliminate the petitioners' ability to invoke or be protected by the doctrine of qualified immunity.¹⁷⁹

3. *Amicus Briefs*. The Supreme Court next received six amicus briefs—one filed in support of Ashcroft and Mueller, and five filed in support of Iqbal.¹⁸⁰ On October 30, 2008, five former Attorneys General, one former director of the FBI, and the Washington Legal Foundation,¹⁸¹ filed a brief urging the Court to dismiss Iqbal's allegations in light of Judge Cabranes's warning that subjecting Ashcroft and Mueller to discovery would have "disruptive effects" on the "ability of high-level officials to carry out their missions effectively."¹⁸² In addition, the *amici* questioned the strength of Iqbal's claims of discrimination. For example, if Iqbal is correct that all Muslims or Arabs were to be deemed individuals of "high interest then one would expect that Iqbal . . . would have been placed immediately into MDC's ADMAX unit," however "federal officials waited two months to designate him a 'high interest' detainee."¹⁸³ As to the petitioners' involvement in the policy, "Iqbal's allegation that Arab Muslim men were treated in a discriminatory manner *in the New York area* therefore suggests that the alleged official policy of discrimination originated among federal officials based in New York, not out of Ashcroft's and Mueller's offices in Washington."¹⁸⁴ As to the targeting of Muslims, the *amici* opined that "given that all those involved in the September 11 attacks were Muslims, reasonable officials in Ashcroft's and Mueller's positions would have had no reason to doubt the legality of a policy of giving closer scrutiny to Muslims than to non-Muslims."¹⁸⁵

The substantive ping-pong match resumed just a day later, October 31, 2008, with the filing of five amicus briefs

179. *See id.* at 36.

180. *See* Ashcroft v. Iqbal, 129 S. Ct. 2931, Docket No. 07-1015.

181. These are roughly the same individuals and the same firm who filed a brief in support of the petition for certiorari, as discussed in *supra* Part II.A.

182. Brief of William P. Barr et al. as Amici Curiae in Support of Petitioners at 6, Ashcroft v. Iqbal, 128 S. Ct. 2931 (2008) (No. 07-1015), 2008 WL 4154531; *see also id.* at 27-28.

183. *Id.* at 16.

184. *Id.* at 17.

185. *Id.* at 25-26.

favorable to Iqbal.¹⁸⁶ In one, a group of civil rights and human rights organizations, represented by then-Yale Law School Dean Harold Koh, asked the Court to reject the petitioners' apparent suggestion that a judicially-created heightened pleading standard applies in a *Bivens* action against high-level government officials.¹⁸⁷ The *amici* expressed the view that the interest in ensuring government officials do not violate constitutional rights is enhanced where, as here, high-level officials are entrusted with weighty, discretionary decisions; further, this interest "do[es] not wane in times of national emergency."¹⁸⁸ According to *amici*, if this interest is sufficiently devalued, civil rights plaintiffs will be unable to attain necessary facts through limited discovery to maintain their claims beyond the dismissal stage.¹⁸⁹

The American Association for Justice also filed an amicus brief in support of Iqbal.¹⁹⁰ The brief emphasized the point that a liberal pleading standard still governs as *Twombly* could not implement a heightened pleading standard because the elevation of the pleading standard cannot be done by way of judicial action.¹⁹¹ It also argued that Iqbal's allegations are not consistent with wholly lawful conduct (as was the situation in *Twombly*) and that the allegations satisfied Rule 8(a)(2)'s fair notice and *Twombly*'s "plausibility" requirements—which are no different in the possible presence of a qualified immunity defense that a plaintiff is not obligated to anticipate, negate, or plead around.¹⁹² The Association similarly contended that Iqbal should not be penalized for failing to have information that is solely within the realm of petitioners' knowledge—as a consequence, Iqbal should not be required, at the pleading

186. See *Ashcroft v. Iqbal*, 129 S. Ct. 2931, Docket No. 07-1015.

187. See Brief of National Civil Rights Organizations as Amici Curiae in Support of Respondents at 1, 129 S. Ct. 2931 (2008) (No. 07-1015), 2008 WL 4805225 [hereinafter Yale Brief].

188. See *id.* at 2-3.

189. See *id.* at 3-4.

190. Brief for the American Ass'n for Justice as Amici Curiae Supporting Respondent, *Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2008) (No. 07-1015), 2008 WL 4805229.

191. See *id.* at 1-2, 4-6, 10-11.

192. See *id.* at 2-3, 7-10, 13-17.

stage, to describe with specificity the petitioners' state of mind with respect to the allegedly discriminatory policy that was applied to Iqbal, as such intent would be revealed only through discovery.¹⁹³

In a separate brief supporting Iqbal, a group of non-citizens similarly situated—arrested in the aftermath of the September 11 attacks, detained as individuals “of interest,” cleared of any wrongdoing, removed, and who filed suit on the grounds that they were classified and subjected to harsh conditions of confinement due to their race and religion—intended to show the Court that discovery in their own cases lead to information supporting their claims of discrimination and as a result, Iqbal’s allegations of discriminatory treatment should not be dismissed at the pleading phase of litigation.¹⁹⁴ The group surmised from information it received during their particular discovery that the mistreatment of detainees was part of a discriminatory pattern and practice established by policy, rather than ad hoc, random events perpetrated by rogue officials on the ground, as the petitioners indicate.¹⁹⁵ In particular, discovery indicated that the petitioners were involved in frequent meetings and conversations about terrorism suspects;¹⁹⁶ that the detainee classification decisions were controlled out of Washington;¹⁹⁷ that Ashcroft was provided with daily reports on the details of the FBI investigations including the details of each detainee;¹⁹⁸ and that perceived Muslims or Arabs were to be detained without any tie to terrorism, suggesting the existence of racial and religious profiling in determining who would be deemed a person of “high interest.”¹⁹⁹ With respect to Judge Cabranes’ concern that the *Iqbal* case would lead to increased litigation implicating high-level government officials, the group responded by stating that *Bivens* actions

193. *See id.* at 3-4, 20-25.

194. Motion for Leave to File Brief for Amici Curiae Ibrahim Turkmen, et al. in Support of Respondents at iii, iv, 1, 6-7, *Ashcroft v. Iqbal*, 128 S. Ct. 2931 (2008) (No. 07-1015), 2008 WL 4805227 [hereinafter Turkmen Brief].

195. *See id.* at 4.

196. *See id.* at 16-17.

197. *See id.* at 18-20.

198. *See id.* at 9-13.

199. *See id.* at 7-8.

are rarely successful, thus this specific case will not lead to an “avalanche” of suits against Ashcroft, Mueller, and others in that strata of the government.²⁰⁰

Also supporting affirmance was a group of five civil rights and public interest organizations—one from each of the Muslim, Pakistani, Korean, Japanese, and Sikh communities.²⁰¹ The organizations contended that the Second Circuit achieved the “appropriate balance” between the competing values of protecting officials from frivolous lawsuits and enabling plaintiffs to recover for wrongdoing by allowing for limited discovery to take place.²⁰² Such a balance must be struck, *amici* argued, because high-ranking officials performing national security functions are not absolutely immune from liability.²⁰³ As a practical matter, upsetting this balance and siding with the petitioners’ cloak of immunity prior to any discovery would, to these organizations, be to “effectively foreclose judicial recourse to plaintiffs, like respondent, who have been injured by the constitutional violations of high-ranking government officials,”²⁰⁴ but who do not have access to information as to knowledge or motivations of those officials.²⁰⁵

Moreover, the organizations pointed to the public records—including the OIG Report—which to them help make “plausible” Iqbal’s claims that he was detained and mistreated on the basis of his race, religion, and/or national origin and that he was one of many Pakistani Muslims rounded up without any connection to terrorism.²⁰⁶ *Amici* pointed out that these documents are also consistent with Iqbal’s allegations that the conditions of confinement were highly restrictive and that the petitioners had a personal hand in the alleged discrimination. Specifically, the Attorney General’s office approved of the detention

200. *See id.* at 21-22.

201. Brief of Amici Curiae Japanese American Citizens League, Pakistani American Public Affairs Committee et al. in Support of Respondent, Ashcroft v. Iqbal, 128 S. Ct. 2931 (2008) (No. 07-1015), 2008 WL 4805228 [hereinafter Organizations Brief].

202. *See id.* at 2.

203. *See id.* at 26-28, 39-40.

204. *Id.* at 35-36.

205. *See id.* at 37.

206. *See id.* at 4-8.

conditions, classification decisions were made by the FBI, processing and removal decisions were made by the Department of Justice, and more generally Ashcroft personally directed the FBI to engage in a “massive investigation” of terrorist suspects.²⁰⁷

Finally, these organizations also argued that Iqbal’s claims of intentional targeting of Muslims and Arabs must not be viewed in a vacuum, but instead “in their proper context and in light of the historic mistreatment of minorities by the Government in times of national crisis.”²⁰⁸ Citing to *Hirabayashi v. United States*,²⁰⁹ in which the Court in 1943 upheld the curfews imposed against Japanese-Americans in the West Coast after Pearl Harbor, and *Korematsu*, in which the Court (one year later) upheld the forced exclusion and relocation of Americans of Japanese ancestry, the organizations warned against the Court again deferring to government assertions of national security when reviewing a minority plaintiff’s claims of wartime discrimination.²¹⁰ The organizations encouraged the Court to be mindful of a lesson from these cases that “racially motivated governmental restrictions imposed on aliens and citizens solely because of their race are inherently suspect and anathema to the ideals of freedom and liberty guaranteed by the Constitution.”²¹¹ Further, “the historical context of this case makes respondent’s claims entirely plausible, if not likely.”²¹²

The last amicus brief—which I drafted on behalf of seven Muslim, Arab, South Asian, and Sikh civil rights organizations and a non-profit research center—principally argued that context matters and, in this case, to properly appreciate Iqbal’s allegations of discrimination, the allegations must be placed within three contexts: the traditional role of the courts in ensuring that individual religious liberty is not infringed upon by the government; the historical use of personal characteristics as a proxy for suspicion in times of war; and the broader mistreatment of

207. *See id.* at 9-11, 22-25.

208. *Id.* at 3; *see also id.* at 13-14.

209. 320 U.S. 81, 104 (1943).

210. *See Organizations Brief, supra* note 201, at 14-17.

211. *Id.* at 19.

212. *Id.* at 32.

Muslims and those perceived to be Muslim in the wake of 9/11.²¹³ These contexts, we suggested, all support both the need for judicial review beyond the pleadings stage and the plausibility of Iqbal's claims of discrimination.²¹⁴ The first perspective was borne out of the concern that Iqbal, as he alleged, was discriminated against on the basis of his religion.²¹⁵ Accordingly, we attempted to impress upon the Court the notion that the district court must be permitted to perform its checking function to ensure the government did not effectively punish Iqbal for being Muslim.²¹⁶

The second was premised on the nation's historical tendency to rely upon personal characteristics, such as race, as the sole measure by which to presume whether an individual may pose a security threat and may be treated differently as a result.²¹⁷ We hoped to remind the Justices that, in *Korematsu*, the Court wrongfully approved of racial discrimination and that its rationalizations at the time—that it must defer to the claims of national security put forth by those responsible for the wartime response, and that the Japanese were targeted not because of animus but because the nation was at war with the Japanese Empire—have been properly viewed in hindsight to have been misguided.²¹⁸ To rely on race or religion as a proxy for suspicion or different treatment is thus counter to the lessons of *Korematsu*, not “sensible” as the petitioners had said in their opening brief, and a dangerous precedent that not perpetuated in *Iqbal*.²¹⁹

Third, we stressed that, in the aftermath of 9/11, Muslims and those perceived to be Muslim have been targeted by the government in various security efforts, for example with respect to airport profiling, selective immigration enforcement, and mass preventative detentions.²²⁰ Iqbal's claims that he was detained and

213. Brief of The Sikh Coalition et al. in Support of Respondent, at 10, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015), 2008 WL 4805226

214. *See id.*

215. *See id.* at 19.

216. *See id.* at 17-18.

217. *See id.* at 20-22.

218. *See id.*

219. *See id.* at 22-24.

220. *See id.* at 27-29.

mistreated because he is Muslim are consistent with such broad discrimination against Muslims generally.²²¹ Moreover, given the extent of the government's demonstrated pursuit of Muslims, it is hard to take seriously the petitioners' contention that they had no personal knowledge or involvement in one aspect of this larger campaign to target Muslims, namely their detention in New York in the aftermath of 9/11.²²²

4. *The Reply*. On November 24, 2008, Ashcroft and Mueller submitted their final written arguments in the case.²²³ The petitioners agreed that the allegations must be assessed in context, though they argued that it is qualified immunity and national security which are relevant to the Court's evaluation of the sufficiency of the complaint.²²⁴ As this case implicates qualified immunity, the Court is required to firmly apply the pleading standards particularly because the national security functions of cabinet-level officers are at issue.²²⁵ This case also arises in the aftermath of the massive post-9/11 investigation, the petitioners noted, and "the size of the September 11 investigation made . . . detailed involvement [of the petitioners] all the more infeasible."²²⁶

Against this backdrop, the petitioners contend that it is not enough to speculate that a discriminatory policy exists, but "[i]nstead, there must be an actual factual basis in the complaint for concluding that such a policy exists and was

221. *See id.* at 29-30.

222. *See id.* at 30.

