No. 12-222

IN THE

Supreme Court of the United States

MATTHEW ORAVEC,

Petitioner,

v.

EARLINE COLE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court should review the case-specific application of *Ashcroft v. Iqbal* to the complaint in this case, where that application raises no unresolved legal issues and involves no conflict among the courts of appeal.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iii
STATEMENT OF THE CASE 1
REASONS FOR DENYING THE WRIT 6
I. The Decision Below Does Not Create Or Further A Conflict Among The Circuits. 6
II. The Court Below Properly Applied *Iqbal* 11
CONCLUSION 16

TABLE OF AUTHORITIES

Cases **Pages**

Alvarez v. Chevron Corp.,
656 F.3d 925 (9th Cir. 2011) 7

Ashcroft v. Iqbal,
556 U.S. 662 (2009) ..... passim

Bivens v. Six Unknown Named Agents,
403 U.S. 388 (1971) 1

Geinosky v. City of Chicago,
675 F.3d 743 (7th Cir. 2012) 9

Kwai Fun Wong v. United States,
373 F.3d 952 (9th Cir. 2004) 10

Moss v. U.S. Secret Service,
675 F.3d 1213 (9th Cir. 2012) 7

Okon v. City of Phoenix,
390 F. App'x 696 (9th Cir. 2010) 9

Power ex rel. Power v. Gilbert Public Schools,
454 F. App'x 556 (9th Cir. 2011) 9

Rios-Colon v. Toledo-Davila,
641 F.3d 1 (1st Cir. 2011) 9

T.E. v. Grindle,
599 F.3d 583 (7th Cir. 2010) 9

Telesaurus VPC, LLC v. Power,
623 F.3d 998 (9th Cir. 2010) 7

United States v. Corinthian Colleges,
655 F.3d 984, 991 (9th Cir. 2011) 7

Wilson v. Ayers,
470 F. App'x 654 (9th Cir. 2012) 9

Wilson v. Birnberg,
667 F.3d 591 (5th Cir. 2012) 9

Statutes

Crime Victims' Rights Act,
18 U.S.C. § 3771 2

Tribal Law and Order Act of 2010,
Pub. L. 111-211, H.R. 725, 124 Stat. 2258 1

Victims' Rights and Restitution Act of 1990,
42 U.S.C. § 10607 2

Miscellaneous

Supreme Court Rule 10 ..... 6, 12

This case is an action under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), against FBI agent Matthew Oravec. Respondents allege that Oravec violated their right to equal protection of the laws by failing to provide police services to Native Americans on and in the vicinity of the Crow Reservation because they are Native American. Respondents are members of the Cole and Bearcrane family and the Springfield family; these families had close relatives who were victims of serious crimes assigned by the FBI to agent Oravec for investigation.

STATEMENT OF THE CASE

Respondents Earline and Cletus Cole, and Precious Bearcrane, parents and minor daughter of Steven Bearcrane, and Veronica and Velma Springfield, wife and minor daughter of Robert Springfield (hereinafter "Respondents" or "Respondent families") originally brought suit against the FBI, the United States Attorney's office for South Dakota, and two FBI agents, Ernest Weyland and Matthew Oravec, alleging that the defendants violated their rights under the equal protection guarantees of the Constitution by providing fewer law enforcement services to them than are provided to non-Native Americans. The claims against the FBI, Weyland, and the U.S. Attorney's office were dismissed by the District Court and are not at issue here.[1]

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[1] Although tribal courts may prosecute tribal members for crimes committed on reservations, prison sentences are limited to three years. Federal prosecution is therefore needed against perpetrators of serious crimes. Tribal Law and Order Act of 2010, Pub.L. 111-211, H.R. 725, 124 Stat. 2258.

