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

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BRIEF OF NATIONAL CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici Curiae comprise a group of civil rights and human rights organizations from around the Nation, including those that represent or advocate on behalf of people whose constitutional rights have been violated by public and private actors. Despite their diverse views and work, *Amici* have joined together to urge the Court to consider the broader impact this decision might have on civil rights litigation generally. *Amici* urge the Court not to limit the ability of individual plaintiffs to assert their civil rights in litigation against the officials ultimately responsible for setting unconstitutional policies or condoning unconstitutional acts.[2]

SUMMARY OF ARGUMENT

The Supreme Court should affirm the decision of the Second Circuit and reject Petitioners' position that a heightened pleading standard applies in situations in which plaintiffs seek to hold accountable "high-ranking" officials. The Second Circuit properly applied the holding of *Bell Atlantic v. Twombly,* 127 S.Ct. 1955 (2007), to require that pleadings meet a "plausibility" standard. Only once that plausibility standard had been met should a court allow "carefully limited and tightly controlled discovery by the Plaintiff as to certain officials." *Iqbal v. Hasty*, 490 F.3d 143, 178 (2d Cir. 2007).

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] Amici are listed in the Appendix to this brief.

The standard articulated by the Second Circuit properly balances the interests of plaintiffs and government defendants in civil rights cases. Certainly, there is a public interest in efficient government, and government officials deserve protection from needless discovery and suit. Yet the very reason supervisory officials are more vulnerable to suit—namely, that their decisions have a far greater impact than frontline officers—also indicates a stronger public interest in holding them accountable in those instances in which they engage in unconstitutional behavior. The "plausibility" standard for construing *Bell Atlantic* employed by the Second Circuit provides effective guidance in balancing these two public interests – for efficient government on one hand and the rule of law on the other.

By contrast, the standard proposed by Petitioners would overprotect defendants while undervaluing the constitutional rights of plaintiffs and degrading the rule of law. Petitioner's position would effectively impose higher factual requirements on plaintiffs in qualified immunity cases through judicial action rather than by amendment of the Federal Rules, something this Court has specifically cautioned against. By seeking to take away the district courts' ability to prescribe even "phased" or "limited" discovery, *see* Pet'r. Br. at 24-25, Petitioners' recommended interpretation of *Bell Atlantic* would require many civil rights plaintiffs to plead the very facts that they could not learn until the discovery phase. Perpetrators of civil rights violations rarely articulate their motives to their victims. This is particularly true in the instance of

supervisory officials who set unconstitutional policies or who condone their inferiors' violations. Such policies are typically kept far from public view and behind a veil of silence. It is precisely in those cases that the public interest in judicial scrutiny is the strongest, to vindicate individual rights and to preserve the rule of law. And those interests do not wane in times of national emergency.

The adoption of Petitioner's position would have wide-reaching ramifications far beyond the "war on terror". As the cases described below illustrate, many worthy civil rights plaintiffs must rely on the discovery process to uncover concrete evidence that the defendant directed their mistreatment with an unconstitutional motive or deliberate indifference. Under the Second Circuit's standard in *Bell Atlantic*, once plaintiffs have afforded defendants full notice of plausible allegations against them, plaintiffs would have access to carefully limited judicially controlled discovery to substantiate their allegations of unconstitutionally motivated mistreatment. Under Petitioner's proposed standard, by contrast, many plaintiffs whose constitutional rights have been violated by biased or unlawful police investigations, police brutality or race or sex discrimination would be bluntly denied both discovery and redress. The plaintiffs profiled in this brief represent only some of the wide range of civil rights victims who would be denied justice under the artificially high pleading standard proposed by the Petitioners.

ARGUMENT

Javaid Iqbal was one of hundreds of Arab, Muslim, and South Asian immigrants in the New York area arrested because of their ethnicity and religion in an arbitrary and heavy handed dragnet after the September 11, 2001 terrorist attacks. Neither Mr. Iqbal, nor any of the other men arrested in this dragnet were ever convicted of any crime relating to terrorism, nor has the government presented any evidence that any of the men posed a threat to national security. Nina Bernstein, *Held in 9/11 Net, Muslims Return to Accuse U.S.*, N.Y. Times, Jan. 23, 2006 at 1. Yet, like Mr. Iqbal, many of these immigrants suffered horrific abuse during their detention. The verbal, physical and sexual abuses suffered by Mr. Iqbal were not isolated incidents, but rather part of a pattern of government abuses against Muslims following the attacks of September 11. A report by the Office of the Inspector General observed that the pattern of abuse was likely not the product of coincidence, but rather a policy authorized at the highest levels of the federal government. Resp't Br. at 4-5.

