

No. CLS 2009-1

In The
Supreme Court of the United States

January Term, 2009

Robert STRYKER, Attorney General of the United States, and
John CORR, Director of the Federal Bureau of Investigation,
Petitioners

v.

Mohammed YUSUF,
Respondent

*On Writ of Certiorari to the
United States Court of Appeals for the Thirteenth Circuit*

RECORD

Cornell Law School
2009 WINTER CUP MOOT COURT COMPETITION

**IN THE
COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT**

Mohammed YUSUF,

Plaintiff-Appellee,

CASE NO: CLS 2009-1

v.

Robert STRYKER, Attorney General of the United States;
John CORR, Director of the Federal Bureau of Investigation,

Defendants-Appellants

Before LUKAS, Chief Judge, and HUNTER and RAINES, Circuit Judges.

OPINION

LUKAS, Chief Judge, with whom RAINES, Circuit Judge, joins.

The present appeal illustrates the unique procedural problems that arise when a private party sues a high-level public official, who then claims qualified immunity. Under the Federal Rules of Civil Procedure, a plaintiff’s complaint must include “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). In this case, we are asked to determine whether a complaint sufficiently states a claim against two high-level government officials—the Attorney General of the United States and the Director of the Federal Bureau of Investigation—where the complaint alleges that these officials knew of, condoned, and agreed to implement a policy of harsh confinement, solely on account of the plaintiff’s religion, race, or national origin. We conclude that the complaint states a plausible entitlement to relief that is sufficient to withstand the government officials’ motion to dismiss.

FACTUAL AND PROCEDURAL BACKGROUND

Immediately after the attacks of September 11, 2001, the Federal Bureau of Investigation (“FBI”) and other segments of the United States Department of Justice launched a massive investigation to identify those involved in the attacks and to disrupt any follow-on attacks. Within a few days, nearly 10,000 FBI Special Agents and support personnel were assigned to work on the investigation. In the first two months of the investigation, the FBI questioned more than one thousand people suspected of having ties to terrorism. Federal officials also arrested and detained over 700 aliens for violating immigration laws.

The Allegations

The plaintiff, Mohammed Yusuf, is a Muslim Pakistani currently residing in Pakistan. The complaint alleges the following facts, which we assume to be true when reviewing a district court's ruling on a motion to dismiss.¹

Shortly after the September 11 attacks, Yusuf was arrested in Myron City, Cascadia by federal agents. *See* Compl. ¶ 80. He was charged with crimes unrelated to terrorism.² From November 2001 until January 2002, Yusuf was detained at the Metropolitan Detention Center (“MDC”) in Myron City, where he was initially housed in the general population unit. *See* Compl. ¶ 81. Beginning in January 2002, however, Yusuf was transferred for more than 150 days to an Administrative Maximum Special Housing Unit (“AdMax unit”) within the MDC. *See* Compl. ¶ 81.

According to Yusuf, he was held in the AdMax unit because he was presumptively categorized as being “of high interest” to the September 11 investigation, solely because of his race, religion, and national origin—not because of any involvement in terrorism. *See* Compl. ¶¶ 48-53, 96. In the AdMax unit, Yusuf was subjected to abusive conditions, including being placed in solitary confinement, undergoing unnecessary and abusive strip searches, and being beaten by correction officers. *See* Compl. ¶¶ 60, 63, 84, 87, 89, 113, 116-17, 120, 122, 137-48, 153-54, 158. The complaint alleges that Yusuf experienced these harsh conditions of confinement *as a matter of policy*, solely based on his religion, race, and national origin. *See* Compl. ¶ 96.

¹ Yusuf's complaint is included with this decision as Appendix A. Several factual allegations have been omitted from the complaint because they are not relevant to the present appeal. Furthermore, since this appeal only involves the Eleventh and Twelfth causes of action, all of the other causes of action have been omitted.

² The complaint does not identify the charges on which Yusuf was arrested, but the district court's opinion indicates that he was charged with identity fraud. Yusuf ultimately pleaded guilty to the criminal charges against him. He does not challenge the validity of his arrest.

