No. 03-841

In the Supreme Court of the United States

DONATO DALRYMPLE, ET AL., PETITIONERS

v.

JANET RENO, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a complaint filed pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that seeks damages from a high-level government official can be subject to a heightened pleading requirement where the claims turn upon the actions taken by the official in a supervisory capacity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 334 F.3d 991. The opinion of the district court (Pet. App. 16-39) is reported at 164 F. Supp. 2d 1364.

JURISDICTION

The court of appeals entered its judgment on June 19, 2003. A petition for rehearing was denied on September 16, 2003 (Pet. App. 14-15). The petition for a writ of certiorari was filed on December 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. In November 1999, six-year-old Elian Gonzalez was found floating on an inner tube off the coast of Florida. Pet App. 3. The Immigration and Naturalization Service (INS) temporarily paroled him into the United States and released him into the custody of his great uncle, Lazaro Gonzalez, who resided in Miami. *Ibid.* Lazaro Gonzalez filed petitions for political asylum on behalf of Elian, *id.* at 3-4, but, because Elian's father requested that his son be returned to Cuba, the then-Commissioner of the INS, Doris Meissner, declined to consider the asylum petitions and the then-Attorney General Janet Reno sustained that decision, see *ibid.* The District Court for the Southern District of Florida upheld the decision, *Gonzalez* v. *Reno*, 86 F. Supp. 2d 1167 (S.D. Fla. 2000), and Lazaro Gonzalez appealed.

While the appeal was pending, Elian's father arrived in the United States. The INS then sought to transfer custody of Elian from Lazaro Gonzalez to the father. Pet. App. 4. When Lazaro Gonzalez failed to comply with requests to transfer custody, the INS informed him that Elian's parole into his custody had been revoked. C.A. App. Tab 19-App, Exh. E. When Lazaro Gonzalez persisted in his refusal to transfer the child, the INS issued an administrative warrant for Elian's arrest and obtained a search warrant to enter the Gonzalez home to search for Elian. See Pet. App. 4; 8 U.S.C. 1226(a). The affidavit submitted in support of the search warrant explained that the search might need to be executed during the nighttime because "[t]he numbers of individuals outside the home dwindles during the night time hours," and thus a search at night would encounter "the least amount of

resistance from any crowd gathered outside the home, [would] ensure the safety of Elian Gonzalez, and [would] protect the officers executing the warrant." C.A. App. Tab 19-App., Affid. at 8.

Federal agents executed the search and administrative arrest warrants in the early morning of April 22, 2000, removing Elian from the home and reuniting him with his father. Pet. App. 4-5. Subsequently, the court of appeals sustained Attorney General Reno's decision not to consider the asylum petitions filed by Lazaro Gonzalez, and this Court denied an application for stay and petition for a writ of certiorari. *Gonzalez* v. *Reno*, 212 F.3d 1338 (11th Cir.), cert. denied, 530 U.S. 1270 (2000). Elian then returned to Cuba with his father.

2. Petitioners are 52 individuals who were near or, in one instance, inside the Gonzalez home at the time the arrest and search warrants were executed. When the agents arrived, at least half of the petitioners tried to "move closer to the Gonzalez family's home," C.A. App. Tab 11 (Amended Compl.) ¶¶ 132-138, 150-157, 160-163, 165-166, 173, 180-181, and two petitioners took positions in front of the home and attempted to block the officers from entering, *id.* ¶¶ 135, 175. Petitioners allege that the agents who carried out the operation used excessive force against them by spraying teargas, threatening them with guns, or pushing them. See Pet. App. 4-5.

Petitioners filed suit against former Attorney General Janet Reno and two other senior officials, then-Deputy Attorney General Eric Holder and then-INS Commissioner Doris Meissner, seeking more than $100 million in damages from them in their personal capacities under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The

complaint alleged that Attorney General Reno and the other two defendants "personally directed" the agents and caused the warrants to be executed in an unconstitutional "manner," in violation of the petitioners' First, Fourth, and Fifth Amendment rights. C.A. App. Tab 11 (Amended Compl.) ¶¶ 189-190, 195-196, 201, 203. Petitioners did not sue any of the agents who executed the warrants or were at the scene.