By adopting a "plausibility" standard, the Second Circuit struck the right balance between Iqbal's litigation interests and protecting Defendants from improper liability and vexatious, needless discovery. In his complaint, Mr. Iqbal alleged that Petitioners, former Attorney General John D. Ashcroft and current Director of the Federal Bureau of Investigation ("FBI") Robert Mueller crafted, approved, and directed, "as a matter of policy" that detainees would be confined in the ADMAX SHU solely because of membership in protected classes.

Pet. App. 172a-173a (Compl. ¶ 96-97). Yet despite those straight-forward pleadings, the OIG Report's concrete conclusions and the Second Circuit's carefully staged discovery plan, Petitioners argue that the Second Circuit's opinion was a "mistake…under the now-discredited 'no set of facts' pleading-standard regime." Pet'r. Br. at 26. Petitioners do not refer to their interpretation of *Bell Atlantic* as a "heightened" pleading standard, and admit that this Court rejected the notion that *Bell Atlantic* imposed a "heightened" standard. *See* Pet'r. Br. at 25 (quoting *Bell Atlantic*, 127 S. Ct. at 1973 n. 14). But Petitioners' proposed rule would impose an impossible "Catch-22" on civil rights plaintiffs, by demanding that they plead what they could not yet know. As demonstrated below, were this Court to accept Petitioner's position, civil rights plaintiffs would be required to plead in advance specific facts regarding the actions of government officials that they could only reasonably learn upon later discovery. By putting the cart before the horse, such a rule disrupts the proper balance between plaintiffs' and defendants' rights and offends the rule of law.

I. The Second Circuit Opinion Properly Interpreted Precedent, Respected the Discretion of District Courts, and Fairly Balanced the Constitutional Rights of Plaintiffs with the Immunity Interests of Government Officials.

The Second Circuit articulated an accurate, straightforward and fair interpretation of *Bell Atlantic v. Twombly,* 127 S.Ct. 1955 (2007) that reconciled that case's holding with *Leatherman v.*

Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993) and *Crawford-El v. Britton*, 523 U.S. 574 (1998). As the Second Circuit noted, "[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*." *Iqbal*, 490 F.3d at 155. After careful consideration of the factors mentioned in *Bell Atlantic*, the Second Circuit held 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." *Id.* at 157-158. The court rejected a "universal standard of heightened fact pleading" and embraced a "flexible plausibility standard," striking a fair balance between plaintiffs' interests in remedying violations of their constitutional rights and protecting government officials from vexatious and frivolous lawsuits. *Iqbal*, 490 F.3d at 157.

In reaching that compromise, the Second Circuit recognized that district court judges are well suited to supervise limited discovery. The Supreme Court has long relied upon district courts to exercise their "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 597-598. In doing so, "the Court in *Crawford-El* was careful to distinguish between the D.C. Circuit's solution to protect government officials from insubstantial claims, which it rejected, and the

options otherwise available under the Federal Rules of Civil Procedure for federal trial judges to deal with this concern." *Currier v. Doran*, 242 F.3d 905, 915 (10th Cir.); *see also Rippy v. Hattaway*, 270 F.3d 416, 426-27 (6th Cir. 2001) (Gilman, J., concurring) (distinguishing between "Circuit-created" rules of heightened pleading and the options available to district courts to "weed out unmeritorious claims" pursuant to the Federal Rules of Civil Procedure); *Cowen v. Bank United of Texas, FSB*, 70 F.3d 937, 944 (7th Cir.1995) (internal citations omitted) ("[C]ontrolling the pace and scope of discovery, being a matter of case management rather than of the application of hard and fast rules, is also within the district judge's discretion); *State of Ariz. v. Manypennym*, 672 F.2d 761 (9th Cir. 1982) (Kennedy, J.) ("The firing point of the legal system is with the trial judge who is best situated to administer the law and protect the rights of all.").

In accordance with those principles, the Second Circuit upheld Judge Gleeson's authorization of "carefully limited and tightly controlled discovery by the Plaintiff as to certain officials." *Iqbal*, 490 F.3d at 178. Such structured discovery vindicates the purpose of qualified immunity and is well within the traditional competencies of district court judges. *Id.* The Second Circuit recognized that victims of constitutional violations often face serious and perhaps insurmountable challenges in pleading detailed, fact specific allegations in the absence of information controlled by the very government officials accused of constitutional violations. "[D]iscovery by the Plaintiff as to certain officials will be appropriate to probe such matters at the Defendants' personal involvement in several of the

alleged deprivations of rights." *Id.* at 178. Imposing a heightened pleading standard in such situations would pose unjustified obstacles to uncovering evidence of discrimination in an opaque bureaucracy.

