No. 10-35710

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

_____

EARLINE COLE, as an individual and as personal representative of the Estate of Steven Bearcrane; CLETUS COLE, as an individual and as personal representative of the Estate of Steven Bearcrane; VERONICA SPRINGFIELD, as an individual and as personal representative of the Estate of Robert Springfield; P.B., minor child; V.S., minor child,

Plaintiffs-Appellees,

v.

MATTHEW ORAVEC, in his individual capacity,

Defendant-Appellant.

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

_____

REPLY BRIEF

_____

TONY WEST
Assistant Attorney General

TIMOTHY Q. PURDON
United States Attorney
District of North Dakota

BARBARA L. HERWIG
(202) 514-5425
EDWARD HIMMELFARB
(202) 514-3547
Attorneys, Appellate Staff
Civil Division, Room 7646
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

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INTRODUCTION

To plead an equal-protection claim, a plaintiff must plead both differential treatment (i.e., discriminatory effect) and discriminatory motive. Wayte v. United States, 470 U.S. 598, 608 (1985) ("Under our prior cases, these standards require petitioner to show both that the passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose."); see United States v. Armstrong, 517 U.S. 456, 465 (1996) ("To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.").

We pointed out in our opening brief (pp. 22-23) that nowhere in the amended complaint is there an allegation of even one specific instance in which Agent Oravec engaged in differential treatment by investigating a case involving non-Native Americans differently from the way he investigated the Bearcrane and Springfield cases. Absent such an allegation, the plaintiffs are merely complaining that they did not like the way he handled their cases, but there is no basis for a claim that Agent Oravec violated equal protection.

The plaintiffs now admit, Br. 9, 15, that they have not pleaded specific other cases involving non-Native Americans that Agent Oravec handled differently from theirs, but they say that is not necessary, because their claim is essentially a three-legged stool. That is, their claim is founded upon three connected allegations: (1)

that the FBI has a practice of providing less law enforcement to Native Americans than to non-Native Americans; (2) that Agent Oravec "acted consistently with [the FBI's] practice"; and (3) that Agent Oravec had a discriminatory motive. Br. 3. See also Br. 5, 7, 23, 29.

But there is a fundamental flaw in their theory: Their allegations about the FBI's alleged practice were expressly rejected as insufficient by the magistrate judge and the district court, in a portion of the order below that is not on appeal here. In his report, the magistrate judge concluded that these allegations "are not sufficient to state a claim":

> There are no non-conclusory factual allegations showing that the FBI Salt Lake City Field Office has a pattern, policy or practice of discriminating against Native Americans.

1 ER 60. See also 1 ER 52 ("bare assertions" of an FBI practice of discrimination "are akin to the conclusory allegations made in Iqbal" and "are not entitled to be assumed true"). And in the district court's order upholding the magistrate judge's report, the court agreed on this point:

> The factual allegations against the FBI are not sufficient to state a claim. There [are] no non-conclusory factual allegations showing that the FBI Salt Lake City Field Office has a pattern, policy or practice of discriminating against Native Americans.

1 ER 9.

With one of the three legs of the stool thus missing, the plaintiffs' equal-

protection claim collapses. We will now explain this in a little more detail and (though it has become unnecessary to do so as a result) we will show that the other two legs are missing as well.

ARGUMENT

The allegations of the amended complaint fail to satisfy the plausibility requirement of Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). First, the district court expressly determined that the allegations of an FBI policy or practice of discriminating against Native Americans were conclusory. Second, the amended complaint contains no allegations supporting a plausible inference of differential treatment by Agent Oravec; his alleged conduct is, at the very most, consistent with such treatment, and Iqbal and Twombly hold that this is not enough. Although it is not necessary to reach the issue, the plaintiffs' objections to our argument that differential treatment cannot be pleaded without specific allegations of cases in which Agent Oravec handled non-Native American cases differently are without merit. Finally, the allegations of discriminatory motive accepted by the district court do not in fact satisfy the requirements of Iqbal and Twombly.

I. THIS CASE IS GOVERNED BY ASHCROFT V. IQBAL.

When a defendant in a Bivens[1] case moves to dismiss based on qualified immunity, a court must apply the analysis in Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), when determining whether the plaintiffs have pleaded a plausible claim that can survive dismissal. The plaintiffs' brief in this case essentially ignores Iqbal.

