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No. 07-1015

IN THE
Supreme Court of the United States

JOHN D. ASHCROFT, former Attorney General of the United States, and ROBERT MUELLER, Director of the Federal Bureau of Investigation,

Petitioners,

v.

JAVAID IQBAL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE*, The Sikh Coalition, American-Arab Anti-Discrimination Committee, Discrimination and National Security Initiative, Muslim Public Affairs Council, Sikh American Legal Defense and Education Fund, Sikh Council on Religion and Education, South Asian Americans Leading Together and United Sikhs **in SUPPORT OF RESPONDENT IQUBAL**

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QUESTION PRESENTED

Amici will address the following question:

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

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INTERESTS OF *AMICI CURIAE*[1]

In the immediate aftermath of the September 11, 2001, attacks, Muslims and those perceived to be Muslim were murdered, assaulted, harassed, and subject to other discriminatory conduct. *Amici* are organizations that have responded to such discrimination on behalf of Muslims, Arabs, South Asians, and Sikhs. Since 9/11, *amici* have led various efforts to safeguard the rights of these communities and to vindicate their rights when abridged.

In important respects, this case concerns the "September 11, 2001 context." *Amici* assert that a meaningful appreciation of that context requires an understanding of the extensive private and public backlash against Muslims and others following 9/11. *Amici* also contend that the post-9/11 climate itself must be placed in the larger context of the government's ongoing struggle to balance security and liberty in times of war. This case also implicates the proper relationship between religious liberty and government action, which must be taken into account as well. *Amici* are concerned that, without a broader factual and historical view of the case, proper consideration may not be afforded to Respondent Javaid Iqbal's allegations of mistreatment on the basis of his race and religion.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

Amici, mindful of Supreme Court Rule 37.1, submit that its unique interest in post-9/11 discrimination and relevant historical themes will enrich the Court's perspective on the disputed issues and will thus aid in the Court's decisional process.

* * *

The Sikh Coalition was founded on September 11, 2001, to 1) defend civil rights and liberties for all people; 2) promote community empowerment and civic engagement within the Sikh community; 3) create an environment where Sikhs can lead a dignified life unhindered by bias and discrimination; and 4) educate the broader community about Sikhism in order to promote cultural understanding and create bridges across communities.

The American-Arab Anti-Discrimination Committee (ADC) is a civil rights organization committed to defending the rights of people of Arab descent and promoting their rich cultural heritage. ADC, which is non-sectarian and non-partisan, is the largest Arab-American grassroots civil rights organization in the United States. Founded in 1980 by former United States Senator James Abourezk, ADC is at the forefront in addressing discrimination and bias against Arab-Americans.

The Discrimination and National Security Initiative (DNSI) is a non-profit organization established in 2004. DNSI's purpose is to research the mistreatment of minority communities in times of war and in particular to study the human consequences of post-9/11 discrimination.

The Muslim Public Affairs Council (MPAC) is a public service agency working for the civil rights of American Muslims, for the integration of Islam into

American pluralism, and for a positive, constructive relationship between American Muslims and their elected representatives. MPAC was created in 1988 to promote a vibrant American Muslim community and to enrich American society through exemplifying the Islamic values of Mercy, Justice, Peace, Human Dignity, Freedom, and Equality for all.

South Asian Americans Leading Together (SAALT) is a national, non-profit, non-partisan organization dedicated to fostering civic and political engagement by South Asians in the United States through a social justice framework that includes policy analysis and advocacy, community education, and leadership development.

The Sikh American Legal Defense and Education Fund (SALDEF) is the oldest and largest Sikh American civil rights and advocacy organization in the United States. SALDEF's mission is to protect the civil rights of Sikh Americans through legal assistance, legislative advocacy, educational outreach, and media advocacy.

The Sikh Council on Religion and Education is a faith-based non-profit organization dedicated to creating awareness of the Sikh religion and the Sikh people in the United States and around the world, and to promoting the values of justice, equality and brotherhood inherent in the Sikh religion. It aims to provide a platform for interfaith dialogue to create a peaceful coexistence of all faiths.

United Sikhs is a UN-DPI-affiliated, international non-profit, non-governmental, humanitarian relief, human and civil rights advocacy organization, aimed at empowering those in need, especially disadvantaged and minority communities across the world.

STATEMENT OF THE CASE

1. 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. "Americans will never forget the devastation wrought by these acts." *Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006). One subset of individuals in America – those sharing characteristics with those responsible for 9/11 – were subject to an immediate and widespread backlash initiated by private and public actors.

