No. 10-1479

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MARIA ARGUETA, et al.,
Plaintiffs-Appellees,

v.

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT ("ICE"), et al.,
Defendants-Appellants.

Appeal from the U.S. District Court for the District of New Jersey
No. 2:08-cv-1652-PGS

BRIEF OF *AMICI CURIAE* PUBLIC JUSTICE, THE PRISONERS' RIGHTS PROJECT OF THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK, AND THE PENNSYLVANIA INSTITUTIONAL LAW PROJECT IN SUPPORT OF PLAINTIFFS-APPELLEES

Alexander A. Reinert
Associate Professor of Law
BENJAMIN N. CARDOZO SCHOOL OF LAW
55 Fifth Avenue, Room 938
New York, NY 10003
(212) 790-0403

Steven Banks
John Boston
THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK,
PRISONERS' RIGHTS PROJECT
199 Water Street
New York, NY 10038
(212) 577-3530

Additional counsel listed on reverse

Claire Prestel
PUBLIC JUSTICE
1825 K Street NW, Suite 200
Washington, DC 20006
(202) 797-8600

Angus Love
THE PENNSYLVANIA INSTITUTIONAL
LAW PROJECT
718 Arch Street,
Suite 304 South
Philadelphia, PA 19106
(215) 925-2966

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 10-1479

Maria Argueta, et al.

v.

U.S. Immigration and Customs Enforcement (ICE), et al.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

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None.

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3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

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s/Claire Prestel
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Dated: Dec. 8, 2010

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None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

n/a

s/Claire Prestel
(Signature of Counsel or Party)

Dated: Dec. 8, 2010

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2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

n/a

s/Claire Prestel
(Signature of Counsel or Party)

Dated: Dec. 8, 2010

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI CURIAE*.....1

SUMMARY OF ARGUMENT.....2

ARGUMENT.....5

I. *Iqbal* Did Not Eliminate Supervisory Liability As It Has Existed in the Third Circuit. 5

II. Appellants' Argument Is Contrary to the Holdings of the Overwhelming Majority of Post-*Iqbal* Decisions. 9

III. The Availability of Supervisory Liability Is Critical To Deterring Constitutional Violations and Compensating Victims of Those Violations. 14

IV. The United States Itself Has Recognized the Importance of Holding Supervisors Accountable to Prevent Constitutional Violations.....24

CONCLUSION 31

TABLE OF AUTHORITIES

Cases

al-Kidd v. Ashcroft, 580 F.3d 949 (9th Cir. 2009), *cert. granted on other grounds*, 131 S. Ct. 415 (2010) 10

A.M. ex rel. J.M.K. v. Luzerne County Juvenile Detention Center, 372 F.3d 572 (3d Cir. 2004) 5

Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990) 23

Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) .....*passim*

Baker v. Monroe Twp., 50 F.3d 1186 (3d Cir. 1995) 5

Bellamy v. Mount Vernon Hosp., No. 07 Civ. 1801, 2009 WL 1835939 (S.D.N.Y. June 26, 2009) 13

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) .....*passim*

Blyden v. Mancusi, 186 F.3d 252 (2d Cir. 1999) 7

Brenes-Laroche v. Toledo Davila, 682 F. Supp. 2d 179 (D. P.R. 2010) 16

Brown v. Muhlenberg Twp., 269 F.3d 205 (3d Cir. 2001) 5

Bullock v. Beard, No. 3:10-cv-401, 2010 WL 1507228 (M.D. Pa. Apr. 14, 2010) 14

Butz v. Economou, 438 U.S. 478 (1978) 15, 16

Cagle v. Gravlin, No. 9:09-cv-0648, 2010 WL 2088267 (N.D.N.Y. Apr. 29, 2010) 13

Carlson v. Green, 446 U.S. 14 (1980) 15, 20

Cleveland-Perdue v. Brutsche, 881 F.2d 427 (7th Cir. 1989) 20

Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) 15

Coscia ex rel. Estate of Coscia v. Town of Pembroke, Mass.,
715 F. Supp. 2d 212 (D. Mass 2010).....11

Curry v. Scott, 249 F.3d 493 (6th Cir. 2001).....21

Dillon v. Rogers, 596 F.3d 260 (5th Cir. 2010).....1

Dodds v. Richardson, 614 F.3d 1185 (10th Cir. 2010).....9

Doe v. Sch. Bd. of Broward County, Fla., 604 F.3d 1248 (11th Cir. 2010).....11

D'Olimpio v. Crisafi, 09 Civ. 7283, 2010 WL 2428128
(S.D.N.Y. June 15, 2010).....12

Dotson v. Stultz, No. 1:02-cv-164, 2009 WL 2058820
(E.D. Tenn. July 6, 2009).....11

Estate of Davis by Ostenfeld v. Delo, 115 F.3d 1388 (8th Cir. 1997).....20

Farmer v. Brennan, 511 U.S. 825 (1994).....21

Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553 (1st Cir. 1989).....27

Hammond v. Gordon County, 316 F. Supp. 2d 1262 (N.D. Ga. 2002).....18

Hardy v. Diaz, No. 9:08-cv-1352, 2010 WL 1633379
(N.D.N.Y. Mar. 30, 2010).....13

Herrera v. Hall, No. 1:08-cv-01882, 2010 WL 2791586
(E.D. Cal. July 14, 2010).....11

Hudson v. McMillian, 503 U.S. 1 (1992).....7

Hui v. Castaneda, 130 S. Ct. 1845 (2010).....1

Keating v. City of Miami, 598 F.3d 753 (11th Cir. 2010).....11

Keenan v. City of Philadelphia, 983 F.2d 459 (3d Cir. 1992).....23

LaFaut v. Smith, 834 F.2d 389 (4th Cir. 1987).....21

Langford v. Norris, 614 F.3d 445 (8th Cir. 2010).....10

Larez v. City of Los Angeles, 946 F.2d 630 (9th Cir. 1991).....22

Liberty and Prosperity 1776, Inc. v. Corzine, No. 08-2642, 2010 WL 2557212 (D. N.J. June 24, 2010) 14

Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995).....7

Mason v. Hann, No. 01 Civ. 523, 2010 WL 3025669 (S.D.N.Y. July 26, 2010) ...12

Massenburg v. Adams, 08 Civ. 106, 2010 WL 1279087 (E.D. Va. Mar. 31, 2010) 14

McCarroll v. Federal Bureau of Prisons, No. 9:08-cv-1343, 2010 WL 4609379 (N.D.N.Y. Sept. 30, 2010) 12

Menotti v. City of Seattle, 409 F.3d 1113 (9th Cir. 2005) 1

Mincy v. McConnell, No. 09 Civ. 236, 2010 WL 3092681 (W.D. Pa. July 15, 2010).....13

Mitchell v. Rappahannock Regional Jail Auth., 703 F. Supp. 2d 549 (E.D.Va. 2010).....14, 18

Ortiz v. Jordan, 316 F. App'x 449 (6th Cir. 2009), *rev'd in part sub nom. Ortiz v. Jordan*, 316 F. App'x 449 (6th Cir. 2009), *cert. granted on other grounds*, 130 S. Ct. 2371 (2010) 19

