13-981-cv(L)

13-1662-cv(XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IBRAHIM TURKMEN, AKIL SACHVEDA, ANSER MEHMOOD, BENAMAR BENATTA, AHMED KHALIFA, SAEED HAMMOUDA, PURNA BAJRACHARYA, AHMER ABBASI,
Plaintiffs-Appellees-Cross-Appellants,

ASIF-UR-REHMAN SAFFI, SYED AMJAD ALI JAFFRI, on behalf of themselves and all others similarly situated, SHAKIR BALOCH, HANY IBRAHIM, YASSER EBRAHIM, ASHRAF IBRAHIM, AKHIL SACHDEVA,
Plaintiffs-Appellees,

v.

[caption continued on inside cover]

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

PROOF BRIEF FOR DEFENDANTS-CROSS-APPELLEES JOHN ASHCROFT AND ROBERT MUELLER

STUART F. DELERY
Assistant Attorney General

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

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

[caption continued]

WARDEN DENNIS HASTY, former Warden of the Metropolitan Detention Center (MDC), MICHAEL ZENK, Warden of the Metropolitan Detention Center, JAMES SHERMAN, SALVATORE LoPRESTI, MDC Captain,
Defendants-Appellants-Cross-Appellees,

JOHN ASHCROFT, Attorney General of the United States, ROBERT MUELLER, Director, Federal Bureau of Investigations, JAMES W. ZIGLAR, Commissioner, Immigration and Naturalization Service, JOHN DOES 1-20, MDC Corrections Officers, JOHN ROES, 1-20, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents, CHRISTOPHER WITSCHEL, MDC Correctional Officer, Unit Manager CLEMETT SHACKS, MDC Counselor, BRIAN RODRIGUEZ, MDC Correctional Officer, JON OSTEEN, MDC Correctional Officer, RAYMOND COTTON, MDC Counselor, WILLIAM BECK, MDC Lieutenant, STEVEN BARRERE, MDC Lieutenant, LINDSEY BLEDSOE, MDC Lieutenant, JOSEPH CUCITI, MDC Lieutenant, Lieutenant HOWARD GUSSAK, MDC Lieutenant, Lieutenant MARCIAL MUNDO, MDC Lieutenant, STUART PRAY, MDC Lieutenant, ELIZABETH TORRES, MDC Lieutenant, SYDNEY CHASE, MDC Correctional Officer, MICHAEL DEFRANCISCO, MDC Correctional Officer, RICHARD DIAZ, MDC Correctional Officer, KEVIN LOPEZ, MDC Correctional Officer, MARIO MACHADO, MDC Correctional Officer, MICHAEL MCCABE, MDC Correctional Officer, RAYMOND MICKENS, MDC Correctional Officer, SCOTT ROSEBERY, MDC Correctional Officer, DANIEL ORTIZ, MDC Lieutenant, PHILLIP BARNES, MDC Correctional Officer, UNITED STATES OF AMERICA, JAMES CUFFEE,
Defendants -Cross-Appellees,

OMER GAVRIEL MARMARI, YARON SHMUEL, PAUL KURZBERG, SILVAN KURZBERG, JAVAID IQBAL, EHAB ELMAGHRABY, IRUM E. SHIEKH,
Intervenors.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules:

JURISDICTIONAL STATEMENT

Defendants-cross-appellees John Ashcroft, former Attorney General of the United States, and Robert Mueller, former Director of the Federal Bureau of Investigation (FBI), along with James W. Ziglar, former Commissioner of the Immigration and Naturalization Service (INS), are parties only to plaintiffs' cross-appeal, No. 13-1662-cv(XAP), which has been consolidated with other appeals from the same decision below, No. 13-981-cv(L).[1] In the underlying litigation, plaintiffs invoked the jurisdiction of the district court under 28 U.S.C. § 1331. JA __ (Dkt# 726, at 5). On January 15, 2013, the district court granted the motions to dismiss of John Ashcroft, Robert Mueller, and James Ziglar. SPA 3, 62. The district court entered final judgment dismissing those three defendants, pursuant to Rule 54(b), on April 11, 2013. JA __ (Dkt# 788). Plaintiffs filed a notice of appeal on April 24, 2013. JA __ (Dkt# 790, 791). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

[1] Mr. Ziglar is separately represented.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the district court correctly held that dismissal is required under *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), in which the Supreme Court held that a similar complaint must be dismissed for failure to state a claim against former Attorney General Ashcroft and former FBI Director Mueller.