An aspect of the public response to the attacks was the government's mass preventative detention of over one thousand individuals. The Department of Justice, Office of the Inspector General, reviewed the cases of 762 of the "September 11 detainees." *See* Office of the Inspector General, 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 (Apr. 2003) (OIG Report). The report found that the detainees were "almost exclusively men," most were between 26 and 40 years of age, and most were of Pakistani origin. *Id.* at 20-21. The report determined that, in New York, the Federal Bureau of Investigation (FBI) and the Immigration and Naturalization Service (INS) "made little effort" to differentiate between those detainees tied to terrorism and those encountered by chance. *See id.* at 69. Similarly, it noted that the process of ascertaining which detainees were persons of "high interest" was both inconsistent and imprecise. *See id.* at 158. The report noted that the September 11 detainees' conditions of confinement in the Metropolitan Detention Center (MDC) raise "serious

questions" regarding the treatment of those detainees. *Id.*

2. On November 2, 2001, Respondent Javaid Iqbal – a Muslim male, and native and citizen of Pakistan – was arrested in New York by FBI and INS agents. *See* Compl. at¶80. He was arrested on charges related to identity theft. *See Elmaghraby v. Ashcroft*, No. 04-1409, 2005 WL 2375202, at *1 n.1 (E.D.N.Y. Sept. 27, 2005) (Respondent Iqbal was charged with violating 18 U.S.C. §§ 371 & 1028 (conspiracy to defraud the United States and fraud with identification)). He pleaded guilty.

Respondent Iqbal alleges that, on or around November 5, 2001, he was brought to the MDC in Brooklyn and housed in its general population unit. *See* Compl. at¶81. He further alleges that he was subsequently designated to be 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. *See id.* at¶¶51, 81. Respondent Iqbal contends that ADMAX SHU detainees were subject "to highly restrictive conditions of confinement" that were "[m]arkedly different from the conditions in the MDC's general population[.]" *Id.* at ¶¶60, 63.

3. Respondent Iqbal filed suit against Petitioners and others,[2] generally challenging his

[2] 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

classification as a person of "high interest" and the permissibility of the harsher conditions of confinement he experienced as a result. *See id.* at ¶¶1-2.[3] Respondent Iqbal argues 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. *See id.* at ¶¶3, 52, 96.

The complaint presses twenty-one constitutional and statutory claims. In relevant part, the complaint asserts, pursuant to *Bivens*,[4] that Petitioners violated the First Amendment by subjecting Respondent Iqbal to harsher conditions of confinement because of his religious beliefs (claim 11), and the equal protection guarantee of the Fifth Amendment by subjecting him to harsher conditions of confinement because of his race (claim 12). *See* Compl. at ¶¶204-206, 231-36.[5]

4. Prior to discovery, Petitioners and other defendants moved to dismiss the complaint, contending that qualified immunity shielded them from liability and specifically that the allegations in the complaint were insufficient to overcome the qualified immunity defense. *See Conley v. Gibson*, 355 U.S. 41, 47 (1957) (under Rule 8(a)(2) of the

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for Correctional Programs of the BOP; former and current Wardens of the MDC; and certain MDC officers and personnel.

[3] Respondent Iqbal filed suit with Ehad Elmaghraby, a Muslim male. The United States settled Elmaghraby's claims for $300,000. Therefore, Respondent Iqbal remains the only plaintiff in this action.

[4] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[5] In consideration of Supreme Court Rule 37.1 and *amici's* statement of interest, this brief will focus on these claims of discrimination.

Federal Rules of Civil Procedure, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" such that the defendant has "fair notice of what the plaintiff's claim is and the grounds upon which it rests."). The U.S. District Court for the Eastern District of New York noted that dismissal of a complaint is appropriate under Rule 8(a) if, taking the factual allegations as true, it is clear that no set of facts would entitle the plaintiff to relief. *See Elmaghraby*, 2005 WL 2375202, at *9. Applying this standard, the district court denied the motion as to the *Bivens* claims against Petitioners. *See id.* at *35.

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." *Id.*; *see id.* at *18 ("the 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."). 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[.]" *Id.* at *14. And, while the Attorney General "may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution," he "*should* be made to hesitate[.]" *Id.* (emphasis in original; quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)).

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 plaintiffs were confined[.]" *Id.* at *20. According to the district court, the OIG Report "suggests the involvement of [Petitioners] in creating or implementing a policy under which plaintiffs were confined in restrictive conditions until cleared by the FBI from involvement in terrorist activities." *Id.* at *20 n.20 (citing OIG Report at 37-38, 39, 42, 49, 60 112-13, 116).