Litigation in the District Court

In May 2004, Yusuf commenced this action against nearly two dozen defendants, *see* Compl. ¶¶ 9-46, seeking compensation for the role that they played in subjecting him to the harsh conditions of confinement in the AdMax unit. The defendants named in the complaint ranged from rank-and-file correction officers, to mid-level prison administrators, to high-level members of the executive branch: Robert Stryker, the United States Attorney General, and John Corr, the Director of the FBI. Yusuf brought claims under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), for violations of his First, Fourth, Fifth, Sixth, and Eighth Amendment rights, as well as various statutory claims. *See* Compl. ¶¶ 2-3. In this appeal, brought by Stryker and Corr, we consider only the alleged First and Fifth Amendment violations (the Eleventh and Twelfth causes of action in the complaint).

In the district court, all of the defendants moved to dismiss Yusuf's complaint on the grounds that they were protected by qualified immunity. The district court denied the motions to dismiss. Only two of the original defendants, Stryker and Corr, have appealed the district court's denial of their motion to dismiss.

DISCUSSION

This case involves the interplay between two important areas of federal civil litigation: pleading standards and the qualified immunity doctrine. To understand how qualified immunity is processed through the Federal Rules of Civil Procedure, we must survey several important legal principles.

I. General Principles of Pleading and Qualified Immunity

a. Standard of Review

Because this appeal is from the denial of a Rule 12(b)(6) motion to dismiss, we are required to accept as true the material facts alleged in the complaint, *see Zinermon v. Burch*, 494 U.S. 113, 118 (1990), and to read the complaint liberally, drawing all reasonable inferences in the plaintiff's favor, *see Fed. R. Civ. P. 12(b)(6)*.

b. Background on Bivens Actions and Qualified Immunity

Federal public officials in the United States may be sued for violating an individual's constitutional rights under a line of Supreme Court cases beginning with *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).³ *Bivens* actions are an important mechanism by which the courts enforce constitutional norms. "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Indeed, by permitting damages suits against federal officials, the decision in *Bivens* underscores the bedrock principle of our legal system that "[t]he very essence of civil liberty . . . consists in the right of every individual to claim protection of the laws, whenever he receives an injury." *Bivens*, 403 U.S. at 397 (quoting *Marbury v. Madison*, 1 Cranch 137, 163 (1803)).

Although damages litigation against public officials serves to increase compliance with the law, such litigation also imposes serious social costs. One cost is that the "fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). For example, the possibility of a

³ A *Bivens* claim targets federal officials. A party may sue state officials for civil rights violations under 42 U.S.C. § 1983. In *Hartman v. Moore*, 547 U.S. 250 (2006), the Supreme Court referred to *Bivens* as "the federal analog to suits brought against state officials under" Section 1983. *See id.* at 254 n.2.

damages suit can undermine an official's "willingness to execute his office with the decisiveness and the judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 239–40 (1974). Moreover, once it has been initiated, a damages suit risks "diver[ting] . . . official energy from pressing public issues." *Harlow*, 457 U.S. at 814.

Though our legal system permits individuals to vindicate their constitutional rights through damages actions, it also seeks to minimize the costs of unmeritorious litigation. The primary way in which the Supreme Court has attempted to balance these competing policies is by providing public officials with forms of immunity from suit. In *Harlow v. Fitzgerald*, the Court adopted the modern standard for qualified immunity. That standard provides that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818.

c. The Qualified Immunity Defense

Qualified immunity is an immunity from suit, not just a defense to liability. *See Saucier v. Katz*, 533 U.S. 194, 200 (2001). Under *Saucier*, a defendant will be entitled to qualified immunity if either (1) his actions did not violate clearly established law, or (2) it was objectively reasonable for him to believe that his actions did not violate clearly established law.⁴ In determining whether a right was clearly established, the court must assess whether "[t]he contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640.