Petitioners propose replacing the Second Circuit's deference to a district court's traditional case management powers with a new rule that would strip away many of those powers. Petitioners begin by citing *Bell Atlantic*'s disavowal of *Conley*'s "no set of facts" standard in favor of a "plausible liability" standard. *See* Pet'r. Br. at 23. To satisfy this new standard, according to Petitioners, plaintiffs must plead "sufficient 'factual matter' to 'raise a right to relief above the speculative level' and to 'raise a reasonable expectation that discovery will reveal evidence of' illegal activity." *Id.* (citing *Bell Atlantic,* 127 S.Ct. at 1965). However, while seeking to impose a new requirement for "factual matter" and "factually suggestive" allegations, the Petitioners also seek to revoke the ability of district courts to engage in "careful case management" and "'phased' or 'limited' discovery.'" Pet'r. Br. at 24-25.

Moreover, Petitioners' attempt to alter the pleading standard via the courts rather than through changes to the Federal Rules goes completely against this Court's own precedents regarding rule-making authority. *See*, *e.g.*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) ("A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'") (quoting *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)).

Petitioners themselves note that in *Bell Atlantic* this court explicitly rejected the notion that the pleading standard was being changed and acknowledged that it could be changed only by amending the Federal Rules. *See* Pet'r. Br. at 25 (citing *Bell Atlantic*, 127 S.Ct. at 1973 n. 14). Yet while Petitioners may take pains to avoid characterizing it as such, their position on the impact of *Bell Atlantic* represents a radical change to pleading standards and to the conduct of litigation in federal courts.

The Petitioners' proposed pleading standard would create a "Catch-22" for civil rights and human rights plaintiffs: they would be required to plead specific facts that they could not possibly know without discovery in order to be allowed to proceed with discovery. Allowing phased discovery avoids this injustice, which is why the Second Circuit's interpretation of *Bell Atlantic* is correct.[3] Were this

[3] A number of other circuits have adopted a post-*Bell Atlantic* approach to discovery that is very similar to the Second Circuit's approach in this case. Like the Second Circuit, these other circuits interpret *Bell Atlantic*'s requirement that "factual allegations must be enough to raise a right to relief above the speculative level," *Bell Atlantic*, 127 S.Ct. at 1965, to mean that a complaint must create a reasonable expectation that discovery would reveal additional evidence. For example, in *Watts v. Fla. Int'l. Univ.*, the Eleventh Circuit said, "[t]he Court has instructed us that [*Bell Atlantic*] 'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of' the necessary element.…It is sufficient if the complaint succeeds in 'identifying facts that are suggestive enough to render the element plausible.'" *Watts v. Fla. Int'l. Univ.*, 495 F.3d 1289, 1295-1296 (11th Cir. 2007) (quoting *Bell Atlantic*, 127 S.Ct. at 1965); *see also Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3rd Cir. 2008) ("The Supreme Court's *Twombly*

Court to adopt Petitioners' interpretation, then only in the rarest of cases where a "smoking gun" was already a publicly-known fact would a plaintiff have any possibility of surviving the pleading standard. *See, e.g.*, *Limone v. Condon,* 372 F.3d 39 (1st Cir. 2004) (rejecting dismissal on qualified immunity grounds in a case where wrongdoing had been previously established by a Congressional investigation). A misbehaving supervisory official could play a "head's I win, tail's you lose game" by concealing his wrongdoing, then avoiding discovery into it by invoking Petitioners' higher pleading standard. This Court should not accept Petitoners' invitation to create unnecessary and unjust obstacles to civil rights plaintiffs.

II. Neither National Security Nor "High-Ranking Officials" Justify Special Pleading Rules.

Invoking our national tragedy, Petitioners argue that civil rights complaints against "high-

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formulation of the pleading standard . . . does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element'") (citing *Bell Atlantic*, 127 S.Ct. at 1965); *Lindsay v. Yates*, 498 F.3d 434, 440 (6th Cir. 2007) (citing *Bell Atlantic*'s requirement of a "reasonably founded hope that the discovery process will reveal relevant evidence" to reverse dismissal of claim"); *Khorrami v. Rolince,* 539 F.3d 782, 788 (7th Cir. 2008) ("…nothing in [*Bell Atlantic*] suggests that Khorrami's complaint is inadequate. . . . Khorrami's allegations about Rolince's knowledge are plausible, and only discovery will show whether they are correct. Whether Rolince in fact was aware, unaware, or reckless has yet to be shown, but those facts need not be pleaded in the complaint.").

ranking" officials should face a heightened pleading standard of pleading. Yet there is simply no principled distinction to be made among supervisory officials without sacrificing core democratic principles. *Butz v. Economou*, 438 U.S. 478, 506 (1978) (internal citations omitted) ("No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity."). Moreover, civil actions brought pursuant to Title 42 U.S.C. § 1983 and its judge-made cousin, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), represent an important mechanism through which constitutional norms are elaborated and enforced. *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 485 (1994) ("[T]he purpose of *Bivens* is to deter the [federal] officer from infringing individuals' constitutional rights."). By shielding supervisory officials from suit, Petitioners' rule would significantly undermine the necessary deterrent effect of civil rights suits and the rule of law.