A. As explained in our opening brief (pp. 18-19), the Supreme Court's decision in Iqbal holds that, when faced with a motion to dismiss, including one that is based on qualified immunity, a court must first ascertain which allegations of a complaint are conclusory and are, therefore, "not entitled to the assumption of truth." Iqbal, 129 S. Ct. at 1950. It must then assume the truth of the "well-pleaded factual allegations" and "determine whether they plausibly give rise to an entitlement to relief." Id.

This Court has adopted the framework in Iqbal. In Moss v. U.S. Secret Serv., 572 F.3d 962 (9th Cir. 2009), the Court declared that the "critical question before us" is whether the central allegation of viewpoint discrimination "is plausible, not merely possible." Id. at 970. The Court quoted the "methodological approach" of Iqbal – which we set out in the preceding paragraph – and then stated: "We follow the [Supreme] Court's suggested sequence below." Id.

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

And in applying Iqbal in Moss, this Court dismissed as conclusory the "bald allegation of impermissible motive" on the part of the government agents in that case, as well as an allegation that those agents were acting "in conformity with an officially authorized sub rosa [agency] policy" of viewpoint discrimination, "without any factual content to bolster it." Moss, 572 F.3d at 970. As for the well pleaded factual allegations, the Court held that those allegations did "not rule out the possibility of viewpoint discrimination, and thus at some level they are consistent with a viable First Amendment claim, but mere possibility is not enough." Id. at 971-72. Thus, the Court concluded that the factual allegations did not satisfy Iqbal and Twombly, because they "do[] not allow us to reasonably infer" viewpoint discrimination. Id. at 972.

B. Although Iqbal is the single most important case – and surely the most recent Supreme Court decision – dealing with motions to dismiss based on qualified immunity, and although it indisputably governs the disposition of this appeal, the plaintiffs fail to come to terms with it, citing the decision in passing only twice in their entire brief. They first dismiss Iqbal's "impact and ramifications" as "still being debated," Br. 11-12, and later cite the decision, without discussion, in asserting that Iqbal is irrelevant to the question whether the standards for selective-prosecution claims are applicable in this case.

But, contrary to the plaintiffs' implication, Iqbal is not some sort of dubious

decision that can be ignored at will. Twombly called for "retirement" of the old notion that a complaint may not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief, Twombly, 550 U.S. at 563, and Iqbal applies that new approach to qualified-immunity cases. Iqbal demands that courts carefully examine a complaint to ensure that the allegations are not "'merely consistent with' a defendant's liability," Iqbal, 129 S. Ct. at 1949, but rather go beyond mere possibility and actually show entitlement to relief. Id.

As we will now show, the plaintiffs' dismissive approach to Iqbal undermines their defense of their amended complaint.

II. THE AMENDED COMPLAINT FAILS TO PLEAD A PLAUSIBLE EQUAL-PROTECTION CLAIM.

A. As The District Court Held, The Amended Complaint Has No Non-Conclusory Allegations That The FBI Has A Practice Or Policy Of Discriminating Against Native Americans.

The plaintiffs brought this action primarily as an action for equitable relief in an attempt to obtain broad "law reform" by forcing the federal government to provide greater law-enforcement services in Indian country. All of the plaintiffs' claims for declaratory and injunctive relief, however, were dismissed in district court, leaving only a single Bivens claim against Agent Oravec, which is the subject of the present

appeal. The portions of the plaintiffs' case that the district court dismissed are not a part of this appeal, and because the order dismissing them is not final as to all claims against all parties, this Court would lack jurisdiction over the parts of the case that have been dismissed.[2]

The plaintiffs nevertheless try to bring allegations from the dismissed "law reform" portions of the case back into this qualified-immunity appeal through the rear door. In their brief on appeal, they now focus on allegations that the FBI had a practice of discriminatory enforcement of the law, providing less law enforcement in Indian country than elsewhere. Br. 5-6. Summarizing their amended complaint, they state that the "FBI engaged in a practice of discriminatory treatment," Br. 5, and that the "practice of providing less law enforcement protection to Native Americans has had an enormously negative impact on Native Americans." Br. 6. As the amended complaint alleges:

> 27. Defendants FBI, Oravec and Weyand have adopted and engaged in a pattern and practice of selectively discriminating against Native Americans in providing police services and protection on the Crow reservation in Montana; such pattern and practice including, but not limited to the failure to adequately investigate crimes in which Native Americans are victims.