⁴ In *Saucier*, the Supreme Court instructed lower courts to approach the question of qualified immunity through a mandatory two-step sequence, asking (1) whether the plaintiff has stated a legally recognized claim for the violation of a federal right, and (2) whether the right in question was one that was "clearly established" at the time of the challenged conduct. As we write this opinion, the Supreme Court is reconsidering this two-step formulation. *See Pearson v. Callahan*, 128 S. Ct. 1702 (2008) (*certiorari* granted). Whether or not the Court modifies the order of analysis, we must continue to assume that both elements of the *Saucier* analysis are good law.

d. Personal Involvement

A government official's "personal involvement" in a constitutional violation is a prerequisite to that official's personal liability for damages. *See Polk County v. Dodson*, 454 U.S. 312, 316 (1981) (referring to "the requisite personal involvement to state a [civil rights] claim"). In the context of constitutional claims against supervisory government officials, the requirement of personal involvement amplifies the well-established doctrinal bar on recovering damages under a theory of *respondeat superior*. *See Board of County Commissioners v. Brown*, 520 U.S. 397, 415 (1997).

In this case, both Stryker and Corr claim that they are entitled to qualified immunity because Yusuf failed to allege their personal involvement in the challenged acts of religious and racial discrimination. *See* Compl. ¶¶ 231-36. Stryker and Corr are high-level supervisory officials. In the Thirteenth Circuit, as in other Circuits, the personal involvement of a supervisor may be established by showing that he (1) directly participated in the violation, (2) failed to remedy the violation after being informed of it by report or appeal, (3) created a policy or custom under which the violation occurred, (4) was grossly negligent in supervising subordinates who committed the violation, or (5) was deliberately indifferent to the rights of others by failing to act on information that constitutional rights were being violated. *Cf. Williams v. Smith*, 781 F.2d 319 (2d Cir. 1986). A lack of personal involvement is relevant to a qualified immunity defense because it goes to the question of whether a defendant's actions violated a clearly established right. If a defendant was not personally involved, he cannot have violated a constitutional right.

e. Pleading Requirements

The parties fundamentally disagree about the extent to which a plaintiff must plead specific facts to overcome a defense of qualified immunity at the motion-to-dismiss stage.

Stryker and Corr argue that a complaint’s “conclusory allegations” do not suffice to withstand a qualified immunity defense, especially with respect to allegations of supervisory involvement and racial or religious discrimination. Yusuf contends that Stryker and Corr are essentially seeking a heightened pleading standard that improperly exceeds the requirements of Rule 8(a)(2).

The pleading standard to overcome a qualified immunity defense is an unsettled question in this Circuit. For guidance, we look to four Supreme Court precedents that deal with pleading requirements in a variety of contexts: *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993); *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002); *Crawford-El v. Britton*, 523 U.S. 574 (1998); and *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

In *Leatherman*, the Court rejected a heightened pleading standard in a civil rights action alleging municipal liability; instead, it applied the traditional requirement of “a short and plain statement of the claim showing that the pleader is entitled to relief.” 507 U.S. at 168 (quoting Fed. R. Civ. P. 8(a)(2)). The *Leatherman* Court did, however, distinguish between municipalities’ immunity from *respondeat superior* liability and government officials’ qualified immunity from suit. *See id.* at 166. In a sense, then, the opinion leaves open the question of whether courts might require a plaintiff to satisfy a heightened pleading standard to overcome a government official’s defense of qualified immunity. *See id.* at 167. However, the *Leatherman* Court goes on to suggest that heightened pleading standards are only permissible when authorized by Rule 9(b). *See id.* at 168.