223. Reply Brief, *supra* note 73.

224. *Id.* at 8.

225. *See id.* at 3-4, 8-9; *see also id.* at 12 ("[The petitioners'] position is that the lower courts failed to follow this Court's decisions in this area and give a 'firm application' of the Federal Rules.").

226. *See id.* at 10; *see also id.* at 17 ("The Attorney General and the FBI Director generally do not involve themselves in the granular operational decisions of their subordinates. And respondent's suggestion that petitioners engaged in this sort of micro-management during one of the largest criminal and national-security investigations in United States history is particularly implausible."); *id.* at 18 (indicating that the "usual practice" was for Ashcroft and Mueller to not have "actual knowledge" of "decisions being made by lower level officials.").

handed down by [the petitioners].”²²⁷ Here, any suggestion (derived ostensibly from the OIG Report) that the detainee classification decisions were made arbitrarily (e.g., without specific criteria or guidance) contradicts the possibility that there was a discriminatory policy.²²⁸ In addition, Iqbal only alleges that “many” Arab Muslim detainees were classified as individuals “of high interest,” not that “all” Arab Muslim detainees were so classified²²⁹—this, to the petitioners, undercuts Iqbal’s claim that the classification decisions were made on the basis of race, religion, and/or national origin.²³⁰ The fact that Iqbal’s classification decision was made two months after his initial detention also does not mesh with Iqbal’s allegations of discrimination, as one would expect his classification would be made immediately or very soon after his detention if there was a discriminatory policy in place.²³¹ In addition, whether there was profiling involved in the post-9/11 investigation “does not materially advance” the allegation that Ashcroft and Mueller were personally involved in the classification of Iqbal and the subsequent treatment he received in the ADMAX SHU.²³²

In any event, according to the petitioners, any detention policy that was in play was constitutional: “there is nothing inherently *discriminatory* about a general policy of holding suspects until cleared of any connection with the September 11 attacks, or with the alleged failure to provide an individual classification determination.”²³³ In light of this, the petitioners contended that Iqbal’s conclusory allegations “do not remotely cross the line between possibility and

227. *Id.* at 10-11; *see also id.* at 14 (“[R]espondent points to no factual allegations that support the existence of such a *discriminatory* policy.”).

228. *See id.* at 15.

229. *See id.* at 16 n.3 (citation omitted) (reciting the OIG finding that 184 of 762 “September 11” detainees were classified as individuals “of high interest.”); *see also id.* at 18-19 (“[T]he vast majority of Arab and Muslim men who were arrested on immigration or criminal charges as part of the September 11 investigation were *not* classified as being ‘of high interest.’” (citation omitted)).

230. *See id.* at 15.

231. *See id.* at 16.

232. *See id.* at 17.

233. *Id.* at 15.

plausibility of entitlement to relief²³⁴—a customary, non-heightened standard that generally applies across the board, not just in the antitrust sphere.²³⁵ These allegations, in other words, are “factual neutral” in that they are consistent with lawful conduct.²³⁶

Finally, the petitioners highlighted Judge Cabranes’s concern that Iqbal’s allegations, if allowed to pass through to the discovery phase, would serve as a “blueprint” for plaintiffs allegedly aggrieved by national security programs and thus allow for the future distraction of high-level officials from their essential duties.²³⁷ Indeed, they cited to a district court case which relied on the Second Circuit’s opinion to allow claims against Ashcroft and others to proceed.²³⁸

On the same day, Rolince and Maxwell filed their reply, arguing simply that they are entitled to relief on the same grounds as the petitioners—qualified immunity—and urging the Court to reverse the Second Circuit’s decision.²³⁹ Hasty also filed a reply, restating the petitioners’ positions that the government is not relying on a heightened pleading standard and that qualified immunity is a relevant consideration and must be resolved prior to discovery.²⁴⁰

234. *Id.* at 3 (brackets and internal quotation marks omitted) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)); *see id.* at 13-14.

235. *See id.* at 8; *see also id.* at 12 (disavowing any suggestion that Ashcroft and Mueller were asking for a heightened pleading standard); *id.* at 13 (“Rather than seeking a heightened pleading standard for *any* of respondent’s allegations, petitioners argue that the normal Rule 8(a)(2) pleading standard must be considered—as *Bell Atlantic* reinforces—contextually with respect to matters such as the plausibility of an allegation.”).

236. *See id.* at 7.

237. *See id.* at 1-2.

238. *See id.* at 20 n.6.

239. Reply Brief for Michael Rolince et al. in Support of Reversal, at 2, *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) (No. 07-1015), 2008 WL 5027911.

240. *See* Hasty Brief, *supra* note 154, at 4-6.

C. *Oral Argument*

On Wednesday, December 10, 2008, the Court heard argument in the case.²⁴¹ Appearing for the petitioners was Gregory Garre, then-acting Solicitor General Garre of the United States.²⁴² Alexander Reinert, a Yeshiva University law professor and private practitioner from New York, argued on behalf of Iqbal.²⁴³

Solicitor General Garre began his argument by stating that the Second Circuit “erred in concluding that the complaint stated a violation of clearly established rights by [Ashcroft and Mueller], because under this Court’s precedents the complaint fails adequately to plead the personal involvement of those high-ranking officials for the alleged discriminatory acts of lower level officials.”²⁴⁴ Put differently, Iqbal’s claim is implausible precisely because no “affirmative link between the acts of . . . the subordinates and the higher-level officials” has been sufficiently alleged.²⁴⁵

Justice Ruth Bader Ginsburg picked up on the debate between the parties regarding whether the sufficiency of the complaint could be assessed on its own (irrespective of whether a qualified immunity defense may be asserted at some point) or whether qualified immunity factors into the pleadings analysis.²⁴⁶ Solicitor General Garre responded that qualified immunity is relevant because “a defense can be a basis for a motion to dismiss under [Rule] 12(b)(6)”²⁴⁷ and “the question of whether a complaint adequately pleads the personal involvement of government officials goes directly to the question of qualified immunity[.]”²⁴⁸ Indeed, Solicitor General Garre noted, the Second Circuit addressed

241. Transcript of Oral Argument at 1, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015) [hereinafter Oral Argument Transcript].

242. *Id.*

243. *See id.*

244. *Id.* at 3-4

245. *Id.* at 19.

246. *See id.* at 4.

247. *Id.*

248. *Id.* at 5.

as part of its reasoning “whether these defendants have violated any clearly established rights.”²⁴⁹

As to personal responsibility, Justice David H. Souter sought clarification as to whether the complaint alleged direct wrongdoing on the part of the petitioners. Solicitor General Garre acknowledged that the complaint did make such allegations: “One set of allegations says that Petitioners came up with this policy[.]”²⁵⁰ He explained, however, that “those allegations we think describe a policy which is neutral on its face, a policy of holding persons determined by the FBI to be of interest in connection with a terribly important investigation until they have been cleared.”²⁵¹ As this policy is non-discriminatory, Solicitor General Garre continued, the complaint does not state a claim.²⁵² Solicitor General Garre likened the complaint to the situation present in *Twombly*, where the allegations were suggestive of parallel lawful and unlawful conduct: here you have “factually neutral allegations, perfectly lawful law enforcement conduct to have a policy that says, FBI agents, if you determine these people are of interest, hold them until they are cleared so that we are not releasing people that are potentially suspects or wrongdoers in this investigation.”²⁵³

Justice Souter proposed that Iqbal’s allegations may mean that the petitioners “design[ed]” a policy “which called for holding . . . Arab Muslim men of certain countries of origin without reference to any penal purpose.”²⁵⁴ Solicitor General Garre, however, rejected this interpretation, saying Iqbal instead alleges that “specific lower level officials are making these determinations” and “that these determinations are being made on the basis of ad hoc criteria.”²⁵⁵

249. *Id.*

250. *Id.* at 6.

251. *Id.*

252. *See id.*

253. *Id.* at 11.

254. *Id.* at 6; *see also id.* at 8 (“[T]hat policy we think is . . . a factually neutral, perfectly lawful law enforcement response to the 9/11 attacks . . .”).

255. *Id.* at 7; *see also id.* at 9 (“I think the only policy that the allegations bear out with respect to the Attorney General and the Director of the FBI is a policy . . . of holding suspects until cleared.”); *id.* at 26 (“[T]he complaint in this case

Solicitor General Garre distanced himself from any notion that the government was asking the Court to apply a heightened pleading standard and argued that the government simply was contending that there was a lack of a substantive element to state a claim: there were no “[s]ubsidiary allegations suggesting a plausible affirmative link between the discriminatory actions allegedly taken by much lower level officials in the field and the Director of the FBI and the Attorney General of the United States.”²⁵⁶ Chief Justice John G. Roberts asked whether this point speaks to the merits of the *Bivens* claims, to which Solicitor General Garre responded in the negative: “in order to evaluate whether the pleadings are adequate against the Attorney General and the Director of the FBI, you have to know what the substantive standard under *Bivens* is” with respect to attaching liability to high-level officials for the conduct of “much lower level officials.”²⁵⁷

Solicitor General Garre reiterated the government’s position that “common government experience would suggest that the Attorney General of the United States is not involved in the sort of microscopic decisions.”²⁵⁸ Justice Souter disagreed that this case involved “common government experience.”²⁵⁹ Solicitor General Garre readily conceded that the case implicates the specialized post-9/11 climate, but complained that the Second Circuit “held the extraordinary context of the 9/11 attacks and the aftermath of those attacks against the Petitioners in this case.”²⁶⁰

Solicitor General Garre further argued that discovery should not be permitted with respect to meritless claims because of “the burdens that discovery can impose in the civil and in trust contexts,” which are magnified in

says . . . that FBI officials, far removed from the Attorney General and the Director of the FBI, were making these determinations without criteria, without a uniform classification system.”).

256. *Id.* at 12.

257. *Id.* at 12-13. Although the official oral argument transcript does not italicize case names, quotations of the transcript in this Article have italicized case names to enhance the readability of the excerpts and for consistency with the rest of the text herein.

258. *Id.* at 16.

259. *See id.*

260. *Id.*

situations in which “high level government official[s] [are subjected] to the burdens of civil discovery.”²⁶¹

As to whether the OIG Report “lends some plausibility to Iqbal’s claims,” in Justice Ginsburg words, Solicitor General Garre said it did not because “extra-record materials, extra-complaint materials can’t make up for the deficiencies in the complaint itself,” the Report found that the “hold until cleared” policy is lawful, and that the policy may have been applied differently on an ad hoc basis in practice.²⁶²

Finally, Solicitor General Garre brought up the district court case which cited to the Second Circuit opinion to allow a case against Ashcroft to pass beyond the pleadings stage. This case, according to Solicitor General Garre, “underscores Judge Cabranes’ point that the decision in this case . . . is a blueprint for civil plaintiffs who are challenging the implementation of important law enforcement policies to subject the Attorney General, the Director of the FBI, or other high-level officials to civil discovery based on conclusory . . . and general and inadequate allegations.”²⁶³

Reinert, lead counsel for Iqbal, next stepped up to the lectern. He began his argument by clarifying the policy at issue in the complaint. The policy is not, as Solicitor General Garre indicated, one of “ad hoc decisions made at the low level of the Department of Justice,” but rather “a policy approved with the knowledge of Petitioners that discriminated against detainees.”²⁶⁴ Reinert explained, in response to questioning from Justice Samuel A. Alito, that the allegations regarding this policy were based on the OIG Report and “other information that we gathered in advance of filing . . . the complaint.”²⁶⁵ For example, the OIG Report and other public documents suggest that the petitioners “ordered to have certain groups targeted for questioning, for detention”²⁶⁶ and that “from the Attorney General’s Office, there was a direction [to the director of the Bureau of

261. *Id.* at 18-19.

262. *Id.* at 25-26.

263. *Id.* at 27-28.

264. *Id.* at 29.

265. *Id.* at 30.

266. *Id.* at 31.

Prisons] to make the conditions of confinement as harsh as possible.”²⁶⁷

The Chief Justice suggested that such a direction would be lawful and non-discriminatory. “[M]ake the conditions of confinement as harsh as possible. It’s saying, make the conditions of confinement such that they will not be able to communicate with alleged . . . other prisoners that . . . might be part of the same group connected with the activities on 9/11.”²⁶⁸ Information gleaned after filing the complaint, according to Reinert, confirmed the opposite—that the conditions of confinement were directed to be harsh for discriminatory reasons.²⁶⁹

Justice Antonin G. Scalia was unimpressed. Echoing *Twombly*, he contended that the complaint must allege sufficient facts of unlawful conduct prior to discovery. “[T]here are two possibilities here. Number one is the possibility that there was a general policy adopted by the high-level officials which was perfectly valid and that whatever distortions you are complaining about was in the implementation by low-level officials.”²⁷⁰ The second possibility, which Justice Scalia admitted seemed “much less plausible, is that the . . . high-level officials themselves directed . . . these unconstitutional and unlawful acts.”²⁷¹ Reinert disagreed with this characterization of the possibilities. In his estimation, the two possible theories are that the petitioners had “knowledge of and approval of” a discriminatory policy, while the other is that they directed a discriminatory policy.²⁷² “[B]oth of those possibilities,” Reinert noted, “are unlawful possibilities.”²⁷³

Reinert also offered his belief that the pleading standards do not change in the post-9/11 context even if

267. *Id.*

268. *Id.* at 32.

