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

REPLACEMENT BRIEF FOR DEFENDANT-APPELLEE LARRY D. THOMPSON

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Defendants-Appellees.

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STATEMENT OF THE ISSUES

Plaintiff-Appellant Maher Arar—a Syrian-Canadian dual citizen born in Syria—was stopped by immigration officials at John F. Kennedy International Airport ("JFK"). Based largely on classified information, Arar was found to be a member of al Qaeda and thus inadmissible on national security grounds. Arar was removed to Syria. Arar now claims that defendants conspired to remove him to Syria knowing or intending that he would be tortured and interrogated there. The questions presented are:

1. Whether the district court had jurisdiction notwithstanding provisions of the immigration laws precluding suits that "aris[e] from" removal proceedings or challenge removal determinations.

2. Whether the district court and a panel of this Court properly refused to extend the cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to unadmitted, non-resident aliens claiming due-process violations arising from their removal to and mistreatment in a foreign country.

3. Whether defendants are entitled to qualified immunity on the *Bivens* claims.

4. Whether the district court and a panel of this Court correctly rejected Arar's claim under the Torture Victim Protection Act, 28 U.S.C. § 1350, note.

STATEMENT OF THE CASE

Maher Arar, a Syrian-born dual citizen of Syria and Canada, was removed from the U.S. to Syria after the then-Regional Director of the Immigration and Naturalization Service ("INS") determined that Arar was a member of the terrorist organization al Qaeda and therefore inadmissible to the U.S. for national security reasons.

On January 22, 2004, Arar filed this lawsuit in the Eastern District of New York. The complaint asserts claims against eight named Executive Branch officials under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350, note. On February 16, 2006, the district court dismissed Arar's complaint. 414 F. Supp. 2d 250. Arar declined to amend. A.467-A.468. On August 16, 2006, the district court entered a final judgment of dismissal. SPA.92-SPA.93.

This appeal followed. On June 30, 2008, a panel of this Court affirmed. 532 F.3d 157. On August 12, 2008, the Court ordered that the case be reheard *en banc*.

FACTS AND PROCEEDINGS BELOW

I. ARAR'S REMOVAL TO SYRIA

For purposes of the motion to dismiss, the well-pleaded, factual allegations of the complaint must be accepted as true.

According to the complaint, Arar left Tunisia on September 25, 2002. After transiting through Zürich, Arar arrived at JFK in New York. Arar was booked on a connecting flight to Montreal, Canada. A.29. When Arar presented his passport, an immigration officer discovered a "lookout" identifying Arar as a member of a terrorist organization. A.27, A.88. Arar was detained at the airport before being transferred to a detention center in Brooklyn the next evening. A.31.

On October 1, 2002, the INS initiated removal proceedings against Arar on the ground that Arar was a member of a designated terrorist organization (al Qaeda) and therefore inadmissible under 8 U.S.C. § 1182(a)(3)(B)(i)(V). SPA.4; A.31. Arar was told that he had five days (until October 6) to respond to the charges or face removal. A.88-A.89. Arar contacted his family in Canada, and they retained an attorney for him. A.31. Arar met with a representative of the Canadian Consulate on October 3, and with his attorney on October 5. A.31-A.32. Arar's attorney took no action either by the October 6 deadline or at any time thereafter.

On October 7, based on classified information and Arar's statements regarding his contacts with particular individuals, then-INS Regional Director Blackman found that Arar was "clearly and unequivocally inadmissible" as a "member of a foreign terrorist organization," A.87;

SPA.6, with which he "continues to meaningfully associate," A.92. The Regional Director found "reasonable grounds to believe that Arar is a danger to the security of the United States" and therefore ordered his removal without a hearing under 8 U.S.C. § 1225(c)(2)(B). A.87-A.88, A.92. While Arar now denies that he was connected to terrorist organizations, for purposes of *these* proceedings he has chosen *not* to challenge that determination. *See* Arar Replacement Br. ("Arar Br.") 20; SPA.19; 532 F.3d at 191; Gov't Br. 87 & n.34.

On October 8, then-Acting Attorney General Thompson determined that Arar—who had been determined to be a member of al Qaeda—should not be removed to Canada because it would be "prejudicial to the United States" within the meaning of 8 U.S.C. § 1231(b)(2)(C)(iv). Arar was notified that the Regional Director had decided to remove him to Syria as an alternate country of which he was "a subject, national, or citizen," 8 U.S.C. § 1231(b)(2)(D). A.33. Arar requested protection under the Convention Against Torture ("CAT"). The INS, however, determined Arar could be removed to Syria consistent with the CAT; that determination was incorporated into the Final Notice of Inadmissibility. A.33, A.86.

Arar was flown to Washington, D.C., and from there to Jordan; Jordanian officials then transported Arar to Syria. A.33. Arar alleges that

Syrian authorities tortured him for 12 days and threatened him with torture thereafter. A.36. On October 5, 2003, Syria released Arar to the Canadian Embassy in Damascus. A.37.

II. SUBSEQUENT INVESTIGATIONS

After Arar's release, a Canadian commission examined Canada's role in Arar's removal to and detention in Syria. The U.S. declined to participate, although the Inspector General of the U.S. Department of Homeland Security issued his own report. Neither report supports Arar's main allegation here—that there was a "conspiracy" among defendants to remove him to Syria knowing or intending he would be tortured there. Both documents acknowledge that U.S. officials obtained assurances from Syria that Arar would not be tortured. *See* Dep't of Homeland Security Office of Inspector General, The Removal of a Canadian Citizen to Syria 5, 22 (March 2008) ("IG Report"); Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar: Analysis and Recommendations 156 (2006); Gov't Br. 8 & nn.5-6.

III. THE COMPLAINT

A. The *Bivens* Claims (Counts II-IV)

Counts II and III assert *Bivens* claims in connection with Arar's removal to Syria and his mistreatment there. Count II alleges that defendants violated Arar's substantive due-process rights by conspiring and

"using government resources to transfer [Arar] to Syria" with the knowledge or intent that he would be "subjected to torture and coercive interrogation" there. A.39. Count III alleges that defendants violated substantive due process by conspiring among themselves and with Syrian officials to "deport [Arar] to Syria for the purpose of arbitrary, indefinite detention in that country." A.40.