The Bearcrane and Cole respondents brought this case after the death of Steven Bearcrane, who was shot in the head and killed by a non-Indian on February 2, 2005, at a ranch located on the Crow Indian Reservation. Pet. App. 80a (Amended Complt.). The coroner ruled the death a homicide, and a non-Indian man admitted to shooting Bearcrane, claiming that he shot in self-defense during a dispute over a horse. *Id.* Petitioner Oravec was assigned to investigate Mr. Bearcrane's death but, despite repeated requests, "refused to do anything but the most cursory investigation;" specifically, he "failed to use common investigative tests and data-gathering," such as "fingerprint evidence, blood spatter analysis, criminal and military background information, and crime scene photographs." *Id.* 80a-81a. Further, as alleged specifically in the Amended Complaint, petitioner Oravec destroyed evidence in connection with this investigation (*id.* 81a), hindered investigations involving Indians (*id.* 83a-84a), actively interfered with the county coroner in the Bearcrane case (*id.* 84a), and substituted himself for the Victim's Advocate Specialist to prevent the family from receiving assistance under federal crime victims acts (*id.* 84a-85a).[2] Not only Respondents but the U.S. Commission on Civil Rights complained and requested an adequate investigation (*id.* 81a). In addition, when the Coles, Steven Bearcrane's parents, visited the FBI offices to inquire into the investigation of their son's death, "Oravec attempted to intimidate Cletus Cole by taking Mr. Cole out of the range of cameras and showing Mr. Cole his gun." *Id.* 84a.

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[2] *See* Crime Victims' Rights Act, 18 U.S.C. § 3771; Victims' Rights and Restitution Act of 1990, 42 U.S.C. § 10607.

The claim of the Springfield family focuses on the disappearance and death of Robert Springfield. Although Veronica Springfield reported her husband Robert missing after he did not return home from a hunting trip, agent Oravec and other defendants "refused to investigate." *Id.* 82a. After Springfield's body was found, agent Oravec again "failed to investigate his death, even though many witnesses were available and desired to be interviewed." *Id.* In addition, agent Oravec "failed to positively identify the remains of Robert Springfield even though there was compelling evidence for the identification." *Id.* The family "repeatedly asked defendant FBI and the individual defendants Oravec and Weyand to do an adequate investigation . . . to no avail." *Id.*

The families further allege that agent Oravec "consistently closed cases involving Indian victims without adequate investigation, especially sexual and other assaults involving Indian children and women," that "Oravec has been heard to say that female Native American victims of sexual assault were asking for assault or words to that effect," and that "Oravec . . . acted affirmatively to hinder the investigation of those crimes and to prevent victims from receiving assistance and other rights afforded crime victims under federal law." *Id.* 82a, 83a-84a.

All of the defendants moved to dismiss. Among other things, the motion argued that the complaint failed to state a claim against them with adequate specificity under the standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In lengthy findings and recommendations later adopted by the district court, the magistrate judge, quoting *Iqbal*, stated that "the plaintiff must plead and prove that the defendant acted with discriminatory purpose," and explained

that a "plaintiff must plead 'that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'" Pet. App. 48a (quoting *Iqbal*, 556 U.S. at 1948).

The magistrate judge then reviewed, separately with respect to each defendant, the allegations of an equal protection violation to assess whether they were sufficient to state a claim under the standard set forth in *Iqbal*. With regard to the other defendants, the court held that the complaint did not meet the pleading standard. *Id.* 48a-56a.

As to agent Oravec, however, the court found that "[t]he allegations contained in the Amended Complaint allow the Court to reasonably infer that Defendant Oravec was motivated by racial animus when conducting his investigation into the death of Steven Bearcrane." *Id.* 51a-54a. The court found the specific factual allegations concerning the circumstances of Bearcrane's death—that his death was ruled a homicide, that he was killed by a non-Indian, that the investigation was allegedly insufficient due to Oravec's discriminatory motives—sufficient "to infer at this early stage of the proceedings that a claim is plausible." *Id.* 53a. The court further found that, "although the allegations regarding Robert Springfield are more sparse, they do charge that Oravec's refusal to investigate the Springfield death was due to racial animus." *Id.* (citing complaint). The court noted that its ruling was specific to the early stage of the case: "[U]nder the rules governing the Court's analysis at this stage of the proceedings, the Court concludes that the complaint does contain non-conclusory factual allegations sufficient to plausibly suggest that Oravec acted with a discriminatory state of mind. Consequently, the equal protection

claims asserted by the [plaintiffs] against Oravec are not subject to dismissal at this time." *Id.* 53a-54a.