269. *See id.*

270. *Id.* at 33.

271. *Id.*

272. *Id.*; *see also id.* at 44 (“We are not alleging that the Petitioners individually identified particular detainees as of interest or as of high interest. We are alleging that they either created the policy or they knew of and approved of it.”).

273. *Id.* at 33-34.

high-level officials, such as the petitioners, are involved.²⁷⁴ The high-level officials do, however, have the benefit of the qualified immunity defense, which distinguishes them from ordinary litigants, Reinert added.²⁷⁵

With respect to the relevance of context, Reinert interpreted *Twombly* to mean that while the level of pleading does not depend on the context of the case, “the substantive liability that is in the background of the case affects what you have to plead.”²⁷⁶ “[W]hat Petitioners are asking,” according to Reinert, “is to take the substantive background of an affirmative defense and make that affect . . . what you have to plead.”²⁷⁷ Justice Souter chimed in, stating that his understanding of *Twombly* is that “context tells us how specific you’ve got to be versus how conclusory you’ve got to be, and the reason it does so is that some allegations are . . . more likely to be true than others depending on the context.”²⁷⁸

Justice Alito articulated Judge Cabranes’ concern:

[I]f the Second Circuit is affirmed, there may be other suits that are like this. And what is the protection of the high-level official with qualified immunity with respect to discovery if . . . the official cannot get dismissal under qualified immunity at the 12(b)(6) stage? How many district judges are there in the country? Over 600? One of the district judges has a very aggressive idea about what the discovery should be. What’s the protection there?²⁷⁹

Reinert replied that “if this Court in affirming the Second Circuit outlines and says the Second Circuit took the proper steps—[that] this is what the district court should do—then if any district court disregards that, then there could be a petition for mandamus.”²⁸⁰

274. See *id.* at 34; see also *id.* at 37 (“[T]he pleading standard isn’t different.”); *id.* (“[T]his Court has rejected heightened pleading at every instance. I mean, even in *Bell Atlantic* this Court rejected heightened pleading . . .”).

275. See *id.* at 34.

276. *Id.* at 38.

277. *Id.* at 38-39.

278. *Id.* at 40.

279. *Id.* at 50.

280. *Id.*

Justice Souter then prompted Reinert to discuss the petitioners' construction of Iqbal's allegations, namely "that lower level officials were making decisions on an ad hoc basis without adequate criteria as to . . . how they should make them," which "suggests that what was really going on here . . . wasn't the result of . . . clear policy decisions made by the Attorney General and the Director of the FBI."²⁸¹ Reinert explained that the arbitrary nature of the decisions to classify detainees as "of interest" or "of high interest" is a restatement of the allegation that the classifications were based on race and not on any penological purpose.²⁸²

In rebuttal, Solicitor General Garre contended that Reinert conceded "that substantive standards of law affect what you have to plead," and suggested that there are two substantive standards in play:

One is the standard for supervisory liability under *Bivens*, which requires that the plaintiff show an affirmative link between the wrongdoing alleged by lower level officials and the potential wrongdoing on the part of higher level officials like the Attorney General. And, second, . . . the Attorney General . . . is entitled to a presumption of regularity of his actions.²⁸³

With respect to the concern about subjecting high-level officials to the burdens of discovery, Solicitor General Garre cited to *Twombly* for the proposition that "[w]e don't rely on district court judges to weed out potentially meritless claims through discovery. We apply faithfully the pleading standards" instead.²⁸⁴

Finally, Solicitor General Garre observed that context does matter, but in this case the fact that the petitioners are high-level officials cuts against the plausibility of the claims: "The higher up the chain of command you go, the less plausible it is that the high-level official like the Attorney General is going to be aware of and know about the sort of microscopic decisions here[,] specifically "mistreatment in the Federal detention facility in Brooklyn,

281. *Id.* at 53.

282. *See id.* at 54-55.

283. *Id.* at 59-60.

284. *Id.* at 61.

alleged discriminatory applications made by FBI agents in the field.”²⁸⁵

With that, the case was submitted.

III. THE RULING

This part will provide a summary of the most salient points of the Court’s ultimate decision and an overview of the two dissenting opinions issued by Justices Souter and Breyer.

A. *Majority Opinion*

On May 18, 2009, the Court issued its ruling.²⁸⁶ The Court, in an opinion written by Justice Anthony M. Kennedy, framed the ultimate question to be decided as whether Iqbal “plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights,” concluding, by a 5-4 vote, that Iqbal’s “pleadings are insufficient.”²⁸⁷

1. *Background.* This result is perhaps unsurprising given the Court’s presentation of the relevant facts. The Court’s account of the factual history began with the statement that, “[t]he FBI dedicated more than 4,000 special agents and 3,000 support personnel to the endeavor”²⁸⁸ and the following references to the OIG Report: “[b]y September 18 ‘the FBI had received more than 96,000 tips or potential leads from the public’,”²⁸⁹ “the FBI questioned more than 1,000 people with suspected links to the attacks in particular or to terrorism in general,”²⁹⁰ “[o]f those individuals, some 762 were held on immigration charges; and a 184-member subset of that group was deemed to be of high interest to the investigation,”²⁹¹ and “[t]he high-interest detainees were held under restrictive

285. *Id.* at 62.

286. *See* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

287. *Id.* at 1942-43.

288. *Id.* at 1943.

289. *Id.* (quoting OIG REPORT, *supra* note 42, at 11-12).

290. *Id.* (citing OIG REPORT, *supra* note 42, at 1).

291. *Id.* (citing OIG REPORT, *supra* note 42, at 111) (internal quotes omitted).

conditions designed to prevent them from communicating with the general prison population or the outside world.”²⁹² The Court recognized that Iqbal, one of the detainees classified as a person of high interest, “does not challenge [his] arrest or his confinement in the MDC’s general prison population,” but rather “concentrates on his treatment while confined to the ADMAX SHU.”²⁹³

The gravamen of the suit, the Court recalled, is that Ashcroft and Mueller “designated [Iqbal] a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution.”²⁹⁴ The Court extracted the five following allegations in the complaint that support this overall charge:

- “[T]he [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11.”²⁹⁵

- “[T]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.”²⁹⁶

- “[The p]etitioners ‘each knew of, condoned, and willfully and maliciously agreed to subject’ respondent 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.’”²⁹⁷

- Ashcroft was the ‘principal architect’ of the policy.”²⁹⁸

- Mueller was “‘instrumental in [its] adoption, promulgation, and implementation.’”²⁹⁹

292. *Id.* (citing OIG REPORT, *supra* note 42, at 112-13).

293. *Id.* at 1943-44.

294. *Id.* at 1944.

295. *Id.* (quoting Complaint, *supra* note 14, ¶ 47) (first alteration added).

296. *Id.* (quoting Complaint, *supra* note 14, ¶ 69).

297. *Id.* (quoting Complaint, *supra* note 14, ¶96) (alterations in original).

298. *Id.* (quoting Complaint, *supra* note 14, ¶10).

299. *Id.* (quoting Complaint, *supra* note 14, ¶11) (alterations in original).

The Court, dedicating one paragraph each to the district court's denial of the petitioners' motion to dismiss and to the circuit court's affirmance each, indicated the importance of Judge Cabranes's concurrence by giving it its own paragraph as well. Judge Cabranes, the Court noted, "expressed concern at the prospect of subjecting high-ranking Government officials . . . to the burdens of discovery on the basis of a complaint as nonspecific as respondent's."³⁰⁰ Sympathizing with Judge Cabranes, the Court described him as "[r]eluctant to vindicate that concern as a member of the Court of Appeals," who therefore called upon the Supreme Court "to address the appropriate pleading standard at the earliest opportunity."³⁰¹

2. *Holdings.* With respect to whether the identity of the defendants was relevant to the pleading standards, as urged by Ashcroft and Mueller, or whether the pleading standards may be assessed on their own without regard to the status of the defendants, as proposed by Iqbal, the Court summarily agreed with the petitioners.³⁰² The Court noted that, in *Twombly*, "the Court found it necessary first to discuss the antitrust principles implicated by the complaint," and as a result "we begin by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity."³⁰³ The Court's analysis began with and was permeated by *Twombly*, indicating that the case applies beyond the antitrust context and to all civil motions arising under Rule 8(a)(2).³⁰⁴

The Court next disposed of two uncontested issues. First, the Court assumed that a *Bivens* action may be maintained for First Amendment violations—a legal theory

300. *Iqbal v. Hasty*, 490 F.3d 143, 179 (2d Cir. 2007).

301. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945 (internal quotes omitted).

302. The Court discussed whether it had jurisdiction to entertain the appeal, concluding ultimately that it did have the authority to hear the case. *Id.* at 1945-47. As this threshold question is not relevant to the merits of the allegations, the jurisdictional issue will not be addressed herein.

303. *Id.* at 1947.

304. *See id.* at 1953 ("Our decision in *Twombly* expounded the pleading standard for all civil actions and it applies to antitrust and discrimination suits alike.") (internal quotations and citation omitted).

which was not challenged by Ashcroft or Mueller.³⁰⁵ Second, the Court accepted Iqbal's concession that a respondeat superior theory of liability is not actionable under *Bivens*.³⁰⁶ The Court combined these two propositions to yield the following: for Iqbal's suit to move forward, he must allege a constitutional violation committed by the petitioners themselves.³⁰⁷

To do this, the Court noted, citing in part to the landmark *Washington v. Davis*³⁰⁸ case, "the plaintiff must plead and prove that the defendant acted with discriminatory purpose."³⁰⁹ Applying this standard to the complaint, Justice Kennedy stated that Iqbal "must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason *but for the purpose* of discriminating on account of race, religion, or national origin."³¹⁰ Accordingly, Iqbal's allegations that Ashcroft and Mueller may be held liable for having knowledge of the impermissible conduct of supervisors does not state a claim for two reasons—first this amounts to supervisory liability, which is unavailable under *Bivens*, and in any case, "purpose rather than knowledge is required to impose *Bivens* liability."³¹¹

Before examining whether Iqbal's complaint sufficiently alleges the personal wrongdoing of the petitioners, the

305. *Id.* at 1948.

306. *Id.*; see Response Brief, *supra* note 65, at 1 (admitting that vicarious liability "is not even implicated by respondent's allegations against petitioners").

307. See *Iqbal*, 129 S. Ct. at 1948 ("Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."); *id.* at 1952 ("[P]etitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic.").

308. 426 U.S. 229, 240 (1976).

309. *Iqbal*, 129 S. Ct. at 1948.

310. *Id.* at 1948-49 (emphasis added); see *id.* at 1948 ("[Purposeful discrimination] involves a decisionmaker's undertaking a course of action 'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group." (quoting *Pers. Admin'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (internal quotes omitted; first set of brackets added; second set of brackets in original))).

311. *Id.* at 1949.

Court described its understanding of the legal standard in *Twombly* against which the complaint would be judged: “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”³¹² This standard features two-prongs: first, barebones legal conclusions are not by themselves entitled to an assumption of truth and may be dismissed outright,³¹³ and a complainant’s allegations may not constitute mere recitations of the elements of a cause of action supported by conclusory statements.³¹⁴ Second, those factual allegations that are “well-pleaded” may be credited as true and courts may “then determine whether they plausibly give rise to an entitlement to relief.”³¹⁵ “Facial plausibility” within the meaning of *Twombly* exists “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”³¹⁶ This is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”³¹⁷ Moreover, this determination as to plausibility does not depend on the availability of closely-managed discovery, particularly where government officials are entitled to qualified immunity.³¹⁸

Applying this standard to Iqbal’s complaint, the Court found that three of the aforementioned five allegations were

312. *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

313. *See id.* at 1950 (“[P]leadings that . . . are no more than conclusions, are not entitled to the assumption of truth.”); *see id.* at 1949-50 (“[W]e ‘are not bound to accept as true a legal conclusion couched as a factual allegation.’”) (quoting *Twombly*, 550 U.S. at 555).

314. *Id.* at 1949 (citing *Twombly*, 550 U.S. at 555); *see also id.* at 1950 (“Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”).

315. *Id.* at 1950.

316. *Id.* at 1949 (citing *Twombly*, 550 U.S. at 556).

317. *Id.*

318. *Id.* at 1953 (“[T]he question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process Our rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity.”).

“bare assertions” not entitled to an assumption of truth.³¹⁹ first, that petitioners “knew of, condoned, and willfully and maliciously agreed to subject [him]’ 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;”³²⁰ second, that “Ashcroft was the ‘principal architect’ of this invidious policy;”³²¹ and third, that “Mueller was ‘instrumental’ in adopting and executing it.”³²² These three allegations, thus, did not survive the initial step of the sufficiency analysis.

With respect to the remaining two allegations—that Mueller directed the FBI to arrest and detain “thousands of Arab Muslim men . . . as part of its investigation of the events of September 11”³²³ and that Mueller and Ashcroft approved a policy to “hold[] post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI”³²⁴—the Court held that, accepted them as true, they fail the second step of the test, specifically that they are not “plausible.”³²⁵

As to the first surviving allegation, in a critical passage the Court reasoned that any targeting of Arab Muslims was incidental to the government’s non-discriminatory objective of detaining illegal aliens with possible ties to terrorists, rather than an intentional effort to target individuals on the basis of race, religion, or national origin:

319. *Id.* at 1951 (“It is the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.”); see *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (permitting, arguably, fanciful allegations as long as one could imagine a possibility that they could be true).

