

No. 12-

IN THE
Supreme Court of the United States

DONALD VANCE AND NATHAN ERTEL,

Petitioners,

v.

DONALD RUMSFELD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the federal courts may entertain damages claims brought by civilian American citizens who have been tortured by their own military when a post-deprivation damages remedy is the only means to vindicate their constitutional rights.

Whether *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), imposes a heightened mental-state requirement in all constitutional tort cases against supervising government officials or, alternatively, whether deliberate indifference remains a sufficiently culpable mental state to establish a supervisor's personal responsibility for certain constitutional violations.

PARTIES TO THE PROCEEDINGS

Donald Vance and Nathan Ertel were plaintiffs in the district court and appellees in the court of appeals, and are Petitioners in this Court.

Donald Rumsfeld, former Secretary of Defense of the United States, was a defendant in his individual capacity in the district court and an appellant in the court of appeals, and is Respondent in this Court.

The United States was a defendant in the district court and an appellant in the court of appeals, but Petitioners are not seeking review of their claim against the United States.

Petitioners also sued unknown agents of the United States, who Petitioners allege are the individuals who tortured them. All proceedings in the district court concerning the unknown agents were stayed when Respondent filed this appeal, at which time the United States had not provided Petitioners the information necessary to sue these federal agents.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Donald Vance and Nathan Ertel respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the *en banc* court of appeals (App. 1a-81a) is reported at 701 F.3d 193. The opinion of the panel (App. 82a-169a) is reported at 653 F.3d 591. The district court opinion (App. 170a-215a) is reported at 694 F.Supp.2d 957.

JURISDICTION

The judgment of the *en banc* court of appeals was entered on November 7, 2012. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law[.]”

Relevant portions of the Detainee Treatment Act of 2005, Pub. L. 109-148, §§ 1001-1006, 119 Stat. 2680 (2005), the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. 108-375, 118 Stat. 1811 (2004), and the Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (1992), are reproduced at App. 218a-224a.

STATEMENT

A. Introduction

Petitioners Donald Vance and Nathan Ertel are American citizens who worked as civilian contractors in Iraq. In 2006, members of the U.S. military detained Petitioners *incommunicado* in a military prison and tortured them. Neither had committed any crime. On the contrary, Petitioners were whistleblowers, reporting corruption in Iraq to the FBI. After being released without charge and returning to the United States, Petitioners brought this damages suit against federal officials responsible for their torture.

It is undisputed that the misconduct Petitioners allege amounts to torture, in violation of clearly established constitutional rights. Moreover, the judges below agreed that Petitioners lack any adequate alternative remedy to this damages action. Nonetheless, the Seventh Circuit concluded in a sharply divided *en banc* decision that Petitioners cannot sue the individuals responsible for their torture under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). By improperly applying this Court's intra-military *Bivens* decisions *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United States v. Stanley*, 483 U.S. 669 (1987), the majority below held that no civilian American citizen may ever sue any member of the U.S. military for damages resulting from a violation of

constitutional rights, no matter the severity or location of the misconduct.

This Petition presents the exceptionally important question whether constitutional prohibitions on torture may ever be enforced in U.S. courts, given that torture victims cannot access the courts until after the torture is complete. The decision below also bars all constitutional damages actions brought by American civilians against military officials, and in so doing alters fundamentally the relationship between civilian and military and eliminates judicial review of a broad range of executive conduct that violates the constitution. This new bar on civilian *Bivens* actions against the military contradicts this Court's decisions in *Chappell*, *Stanley*, and *Saucier v. Katz*, 533 U.S. 194 (2001), and creates a circuit split over whether civilians may sue military officials who violate their constitutional rights.

The judgment below contradicts congressional legislation on the subject of torture committed by military officials and the remedies available to torture victims in U.S. courts. The Seventh Circuit ignores laws premised on the view that *Bivens* actions for torture will proceed subject to a qualified-immunity defense. It also untenably attributes to Congress an intent to provide damages actions in U.S. courts to aliens tortured by their governments while denying the same right to Americans. Such conflicts with Congress disobey this Court's command that congressional intent is paramount in the *Bivens* analysis.

The decision below also defies this Court's rulings articulating the importance of American citizenship in the protection of constitutional rights by U.S. courts. The majority states that Petitioners' citizenship has no bearing on their entitlement to redress constitutional injuries in their home courts. But by ignoring citizenship, the lower court imbues non-citizens with greater rights to redress torture in U.S. courts than citizens, contravening this Court's precedents.

Finally, the majority below improperly barred Petitioners' constitutional claims on the ground that *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), imposes a heightened mental-state requirement in all *Bivens* actions against supervising government officials. *Iqbal* imposes no such requirement. The Seventh Circuit's novel conclusion eliminates deliberate indifference as a basis for supervisory liability, in conflict with decisions of this Court and other circuits, which have held unanimously after *Iqbal* that deliberate indifference remains a sufficient basis to establish a supervisor's personal responsibility for certain constitutional violations.

As Judge Wood noted in her separate opinion below, "Civilized societies do not condone torture committed by governmental agents, no matter what job title the agent holds." App. 24a. Yet the majority's judgment ensures that torture and other military abuses of civilian American citizens can persist without judicial review. These issues merit further attention and this Court should grant the Petition.

B. Facts

1. Like thousands of American civilians, Petitioners travelled to Iraq in 2005 as contractors supporting our nation's mission to rebuild and promote democracy in the region. App. 229a, 237a, ¶¶ 3, 28.¹ They are patriotic U.S. citizens who love their country and who have served it for years. App. 236a, 275a, ¶¶ 24-25, 214.

While working for a private security company, Vance and Ertel observed corruption by Iraqi and U.S. officials. App. 234a-235a, 239a-251a, ¶¶ 18-19, 41-104. Prompted by their sense of duty, Petitioners reported what they had seen to FBI agents in Chicago. *Id.* These authorities urged Petitioners to act as whistleblowers and to inform them of other suspicious activity. *Id.* Petitioners obliged and communicated with agents frequently between October 2005 and April 2006, providing valuable intelligence. *Id.*

2. Certain American officials in Iraq discovered that Petitioners had been telling stateside law enforcement about corruption in Iraq; these officials decided to interrogate Petitioners. App. 235a, 241a-242a, 257a-258a, ¶¶ 19, 52-54, 132-37. In April 2006, they arrested Petitioners and imprisoned them at Camp Cropper, a U.S. military prison near Baghdad Airport. App. 258a-273a, ¶¶ 138-205.