5. Petitioners and others filed an interlocutory appeal, objecting to the district court's ruling on the motion to dismiss. The U.S. Court of Appeals for the Second Circuit noted that a Supreme Court opinion issued after the district court's decision, *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), generated uncertainty regarding the pleading standard applicable under Rule 8(a). *See Iqbal v. Hasty*, 490 F.3d 143, 155 (2nd Cir. 2007). According to the Second Circuit, *Twombly* did not institute a heightened pleading standard, but rather clarified the meaning of the pleading requirements – dispensing with the "no set of facts" rubric, a pleader is instead obligated "to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Id.* at 157-58 (emphasis in original). With this understanding of the pleading requirements and upon accepting the allegations in the complaint as true for purposes of the motion to dismiss, the Second Circuit affirmed, except with respect to a procedural due process claim.

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." *Id.* at 151. 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." *Id.* at 159. 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." *Id.* at 160.

Moreover, the Second Circuit held that "it is plausible" to believe that Petitioners "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." *Id.* at 166. As to the claims of discrimination, the Second Circuit noted that the "allegation that [Petitioners] condoned and agreed to the discrimination . . . satisfies the plausibility standard" of Rule 8(a) "because 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." *Id.* at 175-76.

Judge Cabranes filed a concurring opinion in which he expressed fear that this case would lead to more suits from those aggrieved by national security programs and doubted whether district judges could manage discovery in such cases. *Id.* at 179.

6. On June 16, 2008, this Court granted certiorari.

SUMMARY OF ARGUMENT

Respondent Javaid Iqbal – a Muslim male, arrested in New York after the attacks of September 11, 2001 – alleges that he was subjected to harsher conditions of confinement solely because of his race, religion, and national origin. *Amici* contend that this case cannot be examined in isolation or only against the backdrop of the attacks. Context matters, and in this case that context is multi-faceted. In particular, this case implicates the Nation's historical tradition of respecting an individual's religious beliefs or affiliation, the historical use of personal characteristics as a proxy for suspicion in times of war, and the Nation's overall treatment of Muslims and those perceived to be Muslim in the aftermath of 9/11.

Amici assert that an appreciation for these broader historical and factual perspectives is required in order for proper consideration to be given to the allegations and legal conclusions under review. *Amici* argue that these perspectives support the Second Circuit's ruling with respect to Respondent Iqbal's claims of discrimination.

A. The Framers, fresh from their experience with religious persecution, espoused the view that the individual conscience and its religious elements were beyond the reach of the government. At the same time, they recognized that an individual's actions, even if they were consistent with an individual's religious views, were amenable to government regulation. According to the Framers, the courts were to serve as an independent check on state action that allegedly interfered with an individual's religious liberty. This judicial function is enhanced in times of war.

In light of these guiding principles, Respondent Iqbal may not be punished – placed in a prison environment containing harsher conditions of confinement – because of his religious beliefs or affiliation alone. His conduct, committing identify theft, is not in any way related to the terrorist attacks or to the specter of future acts of terrorism, and no evidence has been presented to the contrary. Therefore, it does not seem that his actions were the justification for his classification as a person of "high interest" or for his placement into a prison unit specifically created for "September 11 detainees."

Amici are concerned that Respondent Iqbal's Muslim faith was the sole reason for his segregation from the general prison population and subsequent placement into harsher conditions of confinement. This concern is wholly consistent with the OIG Report, which: found that the FBI and INS agents made little attempt to distinguish between those detainees that presented a security risk and those that happened to be encountered coincidentally; questioned the criteria used to designate a detainee a person of "high interest;" and determined that the process used for such classifications was inconsistent and imprecise. *See* OIG Report, at 20, 69, 158, 196.

Amici therefore argue that the district court should be permitted to perform its essential role of reviewing whether Respondent Iqbal was punished by the government because of his Muslim faith.

B. If Respondent Iqbal was segregated and placed into a harsher prison unit solely because of his religion, the question becomes whether national security interests sanitize such government action. *Amici* assert that the Nation's history reveals that this action is clearly impermissible even in wartime.

During World War II, the government interned over 100,000 individuals of Japanese descent in America. The Court, deferring to the government's claims of military necessity and in recognition of the fact that the Nation was in conflict with the Japanese Empire, upheld the executive order giving rise to the internment. *See Korematsu v. United States*, 323 U.S. 214 (1944). Justice Robert H. Jackson dissented, arguing that the Court had validated a principle of racial discrimination that "lies about like a loaded weapon" available to any authority claiming that national security demands urgent discriminatory action. *Id.* at 246.