STATEMENT OF THE CASE

Plaintiffs in this case originally brought suit in 2002 against the former Attorney General and FBI Director in their individual capacities, among other defendants, alleging violations of constitutional rights during the detention of plaintiffs for immigration violations following the terrorist attacks of September 11, 2001. After an earlier appeal, *Turkmen* v. *Ashcroft*, 589 F.3d 542 (2d Cir. 2009), in which this Court held that the Supreme Court's then-recent decision in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), required a more careful examination of plaintiffs' claims, plaintiffs filed a fourth amended complaint, and defendants moved to dismiss. The district court granted those motions in part, resulting in the dismissal of all claims against Ashcroft and Mueller. Plaintiffs have appealed from that dismissal.

STATEMENT OF THE FACTS

Plaintiffs in this case, like the plaintiff in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), allege that they were detained for immigration violations after September 11, 2001, and that they, along with others (whom they purport to represent as a class), were mistreated during that detention in violation of their constitutional rights. They seek damages from multiple defendants in their individual capacities under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). The defendants include high-ranking federal policy-makers – former Attorney General John Ashcroft, former FBI Director Robert Mueller, and former INS Commissioner James W. Ziglar – as well as custodial officials at the Metropolitan Detention Center (MDC), one of the two detention facilities where plaintiffs were allegedly held (plaintiffs do not seek relief against officials at the other facility, the Passaic County Jail). SPA 5; JA __ (Dkt# 726, at 7-8).

Following the terrorist attacks of September 11, 2001, the Attorney General and FBI Director led the federal government's investigative efforts to identify the perpetrators and prevent any subsequent attacks. As the

Department of Justice Inspector General (IG) concluded in 2003, that effort posed enormous challenges: within a "week after the attacks, the FBI had received more than 96,000 tips or potential leads from the public, * * * [m]any of [which] involved aliens * * * from countries with large Arab or Muslim populations." JA __ (Dkt# 28-att, at 12, 14); JA __ (Dkt# 726, at 13-14).[2] Following investigation of all those leads, federal officials ultimately arrested and detained 762 aliens, nearly all of whom had violated federal immigration laws. JA __ (Dkt# 28-att, at 2, 5).

In the fourth amended complaint now under review, plaintiffs allege that they were mistreated at two detention facilities, and they seek to hold the former Attorney General and FBI Director (among others) individually liable for what they contend were constitutional violations associated with

[2] The 2003 IG report was originally submitted as an attachment to plaintiffs' second amended complaint; a supplemental IG report was issued later in 2003 and was attached to the third amended complaint. Both were incorporated by reference in the fourth amended complaint, although plaintiffs rely on them only selectively. JA __ (Dkt# 726, at 3 n.1, 4 n.2). Both IG reports are also available on the Department of Justice website at: http://www.justice.gov/oig/reports/special.htm#2003.

their conditions of confinement. Much of the complaint is devoted to allegations concerning confinement in a segregated housing unit of the MDC, the ADMAX SHU. See, *e.g.*, JA __ (Dkt# 726, at 23-33). The complaint also cites conditions at the Passaic County Jail, where some plaintiffs were held in non-segregated conditions. JA __ (Dkt# 726, at 22-23). The complaint does not allege that the former Attorney General and FBI Director directed or intended that plaintiffs be held in the particular conditions they complain about.

Following this Court's 2009 decision remanding the case for consideration in light of *Iqbal*, plaintiffs filed their fifth complaint. The eight named plaintiffs include two of the original plaintiffs (others had settled their claims) and six new individuals. The complaint named eight defendants: Three were high-ranking Executive Branch officials – former Attorney General Ashcroft, former FBI Director Mueller, and former INS Director Ziglar – whom the district court referred to collectively as the "DOJ defendants." Five defendants were former custodial officials at the MDC, including two former Wardens (Dennis Hasty and Michael Zenk)

and three other officials (James Sherman, Salvatore LoPresti, and Joseph Cuciti), collectively referred to by the district court as the "MDC defendants." SPA 4-5; JA __ (Dkt# 726, at 5-10).

The defendants moved for dismissal of the claims against them, and the district court considered those motions together in a decision issued in January 2013. After describing the parties and the lengthy procedural history of the case, SPA 3-18, the district court considered each of the claims as raised against each defendant, *id.* at 26-61. The court held that all claims against the DOJ defendants must be dismissed on the ground that the complaint did not, as required by *Iqbal*, plausibly allege that the DOJ defendants were themselves responsible for the unconstitutional treatment plaintiffs complained of.

