06-4216-cv

United States Court of Appeals

for the

Second Circuit

MAHER ARAR,

Plaintiff-Appellant,

– v. –

JOHN ASHCROFT, Attorney General of the United States, LARRY D. THOMPSON, formerly Acting Deputy Attorney General, TOM RIDGE, Secretary of State of Homeland Security, J. SCOTT BLACKMAN, formerly Regional Director of the Regional Office of Immigration and Naturalization Services, PAULA CORRIGAN, Regional Director of Immigration and Customs Enforcement, EDWARD J. MCELROY, formerly District Director of Immigration

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PLAINTIFF-APPELLANT UPON REHEARING *EN BANC*

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and Naturalization Services for New York District, and now Customs Enforcement, ROBERT MUELLER, Director of the Federal Bureau of Investigation, JOHN DOE 1-10, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents, JAMES W. ZIGLAR, formerly Commissioner for Immigration and Naturalization Services, UNITED STATES,

Defendants-Appellees.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The following information is provided pursuant to Federal Rule of Appellate Procedure 26.1:

The *amicus curiae* is the NAACP Legal Defense & Educational Fund, Inc. ("LDF"). It is a tax-exempt nonprofit organization. *Amicus curiae* does not have any corporate parent. It does not have any stock, and therefore, no publicly held company owns 10% or more of the stock of the *amicus curiae*.

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INTEREST OF AMICUS

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is a nonprofit corporation chartered by the Appellate Division of the New York Supreme Court as a legal aid society.[1] LDF's first Director Counsel was Thurgood Marshall. Since its founding, LDF has been committed to transforming this nation's promise of equality into reality for all Americans, with a particular emphasis on the rights of African Americans. *See NAACP v. Button*, 371 U.S. 415, 422 (1963) (describing LDF as a "'firm' . . . which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation").

LDF's interest in this case arises from the panel's interpretation of 42 U.S.C. § 1983 (2008) ("section 1983"), the principal statute governing private remedies for federal civil rights violations, *see, e.g.*, *Mitchum v. Foster*, 407 U.S. 225, 239 (1972) (noting that section 1983 provides "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation"), for purposes of determining the scope of the Torture Victim Protection Act, 28 U.S.C. § 1350 (2008) ("TVPA"). Section 1983

[1] Counsel of record for all parties received notice of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its staff, or its counsel made a monetary contribution to its preparation or submission.

creates liability for any "person who, under color of any statute, ordinance, regulation, custom, or usage, of any State" deprives or causes any person within the jurisdiction of the United States to be deprived of "any rights, privileges, or immunities secured by the Constitution and [federal] laws . . . ." 42 U.S.C. § 1983. Enacted as part of the Civil Rights Act of 1871, section 1983 was intended to provide a private remedy for federal civil rights violations and has subsequently been interpreted to create a species of tort liability. *See Memphis Cmty. School Dist. v. Stachura*, 477 U.S. 299, 305 (1986), *quoting*, *inter alia*, *Carey v. Piphus*, 435 U.S. 247, 253 (1978). Section 1983 plays an important role in safeguarding the federal rights of all citizens, and LDF has litigated numerous cases under section 1983 before this Court and the United States Supreme Court. *See, e.g.*, *Haines v. Kerner*, 404 U.S. 519 (1972) (upholding the right of state prisoners to challenge conditions of confinement under section 1983); *Kennedy Park Homes Ass'n, Inc. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) (holding that city ordinance interfering with the construction of low-income housing in a predominantly white neighborhood is actionable under section 1983), *cert. denied*, 401 U.S. 1010 (1971).

Section 1983 is an important means of redress for constitutional violations committed not only by state government officials, but also by non-state actors, such as private individuals and federal officials. Indeed, the statute is known as the

"Ku Klux Klan Act" because one of its primary purposes was to provide a civil remedy against abuses that were being committed in southern states during the Reconstruction era, especially by private organizations such as the Ku Klux Klan. *See Monroe v. Pape*, 365 U.S. 167, 174-76 (1961). The Supreme Court has consistently held that non-state actors can, under certain circumstances, engage in conduct under "color of State law," and may be subject to liability under section 1983 where they "act jointly" or conspire with state government officials. *See, e.g.*, *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 296 (2001); *Tower v. Glover*, 467 U.S. 914, 919 (1984); *Dennis v. Sparks*, 449 U.S. 24, 27 (1980); *cf. United States v. Price*, 383 U.S. 787, 794 (1966) (holding that, for purposes of finding liability under the criminal law analogue of section 1983, 18 U.S.C. § 242, private individuals acting jointly with state officers engage in conduct "under color" of state law).