¹ This account summarizes the detail of Petitioners' 387-paragraph complaint, whose allegations are accepted as true. *Iqbal*, 556 U.S. at 677-80.

Judge Hamilton's panel opinion summarizes the allegations of unconstitutional treatment Petitioners suffered there:

[T]hey experienced a nightmarish scene in which they were detained incommunicado, in solitary confinement, and subjected to physical and psychological torture for the duration of their imprisonment [T]he torture they experienced was of the kind "supposedly reserved for terrorists and so-called enemy combatants."

* * *

Vance and Ertel allege that after they arrived at Camp Cropper they were held in solitary confinement, in small, cold, dirty cells and subjected to torturous techniques forbidden by the Army Field Manual and the Detainee Treatment Act. The lights were kept on at all times in their cells[.] Their cells were kept intolerably cold[.] There were bugs and feces on the walls of the cells[.] Vance and Ertel were driven to exhaustion; each had a concrete slab for a bed, but guards would wake them if they were ever caught sleeping. Heavy metal and country music was pumped into their cell at "intolerably-loud volumes," and they were deprived of mental stimulus. . . . They were often deprived of food and water and repeatedly deprived of necessary medical care.

. . . [T]hey were physically threatened, abused, and assaulted by the anonymous U.S. officials working as guards. They allege, for example, that they experienced “hooding” and were “walled,” *i.e.*, slammed into walls while being led blindfolded with towels placed over their heads to interrogation sessions. [Petitioners] also claim that they were continuously tormented by the guards[.]

The constant theme of the aggressive interrogations was a haunting one—if Vance and Ertel did not “do the right thing,” they would never be allowed to leave Camp Cropper. Vance and Ertel were not only interrogated but continuously threatened by guards who said they would use “excessive force” against them if they did not immediately and correctly comply with instructions.

App. 89a-91a (citations omitted).

The interrogations focused on what information Petitioners had disclosed as whistleblowers. App. 235a, 259a-266a, ¶¶ 21, 143-76. Because the military prison was a “sterilized” environment, personnel wore no identification; so Petitioners never learned the names of their torturers. App. 268a, ¶ 185. Nor were they ever allowed access to counsel or the courts. App. 263a, ¶¶ 161-63. So secret was their detention that their families never knew where they were. App. 229a, 263a, 270a, ¶¶ 1, 161, 194.

Vance was detained more than three months and Ertel was held six weeks before being released. App. 236a, 273a-275a, ¶¶ 22, 206-214. Petitioners were never charged with a crime; nor had they committed any wrongdoing. App. 229a, 274a-275a, ¶¶ 1, 212, 214.

C. Proceedings Below

1. Once home, Petitioners sued the federal officials responsible for their torture. Invoking the district court's jurisdiction pursuant to 28 U.S.C. § 1331, they alleged that the torture violated their Fifth Amendment right to due process and sought damages under *Bivens*. Petitioners named as defendants Respondent and unknown federal agents "who ordered, carried out, and failed to intervene to prevent the torture and unlawful detention." App. 236a-237a, ¶¶ 26-27.

Petitioners alleged Respondent personally devised and implemented illegal policies that caused their mistreatment in Iraq. App. 230a-232a, 235a, 275a-288a, ¶¶ 6, 9, 12, 14-15, 19, 215-57. Respondent first approved use of specific torture techniques at Guantanamo Bay in 2002, ordering their application even though they were prohibited by the Army Field Manual. App. 281a-282a, ¶¶ 232-34; S. Comm. on Armed Services, 110th Cong., Inquiry Into the Treatment of Detainees in U.S. Custody xix-xxii (Nov. 20, 2008). In 2003, Respondent ordered subordinates to "Gitmo-ize" U.S. military prisons in Iraq, applying the same

prohibited torture techniques at those facilities. App. 282a-283a, ¶¶ 235-39.

Petitioners' complaint details the ensuing reports that Respondent received from his staff and from international organizations, highlighting widespread abuse of detainees by U.S. officials in Iraq. App. 283a-287a, ¶¶ 240-252. The reports warned that detainees, including American citizens, were being tortured. *Id.* Despite these reports, Respondent did not halt the mistreatment and instead continued to authorize torture at military prisons in Iraq. App. 282a-285a, 287a, ¶¶ 235-45, 252.

Eventually Congress addressed the problem in two laws: the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 ("NDAA"), Pub. L. 108-375, 118 Stat. 1811 (2004), and the Detainee Treatment Act of 2005 ("DTA"), Pub. L. 109-148, §§ 1001-1006, 119 Stat. 2680 (2005). These laws made clear that torture was absolutely illegal and against military policy, and they limited interrogation techniques to those in the Army Field Manual. App. 218a-219a, DTA §§ 1002(a), 1003(a)&(d); App. 221a-222a, NDAA § 1091(b). They also required Respondent to take measures to halt the use of illegal torture immediately. App. 222a, NDAA § 1092(a).

Congress further addressed the question of lawsuits brought against U.S. officials accused of torture. It chose to provide good-faith immunity from suit for officials who had committed torture

not realizing its illegality, and it provided counsel for such suits. App. 219a-220a, DTA § 1004.

Petitioners allege Respondent took no steps to curb torture despite these clear laws, and that his inaction led to Petitioners' abuse. Respondent ensured continued use of illegal torture techniques by adding them to a classified section of the Army Field Manual. App. 284a-285a, ¶¶ 243-44; see also Eric Schmitt, *New Army Rules May Snarl Talks with McCain on Detainee Issue*, N.Y. Times, Dec. 14, 2005. Petitioners allege it was those techniques that were used against them at Camp Cropper. App. 236a, 260a-261a, 273a-275a, 284a-285a, ¶¶ 22, 144-52, 206-214, 243-44. Not until September 2006, after Petitioners' release, did Respondent stop using illegal torture. App. 282a-285a, 287a, ¶¶ 235-45, 252.

Importantly, Petitioners allege that the torture techniques they experienced required Respondent's personal approval on a case-by-case basis. App. 275a-276a, 282a, ¶¶ 217, 235. Petitioners therefore contend Respondent is personally responsible because he specifically authorized their torture. App. 275a-276a, 282a, ¶¶ 217, 235.

2. Respondent moved to dismiss, arguing that special factors precluded a *Bivens* action, that the pleadings were insufficient under Rule 8, and that he was entitled to immunity. The district court denied the motion in part, allowing Petitioners' substantive due process claims based on torture to proceed. App. 208a.