Claims One and Six alleged that the conditions of confinement violated plaintiffs' substantive due process rights, but the district court pointed out that the complaint did not allege that the DOJ defendants intended for subordinate officials to create the specific conditions at issue, or even that the DOJ defendants knew of those conditions. The court

rejected plaintiffs' theory of supervisory liability as inconsistent with *Iqbal*, and held that the allegations did not demonstrate unconstitutional conduct on the part of the DOJ defendants. The court emphasized that the DOJ defendants were entitled to presume that their policy would be carried out lawfully by their subordinates. *Id.* at 29-32 (JA __). The district court applied similar reasoning to dismiss Count Three, a claim that the alleged harsh conditions of confinement violated plaintiffs' free exercise rights, reiterating that the DOJ defendants' policy itself was constitutional, and they could presume lawful implementation. *Id.* at 55-56 (JA __).

Claim Two, plaintiffs' equal protection argument, alleged that plaintiffs were subjected to harsh conditions of confinement on the basis of their race, religion, ethnicity, or national origin. Because of the Executive's plenary power over immigration, the district court observed that there is no right to be free from immigration investigation, arrest, or detention based on classifications drawn on the basis of race, religion, or national origin. In the absence of any allegation that the DOJ defendants themselves directed or required the conditions of confinement at issue, the

court held that plaintiffs cannot prevail against them on a claim that those conditions were imposed by others, even if an allegedly prohibited basis prompted those actions. *Id.* at 37-40 (JA __).

Unlike the district court's decision concerning Counts One, Two, Three and Six – in which the court granted the DOJ defendants' motions to dismiss but denied the motions of the MDC defendants, the district court dismissed Counts Four and Five, alleging a constitutional violation based on limitations imposed on plaintiffs' communications and access to the outside world while in detention, as against all defendants. The court determined that the asserted right to be free from such a policy was not clearly established in 2001, and thus could not be a basis for *Bivens* liability. *Id.* at 41-49 (JA __).

Finally, the district court considered Count Seven, a conspiracy claim under 42 U.S.C. § 1985. Because the court had dismissed the other counts specifying the underlying conduct alleged to be the aim of the conspiracy, the conspiracy charge could not proceed against the DOJ defendants. *Id.* at 60-62 (JA __). Thus, the district court dismissed the complaint in its

entirety, as against the DOJ defendants. Plaintiffs appealed from that decision following entry of final judgment as to the DOJ defendants pursuant to Rule 54(b), and this case was docketed as a cross-appeal and consolidated with the pending appeals of the MDC defendants.

SUMMARY OF ARGUMENT

This case, like *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), seeks to hold the former Attorney General and FBI Director liable in their individual capacities for their high-level policy decisions concerning the detention of immigration violators following the terrorist attacks of September 11, 2001. The complaint here fails to meet the plausibility requirement imposed by the Supreme Court in that case, and the district court properly dismissed the claims against Ashcroft and Mueller on that basis.

The alleged conduct of the former Attorney General and FBI Director offers no "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. Because the DOJ defendants were entitled to presume that the facially constitutional policy would in turn be

implemented lawfully, the plaintiffs have not offered plausible factual allegations of wrongdoing by Ashcroft and Mueller.

Each of plaintiffs' claims is based on the specific conditions of confinement they allegedly suffered. But the former Attorney General and FBI Director did not themselves require or specify any of the particular conditions set forth in the complaint. And they cannot be held liable on what amounts to a theory of *respondeat superior* for the actions of others who may have imposed those conditions.

Plaintiffs have had 11 years and five iterations of their complaint to identify a plausible basis to conclude that the former Attorney General and FBI Director acted unconstitutionally in formulating national immigration policies in the wake of the September 11 attacks. The absence of any indication of wrongdoing – after multiple inquiries and investigations over the years – confirms that there is no basis for a *Bivens* claim against Ashcroft and Mueller. The district court correctly recognized that plaintiffs should not be allowed to continue this suit without any indication of

wrongful conduct on the part of the Nation's highest law enforcement officials.

ARGUMENT

THE DISTRICT COURT CORRECTLY DISMISSED THE COMPLAINT AS TO FORMER ATTORNEY GENERAL ASHCROFT AND FORMER FBI DIRECTOR MUELLER.

As the district court recognized, the Supreme Court in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), "dramatically altered the legal landscape" as relevant to this case. SPA 18. The Supreme Court's decision requires dismissal unless the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). The Court explained that the plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Ibid.* The complaint must do more than "plead[] facts that are 'merely consistent with' a defendant's liability." *Ibid.* (quoting *Twombly*, 550 U.S. at 557). The Supreme Court in *Iqbal* "in no uncertain terms" also "eliminated supervisory liability in *Bivens* claims." SPA 22. Thus, *Iqbal* requires *Bivens*

plaintiffs to "plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Iqbal*, 556 U.S. at 676; see also *id.* at 677 ("each Government official, his or her title notwithstanding, is only liable for his or her own misconduct").