Petitioners fail to adequately address the question of *when* their proposed heightened pleading standard would apply. Petitioners repeatedly cite the "national-security crisis" faced by this Nation and imply that government officials responding to this crisis should be protected from accountability for their constitutional violations by a heightened pleading standard.[4] Petitioners seem to imply that during national security crises, constitutional protections should be weakened by the imposition of a heightened pleading standard upon civil rights complaints. Yet as observed by the Second Circuit,

[4] The phrase "national security" appears ten times in Petitioners' brief, at 10, 11, 13, 18, 19, 26, 33, 40, and 41.

"the exigent circumstances of the post-9/11 context do not diminish the Plaintiff's right not to be needlessly harassed and mistreated by repeated strip and body-cavity searches." *Iqbal*, 490 F.3d at 150-60. Moreover, the Petitioners do not explain when such a heightened pleading standards would be triggered.

Petitioners fail to articulate limiting principles because there is no clear limit to the exceptions they would create. There cannot be one special pleading standard applied to "high" government officials during "extraordinary" times and another applied to "low" government officials during "ordinary" times. Such exceptions would swallow the rule. As the Court has recently held, "[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times." *Boumediene v. Bush,* 128 S.Ct. 2229, 2277 (2008).

The roundup of Mr. Iqbal and other Muslims following the September 11th attacks is but the latest episode during the history of this great Nation when government officials have persecuted ethnic and religious minorities during periods of national crisis. In the past the Court has not always protected weak and unpopular groups from the unconstitutional and capricious exercise of power by government officials citing the imperatives of national security. *See Korematsu v. United States*, 323 U.S. 214 (1944). Yet, as the Court has recently observed, "[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." *Boumediene,* 128 S.Ct. at 2277.

Amici respectfully ask the Court to protect the People's liberty and security within the framework of the Federal Rules of Civil Procedure. Federal Rule of Civil Procedure 2 recognizes "one form of action known as the civil action." Fed. R. Civ. P. 2. Federal Rule 8 specifies a notice pleading standard for all civil cases, without exception for those involving claims of national security. Fed. R. Civ. P. 8. . The Second Circuit's "plausibility" standard adequately balances national security interests within a procedural framework that holds even the powerful accountable for violations of the Constitution.

III. Petitioners' Heightened Pleading Standard Would Adversely Affect a Broad Class of Civil Rights Plaintiffs.

Although Mr. Iqbal's claims arose under extraordinary circumstances, there is nothing unique about the violations he suffered or his need for judicial recourse. Civil rights litigation has proven to be a necessary bulwark against the use of excessive force, abuse of process and retaliation by federal, state and local officials, especially in circumstances involving supervisory liability. The individuals profiled below are among the many plaintiffs whose claims would likely have been dismissed under a heightened pleading standard applied to civil rights actions in which officials assert the defense of qualified immunity. Individuals like these would suffer were the Court to overprotect defendants in civil rights cases by adopting the Petitioner's heightened pleading standard.

A. Sara Reedy: Failure to Supervise Officers who Abuse their Authority

Sara Reedy's ordeal shows why structured discovery is necessary in claims against officials supervising police officers who abuse their authority. Reedy was nineteen years old and working the night shift as a cashier at a gas station when she was sodomized by a man holding a gun to her head. *Reedy v. Township of Cranberry*, 2007 WL 2318084 at *1 (W.D. Pa, 2007). After sexually assaulting her, her assailant ordered her at gunpoint to remove money from the gas station's safe and rip the phone lines from the wall. After her assailant left, Reedy fled the station and sought assistance. *Id.* at *1.

Unfortunately for Reedy, the police appeared less interested in apprehending her assailant than accusing her of the theft. After Reedy provided the police with information regarding the robbery and sexual assault, she was taken to the hospital where she was treated and evidence of the sexual assault was gathered. While Reedy was at the hospital, Officer Frank Evanson formed the opinion that Reedy had fabricated the story and stolen the money in order to support a heroin habit. While Reedy was still receiving treatment in the hospital, Evanson accused her of faking the sexual assault and committing the theft herself. Without a warrant or informed consent, Evanson ordered a toxicology screen of Reedy's blood. *Id.* at *1-2.