320. *Iqbal*, 129 S. Ct. at 1951 (quoting Complaint, *supra* note 14, ¶ 96) (internal alterations in original).

321. *Id.* (quoting Complaint, *supra* note 14, ¶ 10).

322. *Id.* (quoting Complaint, *supra* note 14, ¶ 11).

323. *Id.* (quoting Complaint, *supra* note 14, ¶ 47).

324. *Id.* (quoting Complaint, *supra* note 14, ¶ 69).

325. *Id.* (“Taken as true, these allegations are consistent with petitioners’ purposefully designating detainees ‘of high interest’ because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.”).

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts.³²⁶

The government's non-discriminatory response in seeking individuals with associations to terrorism, the Court continued, was lawful conduct, much in the same way that the allegations in *Twombly* were consistent with purely lawful activity.³²⁷

As to the second allegation, even if the policy was discriminatory, Iqbal failed to allege "facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as 'of high interest' because of their race, religion, or national origin."³²⁸ While Iqbal has alleged that the petitioners "adopt[ed] a policy approving restrictive conditions of confinement for post-September-11 detainees until they were cleared by the FBI,"³²⁹ he has not averred that the petitioners "purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin."³³⁰ In other words:

All [Iqbal] plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist

326. *Id.*

327. *See id.* at 1951-52.

328. *Id.* at 1952.

329. *Id.* (internal quotation marks omitted).

330. *Id.*

activity. Respondent does not argue, nor can he, that such a motive would violate petitioners' constitutional obligations.³³¹

Iqbal did allege motive generally; however, the Court held that this allegation of a discriminatory intent was conclusory "without reference to its factual context."³³² The Court, therefore, did not have to credit as true such intent for Rule 8 purposes and therefore the allegation itself became implausible.³³³

Commenting on the Second Circuit's solution to permit discovery against only low-level defendants prior to any possible discovery against Ashcroft and Mueller, the Court did not think it adequately addressed the potential distractions faced by the petitioners:

It is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.³³⁴

The Court did remark that the allegations against the low-level officers, if true, are troublesome.³³⁵ Those defendants, however, were not before the Court and therefore their liability, if any, would need to be addressed elsewhere.³³⁶

The Court—consisting of Chief Justice Roberts, Justices Kennedy, Scalia, Thomas, and Alito—reversed and remanded the case back to the Second Circuit to decide

331. *Id.* With respect to motive, the Court observed that "respondent's complaint does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind. His pleadings thus do not meet the standard necessary to comply with Rule 8." *Id.*

332. *Id.* at 1954.

333. *See id.*

334. *Id.* at 1953.

335. *Id.* at 1952 ("Respondent's account of his prison ordeal alleges serious official misconduct that we need not address here.").

336. *Id.* ("Our decision is limited to the determination that respondent's complaint does not entitle him to relief from petitioners.").

whether to send the matter back to the district court to allow Iqbal to amend his complaint.³³⁷

B. *Dissenting Opinions*

Justice Souter, in an opinion joined by Justices Stevens, Ginsburg, and Breyer, dissented.³³⁸ Justice Souter first noted that the petitioners did not challenge—at the petition or merits stages—that they would be liable for possessing knowledge of their subordinates' discrimination.³³⁹ In Justice Souter's view, the petitioners did not disagree that their knowledge of the discriminatory conduct of low-level officers could be the basis for liability, but instead argued that Iqbal's allegations as to the petitioners generally were insufficient under *Twombly's* understanding of Rule 8.³⁴⁰

According to Justice Souter, the petitioners did not contest whether a supervisory liability claim is cognizable under *Bivens*, this question was not before the Court.³⁴¹ Rather than give effect to this concession³⁴² and commensurately recognize a live dispute was not present

337. *Id.* at 1954. The Second Circuit remanded the case back to the district court for further proceedings consistent with the Supreme Court's pronouncements in *Iqbal*. See *Iqbal v. Ashcroft*, 574 F.3d 820, 822 (2d Cir. 2009).

338. See *Iqbal*, 129 S. Ct. at 1954 (Souter, J., dissenting).

339. See *id.* at 1956 (“[The petitioners] would be liable if they had ‘actual knowledge’ of discrimination by their subordinates and exhibited ‘deliberate indifference’ to that discrimination.” (internal quotation marks and citation omitted) (quoting Petition for Writ of Certiorari, *supra* note 17, at 29)); *id.* (“[The petitioners] would be subject to supervisory liability if they ‘had actual knowledge of the assertedly discriminatory nature of the classification of suspects as being of high interest and they were deliberately indifferent to that discrimination.’” (internal quotation marks omitted) (quoting Opening Brief, *supra* note 129, at 50) (citing Reply Brief, *supra* note 73, at 21-22)); see also *id.* at 1957 (“Ashcroft and Mueller have . . . made the critical concession that a supervisor’s knowledge of a subordinate’s unconstitutional conduct and deliberate indifference to that conduct are grounds for *Bivens* liability.”).

340. See *id.*

341. See *id.* at 1956 (“Without acknowledging the parties’ agreement as to the standard of supervisory liability, the Court asserts that it must *sua sponte* decide the scope of supervisory liability here.”); *id.* at 1958 (“[W]hat is most remarkable about its foray into supervisory liability is that its conclusion has no bearing on its resolution of the case.”).

342. See *id.* at 1957 (“The majority . . . does ignore the concession.”).

requiring the Court's involvement,³⁴³ the Court went out of its way to hold that liability premised upon actual knowledge of subordinate misconduct was not actionable³⁴⁴ and that a supervisor is liable only for his own direct misconduct.³⁴⁵ Justice Souter found the Court's ruling with respect to supervisory liability to be not only unnecessary, but also imprudent, as the parties did not brief the issue, and unfair to Iqbal, as he had no reason to second-guess the petitioners' position on supervisory liability and as his allegations were held to a standard that was announced only with the issuance of the Court's opinion.³⁴⁶ More importantly, Justice Souter found the conclusion itself to be legally incorrect: for example, supervisory liability "could be imposed where a supervisor has actual knowledge of a subordinate's constitutional violation and acquiesces,"³⁴⁷ or where supervisors "know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see."³⁴⁸

As to the adequacy of the complaint, Justice Souter contended that the Court's misapplied *Twombly*—a case he knows something about as he was the author of that opinion—to find that Iqbal's complaint did not state a claim.³⁴⁹ Specifically, as to the standard, "*Twombly* does not

343. *See id.* at 1956-57 ("[D]eciding the scope of supervisory *Bivens* liability in this case is uncalled for.").

344. *See id.* at 1954-55; *see also id.* at 1957 ("[T]he majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely."); *id.* ("The nature of a supervisory liability theory is that the supervisor may be liable, under certain conditions, for the wrongdoing of his subordinates, and it is this very principle that the majority rejects.").

345. *See id.* at 1957.

346. *See id.* at 1957 ("[B]ecause of the concession, we have received no briefing or argument on the proper scope of supervisory liability" and the Court's members "consequently are in no position to decide the precise contours of supervisory liability here . . ."); *id.* ("[T]he Court's approach is most unfair to Iqbal. He was entitled to rely on Ashcroft and Mueller's concession . . ."); *id.* at 1958 n.2 ("Iqbal had no reason to argue the (apparently dispositive) supervisory liability standard in light of the concession.").

347. *See id.* at 1958 (citing *Baker v. Monroe Twp.*, 50 F.3d 1186, 1194 (3d Cir. 1995); *Woodward v. Worland*, 977 F.2d 1392, 1400 (10th Cir. 1992)).

348. *See id.* (internal quotation marks omitted) (quoting *Int'l Action Ctr v. United States*, 365 F.3d 20, 28 (D.C. Cir. 2004) (Roberts, J.)).

349. *See id.* at 1954-55.

require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be.”³⁵⁰ The only exception to this rule is not whether the facts are barebones recitations of the elements to a cause of action, but whether the allegations are “sufficiently fantastic to defy reality as we know it.”³⁵¹ Barring this possibility, the prevailing pleading standard under *Twombly* is, in Justice Souter’s words, “whether, assuming the factual allegations are true, the plaintiff has stated a ground for relief that is plausible.”³⁵²

Applying this standard, Justice Souter would have found Iqbal’s complaint to satisfy Rule 8. That is:

[T]he allegations in the complaint are neither confined to naked legal conclusions [as proscribed by the first prong of the majority’s standard] nor consistent with legal conduct [as was the issue in *Twombly*]. The complaint alleges that FBI officials discriminated against Iqbal solely on account of his race, religion, and national origin, and it alleges the knowledge and deliberate indifference that, by Ashcroft and Mueller’s own admission, are sufficient to make them liable for the illegal action. Iqbal’s complaint therefore contains ‘enough facts to state a claim to relief that is plausible on its face.’³⁵³

With respect to the two allegations that the majority did credit as true—that “the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11,”³⁵⁴ and that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11,

350. *Id.* at 1959 (Souter, J., dissenting) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (“[A] court must proceed ‘on the assumption that all the allegations in the complaint are true (even if doubtful in fact).’” (citation omitted))); *id.* at 556 (“[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable . . .”).

351. *Id.*

352. *Id.*

353. *Id.* at 1960 (quoting *Twombly*, 550 U.S. at 570).

354. Complaint, *supra* note 14, ¶ 47.

2001”³⁵⁵—Justice Souter did not find them to be “conclusory.” This is because, according to Justice Souter, Iqbal detailed a “particular, discrete, discriminatory policy” in the complaint and alleged that the petitioners “helped to create” this discriminatory policy.³⁵⁶ These allegations therefore comply with the ultimate purpose of Rule 8(a)(2) which is to give the defendants fair notice of the claims and the grounds upon which they rest.³⁵⁷ Moreover, the dissent argued that the majority considered these two allegations in isolation, though it should have assessed the two allegations and the other non-conclusory allegations together, which would have led to the proper conclusion that the complaint states a claim that is plausible on its face.³⁵⁸

Finally, Justice Souter was troubled that the majority could, on one hand, accept as true the government’s assertion that Ashcroft and Mueller approved of a “hold and release” policy in which detainees were subject to highly restrictive conditions of confinement, but not Iqbal’s allegation that Ashcroft and Mueller were aware of a policy classifying individuals in these highly restrictive conditions on the basis of race, religion, or national origin on the other.³⁵⁹ In concluding, Justice Souter remarked that “there is no principled basis for the majority’s disregard of the allegations linking Ashcroft and Mueller to their subordinates’ discrimination.”³⁶⁰

Justice Stephen G. Breyer wrote separately in dissent to express his belief that the district courts are able to protect government officials entitled to qualified immunity from the disruptions of litigation through carefully managed discovery.³⁶¹ He deemed unfounded the Court’s lack of faith in the ability of district judges to allow cases to proceed without subjecting government officials to burdensome litigation: “Neither the briefs nor the Court’s opinion provides convincing grounds for finding these alternative

355. *Id.* ¶69.

356. *Iqbal*, 129 S. Ct. at 1961 (Souter, J., dissenting).

357. *See id.* (citing *Twombly*, 550 U.S. at 555).

358. *See id.* at 1960.

359. *See id.* at 1961.

360. *Id.*

361. *See id.* (Breyer, J., dissenting).

case-management tools inadequate, either in general or in the case before us.”³⁶²

IV. ANALYSIS

The purpose of this part will be to argue why *Iqbal* was wrongly decided from both procedural and substantive perspectives. In particular, it will be my contention that *Iqbal* has effectively heightened the fundamental principles governing a motion to dismiss for failure to state a claim and has thereby made it functionally more difficult for plaintiffs to survive motions to dismiss. With an understanding of pleading standards, I examine the Court’s review of *Iqbal*’s complaint under Rule 8(a)(2) and suggest that a faithful application of the pleading standards would have found the complaint to be sufficient within the meaning of Rule 8(a)(2). I also comment on the Court’s unnecessary and improper statement that the targeting of Muslims after 9/11 was unremarkable. In doing so, I recall lessons from the *Korematsu* ruling, a case that should reinforce the adequacy of *Iqbal*’s complaint and highlight the noxiousness of the Court’s statement on profiling in the aftermath of 9/11. Finally, I offer some thoughts on how these procedural and substantive missteps may be corrected should the Supreme Court have the opportunity to reconsider *Iqbal*.

A. *The Procedural Problems with Iqbal*

“The basic aim of the federal rules [is] to secure the just, speedy, and inexpensive determination of every lawsuit.”³⁶³ As noted in *Twombly*, Rule 8(a)(2) “requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’”³⁶⁴ A pleader is “entitled to considerable latitude regarding the mode of stating a claim for relief, provided the pleading gives reasonable notice of the claims that are being

362. *Id.* at 1962.

363. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216 (3d ed. 2004).

364. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *FED. R. CIV. P.* 8(a)(2); *Conley v. Gibson*, 355 U.S. 41, 47 (1975)).

asserted.”³⁶⁵ Pleadings are to be construed “so . . . as to do . . . justice”³⁶⁶ and, as such, the pleading standard is a “liberal” one.³⁶⁷

A court also “must accept as true all of the factual allegations contained in the complaint.”³⁶⁸ This rule was reiterated by the Court two weeks after *Twombly* in *Erickson v. Pardus*.³⁶⁹ “[H]ornbook law,” one law professor observed almost twenty years ago, “states—indeed requires—that the Rule 12(b)(6) motion accept as true all of the factual allegations of the complaint for purposes of ruling on the motion.”³⁷⁰ Indeed, all circuit courts have set forth this basic rule—regarding the crediting of a complaint’s allegations as true—when encountering motions to dismiss.³⁷¹

365. 5 WRIGHT & MILLER, *supra* note 364, at § 1216 ; see *Sanjuan v. Amer. Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994) (“At this stage the plaintiff receives the benefit of imagination, so long as the hypotheses are consistent with the complaint.”).

366. FED. R. CIV. P. 8(f).

367. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514 (2002).

368. *Id.* at 508 n.1.

369. *Erickson v. Pardus*, 551 U.S. 81, 94 (2007) (citing *Twombly*, 550 U.S. at 555-56).

370. Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing it with Pre-Verdict Dismissal Devices*, 60 FORDHAM L. REV. 257, 269 (1991).

371. See, e.g., *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1100 n.1 (9th Cir. 2008) (“In reviewing a motion to dismiss, we accept the alleged facts as true.”); *Teigen v. Renfrow*, 511 F.3d 1072, 1083 (10th Cir. 2007) (“In the context of a motion to dismiss under 12(b)(6), this court accepts all of the allegations in the complaint as true”); *State Employees Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 77 (2d Cir. 2007) (“Because the case comes to us after the denial of a motion to dismiss, we accept as true the facts as they are alleged in the amended complaint”); *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007) (“[W]e construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.”); *Phipps v. F.D.I.C.*, 417 F.3d 1006, 1010 (8th Cir. 2005) (“As to the motion to dismiss, under Federal Rule of Civil Procedure 12(b)(6), we must accept the plaintiffs’ factual allegations as true and grant all reasonable inferences in the plaintiffs’ favor.”); *Lambeth v. Bd. of Comm’rs of Davidson County, NC*, 407 F.3d 266, 268 (4th Cir. 2005) (“In assessing a Rule 12(b)(6) issue, we accept as true the factual allegations of the challenged complaint”); *Perry v. New England Bus. Serv., Inc.*, 347 F.3d 343, 344 (1st Cir. 2003) (“On review of a motion to dismiss, we accept as true the factual allegations of the

In addition, it is “well-established . . . that a court, when reading a complaint, shall draw all reasonable inferences in favor of plaintiff.”³⁷² Each circuit court has followed this rule—about reasonable inferences construed in the pleader’s favor—in evaluating a motion to dismiss.³⁷³

complaint and construe all reasonable inferences therefrom in favor of [the plaintiff.]); Toys “R” Us, Inc. v. Step Two, S.A., 318 F.3d 446, 457 (3rd Cir. 2003) (“It is well established that in deciding a motion to dismiss for lack of jurisdiction, a court is required to accept the plaintiff’s allegations as true, and is to construe disputed facts in favor of the plaintiff.”); Nolen v. Nucentrix Broadband Networks Inc., 293 F.3d 926, 928 (5th Cir. 2002) (“In [evaluating a Rule 12(b)(6) motion], we accept the facts alleged in the complaint as true and construe the allegations in the light most favorable to the plaintiffs.”); Martinez v. Hooper, 148 F.3d 856, 858 (7th Cir. 1998) (“[B]efore us [is] a motion to dismiss the complaint, and the allegations in the complaint must be accepted as true”); Harris v. Ladner, 127 F.3d 1121, 1123 (D.C. Cir. 1997) (“To determine whether the district court appropriately dismissed [the plaintiff’s] action for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, we must accept her factual allegations as true” (citations omitted)); Harper v. Thomas, 988 F.2d 101, 103 (11th Cir. 1993) (“We review the dismissal of a case [pursuant to Rule 12(b)(6)] *de novo*, accepting all allegations in the complaint as true and construing the facts in a light favorable to the plaintiff.”).

372. Elliott J. Weiss, *The New Securities Fraud Pleading Requirement: Speed Bump or Road Block?*, 38 ARIZ. L. REV. 675, 691 (1996).

373. See *Minneapolis Taxi Owners Coal., Inc. v. City of Minneapolis*, 572 F.3d 502, 506 (8th Cir. 2009) (reviewing a motion to dismiss for failure to state a claim under Rule 12(b)(6), accepting the facts as alleged in the complaint, and granting all reasonable inferences in favor of the non-moving party); *Vila v. Inter-American Inv., Corp.*, 570 F.3d 274, 292 (D.C. Cir. 2009) (“Rule 12(b)(6) of course requires us to draw all reasonable inferences in favor of the plaintiff”); *Catholic League for Religious & Civil Rights v. City of S.F.*, 567 F.3d 595, 599 (9th Cir. 2009) (“In addressing [a dismissal for failure to state a claim under Rule 12(b)(6)], we must accept the allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff.”); *Brooks v. City of Chi.*, 564 F.3d 830, 832 (7th Cir. 2009) (“On appeal from an order granting a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), we review *de novo* whether the appellant states a claim for which relief can be granted. We accept as true all well-pleaded allegations, and we draw all reasonable inferences in the appellant’s favor.”); *Severance v. Patterson*, 566 F.3d 490, 501 (5th Cir. 2009) (“We construe the complaint in the light most favorable to the plaintiff and draw all reasonable inferences in the plaintiff’s favor.”); *McGovern v. City of Phila.*, 554 F.3d 114, 115 (3d Cir. 2009) (“We accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in [the non-movant’s] favor.”); *Gray v. Evercore Restructuring L.L.C.*, 544 F.3d 320, 324 (1st Cir. 2008) (drawing all reasonable inferences in favor of the non-moving party in reviewing a Rule 12(b)(6) motion); *Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10th Cir. 2002)

Moreover, “[a]t the pleading stage . . . on a motion to dismiss [a court] presume[s] that general allegations embrace those specific facts that are necessary to support the claim.”³⁷⁴

There are two well-established exceptions to such generosity in reading and assessing complaints. First, while factual allegations are to be accepted as true, the Supreme Court in *Papasan v. Allain*³⁷⁵ instructed courts that they are “not bound” in reviewing motions to dismiss “to accept as true a legal conclusion couched as a factual allegation.”³⁷⁶ Second, a court need not accept as true allegations that are plainly irrational.³⁷⁷ In other words, all factual allegations

(“The court must view all reasonable inferences in favor of the plaintiff, and the pleadings must be liberally construed.”); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002) (“[The Court] review[s] *de novo* a district court’s dismissal of a complaint pursuant to Rule 12(b)(6)[] [by] construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff’s favor.”); *Denno v. Sch. Bd.*, 218 F.3d 1267, 1270 (11th Cir. 2000) (“The district court dismissed [the plaintiff’s] claim against the individual defendants pursuant to Fed.R.Civ.P. 12(b)(6) based on qualified immunity. In the posture of this case, we are required to assume all reasonable inferences from the complaint in favor of [the non-movant].”); *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999) (“[In] a Rule 12(b)(6) motion, [the court will] accept[] all well-pleaded allegations in the plaintiff’s complaint as true and draw[] all reasonable factual inferences from those facts in the plaintiff’s favor.”); *Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037, 1039-40 (6th Cir. 1991) (“Whether the district court properly dismissed the complaint pursuant to Fed. R. Civ. P. 12(b)(6) is a question of law subject to *de novo* review. All factual allegations are deemed admitted, and when an allegation is capable of more than one inference, it must be construed in the plaintiffs’ favor.” (citations omitted)).

374. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal punctuation and quotation omitted); *accord Twombly*, 550 U.S. at 555 (“[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations”) (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957); *Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994)).

375. 478 U.S. 265 (1986).

376. *Id.* at 286.; *accord Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (“[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”).

377. *See Denton v. Hernandez*, 504 U.S. 25, 33 (1992) (“[A] finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible”); *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989) (“[Courts are empowered to] dismiss those claims whose factual

are to be accepted as true except to the extent that a factual allegation is the restatement of a legal conclusion or is too obviously meritless to be considered; where a legal conclusion is passed off as a factual allegation or where the factual allegation is utterly inconceivably, a court may refuse to credit it as true.³⁷⁸

The Court in *Conley* articulated the standard that applied for fifty years to motions to dismiss for failure to state a claim. It held, “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”³⁷⁹ This formulation conflated two overlapping issues that are implicated by motions to dismiss. On the one hand, there is the question of what facts a claimant may use to state a claim under Rule 12(b)(6) (the “allegations issue”), and on the other, there is the question of when a complaint is sufficient to state a claim such that it may move beyond the threshold of the pleadings stage (the “sufficiency issue”).

In *Twombly*, the Court “retired” the “no set of facts” rubric of *Conley*, which the Court felt was “an incomplete, negative gloss on an accepted pleading standard.”³⁸⁰ More specifically, the *Twombly* Court recognized that the “no set of facts” was being literally interpreted as the standard for the sufficiency issue—whether the complaint can be supported by any conceivable set of facts—but it was intended to speak to the allegations issue—what facts can a claimant use in supporting his claims? Put differently by the Court in *Twombly*, “*Conley* . . . described the breadth of

contentions are clearly baseless [For example,] claims describing fantastic or delusional scenarios, claims with which federal district judges are all too familiar.”); see also *Iqbal*, 129 S. Ct. at 1959 (Souter, J., dissenting) (“[Courts need not credit as true] allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel.”). The *Twombly* Court may have put out to pasture the “no set of facts” rubric of *Conley*, but it did not repudiate this exception as described by Justice Souter in his dissent. See *Twombly*, 550 U.S. at 546.

378. See, e.g., *Mixon v. Ohio*, 193 F.3d 389, 400 (6th Cir. 1999) (“[Courts] need not accept as true legal conclusions or unwarranted factual inferences.”); see also *Maio v. Aetna, Inc.*, 221 F.3d 472, 485 n.12 (3d Cir. 2000) (same).

379. *Conley*, 355 U.S. at 45-46.

380. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival."³⁸¹ The *Twombly* Court clarified that the proper standard for the adequacy of the complaint—the sufficiency issue—is whether the complaint contains “enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal” conduct.³⁸² In other words, the question is whether a complaint has “enough facts to state a claim to relief that is plausible on its face.”³⁸³ Again, the “[f]actual allegations must be enough to raise a right to relief above the speculative level.”³⁸⁴ Though these statements may appear to have elevated the pleading requirements, the Court made it clear that it was not implementing a “heightened fact pleading of specifics.”³⁸⁵ Rather, it claimed it was clarifying that to survive a motion to dismiss, the claims in a complaint must “plausible,” not just “conceivable.”³⁸⁶

To help make sense of the relationship between *Conley* and *Twombly*, it may be helpful to consider that *Conley* addressed the “negative” while *Twombly* the other side of the coin, the “positive.” In other words, *Conley* asked whether it was factually impossible or inconceivable that the complainant was entitled to relief; *Twombly* inquires into the converse, specifically whether the complainant has affirmatively plead a genuine possibility that he or she is entitled to relief.³⁸⁷ In this light, it is plain to see why *Twombly* considered *Conley* to be “negative” in that it spoke to what was not possible rather than what is possible, and that it therefore served as an “incomplete” statement of the pleading standard.³⁸⁸

381. *Id.* at 563.

382. *Id.* at 556.

383. *Id.* at 570.

384. *Id.* at 555 (citing 5 WRIGHT & MILLER, *supra* note 364, at § 1216).

385. *Id.* at 570.

386. *Id.*

387. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (“The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” (quoting *Twombly*, 550 U.S. at 556)).

388. See *Twombly*, 550 U.S. at 563.

In *Iqbal*, the Court, citing *Twombly*, noted that “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”³⁸⁹ To the extent the *Iqbal* Court intended to suggest that conclusory statements cast as legal conclusions are not entitled to be credited by a court, which would be consistent with *Papasan*, the Court’s finding is accurate and honors existing precedent on the subject. It does not appear, however, that the Court correctly restated *Papasan*. Rather than continue the traditional legal conclusion/factual allegation dichotomy, the Court appears to have invented a conclusory/non-conclusory framework, which is problematic for several reasons.

Perhaps most obvious, the distinction between conclusory and non-conclusory statements carves out an additional set of statements that a court may disregard from the universe of statements within a complaint, where the law generally recognized that only legal conclusions and fantastic allegations may be so disregarded.³⁹⁰ In addition, it must not be forgotten that the essential purpose of notice pleading is put “focus litigation on the merits of a claim”³⁹¹ and, more specifically, to “giv[e] the opposing party fair notice of the nature and basis or grounds of” the claim³⁹². A “conclusory” statement may not be detailed or florid, but it may be sufficient nonetheless if it serves the essential objectives of notice pleading. Accordingly, as observed by Judge Frank Easterbrook, in the context of discrimination claims, a statement that “Defendant discriminated against me” would fall short of the notice pleading requirements, however, a simple statement that “I was turned down for a job because of my race” would,³⁹³ even if the latter is considered conclusory. Accordingly, to the extent that the Court suggests that conclusory statements may be dismissed outright, this holding is difficult to reconcile with the underlying purposes of notice pleading.

389. *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555).

390. See *supra* notes 377-78.

391. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).

392. 5 *WRIGHT & MILLER*, *supra* note 364, at § 1215.

393. *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (Easterbrook, J.) (stating that this statement would suffice for notice pleading purposes).