SUMMARY OF ARGUMENT

In adjudicating plaintiff-appellant's claim under the TVPA, the panel looked to "principles of agency law" and "to jurisprudence under 42 U.S.C. § 1983" for guidance to determine the scope of the phrase "under color of foreign law."[2] 532

[2] Congress intended section 1983 jurisprudence to serve as a guide for the interpretation of the phrase "color of law" as used in the TVPA, *see* H.R. Rep. No.

F.3d at 175, quoting *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995). To the extent that the opinion below purports to rely on section 1983 case law, it seriously misinterprets well-settled precedent. The panel assumed that, for purposes of finding liability under section 1983, a non-State defendant acts "under color of State law" only where the defendant is under the "control or influence" of a State government official. 532 F.3d at 176, *quoting Kletschka v. Driver*, 411 F.2d 436, 449 (2d Cir. 1969). The panel then reasoned by analogy that, for purposes of establishing liability under the TVPA, a defendant who is not an official of a foreign government cannot act "under color of foreign law" unless the defendant is under the "control or influence" of a foreign official, and dismissed plaintiff-appellant's claim accordingly.

Contrary to the panel's reasoning, however, private individuals or federal officials need not be under the "control or influence" of a state government in order to be subject to section 1983 liability. To the contrary, private individuals can be held liable under section 1983 where they act jointly or conspire with such officials. *See, e.g.*, *Dennis*, 449 U.S. at 27.

If, as the panel assumed, a court applying the test for actionable conduct "under color of foreign law" under the TVPA should look to the test for conduct "under color of State law" under section 1983, *see* 532 F.3d at 175, then plaintiffs

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367, 102d Cong., 2d Sess., at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 87 ("Courts should look to 42 U.S.C. Sec. 1983 is [sic] construing 'color of law'").

should be able to state a claim under the TVPA against federal officials for joint action with foreign officials. To the extent that liability under the TVPA is analogous to liability under section 1983, the panel's reasoning concerning a "control or influence requirement" is simply erroneous.

ARGUMENT

I. The Panel Decision Misconstrued Clearly-Established Section 1983 Case Law Concerning Liability for Non-State Actors

A. Non-State Actors May Be Found Liable Under Section 1983 for Participation in "Joint Activity" with State Actors

Prior to the panel's decision, federal courts have held repeatedly and consistently that in order for non-state actors—whether they be private citizens or federal officials—to be liable under section 1983, they need not be under the "control or influence" of state government officials. While such "control or influence" may be a sufficient condition to establish liability for non-state actors, it is by no means a necessary one. To the contrary, the Supreme Court has clearly held that liability for a non-state actor under Section 1983 can be established in multiple situations that do not involve "control or influence," for instance: (1) where a private individual participates in joint activity with state officials, *see Dennis*, 449 U.S. at 27-28 (finding private individuals liable for conspiring with a state judge to enjoin plaintiff's mining operations, and holding that, "to act 'under

color of' state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions"); and (2) where private conduct is "entwined" with state action, *see Brentwood*, 531 U.S. at 296 (finding a nominally private state athletic association, which was overwhelmingly composed of public school officials, liable under section 1983, and holding, "[w]e have treated a nominally private entity as a state actor . . . when it is 'entwined with governmental policies' or when government is 'entwined in [its] management or control'"), *quoting Evans v. Newton*, 382 U.S. 296, 299, 301 (1966).[3]

Each of these bases for section 1983 liability for non-state actors—joint action and entwinement—has been recognized repeatedly and consistently in this Circuit. Only weeks ago, in *Sybalski v. Independent Group Home Living Program, Inc.*, --- F.3d ----, 2008 WL 4570642 at *2 (2d Cir. Oct. 15, 2008) (Cabranes, Newman, and B.D. Parker, JJ.), a panel of this Court explained,