The similarities between this case and *Iqbal* are striking. Plaintiffs in both cases seek to hold the former Attorney General and FBI Director individually liable for the conditions of plaintiffs' confinement – in both cases complaining specifically of detention in the MDC ADMAX SHU. The plaintiff in *Iqbal* claimed that he had been detained in the ADMAX SHU because of a policy of "classifying post–September–11 detainees as 'of high interest' because of their race, religion, or national origin." 556 U.S. at 682. The Supreme Court held that the plaintiff there had alleged that "other defendants, who are not before us, may have labeled him a person 'of high interest' for impermissible reasons," but that no such allegation linked Ashcroft or Mueller to those assertedly impermissible actions. *Id.* at 682-683. The district court in this case likewise pointed out that the complaint alleged only that Ashcroft and Mueller adopted a facially constitutional

policy, and properly presumed that their subordinates would implement it lawfully. SPA 31-32.

The complaint here fails to satisfy the *Iqbal* standard. Plaintiffs do not allege individual actions by Ashcroft and Mueller that violate the Constitution. The complaint alleges only that the former Attorney General and FBI Director established a lawful policy that was implemented by others in a way that plaintiffs allege was unconstitutional. As the Supreme Court made clear, the defendants cannot be held liable for the conduct of others.[3]

1. All three sets of claims at issue seek to hold the former Attorney General and FBI Director liable – under various theories – for the conditions of confinement plaintiffs experienced while detained. See SPA 28 (identifying the following conditions of confinement: plaintiffs were allegedly "constructively denied the opportunity to exercise; denied sleep; repeatedly placed in handcuffs and shackles; deprived of hygienic

[3] Plaintiffs acknowledge the discretion left to subordinate officials. See Pl. Br. 39-40 n.6.

implements, such as soap and toilet paper; subjected to extremely cold conditions; deprived of sufficient food; frequently verbally and physically abused; and repeatedly strip-searched"). But they do not allege that Ashcroft or Mueller directed or intended that the custodial defendants should impose any of those (or any other) specific conditions during detention. Instead the complaint says only that Ashcroft and Mueller created a policy of investigating every lead related to the September 11 attacks, and that the investigation would result in the arrest of certain immigration violators from Middle Eastern countries. JA __ (Dkt# 726, at 13). The complaint alleges that the former Attorney General instructed that "maximum pressure" be placed upon the detainees in question, and that they be encouraged to "cooperate" in "any way possible." JA __ (Dkt# 726, at 21-22), quoted in SPA 31. As the district court recognized, plaintiffs here "do not allege that the DOJ defendants intended that the MDC defendants create the punitive and abusive conditions in which the plaintiffs were detained. Nor do they allege that the DOJ defendants were even aware of those conditions." SPA 31.

Those claims do not demonstrate unconstitutional conduct by the former Attorney General and FBI Director, under any legal theory. As the district court explained, Ashcroft and Mueller formulated a policy that was constitutional on its face, and they "were entitled to expect that their subordinates would implement their directions lawfully." SPA 31-32. The district court recognized that plaintiffs' effort to hold Ashcroft and Mueller "liable *solely* on the basis that the MDC defendants unconstitutionally applied their facially constitutional policy would be the equivalent of imposing *respondeat superior* liability – a form of supervisory liability discarded in *Iqbal*." SPA 30.

Plaintiffs have failed to allege any individual actions of the former Attorney General or FBI Director that show they themselves violated the Constitution. It is not enough that plaintiffs "simply contend that the unconstitutional conditions of confinement were the 'direct result' of the DOJ defendants' harsh confinement policy." SPA 31 (quoting JA __ (Dkt# 726, at 22)). Such a formulation is nothing more than a conclusory statement, which cannot support a plausible inference of liability. See, *e.g.*,

Iqbal, 556 U.S. at 686. Moreover, every unconstitutional action by a subordinate can be traced back to a policy decision at a higher level, but holding the policymaker liable would impose *respondeat superior* liability in contravention of the Supreme Court's clear holding in *Iqbal*. SPA 30 (citing *City of Okla. City* v. *Tuttle*, 471 U.S. 808, 823 (1985); *Connick* v. *Thompson*, 131 S. Ct. 1350, 1365 (2011)). And plaintiffs' argument would require government officials to constantly seek to ensure that their general policy directions are not being implemented by others in a manner that could be unconstitutional. See SPA 31 (plaintiffs pointed to "DOJ defendants' failure to specify that the harsh confinement policy should be carried out *lawfully*"). The practical implication of that approach would be to "inhibit[] the zealous performance of official obligations." *Cartier* v. *Lussier*, 955 F.2d 841, 844 (2d Cir. 1992); see also, *e.g.*, *Robertson* v. *Sichel*, 127 U.S. 507, 515 (1888) ("Competent persons could not be found to fill positions of the kind, if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates * * *.").