Also, in favoring dismissal, the Court discounts other procedural mechanisms which may be invoked to ensure a “just” disposition of motions to dismiss,³⁹⁴ but which do not result in the flat rejection of allegations. For example, if any part of a complaint is unclear due to conclusory allegations, a more definite statement under Federal Rule 12(e) may be demanded.³⁹⁵

Further, an argument can be made that the folly of discrediting conclusory statements is particularly apparent in this case, where Iqbal did not have detailed information as to the intent of Ashcroft and Mueller, but nonetheless averred that they intentionally discriminated against him by designing a specific detainee policy or at least had knowledge of the discriminatory application of a defined policy.³⁹⁶ The problem with the *Iqbal* Court’s categorization of these statements as conclusory is that, when mental state is at issue, such generalized allegations may be all the plaintiff has at the pleadings stage. As law professor Howard Wasserman asks in response to *Iqbal*:

[H]ow anyone can plead defendant’s state of mind anymore without avoiding such conclusory facts . . . [W]hat more could he say? [W]hat else could the plaintiff say at the complaint stage? . . . Absent some discovery and the chance to inquire into the defendants’ thinking when acting . . . , what words can a plaintiff possibly use to describe that the defendant enacted or approved or acquiesced in a policy knowing (or intending) it to be discriminatory?³⁹⁷

To be sure, in *al-Kidd v. Ashcroft*, a recent case in which a Muslim plaintiff alleged that Ashcroft and Mueller intentionally and impermissibly used the material witness statute as a pretext to detain him, the Ninth Circuit denied the government’s motion to dismiss on pleadings grounds.³⁹⁸

394. See 5 WRIGHT & MILLER, *supra* note 364, at § 1216 (commenting on the purpose of the Federal Rules).

395. *Bennett*, 153 F.3d at 518.

396. See Complaint, *supra* note 14, ¶¶ 10-11, 69, 96-97, 232, 235, 247, 250.

397. Howard Wasserman, *Iqbal and the Death of Notice Pleading: Part II*, PRAWFSBLOG, May 18, 2009, <http://prawfsblawg.blogs.com/prawfsblawg/2009/05/iqbal-and-the-death-of-notice-pleading-part-ii.html> [hereinafter Wasserman Post].

398. *al-Kidd v. Ashcroft*, 580 F.3d 949, 975-77 (9th Cir. 2009).

The complaint included statements from Ashcroft and Mueller that provided direct evidence of their intent to use the material witness statute as a means to detain suspected terrorists.³⁹⁹ But direct evidence of intent generally is rarely unearthed in the course of litigation, let alone possessed at the pleadings stage.⁴⁰⁰ As a result, *al-Kidd* should be viewed as an unusual case or high-water mark in terms of what a plaintiff alleging illegal conduct by high-level officials may assert at the pleadings stage, not the minimum that all complaints need to meet to defeat a motion to dismiss.

The *Iqbal* Court's conclusory/non-conclusory paradigm is also problematic in its practical application, as *Iqbal* itself demonstrates. The Court found that certain of *Iqbal*'s allegations—that Ashcroft and Mueller “‘knew of, condoned, and willfully and maliciously agreed to subject [him]’ 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;’”⁴⁰¹ that “Ashcroft was the ‘principal architect’ of this invidious policy,”⁴⁰² and that “Mueller was ‘instrumental’ in adopting and executing it”⁴⁰³—were conclusory.⁴⁰⁴ But the Court found the other allegations—that Mueller directed the FBI to arrest and detain “thousands of Arab Muslim men . . . as part of its investigation of the events of September 11”⁴⁰⁵ and that Mueller and Ashcroft approved a policy to “‘hold[] post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI”⁴⁰⁶—to be

399. *Id.* at 954-55 (discussing statements from a press briefing by Ashcroft and congressional testimony by Mueller).

400. *See, e.g.*, *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (“There will seldom be ‘eyewitness’ testimony as to the employer’s mental processes.”); *see also* *Bailey v. Ala.*, 219 U.S. 219, 233 (1911) (“As the intent is the design, purpose, resolve, or determination in the mind of the accused, it can rarely be proved by direct evidence, but must be ascertained by means of inferences from the facts and circumstances developed by the proof.”).

401. Complaint, *supra* note 14, ¶ 96.

402. *Id.* ¶ 10.

403. *Id.* ¶ 11.

404. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009).

405. Complaint, *supra* note 14, ¶ 47.

406. *Id.* ¶ 69.

well-plead and non-conclusory.⁴⁰⁷ It is hard to understand the basis for the determination that the allegations that the petitioners knew of, condoned, and agreed to a policy, were the architects of and were instrumental in developing it are conclusory while allegations that the petitioners directed and approved of a policy are not. As Justice Souter contended, “the majority’s holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory.”⁴⁰⁸ This brings to mind the suggestion of another professor, that following *Iqbal* a conclusory statement may be ascertained only according to Justice Potter Stewart’s amorphous “I know it when I see it” definition.⁴⁰⁹

In ordering that all conclusory statements be off-limits in the consideration of the adequacy of a complaint’s allegations, the *Iqbal* Court itself adopts a “two-step process”⁴¹⁰ which cherry-picks or “prunes” allegations from the complaint, and urges other courts to do the same: “a court considering a motion to dismiss,” the Court writes, “can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.”⁴¹¹ This process warrants critical attention because it encourages the courts to identify—and thereafter assess—allegations in isolation.

The Court filtered the five allegations it extracted from the complaint to identify only two that it wanted to credit as true. Rather than examining the allegations in concert, the

407. See *Iqbal*, 129 S. Ct. at 1951-52.

408. *Iqbal*, 129 S. Ct. at 1961 (Souter, J., dissenting); see Wasserman Post, *supra* note 398 (“Can anyone find a principled way to determine why these are any less bare than the three [allegations accepted by the Court as true]?”).

409. See Jared A. Goldstein, *Is There a “Religious Question” Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 536-37 (2005).

410. See *Iqbal*, 129 S. Ct. at 1940-50 (describing this two-pronged framework); see also *Moss v. United States Secret Serv.*, 572 F.3d 962, 970 (9th Cir. 2009) (setting out and then following this two step “sequence”); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009) (same); *Wood ex rel. United States v. Applied Research Assocs., Inc.*, 328 F. App’x 744, 746-47 (2d Cir. 2009) (same); *Harris v. Mills*, 572 F.3d 66, 71-72 (2d Cir. 2009) (same); *Neutze v. United States*, 88 Fed. Cl. 763, 768-69 (2009) (same).

411. *Iqbal*, 129 S. Ct. at 1950.

Court reviewed each on its own, ultimately concluding, perhaps unsurprisingly, that neither satisfied the ultimate plausibility standard. “The fallacy of the majority’s position,” Justice Souter pointed out, “lies in looking at the relevant assertions in isolation. . . . Taking the complaint as a whole, it gives Ashcroft and Mueller” fair notice in compliance with Rule 8(a)(2).⁴¹² In as recently as 2007, the Court in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,⁴¹³ noted that “courts must consider the complaint in its entirety . . . when ruling on Rule 12(b)(6) motions to dismiss.”⁴¹⁴ While *Tellabs* arose in the context of securities fraud case, the Court did not expressly or impliedly indicate that this principle was limited to that particular area of law and, indeed, the Court made this statement in discussing the standard that applies to Rule 12(b)(6) where state of mind is implicated by the allegations.⁴¹⁵ If there is any doubt about the broader applicability of this rule, circuit courts have held that well-plead allegations are to be reviewed as a whole, not in isolation, where constitutional claims are at issue.⁴¹⁶

The established rule that all allegations are to be accepted as true aside from the two exceptions (legal conclusions and factual fantastic allegations) is not the only one that the Court dissolves in *Iqbal*. In reviewing the allegations in a complaint pursuant to a motion to dismiss the complaint under Rule 12(b)(6), courts are to accept all reasonable factual inferences in favor of the non-movant.⁴¹⁷ This rule contemplates courts taking the non-movant’s version of the facts as true, so long as they are not legal conclusions or factually irrational, when determining whether a complaint should be dismissed.⁴¹⁸ The Court

412. *Id.* at 1960-61 (Souter, J., dissenting).

413. 551 U.S. 308 (2007).

414. *Id.* at 322.

415. *See id.* at 322-23.

416. *See, e.g.,* Bernheim v. Litt, 79 F.3d 318, 326 (2d Cir. 1996); Guercio v. Brody, 911 F.2d 1179, 1183 (6th Cir. 1990).

417. *See supra* notes 364-69 and accompanying text.

418. *See, e.g.,* Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (“At this stage of the litigation, we must accept petitioner’s allegations as true.”); Goldstein v. Pataki, 516 F.3d 50, 53 (2d Cir. 2008) (“[W]e must derive our version of the facts of record . . . from the allegations set forth in the plaintiffs’ Amended Complaint, ‘taking [them] as true . . . and drawing all reasonable inferences in favor of the

seems to have overlooked or ignored this basic tenet of procedural jurisprudence.

As this case featured two factual scenarios surrounding the allegations, the Court's disloyalty to this rule is easy to see. Iqbal's portrayal is that he was classified and subject to harsher conditions of confinement because he was targeted on the basis of his race, religion, and national origin, and not for any penological reasons.⁴¹⁹ By contrast, Ashcroft and Mueller's side of the story is that, at most, they instituted a general policy of holding suspects until cleared and that the focus on those who shared characteristics with the 9/11 hijackers was sensible.⁴²⁰ In accordance with the rule that the facts alleged—except for those that are legal conclusions or factually fantastic—by the non-movant are to be the governing version of the facts only for the limited purpose of ruling on the motion to dismiss, Iqbal's account should have been credited as true. The allegations, accepted as true, would reasonably suggest that Ashcroft and Mueller engaged in illegal conduct and that as a result Iqbal may be entitled to relief.⁴²¹

Instead, the Court weighed in on the scenarios, finding that Ashcroft and Mueller's explanations as to what occurred were "more likely."⁴²² Assessing which set of facts is more likely to be true is not, however, a proper function of

plaintiff[s].") (alterations in original) (quoting *Stuto v. Fleishman*, 164 F.3d 820, 824 (2d Cir.1999)); *Bradley v. Chiron Corp.*, 136 F.3d 1317, 1321 (9th Cir. 1998) ("In keeping with the rules governing dismissal under Rule 12(b)(6) the factual statements in the complaint are accepted as true. The dismissal of a claim under Rule 12(b)(6) is proper only when, on the complainant's version of the facts, the premises of a cognizable claim have not been stated."); *Delong Equip. Co. v. Washington Mills Abrasive Co.*, 840 F.2d 843, 845 (11th Cir. 1988) ("[W]hen there is a battle of affidavits placing different constructions on the facts, the court is inclined to give greater weight, in the context of a motion to dismiss, to the plaintiff's version" (citation and internal quotation marks omitted)).

419. See Complaint, *supra* note 14, ¶¶ 3, 52, 96.

420. See Reply Brief, *supra* note 73, at 15.

421. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1959 (2009) (Souter, J., dissenting) ("If these factual allegations are true, Ashcroft and Mueller were, at the very least, aware of the discriminatory policy being implemented and deliberately indifferent to it."). The plausibility of the illegal conduct complained of will be discussed in greater detail in the next part, *infra* Part IV.B.

422. *Iqbal*, 129 S. Ct. at 1951.

a court at the motion to dismiss stage. Indeed, passing judgment as to which version of facts is “more likely” is not even appropriate at the summary judgment phase, where courts are charged with determining whether “a reasonable jury” could agree with the non-movant’s factual take on the case.⁴²³ In fact, the Supreme Court has held that in reviewing a motion for summary judgment, “[t]his Court’s ‘function is not [it]self to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.’”⁴²⁴ The weighing of facts, however, is precisely what the *Iqbal* Court did—at the motion to dismiss stage.

Doing so not only departs from established norms with respect to the Court’s role in entertaining a Rule 12(b)(6) motion, but arguably usurps the duties of the fact-finder, whom the Supreme Court has acknowledged is tasked with the responsibility to “resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.”⁴²⁵ Plainly, the “factfinder’s role” is the “weigher of the evidence.”⁴²⁶ It may be the case that *Iqbal* does not have the factual support for his claims against Ashcroft and Mueller. That is, however, a determination that may not be made at the motion to dismiss stage.

After *Iqbal*, a defendant may now simply file a motion to dismiss to defeat allegations of blanket profiling, especially as the plaintiff generally will not have direct evidence of intent to discriminate, and a plaintiff will have his case dismissed on the pleadings without having the opportunity to making a showing on the merits. Indeed, a circuit court already has cited to *Iqbal* in ruling that a district court properly dismissed a complaint challenging a city police department’s investigation in which random,

423. See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

424. *Id.* at 249.

425. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

426. *Id.* This feature of the Court’s ruling may raise constitutional implications. See U.S. CONST. amend. VII (“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be . . . preserved, and no fact tried by a jury, shall be otherwise re-examined in any . . . Court of the United States, than according to the rules of the common law.”). This question warrants exploration and, as it is outside the scope of this Article, will require resolution elsewhere.

young African-American men were approached for DNA samples,⁴²⁷ thereby validating Justice Jackson's concern that wartime discrimination blessed by the Court will be expanded for new purposes.