Peddle v. Sawyer, 64 F. Supp. 2d 12 (D. Conn. 1999).....18

Preschooler II v. Clark County Sch. Bd. of Trustees, 479 F.3d 1175 (9th Cir. 2007) 23

Pruitt v. Clark, No. 1:07-cv-01709, 2010 WL 3063254 (E.D. Cal. Aug. 3, 2010) 11

Qasem v. Toro, No. 09 Civ. 8361, 2010 WL 3156031 (S.D.N.Y. Aug. 10. 2010) 12

Rahman v. Fischer, No. 08 Civ. 4368, 2010 WL 1063835 (S.D.N.Y. Mar. 22, 2010) 13

Ramirez v. Jim Wells County, Tex., No. 09 Civ. 209, 2010 WL 2598304 (S.D. Tex. June 25, 2010) 22

Reed v. Penasquitos Casablanca Owner's Ass'n, Nos. 08-55069, 08-55072, 08-55151, 381 F. App'x 674, 2010 WL 2232339 (9th Cir. 2010) 27

Riley v. Olk-Long, 282 F.3d 592 (8th Cir. 2002) 19

Robinson v. Fed. Bureau of Prisons, 2010 WL 1752587 (E.D.N.Y. Mar. 24, 2010) 13

Sample v. Diecks, 885 F.2d 1099 (3d Cir. 1989) 5

Sanchez v. Pereira-Castillo, 590 F.3d 31 (1st Cir. 2009).....10

Sash v. United States, 674 F. Supp. 2d 531 (S.D.N.Y. 2009) 13

Shaw v. Stroud, 13 F.3d 791 (4th Cir. 1994) 22

Spear v. Hugles, No. 08 Civ. 4026, 2009 WL 2176725 (S.D.N.Y. July 20, 2009) 13

Stoneking v. Bradford Area School Dist., 882 F.2d 720 (3d Cir. 1989) 5

T.E. v. Grindle, 599 F.3d 583 (7th Cir. 2010).....11

Tafari v. McCarthy, 714 F. Supp. 2d 317 (N.D.N.Y. Mar 31, 2010) 12

Tafoya v. Salazar, 516 F.3d 912 (10th Cir. 2008).....19

Valdes v. Crosby, 450 F.3d 1231 (11th Cir. 2006), *cert. dismissed*, 549 U.S. 1249 (2007).....7, 20

White v. Holmes, 21 F.3d 277 (8th Cir. 1994) 7

White v. Ottinger, 442 F. Supp. 2d 236 (E.D. Pa. 2006) 18

Williams v. Santana, No. 09-10198, 340 F. App'x 614, 2009 WL 2435053 (11th Cir. 2009) 22

Wilson v. Seiter, 501 U.S. 294 (1991) 21

Wright v. Leis, No. 08-3037, 335 F. App'x 552, 2009 WL 1853752 (6th Cir. June 30, 2009) 10

Zion v. Nassan, No. 09-383, --- F. Supp. 2d ----, 2010 WL 2926218 (W.D. Pa. July 23, 2010).....13

Statutes

42 U.S.C. §1983.....9, 15, 27

42 U.S.C. §1997a.....24

N.J. Stat. Ann. §59:10-1.....17

N.Y. Pub. Officers Law Art. 2 §17.....17

Other Authorities

Allen J. Beck & Paige M. Harrison, Sexual Victimization in Prisons & Jails Reported by Inmates, 2008–09 (U.S. Dep't of Justice, Bureau of Justice Statistics, 2010) 17

Am. Compl., *United States v. Erie County*, No. 09 Civ. 849 (W.D.N.Y. July 23, 2010)……..……26

Br. of United States as Amicus Curiae in *Reed v. Penasquitos Casablanca Owner's Ass'n*, Nos. 08-55069, 08-55072, 08-55151, 381 F. App'x 674, 2010 WL 2232339 (9th Cir. June 2, 2008).....26, 27

Compl., *Johnson v. Fla.*, No. 87-cv-369 (M.D. Fla.)……..……25

Compl., *United States v. Columbus Consol. City/County Gov't*, No. 4:99-cv-00132 (M.D. Ga. Sept. 23, 1999)……..……...25

Compl., No. 2:02-cv-02382, *United States v. Nassau County* (E.D.N.Y. Apr. 22, 2002).....24, 25

Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 Yale L.J. 1055, 1060 (1972).....16

Letter from Alexander Acosta, Ass't Attorney General, to Hon. James E. McGreevey (Nov. 12, 2004)…….……28

Letter from Loretta King, Acting Ass't Attorney General, to Hon. Chris Collins, County Executive (July 15, 2009)..…….....30

Letter from Loretta King, Acting Ass't Attorney General, to Martin S. Gusman, Orleans Parish Criminal Sheriff (Sept. 11, 2009)..…….....30

Letter from Loretta King, Acting Ass't Attorney General, to Raymond P. Fitzpatrick, Jr., Esq. (June 9, 2009)..……...29, 30

Letter from Ralph F. Boyd, Jr., Ass't Attorney General, to Hon. James E. McGreevey (Apr. 8, 2003)……..……28, 29

Letter from Ralph F. Boyd, Jr., Ass't Attorney General, to Robert D. Prunetti, County Executive (Oct. 9, 2002)……..…….28

Letter from Shanetta Y. Cutlar, Chief, Special Litig. Section, to Comm'r Elton Lewis, Virgin Islands Police Dep't, (Oct. 5, 2005)……...29

Letter from Thomas E. Perez, Ass't Attorney General, to Hon. Andrew J. Spano, County Executive (Nov. 19, 2005)……30

Letter from Thomas E. Perez, Ass't Attorney General, to Hon. Jack Markell (Nov. 9, 2010)……...29

Mem. Opp. Defs.' Mot. for Suum. J., *United States v. State of Ariz.*, No. 97-cv-476 (D. Ariz. Nov. 25, 1998)……...25

Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. Chi. L. Rev. 1311 (1989).....17

Stephen G. Gilles, *Negligence, Strict Liability and the Cheapest Cost Avoider*, 78 Va. L. Rev. 1291 (1992).....16

INTERESTS OF *AMICI CURIAE*

Public Justice is a national public interest law firm dedicated to preserving access to justice, remedying government and corporate wrongdoing, and holding the powerful accountable in courts. As part of its access-to-justice work, Public Justice created an *Iqbal* Project in 2009 to combat misuse of the Supreme Court's decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The Project tracks developments in the case law and provides assistance to counsel facing *Iqbal*-based motions. Public Justice is concerned that overbroad readings of *Iqbal* threaten to deny justice to many injured plaintiffs with meritorious claims.

In addition to Public Justice's *Iqbal*-related interest in this case, the firm also represents prisoners, arrestees, other detainees, their family members, and other plaintiffs in a variety of cases involving constitutional claims. *See, e.g.*, *Hui v. Castaneda*, 130 S. Ct. 1845 (2010); *Dillon v. Rogers*, 596 F.3d 260 (5th Cir. 2010); *Menotti v. City of Seattle*, 409 F.3d 1113 (9th Cir. 2005); *Everett v. Cherry*, No. 08-00622 (E.D. Va.) (case pending). Public Justice is concerned that Appellants' arguments regarding supervisory liability will, if accepted, prevent many plaintiffs with constitutional claims from obtaining a full remedy.