In *Swierkiewicz*, the Court considered the pleading requirements for a Title VII employment discrimination complaint. *Swierkiewicz* rejected a rule that would have required

plaintiffs to allege facts constituting a *prima facie* case of employment discrimination. *See* 534 U.S. at 515. As in *Leatherman*, the Court again emphasized that a heightened pleading standard would conflict with the text of Rule 8(a), and that a heightened standard could only be attained “by the process of amending the Federal Rules, and not by judicial interpretation.” *Id.*

However, in *Crawford-El*, the Supreme Court suggested in dicta that, in some circumstances, a court could require “specific, nonconclusory factual allegations” at the pleading stage in claims against government officials. *See* 523 U.S. at 598 (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring)). At issue in *Crawford-El* was a D.C. Circuit holding that required a plaintiff to offer clear and convincing evidence of a defendant’s state of mind to survive a motion for summary judgment in unconstitutional motive cases. *See id.* at 584–85. The Supreme Court rejected the D.C. Circuit’s rule, and concluded that “broad discretion” in the discovery process is more “useful and equitable” than categorical rules. Though pleading requirements were not directly at issue in *Crawford-El*, portions of the opinion caution lower courts to “exercise . . . discretion in a way that protects the substance of the qualified immunity defense . . . so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings.” *See id.* at 597–98. This language arguably supports Stryker’s and Corr’s contention that liberal pleading rules are in tension with the purposes of the qualified immunity defense.

Most recently, the *Bell Atlantic* decision has created general uncertainty about the standard for assessing the adequacy of pleadings. The Supreme Court indicated in *Bell Atlantic* that it intended to make some change in the regime of pure notice pleading that had existed since *Conley v. Gibson*, 355 U.S. 41 (1957). There are several signals in the opinion that can be read to suggest a new and heightened pleading standard. For example, the Court retired the “no set of

facts” language from *Conley*, 355 U.S. at 45–46, explaining that an overly literal reading of that earlier decision would permit “a wholly conclusory statement of claim [to] survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish ‘some set of [undisclosed] facts’ to support recovery.” *Bell Atlantic*, 127 S. Ct. at 1968.

After carefully considering the *Bell Atlantic* opinion, however, we believe that the Supreme Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible “plausibility standard,” which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.⁵ As discussed below, *see* Part II, we conclude that Yusuf’s complaint survives a motion to dismiss under the *Bell Atlantic* plausibility approach.

II. Causes of Action Based on Religious and Racial Discrimination

Having discussed the various legal principles that apply to pleading and qualified immunity, we can now turn to the two specific claims against Stryker and Corr: the Eleventh cause of action, alleging religious discrimination in violation of the First Amendment, and the Twelfth cause of action, alleging racial discrimination in violation of the Fifth Amendment. Since both claims deal with allegations of animus, we consider them together.

In this case, Yusuf’s claims are based on long-established constitutional rights under the First and Fifth Amendments. *See, e.g., Cooper v. Pate*, 378 U.S. 546 (1964) (barring discrimination in conditions of confinement on the basis of religion); *Lee v. Washington*, 390 U.S. 333 (1968) (barring discrimination in conditions of confinement on the basis of race).

⁵ Under the plausibility approach, a conclusory allegation concerning some elements of a plaintiff’s claim might need to be supplemented by a response to a defendant’s motion for a more definite statement. *See* Fed. R. Civ. P. 12(e). In addition, where qualified immunity is an issue, a trial court “*must* exercise its discretion in a way that protects the substance of the qualified immunity defense . . . so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings.” *Crawford-El*, 523 U.S. at 597–98 (emphasis added).

Stryker and Corr argue that, despite this clearly established jurisprudence specifically condemning the precise behavior alleged in this case, they are entitled to qualified immunity because of the unique context of the September 11 tragedy.

We fully recognize the gravity of the situation that confronted government officials as a consequence of the September 11 attack. In addition, we acknowledge that some forms of government action are permitted in emergency situations that would exceed constitutional limits in normal times. *See Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 425–26 (1934) (“While emergency does not create power, emergency may furnish the occasion for the exercise of power.”). However, the right to be free from racial or religious discrimination does not vary with the surrounding circumstances. *Cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (“It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.”).