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[3] We note that the "color of law" test under section 1983 is interchangeable with the "state action" test under Equal Protection analysis. *See, e.g.*, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982); *Annunziato v. Gan, Inc.*, 744 F.2d 244, 249 (2d Cir. 1984) ("[T]he 'under color' of law requirement has consistently been viewed in the same manner as the 'state action' requirement under the Fourteenth Amendment."); *Kletschka v. Driver*, 411 F.2d 436, 445 (2d Cir. 1969), *citing Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

> For the purposes of section 1983, the actions of a nominally private entity are attributable to the state when: (1) the entity . . . is "controlled" by the state ("the compulsion test"); (2) when . . . the entity is a "willful participant in joint activity with the [s]tate," or the entity's functions are "entwined" with state policies ("the joint action test" or "close nexus test"); or (3) when the entity "has been delegated a public function by the [s]tate," ("the public function test").

Other panels of this court have, without exception, reached the same conclusion. *See, e.g.*, *Tancredi v. Metro. Life Ins. Co.*, 316 F.3d 308, 312-13 (2d Cir. 2003) (Kearse, McLaughlin, and Daniels JJ.) (recognizing joint activity and entwinement between state and private actors as a basis for 1983 liability); *Ginsberg v. Healey Car & Truck Leasing, Inc.*, 189 F.3d 268, 271 (2d Cir. 1999) (Winter, Sack, and Sprizzo, JJ.) (recognizing joint activity as a basis for 1983 liability); *Ostensen v. Suffolk County*, 236 Fed.Appx. 651, 2007 WL 1492856 at **2 (2d Cir. May 23, 2007) (B.D. Parker, Raggi, and Wesley, JJ.) (same); *Chladek v. Verizon N.Y. Inc.*, 96 Fed.Appx. 19, 2004 WL 816376 at **2 (Oakes, Straub, and Pollack JJ.) (2d Cir. April 12, 2004) (same); *Stevens v. Stearns*, 213 F.3d 626 (Table), 2000 WL 710495 (2d Cir. May 30, 2000) (same).

Simply put, "control or influence" by a state actor is unnecessary to establish liability for non-state actors under section 1983. In *Dennis v. Sparks*, *supra*, the Supreme Court held that a plaintiff corporation alleging an unlawful conspiracy to enjoin its mining operations, perpetrated by a state court judge, another corporation, and two private individuals who were sureties on the injunction bond,

could bring claims against the private defendants under section 1983. 449 U.S. at 27. There was no discussion in *Dennis* of which of the defendants were allegedly in control of the conspiracy; in fact, because the private defendants were alleged to have bribed the judge, *see id.* at 28, it was likely the judge who was under the "influence" of the private defendants. Similarly, in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970), *overruled in part on other grounds*, *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) the Supreme Court held that, where an employee at a lunch counter conspired with a police officer to deny service to a white schoolteacher in the company of six black youths, the lunch counter employee was subject to section 1983 liability. Again, the Court engaged in no discussion of which defendants had "control or influence," but found liability on the basis of joint action alone.

Given the consistent and unambiguous precedent holding that non-state actors may be subject to liability under section 1983 even where they are not under the "control or influence" of state officials, the panel's decision is clearly incorrect. To be sure, the case relied on by the panel, *Kletschka v. Driver*, 411 F.2d 436 (2d. Cir. 1969) stated that private individuals may be liable under section 1983 where they are under the "control or influence" of state actors." 411 F.2d 448-49. And courts have stated that non-state actors may be liable under section 1983 where their actions can be "fairly attributable to the state." *Fisher v. Silverstein*, 2004

U.S. Dist. LEXIS 17278 at *17 n.45 (S.D.N.Y. Aug. 30, 2004) (citations and quotation marks omitted). But as this Court stated only recently in *Sybalski*, "[f]or the purposes of section 1983, the actions of a nominally private entity are *attributable to the state* when . . . the entity is a willful participant in *joint activity* with the [s]tate." 2008 WL 4570642 at *2 (emphases added).