Nor can plaintiffs redefine the "plausibility" inquiry required by *Iqbal* to permit this case to proceed based on an allegation that a facially constitutional policy allowed others to impose allegedly unconstitutional conditions. That is the substance of plaintiffs' claim that the specific conditions at issue resulted from the facially constitutional policy adopted by the former Attorney General and FBI Director. See Pl. Br. 25-30. That argument equates inference with possibility, contrary to the Supreme Court's specific holding. See, *e.g.*, *Iqbal*, 556 U.S. at 679.

2. Plaintiffs contend that the conditions of their confinement violated due process and unconstitutionally limited their rights to free exercise of their religion. Pl. Br. 30-42. They argue that their claims of unconstitutional conditions of confinement should be reinstated because an intent to punish can be inferred from the harshness of the conditions. But, as the district court correctly recognized, the complaint does not allege that the harsh conditions of confinement were required or directed by the former Attorney General or FBI Director.

Thus, the complaint here – as in *Iqbal* – failed to plead that these two defendants, "through [their] own individual actions, [have] violated the Constitution." 556 U.S. at 676. In the absence of such allegations of individual misconduct, it would not matter if there were "punitive intent" – a phrase used frequently by plaintiffs, see *e.g.*, Pl. Br. 30, 31, 40, in a context suggesting it suffices by itself to support an inference of liability. Plaintiffs cannot prevail by alleging intent alone on the part of the former Attorney General and FBI Director, in conjunction with the conduct of their subordinates. They argue that this Court's decision in *Iqbal* v. *Hasty*, 490 F.3d 143, 169 (2d Cir. 2007), rev'd and remanded, *Iqbal*, 556 U.S. at 687, supports such a theory. See Pl. Br. 30-31. But that misreads both this Court's reasoning and the essential holding of the Supreme Court reversing that decision.

Primarily, plaintiffs argue that the district court failed to take account of the segregated housing conditions that some plaintiffs experienced in

the MDC ADMAX SHU. Pl. Br. 33-37.[4] But according to the complaint, any segregation while in detention – like the other conditions plaintiffs allege – was not specified or required by Ashcroft and Mueller, and thus cannot be plausibly attributed to them.

Plaintiffs contend that it is nevertheless plausible to impute to Ashcroft and Mueller an intent to require specific segregated housing conditions based first on the allegation that the DOJ policy sought to limit the detainees' contact with others, and second on the plaintiffs' assertion that prison officials routinely use segregated housing – and specifically the ADMAX SHU – as a means for limiting outside communications by detainees and other prisoners. See Pl. Br. 35 ("Ashcroft and his small working group instructed that Plaintiffs be restricted from contacting the outside world, and such restriction required that Plaintiffs be placed in a SHU.") (citation omitted). But the complaint does not allege that Ashcroft

[4] Plaintiffs do not dispute the absence of allegations that Ashcroft and Mueller directed or intended the other conditions they allege (those listed by the district court, see SPA 28).

and Mueller dictated any particular means of limiting detainees' communications.

Plaintiffs' brief (at 35-36) cites cases and a proposed rule suggesting the difficulties of limiting communication by detainees, but those authorities do not support the inference that segregation in the ADMAX SHU was the only possible means of doing so. Nor does plaintiffs' argument offer any basis on which to conclude that choices made by others about how to implement the policy can be attributed to the former Attorney General or FBI Director. And the complaint itself actually demonstrates that the policy adopted by Ashcroft and Mueller left implementation decisions to the discretion of subordinate officials. See JA __ (Dkt# 726, at 22-23) (noting that plaintiffs detained at one facility "were not held in isolation or otherwise placed in restrictive confinement").[5]

Plaintiffs also point to a report by the Justice Department Inspector General (IG) in an effort to show that segregated housing decisions should

[5] Moreover, plaintiffs point to no authority suggesting that administrative housing segregation by itself would violate due process.

be attributed to Ashcroft and Mueller. Pl. Br. 36-37. But that report actually refutes plaintiffs' arguments and confirms the correctness of the district court decision here. First, the quoted language makes clear that the DOJ policy was to request that the Bureau of Prisons "limit, as much as possible *within their lawful discretion*, the detainees' ability to communicate with other inmates and with people outside the MDC." Pl. Br. 36 (quoting JA __ (Dkt# 28-att, at 19-20) (emphasis added). The IG report thus confirms, as the district court explained, that Ashcroft and Mueller "were entitled to expect that their subordinates would implement their directions lawfully." SPA 31-32. Second, the report does not suggest that the former Attorney General or FBI Director required any particular means of limiting detainees' communication. The IG report refers to individuals who are not named as defendants (David Laufman and Christopher Wray), and those individuals likewise did not direct the use of any specific segregated housing measures. See Pl. Br. 36-37 (quoting JA __ (Dkt# 28-att, at 112-113).