The Legal Aid Society of the City of New York is a private organization that has provided free legal assistance to indigent persons in New York City for over 125 years. Through its Prisoners' Rights Project, the Society seeks to ensure that

prisoners' constitutional and statutory rights are protected. The Society advocates on behalf of prisoners in the New York City jails and New York state prisons, and conducts litigation on prison conditions. The Society often litigates claims of supervisory liability.

The Pennsylvania Institutional Law Project is a private not-for-profit organization created to ensure equal access to justice for indigent institutionalized persons. Part of the Pennsylvania Legal Aid Network, the Institutional Law Project provides direct representation services, self-help and other legal materials, and class representation to eligible low-income residents of Pennsylvania's prisons, jails, state hospitals, and state centers. The Project also takes part in advocacy and legislative initiatives concerning institutional reform in Pennsylvania.[1]

SUMMARY OF ARGUMENT

Amici Public Justice, the Prisoners' Rights Project of the Legal Aid Society of the City of New York, and the Pennsylvania Institutional Law Project file this brief in support of Appellees Maria Argueta, Walter Chavez, Ana Galindo, W.C.,

[1] All parties have consented to the filing of this brief. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person—other than *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

Arturo Flores, Bybyana Arias, Juan Ontaneda, Veronica Covias, and Yesica Guzman.

Appellants make an untenable argument about the availability of supervisory liability after *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009): they suggest that recovery against supervisory officials is permissible only when those officials participate directly in the same unconstitutional misconduct committed by their subordinates. Appellants' Br. 18 (emphasizing that the supervisory defendants are not alleged to have themselves "searched or seized . . . the plaintiffs or participated in or planned" the home raids). In this extreme view, which is contrary to decades of Third Circuit case law, neither a supervisor's knowledge of and acquiescence in a subordinate's wrongful conduct, nor a failure to respond to a pattern of unlawful activity, is ever sufficient to hold a supervisor liable in an action pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Appellants' Br. 17, 24.

Appellants' position should be rejected for at least four reasons. First, it finds no support in the reasoning or language of *Iqbal*, which acknowledged that a supervisor may still be liable for "violations arising from his or her superintendent responsibilities." *Iqbal*, 129 S. Ct. at 1949. At most, *Iqbal* rejected a "knowledge and acquiescence" theory of supervisory liability for equal protection claims because in equal protection cases, plaintiffs must show intentional discrimination,

not merely knowledge. *Id*. at 1948–49. There is no equal protection claim at issue here.

Second, Appellants' extreme view is inconsistent with the approach taken by the vast majority of lower courts, which have held that supervisors may violate the Constitution in different ways than subordinates, either because the supervisors' duties are different or because the supervisors' conduct is governed by different legal standards. Failing to recognize that fact will obstruct the enforcement of constitutional norms by immunizing supervisory misconduct that is often a more fundamental and persistent cause of constitutional violations than the direct conduct of line employees.

Third, adoption of Appellants' position would effectively eliminate supervisory liability altogether, notwithstanding numerous examples of the importance of supervisory liability in remedying, deterring, and enjoining ongoing constitutional violations.

Finally, Appellants' position on supervisory liability is sharply at odds with the position taken by the United States Department of Justice in its affirmative enforcement of constitutional rights against state and local entities and officials.

ARGUMENT

I. *Iqbal* Did Not Eliminate Supervisory Liability As It Has Existed in the Third Circuit.

In the Third Circuit, it is well-settled that government officials with superintendent responsibilities may be held liable for constitutional violations in many circumstances not involving their direct participation in subordinates' misconduct. For example, supervisors may be liable when they had "actual knowledge of and acquiesce[d]" in subordinates' misconduct, *Baker v. Monroe Twp.*, 50 F.3d 1186, 1194 & n.5 (3d Cir. 1995), "tolerated past or ongoing" misconduct, *id.* at 1191 n.3, directed or encouraged such misconduct, *see A.M. ex rel. J.M.K. v. Luzerne County Juvenile Detention Ctr.*, 372 F.3d 572, 586 (3d Cir. 2004), and when, "with deliberate indifference to the consequences," they "established and maintained a policy, practice or custom which directly caused . . . constitutional harm." *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3d Cir. 1989). This Court has made clear that there must be a causal connection between the supervisors' acts or omissions and the plaintiff's injury, *see, e.g.*, *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 216 (3d Cir. 2001), *Sample v. Diecks*, 885 F.2d 1099, 1188 (3d Cir. 1989), but direct participation in subordinates' misconduct has never been required.

Nothing in *Iqbal* undermines the Third Circuit's approach. In *Iqbal*, the Court started its review of the supervisory claims in that case by noting that the

plausibility of any claim is context-specific. 129 S. Ct. at 1948, 1950. In *Iqbal* itself, the only causes of action before the Court were *Bivens* claims for discrimination alleged against former Attorney General Ashcroft and Federal Bureau of Investigation Director Robert Mueller. *Id*. at 1948–49. In that context, the Supreme Court held that a "knowledge and acquiescence" theory of supervisory liability was inappropriate because constitutional discrimination claims depend on proof of the defendant's own discriminatory purpose. *Id*. at 1949. That is, a supervisor who has only knowingly acquiesced in a subordinate's conduct, but who lacks discriminatory intent, simply has not violated the prohibition on intentional discrimination. *Id*.

In reaching that limited and context-specific conclusion, the Supreme Court expressed no intent to eviscerate supervisory liability in its entirety or to require supervisors' direct participation in the unconstitutional conduct of their subordinates. The Court noted that supervisory liability is a "misnomer" to the extent that it suggests that a supervisor may be liable solely because of the misconduct of a subordinate. *Id*. at 1949. But only two sentences later it also made clear that an official may be held liable for "violations arising from his or her *superintendent responsibilities*." *Id*. (emphasis supplied). That language cannot be squared with the kind of direct-participation requirement that Appellants would impose.

Iqbal did hold, as Appellants note, that to be liable under *Bivens*, supervisors must violate the Constitution themselves. But case law demonstrates that there are many ways in which supervisory governmental officials can violate the Constitution, often without engaging in exactly the same conduct as their subordinates (or acting with exactly the same culpable state of mind). For example, while subordinate correction officers who use force directly against inmates violate the constitution when they behave "maliciously and sadistically for the very purpose of causing harm," *Hudson v. McMillian*, 503 U.S. 1, 6 (1992) (quotation marks omitted), the officials responsible for supervising such officers violate the Constitution if, without using any force themselves, they exhibit deliberate indifference to the risk that their subordinates will inflict force intentionally and unnecessarily upon detainees. *Valdes v. Crosby*, 450 F.3d 1231, 1243–44 (11th Cir. 2006), *cert. dismissed*, 549 U.S. 1249 (2007); *Curry v. Scott*, 249 F.3d 493, 506 n.5 (6th Cir. 2001); *Blyden v. Mancusi*, 186 F.3d 252, 264–65 (2d Cir. 1999); *White v. Holmes*, 21 F.3d 277, 280 (8th Cir. 1994) (claim against supervisor in use of force case decided under deliberate indifference standard); *Madrid v. Gomez*, 889 F. Supp. 1146, 1249–51 (N.D. Cal. 1995). Although all the defendants in such a case are in violation of the Constitution, their constitutional violations are established with different evidence precisely because they occupy different levels of the correctional hierarchy.