Because the essence of this appeal is a challenge to the adequacy of Yusuf’s allegations, we refer attentively to the language that appears in the complaint to assess whether it states a plausible claim for relief. Yusuf alleges that he was deemed to be “of high interest,” and accordingly was kept in the AdMax unit under harsh conditions, solely because of his race, ethnicity, and religion. *See* Compl. ¶ 51. Yusuf also alleges that the “Defendants specifically targeted [him] for mistreatment because of [his] race, religion, and/or national origin.” *See* Compl. ¶ 198. These allegations are sufficient to state a claim of animus-based discrimination that any reasonably competent officer would understand to have been illegal under prior case law. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986). We find that Yusuf’s racial, ethnic, and

religious discrimination claims cannot be dismissed on qualified immunity grounds at this stage of the litigation.

Stryker and Corr argue that Yusuf’s allegations of racial, ethnic, and religious animus are too conclusory. But, as discussed above, *Crawford-El* teaches us that courts cannot require a heightened pleading standard for civil rights complaints involving improper motive. Here, Yusuf’s allegations suffice to state claims of racial, ethnic, and religious discrimination. He alleges in particular that FBI agents classified him “of high interest” solely because of his race, ethnic background, and religion, and not because of any evidence of involvement in terrorism. *See* Compl. ¶ 51. Yusuf offers additional factual support for this allegation, stating that “within the Myron City 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.” Compl. ¶ 52. In addition, Yusuf alleges that, under the policy created and implemented by Stryker and Corr, he was singled out for unnecessarily punitive conditions of confinement based on his racial, ethnic, and religious characteristics. *See* Compl. ¶¶ 10, 11, 96, 97. The combination of these allegations suffices to state a clearly established constitutional violation.

Finally, Stryker and Corr contend that Yusuf has failed to allege their personal involvement in any discrimination. The complaint, however, alleges broadly that Stryker and Corr were instrumental in adopting the “policies and practices challenged here.” Compl. ¶¶ 10, 11. The complaint also alleges that the FBI, “under the direction of Defendant Corr,” arrested thousands of Arab Muslims, and that Stryker and Corr “knew of, condoned, and willfully and maliciously agreed to subject [Yusuf] to these 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.” See Compl. ¶¶ 47, 96 (emphasis added). While Yusuf’s complaint acknowledges that other FBI officials made the actual determination that he was “of high interest,” see Compl. ¶¶ 50, 51, this concession does not necessarily insulate Stryker and Corr from personal responsibility for the actions of their subordinates under the standards of supervisory liability set forth above, see Part I(d). It is likely that senior officials like Stryker and Corr would have concerned themselves with the formulation and implementation of policies dealing with the detention and confinement of those arrested on federal charges in the Myron City area and designated “of high interest” in the wake of September 11. We therefore conclude that Yusuf’s allegation that Stryker and Corr condoned and agreed to the discrimination satisfies the *Bell Atlantic* plausibility standard without needing further allegations of subsidiary facts. If, as court-supervised discovery proceeds, Stryker and Corr believe that the emerging facts refute Yusuf’s allegations of their personal involvement, they remain free to move for summary judgment.

Conclusion

For the foregoing reasons, we **AFFIRM** the district court’s denial of Stryker’s and Corr’s motions to dismiss Yusuf’s claims of religious and racial discrimination.

Dated: October 18, 2008

/s/ _____
Lukas, Chief Judge, and Raines, Circuit Judge.

The Court of Appeals for the Thirteenth Circuit

DISSENT

HUNTER, Circuit Judge, dissenting.

The majority and I agree that tension exists between the need to deter unlawful conduct, on the one hand, and the dangers of exposing public officials to burdensome litigation, on the other. Today the majority strikes the wrong balance between those competing concerns and jeopardizes the “national interest in enabling Cabinet officers with responsibilities in [the national security] area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation.” *Mitchell v. Forsyth*, 472 U.S. 511, 541 (1985) (Stevens, J., concurring). From now on, plaintiffs in the Thirteenth Circuit can simply follow the blueprint laid out by this lawsuit to require high-level officials with national security responsibilities to submit to lengthy and vexatious discovery.