Oravec appealed, and the Ninth Circuit affirmed in part, reversed in part, and remanded. In a unanimous decision by Circuit Court Judges Milan Smith and Mary Schroeder and District Court Judge Roger Benitez, sitting by designation, the court of appeals, repeatedly citing this Court's decision in *Iqbal*, held that the complaint sufficiently alleges differential treatment by Oravec with regard to the Bearcrane investigation. *Id.* 2a-3a. The court held that the allegations "allow the court 'to draw the reasonable inference' that agent Oravec conducted the Bearcrane investigation differently than he would have conducted an investigation of similarly situated non-Native American victim." *Id.* 3a (citing *Iqbal*). The court—again, citing *Iqbal*—also affirmed the district court's holding that the allegations concerning Oravec's investigation of Bearcrane's death "plausibly suggest" that Oravec's differential treatment was the result of discriminatory motive. *Id.* (quoting *Iqbal*, 556 U.S. at 681).

In contrast, the court found the "non-conclusory allegations of differential treatment as to the Springfield investigation" insufficient. *Id.* Those allegations, the court stated, are "'merely consistent with' Oravec's liability, and, therefore 'stop[] short of the line between possibility and plausibility of entitlement to relief.'" *Id.* 4a (quoting *Iqbal*, 556 U.S. at 678). The court therefore reversed the district court's holding that the allegations concerning the Springfield investigation stated a claim under the pleading standard set forth in *Iqbal* and remanded to allow Respondents an opportunity to amend the complaint. *Id.*

Reflecting its straightforward application of existing law to the facts alleged, the decision is unpublished. Oravec's petition for rehearing *en banc* was denied, with no judge requesting a vote on whether to rehear the case. *Id.* 66a-67a.

REASONS FOR DENYING THE WRIT

Petitioner Oravec acknowledges that the decision below properly identified *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), as establishing the standard by which the complaint must be evaluated on a motion to dismiss. The petition does not argue that the court misstated *Iqbal* or ignored it, only that it misapplied it. The court did not do so. Moreover, the generalities with which the petition claims a conflict between the Ninth Circuit and other courts of appeal reveal the weakness of that claim. The Ninth Circuit follows the same approach as the other cases cited.

Overall, relying on selective citations to the factual allegations in the complaint, as well as mischaracterizations of the use of the factual allegations by the courts below, Petitioner seeks simply to overturn a decision he does not like. The complaint as a whole, like the decisions below, satisfies the *Iqbal* standard. The lower courts' application of the facts to established law does not warrant review. *See* S. Ct. R. 10.

I. The Decision Below Does Not Create Or Further A Conflict Among The Circuits.

The petition argues for Supreme Court review by presenting the Ninth Circuit as an outlier in its application of *Iqbal*. Focusing on three quotes from *Iqbal*, the petition asserts that other courts heed this Court's words but that the Ninth Circuit does not.

The cases, however, do not support petitioner's theory.

First, the petition lists (at 18) cases from a variety of circuit courts that quote *Iqbal*'s statement that "[t]hreadbare recitals of the elements of a cause of action" are inadequate to survive a motion to dismiss. The petition suggests that the Ninth Circuit, in contrast to these other circuit courts, has not followed this Court's instruction to disregard "threadbare allegations."

In fact, the Ninth Circuit, like the courts cited in the petition, has quoted, adopted, and applied this aspect of *Iqbal*. *See, e.g.*, *Moss v. U.S. Secret Serv.*, 675 F.3d 1213, 1232 (9th Cir. 2012) (finding "threadbare recitals" insufficient to state a claim); *Alvarez v. Chevron Corp.*, 656 F.3d 925, 930 (9th Cir. 2011) (quoting *Iqbal*'s statement that "threadbare recitals" do not suffice to state a claim); *United States v. Corinthian Colleges*, 655 F.3d 984, 991, 993-94 (9th Cir. 2011) (stating that "threadbare recitals" will be disregarded and finding complaint inadequate to state a claim); *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003, 1005 (9th Cir. 2010) (stating that "threadbare recitals" will be disregarded and finding complaint inadequate to state a claim). Like the cases cited in the petition, in these cases, the Ninth Circuit affirmed dismissal based on "threadbare" recitals in the complaints.