Count IV asserts a *Bivens* claim arising from Arar's treatment in the U.S. Arar alleges that defendants violated substantive due process by keeping him overnight at JFK in a lighted cell with no bed, A.30; not giving him food until the next day, A.30; interrogating him aggressively, A.29, A.30; and interfering with his access to counsel and the courts, A.32, A33.

B. The TVPA Claim (Count I)

Count I asserts that defendants violated the Torture Victim Protection Act by "acting in concert with," "conspir[ing] with," or "aid[ing] and abett[ing]" unnamed Jordanian and Syrian officials "in bringing about" the violation of Arar's "right not to be tortured." A.38.

C. The Allegations Concerning Thompson

Although the complaint spans 19 pages and includes nearly 100 paragraphs, Thompson's actions are addressed in four sentences. Two sentences state that Thompson signed the order removing Arar to Syria. *See*

A.24, A.33. (The order attached to the complaint, however, is signed by Blackman. *See* A.86.) The other two sentences assert that Thompson removed Arar to Syria knowing or intending that Arar would be tortured there. *See* A.24.

In his *en banc* brief, Arar changes the allegations. He asserts *only* that "Thompson concluded that returning Arar to Canada would be prejudicial to U.S. interests, thereby making way for his removal to Syria." Arar Br. 26.

IV. THE DISTRICT COURT'S DECISION

Judge Trager granted defendants' motions to dismiss for failure to state a claim. SPA.1-SPA.88.

A. Jurisdiction

The district court first rejected defendants' argument that 8 U.S.C. §§ 1252(g) and 1252(b)(9)—which preclude district court jurisdiction over suits and judicial review "arising from" removal decisions—bar adjudication of Arar's claims. Arar's suit, the court ruled, "raises issues collateral to the removal order." SPA.40. The district court further held that the suit was not precluded by 8 U.S.C. § 1252(a)(2)(B)(ii) because Arar "does not challenge discretionary decision-making by the Attorney General, but rather constitutional violations incident to his removal to Syria." SPA.50.

B. Counts II And III—*Bivens* Claims Relating To Mistreatment Abroad

The district court dismissed the *Bivens* counts (II and III) relating to Arar's removal to and mistreatment in Syria. SPA.70-SPA.77. *Bivens*, the court explained, cannot be extended to a new context where "doing so trammels upon matters best decided by coordinate branches of government," including "foreign policy and national-security" issues. SPA.68.

The court found that this case "undoubtedly presents broad questions touching on the role of the Executive branch in combating terrorist forces—namely the prevention of future terrorist attacks within U.S. borders." SPA.71. The court also found that the case implicates "'complicated multilateral negotiations concerning efforts to halt international terrorism.'" SPA.72 (quoting *Doherty v. Meese*, 808 F.2d 938, 943 (2d Cir. 1986)). Extending *Bivens* to this new context thus "'could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest.'" SPA.72-SPA.73 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-74 (1990)).

The district court also observed that "[r]emoval decisions, including the selection of a removed alien's destination, 'may implicate our relations with foreign powers' and require consideration of 'changing political and economic circumstances.'" SPA.73 (quoting *Jama v. Immigration &*

Customs Enforcement, 543 U.S. 335, 348 (2005)). Because national policy toward aliens is "'exclusively entrusted to the political branches of government,'" the court declined to extend the judicially created *Bivens* remedy here. SPA.73 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)); SPA.76.

C. Count IV—The Domestic *Bivens* Claims

The court also dismissed Arar's *Bivens* challenge to the conditions of his detention within the U.S. (Count IV). SPA.73-SPA.83. The court acknowledged that excludable aliens at the border have very limited due-process protections. SPA.78-SPA.79. But it held that a practical defect doomed Count IV: "[A]t this point, the allegations against the individually named defendants do not adequately detail which defendants directed, ordered and/or supervised the alleged violations of Arar's due process rights" while Arar was detained in the U.S. SPA.84-SPA.85. Therefore, the court dismissed Count IV with leave to add those allegations. SPA.87-SPA.88.

The district court also rejected Arar's claim that defendants "interfered with his access to courts in part by lying to his counsel." SPA.82. The district court concluded that, having rejected Arar's *Bivens* claims, it would be "circular to conclude that a denial of access to counsel

amounted to a violation of the Fifth Amendment when Arar cannot assert a separate and distinct right to seek judicial relief against defendants in the first place." SPA.83 (internal quotation marks omitted). The court instructed Arar, when repleading Count IV, to "identify the specific injury he was prevented from grieving." SPA.88.

D. Count I—The TVPA Claim

The TVPA creates a cause of action against any "individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture." 28 U.S.C. § 1350, note § 2(a)(1). The district court ruled that defendants had not acted "under actual or apparent authority, or color of law, of [a] foreign nation." *See* SPA.37, SPA.87. To the contrary, they had acted under color of U.S. law. SPA.32-SPA.33. The district court also expressed doubt that Arar had sufficiently alleged that he was "in" defendants' "custody or physical control" when he was tortured, as required by § 3(b)(1) of the TVPA. SPA.26-SPA.28.

E. Arar Declines To Replead

Although the district court gave Arar leave to replead, SPA.83, SPA.85, SPA.88, Arar declined to do so, SPA.89, A.467-A.468. Accordingly, the district court entered a final judgment of dismissal. SPA.92-SPA.93

V. THE PANEL DECISION

A panel of this Court affirmed. 532 F.3d 157. A majority of the panel agreed with the district court that *Bivens* could not be extended to encompass Arar's claims arising from his removal and subsequent mistreatment abroad (Counts II and III). The panel majority concluded that "the review procedures set forth by the [Immigration and Nationality Act ("INA")] provide a convincing reason for us to resist recognizing a *Bivens* cause of action for Arar's claims arising from his alleged detention and torture in Syria." 532 F.3d at 180 (citation and internal quotation marks omitted). Alternatively, the majority held that special factors counseled against creating a *Bivens* remedy because "adjudication of the claim at issue would necessarily intrude on the implementation of national security policies and interfere with our country's relations with foreign powers." *Id.* at 181.