When Reedy gave a detailed statement to the police a few days later, she included a description of Evanson's inappropriate behavior at the hospital. After Reedy gave her statement, Officers Evanson

and Meyer visited Reedy at her home and attempted to intimidate her into admitting she had fabricated the sexual assault and theft. The Officers threatened both Reedy and her husband. Reedy refused to recant, whereupon Evanson promised to return with a warrant for her arrest. *Id.* at *2.

Evanson obtained an arrest warrant against Reedy, charging that she had made a false report to law enforcement, committed theft by unlawful taking and had received stolen property. When Reedy, now four months pregnant, became aware of the warrant a few days later, she turned herself in. At her preliminary hearing, Evanson testified that Reedy was a flight risk, despite the fact that she had no serious criminal record, little money and was pregnant. After bond was set at $5,000, she served five days in jail while awaiting a bail reduction hearing. Her husband was forced to sell many of their possessions in an attempt to make bail. *Id*.

One month before Reedy's trial was to begin, Wilber Cyrus Brown was arrested while in the process of committing a robbery and attempting to sexually assault another convenience store clerk. The suspect subsequently confessed to a series of sexual assaults, including the attack upon Reedy. Karen Kane, *Butler County's Tax Dollars Hard at Work*, PITTSBURGH POST-GAZETTE, 28 Feb. 2007 at 1; Karen Kane, *Assault Victims' Lawsuit to Delay Prosecution of Assailant*, PITTSBURGH POST-GAZETTE, 17 Aug. 2007 at 1. Although the charges against Reedy were then dropped, Reedy had already lost her job, was forced to drop out of school and been deeply traumatized by the police harassment and

intimidation as well her incarceration. *Reedy*, 2007 WL 2318084 at *2 (quoting Compl. at ¶¶53-62).

Reedy brought an action under 42 U.S.C. §1983 against Officers Evanson and Meyer, their supervisor Steve Mannell, and the District Attorney of Butler County, Pennsylvania, as well as Butler County itself alleging false imprisonment, unlawful detention, malicious prosecution and harm to her liberty interest in violation of the Fifth Amendment. *Id.* at *1. At least with respect to malicious prosecution, Reedy's claims were strong enough that Butler County reached a financial settlement with her outside of court. *Id.* at *1.

Evanson, Meyers and Mannell moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). Defendant Mannell asserted the defense of qualified immunity and alleged that Reedy had not pleaded sufficiently detailed facts to show his personal involvement in the violation of her constitutional rights. *Id.* at *5. In rejecting Mannell's motions to dismiss, District Judge Cercone highlighted the problem of asymmetric information faced by civil rights plaintiffs like Sara Reedy. Judge Cercone found that Reedy had

> …a well-founded basis for the general allegations of the claim based on information and belief, *but is not capable of detailing specific allegations against the defendant because such information is exclusively within the possession and control or knowledge of the defendant.* If the plaintiff does not have access to such specific information

> about the defendant's behavior because discovery is the only avenue by which the plaintiff could learn about the defendant's specific undertakings, the plaintiff cannot be expected to allege anything more than what was in the original complaint.

Id. at *7 (emphasis added). Judge Cercone next emphasized the necessity of limited discovery in cases of qualified immunity. "Only some form of discovery could satisfactorily verify the veracity of Mannell's factual assertion… Thus, to foreclose a §1983 claim on the defense without even so much as the ability to explore that distinct possibility would run the risk of elevating the defense to a level of protection far beyond it intended purpose." *Id.* at *8. In reaching the decision to allow limited discovery, Judge Cercone employed a plausibility standard: "It is reasonable to infer that detectives and officers often confer with and seek guidance and direction from their supervisors, particularly in challenging or high profile cases." *Id.* at *8.

Judge Cercone rejected Mannell's motion to dismiss on the basis of qualified immunity. In balancing Reedy's constitutional rights against the defense of qualified immunity, Judge Cercone permitted limited discovery against the defendant police officers with respect to their interactions with their superiors and allowed Reedy to amend her complaint on the basis of that discovery. Because Judge Cercone allowed limited and structured discovery, Reedy obtained the information necessary to amend her complaint to include specific factual allegations regarding Mannell's personal

involvement in the violation of her constitutional rights. *Reedy v. Evanson*, Am. Complaint, Civ. No. 2:06-cv-01080-DSC (March 12, 2008). In particular, she made detailed allegations that Mannell had personally consulted upon the investigation of her case and condoned the officers' conduct.

Sara Reedy's case illustrates that controlled discovery is essential to vindicating civil rights violations. Only with limited and structured discovery was Reedy able to determine what role Mannell played as policy maker and supervisor and the extent of his involvement in the violation of her constitutional rights. The Second Circuit's standard allows for the limited discovery which provided for Reedy's remedy. The Petitioner's standard would block such discovery. Had Petitioner's proposed heightened fact pleading standard been required to overcome Mannell's defense of qualified immunity, Sara Reedy would have been deprived of the opportunity to pursue a remedy for the violation of her constitutional rights.