Likely for this reason, the petition does not state that other appellate courts have applied the Court's statement in a way that conflicts with the Ninth Circuit cases. It argues only that, as a factual matter, the court below should have categorized the allegations here as "threadbare." The fact that the recitals

with respect to Oravec's investigation of Mr. Bearcrane's death are more than "threadbare recitals" does not illustrate a conflict among the circuits, but that applying established law to different sets of facts may lead to different results. For example, here, the court found that the allegations with respect to the Bearcrane investigation were sufficient, but that the allegations with respect to the Springfield investigation were not. *Compare* Pet. App. 2a-3a, *with id.* 3a-4a.

Second, the petition lists (at 19) courts of appeals decisions that quote the *Iqbal* allegation that defendants "'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.'" The petition claims (at 20) that the decision below "credited" an allegation that is "nearly identical" to this *Iqbal* allegation. Yet its citation for that claim is not to the court of appeals' decision, but to the magistrate judge's findings and recommendations, which did *not* "credit" the allegation cited by petitioner. To the contrary, the magistrate judge found the allegation to be "akin to the conclusory allegations made in *Iqbal* . . . . As such, they are not entitled to be assumed true." Pet. App. 48a-49a. These findings were adopted by the district court, whose decision was then affirmed by the Ninth Circuit. Accordingly, on this point as well, the decision below is in line with the circuit court decisions cited favorably by petitioner.

Third, citing three court of appeals decisions, the petition states (at 20) that other circuits "have dismissed equal protection claims founded on flimsy allegations." The petition does not discuss the factual

allegations pleaded in any of the cases cited, however, which is important because *Iqbal* does not hold that an equal protection claim cannot be pleaded and litigated; it holds that an equal protection claim cannot proceed based on allegations that do not state a plausible claim for relief. *Iqbal*, 556 U.S. at 678-79. Because the ruling on a motion to dismiss necessarily turns on the adequacy of the pleading—a case-specific inquiry—it is not surprising that courts sometimes allow equal protection claims to go forward and sometimes do not. *Compare* Pet. 20 (citing three cases dismissing equal protection claims), *with Geinosky v. City of Chicago*, 675 F.3d 743 (7th Cir. 2012) (applying *Iqbal* and allowing equal protection claim to go forward); *Wilson v. Birnberg*, 667 F.3d 591, 599-600 (5th Cir. 2012) (same); *Rios-Colon v. Toledo-Davila*, 641 F.3d 1, 5 (1st Cir. 2011) (same); *T.E. v. Grindle*, 599 F.3d 583, 588 (7th Cir. 2010) (same).

Here, for example, the court of appeals held that the equal protection allegations against Oravec were sufficient with respect to the Bearcrane investigation, but not with respect to the Springfield investigation. Pet. App. 2a-4a. And the district court held that the allegations against Oravec were sufficient, but not those against Weyland. *Id.* 52a-53a. Thus, this case itself reflects a careful application of *Iqbal* that both follows the principles set forth in that opinion and is consistent with the fact-specific approach of other courts of appeal. *See also Wilson v. Ayers*, 470 F. App'x 654 (9th Cir. 2012) (citing *Iqbal* and affirming dismissal of inadequately pleaded equal protection claim); *Power ex rel. Power v. Gilbert Pub. Sch.*, 454 F. App'x 556, 558 (9th Cir. 2011) (affirming dismissal of inadequately pleaded equal protection claim); *Okon v. City of Phoenix*, 390 F. App'x 696, 697

(9th Cir. 2010) (citing *Iqbal* and affirming dismissal of inadequately pleaded equal protection claim).