The panel majority also held that Arar's domestic-detention claim (Count IV) was properly dismissed. *Id.* at 184. As to Arar's claim of interference with his access to the courts, the majority found that Arar's "complaint fail[ed] to set forth adequately the underlying cause of action that defendants' conduct compromised." *Id.* at 188 (citation and internal quotation marks omitted). Nor could Arar's conditions-of-confinement challenge succeed. The allegations satisfied neither the "gross physical

abuse" standard adopted by the Fifth and Eleventh Circuits nor the alternative standard urged by Arar. *See id.* at 189-90.

The panel unanimously agreed that Arar's TVPA claim (Count I) was properly dismissed because defendants did not act under color of foreign law. *Id.* at 175. "Nowhere," the panel explained, "does [Arar] contend that defendants possessed any power under Syrian law, that their allegedly culpable actions resulted from the exercise of power under Syrian law, or that they would have been unable to undertake these culpable actions had they not possessed such power." *Id.* at 176.

Dissenting in part, Judge Sack concluded that, considering the complaint's allegations "in their entirety and as a whole," Arar had alleged a violation of substantive due process, *Bivens* should be available, and the individual defendants were not entitled to qualified immunity. *See* 532 F.3d at 193-216.

SUMMARY OF ARGUMENT

The district court and panel majority correctly concluded that the complaint must be dismissed.

I. Three different statutory provisions expressly bar damages actions, like this one, that arise from the exercise of removal authority under

the immigration laws. *See* 8 U.S.C. §§ 1252(g), 1252(b)(9), 1252(a)(2)(B)(ii).

II. Arar's claims arising from his removal and mistreatment abroad (Counts II and III) cannot be asserted under *Bivens*. The Supreme Court has repeatedly cautioned against extending that implied cause of action to new contexts. The express statutory structure for reviewing removal decisions, and "special factors counseling hesitation," preclude *Bivens* from being extended here. As the district court and the panel majority observed, this case implicates issues of foreign policy, international relations, and national security—highly sensitive areas long reserved to the nearly exclusive control of the political branches.

III. There was no violation of clearly established constitutional rights in connection with Arar's removal and mistreatment abroad. The Fifth Amendment's Due Process Clause does not apply to decisions to remove unadmitted aliens to particular foreign countries; nor does it apply to aliens in the custody of foreign governments abroad. In any event, Thompson is entitled to qualified immunity. To the extent the Due Process Clause applies here, that was not so clearly established at the time of the alleged conduct that no reasonable officer could have thought otherwise.

Arar's *Bivens* claims based on his domestic detention also fail. Arar has not alleged the "gross physical abuse" necessary to state a due-process violation based on his domestic detention. Arar's access-to-court claim is waived and fails on the merits. And Thompson is entitled to qualified immunity because his actions did not violate clearly established law.

IV. The district court and panel unanimously and properly rejected the TVPA claims. The TVPA extends only to defendants acting under color of *foreign* law. But defendants acted under color of *U.S.* law, not Syrian law. The TVPA also applies only if the victim is tortured while in the defendant's custody or physical control. But Arar was allegedly tortured while in Syrian—not the defendants'—custody and physical control. Thompson, in any event, is entitled to qualified immunity.

STANDARD OF REVIEW

This Court generally reviews the district court's decision on a motion to dismiss *de novo*. *Anatian v. Coutts Bank (Switzerland) Ltd.*, 193 F.3d 85, 88 (2d Cir. 1999). The decision to require additional allegations, however, is reviewed for an abuse of discretion. *Gurary v. Winehouse*, 235 F.3d 792, 801 (2d Cir. 2000). The Court must accept the well-pleaded factual allegations in the complaint. *Id.* But the Court need not give credence to

conclusory allegations posing as factual assertions. *Cantor Fitzgerald, Inc. v. Lutnick*, 313 F.3d 704, 709 (2d Cir. 2002).

ARGUMENT[1]

I. CONGRESS EXPRESSLY BARRED SUITS ARISING FROM REMOVAL DECISIONS

A. The Statutory Text Is Clear

In three different provisions of the immigration laws, Congress precluded aliens from bringing damages actions that, like Arar's, arise from the aliens' removal from the U.S.

First, 8 U.S.C. § 1252(g) expressly bars "any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." Second, 8 U.S.C. § 1252(b)(9) provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States . . . shall be available only in judicial review of a final order under [8 U.S.C. § 1252(d)]." Third, 8 U.S.C. § 1252(a)(2)(B)(ii) provides that, "[n]otwithstanding any other provisions of law . . . , no court

[1] Thompson also incorporates by reference and joins the arguments made by the other defendants.

shall have jurisdiction to review . . . any . . . decision or action of the Attorney General . . . the authority for which is specified under this subchapter to be in the discretion of the Attorney General."

The first two provisions, §§ 1252(g) and 1252(b)(9), make it clear that federal courts have no jurisdiction over any suit that "aris[es] from" an action or proceeding to remove an alien, or from the decision to "execute removal orders against any alien," unless the action is brought under the immigration laws themselves. It is equally clear that this action against Thompson "arises from" his alleged decision (as the Attorney General's designee) "to remove" Arar. In fact, the complaint alleges *only one action by Thompson*—that Thompson "signed the order removing Mr. Arar to Syria," or "removed Mr. Arar to Syria." A.24, A.33.

Because challenges "arising from" removal decisions can be raised only under the immigration laws themselves, this suit must be dismissed. *See Foster v. Townsley*, 243 F.3d 210 (5th Cir. 2001); *Van Dinh v. Reno*, 197 F.3d 427, 434 (10th Cir. 1999). Any doubt that Arar's claims "arise from" his removal is dispelled by Arar's argument that, if he prevails in this case, "the *removal order* would be *invalid*." Arar Br. 53 (emphasis added). Arar thus admits that this action arises from (indeed, challenges) the decision to remove him—precisely the type of action Congress barred.