B. George Jones: Unconstitutional Policies and Practices in Criminal Investigations

George Jones was a senior at Fenger High School in Chicago approaching graduation in May 1981. Jones, the son of a local policeman and the editor of his school newspaper, planned to join the Air Force and then attend college. *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988).

Jones' dreams were shattered as the result of a terrible tragedy. Only one block from his house, 12-year-old Sheila Pointer was raped and beaten to

death on May 4, 1981. The assailant also beat Sheila's 10-year-old brother Purvy unconscious. Detectives Houtsma and Tosello questioned Purvy just as he was emerging from a coma. Based upon equivocal and conflicting statements from Purvy, the police searched then searched the neighborhood and settled upon George Jones, even though he did not match the description. *Id*. at 988. Detectives went to George's high school and arrested him in his classroom. They brought him to the police station and "threatened him with the electric chair if he didn't confess." *Id*. at 989. Despite the threats, Jones denied any involvement with the crime.

The following day, a grand jury indicted Jones for murder and rape based on a factual record riddled with fabrications and omissions. *Id*. at 990. The official arrest report, signed by supervisor Sergeant Palmer, falsely stated that Jones' father told officers that he had not seen his son the morning of the murder and left out key information such as that Purvy had indicated that the assailant was a gang member and that he had failed to affirmatively identify Jones as the assailant.

After the indictment, a new detective on the case, Detective Laverty, uncovered new evidence. He interviewed Purvy, who for the first time said that there had been two assailants and that they had worn stocking masks and again said the assailant was a gang member. *Id*. Several months later, a well-known gang-member, "King George," confessed to a strikingly similar murder nearby. Detective Laverty told his supervisors, Commander Deas and Lieutenant Griffith, who was the head of the violent crimes unit of the area detective division,

that the police had charged the wrong person. Laverty wrote in a report that he believed that "King George," not Jones, was the murderer, but his superiors never forwarded it to state prosecutors. Commander Deas later lied to Laverty that the charges had been dropped in light of the contradictory evidence. *Id*. at 990.

Subject to a policy department policy of keeping "street files," all of the exculpatory evidence was excluded from the official file and remained hidden from prosecutors or defense counsel. The street files were essentially shadow files of the official investigatory files handed over to prosecutors and contained informal notes and memos, whereas the official files contained only the final reports. As a result, the street files were not available to defense counsel even if they contained exculpatory material. For Jones, that meant that his lawyer had only Sergeant Palmer's official report—riddled with falsehoods and omissions—and his lawyer never learned the full accounts of the various conflicting witness statements or Detective Laverty's discoveries. *Id*. at 989.

In the spring of 1982, Detective Laverty was shocked to learn that George Jones was standing trial for the rape and murder of Sheila Pointer. Laverty contacted Jones' lawyer to tell him about the exculpatory information secreted in the "street files." The lawyer told the trial judge, who declared a mistrial. Shortly afterward the state's attorney dropped all charges against Jones. No apology was ever made to Jones, and neither the City nor the state offered to compensate him for his ordeal. *Id*. at 991.

Following the mistrial, Jones briefly attended a community college, but quit "amid harassment that included finding a piece of paper bearing the word `murderer`` taped to his locker." Fred Marc Biddle & Maurice Possley, *City Fined $800,000 in Arrest Suit*, CHI. TRIB., Mar. 6, 1987 at 1, *available at* 1987 WLNR 1399493. Jones continued to be plagued by ongoing post traumatic stress disorder and the recurring nightmare of being executed while his parents looked on. Having abandoned his early dreams of joining the Army and going to college, he ultimately moved to Detroit and worked as an exotic dancer. *Id*.

Jones sued the City of Chicago and several officers, including supervisors Commander Deas, Lieutenant Griffith, and Sergeant Palmer, under 42 U.S.C. § 1983 for false arrest, false imprisonment, intentional infliction of emotional distress, and malicious prosecution, as well as conspiracy to commit these wrongs. He alleged that the defendants' conduct had denied him due process of law under the Fourteenth Amendment and violated his rights under the common law of Illinois. A jury awarded him $801,000 in compensatory and punitive damages. *Id*. at 992.

In challenging the verdict on appeal, the defendants argued there was insufficient evidence of their personal participation as supervisors. Judge Posner of the Seventh Circuit agreed that "[t]he least extensive participations were those of the supervisory officers," but nonetheless held that "[t]here was, however, enough evidence to enable the jury to infer that Deas, Griffith, and Palmer had

known every false step taken by the subordinate officers, had approved every false step, and had done their part to make the scheme work...." *Id*. at 992, 993.