The judge noted, “*Iqbal* undoubtedly requires vigilance on our part to ensure that claims which do not state a plausible claim for relief are not allowed to occupy the time of high-ranking government officials.” App. 176a. It continued, “[*Iqbal*] is not, however, a categorical bar on claims against . . . a high-ranking government official.” *Id.* The judge concluded that Petitioners plausibly alleged Respondent’s personal responsibility for their torture, App. 183a-184a, and that the conduct violated clearly established rights, App. 199a.

Applying this Court’s two-step *Bivens* framework, the trial court noted “little dispute regarding the absence of an alternative remedy”; Petitioners were denied access to courts throughout their torture. App. 200a-201a. It next concluded that special factors did not counsel hesitation, identifying two aspects of the case that justified rejecting a “blank check’ for high-ranking government officials.” App. 208a. First, Petitioners’ damages action did not require intervention in military policy because it only sought *ex post* review of military treatment of civilians. App. 204a-208a. Second, the judge emphasized Petitioners’ American citizenship and this Court’s precedents protecting the constitutional rights of American civilians who interact with the military abroad. *Id.* (citing *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

3a. A panel of the Seventh Circuit affirmed with one judge dissenting.² App. 82a-169a. Writing for the majority, Judge Hamilton recognized that the case “raises fundamental questions about the relationship between the citizens of our country and their government,” App. 82a, and reiterated that high-level officials should not be subjected to civil proceedings lightly, App. 98a.

Noting that the Federal Rules “impose no special pleading requirements for *Bivens* claims, including those against former high-ranking government officials,” App. 97a (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513-14 (2002)), the panel applied *Iqbal*’s requirement that Petitioners “allege facts indicating that [Respondent] was personally involved in and responsible for the alleged constitutional violations,” App. 94a. Adhering to *Iqbal*’s teaching that “the factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue,” App. 94a-95a (quoting *Iqbal*, 556 U.S. at 675-77), the majority identified a critical difference between *Iqbal* and this case: “Unlike in *Iqbal*, which was a discrimination case, where the plaintiff was required to plead that the defendant acted with discriminatory purpose, the minimum . . . required

² The district court stayed proceedings when Respondent appealed. Prior to the stay, Petitioners repeatedly moved to compel and the court twice ordered the United States to provide information necessary to name the unknown federal agents as defendants, but “the United States . . . staunchly refused to divulge the fruits of its investigation.” *Vance v. Rumsfeld*, 2007 WL 4557812, at *5 (N.D. Ill. Dec. 21, 2007).

here would be deliberate indifference[.]” App. 95a (citing *Farmer v. Brennan*, 511 U.S. 825 (1994)).

The panel examined the complaint in painstaking detail and concluded that Petitioners plausibly alleged three theories supporting their claims. App. 99a-109a. First, Respondent approved the use of torture against detainees *ad hoc* and thus against them specifically. App. 97a, 100a. Second, Respondent “devised and authorized policies that permit the use of torture in their interrogation and detention.” App. 99a. And third, Respondent “acted with deliberate indifference by not ensuring that detainees were treated in a humane manner despite his knowledge of widespread detainee mistreatment.” App. 107a. The complaint sufficiently alleged that Respondent “was well aware of detainee abuse because of both public and internal reports,” App. 101a, that Congress outlawed those abuses in the DTA, App. 102a-103a, and that Respondent did nothing “despite his actual knowledge that U.S. citizens were being and would be detained and interrogated using the unconstitutional abusive practices that he had earlier authorized.” App. 104a. “While it may be unusual that such a high-level official would be personally responsible for the treatment of detainees,” the panel concluded, “here we are addressing an unusual situation where issues concerning harsh interrogation techniques and detention policies were decided, at least as the plaintiffs have pled, at the highest levels of the federal government.” App. 97a.

3b. Both majority and dissent agreed that qualified immunity was not contested and that the facts, properly pleaded, stated a violation of clearly established rights. App. 111a-112a, 121a, 159a. “On what conceivable basis could a U.S. public official possibly conclude that it was constitutional to torture U.S. citizens?” the panel asked, App. 111a, noting that all three branches had repeatedly declared torture unconstitutional, App. 119a-121a.

3c. Regarding *Bivens*, the panel observed that Respondent argued “for a truly unprecedented degree of immunity from liability for grave constitutional wrongs committed against U.S. citizens.” App. 130a. “The defense theory” it continued, immunized Respondent and every soldier “from civil liability for deliberate torture and even cold-blooded murder of civilian U.S. citizens. The United States courts, and the entire United States government, have never before thought that such immunity is needed for the military to carry out its mission.” *Id.* The panel concluded that *Bivens* is available to remedy the torture of civilian American citizens by U.S. military personnel. App. 84a.

Acknowledging that “*Bivens* remains the law of the land” and “prevent[s] constitutional rights from becoming ‘merely precatory,’” App. 124a-125a & n.13 (quoting *Davis v. Passman*, 442 U.S. 228, 242 (1979)), the panel’s analysis strictly applied this Court’s recent decisions urging “caution in recognizing *Bivens* remedies in new contexts.” App. 124a. The panel stressed, “*Bivens* does not provide

an ‘automatic entitlement’ to a remedy[.]” App. 124a (quoting *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007)).

Because Respondent conceded the absence of alternative remedies, App. 122a, the analysis focused on special factors. The panel explained that the elements of Petitioners’ claims were well established: prisoners abused by federal jailors may invoke *Bivens*, App. 132a (citing *Carlson v. Green*, 446 U.S. 14 (1980)); civilians may bring constitutional claims against military officers, *id.* (citing *Saucier*, 533 U.S. 194); American civilians can depend upon constitutional rights overseas, App. 134a (citing *Reid v. Covert*, 354 U.S. 1 (1957)); and *Bivens* actions may proceed against high-level officials, App. 135a (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985)).

Respondent contended that *Chappell* and *Stanley* foreclosed Petitioners’ claims and that courts should not interfere with military affairs. The panel rejected the first argument by pointing out that *Chappell* and *Stanley* were intra-military cases and that neither “provides a basis for rejecting a *Bivens* claim by a civilian against a military official.” App. 133a-134a n.17.