By permitting this suit to proceed against Attorney General Stryker and Director Corr, the majority violates several established principles. First, courts should engage in a “firm application” of the Federal Rules of Civil Procedure when considering motions to dismiss based on qualified immunity. *See Butz v. Economou*, 438 U.S. 478, 508 (1978). Second, courts should resolve qualified immunity claims “at the earliest possible stage in litigation” to instantiate the policies at the heart of the qualified immunity doctrine. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). Third, courts should “insist” that a plaintiff “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.” *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (internal quotation marks omitted). Finally, courts should dismiss complaints that fail to allege sufficient facts to cross “the line between possibility and plausibility.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1966 (2007).

I. The Majority Improperly Permits Complaints To Proceed To Discovery Based On Mere Conclusory Allegations Of Wrongdoing

The Supreme Court has long recognized that government officials face significant burdens when they are forced to defend damages claims filed against them for actions taken in connection with their employment. As the Supreme Court explained in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982):

Each such suit [against high-level government officials] almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications at the presidential and cabinet levels. Such discover[y] is wide-ranging, time-consuming, and not without considerable cost to the officials involved.

Id. at 817 n.29 (quoting *Halperin v. Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring)).

In light of these considerable costs, it is especially important for federal courts to sift out insubstantial claims against high-level government officials before discovery commences. By applying an overly lenient interpretation of Rule 8(a) and failing to dismiss Yusuf’s claims against the Attorney General and the Director of the FBI, the majority is not fulfilling its important gatekeeping function. Even without considering Stryker’s and Corr’s qualified immunity defense (which, I believe, changes the calculus), the complaint against them should not go forward.

Rule 8(a)(2) requires a complaint to include “a short and plain statement of the claim showing that the pleader is entitled to relief.” While that rule eliminated the requirement that a claimant “set out *in detail* the facts upon which he bases his claim,” *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (emphasis added), the rule:

[S]till requires a “showing,” rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only “fair notice” of the nature of the claims, but also “grounds” on which the claim rests.

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965 n.3 (2007).

Bell Atlantic held that Rule 8(a) requires a complaint to include sufficient “factual matter” to provide “plausible grounds” to infer that the allegations of the complaint are true. *Id.* at 1965. It held that a standard of plausibility “reflects the threshold requirement of Rule 8(a)(2) that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’” *Id.* at 1966. The Court explained that a test requiring plausibility is not so strict as to require “probability,” but nonetheless requires more than that the allegations are merely possible or conceivable. *Id.* at 1966, 1974.

My colleagues are able to find that Yusuf meets *Bell Atlantic*’s “plausible grounds” standard only by contorting that standard beyond recognition. The complaint includes *no* factual assertions to support its conclusory allegations that Stryker and Corr “knew of,” “condoned,” and “agreed to” the allegedly discriminatory treatment of Yusuf. *See* Compl. ¶ 96. While apparently conceding that the complaint includes no allegations of subsidiary facts, the majority nonetheless deems the claims against Stryker and Corr to be plausible because of a mere supposition that Stryker and Corr *might* have had some involvement in the decision to place the plaintiff into restrictive conditions of confinement.

The majority’s understanding of what constitutes a “plausible” claim cannot be reconciled with the Supreme Court’s decision in *Bell Atlantic*. *Bell Atlantic* made clear that the mere possibility that the allegations of a complaint are true is not sufficient to meet the requirements of Rule 8(a). Though it is theoretically possible that Stryker and Corr, while carrying out the most massive anti-terrorist operation in American history, took the time to

concern themselves with the precise criteria lower-level officials used to determine which Myron City-area detainees should be deemed “of high interest,” Yusuf has included nothing in his complaint to suggest that that scenario is *plausible*.