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[2] The plaintiffs initially filed a cross-appeal purporting to challenge the dismissal of their claims, No. 10-35717 (9th Cir.), but they voluntarily dismissed their cross-appeal.

2 ER 87.

The reason the plaintiffs import these "law reform" allegations back into the case on appeal is that they depend on them for their allegation that Agent Oravec discriminated in conducting the Bearcrane and Springfield investigations. Absent allegations about how Agent Oravec handled investigations of non-Native Americans, the plaintiffs have to fall back on the argument that Agent Oravec "acted in conformance with the FBI practice." Br. 7. See also Br. 3, 23, 29.

But the portion of the case to which these allegations are directed is not properly part of this appeal. Both the magistrate judge and the district court expressly ruled that these allegations of an FBI practice or policy were conclusory and, under Iqbal, were not entitled to an assumption of truth on a motion to dismiss. 1 ER 9 (district court) ("The factual allegations against the FBI are not sufficient to state a claim. There [are] no non-conclusory factual allegations showing that the FBI Salt Lake City Field Office has a pattern, policy or practice of discriminating against Native Americans."); 1 ER 60 (magistrate judge) ("There are no non-conclusory factual allegations showing that the FBI Salt Lake City Field Office has a pattern, policy or practice of discriminating against Native Americans."). See also 1 ER 52 ("bare assertions" of an FBI practice of discrimination "are akin to the conclusory allegations made in Iqbal" and "are not entitled to be assumed true"). The order we have appealed not only denies qualified immunity to Agent Oravec but also dismisses the plaintiffs'

equitable claims. It is not a final order as to the plaintiffs.

If the allegations of an FBI practice or policy of discrimination are conclusory and the portion of the case to which they apply is not part of this appeal, the plaintiffs may not argue that Agent Oravec acted "consistently with" that practice or policy, Br. 3, to support a plausible claim that Agent Oravec engaged in differential treatment.

B. The Amended Complaint Fails To Allege A Plausible Claim That Agent Oravec Engaged In Differential Treatment.

There are no other non-conclusory allegations in the amended complaint that support a plausible claim of differential treatment.

1. In our opening brief (pp. 18-25), we showed that the plaintiffs have no non-conclusory allegations in their amended complaint regarding differential treatment by Agent Oravec, which is an essential element of any equal-protection claim, including in the context of law enforcement. The plaintiffs have alleged no similar case involving someone other than a Native American where Agent Oravec conducted a more thorough investigation.

The plaintiffs essentially admit this but argue that such an allegation is not required, Br. 15-24, and that it is "impractical[]" for them to cite other cases in any event. Br. 27. Instead, they make two claims: that it is enough for them to allege that Agent Oravec acted consistently with a policy or practice of the FBI that treats Native Americans differently, Br. 3, 7, 23, and that it is enough for them to allege that

there were certain deficiencies in Agent Oravec's investigation of the Bearcrane and Springfield cases, without reference to other cases. Br. 12-14. Neither claim is correct.

First, as we showed above, the plaintiffs cannot rely on an FBI policy that the district court held was alleged in a conclusory manner.

Second, alleged deficiencies in a single investigation are insufficient to plead differential treatment. The plaintiffs appear to believe that there is some platonic ideal of a criminal investigation against which any single investigation can be measured and judged. Br. 4 ("common investigative tests"); id. at 13 ("duty normally undertaken"); id. at 13-14 ("normal investigative procedures"); id. at 14 ("routine homicide investigative procedures"). That is not correct. As this Court has recognized in the context of suits against the United States, the conduct of a criminal investigation involves a multitude of discretionary decisions, at least "in the absence of mandatory directives governing how to perform [the] investigations." Alfrey v. United States, 276 F.3d 557, 565 (9th Cir. 2002); Vickers v. United States, 228 F.3d 944, 951 (9th Cir. 2000) ("discretionary function exception protects agency decisions concerning the scope and manner in which it conducts an investigation so long as the agency does not violate a mandatory directive"). See also Suter v. United States, 441 F.3d 306, 311 (4th Cir.), cert. denied, 549 U.S. 887 (2006) (holding that FBI acted within its discretionary authority during criminal investigation, when no specific

directive required it to be handled in any particular way).