The defendants moved to dismiss the complaint on the ground that the claims were barred by qualified immunity because the actions of the law enforcement agents, and *a fortiori* the defendants' own actions, did not violate petitioners' clearly established constitutional rights. The district court dismissed all the claims against defendants Holder and Meissner, but dismissed only the Fifth Amendment claim against Attorney General Reno. Pet. App. 23-24, 34-37. The court denied the motion to dismiss the First and Fourth Amendment claims against the former Attorney General on the grounds that the complaint stated valid First and Fourth Amendment claims and that the allegations were sufficient to subject Attorney General Reno to supervisory liability for the actions of the agents who executed the warrants. *Id.* at 23-34.

3. Attorney General Reno took an interlocutory appeal, see *Mitchell* v. *Forsyth*, 472 U.S. 511, 524-530 (1985), and the court of appeals reversed. Pet. App. 1-13. The court held that Attorney General Reno could be held liable only if her "supervisory actions caused the alleged constitutional violations by the agents on the scene." *Id.* at 9; see also *id.* at 10 (causal connection can be established if a supervisor "directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them"). Following unchallenged circuit precedent

decided before this Court's decision in *Crawford-El* v. *Britton*, 523 U.S. 574 (1998), the court explained that, in cases involving assertions of qualified immunity, "the complaint must allege the relevant facts with 'some specificity,'" and that "[m]ore than mere conclusory notice pleading is required." Pet. App. 10. Under what the court termed its "heightened pleading" standard, "a complaint will be dismissed as insufficient where the allegations it contains are vague and conclusory." *Ibid.*

Applying that standard, the court of appeals concluded that petitioners "have failed to allege facts that would establish a causal connection between Reno's supervisory actions and the alleged constitutional violations by the officers on the scene." Pet. App. 13. The court observed that the complaint's allegations regarding the former Attorney General's responsibility for the agent's actions were "vague and conclusory," and further held that simply asserting that the operation was "carefully choreographed [and] pre-planned" could not reasonably support an inference that the former Attorney General directed the agents to use unlawful force. *Id.* at 12-13.

Petitioners filed a petition for rehearing in which they challenged, for the first time, the court of appeals' established law requiring heightened pleading in qualified immunity cases as inconsistent with *Crawford-El*. The court of appeals denied the petition for rehearing. Pet. App. 14.

ARGUMENT

In *Crawford-El* v. *Britton*, 523 U.S. 574 (1998), this Court held that, when a plaintiff brings a constitutional tort claim that is predicated on unconstitutional motivation, the plaintiff need not adduce "clear and convincing evidence" of the defendant's motive in order to

survive a motion for summary judgment. *Id.* at 578. Petitioners seek this Court's review of the court of appeals' pleading requirement on the ground that it conflicts with this Court's decision concerning a heightened evidentiary burden of proof in *Crawford-El* (Pet. 10-13), and with the decisions of other circuits (Pet. 13-15). Review in this case would be inappropriate, however, because petitioners failed properly to preserve their challenge to the pleading requirement, because the unique factual context in which this case arises makes it an inapt vehicle for resolving the question presented, and because the decision below is correct.

1. Although petitioners now argue (Pet. 10-13) that the court of appeals' longstanding pleading requirement conflicts with this Court's decision in *Crawford-El*, *supra*, petitioners did not properly present or preserve that argument below. Indeed, the arguments presented by petitioners to the panel bore no resemblance to the argument for which petitioners seek this Court's review. See Pet. C.A. Br. 13-49. Petitioners simply did not contest under *Crawford-El*, or on any other basis, the court's continuing application of established circuit precedent imposing heightened pleading requirements in lawsuits against government officials sued in their personal capacities. See, *e.g.*, *GJR Investments, Inc.* v. *County of Escambia*, 132 F.3d 1359, 1367 (11th Cir. 1998). In fact, petitioners' appellate brief did not even cite *Crawford-El*, much less suggest that it required the Eleventh Circuit to depart from extant circuit precedent.[1] As a result, the appropriateness of the

[1] See, *e.g.*, *Davis* v. *Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997) ("To the extent of any inconsistency between our [prior opinions'] pronouncements and the Supreme Court's supervening ones, of course, we are required to heed those of the Supreme

pleading standard applied by the court of appeals, in light of *Crawford-El*, was never placed at issue before the panel or addressed by the decision below. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); see also *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 527 (1994).