In the instant case, as in the above example, the supervisory defendants may be held liable for their own unconstitutional misconduct even though it is not exactly the same as the misconduct of their subordinates. Specifically, Appellants allegedly took no action to correct or modify policies or to institute training in the face of repeated unconstitutional misconduct by their subordinates. JA 538–42 (Second Amended Compl. ¶¶33–42). Because the underlying violations are of Fourth Amendment rights, the supervisors may be held liable under *Iqbal*'s logic if their objectively unreasonable behavior—including failure to act upon knowledge of past and ongoing Fourth Amendment violations by subordinates—was a cause of future Fourth Amendment violations by subordinates. In this circumstance, the supervisors have themselves violated the Fourth Amendment: no objectively reasonable supervisor would fail to act in the face of information that subordinates were routinely violating the Constitution.[2]

Nothing about this liability regime is any way inconsistent with *Iqbal's* reminder that supervisors are only "liable for [their] own misconduct." 129 S. Ct. at 1949. To the contrary, it is Appellants who would, in effect, amend the Court's language to add the modifier "liable for [their] own misconduct *by directly injuring detainees in the exact same way as their subordinates*." That standard is

[2] In this particular scenario, the state of mind required to establish culpability (objective unreasonableness) happens to be the same for both the supervisors and subordinates, although that is not always the case, as discussed above.

inconsistent with *Iqbal*'s recognition that high-level officials can be liable for violating their "superintendent responsibilities," *id*., and finds no support anywhere else in the Supreme Court's decision.

II. Appellants' Argument Is Contrary to the Holdings of the Overwhelming Majority of Post-*Iqbal* Decisions.

Many appellate and district courts have considered the scope of supervisory liability after *Iqbal*, and the overwhelming majority have reached conclusions inconsistent with Appellants' view.

The Tenth Circuit's recent decision in *Dodds v. Richardson*, 614 F.3d 1185 (10th Cir. 2010), provides a useful example. The court conducted an extensive analysis of the impact of *Iqbal* on supervisory liability and came to several conclusions that bear on the instant case. First, the court made clear that the "personal involvement" requirement for §1983 actions may be satisfied without an official's "direct participation" in unconstitutional conduct. *Id*. at 1195. Although the *Dodds* court based this conclusion in part on an interpretation of the word "causes" in §1983, the Supreme Court treats *Bivens* and §1983 claims interchangeably for personal involvement purposes. *See Iqbal*, 129 S. Ct. at 1948. Second, the Tenth Circuit concluded that a plaintiff could demonstrate a supervisor's personal involvement in a constitutional violation, post-*Iqbal*, by showing that the supervisor "promulgated, created, implemented or *possessed responsibility for the continued operation*" of a challenged constitutional violation.

Dodds, 614 F.3d at 1199 (emphasis added). And finally, the court held that to be liable, in addition to being personally involved, there must be a causal link between the supervisor's conduct and the constitutional violation, and the supervisor must act with the state of mind "required to establish the alleged constitutional deprivation." *Id*. In *Dodds*, this meant that the supervisor had to act with deliberate indifference, because the challenge involved an alleged substantive due process violation. *Id*. at 1205.

Other circuits have reached similar conclusions after *Iqbal*. The First, Sixth, Eighth, Ninth and Eleventh Circuits have all held that supervisors may be liable in circumstances that do not involve direct participation in subordinates' misconduct or direct contact with the plaintiff. *See Sanchez v. Pereira-Castillo*, 590 F.3d 31, 48–49 (1st Cir. 2009) (holding that supervisors may be liable either as direct participants or by exhibiting deliberate indifference that contributes to a civil rights violation); *Wright v. Leis*, No. 08-3037, 335 F. App'x 552, 2009 WL 1853752, at *3 (6th Cir. June 30, 2009) (per curiam) (accepting failure to train as a viable theory for claim against supervisor where jail detainee alleged he was subjected to excessive force by line officer); *Langford v. Norris*, 614 F.3d 445, 463–64 (8th Cir. 2010) (holding that supervisors who ignored complaints of deficient medical care could be liable for deliberate indifference under the Eighth Amendment); *al-Kidd v. Ashcroft*, 580 F.3d 949, 965 (9th Cir. 2009), *cert. granted on other grounds*, 131

S. Ct. 415 (2010) (acknowledging viability of knowledge and acquiescence theory of liability); *Doe v. Sch. Bd. of Broward County, Fla.*, 604 F.3d 1248, 1266–67 (11th Cir. 2010) (recognizing the possibility of supervisory liability based on a failure to correct widespread abuse or the creation of a custom or policy that results in deliberate indifference to constitutional rights); *see also Keating v. City of Miami*, 598 F.3d 753, 764–65 (11th Cir. 2010) (supervisors violate the Constitution when they know of unconstitutional conduct or that subordinates will act unconstitutionally, possess the power to order their subordinates to cease, but fail to do so).[3]

The Seventh Circuit has taken a similar position, rejecting a deliberate-indifference theory for an equal-protection claim but limiting that holding to the equal-protection context and confirming that deliberate indifference remains a viable theory for other claims. *T.E. v. Grindle*, 599 F.3d 583, 588–91 (7th Cir. 2010). None of these cases can be squared with Appellants' view that supervisors

[3] *See also Pruitt v. Clark*, No. 1:07-cv-01709, 2010 WL 3063254, at *5 (E.D. Cal. Aug. 3, 2010) (finding allegation that supervisors knew of and failed to halt cross-gender strip searches by their subordinates sufficient to state a claim for violation of Fourth Amendment); *Herrera v. Hall*, No. 1:08-cv-01882, 2010 WL 2791586, at *4 (E.D. Cal. July 14, 2010) (approving of liability under the Eighth Amendment where supervisor knew about impending violation and "had the authority and opportunity to prevent the ongoing violation," but failed to do so); *Coscia ex rel. Estate of Coscia v. Town of Pembroke, Mass.*, 715 F. Supp. 2d 212, 227–28 (D. Mass 2010) (applying deliberate indifference standard after *Iqbal*); *Dotson v. Stultz*, No. 1:07-cv-164, 2009 WL 2058820, at *5 (E.D. Tenn. July 6, 2009) (noting that supervisors may be liable when they cause a constitutional violation by, *inter alia*, failing to discharge a supervisory duty).

must violate the Constitution in the exact same way as their subordinates in order to be held liable. *See, e.g.*, *id*. at 591 ("When a state actor's deliberate indifference deprives someone of his or her protected liberty interest in bodily integrity, that actor violates the Constitution, regardless of whether the actor is a supervisor or subordinate . . . .").