Even if a single investigation could be criticized as improperly handled, that would not suffice. Improper handling of a single investigation is "merely consistent with" differential treatment but does not plausibly show that it occurred. This is precisely why it is necessary to plead some basis for comparison – a case not involving Native Americans (in fact, more than one such case) – to support a plausible inference of differential treatment. The plaintiffs have not done so. Saying that it is "impractical[]" for them to do so, Br. 27, gets them nowhere. See United States v. Arenas-Ortiz, 339 F.3d 1066, 1071 (9th Cir.), cert. denied, 540 U.S. 1084 (2003) (discovery not required "in every case [alleging selective prosecution] in which the defendant has no feasible way of augmenting an inadequate evidentiary showing").

What is more, the plaintiffs' allegations of deficiencies in the Bearcrane and Springfield investigations, Br. 12-14, are defective on their own terms. First, the allegation that Agent Oravec discriminated against the plaintiffs with respect to receipt of victims' assistance was rejected as speculative in district court: "The lost opportunities to receive benefits under the crime victims statutes are too speculative to give rise to an Article III injury." 1 ER 36-37 n.4. This portion of the case is not on appeal. Second, their allegation that Agent Oravec failed to use "normal" or "routine" procedures for investigating homicides, Br. 14; see 2 ER 88, merely assumes that such procedures exist for every case. But there are reasons for using or

not using particular procedures in any specific case. The allegation that Agent Oravec used or did not use those procedures in one specific case does not show that he treated it differently from others; the plaintiffs must offer other cases for purposes of comparison. Third, his alleged announcement that Bearcrane had been shot in self-defense, "despite evidence to the contrary," Br. 14, has no bearing on the question; in many, if not most, homicide investigations, there is conflicting evidence, and investigators must first evaluate that conflicting evidence for themselves to make a tentative judgment whether they can obtain a conviction if the case is pursued.

In short, without reference to specific other cases where Agent Oravec was the investigator, it is impossible to infer differential treatment from mere disputes over his handling of these two investigations. Compare Elliot-Park v. Manglona, 592 F.3d 1003, 1006 (9th Cir. 2010) (allegation that officers "fully investigated another drunk driving accident that occurred the same evening where the victim was Micronesian but the driver wasn't"). As the magistrate judge admitted, "there may be alternative explanations for Oravec's decisions." 1 ER 58; see Iqbal, 129 S. Ct. at 1951 ("more likely explanations" than one offered by plaintiffs).

2. This is an appropriate place to respond, briefly, to the plaintiffs' assertion that the legal principles in selective-prosecution cases should not be applied to civil actions alleging similar claims of differential treatment based on race.

First, although we think the argument we made in our opening brief (pp. 26-28)

is strong for the reasons we gave there, we reiterate that it is unnecessary to reach that question here, since the amended complaint makes no non-conclusory allegations of differential treatment. The plaintiffs' statement in their brief that such a requirement would be "impractical[]," Br. 27 – indicating that they would be unable to fix their complaint – merely confirms that leave to amend should not be granted. See Polich v. Burlington Northern, Inc., 942 F.2d 1467, 1472 (9th Cir. 1991) (dismissal without leave to amend is proper if it is clear that the "complaint could not be saved by any amendment").

Second, it is true, as the plaintiffs say, that the cases we cited do not "clearly address" how the plaintiff in a Bivens action must allege and prove differential treatment by an investigator based on race. Br. 15. But there is a good reason for that. This appears to be the first case in which the allegations of differential treatment by an investigator must be tested under the pleading requirements set forth in Iqbal. It was our intention to provide the answer to that question by inference from the case law in the similar area of selective prosecution.

At the same time, the plaintiffs' efforts to distinguish selective prosecution from differential treatment in the Bivens context are ineffective. They say, for instance, that criminal defendants, unlike civil plaintiffs, have already been entitled to discovery. Br. 25-26. But the limited discovery that is permitted in a criminal case has no connection whatsoever to the question of selective prosecution; that is why the

Supreme Court could impose a separate and additional showing that a criminal defendant must make in order to obtain discovery into selective prosecution. See United States v. Armstrong, 517 U.S. 456 (1996). Because criminal defendants have had no discovery on the issue of selective prosecution, they and civil plaintiffs are in the identical position.

The plaintiffs also say that Agent Oravec's actions, unlike the prosecutors' actions in Armstrong, have no presumption of regularity. Br. 26. They are mistaken.

> [T]here is a presumption of legitimacy accorded to the Government's official conduct. The presumption perhaps is less a rule of evidence than a general working principle. However the rule is characterized, where the presumption is applicable, clear evidence is usually required to displace it.