It is that same loaded weapon that the government has attempted to wield in this case. Just as the government after Pearl Harbor used Japanese ancestry as a proxy for suspicion or disloyalty, *amici* are concerned that the government after 9/11 has used the Muslim religion as a proxy for those same unsavory qualities – a technique that is clearly wrong in light of Justice Jackson's opinion. Accordingly, *amici* disagree with Petitioners that it was "sensible" to treat individuals who shared the hijackers' religion in this fashion. For the same reason, *amici* disagree with Petitioners' assertion that Respondent Iqbal's allegation that he was classified as a security risk solely because of his religion is insufficient to state a claim.

Justice Jackson also expressed his disappointment that the Court was used as an instrument to bring a discriminatory wartime doctrine within the bounds of the Constitution. Petitioners are asking the Court to believe that the "September 11 context" excuses wholesale discrimination and thereby insulates them from allegations of discriminatory treatment. The

Constitution should not be read to encompass this proposition.

Amici argue that that national security interests do not justify the blanket placement of Muslim detainees into harsher conditions of confinement.

C. Petitioners contend that even if discriminatory conduct took place with respect to Respondent Iqbal and Muslims in the ADMAX SHU, they did not have personal knowledge of such conduct. The extensive public backlash against Muslims and those perceived to be Muslim, however, belies any suggestion that Petitioners were unaware of the mistreatment of Muslims, including Respondent Iqbal, in the ADMAX SHU.

In the aftermath of 9/11, the government engaged in a number of investigative and security measures that targeted individuals on the basis of their race, religion, and/or national origin. For example, Muslims and others encountered heightened airport screening, were prohibited from boarding their flights, and were ejected from planes because of how they looked. The government also initiated several wide-ranging immigration programs that rounded up thousands of Muslims in the hopes that terrorists would be among those caught in the government's wide-net. In addition, the government led a campaign of mass preventative detention, in which over one thousand individuals were detained.

Respondent Iqbal's allegations that he was segregated from the general prison population and assigned to the ADMAX SHU as a result of his race, religion, or national origin are consistent with the government's other post-9/11 security responses, which targeted Muslims irrespective of whether they were linked to terrorism. It also supports the Second

Circuit's conclusions that it is plausible that Petitioners affirmatively approved, condoned, or knew of, the detention of Muslims, including Respondent Iqbal, in a prison unit created specifically after 9/11. The notion that Respondent Iqbal was targeted as a result of his race, religion, or national origin is supported by the OIG Report, which commented on the arbitrary manner in which individuals were detained and then selected by federal agents for inclusion in the ADMAX SHU.

Amici argue that the post-9/11 backlash, taken as a whole, suggests that Petitioners had personal knowledge of the treatment of the September 11 detainees in the ADMAX SHU.

In conclusion, *amici* respectfully submit that the Court of Appeals' ruling with respect to Respondent Iqbal's claims of discrimination should be affirmed.

ARGUMENT

BROADER HISTORICAL AND FACTUAL CONTEXTS SUPPORT AFFIRMANCE OF THE COURT OF APPEALS' RULING

This case concerns whether Petitioners may be held personally responsible, under *Bivens*, for segregating Respondent Iqbal – a Muslim male arrested in New York in the wake of 9/11 – and subjecting him to harsher conditions of confinement because of his race, religion, or national origin. This case therefore implicates the Nation's historical tradition of safeguarding religious liberty, the historical use of personal characteristics as a proxy for suspicion in times of war, and the Nation's overall treatment of Muslims and those perceived to be

Muslim in the aftermath of 9/11. *Amici* contend that this case cannot be viewed on its own or only in the post-9/11 context – it is another episode in the Nation's ongoing and maturing endeavor to provide security while safeguarding liberty. In this sense, *amici* argue that broader historical and factual contexts are required to properly examine the allegations and legal conclusions now under review. As explained below, a more comprehensive perspective of the case cuts in favor of affirming the Second Circuit's opinion with respect to Respondent's claims of discrimination.

A. The Historical Importance of Religious Liberty in the United States Highlights the Need for Judicial Review

A foundation of the American Republic is that the individual may freely practice his religion without government interference. *See Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976) (per curiam) ("religious worship both in method and belief must be strictly protected from government intervention."); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1830 (2004) (describing the American concept of religious liberty as a "negative liberty," that is "a sphere of private activity to be protected from state interference[.]"). This fundamental view regarding the appropriate relationship between the individual and the State was enshrined in the First Amendment, which provides that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST., AMDT. 1.