Likewise, § 1252(a)(2)(B)(ii), which bars suits to review decisions "specified under this subchapter to be in the discretion of the Attorney General," forecloses this suit. The determination to remove an alien to a country other than the one he selects is "specified" under the INA to be in the Attorney General's discretion. *See* 8 U.S.C. § 1231(b)(2)(C)(iv).[2]

B. Arar's Contrary Arguments Fail

Arar largely does not dispute that the text of the statutory provisions, literally read, forecloses this suit. Instead, he raises a series of non-textual arguments. None succeeds.

1. Collaterality

In the district court, Arar urged (and the district court agreed) that this suit was "collateral" to the immigration laws because Arar does not "appear to attack the bases for sending him" to Syria. SPA.40. But the complaint is predicated on—and identifies no conduct by Thompson other than—Thompson's alleged decision to "remove Arar" to a location other than

[2] The ACLU (Br. 11) argues that § 1252(a)(2)(B)(ii) does not apply because federal officials do not have "discretion" to violate the Constitution. But § 1252(a)(2) does not bar suits challenging "discretionary decisions." It bars suits challenging actions "*specified under this subchapter* to be in the discretion of the Attorney General." Thus, the scope of preclusion under § 1252(a)(2)(B)(ii) is determined by what the subchapter specifies. Removal to a country, other than the one designated by the alien, for national security reasons is "specified" to be in the Attorney General's discretion in the relevant subchapter. Whether *other* provisions may limit that discretion is irrelevant.

Canada. A.24, A.33. The district court confirmed as much when it observed that "this case concerns whether defendants could legally send Arar to a country where they knew he would be tortured or arbitrarily detained." SPA.40. The suit thus "arises from" the decision to remove Arar to Syria, plain and simple.

The assertion that this is a "collateral" challenge to "a policy under which [Arar] was sent" to Syria, SPA.40, is also unpersuasive. Arar disclaimed any "policy" challenge. Pl. Opp. to Mot. to Dismiss at 69 (Dkt. #60). And Arar seeks only damages relief from Thompson. A.22-A.24. Arar cannot demand damages based on disagreement with policy. The Supreme Court, in any event, has rejected the notion that a challenge can escape preclusion as "collateral" when the relevant provisions, like those in the INA, preclude jurisdiction for all claims "arising under" a particular statute. *See Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1, 13-14 (2000). This Court likewise has construed the phrases "arising from" and "arising under" broadly. *See Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224 (2d Cir. 2001).

The allegations that Thompson removed Arar "knowing" that Arar would be tortured or detained—or "so that Syrian authorities would interrogate him [using] torture," A.24—cannot alter the fact that the suit

"arises from" the decision to remove Arar to a country other than Canada. Those allegations are merely averments as to mental state. *See Reno v. American-Arab Anti-Discrim. Comm.*, 525 U.S. 471 (1999) (§ 1252(g) bars courts from hearing claim even where the alien asserts that the decision to initiate proceedings was based on an unconstitutional, discriminatory purpose). The allegation that Thompson "conspir[ed] with" others when exercising his authority to "remove[]" Arar, A.24, likewise cannot alter the fact that Arar's claims "arise from" an exercise of removal authority.

The INS Regional Director's determination of inadmissibility, moreover, expressly found that Arar's removal to Syria would not violate the CAT—an official finding that it was *not* more likely than not that Arar would be tortured if sent to Syria. A.33, A.86. Arar's claim that defendants in fact knew and intended that Arar would be tortured in Syria is just another way of saying that the CAT determination incorporated into the final order of removal was wrong. A.33; Gov't Br. 29-30. Moreover, where the claimant seeks to challenge the adequacy of a foreign power's assurances that the claimant will not be tortured—precisely the case here—courts cannot review the claim at all. *See* Gov't Br. 31-35.

2. Access To Courts

The centerpiece of Arar's effort to overcome these barriers is his claim that defendants interfered with his access to court to challenge his removal under the INA. Arar Br. 29. That argument fails. As explained below, pp. 50-53, *infra*, the complaint does not allege that officials interfered with Arar's ability to prevent his removal under the INA; the district court understood the complaint to allege interference with some other claim; and Arar declined an invitation to amend to specify the claim he would have filed but for the interference. It is a bedrock principle that, where an obvious barrier to jurisdiction exists, courts must dismiss unless the complaint contains allegations that overcome that barrier. *See Valley Disposal, Inc. v. Central Vermont Solid Waste Mgmt. Dist.*, 31 F.3d 89, 96-97 (2d Cir 1994). Here the complaint does not do that, and Arar specifically declined an opportunity to remedy that defect by specifying the claim with which defendants allegedly interfered.

Besides, as also explained below, the facts of the complaint do not allege a sufficiently meaningful interference with access to overcome the jurisdictional barriers. *See* p. 55, *infra*. And the logical remedy for any interference would be to toll the time limits for bringing a challenge under

the review provisions Congress provided—not to disregard the jurisdictional barriers to collateral attacks altogether.

II. THE DISTRICT COURT AND PANEL MAJORITY CORRECTLY DECLINED TO EXTEND *BIVENS* TO THIS NEW CONTEXT

The district court and panel majority both properly concluded that the cause of action recognized in *Bivens* cannot be extended to this new context and thus properly dismissed Arar's removal-related *Bivens* claims (Counts II, III). For decades, the Supreme Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001). It has declined to extend *Bivens* to First Amendment violations arising in the federal employment context, *Bush v. Lucas*, 462 U.S. 367 (1983); to constitutional claims against military officers who allegedly injure enlisted personnel, *Chappell v. Wallace*, 462 U.S. 296 (1983); to military personnel if "the injury arises out of activity 'incident to service,'" *United States v. Stanley*, 483 U.S. 669, 681 (1987); to due-process violations in the Social Security context, *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988); to suits against instrumentalities created by federal law, *FDIC v. Meyer*, 510 U.S. 471, 484-86 (1994); to suits against corporations, *Malesko*, 534 U.S. at 68; and to retaliation against the exercise of ownership rights, *Wilkie v. Robbins*, 127 S. Ct. 2588, 2597 (2007).