Finally, asserting that the court below allowed the case to go forward on the basis of allegations that "had nothing at all to do with Agent Oravec," the petition complains (at 21) that the Ninth Circuit, unlike other circuit courts, refuses to follow *Iqbal*'s direction that "a constitutional tort claim must be based on a defendant's own actions." In support of its claim, the petition cites three Ninth Circuit cases in which there was disagreement among the judges about whether the complaint adequately pleaded the defendant's own actions. These cases are not indications of Ninth Circuit disregard of *Iqbal*—in fact, on this point, *Iqbal* mirrors the Ninth Circuit's own prior precedent. *See, e.g.*, *Kwai Fun Wong v. United States*, 373 F.3d 952, 968 (9th Cir. 2004) (dismissing discrimination claims against individual defendants for failure to allege facts with respect to each defendant). These cases are applications of facts to settled law, both *Iqbal* and the pre-existing Ninth Circuit cases consistent with *Iqbal* on the point.

In *this* case, petitioner's charge that the Ninth Circuit disregarded the requirement that the complaint allege facts regarding the defendant's own actions is belied by the words of the unanimous decision itself, which relied on allegations that "contrary to standard procedures, agent Oravec provided Bearcrane's family with less investigatory services than he would have provided to a non-Native American victim's family," Pet. App. 2a, and that "despite the fact that Bearcrane's death was ruled a homicide, the non-Native American man admitted to shooting Bearcrane, and there was evidence negating the claim of self-defense, Oravec failed to properly inves-

tigate the case," and that "Oravec consistently closed cases involving Indian victims without adequate investigation, and that he has been heard to make improper remarks about female Native American victims of sexual assault," *id.* 3a. The findings of the magistrate judge, which were adopted by the district court, recite in more detail other specific factual allegations that support the families' claims. *Id.* 51a-53a; *see supra* p. 4.

Moreover, the district court expressly recognized the rule that petitioner urges here, as it dismissed the claims against agent Weyand expressly because he "can only be liable for his own actions," Pet. App. 10a (citing *Iqbal*, 556 U.S. 676); *see id.* 52a, and the complaint did not "show that he personally acted with a discriminatory motive," *id.* 10a, 52a.

Thus, the petition's argument that the decision below evidences a conflict with those of other courts of appeals by allowing a claim that is not based on the defendant's own actions to go forward misreads prior Circuit opinions, fails to take into account allegations that are specific to Oravec, and reflects a factual dispute properly addressed in the course of trial-court litigation.

II. The Court Below Properly Applied *Iqbal*.

The bulk of the petition is devoted to arguing that the decision below is incorrect. Further, the petition cites a variety of allegations from the complaint, without distinguishing those alleged in support of the claims against other defendants from those alleged in support of claims against Oravec, or those relied on by the courts below from those not credited by the courts below in deciding the motion to dismiss.

Oravec argues (at 12) that the Ninth Circuit erred by relying on statements in Respondent's complaint that were conclusory. Agent Oravec supports this assertion in part (at 11-12) by attempting to equate carefully selected allegations in Respondent's complaint with allegations held insufficient in Iqbal's complaint. Yet there is no comparison between: (i) Respondent families' allegations that agent Oravec failed to utilize normal investigative methods, destroyed evidence, personally inserted himself into decisions under the federal crime victim's acts, and made statements clearly showing animus, and (ii) the general allegation, at issue in *Iqbal*, that policymakers adopted a discriminatory policy. In making that specific argument, Oravec misapplies the principle stated in *Iqbal*: that in assessing the adequacy of a complaint, the court need not accept as true allegations that are simply legal conclusions.

The allegation that Oravec failed to use normal investigative methods is not a legal conclusion. Oravec's characterization of it as such is at bottom a complaint that the factual allegation is not sufficiently detailed. But "the pleading standard [Federal Rule of Civil Procedure] 8 announces does not require 'detailed factual allegations.'" *Iqbal*, 556 U.S. at 677-78 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Oravec is attempting to expand the meaning of the phrase "legal conclusion" to include factual statements that, in his opinion, are not detailed enough. The courts below disagreed with Oravec, and that factual disagreement does not warrant review. *See* S. Ct. R. 10.