Thus, while a state actor's control over a private actor is *sufficient* to establish section 1983 liability, neither the Supreme Court nor this Circuit has ever held that such control or influence is *necessary*. The Supreme Court in *Brentwood* clearly held that a private actor may be liable under section 1983 when the defendant has been controlled by state actors "*or*" where the defendant has been a "willful participant in joint activity" with state actors. 531 U.S. at 296 (emphasis added). Properly construed, control by state officials and joint activity with such officials constitute alternate bases for section 1983 liability. *See Sybalski*, 2008 WL 4570642 at *2. The panel's articulation of a "control or influence" requirement, without acknowledging alternate bases for liability, squarely contradicts applicable precedent.

B. A Conspiracy Between Federal and State Officials to Violate a Plaintiff's Federal Rights Constitutes "Joint Activity" for Purposes of Finding Section 1983 Liability

Given the well-established precedent that "joint activity" between non-state actors and a state official is sufficient to support liability under section 1983,

Brentwood, 531 U.S. at 296, the next question is what level of collaboration is necessary to find that non-state actors and a state official have jointly acted to violate a plaintiff's civil rights. Admittedly, *de minimus* contacts would be insufficient to constitute "joint activity." *See, e.g.*, *Ginsberg*, 189 F.3d at 272 (explaining that a non-state actor's providing the state official, a police officer, with background information does not, by itself, constitute joint activity); *Benavidez v. Gunnell*, 722 F.2d 615, 618 (10th Cir. 1983) ("The mere furnishing of information to police officers does not constitute joint action under color of state law which renders a private citizen liable under [section 1983] . . . ."). But where there is evidence of "conspiracy," "preconceived plan," "mutual understanding" or "concerted action" between non-state actors and a state official there can be section 1983 liability. *See Annunziato*, 744 F.2d at 252; *see also Adickes*, 398 U.S. at 152 (holding that white schoolteacher, in company of six black youths denied service at lunch counter, would be entitled to relief under section 1983 upon proof that an employee of the lunch counter and a police officer had reached an understanding to deny service to teacher); *Wagenmann v. Adams*, 829 F.2d 196, 209-10 (1st Cir. 1987) (finding section 1983 liability where a private individual worked with state actors—law enforcement officials—to have the plaintiff falsely imprisoned in both a police station and the psychiatric ward of a state hospital); *Fonda v. Gray*, 707 F.2d 435, 439 (9th Cir. 1983) (affirming the district court's grant of summary

judgment because appellant could not produce "evidence of the existence of a 'meeting of the minds' between [bank employees and government officials] to knowingly attempt" to deprive her of her civil rights); *Norton v. Liddel*, 620 F.2d 1375, 1379 (10th Cir. 1980) (explaining that even where a private individual "actively conspires with an immune State official" to deprive a plaintiff of his constitutional rights, that private individual is subject to liability under section 1983). Accordingly, a conspiracy between private individuals and a state official can constitute activity under "the color of state law" for purposes of section 1983 liability. *See, e.g.*, *Lugar*, 457 U.S. at 941; *Dennis*, 449 U.S. at 29 ("Private parties who corruptly conspire with a judge in connection with such conduct are thus acting under color of state law within the meaning of § 1983 as it has been construed in our prior cases."); *Adickes*, 398 U.S. at 150-52.

Moreover, this rule applies to federal officials just as it does to private individuals. In fact, this court has written: "We can see no reason why a joint conspiracy between federal and state officials should not carry the same consequences under § 1983 as does joint action by state officials and private persons." *Kletschka*, 411 F.2d at 44; *see also Beechwood Restorative Care Ctr. v. Leeds*, 436 F.3d 147, 154 (2006) (Jacobs, B.D. Parker, and Hurd JJ.) ("A federal actor may be subject to section 1983 liability where there is evidence that the federal actor was engaged in a 'conspiracy' with state defendants"); *cf. Rosquist v.*

New York Univ. Med. Ctr., 1999 U.S. App. LEXIS 23373, at *5 (2d Cir. Sept. 20, 1999) (Van Graafeiland, Jacobs, Straub, JJ.) ("Nor is there evidence that any NYUMC employees collaborated or conspired with state officials, or acted together with state officials so as to come within the purview of § 1983.").