The Second Circuit has yet to squarely address the issue, but several district courts within the circuit have held that *Iqbal* affects supervisory liability only in intentional discrimination cases. *See Qasem v. Toro*, No. 09 Civ. 8361, --- F. Supp. 2d ----, 2010 WL 3156031, at *4 (S.D.N.Y. Aug. 10. 2010) (the Second Circuit's pre-*Iqbal* standards survive "as long as they are consistent with the requirements applicable to the particular constitutional provision alleged to have been violated"); *Mason v. Hann*, No. 01 Civ. 523, 2010 WL 3025669, at *5 n.4 (S.D.N.Y. July 26, 2010) (pre-*Iqbal* standards apply in Fourth and Eighth Amendment cases but not in discrimination claims); *D'Olimpio v. Crisafi*, 09 Civ. 7283, 09 Civ. 9952, 2010 WL 2428128, at *4–5 (S.D.N.Y. June 15, 2010) (reaching the same conclusion as in *Qasem*); *see also Tafari v. McCarthy*, 714 F. Supp. 2d 317, 342–43 (N.D.N.Y. 2010) (court is persuaded that pre-*Iqbal* standard still applies, at least in deliberate indifference context); *McCarroll v. Fed. Bureau of Prisons*, No. 9:08-cv-1343, 2010 WL 4609379, at *4 (N.D.N.Y. Sept. 30, 2010) (pre-*Iqbal* standard "may" still apply except in intentional discrimination cases);

Sash v. United States, 674 F. Supp. 2d 531, 543–44 (S.D.N.Y. 2009) (same). Others have assumed that the pre-*Iqbal* standards still apply or have applied them without comment. *See Cagle v. Gravlin*, No. 9:09-cv-0648, 2010 WL 2088267, at *7 (N.D.N.Y. Apr. 29, 2010) (stating that *Iqbal* arguably casts doubt on Second Circuit's standard but assuming that it still applies); *Hardy v. Diaz*, No. 9:08-cv-1352, 2010 WL 1633379, at *7 (N.D.N.Y. Mar. 30, 2010) (applying Second Circuit's pre-*Iqbal* law); *Robinson v. Fed. Bureau of Prisons*, No. 08-CV-902, 2010 WL 1752587, at *5 (E.D.N.Y. Mar. 24, 2010) (applying Second Circuit's standard without referring to *Iqbal*); *see also Rahman v. Fischer*, No. 08 Civ. 4368, 2010 WL 1063835, at *4–5 (S.D.N.Y. Mar. 22, 2010) (collecting cases). *But see Spear v. Hugles*, No. 08 Civ. 4026, 2009 WL 2176725, at *2 (S.D.N.Y. July 20, 2009) (assuming that only two of the five Second Circuit supervisory liability standards survive *Iqbal*); *Bellamy v. Mount Vernon Hosp.*, No. 07 Civ. 1801, 2009 WL 1835939 (S.D.N.Y. June 26, 2009) (same).

District courts in the Third Circuit have also rejected the idea that Iqbal eviscerated supervisory liability and have continued to uphold claims based on a supervisor's knowledge and acquiescence. *See Zion v. Nassan*, No. 09-383, --- F. Supp. 2d ----, 2010 WL 2926218, at *17–18 (W.D. Pa. July 23, 2010) (applying knowledge and acquiescence standard in Fourth Amendment excessive force case); *Mincy v. McConnell*, No. 09 Civ. 236, 2010 WL 3092681, at *4 (W.D. Pa. July 15,

2010) (permitting liability based on knowledge and acquiescence theory); *Liberty and Prosperity 1776, Inc. v. Corzine*, No. 08-2642, 2010 WL 2557212, at *4–6 (D. N.J. June 24, 2010) (recognizing that knowledge and acquiescence standard may be sufficient for some First Amendment claims, depending on whether discriminatory purpose is essential to claim); *Bullock v. Beard*, No. 3:10-cv-401, 2010 WL 1507228, at *4 (M.D. Pa. Apr. 14, 2010) (applying knowledge and acquiescence standard to Eighth Amendment claim).[4]

In short, Appellants' extreme position is contrary to the overwhelming majority of post-*Iqbal* case law.

III. The Availability of Supervisory Liability Is Critical To Deterring Constitutional Violations and Compensating Victims of Those Violations.

The lack of legal support for Appellants' position is sensible, given the critical role that supervisory liability has played in ensuring that civil rights violations are adequately deterred and that victims of egregious violations are sufficiently compensated. It would strain the Court's indulgence (and its Rules) to enumerate the many varied instances in which the availability of liability for

[4] District courts within the Fourth Circuit have also permitted supervisory liability claims where the supervisor did not directly participate in the violation, but where the supervisors knew of and remained indifferent to the violations by their subordinate. *See Mitchell v. Rappahannock Regional Jail Auth.*, 703 F. Supp. 2d 549 (E.D.Va. 2010) (Eighth Amendment violations); *Massenburg v. Adams*, 08 Civ. 106, 2010 WL 1279087 (E.D. Va. Mar. 31, 2010) (religious exercise case).

supervisors has proven important to deterrence and compensation, so this brief will highlight only some of the relevant cases.

We start with the principle that deterrence and compensation are the recognized twin goals of both *Bivens* and Section 1983 litigation. The *Bivens* Court itself focused on the need for compensating the victims of wrongdoing. *See Bivens*, 403 U.S. at 396–97; *id*. at 410 (Harlan, J., concurring) ("For people in Bivens' shoes, it is damages or nothing."). Subsequent to *Bivens*, the Court identified an interest in deterrence as another basis for the cause of action. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations."); *Carlson v. Green*, 446 U.S. 14, 21 (1980) ("*Bivens* . . . in addition to compensating victims, serves a deterrent purpose."); *Butz v. Economou*, 438 U.S. 478, 505–06 (1978) (declining to provide absolute immunity to federal executive officials under *Bivens* because doing so would eviscerate deterrent effect).

Ensuring that supervisors are liable for their constitutional violations has historically been important to meeting both goals of civil rights damages litigation. When a plaintiff has suffered a constitutional injury caused by the conduct of both direct participants and supervisory officials, compensation from all parties is just and sometimes necessary to ensure a complete remedy. For instance, when a line officer has insufficient funds to compensate an injured plaintiff fully, a supervisor

who is also culpable may be able to fill the gap. Moreover, there may be circumstances when line officers are not available to pay damages (*e.g.*, because they cannot be identified or because of a lack of indemnification) but supervisors are. *See, e.g.*, *Brenes-Laroche v. Toledo Davila*, 682 F. Supp. 2d 179, 186–88 (D. P.R. 2010) (subordinate officers removed their badges before using unlawful force to hide their identities).

Supervisors may also be more subject to the deterrent effect of individual liability and more important to deter, given their greater authority, greater institutional affiliation with their employing agencies, better access to information necessary to prevent constitutional violations, and their responsibility to ensure that line-officer staff are properly trained and supervised. *See, e.g.*, *Butz*, 438 U.S. at 505–506 (emphasizing the importance of liability for high-ranking officials because they may exercise authority over subordinates with respect to "a wide range of projects" and their "greater power . . . affords a greater potential for a regime of lawless conduct"); *see also infra* Part IV. Indeed, analogous to well-accepted principles of common-law tort theory, supervisors are the "cheapest cost avoider[s]" in the constitutional tort context. Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 Yale L.J. 1055, 1060 (1972); Stephen G. Gilles, *Negligence, Strict Liability and the Cheapest Cost-Avoider*, 78 Va. L. Rev. 1291 (1992); *cf.* Richard A. Posner, *An Economic Analysis of Sex*

Discrimination Laws, 56 U. Chi. L. Rev. 1311, 1332 (1989) ("The most efficient method of discouraging sexual harassment may be by creating incentives for the employer to police the conduct of its supervisory employees, and this is done by making the employer liable.").