The Supreme Court's "reluctance to extend *Bivens* is not without good reason." *Holly v. Scott*, 434 F.3d 287, 289 (4th Cir. 2006). Because the *Bivens* cause of action "is implied" by courts "without any express congressional authority whatsoever," it is "hardly the preferred course." *Id.* Rather, the "decision to create a private right of action is" generally "better left to legislative judgment." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). "Because a *Bivens* action is a judicially created remedy," courts must "proceed cautiously in extending such implied relief." *Dotson v. Griesa*, 398 F.3d 156, 166 (2d Cir. 2005).

When deciding whether to extend *Bivens*, the Court must ask "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 127 S. Ct. at 2598. "[E]ven in the absence of an alternative," the Court must "pay[] particular heed . . . to any special factors counseling hesitation before authorizing a new kind of federal litigation." *Id.* (citation and internal quotation marks omitted). Each of those considerations independently forecloses an expansion of *Bivens* here.

A. The Comprehensive Alternative Scheme Precludes Expansion Of *Bivens* Into This Context

1. Congress has comprehensively regulated immigration review and has established a complex regulatory scheme that balances competing policy considerations. As explained above, that regime creates an exclusive mechanism for challenging removal decisions, and expressly bars the assertion of other actions that, like this one, "aris[e] from" such decisions. *See* pp. 16-20, *supra*; Gov't Br. 25-30. Those mechanisms reflect Congress's deliberate decision to "drastically reduce" district-court review "with the intent of 'protecting the Executive's discretion from the courts.'" *Van Dinh*, 197 F.3d at 433 (quoting *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999)). In so doing, Congress "deliberately refused to provide a private cause of action for monetary damages within any provision of the INA." SPA.70.

The complexity and comprehensiveness of the statutory regime counsels against injecting a *Bivens* action here. Federal courts ought not create a cause of action for damages that Congress "deliberately refused to provide." Nor should they expand jurisdiction that Congress intentionally "reduce[d]." That is particularly true in a case touching on foreign affairs, national security, and immigration policy. "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the

admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citation and internal quotation marks omitted); *Galvan v. Press*, 347 U.S. 522, 531 (1954). For those reasons, the Fifth and Tenth Circuits have declined to extend *Bivens* to the immigration context. *Van Dinh*, 197 F.3d at 434; *Foster*, 243 F.3d at 214-15. This Court should do likewise.

2. Arar responds in part by presuming the existence of a *Bivens* remedy and urging that there is no evidence Congress "deliberately chose" to displace it. Arar Br. 26. That analysis is backwards. The Supreme Court has explained "that any freestanding damages remedy for a claimed constitutional violation has to represent a judgment about the best way to implement a constitutional guarantee." *Wilkie*, 127 S. Ct. at 2597. Accordingly, a *Bivens* remedy "is not an automatic entitlement" and "in most instances" is "unjustified." *Id.*

The question, moreover, is not whether Congress specifically intended to foreclose *Bivens* remedies "for conspiracies by federal officials to subject individuals to torture." Arar Br. 26. It is whether Congress provided Arar with "some procedure" that makes judicial creation of a money-damages action inappropriate. *Wilkie*, 127 S. Ct. at 2599. Moreover, "it is the overall comprehensiveness of the statutory scheme at issue, not the adequacy of the particular remedies afforded, that counsels judicial caution in implying

Bivens actions." *Dotson*, 398 F.3d at 166-67. This Court has repeatedly refused to imply *Bivens* remedies to supplement comprehensive statutory schemes. *See Hudson Valley Black Press v. IRS*, 409 F.3d 106 (2d Cir. 2005); *Sugrue v. Derwinski*, 26 F.3d 8 (2d Cir. 1994). In *Dotson*, this Court found that the comprehensiveness of the Civil Service Reform Act precluded a *Bivens* remedy for certain employees, even though the Act itself provided them no relief, noting that "Congress's omission . . . was not inadvertent." 398 F.3d at 169.

3. Arar also asserts that this Court should ignore the INA's exclusive review scheme because federal officials thwarted his access to judicial relief through that mechanism. *See* Arar Br. 29-33. That argument suffers from the same defects here as it does in connection with the jurisdictional barriers: It is not supported by the complaint, which Arar declined to amend. *See* pp. 50-53, 55, *infra*. Arar, moreover, cites no contemporary appellate decision holding that such circumstances allow courts to create a *Bivens* remedy despite Congress's evident intent to create an exclusive statutory review mechanism. Arar first cites *Sonntag v. Dooley*, 650 F.2d 904 (7th Cir. 1981), but that decision rests on the outdated assumption that *Bivens* actions are *presumptively* available. *See id.* at 906 ("[A] *Bivens* remedy exists . . . unless one of the following two exceptions

exists . . . ."). That is inconsistent with modern *Bivens* jurisprudence. *See Wilkie*, 127 S. Ct. at 2597; pp. 22-23, *supra*. Arar's citation of *Munsell v. Department of Agriculture*, 509 F.3d 572 (D.C. Cir. 2007), is likewise of little help. The D.C. Circuit there explicitly declined to reach the *Bivens* issue. *See id.* at 591.

Arar also misreads *Bishop v. Tice*, 622 F.2d 349 (8th Cir. 1980). *See Arar*, 532 F.3d at 180. As the panel majority explained, *Bishop* "held that federal officials who interfered with a plaintiff's access to an exclusive administrative remedial scheme could, pursuant to *Bivens*, be held liable for that interference inasmuch as it violated due process, but could not be sued for the underlying injury that the remedial scheme was designed to redress." *Id.* The *Bishop* language Arar cites, *see* Arar Br. 32, bears on the calculation of damages related to liability *for the interference*; it does not allow the claimant to assert the underlying claim through *Bivens*. *See Bishop*, 622 F.2d at 357 n.17. Besides, *Tice* predates 38 years of important Supreme Court *Bivens* jurisprudence and cannot be read expansively in view of contemporary precedent. Gov't Br. 41 n.14.