In support of its decision to allow Yusuf’s discrimination claims to proceed, the majority also cites the complaint’s allegation that “within the Myron City area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following investigative leads 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.” Compl. ¶ 52. But even if true, that allegation provides no support for Yusuf’s claims. It took a finding that an MDC detainee was “of *high* interest”—not merely “of interest”—before the detainee was placed in MDC’s AdMax unit. Accordingly, the alleged policy of which Yusuf complains does not add plausibility to his claim that he was transferred to the AdMax unit for discriminatory reasons. More importantly, the allegation that such a policy existed tends to undercut the allegation of direct involvement by Stryker and Corr. If senior Department of Justice officials based in Washington, D.C. had adopted a detailed policy regarding which federal detainees were to be deemed “of high interest” in the post-September 11 investigation, one would expect that policy to apply uniformly nationwide. Yusuf’s allegation that Arab Muslim men were treated in a discriminatory manner *in the Myron City area* therefore suggests that the alleged official policy of discrimination originated among lower-level federal officials based in Myron City, not out of Stryker’s and Corr’s offices in Washington.

In determining that the complaint meets Rule 8(a)’s pleading standards, the majority relies primarily on two recent Supreme Court decisions: *Crawford-El v. Britton*, 523 U.S. 574 (1998) and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). Neither decision is pertinent.

Swierkiewicz held that when a Title VII plaintiff alleges that he was discharged based on discriminatory animus, he meets the requirements of Rule 8(a) without having to assert specific facts to support the claim of discriminatory motive; it is enough that he clearly alleges the discriminatory act in question. *See* 534 U.S. at 515. In *Crawford-El*, the Court held that when an inmate alleges that a prison official took adverse action against him in retaliation for the inmate's exercise of First Amendment rights, the inmate need not assert facts demonstrating that the defendant harbored retaliatory intent; it is enough that the prisoner identifies the specific adverse action allegedly taken by the prison official. *See* 523 U.S. at 592. Here, the majority concludes that these two precedents require it to simply accept Yusuf's allegation that Stryker and Corr acted with discriminatory intent.

However, the basic issue here is not whether Stryker and Corr harbored discriminatory motives when they took action with respect to Yusuf. Rather, the issue is whether they took any actions *at all* with respect to Yusuf. In the absence of any factual allegations rendering it more than a theoretical possibility that Stryker and Corr were directly involved in the decision to place Yusuf into the AdMax SHU, the complaint fails to meet Rule 8(a)'s pleading requirements.

II. The Majority Fails To Preserve The Substance Of Qualified Immunity

The deficiencies in Yusuf's complaint are intensified when one considers that Stryker's and Corr's motion to dismiss arises in connection with an assertion of qualified immunity. Since *Harlow v. Fitzgerald*, it is well-established that government officials are shielded from personal damages liability as long as their conduct does not violate a plaintiff's "clearly established" constitutional rights. In a number of cases, the Supreme Court has elaborated on the qualified immunity doctrine. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Anderson v. Creighton*, 483 U.S. 635 (1987); *Hunter v. Bryant*, 502 U.S. 224 (1991); *Behrens v. Pelletier*, 516 U.S. 299

(1996); *Saucier v. Katz*, 533 U.S. 194 (2001). As I read these cases, an important corollary of the qualified immunity doctrine is that a qualified immunity claim—such as the one made here by Stryker and Corr—cannot be defeated simply by broad allegations that a government official was generally responsible for the allegedly unconstitutional actions of a subordinate.

When a complaint makes only conclusory allegations that senior government officials approved a policy that ultimately resulted in the plaintiff being treated in a discriminatory manner, the complaint has failed to demonstrate that the government officials acted in violation of “clearly established” constitutional rights in light of the specific facts confronting those officials. As the Supreme Court explained in *Anderson*, “[O]ur cases establish that the right the official is alleged to have violated must have been ‘clearly established’ in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” 483 U.S. at 640.

Thus, it is clear that a court reviewing a qualified immunity defense must determine whether the plaintiff alleges that the defendant took specific actions that a reasonable official would have understood—based on specific facts known to the official at the time of his actions—violated the plaintiff’s rights. Such a particularized inquiry is impossible unless the complaint sets forth factual allegations with sufficient specificity to allow the reviewing court to determine “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Saucier*, 533 U.S. at 202.