The Framers found it necessary to include this provision in the Constitution because of their experiences with religious persecution. *See Bowen v. Roy*, 476 U.S. 693, 703 (1986) (it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause."); *Douglas v. Jeannette*, 319 U.S. 157, 179 (1943) (Jackson, J., concurring in result) ("the First Amendment separately mention[s] free exercise of religion" because of "[t]he history of religious persecution[.]"). Accordingly, the Framers placed the individual conscience, including its religious dimensions if any, beyond the reach of government control or coercion. *See Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 226 (1963) ("The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the . . . inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of the government to invade that citadel[.]"); *Schneider v. Smith*, 390 U.S. 17, 25 (1968) (noting that the First Amendment "creates a preserve where the views of the individual are made inviolate.").

As a result, the government generally cannot penalize (or reward) individuals on the basis of religious belief or affiliation alone. *See Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 18 (1947) ("State power is no more to be used so as to handicap religions, than it is to favor them."). Instead, the Framers contended that it is only the individual's conduct – not the religious content of his mind – that the government may touch. *See Schneider*, 390 U.S. at 25 (quoting Thomas Jefferson as saying, "[t]he opinions of men are not the object of civil government, nor under its jurisdiction[.] [I]t is time

enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order[.]") (internal quotation marks and citation omitted); Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802), *reprinted in* Michael W. McConnell, *et al.*, Religion and the Constitution, 54-55 (2002) ("religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions[.]"). In short, the freedom of religion, however revered in our constitutional tradition, is not absolute – while "legislative power over mere opinion is forbidden," such power "may reach people's actions when they are found to be in violation of important social duties or subversive of good order" even if the actions are consistent with the people's religious convictions. *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961).

The Framers also recognized that the courts were to serve as a check on government activity implicating religious liberty. *See Davis v. Passman*, 442 U.S. 228, 241-42 (1979) (quoting James Madison as saying, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of [the Bill of Rights]; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.") (citation omitted); *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 883 (2005) (O'Connor, J., concurring) ("Our Founders conceived of a Republic receptive to voluntary religious expression, and provided for the possibility

of judicial intervention when government action threatens or impedes such expression."); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1445 n.186 (1990) (noting, with respect to the free exercise clause, that, "[t]he evidence is overwhelming that [the] framers and ratifiers understood and intended the courts to engage in constitutional judicial review."). This is especially so in times of war. *See* National Commission on Terrorist Attacks upon the United States, The 9/11 Commission Report, p. 394 (2004) (a "shift of power and authority to the government [after 9/11] calls for an *enhanced* system of checks and balances to protect the precious liberties that are vital to our way of life.") (emphasis added).

In consideration of these guiding principles, *amici* argue that Respondent Iqbal may not be punished – classified as a person of "high interest" and thereafter subjected to harsher conditions of confinement – on the basis of his subscription to a certain religious belief system, or the perception that he did so subscribe. Further, while other individuals invoked Islam to justify their socially-disruptive behavior, Respondent's actions – committing identity theft – were wholly unrelated to 9/11 or any religious-based conduct that upset the social order.[6]

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[6] Absent from Petitioners' opening brief is any indication that Respondent's conduct was in any way related to 9/11 or the preparation of an additional attack. *Amici* anticipate that Petitioners may, in their reply brief, attempt to make such a connection that is based on Respondent's actions rather than his membership to a particular faith. Any attempts made for the first time in Petitioners' reply should be viewed with skepticism if not ignored entirely. *See Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 895 (1988)

Amici are concerned that it was Respondent's faith alone that served as the basis for his classification and subsequent detention in the ADMAX SHU.

This concern is wholly consistent with the OIG's findings, which suggest that Muslims in New York, such as Respondent Iqbal, were not only swept up by federal authorities, but then categorically sent to the ADMAX SHU irrespective of any link to terrorism. *See* OIG Report, at 69 (the FBI and INS "made little attempt" to distinguish between detainees linked to the attacks or to terrorism, and "those encountered coincidentally."); *id.* at 158 ("we question the criteria (or lack thereof) the FBI used to make its initial designation of the potential danger posed by September 11 detainees."); *id.* ("there was little consistency or precision to the process that resulted in detainees being labeled 'high interest,' 'of interest,' or 'of undetermined interest.'"); *id.* at 196 ("we believe the FBI should have exercised more care in the classification process[.]"); *id.* at 20 (an Assistant U.S. Attorney from the Southern District of New York "who worked on the terrorism investigation" recalled that he was "frustrated that the BOP did not distinguish between detainees who, in his view, posed a security risk" and those who were "uninvolved witnesses.").

Amici respectfully urge the Court to allow the district court to perform its essential role of reviewing whether Respondent Iqbal was punished on the basis of his religion.

("argument[s] not presented to the courts below . . . will not be considered here.").