National Archives and Records Admin. v. Favish, 541 U.S. 157, 174 (2004). See Gonzalez v. Reno, 325 F.3d 1228, 1235 (11th Cir. 2003) ("presumption of legitimacy accorded to official conduct" applies to law-enforcement conduct). This presumption of regularity is why Iqbal requires that courts consider an "obvious alternative explanation" for law-enforcement conduct to the invidious explanation suggested by the complaint. Iqbal, 129 S. Ct. at 1951-52.[3]

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[3] The plaintiffs argue, Br. 21-24, that precedent from this Circuit allowing equal-protection claims against law-enforcement officers supports the minimal allegations of differential treatment in the amended complaint. Those cases focus on what is necessary to allege a governmental policy – which, as noted, is not a question on (continued...)

C. The Amended Complaint Fails To Allege A Plausible Claim That Agent Oravec Acted With Discriminatory Motive.

Our opening brief (pp. 34-39) explained, alternatively, that the district court erred in concluding that the plaintiffs had adequately pleaded discriminatory motive. The allegations cited by the magistrate judge and the district court as supporting the allegation of motive are vague, unspecific, and largely conclusory; they are, at most, consistent with discriminatory motive, and do not support a plausible inference of such motive. The proper way to plead discriminatory motive, we explained (p. 35), is to "plead that a defendant made biased statements reflecting an animus, or that he displayed animus though his behavior."

The plaintiffs now respond, principally, by saying that this is in fact what they have alleged. Br. 28 ("The Plaintiffs/Appellee families have alleged both."). But it is not. The plaintiffs have alleged that an unnamed person said that Agent Oravec made a biased remark, but they provide no attribution or context, and the bias (if any) would relate to women, and not to Native Americans. See Balistreri v. Pacifica

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[3](...continued)
appeal here. Moreover, the plaintiffs omit from their discussion this Court's decision in Elliot-Park v. Manglona, 592 F.3d 1003, 1006 (9th Cir. 2010), where the Court accepted allegations of differential treatment by police officers based upon an allegation that the defendant officers treated a nearly identical incident involving a person of a different race differently from the way they treated the plaintiff's own case. There is no such allegation in this case.

Police Dep't, 901 F.2d 696, 701 (9th Cir. 1990). This case has nothing to do with bias against women. As for the allegations about Agent Oravec's allegedly biased behavior, these allegations indicate nothing of the sort, absent any comparison with the way Agent Oravec handled investigations involving non-Native Americans. The plaintiffs simply argue it is not necessary for them to plead cases that would permit a comparison and an inference of bias. They offer no explanation of how that is consistent with Iqbal.

Finally, in the case of the Bearcrane investigation, the amended complaint itself recognizes that the FBI referred the matter to the U.S. Attorney's Office in South Dakota for prosecution. 2 ER 94. This hardly suggests a bias against Native Americans. But the plaintiffs now argue that this referral is meaningless, because (as we understand their argument) Agent Oravec deliberately conducted a poor investigation out of bias but nevertheless had the matter referred for prosecution. This theory makes no sense. A referral may perhaps be consistent with a negligent investigation, but it is completely inconsistent with an intent to discriminate.[4]

In short, given the lack of non-conclusory allegations of discriminatory motive,

[4] The plaintiffs note that they originally charged the prosecutor with bias against Native Americans but dropped the allegations after realizing that the prosecutor would have absolute immunity. Br. 29 & n.6. We do not understand how an allegation about prosecutorial bias that the plaintiffs have dropped from their amended complaint is supposed to show bias on the part of Agent Oravec.

the plaintiffs have not pleaded a plausible equal-protection claim.

CONCLUSION

For the foregoing reasons and those given in the opening brief, the district court's order denying qualified immunity should be reversed, and the case should be remanded with instructions to dismiss the Bivens claim against Agent Oravec.

Respectfully submitted,

TONY WEST
Assistant Attorney General

TIMOTHY Q. PURDON
United States Attorney
District of North Dakota

BARBARA L. HERWIG
(202) 514-5425
EDWARD HIMMELFARB
(202) 514-3547
Attorneys, Appellate Staff
Civil Division, Room 7646
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

MAY 2011

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/s/ Edward Himmelfarb
Edward Himmelfarb
Attorney for the Appellant

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