The importance of maintaining supervisory liability is reflected in the case law. Take as one example the well-documented problem of sexual abuse and rape in prisons. *See, e.g.*, Allen J. Beck & Paige M. Harrison, Sexual Victimization in Prisons & Jails Reported by Inmates, 2008–09 (U.S. Dep't of Justice, Bureau of Justice Statistics, 2010).[5] Prisoners who have been victimized by such abuse often have limited remedies against the direct participants—if the direct participants are other detainees, they will likely be judgment proof, and if they are correction officers, they will likely not be indemnified by their employing agencies. *See, e.g.*, N.J. Stat. Ann. §59:10-1 (state need not indemnify employee who committed "intentional wrong"); N.Y. Pub. Officers Law Art. 2 §17 (same).

In these circumstances, supervisors who violate the Constitution by exhibiting deliberate indifference to the risk that other inmates or prison employees will rape detainees are often the only wrongdoers who can be fully reached by the law. Under the Appellants' formulation in the instant case, however, even supervisors who know of and acquiesce in rape of prisoners will not be held liable

[5] Available at http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf.

unless they participate directly in the rape or its planning. According to Appellants' view, liability would be inappropriate in all of the following cases:

- When supervisors know of an officer's history of sexual abuse but nonetheless assign him to posts with "prolonged and unsupervised contact with female inmates, including the overnight shift in the sexual trauma unit." *Peddle v. Sawyer*, 64 F. Supp. 2d 12, 18–19 (D. Conn. 1999).

- When supervisors know of multiple instances of sexual assaults by a line officer and are aware of his "obsession" with a specific inmate but take no steps to intervene. *Mitchell v. Rappahannock Regional Jail Auth.*, 703 F. Supp. 2d 549, 559–60 (E.D. Va. 2010).

- When supervisors know of a subordinate's long history of sexual abuse of prisoners, take no action in response, and one even admits intentionally not investigating for fear of what an investigation would uncover. *See White v. Ottinger*, 442 F. Supp. 2d 236, 248–50 (E.D. Pa. 2006).

- When supervisors provide no formal training to most subordinates concerning sexual harassment or proper contact with inmates, allowing subordinates "essentially [to do] as they please[]," notwithstanding a history of complaints about staff sexual misconduct. *Hammond v. Gordon County*, 316 F. Supp. 2d 1262, 1288–90 (N.D. Ga. 2002).

- When a supervisor does nothing to protect a prisoner from a known risk of sexual assault other than to tell her to stay around her friends and "do anything you have to do to protect yourself." *Ortiz v. Voinovich*, 211 F. Supp. 2d 917, 924–26 (S.D. Ohio 2002), *rev'd in part sub nom. Ortiz v. Jordan*, 316 F. App'x 449 (6th Cir. 2009), *cert. granted on other grounds*, 130 S. Ct. 2371 (2010).

- When a sheriff who has already been put on notice by federal courts of his inadequate supervision and its contribution to two sexual assaults makes only minimal efforts to correct "glaring" safety problems, fails to impose a serious threat of discipline for policy violations by staff, and fails to implement adequate training. *Tafoya v. Salazar*, 516 F.3d 912, 918–20 (10th Cir. 2008).

- When a supervisor is aware of past sexual misconduct allegations against a guard, believe the allegations are likely true and that it would be prudent to reassign the guard, yet does nothing to protect inmates from additional assaults. *Riley v. Olk-Long*, 282 F.3d 592, 595–96 (8th Cir. 2002).

- When a warden, knowing of a guard's many incidents of sexual misconduct, nonetheless allows him to resume his duties notwithstanding admitted concerns about inmates' safety and concerns about the guard's "continued use of poor judgment." *Id.* at 596–97.

Even outside of the context of prison sexual abuse, supervisory liability claims have forced the exposure and examination—and, one can reasonably

expect, the correction in many cases—of practices or omissions by higher-level officials that exposed prisoners to an excessive risk of harm. In these cases, supervisors and administrators are not held liable or potentially liable on a *respondeat superior* theory; rather, they are held responsible on the basis of their own deliberate indifference with regard to their "superintendent responsibilities." One need only look to *Carlson v. Green*, 446 U.S. 14 (1980), in which the Supreme Court made clear that *Bivens* provides a remedy for Eighth Amendment violations, for an example of a supervisory liability theory that would be cast aside by Appellants. After remand from the Supreme Court, the plaintiffs successfully argued that the medical director of the entire federal prison system could be liable for failing to remedy systemic deficiencies in prison medical care. *See Cleveland-Perdue v. Brutsche*, 881 F.2d 427, 430–31 (7th Cir. 1989). Under Appellants' direct-participation theory, *Carlson* and each of the following examples would no longer represent viable constitutional claims:

- When a warden who knows of pattern of excessive force fails to take steps to address it, adopts a "hands-off" approach, discontinues the practice of videotaping certain guard conduct, and fails to read inmate complaints. *Valdes*, 450 F.3d at 1237–44; *see also Estate of Davis by Ostenfeld v. Delo*, 115 F.3d 1388, 1396 (8th Cir. 1997) (another example of a supervisor who failed to take action notwithstanding history of excessive force).

- When prison supervisors ignore a pattern of racial harassment by a subordinate. *Curry v. Scott*, 249 F.3d 493, 507–08 (6th Cir. 2001)

- When a warden is "fully advised both of the inhumane conditions of [a disabled prisoner's] confinement and the failure to provide him with needed therapy," but neglects to take any remedial steps. *LaFaut v. Smith*, 834 F.2d 389, 394 (4th Cir. 1987) (Powell, J., sitting by designation) (cited with approval in *Wilson v. Seiter*, 501 U.S. 294, 303 (1991)).

Taken to its logical conclusion in the prison context, Appellants' argument would also create a bizarre dichotomy between cases involving abuse by fellow inmates and abuse by guards. In inmate-abuse cases, supervisors might still be liable under Appellants' theory because both supervisory and subordinate defendants would violate the Constitution in the same way—by failing to protect some inmates from others. *See generally Farmer v. Brennan*, 511 U.S. 825, 833 (1994). But in guard-abuse cases, supervisors would be shielded from liability because of their failure to participate in constitutional violations in the same way as their subordinates, despite their deliberate indifference to their subordinates' abuse. This kind of distinction lacks support in law, logic, and policy.

Appellants' argument, if accepted, would do real harm outside the prison context as well. There are many examples in the case law of supervisory-liability claims against police officers and others that serve the compensatory and deterrent

purposes of civil rights litigation. Under Appellants' view, there would be no liability:

- When a police chief fails to discipline officers for excessive force or to do anything to prevent unlawful force in the future and responds to a citizen's many complaints about excessive force with a letter saying the complaints would not be sustained. *See Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991).

- When a police chief knows that a particular officer has been reprimanded for a constitutional violation, has been the subject of eight other complaints about violence in four years, but fails to provide any additional training or supervision. *Williams v. Santana*, No. 09-10198, 340 F. App'x 614, 2009 WL 2435053 (11th Cir. Aug. 11, 2009).

- When a supervisor knows of multiple incidents in which a subordinate used excessive force prior to his killing a suspect and responds to complaints "callously and with apparent amusement." *Shaw v. Stroud*, 13 F.3d 791, 799–801 (4th Cir. 1994).