Addressing the second argument, the panel decided that Petitioners were “not challenging military policymaking and procedure generally, nor an ongoing military action. They challenge only their particular torture at the hands and direction of U.S. military officials, contrary to the statutory

provisions and stated military policy, as well as the Constitution.” *Id.* Because Petitioners did so “in a lawsuit to be heard well after the fact,” the panel decided a *Bivens* remedy would “not impinge inappropriately on military decision-making,” App. 137a-138a. It added that “it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims.” App. 137a (citing *Hamdi*, 542 U.S. at 535; *Ex parte Quirin*, 317 U.S. 1, 19 (1942)). “Courts reviewing claims of torture in violation of statutes such as the Detainee Treatment Act or in violation of the Fifth Amendment do not endanger the separation of powers, but instead reinforce the complementary roles played by the three branches of our government.” App. 138a-139a.

The panel found no indication that Congress intended the Judiciary to withhold a *Bivens* remedy in these circumstances. App. 146a-150a. “Congress was aware that *Bivens* might apply when it enacted legislation relevant to detainee treatment,” the panel noted, and “when Congress enacted the Detainee Treatment Act, it opted to regulate—not prohibit—civil damages claims against military officials accused of tortur[e]” by creating “a good faith defense . . . for officials who believed that their actions were legal and authorized[.]” App. 147a. Legislation providing a qualified defense strongly suggested that citizens tortured by military officers could bring civil actions. *Id.*

The majority found “other powerful evidence that weighs heavily in favor of recognizing a judicial remedy,” noting that “Congress has enacted laws that provide civil remedies under U.S. law for foreign citizens who are tortured by their governments[.]” App. 148a. “It would be extraordinary,” said the panel, “for the United States to refuse to hear similar claims by a U.S. citizen against officials of his own government. And *Bivens* provides the only remedy.” App. 150a.

Finally, the majority addressed Petitioners’ citizenship, stressing two established principles. First, “[e]ven when the United States acts outside its borders, its powers are not ‘absolute and unlimited’ but are subject ‘to such restrictions as are expressed in the Constitution.” App. 134a-135a (citing *Boumediene v. Bush*, 553 U.S. 723, 765 (2008)). And second, while foreigners can turn to their own governments for help, Americans tortured by their military can only rely upon U.S. courts. App. 143a.

In closing, the panel recognized that the courts for centuries have provided Americans redress when their rights are invaded by the government, App. 153a-154a (citing *Dunlop v. Munroe*, 7 Cranch 242 (1812); *Little v. Barreme*, 2 Cranch 170 (1804); *Marbury v. Madison*, 1 Cranch 137 (1803)), and concluded: “Relying solely on the military to police its own treatment of civilians . . . would amount to an extraordinary abdication of our government’s checks and balances that preserve Americans’ liberty.” App. 154a.

4. The Seventh Circuit granted rehearing *en banc* and reversed. All judges acknowledged that Petitioners' mistreatment amounted to torture, in violation of statute and clearly established constitutional rights. App. 3a-4a, 7a-8a, 25a-26a, 67a. Nonetheless, the majority held that Petitioners could not pursue a *Bivens* action because civilian American citizens can never bring constitutional damages claims against military officials. App. 2a-8a. The majority based its categorical bar on *Chappell* and *Stanley*. App. 10a-12a.

Four judges wrote separately disavowing that conclusion. Judge Wood rejected the bar to "any and all possible claims against military personnel," App. 27a, and the dissenting judges called the majority's rule an "unprecedented exemption from *Bivens* for military officers," App. 71a (Williams, J., dissenting), and a "grant of absolute civil immunity to the U.S. military for violations of civilian citizens' constitutional rights," App. 68a (Hamilton, J., dissenting).

The *Bivens* analysis was again limited to special factors, all judges agreeing that Petitioners have no alternative remedy meeting the requirements of *Minneci v. Pollard*, 132 S. Ct. 617 (2012). App. 15a. The majority began with the premise that "[w]hatever presumption in favor of a *Bivens*-like remedy may once have existed has long since been abrogated," App. 8a-9a, and it identified two justifications for its categorical *Bivens* bar: judicial interference with military policy, App. 10a-13a; and

“diverting Cabinet officers’ time from management of public affairs to defense of their bank accounts,” App. 17a.³

Judge Wood rejected the notion that *Bivens* “sprang forth from the heads of federal judges,” explaining that it is “solidly rooted in the most fundamental law we have, the Constitution,” App. 27a, and has been repeatedly reaffirmed as good law, App. 29a-30a. Judge Hamilton reiterated that Petitioners “are not asking this court to *create* a cause of action. . . . It is the defendants who have sought and have now been given a new, extraordinary, and anomalous *exception to Bivens*.” App. 40a.

Judges Rovner and Wood strongly criticized the majority’s concern “that *Bivens* liability would cause Cabinet Secretaries to carry out their responsibilities with one eye on their wallets,” App. 35a, calling it “disrespectful of those who serve in government and dismissive of the protections that such liability affords against serious and intentional violations of the Constitution,” App. 69a. Judge Hamilton added that concern about damages liability cannot be a special factor given this Court’s repeated recognition of *Bivens* actions against high-level officials and its cases expressing

³ The majority mentioned briefly concerns about evidence, App. 18a, which Judge Calabresi has noted elsewhere are managed using judicial tools and not by barring *Bivens* actions altogether. *Arar v. Ashcroft*, 585 F.3d 559, 635 (2d Cir. 2009) (Calabresi, J., dissenting).

a preference for addressing liability concerns in the immunity analysis. App. 45a-46a. (citing *Mitchell*, 472 U.S. 511; *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Butz v. Economou*, 438 U.S. 478 (1978)).

Regarding interference with military affairs, the judges writing separately explained that the majority's bar on civilian *Bivens* claims found no support in *Chappell* or *Stanley* and actually contradicted those decisions' express limitation to intra-military disputes. App. 38a-42a, 73a-74a. "Can there be a clearer indication of error?" Judge Williams asked. App. 74a.

The dissenting judges identified two additional reasons that concerns about interfering with military policy provided no basis for barring Petitioners' claims. Judge Williams first reiterated that Petitioners were not asking for review of military command or policy. App. 72a-73a. "[T]here is little need to do so because Congress has already directly addressed and outlawed the detention practices inflicted on [Petitioners]." *Id.* Second, Judge Williams pointed out that the majority said in its own opinion that Petitioners should have sought injunctive relief, App. 17a, and noted that it is inconsistent to endorse injunctive relief against the military while citing concerns about interference as a reason to bar damages actions. App. 76a.