In this case, Yusuf alleges that Stryker and Corr adopted an unspecified policy that led to Yusuf being placed into solitary confinement because of his religion, race, and nationality. However, by failing to answer such basic questions as “when,” “where,” “how,” and “with whom” Stryker and Corr are supposed to have involved themselves in the decision to subject

Yusuf to harsh conditions of confinement, the complaint does not adequately allege that Stryker and Corr violated clearly established law.

As a more general matter, and despite the impression created by the majority, the Supreme Court has never before considered whether the assertion of a qualified immunity defense should bar recognition of a *Bivens* action against high-level federal officials in the absence of detailed factual allegations of misconduct by those officials. When the issue arose in cases brought under 42 U.S.C. § 1983, the Court naturally expressed reluctance to expand the qualified immunity defenses of such officials, stating that any such expansion should be initiated by Congress. *See Crawford-El*, 523 U.S. at 597. As Justice Kennedy pointed out in his concurrence, because it was Congress that created the § 1983 right of action against state and local government officials, the power to alter pleading standards in such cases “lies with the Legislative Branch, not with us.” *Id.* at 601 (Kennedy, J., concurring).

In contrast, *Bivens* actions are a judicial creation. It is therefore wholly fitting for courts to determine the contours of a *Bivens* action. *See Wilkie v. Robbins*, 127 S. Ct. 2588, 2597 (2007) (judicial recognition of such actions “has to represent a judgment about the best way to implement a constitutional guarantee”). In determining those contours, courts must ensure that federal officials are not deprived of the opportunity to have their qualified immunity claims decided at the earliest possible stage of litigation. *See Hunter v. Bryant*, 502 U.S. 224, 227 (1991). Accordingly, I would hold that a claim of qualified immunity should be overcome at the motion-to-dismiss stage only if a *Bivens* plaintiff provides, specific, non-conclusory factual allegations sufficient to plausibly suggest that a high-level government official violated a clearly established constitutional right.

Conclusion

It is troubling that the majority does not give due weight to the unique context of this suit. At the time of their allegedly unlawful conduct, Stryker and Corr were trying to cope with a national and international security emergency that was unprecedented in our history. The Supreme Court’s basic concern in *Bell Atlantic*—that permitting thinly pleaded complaints to survive motions to dismiss might unnecessarily impose “enormous” discovery expenses, *see* 127 S. Ct. at 1967—applies with greater force in the post-September 11 context. High-level officials, like Stryker and Corr, “require greater protection than those with less complex discretionary responsibilities.” *Harlow*, 457 U.S. at 807. Because the majority’s holding in this case compromises the interests underlying the qualified immunity doctrine, I respectfully dissent.

TABLE OF AUTHORITIES

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Zinermon v. Burch, 494 U.S. 113 (1990)

NOTE ON USE OF ADDITIONAL MATERIALS

The authorities listed above are designed to provide all that is necessary to successfully argue the 2009 Winter Cup problem. In addition to these authorities, Competitors may make reference in oral arguments to any case or statute cited in the cases listed above (i.e., “one degree of separation”). However, beyond this one degree of separation, Competitors **MAY NOT** read any additional cases, even if they have similar legal or factual material.

In addition, Competitors **MAY NOT**:

- Shepardize or KeyCite any cases to view case history
- Read any case decided after 2007, except cases cited within the Winter Cup opinions
- Use the internet (e.g., Google) to perform background research related to the Winter Cup problem
- Listen to any appellate oral arguments
- Use any material prepared by an attorney, including but not limited to appellate briefs, amicus briefs, and oral argument transcripts
- Discuss the problem with professors, lawyers, or parents
- Cite journal articles in their written brief or rounds of oral competition

Competitors **MAY**:

- Read journal articles on Westlaw or LexisNexis for personal education
- Speak with one another about the Winter Cup problem *until* the time of the first preliminary round