- When supervisors joke about their subordinate's propensity to use a Taser on citizens but nonetheless fail to train subordinates as to how to use the weapon properly. *See Ramirez v. Jim Wells County, Tex.*, No. 09 Civ. 209, 2010 WL 2598304, at *2 (S.D. Tex. June 25, 2010) (plaintiff alleged that supervisors

referred to subordinate as "Taser Joe" and failed to train him in the use of his Taser gun).

- When school officials fail to train special education teachers and fail to hire qualified staff to work in special education teachers, despite awareness of physical abuse of special education student, including beating, slapping, and slamming into a chair. *Preschooler II v. Clark County Sch. Bd. of Trustees*, 479 F.3d 1175, 1182–83 (9th Cir. 2007).

- When supervisors approve without inquiry the retaliatory transfers of police officers who reported sex-based discrimination, even though the captain initiating the transfers is the principal alleged discriminator. *Keenan v. City of Philadelphia*, 983 F.2d 459, 462–63, 466–68, 472 (3d Cir. 1992) (upholding verdict in plaintiffs' favor).

- Where supervisors are aware of ongoing harassment of female officers, including use of lewd language, placement of pornographic pictures in officers' work desks, and destruction of officers' work product, but take no action to investigate or stop the conduct. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1472–75, 1478–79 (3d Cir. 1990).

In sum, there are many examples in the case law of claims against supervisory officials that have played an important role in furthering the twin goals of *Bivens* and §1983 litigation—compensation and deterrence. Appellants'

extreme view would prevent *Bivens* and §1983 from serving their purpose in many significant cases.

IV. The United States Itself Has Recognized the Importance of Holding Supervisors Accountable to Prevent Constitutional Violations.

As part of its affirmative enforcement of constitutional standards through investigation of and litigation against state and local entities, the United States has recognized the importance of supervisory liability and has taken positions diametrically opposed to Appellants' view here.

Under the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997a(a), the Department of Justice, through its Civil Rights Division (CRD), has statutory power to investigate and, where appropriate, institute civil actions to prevent state and local officials from violating the Constitution. In almost all actions instituted by CRD pursuant to this authority, the United States has relied on, *inter alia*, allegations of supervisory involvement identical to those it derides as legally insufficient in the instant case.

For example, in a lawsuit against Nassau County and supervisory defendants, the United States alleged that the defendants violated the Eighth and Fourteenth Amendments by "tolerat[ing] and condon[ing]" the use of excessive force against detainees, failing to train and supervise, failing to maintain adequate policies, failing to adequately investigate complaints and failing to discipline errant staff. *See* Compl. ¶16, No. 2:02-cv-02382, *United States v. Nassau County*

(E.D.N.Y. Apr. 22, 2002).[6] In a lawsuit against Columbus County, Georgia, the United States sought relief for violations of the Constitution caused by supervisory defendants' failure to provide "adequate staffing and staff training, and fail[ure] to develop and implement appropriate policies and procedures to safely operate the Jail." *See* Compl. ¶14, *United States v. Columbus Consol. City/County Government*, No. 4:99-cv-00132 (M.D. Ga. Sept. 23, 1999).[7] In a case against the State of Arizona, the United States relied upon a theory of supervisory liability where the defendants failed to provide adequate training and investigation of sexual misconduct by staff. *See* Mem. Opp. Defs.' Mot. for Summ. J., *United States v. State of Ariz.*, No. 97-cv-476 (D. Ariz. Nov. 25, 1998);[8] *see also* Compl. ¶21, *Johnson v. Fla.*, No. 87-cv-369 (M.D. Fla.) (United States alleged that supervisors violated substantive due process by failing to protect hospital patients from harm, by failing to supervise staff, and by failing to investigate abuse, *inter alia*).[9]

[6] Available at http://www.justice.gov/crt/split/documents/Nassa_sher_comp.php.

[7] Available at http://www.justice.gov/crt/split/documents/muscogeecomp.php.

[8] Available at http://www.justice.gov/crt/split/documents/arizbrf.php.

[9] Available at http://www.justice.gov/crt/split/documents/gpwcomp.php.

Iqbal has not changed the United States' litigating position. In *United States v. Erie County*, No. 09-cv-849, 2010 WL 2737131 (W.D.N.Y. July 9, 2010), the United States recently amended its complaint to add supervisory liability allegations that are based on the same theory that plaintiffs seek to pursue in this case. *See* Am. Compl ¶21, *United States v. Erie County*, No. 09 Civ. 849 (W.D.N.Y. July 23, 2010) (alleging that defendants disregarded known and serious risks of harm to detainees);[10] *id*. at ¶22 (alleging that defendants "have repeatedly failed to take reasonable measures to prevent staff from inflicting serious harm on inmates"), *id*. at ¶23, 27, 31, 35 (alleging that subordinates' unconstitutional conduct was caused by supervisors' failure to adopt policies necessary to prevent such violations), *id*. at ¶24, 28, 32, 36 (failure to train allegations), ¶25, 29, 33, 37 (failure to discipline or supervise allegations). Thus, the United States seeks to hold Appellees to a standard it does not apply to itself.

Even when the United States is not a formal litigant, it has taken positions at odds with that of Appellants' here. In the Ninth Circuit, CRD filed an *amicus* brief arguing that a district court improperly granted judgment as a matter of law on punitive damages, in part arguing that punitive damages, like supervisory liability, was necessary to ensuring adequate enforcement of civil rights laws. *See* Br. of United States as *Amicus Curiae, Reed v. Penasquitos Casablanca Owner's Ass'n*,

[10] Available at http://www.justice.gov/crt/split/documents/US_v_Erie_AmendedComplaint_07-23-10.pdf.

Nos. 08-55069, 08-55072, 08-55151, 381 F. App'x 674, 2010 WL 2232339 (9th Cir. June 2, 2010) (brief filed Nov. 6, 2008).[11] The government drew a useful comparison between punitive damages and supervisory liability and adopted a standard for supervisory liability that is far broader than what the United States argues in its defensive posture in this case. *See id.* at 27–28 (citing law indicating that under 42 U.S.C. § 1983, "supervisory inaction" can be reckless when defendant failed to act on knowledge of illegality). In so doing, the United States favorably cited the pre-*Iqbal* supervisory liability standard from the First Circuit, in which that court applied a deliberate indifference standard for supervisory liability in police misconduct. *See id.* at 27 (citing *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 562 (1st Cir. 1989), with approval). The Ninth Circuit ultimately agreed with the United States' position. *See Reed v. Penasquitos Casablanca Owner's Ass'n*, Nos. 08-55069, 08-55072, 08-55151, 381 F. App'x 674, 2010 WL 2232339, at *2 (9th Cir. June 2, 2010). Indeed, the Ninth Circuit held that a defendant's "reckless indifference" was sufficient to entitle a plaintiff to punitive damages, and that a plaintiff could show such indifference by demonstrating that the defendant knew of unlawful conduct by subordinates and failed to take any action. *Id.*

[11] Available at http://www.justice.gov/crt/briefs/reedbrief.pdf.