The majority's discussion of congressional intent also provoked criticism. Judge Hamilton noted that "the majority opinion converts the second step of

Bivens analysis . . . into a search for evidence that Congress has expressly authorized *Bivens* actions against U.S. military personnel.” App. 51a. Not only had the majority “brush[ed] over the fact that the [DTA] expressly provides a defense to a civil action” for torture, App. 30a (“a strong indication that Congress has not closed the door on judicial remedies,” App. 55a), but it ignored completely the State Department’s declaration that *Bivens* is available to torture victims, App. 31a-32a. Moreover, the majority neglected that Congress has provided aliens tortured abroad a damages action in U.S. courts, and it thus “attribut[ed] to Congress an intention to deny U.S. civilians a right that Congress has expressly extended to the rest of the world.” App. 53a. Judge Hamilton observed, “Congress has legislated on the assumption that U.S. nationals, at least, should have *Bivens* remedies against U.S. military personnel in most situations.” App. 52a.

Finally, the majority held that even if a *Bivens* action proceeded “[Respondent] could not be held liable.” App. 19a. The majority read *Iqbal* as imposing a rule that a “supervisor can be liable only if he wants the unconstitutional or illegal conduct to occur.” *Id.* Though the majority’s analysis refers only to the “gist” or “theme” of Petitioners’ complaint, App. 19a-21a, the court decided that “[Petitioners] do not allege that [Respondent] *wanted* them to be mistreated in Iraq,” and it held the pleadings insufficient on that ground. App. 19a; see also App. 33a-34a (Wood, J., concurring). The dissenting judges recognized that

vicarious liability does not apply in *Bivens* suits, App. 63a, but emphasized that “*Iqbal*’s different approach to pleading an individual’s *discriminatory intent*” did not apply to Petitioners’ claims of deliberate indifference. App. 65a. Petitioners’ “complaint is unusually detailed,” they concluded, making allegations that “go well beyond those deemed insufficient in [*Iqbal*].” App. 81a.

REASONS FOR GRANTING THE PETITION

A. The Seventh Circuit's Prohibition of Civilian *Bivens* Actions Against the Military Raises Issues of National Importance

The Seventh Circuit bars civilian American citizens from filing *Bivens* actions against any member of the U.S. military for all constitutional injuries, no matter how extreme the misconduct or where it occurs. Judge Wood observed that the decision means “that a civilian in the state of Texas who is dragged by a military officer onto the grounds of Fort Hood and then tortured would not have a *Bivens* cause of action.” App. 27a. The lower court’s complete bar to constitutional suits against military personnel applies “to military mistreatment of civilians not only in Iraq but also in Illinois, Wisconsin, and Indiana.” App. 38a. The unlimited breadth of the decision and the fundamental change that it works in the relationship between civilians and the military presents a question of national importance warranting further review.

B. The Lower Court's Bar on Civilian *Bivens* Actions Undermines Checks and Balances by Foreclosing Judicial Review of A Range of Executive Conduct That Violates the Constitution

Certiorari is warranted because the judgment below undermines constitutional checks and

balances and abandons the Judicial Branch's obligation to exercise judicial review when the use of executive authority affects the rights of civilians. In so doing, the lower court contradicts this Court's precedents emphasizing that this judicial obligation persists even when war powers are implicated. See *Boumediene*, 553 U.S. at 765 (“[T]he political branches [do not] have the power to switch the Constitution on or off at will [That] would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’”) (quoting *Marbury*, 1 Cranch 137); *Hamdan v. Rumsfeld*, 548 U.S. 557, 602 (2006) (discussing the risk of “concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution”); *Hamdi*, 542 U.S. at 535-36 (“[W]e necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts [A] state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens[.]”); *Reid*, 354 U.S. at 23-24 (“The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds.”); *Ex Parte Quirin*, 317 U.S. at 19 (“[T]he duty which rests on the courts, in time of war as well as in time of peace, [is] to preserve unimpaired the constitutional safeguards of civil liberty[.]”); *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934) (“[E]ven the war power does not remove constitutional limitations safeguarding essential

liberties.”); see also *The Federalist* No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison) (“The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.”).

The *en banc* majority invoked separation of powers as its reason for barring all *Bivens* actions against the military, but its decision actually eliminates judicial review of most military abuses committed against civilians. A post-deprivation damages action is usually the only way for a court to evaluate interactions between the military and civilians. Most such interactions fall in a category of conduct that courts cannot evaluate in advance, are unable to enjoin as it is occurring, and for which they cannot provide equitable relief after the fact. For such conduct, the Seventh Circuit’s prohibition of a *Bivens* remedy represents a complete bar to judicial involvement in enforcing the constitutional rights of civilians harmed by the military.

“For people in [Petitioners’] shoes, it is damages or nothing.” *Bivens*, 403 U.S. at 410 (Harlan, J., concurring). An *ex post* damages action is the only way a court can review the misconduct Petitioners allege. Other remedies are useless now that the constitutional violation is complete. *Mitchell*, 472 U.S. at 523 n.7. The majority below thought injunctive relief would vindicate Petitioners’ rights. App. 17a. But Petitioners, like all torture victims, were held *incommunicado* and had no opportunity to petition for a writ of habeas corpus or to seek an

injunction while their torture was ongoing. Neither is there any basis today after the misconduct has ceased to pursue prospective relief. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-09 (1983).

Even assuming *arguendo* that injunctive relief was possible, a post-deprivation damages action is far less intrusive. Judge Williams's dissent highlights this additional tension in the majority's assertion that injunctive relief is a viable alternative to *Bivens* in these circumstances: an action to enjoin military conduct implicates precisely the same concerns about invading the political branches' prerogatives that the majority below cited as reasons for barring damages actions entirely. App. 78a. "Traditionally, damages actions have been viewed as *less* intrusive than injunctive relief because they do not require the court to engage in operational decision-making." *Id.*; see also *Bivens*, 403 U.S. at 395-97. The lower court's endorsement of injunctive relief fatally undermines its reasons for disallowing damages actions.

By forbidding civilian *Bivens* actions against military personnel, the Seventh Circuit closes the best and only avenue for judicial review of Petitioners' injuries and all transient constitutional violations committed by military officials. In so doing, the lower court "fails to carry out the judiciary's responsibility under Supreme Court precedents to protect individual rights under the Constitution, including a right so basic as not to be tortured by our government." App. 37a (Hamilton, J., dissenting); see also *Marbury*, 1 Cranch 137

(1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”). This abdication of the judicial role requires correction.