To be sure, genuine interference with Arar's ability to challenge his removal under the mechanisms established by the immigration laws might justify "tolling" so that Arar could invoke those mechanisms to challenge his

removal order belatedly. But it does not justify the creation of a free-standing action for damages—especially not before Arar has even *attempted* to invoke the remedies *Congress* provided. In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court held that, "to recover damages" for "harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed" or otherwise invalidated. *Id*. at 486-87 (footnote omitted). "A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983." *Id*. at 487; *see also Tavarez v. Reno*, 54 F.3d 109, 110 (2d Cir. 1995) (applying *Heck* to *Bivens* actions). Likewise here, Arar seeks damages for harm allegedly caused by a removal order on a theory that challenges the correctness of (and according to Arar, invalidates) that order. *See* Arar Br. 52-53. Consistent with *Heck*, Arar cannot pursue that damages claim without first having his removal order reversed or invalidated under the procedures provided by Congress.

B. Special Factors Preclude Expanding *Bivens* Here

1. The panel also properly held that "special factors counseling hesitation" independently preclude judicial creation of a *Bivens* remedy here. The Constitution commits "the entire control of" foreign affairs to the

political branches. *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893). As a result, the "'propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.'" *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972) (quoting *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918)); *see also Whiteman v. Dorotheum GmbH & Co.*, 431 F.3d 57, 71 (2d Cir. 2005); *In re Austrian, German Holocaust Litig.*, 250 F.3d 156, 163-64 (2d Cir. 2001).

This case—a suit by an unadmitted alien asserting that he was identified as a terrorist, removed to a foreign country, and subjected to coercive interrogation by foreign officials there—"raises crucial national-security and foreign policy considerations" that are entrusted almost exclusively to the control of the political branches. SPA.71-SPA.72 (citing *Doherty*, 808 F.2d at 943). The creation of a *Bivens* action in these circumstances "necessarily intrude[s] on the implementation of national security policies and interfere[s] with our country's relations with foreign powers." 532 F.2d at 181.

By its very terms, the complaint intrudes on "complicated multilateral negotiations." SPA.72. Arar asserts that U.S. officials coordinated with foreign officials to remove Arar to Syria where he would be tortured. A.20. Any effort to effect discovery on those alleged international interactions and

prove them—much less condemn them—would invade the political branches' exclusive control over foreign relations. Even ordinary "removal decisions, including the selection of a removed alien's destination, 'may implicate our relations with foreign powers.'" *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005) (quoting *Mathews,* 426 U.S. at 81).

In this case, moreover, the government obtained assurances from Syrian officials that Arar would not be tortured, assurances it deemed sufficiently reliable. *See* p. 6, *supra*. Confronting a similar executive determination also based on "foreign assurances" in *Munaf v. Geren*, 128 S. Ct. 2207 (2008), the Supreme Court declared that "the judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the government's ability to speak with one voice in this area." *Id*. at 2226. Based on those considerations, the Court in *Munaf* declined to exercise statutory *habeas* jurisdiction. Those same considerations weigh dispositively against the *judicial creation* of a cause of action that would raise similar concerns.

In the area of government employment (hardly the political branches' exclusive domain), the Supreme Court has declined to extend *Bivens*

because the political branches are "far more competent than the Judiciary to carry out the necessary 'balancing [of] governmental efficiency and the rights of employees.'" *Chilicky*, 487 U.S. at 423 (quoting *Lucas*, 462 U.S. at 398). *A fortiori*, similar concerns preclude judicial establishment of a cause of action for unadmitted aliens asserting claims touching so closely on foreign relations. As the D.C. Circuit has explained, "the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad." *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985).

Arar's claims, by their terms, also implicate national security. As the district court observed, this case concerns "complicated multilateral negotiations concerning efforts to halt international terrorism." SPA.72 (quoting *Doherty*, 808 F.2d at 943) (internal quotation marks omitted). Extending *Bivens* to this new context "'could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest.'" SPA.72-SPA.73 (quoting *Verdugo-Urquidez*, 494 U.S. at 273-74).

Indeed, any effort to litigate this case would require the parties to "probe deeply into the inner working of the national security apparatus of"

the U.S. and "at least three foreign countries." *Arar*, 532 F.3d at 181. Canada has already asserted the need "to maintain the confidentiality of material that goes to the heart of Arar's claims." *Id.* The U.S. has asserted the state-secrets privilege. *See id*; Gov't Br. 13-15; A.126-A.138. And the Department of Homeland Security Inspector General's Report—on which Arar relies (*see* Arar Br. 3 & n.3, 11)—has been redacted to protect national security. It makes clear that U.S. officials *in fact* received assurances from Syria that Arar would not be tortured, but all details have been redacted pursuant to 5 U.S.C. § 552(b)(1). *See* IG Report at 5, 22, 26-29. Here, as in *Wilson v. Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008), the fact that the claims would "inevitably require an inquiry into classified information" provides "further support" for the conclusion "that a *Bivens* cause of action is not warranted."

The issue here is not whether the judiciary is competent to conduct review where Congress has authorized it to do so. *See* Arar Br. 34-37. It is instead whether the judiciary, *without* any grant of authority from Congress, should *on its own create* a damages remedy in this area. As the district court correctly recognized, the *Bivens* inquiry "involve[s] '. . . *who should decide* whether such a remedy should be provided.'" SPA.67 (quoting *Lucas*, 462 U.S. at 380) (emphasis added). Congress must decide. Courts should

decline to "create a new substantive legal liability without legislative aid" when "Congress is in a better position to decide whether or not the public interest would be served by creating it." *Lucas*, 462 U.S. at 390. Given the foreign-affairs and national-security implications raised by suits like this one, that is clearly the case here.

2. Arar contends that foreign-affairs and national-security concerns are inappropriate "special factors" because review of a removal order—had he sought it—would involve "virtually the identical inquiry." Arar Br. 37 & n.30 (emphasis omitted).[3] Not so. For example, Arar presumably will seek discovery into sensitive international negotiations and communications to prove the international conspiracy he posits. A petition for review under 8 U.S.C. § 1252(b)(4), by contrast, is decided "only on the administrative record"; "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"; and "a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law." 8 U.S.C. § 1252(b)(4)(A)-(C).

[3] Arar also claims that "[t]he Supreme Court has *never* treated foreign policy, national security, or the possibility of 'state secrets' as 'special factors' counseling against a *Bivens* remedy." Arar. Br. 34 & n.22. Arar, however, cites no case—from *any* court—even hinting that such considerations are inappropriate "special factors."