The petition goes on (at 13-16) at length arguing that the Ninth Circuit wrongly found the claims with regard to the Bearcrane investigation to be "plausi-

ble." Accordingly to the petition, the allegations show only possibility, not plausibility. But this fact-specific quarrel with the courts below and the views of all five judges to consider the case—the magistrate judge, the district court judge, and the three court of appeals judges—is hardly appropriate for Supreme Court review. As this Court has stated, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

Arguing that the decision below is inconsistent with *Iqbal*, Petitioner creates straw men to knock down. For example, the petition states (at 10) that the decision below erred by not discarding "the allegation that Oravec 'provided Bearcrane's family with less investigatory services than he would have provided to a non-Native American victim's family.'" Pet. 10 (quoting Pet. App. 2a). But the "allegation" quoted is the court's summary of the complaint, not a quotation taken directly from the complaint. Read in context, it is clear that, in the passage quoted, the court is referring to allegations set forth in greater detail in the complaint and by the district court. *See* Pet. App. 51a (district court) & 79a-81a (Amended Complt.). Thus, the petition's criticism that the Ninth Circuit credited "threadbare allegations" turns on the petition's failure to acknowledge the allegations underlying the statement it quotes: allegations that Oravec did not do use standard investigative techniques, such as "fingerprint evidence, blood spatter analysis, criminal and military background information, and crime scene photographs," *id.* 80a-81a, allegations that Oravec destroyed evidence, *id.* 81a, and that he had attempted to intimidate Bearcrane's

father, respondent Cletus Cole, when Cole asked for information about his son's death, *id.* 84a.

The petition also complains (at 11) that the decision below "apparently credited" what petitioner deems to be conclusory allegations regarding the poor provision of law enforcement services to Native Americans on the reservations, because the court interpreted "'conclusory' so narrowly that it is hard to imagine allegations what would *not* pass muster." Again, as explained above, *supra* p. 9, the petition here is discussing a provision that was explicitly *not credited* below. Pet. App. 48a-49a. Rather, what the courts credited were allegations that follow the sentence quoted in the petition, allegations that provide specific facts to illustrate the discrimination. *Id.* 51a-52a (district court opinion), 80a-81a (Amended Complt.), 83a-85a (Amended Complt.).

Next, the petition argues (at 12) that the allegations about crime statistics are "general and unsupported." But the district court did not base its decision on these allegations. Rather, it stated that, "[w]hile troubling and entitled to an assumption of truth, these allegations allow the Court to reasonably infer no more than a mere possibility that defendants have acted unlawfully." Pet. App. 50a. Without mentioning that the district court expressly did not credit the general allegations, the petition suggests that the Ninth Circuit did credit them. As review of the opinions quickly demonstrates, the appellate opinion works off of the more detailed district court opinion, which quotes extensively from the complaint and makes specific findings as to which allegations would be credited and which would not be. The detailed opinion shows that the courts below properly applied *Iqbal.*

Finally, the petition argues (at 16) that the decision below conflicts with *Iqbal*'s requirement that a *Bivens* claim be based on a defendant's individual action. To begin with, petitioner is off-base to complain that much of the complaint does not address his specific actions, because the complaint alleged claims against five defendants. Unsurprisingly, not every allegation relates to every defendant. Yet the decision below is not based on allegations about the actions of other people. As the opinion makes plain, the court looked to allegations that "agent *Oravec* conducted the Bearcrane investigation differently than he would have conducted an investigation of a similarly situated non-Native American victim," that "*Oravec* failed to properly investigate the case," that "*Oravec* consistently closed cases involving Indian victims without adequate investigation, and that *he* has been heard to make improper remarks about female Native American victims of sexual assault," Pet. App. 3a (emphasis added), to reach the conclusion that the allegations "plausibly suggest" that *Oravec* treated the Bearcrane investigation differently because of *his* discriminatory motive and *his* animus toward Native Americans. *Id.*

Moreover, the court held that the allegations with respect to the Bearcrane investigation state a plausible claim for relief, but that the allegations with respect to the Springfield investigation "stop[] short of the line between possibility and plausibility of entitlement to relief." Pet. App. 4a. This aspect of the decision further demonstrates that the court understood the principle that the petition accuses it of misconstruing.

In sum, the petition's primary argument for certiorari—that the decision below is "irreconcilable" with

Iqbal—is based on selective reading of the decision and the complaint, along with fact-specific disagreements about the case. The lower court decisions, however, are consistent with the teaching of *Iqbal*, a case on which both the Ninth Circuit and the district court opinions heavily rely.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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