Several of CRD's pre-litigation letters to state and local government agencies are also worth noting. These letters present CRD's findings regarding constitutional violations and its recommendations for preventing their recurrence, and they reflect CRD's recognition that supervisory oversight of governmental agency operations and staff is essential as a practical matter to preventing constitutional violations by lower-level officials. When such violations occur in a recurrent or systematic way, improved supervision is almost always an essential component of an effective remedy.

For example, when investigating the Mercer County, New Jersey Geriatric Center, CRD found widespread constitutional violations and recommended, among other remedial measures, meaningful training, investigation, and follow-up of incidents of abuse. *See* Letter from Ralph F. Boyd, Jr., Ass't Attorney General, to Robert D. Prunetti, County Executive (Oct. 9, 2002) (findings letter).[12] CRD similarly drew a link between inadequate supervision and unconstitutional conduct when investigating a Woodbridge, New Jersey facility. *See* Letter from Alexander Acosta, Ass't Attorney General, to Hon. James E. McGreevey, at 3, 34–36 (Nov. 12, 2004)[13] (findings with respect to Woodbridge Developmental Ctr.) (detailing

[12] Available at http://www.justice.gov/crt/split/documents/mercercounty.php.

[13] Available at http://www.justice.gov/crt/split/documents/split_woodbridge_findings_nov11_04.pdf.

minimal supervision and training recommendations to prevent unconstitutional harm); *see also* Letter from Ralph F. Boyd, Jr., Ass't Attorney General, to Hon. James E. McGreevey, at 5 (Apr. 8, 2003)[14] (findings with respect to New Lisbon Developmental Ctr.) (identifying lack of staff training and incident reporting as one cause of unconstitutional failure to protect from harm); Letter from Thomas E. Perez, Ass't Attorney General, to Hon. Jack Markell, at 14 (Nov. 9, 2010)[15] (findings with respect to the Del. Psychiatric Ctr.) (criticizing lack of investigation of incidents of abuse and lack of interventions to "minimize or eliminate risks of harm"). As CRD observed when investigating the Virgin Islands Police Department, "[p]olicies and procedures are the primary means by which police departments communicate their standards and expectations to their officers," and thus supervisory oversight and training is essential to remedying constitutional misconduct. Letter from Shanetta Y. Cutlar, Chief, Special Litig. Section, to Comm'r Elton Lewis, Virgin Islands Police Dep't, at 2, 22–27 (Oct. 5, 2005).[16]

Outside of the Third Circuit, CRD has made similar findings, criticizing law enforcement officials who fail to provide policy guidance on use of force, fail to

[14] Available at http://www.justice.gov/crt/split/documents/newlisbon_finding_letter.pdf.

[15] Available at http://www.justice.gov/crt/split/documents/DPC_findlet_11-09-10.pdf.

[16] Available at http://www.justice.gov/crt/split/documents/virgin_island_pd_talet_10-5-05.pdf.

review incidents of abuse, and fail to train their officers. *See* Letter from Loretta King, Acting Ass't Attorney General, to Raymond P. Fitzpatrick, Jr., Esq. ["Yonkers Letter"], at 5, 17, 18, 30 (June 9, 2009)[17] (investigation of Yonkers Police Dep't); Letter from Thomas E. Perez, Ass't Attorney General, to Hon. Andrew J. Spano, County Executive ["Westchester Letter"], at 32–35 (Nov. 19, 2009)[18] (findings with respect to Westchester County Jail) (detailing recommendations regarding changes in supervision necessary to prevent unconstitutional uses of force); Letter from Loretta King, Acting Ass't Attorney General, to Martin N. Gusman, Orleans Parish Criminal Sheriff, at 5–6, 9–10, 24–25 (Sept. 11, 2009)[19] (findings with respect to Orleans Parish Prison Sys.) (providing recommendations on oversight remedies to prevent excessive use of force); Letter from Loretta King, Acting Ass't Attorney General, to Hon. Chris Collins, County Executive, at 41 (July 15, 2009)[20] (findings with respect to Erie County Holding Ctr. and Erie County Correctional Facility) (recommending oversight and training on use of force). As CRD has stated succinctly on numerous

[17] Available at http://www.justice.gov/crt/split/documents/YonkersPD_talet_06-09-09.pdf.

[18] Available at http://www.justice.gov/crt/split/documents/Westchester_findlet_11-19-09.pdf.

[19] Available at http://www.justice.gov/crt/split/documents/parish_findlet.pdf.

[20] Available at http://www.justice.gov/crt/split/documents/Erie_findlet_redact_07-15-09.pdf.

occasions, supervisory oversight is "critical" to ensure that subordinates' conduct is consistent with constitutional standards. Yonkers Letter at 18; *see also* Westchester Letter at 7 ("To ensure reasonably safe conditions, officials must take measures to prevent the use of unnecessary and inappropriate force by staff.").

Thus, although the United States takes a contrary position here, it has consistently argued for a broad reading of supervisory liability in affirmative litigation, precisely because of the close link between supervisory inaction to unconstitutional conduct by subordinates.

CONCLUSION

For the foregoing reasons, Appellants' arguments regarding supervisory liability should be rejected and the district court's decision affirmed.

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Respectfully submitted,

s/ Claire Prestel

Claire Prestel
PUBLIC JUSTICE, P.C.
1825 K Street NW, Suite 200
Washington, DC 20006
(202) 797-8600
cprestel@publicjustice.net

Alexander A. Reinert
Associate Professor of Law
BENJAMIN N. CARDOZO
SCHOOL OF LAW
55 Fifth Avenue, Room 938
New York, NY 10003
(212) 790-0403

areinert@yu.edu

Steven Banks
John Boston
THE LEGAL AID SOCIETY OF
THE CITY OF NEW YORK
PRISONERS' RIGHTS PROJECT
199 Water Street
New York, NY 10038
(212) 577-3530
JBoston@legal-aid.org

Angus Love
THE PENNSYLVANIA
INSTITUTIONAL LAW PROJECT
718 Arch Street,
Suite 304 South
Philadelphia, PA 19106
(215) 925-2966
alove@pailp.org

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s/ Claire Prestel
Claire Prestel

CERTIFICATION AS TO BAR MEMBERSHIP

I hereby certify that at least one of the attorneys whose names appear on this brief (specifically, Claire Prestel) is a member of the bar of this Court.

s/ Claire Prestel
Claire Prestel

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I hereby certify that on December 8, 2010, the foregoing brief was served via the Court's ECF system and overnight delivery service on the following persons: Barbara L. Herwig, Esq. and Howard S. Scher, Esq., Attorneys, Appellate Staff, Civil Division, Department of Justice, 950 Pennsylvania Avenue, NW, Room 7239, Washington, D.C. 20530-000; Baher A. Azmy, Esq., Seton Hall Law School, 833 McCarter Highway, Newark, NJ 07102-0000; Heather Colleen Bishop, Esq., Natalie J. Kraner, Esq., Aurora Frances Parrilla, Esq., David Marshall Reiner, Esq., R. Scott Thompson, Esq., Scott L. Walker, Esq., Catherine Weiss, Esq., and Kenneth H. Zimmerman, Esq., Lowenstein Sandler, 65 Livingston Avenue, Roseland, NJ 07068-0000, and Lawrence S. Lustberg, Esq., Gibbons, One Gateway Center, Newark, NJ 07102-5310.

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