Petitioners' omission is particularly glaring because the government expressly argued that the circuit's pleading requirement is consistent with and, indeed, invited by the Court's decision in *Crawford-El*. See Gov't C.A. Opening Br. 22, 32-34; Gov't C.A. Reply Br. 9-10. Petitioners thus were fully apprised of *Crawford-El*'s relevance to the appeal. Petitioners' failure to present to the court of appeals the argument they now raise before this Court thus cannot readily be attributed to anything other than a tactical litigation judgment. The certiorari process, however, is not designed to relieve disappointed litigants of the consequences of strategies employed below.[2]

2. Petitioners assert (Pet. 13-15) that this Court's review is necessary to resolve a circuit conflict on the

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Court."); *Lufkin* v. *McCallum*, 956 F.2d 1104, 1107 (11th Cir.) ("A panel of this Court may decline to follow a decision of a prior panel if such action is necessary in order to give full effect to an intervening decision of the Supreme Court"), cert. denied, 506 U.S. 917 (1992).

[2] While petitioners later raised the issue in their rehearing petition, that tardy assertion was procedurally barred because the Eleventh Circuit, like other courts of appeals, "do[es] not consider issues or arguments raised for the first time on petition for rehearing." *United States* v. *Martinez*, 96 F.3d 473, 475 (11th Cir. 1996), cert. denied, 519 U.S. 1133 (1997).

question whether, consistent with *Crawford-El*, courts may impose what has been characterized as a heightened pleading requirement in lawsuits brought against government officials in their personal capacities under *Bivens*. While a circuit conflict exists on the question, it is not well evidenced by the cases that petitioners cite. Compare *Galbraith* v. *County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002); *Goad* v. *Mitchell*, 297 F.3d 497, 502-503 (6th Cir. 2002); *Higgs* v. *Carver*, 286 F.3d 437, 439 (7th Cir. 2002); and *Currier* v. *Doran*, 242 F.3d 905, 915-916 (10th Cir.), cert. denied, 534 U.S. 1019 (2001) (all: rejecting heightened pleading requirements), with *Judge* v. *City of Lowell*, 160 F.3d 67, 72-75 (1st Cir. 1998) (imposing heightened pleading requirement in qualified immunity cases as consistent with *Crawford-El*); cf. *Trulock* v. *Freeh*, 275 F.3d 391, 405 (4th Cir. 2001) ("Although there is no heightened pleading standard in qualified immunity cases, a district court has the discretion to ask a plaintiff to "put forward specific, non-conclusory factual allegations that establish improper motive.") (citing *Crawford-El*), cert. denied, 537 U.S. 1045 (2002).[3]

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[3] Five of the six cases cited by petitioners (Pet. 13-15) do not evidence a circuit conflict. In three of the cited cases, the language discussing a heightened pleading requirement was dicta. See *Thaddeus-X* v. *Blatter*, 175 F.3d 378, 399-400 (6th Cir. 1999) (en banc) (an evenly divided en banc court, in a multiplicity of opinions, ultimately concluded that the plaintiffs' evidence regarding retaliatory motive precluded summary judgment); *Nance* v. *Vieregge*, 147 F.3d 589, 590-591 (7th Cir.) (complaint properly dismissed for failure to state a claim), cert. denied, 525 U.S. 973 (1998); *Harbury* v. *Deutch*, 233 F.3d 596, 610-611 (D.C. Cir. 2000) (defendant's motive is germane to constitutional claim for denial of access to courts), rev'd on other grounds, 536 U.S. 403 (2002). Two of the other cases cited involve totally different pleading rules applied in cases not involving qualified immunity. See *Ray* v. *Kertes*, 285

This is a particularly inappropriate case in which to address that circuit conflict, however. First, notably absent from the list of conflicting circuits is the court of appeals below. The Eleventh Circuit simply has not yet definitively joined the debate over the effect of *Crawford-El* on heightened pleading requirements, because petitioners failed to argue the issue to the panel. How that circuit will resolve the question of whether heightened pleading requirements are consistent or inconsistent with *Crawford-El* when the matter is properly presented to it thus remains an open question. The failure to raise the issue, moreover, clearly deprived the Eleventh Circuit of an opportunity to weigh in on the issue that has divided the circuits or to explain why this case may involve special considerations justifying heightened pleading either as a matter of procedural or substantive law.