Similarly, a majority of the other Courts of Appeals, including the Third,[4] Fifth,[5] Sixth,[6] Seventh,[7] Eighth,[8] Ninth,[9] and D.C.[10] Circuits, have held that federal

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[4] *Jorden v. National Guard Bureau*, 799 F.2d 99, 111 n. 17 (3rd Cir. 1986) ("federal officials who conspire or act jointly with state officials may be liable under § 1983").

[5] *Knights of Ku Klux Klan Realm v. East Baton Rouge Parish School Bd.*, 735 F.2d 895, 900 (5th Cir. 1984) (explaining that members of the school board conspired with officials of the U.S. Department of Health and Human Services to prevent the Ku Klux Klan from using school facilities, writing: "when federal officials conspire or act jointly with state officials to deny constitutional rights, the state officials provide the requisite state action to make the entire conspiracy actionable under section 1983." (internal quotation marks and citation omitted)).

[6] *Strickland v. Shalala*, 123 F.3d 863, 867 (6th Cir. 1997) ("courts finding that a *federal* official has acted under color of state law have done so only when there is evidence that federal and state officials engaged in a conspiracy or 'symbiotic' venture to violate a person's rights under the Constitution or federal law.") (emphasis in original).

[7] *Hampton v. Hanrahan*, 600 F.2d 600, 623 (7th Cir. 1979) (holding that section 1983 is applicable to federal defendants, who were employees of the Federal Bureau of Investigations, when they engaged in a conspiracy with state officials, employees of the Chicago Police Department, writing: "when federal officials are engaged in a conspiracy with state officials to deprive constitutional rights, the state officials provide the requisite state action to make the entire conspiracy actionable under section 1983."), *rev'd in part on other grounds*, 446 U.S. 754 (1980).

[8] *Premachandra v. Mitts*, 753 F.2d 635, 641 n.7 (8th Cir. 1985) ("Conspiracies that make federal officials liable under section 1983 are not commonplace but nor are they unheard of.").

officials can be found liable under section 1983 when they conspire with state officials. District courts in a number of the remaining Circuits have reached the same conclusion.[11]

It is clear, therefore, that where federal and state officials conspire to deprive a plaintiff of his constitutional rights, the federal officials may be liable under section 1983's "color of state law" analysis. And to the extent that analysis of the TVPA's "under the color of foreign law" provision is analogous to section 1983's "under the color of state law" provision, *see Kadic*, 70 F.3d at 245, allegations of a

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[9] *Cabrera v. Martin*, 973 F.2d 735, 741 (9th Cir. 1992) ("a well-established line of cases has held that federal officials, who act in concert or conspiracy with state officials to deprive persons of their federal rights, may be held liable for prospective relief under § 1983 when sued in their official capacity.).

[10] *Williams v. United States*, 396 F.3d 412, 414 (D.C. Cir. 2005) (citing approvingly D.C. Circuit court case law that has held that federal defendants are liable under section 1983 because they acted "under color of" state law by conspiring with state officials in committing allegedly illegal acts).

[11] *See, e.g.*, *Renaud v. Martin Marietta Corp.*, 1988 U.S. Dist. LEXIS 17531 at *3 (D. Colo. Dec. 5, 1988) ("there is ample case support from other circuits for the Court's conclusion that federal officials may be liable under § 1983 when they conspire with officials acting under color of state law."); *Krohn v. United States*, 578 F. Supp. 1441, 1447 (D. Mass 1983) ("Federal officers may be subject to liability under § 1983 where they act under color of state law to deprive a person of rights secured under the Constitution or laws of the United States. A plaintiff may establish liability by showing . . . that federal officials participated in a conspiracy to deprive him of a constitutional right and that he was in fact so deprived."), *rev'd on other grounds*, 742 F.2d 24 (1st Cir. 1984); *but see also Redding v. Christian*, 161 F. Supp. 2d 671, 675 (W.D.N.C. 2001) ("While a private citizen can act under color of state law if he is a willful participant in joint action with the state or its agents, there is no authority for the position that a federal employee or officer acts under color of state law, even if he works with state actors in pursuing a particular investigation." (internal quotation marks and citation omitted)).

conspiracy between federal and foreign officials should be sufficient to state an actionable claim under the TVPA. *Cf. Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242, 1248-49 (11th Cir. 1005) (per curiam) (holding plaintiffs' allegations that U.S. corporation jointly acted with a foreign official—a Guatemalan mayor—sufficient to sustain a TVPA claim). Accordingly, the panel's conclusion that Arar had to allege that defendants-appellees were under the "control or influence" of a foreign state was erroneous, as it conflicts with well-established precedent, including from this court.