Plaintiffs also argue that Ashcroft and Mueller "intended for Plaintiffs to be treated harshly." Pl. Br. 37. But that formulation is telling

(and is notably not what the complaint alleges). Intent alone cannot suffice to satisfy *Iqbal*'s requirement of plausible allegations that the defendant's own actions violated the Constitution. Plaintiffs do not argue that the former Attorney General and FBI Director required any particular conditions of confinement that violated due process. As the district court recognized, those choices were left up to subordinate custodial officials. SPA 31-32.

And plaintiffs' argument itself requires multiple steps and assumptions that are unsupported and unjustified. They seek to attribute the specific conditions of confinement to Ashcroft and Mueller indirectly by suggesting that the chain of events leading to those conditions can be traced back to the former Attorney General and FBI Director. But the allegation that Ashcroft and Mueller falsely described plaintiffs as being somehow connected to terrorists does not itself state a violation of due process. And – most importantly – such an allegedly false description would not compel any particular conditions of confinement. See JA __ (Dkt# 726, at 22-23) (alleging that some plaintiffs were held in non-

segregated conditions). It therefore does not refute the district court's conclusion that Ashcroft and Mueller adopted a facially constitutional policy and cannot be held individually liable for the conduct of subordinate officials whom they did not direct or control.

3. Plaintiffs also seek to hold the former Attorney General and FBI Director individually liable for an alleged violation of their equal protection rights. This claim is also based on their allegations that the conditions of confinement were improper. See Pl. Br. 42 ("Plaintiffs' Equal Protection claim is that they were subjected to *harsh treatment* because of their race, religion, ethnicity, and national origin; that all Defendants were prejudiced against them on these grounds; and that the prejudice of each Defendant, including each DOJ Defendant, contributed to the *harsh treatment* Plaintiffs received.") (emphasis added); see also SPA 37 (identifying "the facially discriminatory harsh confinement policy" as "the sole equal protection violation alleged"). The claim thus suffers the same infirmities explained above: Because the former Attorney General and FBI Director did not dictate or specify the conditions complained of, they

cannot be liable individually even if those conditions were applied in a discriminatory manner.

As explained above, plaintiffs allege only that Ashcroft and Mueller used race, religion, and national origin or ethnicity as a basis to call for the investigation of certain immigration violators, and then sought to encourage their cooperation in any (lawful) way possible. The district court recognized that the mere arrest and detention of alien immigration violators does not violate equal protection principles, even if based on a classification that includes race, religion or national origin. SPA 37 (classifications of immigrants "on the basis of race, religion and national origin for purposes of arrest and detention *** do not constitute equal protection violations standing alone"). The court recognized "the broad powers of the political branches in the areas of immigration and naturalization," and pointed out that in the immigration context, "discrimination on grounds of race, religion and national origin is not invidious." *Id.* at 38 (citing *Reno* v. *Arab-American Anti-Discrim. Comm.*, 525 U.S. 471, 490-491 (1999)).

Thus, in order to prevail on their equal protection claim, plaintiffs must show that Ashcroft and Mueller required impermissible conditions of confinement (not merely arrest or detention) to be imposed on a discriminatory basis. But, as the district court correctly held, plaintiffs' complaint alleges only that the former Attorney General and FBI Director adopted a general policy of encouraging detainees to cooperate by using lawful means. SPA 31-32. Even to the extent that detainees may have been categorized on the basis of religion or national origin, therefore, they suffered no constitutional injury because of the conduct of the former Attorney General and FBI Director.

The district court thus properly rejected plaintiffs' equal protection claim as to Ashcroft and Mueller because the complaint's "allegations of lawful conduct" cannot "support an inference that the DOJ Defendants created the facially discriminatory confinement policy alleged here." See SPA 38. The court explained that plaintiffs' effort to link Ashcroft and Mueller to the harsh treatment "requires inference upon inference," and noted that "those inferences are very weakly suggested." *Ibid.*; see also *ibid.*

(allegation that Ashcroft and Mueller "were aware that Arab and Muslim noncitizens encountered during the PENTTBOM investigation were, without individualized assessment, automatically treated as 'of interest'" is "consistent with a policy to treat everyone encountered during the PENTTBOM investigation as 'of interest,'" and is therefore "insufficient to render the plaintiffs' equal protection claim plausible").