B. The Nation's Historical Struggles with Liberty and Security Suggest that the Government's Actions are Legally Problematic

If Respondent's classification and assignment to the ADMAX SHU were premised not on his actions, but instead on his actual or perceived adherence to a certain belief system, the question becomes whether the government may, on the basis of a religion alone, segregate detainees and place them into harsher conditions of confinement for national security purposes.[7] *Amici* contend that the answer is plain that the government cannot. The Nation's past experiences with the wartime treatment of individuals sharing characteristics with the true enemy help reveal that answer.

During World War II, over 100,000 individuals of Japanese descent in the West Coast of the United States were brought from their homes to internment camps. In *Korematsu*, the Court deferred to the government's arguments regarding the military necessity of the relocation and upheld the constitutionality of the executive order giving rise to the internment. The Court noted that the petitioner was interned not because of any racial animus towards the Japanese, but

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[7] It appears that the government's identification of Respondent's religion accounted for his classification and detention in the ADMAX SHU. If, however, the reason for the segregation was the safety of the Muslim detainees, or some related penalogical purpose, this would not explain why the ADMAX SHU would contain harsher conditions than the general population. *See* Compl. at ¶¶61, 63.

> 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[.]

Id. at 223.[8] In dissent, Justice Jackson forewarned that the majority had validated a principle of racial 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

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[8] Similarly, in upholding an American citizen of Japanese ancestry's conviction for violating the exclusion order and curfew requirements imposed after the attack on Pearl Harbor, the 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." *Hirabayashi v. United States*, 320 U.S. 81, 101 (1943).

> it has a generative power of its own, and all that it creates will be in its own image.

Id. at 246 (footnote omitted). It is that same loaded weapon that the government has attempted to wield in the post-9/11 context and in this case specifically. *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); *see also* 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."). The government may not have exhibited overt racial hostility towards Islam or Muslims. But it has invoked national security to justify the segregation and harsher treatment of Muslims detained in the New York area despite the absence of any evidence that Respondent Iqbal, a Muslim, was disloyal to the United States. Justice Jackson was troubled by the use of race as a proxy for disloyalty in times of national emergency – *amici* possess the identical concern in this case.

As a result, *amici* disagree with Petitioners that, because "[t]he 19 hijackers were from Arab nations and believed to be Islamic fundamentalists," it was "sensible" for the government to focus on individuals with "the same radical ideology as the attackers[.]" Pet. Br. at 34.[9] For the same reason,

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[9] Even so, Islam cannot be equated with the "same radical ideology" advanced by perpetrators of the attacks. *See generally* "Islam is Peace" Says President, Remarks by the President at Islamic Center of Washington, D.C., Sept. 17,

amici dispute Petitioners' argument that "the bare allegation that those deemed to be 'of high interest' to the September 11 investigation were Arab or Muslim men is insufficient on its own to suggest illegal conduct." *Id.* at 35. The reprehensibility of *Korematsu* itself indicates that the government's segregation of Muslim men into a harsher penal environment, without any evidence of disloyalty, is imprudent, impermissible, and a clearly established wrong. [10]

Justice Jackson was also uncomfortable with the use of the courts as an instrument to validate the government's discriminatory wartime actions. In reflecting on *Korematsu*, he wrote that the executive order under consideration "was an unconstitutional one which the Court should not bring within the Constitution by any doctrine of necessity, a doctrine too useful as a precedent." Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103, 116 (1951). Here, Petitioners have asked the Court to believe that national security interests justify the gathering of Muslim men from the general prison population and their placement into harsher conditions of confinement irrespective of their actions or allegiance to the Nation.[11] The Court

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2001, available at: http://www.whitehouse.gov/news/releases/2001/09/20010917-11.html.

[10] For example, in the Civil Liberties Act of 1988, 50 U.S.C. § 1989, *et seq.*, "Congress recognize[d] that . . . a grave injustice was done to both citizens and permanent residents 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."

[11] It cannot be argued that, by breaking the law with respect to identity theft, that Respondent Iqbal has thereby demonstrated his disloyalty. There is a difference between

should not accept Petitioners' invitation to conform the Constitution to encompass this contention or to convert wholesale religious discrimination into a legitimate investigative technique or preventative measure.[12] *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("[T]he Constitution diffuses power the better to secure liberty[.]").

Amici appreciate the difficult circumstances that the Nation found itself in following the terrorist attacks and the awesome responsibility that the American law enforcement community assumed in its aftermath. Those circumstances, however, do not justify constitutional violations. *See* OIG Report at 164 ("While 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."). *Amici* are therefore mindful of Justice Jackson's warning that the courts should not be tempted to excessively defer to the banner of national security. *See* Jackson, 1 BUFF. L. REV. at 116 ("It is easy, by giving way to the passion, intolerance and suspicions of wartime, to reduce our liberties to a shadow, often

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engaging in some behavior that falls outside of the limits of the law and intending to engage in specific behavior of a treasonous or terrorist sort.