C. The Decision to Bar Civilian *Bivens* Actions Contradicts *Chappell, Stanley, and Saucier* As Well As Lower Courts That Allow Civilians to Sue Military Officials for Constitutional Injuries

Review is warranted because the decision to bar civilian constitutional claims against military officials contradicts this Court’s precedents that set the bounds of *Bivens* actions involving the military. It also creates a split among the lower courts, which until now had permitted *Bivens* actions by American civilians against military personnel. In light of the continual interaction between military and civilians, this Court should immediately address this division among the circuits.

1. The majority below concluded erroneously that *Chappell* and *Stanley* compelled its judgment that no American civilian may ever sue a military official for constitutional violations. App. 12a-13a. This conclusion actually contradicts *Chappell* and *Stanley*, which simply applied to *Bivens* the doctrine of *Feres v. United States*, 340 U.S. 135 (1950). *Feres* barred recovery under the Federal Tort Claims Act for servicemembers alleging injuries incident to military service, *id.* at 141; and *Chappell* and *Stanley* applied the same restriction

to *Bivens* actions, see *Stanley*, 483 U.S. at 684; *Chappell*, 462 U.S. at 305.

Both *Chappell* and *Stanley* expressly limited their holdings, rejecting a complete bar on all constitutional claims by servicemembers against other military personnel. This Court left servicemembers room to bring constitutional claims against military officials for violations arising outside of military service—*i.e.*, arising in servicemembers’ capacity as civilians. *Stanley*, 483 U.S. at 681-83; *Chappell*, 462 U.S. at 304-05. These cases impose no limits on civilian *Bivens* actions against the military,⁴ but instead draw a line between claims of servicemembers and those of civilians. *Chappell*, 462 U.S. at 303-04 (“[T]his Court has long recognized two systems of justice[:] one for civilians and one for military personnel.”).

The Seventh Circuit contradicts both decisions by disregarding their limitation to intra-military injuries suffered incident to service and by applying them to foreclose relief for civilians. As Judge Williams noted, the majority’s judgment “goes well beyond what the Supreme Court has expressly identified as a bridge too far.” App. 74a.

Saucier further illustrates the conflict between this Court’s decisions and the Seventh Circuit’s new bar to civilian *Bivens* claims. 553 U.S. 194. *Saucier* was a *Bivens* action brought by a civilian

⁴ Nor does *Feres* so limit civilian claims. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 510-11 (1988).

after *Chappell* and *Stanley*, in which the civilian alleged the use of excessive force by a military official. This Court found that the military officer was entitled to qualified immunity but nowhere suggested that civilians cannot bring *Bivens* claims against military personnel in the first place. Cf. *Stanley*, 483 U.S. at 684-85 (distinguishing the question of the *Bivens* cause of action from the immunity inquiry). The Seventh Circuit's decision conflicts with this Court's approval of such suits.

2. It is not surprising given these precedents that the lower courts had unanimously permitted civilians to bring *Bivens* actions against military officials who violated their constitutional rights. Before this case, five courts, including the Seventh Circuit, had taken that position. See *Case v. Milewski*, 327 F.3d 564, 568-69 (7th Cir. 2003) (considering civilian claim alleging military officers used excessive force); *Morgan v. United States*, 323 F.3d 776, 780-82 (9th Cir. 2003) (allowing *Bivens* action for civilian alleging military officers conducted illegal search); *Roman v. Townsend*, 224 F.3d 24, 29 (1st Cir. 2000) (entertaining *Bivens* action by civilian against military police); *Applewhite v. U.S. Air Force*, 995 F.2d 997, 999 (10th Cir. 1993) (considering military officers' immunity from civilian's allegations of illegal strip search); *Dunbar Corp. v. Lindsey*, 905 F.2d 754, 756-63 (4th Cir. 1990) (permitting civilian *Bivens* action against military officers for deprivation of

property). No court had previously barred such claims.⁵

The judgment below contradicts decisions of the First, Fourth, Ninth, and Tenth Circuits that permit civilian suits against military officers, consistent with *Saucier*. This conflict and the uncertainty that the judgment below engenders in interactions between military officials and American civilians—whether contractors, military families, or workers on bases—calls for review by this Court.

D. The Seventh Circuit’s *Bivens* Analysis Disregards Congressional Legislation on Torture, In Conflict With This Court’s Special-Factors Precedents

Certiorari is warranted because the decision to insulate military officials from all civilian constitutional suits contradicts congressional legislation contemplating that such suits will proceed subject to qualified immunity. By disregarding Congress’s express policy choices, the lower court misapplies the special-factors analysis and disobeys *Davis* and *Stanley*’s instruction that the *Bivens* analysis should conform to congressionally enacted immunity standards.

⁵ *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012), narrowly declined a *Bivens* remedy to a designated enemy combatant who challenged that designation and sought injunctive and declaratory relief.

1. In the guise of special-factors analysis, the Seventh Circuit reaches a conclusion in conflict with legislation that presumes *Bivens* actions will proceed against military officials, subject to good-faith immunity. When Congress addressed detainee abuses occurring during the war in which Petitioners were tortured, not only did it outlaw the techniques later used on Petitioners, App. 218a-219a, DTA §§ 1002(a), 1003(a)&(d); App. 221a-222a, NDAA §§ 1091(b), 1092(a), it also provided a right to counsel and qualified immunity to military officials accused of torture in civil suits, App. 219a-220a, DTA § 1004 (immunizing officials who torture aliens if they “did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful”).

The decision to regulate rather than bar civil suits for torture is compelling evidence that Congress thought a *Bivens* remedy is available to people tortured by the U.S. military. When the DTA was passed, *Bivens* had been a fixture of this Court’s jurisprudence for four decades. As Judge Wood concluded, by providing this immunity, “Congress can have been referring only to a *Bivens* action.” App. 30a.

Rather than giving effect to this Act of Congress, the court below explained it away amidst a “special-factors” analysis that erected a barricade to the very claims Congress chose not to bar in the DTA. It was error to use special-factors analysis to impose judicial policy in a field where Congress

already had selected a different policy choice. The purpose of special-factors analysis is to ensure that courts defer to Congress on remedies for constitutional violations where there is reason to suspect Congress would expect such deference. *Bush v. Lucas*, 462 U.S. 367, 380, 388-90 (1983). Accordingly, absent a legislative remedy for a particular constitutional violation, courts must consider whether “Congress expected the Judiciary to stay its *Bivens* hand[.]” *Wilkie*, 551 U.S. at 554. Had the lower court heeded this directive, it would have found it dispositive that Congress legislated with the understanding that American civilians may file *Bivens* actions for torture.