Police never solved Sheila Pointer's murder. And none of the officers involved were ever disciplined. *Id*. at 991. The only person to face disciplinary charges was Detective Laverty—the whistleblower who revealed the "street files" policy—charges that were quietly dropped.

In the absence of discovery, plaintiffs do not have access to and therefore cannot allege the specific details of the police investigations which deprived them of their rights. Discovery was necessary to reveal the ways in which police detectives suppressed exculpatory evidence and their officers set policies that led directly to constitutional violations. By requiring Jones to allege greater factual detail in order to overcome the supervisors' qualified immunity, the heightened pleading standards proposed by the Petitioners, would have wrongly allowed them to escape liability for the tragedy the befell George Jones.

C. Carlos Gutierrez-Rodriguez: Failure to Supervise Violent Subordinates

The tragedy of Carlos Gutierrez-Rodriguez illustrates the importance of discovery in establishing the liability of police officials for the constitutional violations of habitually violent officers under their command. Gutierrez was 22 years old when undercover narcotic officers shot and permanently paralyzed him. *Gutierrez-Rodriguez v.*

Cartagena, 882 F.2d 553 (1st Cir.1989). Prior to the shooting, Gutierrez was regularly employed in Puerto Rico and planning on attending university. On the evening of December 9, 1983, Gutierrez was sitting in his car in the mountains above San Juan, admiring the view of the city with his girlfriend, when an unmarked vehicle approached them. Four plain clothes narcotics officers, led by Pedro Soto exited the unmarked vehicle and approached Gutierrez' car, their guns drawn. Upon seeing the unidentified gunmen approaching his car, Gutierrez hastily started to drive away. Without warning the police officers began to fire at Gutierrez and his girlfriend. One of the bullets struck Gutierrez in the back, damaging his spinal court and permanently paralyzing him from the waist down. *Id.* at 557.

Gutierrez brought an action under 42 U.S.C. § 1983 against Soto and the other three plain clothes officers who fired upon him, as well as against Domingo Alvarez, the director of the narcotics division and Desiderio Cartagena, the police superintendent. The jury found that the defendants had violated Carlos's constitutional right to due process and awarded him $4.5 million in compensatory damages jointly and severally against all defendants, as well as hundreds of thousands in punitive damages, including $225,000 against Alvarez and $150,000 against Cartagena. *Id.* at 557-558.

The jury's finding of supervisory liability by Alvarez and Cartagena was affirmed by the First Circuit, which held that the deliberate indifference by Alvarez and Cartagena caused Gutierrez' injuries.

The court found that as Soto's supervisor, Alvarez was aware of Soto's long history of using excessive force against civilians and Soto's general reputation for violence. *Id.* at 562. Soto had more complaints against him for brutality than any officer in the narcotics division. Just a few months prior to the shooting of Gutierrez, Soto had been suspended for five days for holding a physician at gunpoint while officers under his command beat the doctor. Despite his concerns about Soto, including his fear the Soto's violence could spark a riot, Alvarez took no action against Soto such as assigning him to a desk, requesting his transfer or restricting his leadership role. *Id.* at 563.

In affirming Cartagena's supervisory liability, the First Circuit held that the evidence was sufficient for the jury to find that Cartagena was aware of Soto's history of violent and illegal behavior and that Cartagena employed a wholly inadequate and impotent disciplinary system which made it possible for officers like Soto to engage in unconstitutional conduct with impunity. Superintendent Cartagena was responsible for establishing police department policies and procedures and to ensure that these policies and procedures were implemented. Cartagena had the sole authority to suspend or fire an officer. Nonetheless, Cartagena dismissed 12 of 13 civilian complaints against Soto. Moreover, Cartagena refused to consider an officer's past conduct when evaluating complaints of misconduct, thus rendering himself willfully blind to patterns of misconduct. *Id.* at 565-66.

Absent discovery, Gutierrez would never have been able to adequately allege the specific policy-making and implementation roles of Alvarez and Cartagena or their knowledge of Soto's history of violent and illegal conduct. Gutierrez would have had no access to the information which revealed Alvarez's and Cartagena's repeated failure to sanction or discipline Soto, the very facts necessary to specify how these supervisors were deliberately indifferent to the violation of Carlos Gutierrez' constitutional rights.

The Second Circuit's standard would have permitted the discovery necessary to remedy constitutional violations by supervisory officers against plaintiffs like Carlos Gutierrez-Rodriguez. Yet under the heightened pleading standard proposed by Petitioners, Gutierrez' complaint against Alvarez and Cartagena would have been dismissed for failing to allege the very facts that were later uncovered during discovery. Petitioner's proposed pleading standard would have left Carlos Gutierrez-Rodriguez without any remedy against Alvarez and Cartagena, and would have enabled defendants to escape accountability for their unconstitutional actions.