In sum, *Iqbal*, rather than simply clarify the requirements courts are to use when faced with motions to dismiss for failure to state a claim, has drastically and incorrectly altered those bedrock requirements. The Court may have been interested in filtering out a complaint it did not want to see proceed, but in doing so, it may have spelled the end of fundamental principles that traditionally formed the basis for a court's review of a motion to dismiss. The rules that courts are to accept all allegations as true for purposes of a motion to dismiss, that well-plead allegations be viewed collectively and not separately, that courts draw all inferences in favor of the non-moving party, that courts reserve determinations as to the likelihood of success on the merits for motions for summary judgment or for a judge or jury at trial, are all in jeopardy as a result of the improvident route taken by the Court in *Iqbal*. For these reasons, the aggressive screening out of cases employed by the Court will likely make it more difficult for civil rights complainants, and in truth all plaintiffs in civil litigation, to surpass the motion to dismiss hurdle.

The crumbling of the different sacrosanct procedural steps in order to achieve a desirable judicial outcome is the exact trap that Judge Easterbrook warned about over a decade ago—a trap the *Iqbal* Court regrettably fell into on its own accord and despite specific warnings from *amici* and this prescient statement from a prominent Article III judge:

Pressure from the flux of cases makes early disposition of weak claims attractive, freeing judicial time for others that appear to have superior prospects. Matters that formerly were tried now are resolved by summary judgment. But the next time-saving step—resolving under Rule 12(b)(6) matters that formerly were handled by summary judgment—is incompatible with the Rules of Civil Procedure. Litigants are entitled to discovery before being put to their proof, and treating the allegations of the complaint as a

427. See *Monroe v. City of Charlottesville, Va.*, 579 F.3d 380, 389-90 (4th Cir. 2009), *cert. denied*, 78 U.S.L.W. 3418 (Mar. 8, 2010).

statement of the party's *proof* leads to windy complaints and defeats the function of Rule 8.⁴²⁸

With an understanding of the impact of the case on the pleading standards governing motions to dismiss for failure to state a claim, it is now appropriate to turn to the Court's application of that standard to Iqbal's complaint.

B. *The Substantive Problems with Iqbal*

The Supreme Court committed errors not only in the procedural standard to apply to Iqbal's complaint, but also in the substantive review of the complaint itself. While the Court concluded in the end that Iqbal's allegations were not sufficient⁴²⁹, upon closer examination it should be evident that the allegations plausibly state a claim for discrimination.⁴³⁰

Iqbal's central claim is that Ashcroft and Mueller designed or condoned policies that designated Iqbal as a person of high interest and thereafter placed in the harsh conditions of confinement of the ADMAX SHU on account of his race, religion, or national origin.⁴³¹ The *Iqbal* Court explained that the inquiry into whether a complaint states a claim is a "context—specific" enterprise.⁴³² In this case, the overarching context is the terrorist attacks and aftermath of 9/11. Indeed, one federal court observed of *Iqbal* that, "[e]ver-present in the majority's opinion was the fact that these high-ranking officials faced an unprecedented attack on American soil, 'perpetrated by 19 Arab Muslim hijackers.'"⁴³³

The backdrop of 9/11 cuts two different ways in this case. According to Iqbal, "it is virtually inconceivable that petitioners were not involved in the wide-ranging and

428. *Bennett v. Schmidt*, 153 F.3d 516, 519 (7th Cir. 1998).

429. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951-52 (2009).

430. I will not discuss the Court's treatment of supervisory liability and respondeat superior, which was thoroughly critiqued by Justice Souter. *See id.* at 1957 (Souter, J., dissenting).

431. *See id.* at 1944.

432. *Id.* at 1950.

433. *Chao v. Ballista*, 630 F. Supp. 2d 170, 177 (D. Mass. 2009) (quoting *Iqbal*, 129 S. Ct. at 1951).

politically significant decision that detainees of a particular race, religion, and national origin were automatically considered ‘of high interest’ to the September 11th investigation.”⁴³⁴ Ashcroft and Mueller argued the opposite, that the massive scope of post-9/11 investigation made their “detailed involvement . . . infeasible.”⁴³⁵ The Second Circuit found plausible Iqbal’s position that Ashcroft and Mueller “would be aware of policies concerning the detention of those arrested by federal officers in the New York City area in the aftermath of 9/11 and would know about, condone, or otherwise have personal involvement in the implementation of those policies,”⁴³⁶ and agreed as to the “likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated ‘of high interest’ in the aftermath of 9/11.”⁴³⁷

The Supreme Court, however, concluded that Iqbal’s complaint only “plausibly suggests . . . that the Nation’s top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity.”⁴³⁸ It was unsurprising, the Court added, that the application of this general “hold and release” policy focused on Arab Muslims:

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al

434. Response Brief, *supra* note 65, at 54.

435. See Reply Brief, *supra* note 73, at 10; see also *id.* at 17 (“The Attorney General and the FBI Director generally do not involve themselves in the granular operational decisions of their subordinates. And respondent’s suggestion that petitioners engaged in this sort of micro-management during one of the largest criminal and national-security investigations in United States history is particularly implausible.”); *id.* at 18 (indicating that the “usual practice” was for Ashcroft and Mueller to not have “actual knowledge” of “decisions being made by lower level officials.”).

436. *Iqbal v. Hasty*, 490 F.3d 143, 166 (2d Cir. 2007).

437. *Id.* at 175-76. The district court similarly concluded that “the post-September 11 context provides support for plaintiffs’ assertions that defendants were involved in creating and/or implementing the detention policy under which plaintiffs were confined.” *Elmaghraby v. Ashcroft*, No. 04-CV-01809, 2005 WL 2375202, at *20 (E.D.N.Y. Sept. 27, 2005).

438. *Iqbal*, 129 S. Ct. at 1952.

Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts.⁴³⁹

As noted above, such a comment was unnecessary at the motion to dismiss stage if, as the traditional procedural rules mandated, the Court had accepted Iqbal's allegations as true and drawn all reasonable inferences in his favor. The comment, having been made, is eerily similar to other wartime contexts in which any suggestion of discriminatory intent in the targeting of minorities was dismissed as sensible targeting of those at war with the United States. In the *Korematsu* case from the World War II era, the Court deferred to the government's arguments regarding the military necessity of the relocation and upheld the constitutionality of the president's executive order giving rise to the internment of over 120,000 individuals of Japanese descent.⁴⁴⁰ The Court noted that the petitioner was subject to the order not because of any racial animus towards the Japanese, but

because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily.⁴⁴¹

A year before, the Court in *Hirabayashi* upheld the conviction of an American citizen of Japanese ancestry for violating an exclusion order and curfew requirements imposed after the attack on Pearl Harbor.⁴⁴² In doing so, the

439. *Id.* at 1951.

440. *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944).

441. *Id.* at 223.

442. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

Court observed, “[w]e cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry.”⁴⁴³

The *Iqbal* Court’s justification of the targeting of Arab Muslims—that the perpetrators of the 9/11 attacks were themselves Arab Muslims—mirrors the same rationalization offered by the Court in *Korematsu* and *Hirabayashi*. This is an outcome—the use of discrimination in other wartime settings—that was predicted by Justice Robert H. Jackson in his dissenting opinion in *Korematsu*.⁴⁴⁴ In particular, he forewarned that the Court in *Korematsu* had rendered constitutional a principle of discrimination that

lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as “the tendency of a principle to expand itself to the limit of its logic.” [I]f [the courts] review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.⁴⁴⁵

In effect, *Iqbal* alleged that the petitioners have picked up the same loaded weapon in the post-9/11 context, specifically in the decisions to detain Arab Muslims and place them in harsher conditions of confinement on the basis of his background and in the absence of any evidentiary tie to terrorism. The government may not have exhibited overt racial hostility towards Islam or Muslims.⁴⁴⁶

443. *Id.* at 101.

444. See Eric Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571, 592 (2002) (“Justice Jackson’s instruction from sixty years ago must guide our steps today.”).

445. *Korematsu*, 323 U.S. at 246 (footnote omitted).

446. For example, in public Ashcroft urged Americans not to commit acts of hate violence against Arabs or Muslims. See Prepared Remarks, John Ashcroft, Attorney General, Dep’t of Justice (Sept. 13, 2001), <http://www.justice.gov/archive/ag/speeches/2001/0913pressconference.htm> (“We must not descend to the level of those who perpetrated [September 11, 2001’s] violence by targeting individuals based on their race, their religion, or their national

But it is well within reason to assert that it is genuinely possible—given our established wartime tendencies—that race, religion, or national origin has again been used as a proxy for suspicion, this time in the immediate aftermath of the 9/11 attacks.⁴⁴⁷ This use of such a proxy, especially in light of *Korematsu*, suggests that the segregation of Muslims into a harsher penal environment, without any inkling of a connection to terrorism, is a clearly established wrong.⁴⁴⁸

To be sure, Iqbal himself pleaded guilty to a crime and thus was in the criminal justice system.⁴⁴⁹ Iqbal's transgressions, however, were related to identity theft and had no relationship, either inherently or in this particular circumstance, with terrorism. Indeed, there is no evidence in the record that there was any specific tie between Iqbal and terrorism. The *Iqbal* Court countenanced the petitioners' intent to detain individuals with "potential connections to those who committed terrorist acts."⁴⁵⁰ In the absence of any evidence—at the time of the classification or anytime thereafter—that Iqbal had anything to do with terrorism, it is reasonable to suggest that the "potential connection" was his race, religion, and/or national origin. In other words, while the Court deemed permissible the government's focus on individuals with a "suspected link" to terrorists, Iqbal claimed that this "link" was predicated on his background alone—again indicating a clear violation of the Constitution.

Further, the government swept up Muslims in other security measures, which lends additional credence to

origin[.] Such reports of violence and threats are in direct opposition to the very principles and laws of the United States and will not be tolerated.”).

447. See Elbert Lin, *Korematsu Continued* . . . , 112 YALE L.J. 1911, 1913-17 (2003) (suggesting that *Korematsu* has been “revived” after 9/11, even though features of 9/11 do not duplicate each aspect of the internment).

448. See, e.g., Civil Liberties Act of 1988, 50 App. U.S.C. §§ 1989-1989(b)-9 (2006) (“Congress recognize[d] that . . . a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II . . . [and that these actions] were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership.”).

449. See *Elmaghraby v. Ashcroft*, No. 04-CV-01809, 2005 WL 2375202, at *1 n.1 (E.D.N.Y. Sept. 27, 2005).

450. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009).

Iqbal's allegations that he was classified because of his background.⁴⁵¹ For example, the government implemented a special registration program which required aliens from countries, almost all of which are predominantly Muslim, to report to the INS to be fingerprinted and photographed, and possibly interrogated.⁴⁵² Moreover, the government's Absconder Apprehensive Initiative aimed to "locate, apprehend, interview, and deport" approximately "several thousand" individuals from countries where there was an "al Qaeda terrorist presence or activity," again predominantly Muslim countries.⁴⁵³ Also, under the government's Operation Liberty Shield, asylum seekers "from nations where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated" would be detained for the duration of their asylum proceedings.⁴⁵⁴ Pursuant to a separate interview program, eight thousand Arab, Muslim, and South Asian men were called in for "voluntary" questioning.⁴⁵⁵ The impact of these policies on those from predominantly Muslim countries is plain. For example, "[b]etween September 2001 and September 2002, the number of deportable Pakistanis apprehended increased 228%" and the number of Pakistanis deported rose 129%.⁴⁵⁶

What's more, "a feature of the government's response to the attacks of September 11 has been its campaign of mass preventive detention," in which 1147 individuals were detained by early November 2001.⁴⁵⁷ As then-Assistant Attorney General Michael Chertoff noted, "we have to hold

451. See Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 810 (2007) ("In the immediate aftermath of the attacks, federal officials conducted sweeps in which they rounded up over a thousand noncitizens . . . [where] [n]early all of these noncitizens were from predominantly Muslim countries.").

452. See Registration and Monitoring of Certain Nonimmigrants from Designated Countries, 67 Fed. Reg. 57,032 (Sept. 6, 2002).

453. See Memorandum from the Deputy Attorney Gen. on Guidance for Absconder Apprehension Initiative to the Comm'r of Immigration and Naturalization Serv. et al. (Jan. 25, 2002).

454. See Press Release, Dep't of Homeland Security, Operation Liberty Shield (Mar. 17, 2003), http://www.dhs.gov/xnews/releases/press_release_0115.shtm.

455. See Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1271 (2004).

456. *Id.* at 1276.

457. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 960 (2002).

these people until we find out what is going on.”⁴⁵⁸ The OIG Report indicated that persons, mainly from Muslim and Arab countries, were detained and classified as persons “of high interest” arbitrarily and without evidence of terrorism.⁴⁵⁹ The government contended that the arbitrary nature of the classification system proves that there was no overall discriminatory policy as to classifying all Arab Muslims as persons of “high interest.”⁴⁶⁰ But, as Reinert explained at argument and as suggested by the OIG Report, the statement that the classifications were made arbitrarily is another way of averring that the decisions were not made pursuant to legitimate, penological interests.