Arar has alleged that federal and Syrian officials conspired to subject him to torture. *See, e.g.*, Appellant's Replacement Opening Br. at 2 (stating that Arar's "torture was the culmination of a *conspiracy* orchestrated by defendants that emerged when Arar was detained at JFK airport . . . [and] included defendants' delivery of Arar to the Syrian security service officials to torture him") (emphasis added). Given that, at this early stage of litigation, Arar's allegations must be taken as true, *see Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002), his pleadings provide a proper basis to find that defendants-appellees acted "under color of foreign law."[12]

[12] Of course, the issue of whether Arar's TVPA claim had been pled with sufficient particularity to survive a motion to dismiss from defendants-appellees should be considered, in the first instance, by the district court on remand. *See Correspondent Services Corp. v. First Equities Corp. of Florida*, 338 F.3d 119,

C. This Court Should Not Establish a New "Control or Influence" Requirement to Find Section 1983 Liability for Non-State Actors

At a minimum, this Court should make clear that its holding will in no way limit the range of conduct for which non-state actors can be held liable under section 1983. To adopt the panel's unprecedented "control or influence" rule for section 1983 liability would not only run counter to clear and well-established precedent from this Circuit and from the Supreme Court, it could unnecessarily narrow the class of defendants who may be subject to liability under section 1983, create unreasonable burdens for plaintiffs and prosecutors challenging conspiracies amongst multiple defendants involved in federal civil rights violations, and risk leaving many victims of such violations without any means for redress. Where a victim's injury is clear, but where the relationship between state and non-state actors amounts to a conspiracy but not one "controlled" or overwhelmingly "influence[d]," by the state actors, the panel's ruling could unfortunately leave a plaintiff without any means of redress.

Non-state actors should be held liable for civil rights violations, not only where they are controlled by state actors, but whenever non-state actors and state actors work together to deprive a plaintiff of federal civil rights. As this Court has observed, "[i]t was the evident purpose of § 1983 to provide a remedy when

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125 (2d Cir. 2003) (remanding back to the district court for consideration of an issue by that court in the first instance).

federal rights have been violated through the use or misuse of a power derived from a State," and this is no less true where the violation "is the joint product of the exercise of a State power and of a non-State power." *Kletschka*, 411 F.2d at 447. *Cf. Wilson v. Garcia*, 471 U.S. 261, 272 (1985), *quoting United States v. Price*, 383 U.S. 787, 801 (1966) ("The high purposes of this unique remedy make it appropriate to accord the statute 'a sweep as broad as its language'"); *Maine v. Thiboutot* 448 U.S. 1, 4 (1980) ("the section 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law"); Erwin Chemerinsky, FED. JURISDICTION 481 (4th ed. 2003) ("This expansive definition of 'under color of law,' which includes private parties participating in conspiracies with government officers reflects the broad remedial goals of § 1983 to redress all violations of constitutional rights that occur under the aegis of state authority and power").

CONCLUSION

It is well-established that non-state actors, including federal officials, can be found liable under section 1983 for acting "under color of state law" where they jointly act or conspire with state officials. Accordingly, the panel's reasoning that non-state actors must be under the "control or influence" of a state official for liability to attach is simply erroneous. Similarly, its conclusion that Mr. Arar's TVPA claim was properly dismissed because Defendants-Appellees were not

under the "control or influence" of Syrian officials is incorrect. Mr. Arar's claim should not be dismissed based on a misinterpretation of section 1983 case law, and this Court's decision with respect to Mr. Arar's TVPA claim should not cast any doubt on settled section 1983 jurisprudence concerning the liability of non-state actors for "joint action" with state officials.

Respectfully Submitted,

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October 28, 2008

CERTIFICATION OF COMPLIANCE

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2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14 point, Times New Roman font.

Dated: October 28, 2008

/ s /

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