It does not avail plaintiffs to highlight insubstantial distinctions between the complaint here and the allegations the Supreme Court found implausible in *Iqbal*. As the district court observed, alleging that Ashcroft and Mueller "knew that law enforcement lacked any information tying the Detainees to terrorism" is not sufficient to impute to the former Attorney General and FBI Director an unconstitutional intent to subject the detainees to particular conditions of confinement. SPA 39. Indeed, it is simply irrelevant to the inquiry here – whether the former Attorney General and FBI Director themselves directed the use of any improperly harsh treatment measures – that defendants allegedly did or did not have knowledge concerning the culpability of detainees.

Plaintiffs make much of their allegation that some non-Arab and non-Muslim immigration violators who were also subject to arrest and detention may have been treated differently than plaintiffs. Pl. Br. 42-43 (citing JA __ (Dkt# 726, at 14)). But the complaint in this respect says only that the subordinate investigating and custodial officials treated plaintiffs differently, not that Ashcroft and Mueller directed them to do so: "The *resulting investigation* focused on men who were Muslim and South Asian or Arab, or who were perceived as such." JA __ (Dkt# 726, at 14) (emphasis added). That allegation makes no mention of the former Attorney General or FBI Director, and it follows a discussion about the perception of an FBI field office head, which the district court explained was not a plausible basis to impute to Ashcroft and Mueller a specific intent to impose impermissible treatment conditions on plaintiffs because of their religion, ethnicity, or national origin. See SPA 38.

Plaintiffs also improperly magnify and take out of context the district court's discussion of the differences between the allegations in this case and those discussed by the Supreme Court in *Iqbal*. Pl. Br. 42-44. But the

district court correctly concluded that the additional allegations – including allegations that Ashcroft and Mueller "knew that law enforcement lacked any information tying the Detainees to terrorism," and that "the few individuals initially detained in harsh conditions who were not Arab or Muslim were cleared quickly or moved into the general population without clearance" – were not sufficient, even "viewed together with all the allegations in the Complaint," to "plausibly suggest that the DOJ Defendants purposefully directed the detention of the plaintiffs in harsh conditions of confinement due to their race, religion or national origin." SPA 39-40. Plaintiffs suggest the district court improperly used subjective criteria, and should have given them the benefit of the doubt. But that misreads the district court's decision. The court did not rely on the judge's "subjective impressions," and did not rest on a determination that any suggestion of wrongdoing "is subject to doubt." Pl. Br. 44.

Plaintiffs' argument is based on the district court's comment that "I find the issue to be a close one." SPA 39. It is not clear what issue the court refers to, but nothing suggests that the court improperly introduced any

subjective element into the analysis. The preceding discussion in the court's opinion instead focuses entirely on the legal question whether the allegations in this case are sufficient to plausibly establish that the actions of Ashcroft and Mueller themselves violated the Constitution. And the remainder of the sentence confirms the court's proper focus on the objective legal inquiry set forth in *Iqbal*: the court concluded that the allegations as a whole "do not plausibly suggest that the DOJ Defendants purposefully directed the detention of the plaintiffs in harsh conditions of confinement due to their race, religion or national origin." *Id.* at 40.

It is irrelevant whether any "[n]eutral investigative intent can[] explain the difference between treatment of Muslims and non-Muslims alleged here." Pl. Br. 43. In light of the district court's reliance on the well-established proposition that investigation, arrest, and detention in the immigration context may be based on religion or national origin, the only question is whether Ashcroft and Mueller themselves directed improperly harsh treatment on a constitutionally prohibited basis. Because, as the district court explained, the complaint does not support a conclusion that

the former Attorney General and FBI Director themselves imposed or required the conditions of confinement plaintiffs complain of, there is no occasion even to inquire about their motivation.