The government’s overall security approach to the 9/11 attacks—which appears to have focused on race, religion, and national origin rather than an individual’s actual link to terrorism—is consistent with Iqbal’s claim that “within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks—however unrelated the arrestee was to the investigation—were immediately classified as ‘of interest’ to the post-September-11th investigation.”⁴⁶¹

The government’s wartime past and its multifaceted targeting of Muslims in the post-9/11 context both provide greater factual credibility to Iqbal’s allegations. Other constitutional principles support Iqbal’s fundamental contention that it is impermissible to use race, religion, or national origin as a proxy for suspicion or, in *Iqbal’s* words, a “potential connection” to terrorism. In the educational context, the Supreme Court allowed the University of Michigan Law School to continue its policy of considering an applicant’s race as a factor in admissions because the law school sought to admit a “critical mass” of underrepresented minorities.⁴⁶² Law school officials testified that, when a critical mass of such students is present, minority students do not feel obligated to serve as a spokesperson for his or her race, but instead are comfortable to articulate an

458. OIG REPORT, *supra* note 42, at 39.

459. See OIG REPORT, *supra* note 42, at 20-21, 69, 158, 196.

460. See Reply Brief, *supra* note 73, at 15.

461. Complaint, *supra* note 14, ¶ 52.

462. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

individual, diverse viewpoint.⁴⁶³ This furthered the educational objectives of dispelling the notion that members of a certain race think alike and informing the law school community that such members have a variety of viewpoints.⁴⁶⁴ In short, the law school's interest in severing a link between a certain race and a certain stereotypical set of ideas was sanctioned by the Court.

Similarly, in the voting context, the Court has held emphatically that political entities may not draw district lines on the assumption that members of the same race subscribe to the same political sentiments: "the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls" has been rejected "as impermissible racial stereotype[]."⁴⁶⁵ In other words, when it comes to education or voting, race could not be used as a proxy for a monolithic, stereotypical set of views. It is difficult to square the repudiation of this proxy in two important constitutional settings with its acceptance in another.

One may argue that the specialized wartime context is one in which the government possesses increased constitutional room within which to operate. But that latitude must still be within the bounds of the law and faithful to the individual rights protected by the Constitution. The Supreme Court noted after 9/11 that, "The laws and Constitution are designed to survive, and remain in force, in extraordinary times."⁴⁶⁶ Earlier, the Court remarked, "even the war power does not remove constitutional limitations safeguarding essential liberties."⁴⁶⁷ In the famous case, *Ex parte Milligan*, the Court held, "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."⁴⁶⁸

463. *See id.* at 319-20.

464. *See id.*

465. *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

466. *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008).

467. *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426, (1934).

468. 71 U.S. (4 Wall.) 2, 120-21 (1866).

Accordingly, the principle that race alone cannot be used as a proxy for certain traits may be said to exist in wartime moments, not just in other compartmentalized constitutional settings. The Court therefore should be particularly careful in reviewing claims of racial classifications because of their potentially invidious nature,⁴⁶⁹ even if those claims arise in the context of national crises. As with racial classifications in general, targeting of individuals on the basis of race in times of war may be purported to be beneficent in purpose (e.g., protecting the homeland), but may create and perpetuate wrongful stereotypes that themselves are harmful (e.g., that all Muslims are terrorists or are somehow linked to terrorism). We must, as Justice Louis D. Brandeis instructed us, “to be *most on our guard* to protect liberty when the government’s purposes are beneficent.”⁴⁷⁰

There are other features of the case’s context that bear mention. Most important to the petitioners, perhaps, is their entitlement to qualified immunity, a doctrine which generally serves to keep government employees from having to answer for their official duties so long as they did not violate clearly established rights which a reasonable person would have known about.⁴⁷¹ It is undisputed in this case that Ashcroft and Mueller are so entitled to qualified immunity. But the use of the aforementioned proxy is clearly wrong not only in light of America’s wartime past but doctrine enshrined in other areas of constitutional law.

Moreover, while the doctrine of qualified immunity aims to allow government officials to do their jobs without fear of legal reprisal, and while Judge Cabranes expressed concern that the *Iqbal* case, if allowed to go forward, would result in a flood of similar cases, in actuality the government was able to identify a single case in which a motion to dismiss

469. It is difficult to determine how *Iqbal*’s allegations of racial discrimination in wartime do not invite the same searching inquiry and skepticism that the Court has applied in other areas of law in which racial classifications are at issue. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (“Indeed the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that [the government] is pursuing a goal important enough to warrant use of a highly suspect tool.”).

470. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) (emphasis added).

471. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

was denied because of the District Court's ruling in *Iqbal*, which allowed the pleadings to stand.⁴⁷² Judge Cabranes's fear of an increase in similar cases is refuted by the facts and, in the end, was mere speculation.

There is another, related element to the case's context – liability under *Bivens*, which enables individuals to hold federal government officials to account for violations of their constitutional rights.⁴⁷³ While the government claimed in this case that qualified immunity assured them a safe haven in order to respond effectively to the attacks of 9/11, which was necessary in consideration of the massive response required, the reach of *Bivens* does not recede when the government is in peril and its officials are acting to protect the homeland. In fact, an argument can be made that *Bivens* is especially important in the wartime context, when the government claims such wide authority and discretion to act.⁴⁷⁴ As the 9/11 Commission said, a “shift of power and authority to the government calls for an *enhanced* system of checks and balances to protect the precious liberties that are vital to our way of life.”⁴⁷⁵

In short, the Court erred in disagreeing with the Second Circuit and district court that this case should move beyond the pleadings stage. The following points illustrate the factual plausibility of Iqbal's allegations that he was classified and placed in the ADMAX SHU on the basis of his race, religion, and national origin, and not for legitimate reasons:

- Iqbal is a Muslim male, as were the 9/11 hijackers;
- Iqbal was arrested in New York, less than two months after 9/11;
- Iqbal plead guilty to charges related to identity theft that had no demonstrated relationship to terrorism;
- the government never charged Iqbal with any violations related to terrorism—indeed, he was removed to Pakistan;

472. See Oral Argument Transcript, *supra* note 241, at 27.

473. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

474. See Yale Brief, *supra* note 187, at 2-3.

475. *Id.* at 191 (emphasis added).

- despite the absence of terrorism charges, he was classified as a person of “high interest” and placed in the ADMAX SHU, which was a federal prison facility in New York;

- the OIG Report concluded that the classification decisions were arbitrary and imprecise;

- the ADMAX SHU was only one of two federal facilities that were the subject of the OIG Report;

- the OIG Report investigated the classification and treatment of, what it called, the “September 11 detainees,” including Iqbal, who were housed at the ADMAX SHU;

- Ashcroft and Mueller were two law enforcement officers responsible overseeing the federal investigation of the terrorist attacks and other terrorist activity after 9/11;

- Ashcroft and Mueller admitted to holding and detaining suspected terrorists until they were cleared;

- Ashcroft and Mueller argued it was sensible to target Arab Muslims because the perpetrators of the attacks were themselves Arab Muslims;

- the government has, in the wake of 9/11, targeted Muslims in multiple security programs;

- the government has, historically and through its top officials including the president, targeted individuals on the basis of race in times of war, though characterizing their security efforts as based on legitimate wartime needs rather than animus;

- the Court’s historical wartime cases and other contemporary constitutional cases suggest that race, religion, and national origin alone may not be used by the government as certain traits, such as presumptive suspiciousness, even in the context of the aftermath of 9/11.

Based on this information, it is my contention that Iqbal’s allegations in his complaint should have been deemed to be sufficient under *Twombly’s* pleading standards. Iqbal’s allegations were not legal conclusions—as indeed it is difficult to surmise how the Court differentiated between the two allegations it found to be conclusory and those it considered to be non-conclusory but implausible—and were not so outrageous as to be dismissed as irrational. There is a genuine possibility, based on these allegations, that Iqbal would be entitled to relief.

C. Possible Reforms

Though Justice Jackson's dissent was not enough to save the majority in *Korematsu* from sanctioning blanket discrimination or deter the *Iqbal* Court from its course of action, there is hope that a future Court may heed his warnings and relieve the government of the convenient proxy which equates individuals of certain races, religions, or national origins with disloyalty, suspicion, and possible involvement in terrorism.

I wish to offer thoughts on how the Court may develop a more workable and legally sound paradigm for dealing with motions to dismiss for failure to state a claim and claims of discrimination in the national security context when and if *Iqbal* is revisited.

First, with respect to the pleading requirements, the Court may consider adopting the following standard:

General. A pleader is required to provide a short and plain statement of the claim showing that the pleader is entitled to relief. The statement must be such that the defendant has fair notice of the claims and the grounds upon which they rest.

Construction. A court, in construing the complaint, is to take all allegations as true and draw all reasonable inferences in favor of the non-movant. A court reviewing allegations in the complaint need not, however, accept as true legal conclusions or factual allegations that are beyond reason or irrational. A legal conclusion cast as a factual allegation is to be read to be a legal conclusion not entitled to be credited as true. A court is to presume that general allegations embrace those specific facts that are necessary to support the claim.

Sufficiency. The allegations, viewed in their entirety, must be plausible. In other words, the allegations, taken as a whole, must show a genuine factual possibility that the pleader is entitled to relief. The context of the factual circumstances is relevant in determining whether the allegations are plausible.

In determining what is a legal conclusion couched as a factual allegation, one need look no further than the simple

distinction provided by Judge Easterbrook, as provided above.⁴⁷⁶

Second, with respect to claims of discrimination in wartime, the Court should adopt a principle—consistent with lessons from *Korematsu*, and the educational and voting rights cases—that:

It is contrary to law for the government to use race, religion, or national origin as the sole basis for suspecting individuals of subversion or disloyalty. Race, religion, and national origin may, however, be used as a factor in making such determinations, provided that the determination is individualized and there are other objective indicia of suspicion, subversion, or disloyalty, that are not premised on race, religion, and national origin.

It is hoped that these proposals will properly balance the interests of plaintiffs seeking redress for violations of their individual rights and the interests of the government in shielding its employees from the tentacles of extensive discovery and burdensome litigation.

CONCLUSION

There can be little doubt that Ashcroft, Mueller, and the rest of the security arm of the federal government were in an extremely difficult situation following the terrorist attacks of 9/11.⁴⁷⁷ Those circumstances, however, do not justify constitutional violations. As the OIG Report stated, “[w]hile the chaotic situation and the uncertainties surrounding the detainees’ role in the September 11 attacks and the potential for additional terrorism explain some of [the identified] problems, they do not explain or justify all of them.”⁴⁷⁸

In this Article, I have attempted to argue that Iqbal has sufficiently alleged violations of his constitutional rights by Ashcroft and Mueller. This is not to say that Iqbal is “right,” that what he says is true on the merits. This is to say only that he has set forth enough information to put the petitioners on notice of the discrimination claims against them and that he should have been provided the basic

476. See text accompanying *supra* note 394.

477. See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY* 67-69, 75 (2007).

478. OIG REPORT, *supra* note 42, at 164.

opportunity to prove that he can support his claims at the next stage of litigation. Instead, the Court effectively assessed which side's set of facts was more likely, taking over the trier of fact's role and depriving Iqbal of his ability to move beyond the pleadings stage. In other words, the Court reached outside of its designated role at the motion to dismiss stage and has, in the process, stunted a suit alleging blanket discrimination.

Worse, it has perpetuated the notion that it is legally permissible for the government to rely solely on race, religion, or national origin in the wartime context—an aspect of the case that it shares with *Korematsu* and that has been extended by the lower courts to domestic law enforcement policies completely unrelated to wartime exigencies.⁴⁷⁹ The approval of profiling in modern wartime situations, and the frustrated capacity of plaintiffs to challenge such profiling, may be the lasting legacy of *Iqbal*. In this respect, *Iqbal* has placed just results in civil litigation further from the grasp of plaintiffs and has diminished the civil rights protections afforded individuals in times of national trauma. It is this aspect of the decision that is most distressing, that an entity entrusted to shield individual rights from government encroachment has gifted the government greater legal cover to discriminate and profile those who look like or share personal characteristics our true enemies. In short, the Court—not some external force or government—has threatened our liberty.

I have suggested possible reforms that will help shift the missteps of *Iqbal* back towards established legal principles. Short of these revisions to *Iqbal*, the legal community and the nation are left with the consequences of a decision that is problematic not only in its upsetting of established procedural rules, but also the substantive conclusion that Iqbal's allegations failed to provide Ashcroft

479. See *Monroe v. City of Charlottesville, Va.*, 579 F.3d 380 (4th Cir. 2009), cert. denied, 78 U.S.L.W. 3418 (Mar. 8, 2010). For my commentary on the broader implications of *Iqbal*'s logic extending past the national security arena, see Dawinder S. Sidhu, Civil Rights and the Wartime Supreme Court (Feb. 22, 2010) (“[*Iqbal* and *Monroe*] demonstrate the mutuality of legal interests between traditional race-based civil rights and wartime civil rights, specifically the doctrinal relationship implicating these groups as well as the reciprocal benefits in eradicating the viability of classifications premised on race, religion, or national origin.”), available at <http://www.scotusblog.com/2010/02/civil-rights-and-the-wartime-supreme-court/>.

and Mueller with fair notice of his claims and that the wartime profiling of communities is consistent with the Constitution.

Justice Jackson wrote, “[i]t is easy, by giving way to the passion, intolerance and suspicions of wartime, to reduce our liberties to a shadow.”⁴⁸⁰ This Article is a modest attempt to prove that the *Iqbal* Court has done just that, and to suggest thereby how we may reverse course to preserve traditional pleading requirements and safeguard civil liberties even in times of peril.

480. Jackson, *supra* note 1, at 116.