Moreover, the only issue under the statutory review scheme would be the narrow question of whether there was "substantial evidence" in the record. That bears no resemblance to the wide-ranging inquiry of who said or did what, where, and when that this suit would involve. *See* Gov't Br. 31-36, 43-47.

In any event, the dispositive fact is that, in enacting the INA and its later amendments, Congress had an opportunity to determine how to protect sensitive information, national security, and international relations. When courts create a *Bivens* action, Congress has no such opportunity. The district court and panel did not err in refusing to expand the *Bivens* cause of action here.

III. DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

No less than whether there is a cause of action to pursue, qualified immunity is a threshold question that must be addressed "at the earliest possible stage in litigation." *Hunter v. Bryant,* 502 U.S. 224, 227 (1991) (citing cases); *Savino v. City of New York*, 331 F.3d 63, 71 (2d Cir. 2003). Given the law at the time of the conduct at issue, defendants are entitled to immunity.[4]

[4] This Court may affirm dismissal "on any grounds supported in the record," *Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 405 (2d Cir. 2006), and should do so when necessary "to prevent unnecessary delay in

A. Qualified Immunity Must Be Granted Unless The Violation Was "Clearly Established" When The Officers Acted.

Courts often address qualified-immunity claims in two steps. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). First, the court asks whether "the facts alleged show the officer's conduct violated a constitutional right." *Id.* Second, if the allegations state a claim, the court still must grant immunity if the "conduct [did] not violate 'clearly established' statutory or constitutional rights." *Harlow v. Fitzgerald*, 457 U.S. 800, 801 (1982).

To defeat qualified immunity, the constitutional right at issue must be so "clearly established" that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. That requires courts to look to "the case law extant at the time of the violation." *In re County of Erie*, __ F.3d __, __, 2008 WL 4554920, at *6 (2d Cir. 2008); *see Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987); *Higazy v. Templeton*, 505 F.3d 161, 170-71 (2d Cir. 2007). The existence of a generalized right is not sufficient. *Saucier*, 533 U.S. at 201-02. Instead, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The *contours of the right* must be sufficiently clear that a reasonable official

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deciding whether [Thompson] is entitled to qualified immunity," *Loria v. Gorman*, 306 F.3d 1271, 1283 n.5 (2d Cir. 2002).

would understand that *what he is doing* violates that right." *Anderson*, 483 U.S. at 640 (emphasis added).

Thus, officers can be denied immunity only "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the conduct would not violate the right being asserted; "but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Here, the allegations in Counts II-IV do not establish a constitutional violation, much less the "clearly established" violation necessary to overcome qualified immunity.

B. Counts II And III (Detention And Mistreatment Abroad) Plead Neither A Due Process Violation Nor A Violation Of Clearly Established Rights

1. Due Process Was Not Violated

Arar's removal-related claims (Counts II and III) rest largely on the repeated allegation that "defendants *conspired* to subject him to arbitrary detention and torture," and that such an allegation necessarily "state[s] a claim for violations of the Fifth Amendment Due Process Clause." Arar Br. 22 (emphasis added); *see id.* at 17 ("[C]onspiracy to torture and arbitrarily detain . . . would violate core constitutional guarantees."). But federal law does not create a separate cause of action for *conspiracy*—conspiracy is

merely a theory for imposing secondary liability. *See Beck v. Prupis*, 529 U.S. 494, 501-03 (2000). Arar thus cannot state a claim for "conspiracy to torture" unless the torture itself violated the Fifth Amendment. *See Cook v. Tadros*, 312 F.3d 386, 388-89 (8th Cir. 2002) ("In the absence of a [constitutional] violation, there is no actionable conspiracy claim"); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 119 (2d Cir. 1995) (Notwithstanding "the pleading of a conspiracy . . . , the lawsuit will stand only insofar as the plaintiff can prove . . . the violation of a federal right.").

Here, the alleged torture—which was perpetrated by Syrians, in Syria, on a Syrian national—did not violate the U.S. Constitution. Unadmitted aliens like Arar simply do not have *any* Fifth Amendment rights outside this Nation's borders. The Supreme Court made that clear in *Johnson v. Eisentrager*, 339 U.S. 763 (1950):

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended [by the Framers], it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view . . . . The practice of every modern government is opposed to it.

Id. at 784-85 (citation omitted).

In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990), the Supreme Court observed that its "rejection of extraterritorial application of

the Fifth Amendment" in *Eisentrager* "was emphatic." Even when the Supreme Court recently employed a "functional" approach to determine what constitutes "territory" of the U.S. in *Boumediene v. Bush*, 128 S. Ct. 2229, 2258 (2008), it did not extend the Constitution's habeas corpus protections beyond individuals in U.S. custody in locations where the U.S. exercises *de facto* sovereignty. No one here claims that any part of Syria is *functionally* part of the U.S. or subject to *de facto* U.S. sovereignty. Consequently, the Syrians' mistreatment of an alien—indeed, a Syrian national—in Syria did not violate the U.S. Constitution.

For those reasons, in *Harbury v. Deutch*, the D.C. Circuit rejected the claim that U.S. officials had violated the Fifth Amendment by ordering, conspiring in, and participating in—through Guatemalan military officers paid by the CIA—the torture and execution of an alien in Guatemala. The court concluded that Due Process claims are not viable where the "conduct at issue . . . — . . . torture [of a foreign national]—occurred outside the United States." 233 F.3d 596, 603 (D.C. Cir. 2000), *rev'd in part not relevant*, 536 U.S. 403 (2002).[5]

[5] The part of *Harbury* reversed by the Supreme Court was the portion that ruled for the plaintiff; the D.C. Circuit's holding rejecting extra-territorial application of U.S. law was left undisturbed. *See* 536 U.S. at 406.