[12] *Amici* agree with Petitioners that the government's conduct should not be viewed "with the 20/20 vision of hindsight." Pet. Br. at 34 n.5 (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). But in light of the lessons of *Korematsu*, *amici* contend that 20/20 hindsight is not required to ascertain the wrongfulness of segregating detainees on the basis of religion for harsher treatment – the impermissibility of such segregation was apparent at the time of the government's conduct.

in answer to exaggerated claims of security."). Accordingly, *amici* urge the Court to reject the argument that the national security interests in this case justify the blanket placement of Muslim detainees into harsher conditions of confinement. *See* 9/11 Commission Report, at p. 395 ("Our history has shown us that insecurity threatens liberty. Yet, if our liberties are curtailed, we lose the values that we are struggling to defend.").

C. The Extent of the Post-9/11 Backlash Belies Petitioners' Alleged Lack of Personal Knowledge of the Detainees' Classification or Treatment

Within minutes of the 9/11 attacks, Muslims and those perceived to be Muslim in the United States were targeted on the basis of their appearance.[13] Within one week, over six-hundred hate crimes were directed against Muslims, Arabs, South Asians, and Sikhs. *See* South Asian American Leaders of Tomorrow, American Backlash: Terrorists Bring War Home in More Ways Than One, 3 (2001), available at: http://www.saalt.org/attachments/1/American%20Backlash%20report.pdf. Within eight weeks, nineteen individuals from these groups had been murdered, while hundreds of others had been stabbed, assaulted, harassed, terminated from their employment, or denied access to restaurants and similar locations – all in response to 9/11. *See, e.g.,*

[13] For example, on 9/11, after the second plane hit the World Trade Center, a Sikh was chased in lower Manhattan by three men and ultimately took his turban off in order to avoid further harassment. *See* Somini Sengupta, Arabs and Muslims Steer Through an Unsettling Scrutiny, N.Y. TIMES, Sept. 13, 2001.

Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1265-77 (2004). According to one report, "anti-Muslim hate crimes in the United States rose 1700% during 2001." Human Rights Watch, 'We Are Not the Enemy': Hate Crimes Against Arabs, Muslims, and Those Perceived to be Arab or Muslim After September 11, Nov. 14, 2002, available at: http://www.hrw.org/press/2002/11/usahate.htm. This invidious behavior has persisted – over seven years after the attacks, members of these communities continue to encounter discriminatory conduct in various settings, including schools and places of public accommodation. *See, e.g.*, Neha Singh Gohil & Dawinder S. Sidhu, *The Sikh Turban: Post-9/11 Challenges to this Article of Faith*, 9 Rutgers J. L. & Religion 10, 28-47 (2008).[14]

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[14] Petitioners accurately note that one of the purposes of the qualified immunity doctrine is to reduce the possibility that public officials will have to answer personally for wrongful conduct and thereby incentivize the country's best and brightest to serve in the government. *See* Pet. Br. at 16. On the other side of the ledger, however, we also must consider that the failure to vigorously protect the rights of immigrants and individuals in the United States who have certain characteristics will also limit the best and the brightest of the world from taking part in the American dream and contributing to our society. For example, Balbir Singh Sodhi came to the United States to escape religious persecution in India, *see* Mike Anton, Collateral Damage in War on Terrorism, L.A. TIMES, Sept. 22, 2001, at A-26, only to be murdered in Mesa, Arizona on September 15, 2001, "for no other reason than because he was dark-skinned, bearded, and wore a turban," Trial Begins for Man Charged with Killing Sikh Immigrant, CNN, Aug. 18, 2003. It is less likely that immigrants would come to or stay in this Nation if they are subject to discriminatory conduct, particularly if that conduct is sanctioned by the courts. *See* PBS Foreign Exchange, Jan. 14, 2006 (discussing "educated and

At the same time, the government engaged in investigative and security measures after 9/11 that focused on race, religion, and national origin. For example, in the airport setting, Muslims, Arabs, South Asians, and Sikhs were subjected to heightened screening, prohibited from boarding their flights, and even ejected from planes on account of their appearance or perceived religion. The number of such post-9/11 incidents has been reported to be in the dozens, with one 2002 count reaching 191 incidents. *See* Ahmad, 92 CAL. L. REV. at 1269; Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575, 1576 n.1 (2002) (citation omitted).