This Court’s special-factors precedents dictate judicial restraint where Congress has not spoken on remedies but has indicated that a judicial remedy is inappropriate. At the same time, those precedents encourage the opposite course—supplying a remedy—where congressional action suggests that a remedy should be available.

When the political branches supply partial immunity to protect officials exercising government authority, this Court has weighed that grant of immunity in the special-factors analysis. And it has directed that it is inappropriate to displace Congress’s immunity choice by withholding the *Bivens* remedy entirely. *Davis* thus considered whether separation-of-powers concerns foreclosed a *Bivens* suit against a congressman, and concluded that a remedy was appropriate because the political branches had weighed those special factors already

in the Speech and Debate Clause and had established the appropriate level of immunity. 442 U.S. at 235 n.11, 246. The *Stanley* Court explained that where the political branches have “addressed the special concerns in [a] field through an immunity provision,” it would “distort[] their plan to achieve the same effect as more expansive immunity by the device of denying a cause of action[.]” 483 U.S. at 685.

The Seventh Circuit improperly substituted its own policy judgment for that of Congress. When Congress enacted the DTA and provided officials qualified immunity for torture claims, it weighed precisely those special factors that the court below invoked as reasons for barring Petitioners’ *Bivens* suit. Congress reached the conclusion that qualified immunity sufficiently protects officials accused of torture. The Seventh Circuit’s decision to insulate the whole military from suit undermines Congress’s plan of a more limited immunity, replacing congressional judgment with judicial policymaking.

2. The majority’s special-factors analysis also requires the absurd conclusion that Congress intended to provide damages in U.S. courts to aliens tortured by their governments while denying the same remedy to U.S. citizens. The Torture Victim Protection Act of 1991 (“TVPA”), Pub. L. 102-256, 106 Stat. 73 (1992), provides a damages action in U.S. courts for aliens tortured overseas. App. 222a-224a, TVPA §§ 2-3. Existing legislation thus provides aliens tortured by foreign

governments exactly the remedy in U.S. courts that the Seventh Circuit denied—and assumed that Congress would want denied—to civilian American citizens. As Judge Hamilton noted, assuming such congressional intent “attributes to our government and to our legal system a degree of hypocrisy that is breathtaking.” App. 37a.

These divisions between Congress and the Seventh Circuit represent special-factors analysis upended. Only by improperly disregarding Congress’s legislation on torture and what it has deemed the proper level of immunity for officials accused of torture could the court below conclude that it is appropriate to ban all *Bivens* actions against the military. This Court should grant the Petition to correct these conflicts with Congress and the misapplication of the special-factors framework.

E. The Lower Court’s Refusal To Consider Petitioners’ American Citizenship Contradicts This Court’s Cases on the Rights of Citizens

Review is warranted because the lower court gave no weight to Petitioners’ American citizenship before deciding that a remedy was unavailable. The majority dismissed Petitioners’ argument that their citizenship affects the *Bivens* analysis, saying, “We do not think that the [Petitioners’] citizenship is dispositive one way or the other. . . . It would be offensive to our allies, and it should be offensive to our own principles of equal treatment, to declare

that this nation systematically favors U.S. citizens . . . when redressing injuries caused by our military[.]” App. 18a.⁶ The majority’s disregard for citizenship undermines this Court’s longstanding emphasis on the special relationship that American citizens enjoy with their sovereign.

Reid established that citizens retain constitutional rights abroad, saying “the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.” 345 U.S. at 6. Moreover, *Eisentrager* stated that Americans enjoy greater protection of those rights in U.S. courts than do aliens. 339 U.S. at 769 (“With the citizen we are now little concerned, except to set his case apart . . . and to take measure of the difference between his status and that of all categories of aliens. . . . The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen’s claims upon his government for protection.”). These principles run throughout the cases. See *Munaf v. Geren*, 553 U.S. 674, 685-88 (2008); *Hamdi*, 542 U.S. at 530-34; *Rasul v. Bush*, 542 U.S. 466, 486 (2004) (Kennedy, J., concurring); *United States v. Verdugo-Urquidez*,

⁶ The majority ignored that the State Department has informed the United Nations that *Bivens* actions in U.S. courts are available to anyone tortured by U.S. officials. App. 227a, U.S. Written Response to Questions Asked by the U.N. Committee Against Torture, ¶ 5 (Apr. 28, 2006); see also App. 31a-32a.

494 U.S. 259, 273 (1990); *id.* at 275-78 (Kennedy, J., concurring).

Despite these precedents, the lower court disregarded Petitioners' citizenship on its way to concluding that Americans tortured by their military cannot vindicate their constitutional rights. That conclusion leaves citizens worse off than non-citizens. Judge Hamilton noted, "If the U.S. government harms citizens of other nations, they can turn to their home governments to stand up for their rights. That is not true for these U.S. citizens alleging torture by their own government." App. 59a. But the asymmetry is made worse because, as discussed, Congress has opened U.S. courts to aliens' damages claims based on torture. As Judge Wood observed, "Only by acknowledging the *Bivens* remedy is it possible to avoid treating U.S. citizens worse than we treat others." App. 33a.

The Seventh Circuit dismissed Petitioners' citizenship, saying, "The Supreme Court has never suggested that citizenship matters to a claim under *Bivens*." App. 18a. This ignores that evaluating "special factors counseling hesitation" necessarily requires evaluating Congress's design of remedial programs. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). Where Congress has provided robust remedies to aliens, citizenship is rendered a central special factor in the *Bivens* analysis. Ignoring citizenship in a decision that elevates the rights of aliens in U.S. courts above those of Americans contradicts this Court's decisions.

F. The Seventh Circuit Improperly Imposes A Heightened Mental-State Requirement For Claims Against Supervising Government Officials, Eliminating Deliberate Indifference As A Basis For Supervisory Liability

Finally, certiorari is warranted because the Seventh Circuit misconstrues *Iqbal* as imposing a heightened mental-state requirement in all constitutional tort claims involving supervisors. The majority requires litigants who wish to establish the personal responsibility of a supervising government official to plead that the supervisor acted with the specific intent to cause the precise harm alleged in the case.