The latter possibility is strongly implicated here and, indeed, the nature of the constitutional injury asserted in this case provides an atypical context in which to consider the heightened-pleading question. Petitioners have not sued the law enforcement agents who executed the search and arrest warrants in a manner that petitioners allege was unconstitutional. They instead have sued only former Attorney General Janet Reno.[4] This Court has long acknowledged the significant

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F.3d 287, 297 (3d Cir. 2002) (exhaustion requirement of the Prison Litigation Reform Act of 1996 is not subject to heightened pleading requirement); *Walker* v. *Thompson*, 288 F.3d 1005, 1007 (7th Cir. 2002) (civil rights plaintiff need not allege overt acts in furtherance of conspiracy) (dicta).

[4] The district court's grant of qualified immunity to the other two governmental defendants, former Deputy Attorney General Eric Holder and former INS Commissioner Doris Meissner, was not at issue in the appeal.

"social costs" entailed by the judicially implied *Bivens* cause of action:

> These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.

Harlow v. *Fitzgerald*, 457 U.S. 800, 814 (1982). When, as in this case, the *Bivens* action is brought against a high-level governmental official, those costs can be "peculiarly disruptive of effective government" and "could implicate separation-of-powers concerns." *Id.* at 817 & n.28. See also *Smith* v. *Nixon*, 807 F.2d 197, 200 (D.C. Cir. 1986) (Scalia, J.,). Thus, even assuming *arguendo* that petitioners are correct in suggesting that a heightened pleading requirement is not warranted in routine *Bivens* actions (but see Point 3, *infra*), distinct constitutional considerations might nonetheless justify imposing a more particularized pleading requirement in cases involving high-level government officials. There is no circuit conflict on that discrete and constitutionally sensitive question; indeed, the government is not aware of any court of appeals that has yet addressed it. None of the cases composing the existing circuit conflict involved actions targeting high-level government officials exclusively, if at all. Moreover, petitioners' failure even to cite *Crawford-El* deprived the court below of the opportunity to explain how the distinctive features of the case might affect the necessary content of the allegations.

Petitioners' claim against former Attorney General Reno, moreover, is predicated on demonstrating that she violated their constitutional rights not directly, but in a supervisory capacity. To state such a claim, petitioners' complaint must go beyond alleging the constitutional injury inflicted. The complaint must allege facts establishing that Attorney General Reno herself caused those injuries through her supervisory conduct. See Pet. App. 9-10 (citing cases); see also *Post* v. *City of Fort Lauderdale*, 7 F.3d 1552, 1561 (11th Cir. 1993) (no supervisory liability where plaintiff failed to show that the supervisors "directed the [officers] to act *unlawfully* or that they knew the [officers] would act unlawfully and failed to stop it"), modified on other grounds, 14 F.3d 583 (1994). Again, unlike the more typical *Bivens* action that targets the individuals alleged to be directly responsible for inflicting the constitutional injury, petitioners' claim, by its very nature, requires additional factual pleading to state a claim of causation. That is because "[t]he standard by which a supervisor is held liable in her individual capacity for the actions of a subordinate is extremely rigorous." *Braddy* v. *Florida Dep't of Labor & Empl. Sec.*, 133 F.3d 797, 802 (11th Cir. 1998). Given that context, the line between the true imposition of a heightened pleading requirement and simply firm enforcement of the requirement that the complaint allege facts showing causation in order to state a claim of supervisory liability would be hard to discern. See Pet. App. 11-12 (finding that complaint fails to allege facts establishing causation). And any effort to do so would entail such a record-bound inquiry as to make the case an awkward vehicle for considering the legal question presented.