For that reason, it is likewise irrelevant whether plaintiffs alleged any animus toward any detainees' religion, ethnicity, or national origin. Any classification by Ashcroft or Mueller on those bases was, according to the complaint's allegations, only done for purposes of investigation, arrest, and detention, and there is no constitutional prohibition against such classifications in the unique area of the enforcement of immigration laws. As this Court recognized in the earlier appeal in this case, Supreme Court case law demonstrates that there was "no authority clearly establishing an equal protection right to be free of selective enforcement of the immigration laws based on national origin, race, or religion." *Turkmen*, 589 F.3d at 550 (citing *American-Arab Anti-Discrim.*, 525 U.S. at 490-491; *Zadvydas* v. *Davis*, 533 U.S. 678, 696 (2001); *Mathews* v. *Diaz*, 426 U.S. 67, 81-

82 (1976)).[6] It is thus not sufficient to allege merely "that Muslims and Arabs were treated differently than similarly situated non-Muslims and non-Arabs." Pl. Br. 44. The relevant inquiry is whether the treatment at issue goes beyond the permissible immigration investigation, arrest, and detention that were alleged here to be linked to Ashcroft and Mueller.

This Court's decision in *Iqbal* is not to the contrary. The opinion there (prior to the Supreme Court's decision) suggested that the government might not be free to "subject members of a particular race, ethnicity, or religion to more restrictive *conditions of confinement* than members of other races, ethnic backgrounds, or religions." *Iqbal* v. *Hasty*, 490 F.3d at 175 (emphasis added). As we have explained, however, the complaint does not allege that Ashcroft and Mueller specified any particular conditions of confinement. The facially lawful policy they allegedly adopted thus cannot support plaintiffs' equal protection claims.

---

[6] Plaintiffs do not appear to dispute this Court's earlier statement of the law, nor do they take issue with the district court's reliance on the well-established proposition that investigation, arrest, and detention in the immigration context may be based on religion or national origin.

The Supreme Court in *Iqbal* confirmed precisely this point, explaining that, "even if the complaint's well-pleaded facts give rise to a plausible inference that respondent's arrest was the result of unconstitutional discrimination, that inference alone would not entitle respondent to relief" because the gravamen of the claim in that case (as here) was not "the constitutionality of his arrest nor his initial detention," but the specific conditions of confinement entailed in holding certain detainees in the MDC ADMAX SHU. *Iqbal*, 556 U.S. at 682. The Supreme Court made clear that the plaintiff in *Iqbal* was required to allege facts plausibly showing that the former Attorney General and FBI Director "purposefully adopted a policy" that itself mandated those conditions of confinement because of detainees' race, religion, or national origin. *Ibid.*[7] Plaintiffs' arguments do not address that key requirement.

---

[7] The plaintiff in *Iqbal* claimed that he had been detained in the ADMAX SHU because of a policy of "classifying post–September–11 detainees as 'of high interest' because of their race, religion, or national origin." 556 U.S. at 682. In both cases, "other defendants, who are not before us, may have" taken steps that caused the plaintiffs to be detained in

Continued on next page.

And it is likewise insufficient for plaintiffs to allege (without any apparent basis) merely that the former Attorney General and FBI Director knew that, with respect to some detainees, there was no evidence at the time of the investigation explicitly connecting them to terrorism. Pl. Br. 46 ("Both men were aware that this would result in the arrest of many individuals about whom they had no information to connect to terrorism.") (quoting JA __ (Dkt# 726, at 13)). That carefully crafted allegation actually says very little of substance, as the absence of knowledge about a connection to terrorism is not equivalent to knowledge of the absence of such a connection. It is in no way inconsistent with *Iqbal*'s assumption that the policy decisions of the former Attorney General and FBI Director could have been motivated by a desire to locate and question immigration violators with "*potential* connections to those who committed terrorist acts," *Iqbal*, 556 U.S. at 682 (emphasis added), as any actual connection would not necessarily be known at the time of investigation. Plaintiffs'

---

particular conditions, but there is no allegation linking Ashcroft or Mueller to those assertedly impermissible actions. *Ibid.*

allegation is thus unsurprising, in light of the necessarily widespread effort to gather as much information as possible following the terrorist attacks. And it is fundamentally irrelevant, as it says nothing about the conditions of their confinement.

* * * *

The district court properly analyzed the complaint's limited allegations concerning the conduct of the former Attorney General and FBI Director, using the standard of plausibility required by *Iqbal*. In the absence of any indication that those high-ranking government officials required the conditions of confinement that plaintiffs complain of, the complaint fails to "state a claim to relief" against Ashcroft and Mueller "that is plausible on its face." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Their dismissal from this suit was therefore proper.[8]

[8] Plaintiffs offer no separate argument concerning their conspiracy allegations. See Pl. Br. 30, 50. Those claims were properly dismissed along with the underlying counts.

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing John Ashcroft and Robert Mueller should be affirmed.

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

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

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

NOVEMBER 2013

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Palatino Linotype, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,092 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

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

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2013, I electronically filed the foregoing Proof Brief For Defendants-Cross-Appellees John Ashcroft And Robert Mueller with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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

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