This novel formulation for supervisor liability contradicts *Iqbal* and creates a circuit split about whether supervisors are liable for their deliberate indifference. The Seventh Circuit's new mental-state requirement eliminates deliberate indifference as a basis for supervisory liability and exempts supervisors from accountability for a wide range of unconstitutional conduct. The court below is therefore in conflict with this Court and all others that have held that deliberate indifference is a sufficiently culpable mental state to establish a supervisor's personal responsibility for numerous constitutional torts, including that alleged by Petitioners here.

1. The Seventh Circuit wrongly extracted the particular state-of-mind allegations necessary to

plead the intentional discrimination at issue in *Iqbal* and applied them as a general requirement for all constitutional claims against supervising officials. *Iqbal* claimed unconstitutional discrimination by the Attorney General and FBI Director. Reiterating that supervisors are not vicariously liable for acts of subordinates in *Bivens* cases and that “a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution,” this Court began “by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination.” *Iqbal*, 556 U.S. at 675-76. That claim required showing that the government official took action “for the purpose of discriminating on account of race, religion, or national origin.” *Id.* at 676-77.

This Court made painstakingly clear that “[t]he factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue.” *Id.* at 676. One of the factors that varies with the constitutional violation at issue is the state of mind that a plaintiff must plead to hold a responsible party liable. *Id.* While *Iqbal* had to plead plausibly that the supervisor defendants intended to cause the harm that he had suffered based on a discriminatory purpose, that pleading requirement was tied to the claim *Iqbal* asserted; the same mental-state requirement would apply to supervisors and subordinates alike.

The Seventh Circuit misunderstood this and instead implemented a new rule that supervisor

defendants are only liable for constitutional torts when a plaintiff establishes that the supervisor acted with the specific intent to cause the precise injury alleged. “The supervisor can be liable only if he wants the unconstitutional or illegal conduct to occur,” wrote the majority, “Yet [Petitioners] do not allege that [Respondent] *wanted* them to be mistreated in Iraq.” App. 19a (citing *Iqbal*, 556 U.S. at 677). The lower court’s heightened mental-state requirement for supervisory liability conflicts with *Iqbal*’s command that the requisite mental state in *Bivens* actions turns on the constitutional violation at issue in each case.

Unlike *Iqbal*, Petitioners’ constitutional claims require that they plead that Respondent (like all other non-supervising defendants) acted with deliberate indifference to a serious risk of harm of which he was aware. *Farmer*, 511 U.S. at 829-30. This level of culpability is less blameworthy than the purposeful action in furtherance of harm required in *Iqbal* and applied in this case by the court below. See *id.* at 836. Petitioners’ complaint contains entirely plausible allegations of deliberate indifference, and the Seventh Circuit’s decision to impose a heightened mental-state requirement because Respondent is a supervisor set an improperly high bar to pleading personal responsibility.⁷

⁷ While the detail of Petitioners’ complaint meets even the majority’s improper standard, App. 69a-70a, 81a, Petitioners’ allegations that Respondent personally crafted the torture policies used against them, ignored warnings that Americans were being tortured, disregarded prohibitions on torture

2. By requiring all litigants who file *Bivens* actions against supervising officials to plead that the supervisor acted with the specific purpose of causing the particular harm alleged, the Seventh Circuit eliminates deliberate indifference as a basis for supervisory liability. In so doing, the lower court exempts supervising officials from liability for a wide range of conduct that this Court has deemed unconstitutional. See *Farmer*, 511 U.S. 825; *Helling v. McKinney*, 509 U.S. 25 (1993); *Wilson v. Seiter*, 501 U.S. 294, 302-04 (1991). In these cases, the Court set deliberate indifference as the appropriate level of culpability for establishing personal responsibility on the part of supervisors and non-supervisors alike. Nothing in *Iqbal* overturned this well-established law. Nor does *Iqbal*'s discussion of supervisory liability and the normal bar on *respondeat superior* liability in constitutional tort cases invite lower courts to upset these precedents or impose new mental-state requirements for supervisors. After *Iqbal*, a supervisor who is deliberately indifferent still should be personally responsible for the type of constitutional violations that Petitioners have alleged without any reference to principles of vicarious liability.

3. Unsurprisingly, the lower court's conclusion that deliberate indifference cannot support

passed by Congress, and authorized application of torture on a case-by-case basis certainly establish the deliberate indifference required to plead Respondent's personal responsibility.

supervisory liability in the wake of *Iqbal* creates a circuit split. Every other circuit to consider *Iqbal*'s impact on supervisory liability has correctly concluded that the constitutional provision at issue in each case dictates what mental state a plaintiff must plead to establish liability and that allegations of deliberate indifference remain sufficient to establish a supervisor's personal responsibility for certain constitutional torts. See *Wagner v. Jones*, 664 F.3d 259, 275 (8th Cir. 2011) (deciding that a supervisor is liable for deliberate indifference after *Iqbal*); *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (concluding there is "nothing in *Iqbal* indicating that the Supreme Court intended to overturn longstanding case law on deliberate indifference claims against supervisors"); *Dodds v. Richardson*, 614 F.3d 1185, 1204 (10th Cir. 2010) (noting that a plaintiff demonstrates supervisory liability by pleading deliberate indifference if "that is the same state of mind required for the constitutional deprivation he alleges"); *Harper v. Lawrence County*, 592 F.3d 1227, 1235-36 (11th Cir. 2010) (recognizing deliberate indifference as a basis for supervisory liability); *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 49 (1st Cir. 2009) (noting "supervisory officials may be liable on the basis of their own acts or omissions," including "deliberate indifference").

Iqbal left lower courts with questions about what allegations are necessary to establish supervisory liability. Now there is a conflict among lower courts about whether supervisors are ever personally responsible based on allegations of a

mental state less culpable than that at issue in *Iqbal* itself. In the Seventh Circuit, supervisors are now exempt from liability for constitutional violations involving their deliberate indifference. Supervisors elsewhere are not. The parties in *Iqbal* did not present briefing or argument on supervisory liability. This case presents an opportunity to consider the subject again in richer detail. Further review will permit this Court to restore unity among lower courts.⁸

⁸ Even if this Court were to adopt a heightened mental-state requirement, leave to amend would be appropriate. Petitioners filed their complaint more than four years ago, before *Iqbal*. App. 228a. Since then, five of 13 judges have found its allegations sufficient, and no court suggested otherwise until the judgment below. The Seventh Circuit simply ignored Petitioners' alternative request to amend, a course this Court has said "is merely abuse of . . . discretion and inconsistent with the spirit of the Federal Rules." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

CONCLUSION

For all of these reasons, this Court should grant the Petition.

Respectfully submitted,

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APPENDIX