3. The decision of the court of appeals is correct and consistent with *Crawford-El*. The Eleventh Circuit's pleading precedents comport with Rule 8(a) of the Federal Rules of Civil Procedure, which requires a complaint to include a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Applying more particularized pleading requirements in qualified immunity cases simply factors the policies underlying the qualified immunity doctrine into the analysis of whether a complaint "show[s] that the pleader is entitled to relief." This Court took the same tack in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), when it defined "finality" for purposes of appellate jurisdiction, 28 U.S.C. 1291, to include denials of qualified immunity, 472 U.S. at 526-527, and thus applied the general principles governing finality in light of the specific concerns underlying the qualified immunity doctrine.[5]

This Court's decision in *Crawford-El*, *supra*, reinforces the court of appeals' approach. In *Crawford-El*, the Court held that, when a plaintiff brings a constitutional tort claim that is predicated on unconstitutional motivation, the plaintiff need not adduce "clear and convincing evidence" of the defendant's motive in order to survive a motion for summary judgment. 523 U.S. at 578. *Crawford-El*'s holding is directed solely at the quantum of evidence required to go to trial, not at the sufficiency of the pleadings required to withstand a motion to dismiss. Indeed, *Crawford-El* itself reiterated *Harlow*'s endorsement of "a firm application of the

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[5] In this case, the court's approach also factored into the Rule 8 inquiry the underlying substantive law governing supervisory liability in *Bivens* actions—that is, the necessary allegations of meaningful personal involvement.

Federal Rules of Civil Procedure" and stressed the need for district courts to "protect[] the substance of the qualified immunity defense." *Id.* at 597-598 (internal quotation marks omitted). Among other things, the Court emphasized that "the [district] court may insist that the plaintiff 'put forward *specific, nonconclusory factual allegations*' that establish improper motive * * * in order to survive a prediscovery motion for dismissal or summary judgment." *Id.* at 598 (emphasis added).

In so holding, the Court cited with approval Justice Kennedy's concurring opinion in *Siegert* v. *Gilley*, 500 U.S. 226 (1991), which emphasized that "avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls." 500 U.S. at 236 (Kennedy, J., concurring in judgment); see also *id.* at 235 ("The heightened pleading standard is a necessary and appropriate accommodation between the state of mind component of malice and the objective test that prevails in qualified immunity analysis as a general matter.").

The pleading standard applied by the Eleventh Circuit, which requires "some factual detail," *Oladeinde* v. *City of Birmingham*, 963 F.2d 1481, 1485 (1992), cert. denied, 507 U.S. 987 (1993), rather than "mere conclusory notice pleading," *Fullman* v. *Graddick*, 739 F.2d 553, 556 (1984), closely mirrors *Crawford-El*'s endorsement of requiring "specific, nonconclusory factual allegations," and it is faithful to the "avoidance of disruptive discovery" that Justice Kennedy's con-

currence in *Siegert*, 500 U.S. at 236, recognized as an integral part of the qualified immunity defense.[6]

Beyond that, as discussed at p. 11 , *supra*, because petitioners' claim for relief turns upon demonstrating that a supervisory official caused the constitutional injuries alleged, the court of appeals' pleading requirement in this case is well grounded in the substantive law of supervisory liability alone, based on the "firm application" of principles of notice pleading directed by this Court in *Harlow*, 457 U.S. at 820 n.35.

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[6] Indeed, most of the courts of appeals that have rejected heightened pleading requirements have *not* done so on the ground advanced by the petition (Pet. 10-13) of alleged inconsistency with *Crawford-El*. Rather, the courts have recognized the appropriateness of imposing heightened pleading requirements under *Crawford-El*, but have concluded that the pleading requirement should be independently imposed by district courts and not dictated by the courts of appeals across the board. See *Goad*, 297 F.3d at 504 ("*Crawford-El* permits *district courts* to require plaintiffs to produce specific, nonconclusory factual allegations of improper motive before discovery.") (emphasis in original); *Trulock*, 275 F.3d at 405 (under *Crawford-El*, the district court "has the discretion to ask a plaintiff to "put forward specific, nonconclusory factual allegations that establish improper motive"); *Currier*, 242 F.3d at 916 (the "option" to require "specific, nonconclusory factual allegations" "resides in the discretion of federal trial judges, not federal circuit courts").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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