The government also implemented several immigration programs in order to round up Muslims with the hope that terrorists would be among those collected in the government's wide-net. *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."). For example, the government's special registration program required aliens from countries, almost all of which are predominantly Muslim, to report to the INS to be fingerprinted and photographed, and possibly interrogated. *See* Registration and Monitoring of Certain Nonimmigrants From Designated Countries, 67 FED. REG. 57,032 (Sept. 6, 2002). In addition, the

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skilled immigrants" leaving the United States, a trend known as "reverse brain drain" or "flight capital," which came to a head after 9/11 when America "started to impose very heavy and ham-fisted immigration policies on both newcomers and potential arrivals.").

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. *See* Memorandum, the Deputy Attorney General, U.S. Dep't of Justice, Guidance for Absconder Apprehension Initiative (Jan. 25, 2002). Also, under 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. *See* Press Release, Dep't of Homeland Security, Operation Liberty Shield (Mar. 17, 2003), available at: http://www.dhs.gov/xnews/releases/press_release_0115.shtm. Pursuant to a separate interview program, eight thousand Arab, Muslim, and South Asian men were called in for "voluntary" questioning. *See* Ahmad, 92 Cal. L. Rev. at 1271. The impact of these policies on those from predominantly Muslim countries is clear. 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%. *Id.* at 1269.

Moreover, "a feature of the government's response to the attacks of September 11 has been its campaign of mass preventive detention," in which 1,147 individuals were detained by early November 2001. David Cole, Enemy Aliens, 54 STAN. L. REV. 953, 960 (2002).[15] Under this feature, the

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[15] Ostensibly because of the large number of detainees, Petitioners and Judge Cabranes appear to be concerned that this suit will lead to abuse by eager litigants and will thus burden Petitioners. *Amici* contend that this concern is speculative – Petitioners have not shown that, in the seven

government held individuals until it was determined that they did not pose a security threat. *See* OIG Report at 39 (quoting then-Assistant Attorney General Michael Chertoff as saying, "we have to hold these people until we find out what is going on."). Respondent Iqbal was arrested as a result of identity theft charges, not an immigration sweep. But he was in the system nonetheless and, because he was a Muslim and thus presumptively dangerous, he was part of the government's campaign of mass detention. *See* OIG Report at 20-21, 69, 158, 196 (suggesting that persons, mainly from Muslim and Arab countries, were detained and classified as persons of "high interest" arbitrarily and without evidence of terrorism).

Here, the nature of 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 Respondent 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." Compl. ¶ at 52. It also supports the related contention that Respondent's assignment to the ADMAX SHU was based on race, religion, or national origin. It also supports the Second Circuit's

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years since 9/11, they have been inundated by frivolous lawsuits filed by individuals alleging discrimination in the aftermath of the attacks, or that district courts were unable to manage discovery in post-9/11 discrimination cases against high-level government officials.

determination that "it is plausible to believe that [Petitioners] 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." 490 F.3d at 166. Indeed, Petitioners would have us believe that they – who were charged with leading the law enforcement and intelligence communities' response to the attacks – did not affirmatively approve, condone, or know of, the detention of hundreds of individuals in a federal facility in New York created specifically after 9/11, a facility that was only one of two that were the subject of the OIG Report.

This cannot be squared away, however, with the OIG Report, *see* OIG Report at 157 ("the security risk posed by individual September 11 detainees or their potential connections to terrorism" were decisions "made by the FBI in consultation with the U.S. Attorney's Office in the Southern District of New York and were communicated to the INS."), a brief from two former high-level FBI officers, *see* Resp. Rolince, *et al.*, Br. at 26 ("FBI Supervisors" designated individuals as persons of "high interest"), the Second Circuit's ruling, *see* 490 F.3d at 166 (it is plausible that Petitioners "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."); *id.* at 175-66 (commenting on the "likelihood that [Petitioners] 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."), or the district court's opinion, *see Elmaghraby*, 2005 WL 2375202, at *20 ("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[.]").

Amici contend that the post-9/11 context, taken as a whole, supports the Second Circuit's conclusions with respect to Petitioners' personal knowledge of the discriminatory conduct taken against Respondent Iqbal.

* * *

Respondent Iqbal's allegations of discrimination on the basis of his race, religion, and national origin, accepted as true, are plausible. *Amici* urge the Court to grant Respondent the modest relief he seeks – to move beyond the pleadings stage and be given an opportunity to prove that he has sufficient facts to support his claims.

CONCLUSION

The Court of Appeals' judgment with respect to claims of discrimination should be affirmed.

Respectfully submitted,

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