D. Annabelle Lipsett: Supervisory Indifference to Sexual Harassment

The case of Annabelle Lipsett exemplifies the difficulties faced by plaintiffs suffering discrimination in the school or workplace. Lipsett was repeatedly sexually harassed while a surgical resident at the San Juan, Puerto Rico VA Hospital. *Lipsett v. University of Puerto* Rico, 864 F.2d 881 (1st

Cir. 1988). Her fellow residents and supervisors continually made clear their views that women should not be surgeons, made sexual remarks about her in her presence, and publicly displayed sexually explicit drawings of the plaintiff's body. Lipsett was warned not to complain about the harassment or else she would be dismissed from the residency program. Two of her superiors, Dr. Rehuel Rivera and Dr. Luis Morales, offered to alleviate Lipsett's harassment if she had sex with them. When Lipsett rejected their propositions, Drs. Rivera and Morales became hostile. *Id.* at 887-88.

Dr. Rivera subsequently retaliated against Lipsett by assigning her work typical for first year residents, but was viewed as punishment for second year residents such as Lipsett. When Lipsett complained, Dr. Rivera increased the amount of work. Lipsett subsequently appealed to Dr. Roberto Novoa, who further retaliated against Lipsett for resisting the orders, by increasing her punishment. Despite raising the issue of the punishment and discussing the general pattern of harassment with the directors of the department of surgery, Dr. Gonzalez and Dr. Blanco, no action was taken to ameliorate conditions. Rather, further retaliation ensued when her male supervisors filed false complaints against her. Acting on the basis of the these complaints, which they knew were retaliatory, Drs. Gonzalez, Blanco and Pedro Santiago, Dean of the Medical School, dismissed Lipsett from the residency program. *Id.* at 888-92.

Lipsett brought action under Title IX and 42 U.S.C. §1983 alleging she was discriminated against because of her sex. She alleged that Drs. Gonzalez,

Blanco and Santiago, were liable for the discrimination and harassment she faced due their gross negligence. A jury returned a $525,000 verdict for Lipsett against the defendants, including those liable as supervisors. *Lipsett v. University of Puerto Rico*, 759 F. Supp. 40 (D. Puerto Rico 1991). The supervisory defendants sought to overturn the verdict against them on the basis of qualified immunity. In upholding the jury's verdict, the District Court found that there was an affirmative link between the defendants deliberate indifference and the violation of Lipsett's rights. *Id.* at 56.

In rejecting an earlier motion for summary judgment submitted by the supervisory defendants, the First Circuit held that there was sufficient evidence the defendants were aware that the disciplinary actions taken against Lipsett were pretextual and retaliatory. *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 903 (1st Cir. 1988). The First Circuit further found that Lipsett had presented sufficient facts to establish that Drs. Blanco and Gonzalez failed to investigate or remedy the sexual harassment she faced and that Drs. Blanco, Gonzalez, and Santiago had relied upon the pretextual complaints in their decision to determinate her. *Id.* at 903. Yet Lipsett presented these facts only *after* discovery. Without discovery Lipsett could not have known what investigative or disciplinary action was taken by the supervisory defendants or their knowledge that the complaints against her were made on a discriminatory basis.

The case of Annabelle Lipsett shows the necessity of discovery in civil rights cases alleging the deliberate indifference of supervisors to sexual

discrimination and harassment. Under the standard articulated by the Second Circuit, Lipsett would have been able to conduct the discovery necessary to determine what knowledge Drs. Blanco, Gonzalez, and Santiago possessed regarding the actions of their subordinates and what actions these supervisors took or failed to take. But the heightened pleading standard proposed by Petitioners would have immunized civil rights violators for their illegal actions and prevented Annabelle Lipsett from holding these supervisors liable for violating her constitutional rights.

* * *

Civil rights litigation is a crucial tool to protect fundamental rights, and carefully managed discovery permits the full and fair enforcement of those rights. Petitioner's proposed departure from traditional pleading standards and undue restriction of judicial discretion to manage discovery would plaintiffs in an intolerable Catch-22. As the cases above illustrate, in too many common situations, Petitioners' heightened pleading standard would systematically disadvantage civil rights plaintiffs and unfairly immunize civil rights violators.

CONCLUSION

This Court should not require a heightened standard of pleading either to defeat the defense of qualified immunity or to allege supervisory liability for the violation of Constitutional rights. The Second Circuit's "flexible plausibility" standard far better guides district court discretion to balance defendants' need for full notice against plaintiffs'

need for full discovery. For the foregoing reasons, *Amici* respectfully request that the Court uphold the decision of the United States Court of Appeals for the Second Circuit.

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