Harbury is also fatal to Arar's attempt to shift the focus to the U.S. because the "conspiracy" allegedly "began" here. Arar Br. 24, 44, 49. In *Harbury* too the plaintiff asserted that some defendants were in the U.S. when they allegedly conspired to have her husband tortured abroad. 233 F.3d at 603. The D.C. Circuit held that the "location of the *primary constitutionally significant conduct* at issue"—"the torture"—is dispositive. 233 F.3d at 604 (emphasis added). Here, as in *Harbury*, the torture and arbitrary detention occurred abroad. Accordingly, here, as in *Harbury*, the Fifth Amendment does not reach the conduct.

That result follows from *Verdugo-Urquidez*. There, the Supreme Court held that the Fourth Amendment does not apply to the search of a nonresident alien's property in Mexico—even though the search was performed at the behest of a U.S. official in the U.S. *See* 494 U.S. at 262; *see Harbury*, 233 F.3d at 603 (warrantless search in *Verdugo-Urquidez* was "conceived, planned, and ordered in the United States" for "the express purpose of obtaining evidence for use in a United States trial").

The contrary view would all but destroy territorial limits on the Constitution's scope. Where U.S. actors are involved, it will "virtually always be possible" to trace claimed injuries abroad back to the U.S. *Sosa*, 542 U.S. at 702-03. For that reason, the Supreme Court has cautioned

against expanding the scope of U.S. law through such tracing, since it would "swallow . . . whole" centuries of jurisprudence. *Id.* at 703.

Arar's claim that *he* was in the U.S. when the alleged conspiracy began also fails. The alleged torture—the "primary constitutionally significant conduct at issue," *Harbury*, 233 F.3d at 603—still occurred abroad. Besides, by operation of law, Arar was not in the U.S. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). As the panel opinion explains, "an unadmitted alien" like Arar "as a matter of law lack[s] a physical presence in the United States." 532 F.3d at 186. "The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores." *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597 n.5 (1953).[6] Consistent with that, "the federal judiciary may not require that persons removed from the United States be accorded constitutional due process." *Linnas v. INS*, 790 F.2d 1024, 1031 (2d Cir. 1986). Correspondingly, "an alien has no constitutional substantive due process right not to be removed from the United States, nor a right not to be removed from the United States to a particular place." *Enwonwu v. Gonzales*, 438

[6] It follows a *fortiori* that the Constitution is "futile authority" to an alien who is not seeking admission; such an alien has even less of a nexus to the U.S. than one who seeks to enter. And, in any event, by operation of law, Arar was deemed an applicant for admission when he presented himself at the border. *See* 8 U.S.C. § 1225(a)(1); 8 C.F.R. § 1.1(q).

F.3d 22, 29 (1st Cir. 2006). Those holdings foreclose any claim that Arar had a "right not to be removed . . . to" Syria or any other "particular place." *Id.* at 29.

Finally, Arar cannot avoid that result by reviving his now seemingly abandoned theory that the "state-created-danger doctrine" barred U.S. officials from sending him to a place where they knew he would suffer serious harm. This Court rejected precisely that theory in *Linnas*, 790 F.2d 1024. There, the plaintiff contended that deporting him to the U.S.S.R., where he had been sentenced to death *in absentia*, would violate due process. This Court rejected that claim because its jurisdiction "obviously does not extend beyond the borders of the United States." *Id.* at 1031. Likewise, in *Enwonwu*, the First Circuit held that the state-created-danger theory represents an "impermissible effort to shift to the judiciary the power" over immigration that the "Constitution has assigned to the political branches." 438 F.3d at 30. "[N]o court of appeals . . . has recognized the constitutional validity of the state-created danger theory in the context of an immigration case." *Kamara v. Attorney General*, 420 F.3d 202, 217 (3d Cir. 2005); *see also Vicente-Elias v. Mukasey*, 532 F.3d 1086 (10th Cir. 2008).

2. The Conduct Violated No Clearly Established Law

Even where conduct violates the Constitution, immunity must be granted unless the violation was so clear that, "on an objective basis, it is *obvious* that *no reasonably competent officer*" in the defendant's circumstances "would have concluded" that the conduct was lawful. *Malley*, 475 U.S. at 341 (emphasis added). If "officers of reasonable competence could disagree . . . immunity should be recognized." *Id.*

Under that standard, the "presumption in favor of finding qualified immunity is necessarily high." *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 102 (2d Cir. 2003). It is not enough that "the relevant 'legal rule'" or "right" is "clearly established" at a high level of generality—*e.g.,* that the Fourth Amendment bars unreasonable searches or that due process bars torture. *Anderson*, 483 U.S. at 639. Instead, the "contours of the right must be sufficiently clear" that any competent officer "would understand that *what he is doing violates that right*." *Id.* at 640 (emphasis added). The scope of the right must be so clear that "all but the plainly incompetent" would have known. *Malley*, 475 U.S. at 343.

a. Here, virtually any reasonable officer would have thought that the Due Process Clause did *not* apply to unadmitted aliens abroad or to the removal of unadmitted aliens to foreign countries. The Supreme Court's

decisions in *Eisentrager* and *Verdugo-Urquidez* had "emphatically" declared that the Fifth Amendment does not apply to unadmitted aliens abroad. In *Verdugo-Urquidez* and *Harbury*, moreover, the Supreme Court and the D.C. Circuit held the Fifth Amendment inapplicable even where the alleged mistreatment abroad was "planned" or the product of a "conspiracy" in the U.S. *See* p. 39, *supra*.

Nor would any reasonable officer, confronting these circumstances, have necessarily concluded that the Fifth Amendment applied simply because Arar landed at JFK. The panel decision in this very case concluded that "an unadmitted alien" like Arar "as a matter of law lack[s] a physical presence in the United States." 532 F.3d at 186. The panel having reached that conclusion—and the Supreme Court having so held, *see* p. 40, *supra*, Gov't Br. 53—an officer would not have to be "plainly incompetent" to have reached the same conclusion, *Malley*, 475 U.S. at 343. "If judges . . . disagree on a constitutional question, it is unfair to subject [officers] to money damages for picking the losing side." *Wilson v. Layne*, 526 U.S. 603, 618 (1999). In cases like *Linnas*, 790 F.2d 1024, and *Enwonwu*, 438 F.3d at 30-31, moreover, the courts held that unadmitted aliens have no "right not to

be removed from the United States to a particular place."[7] An officer would not be "plainly incompetent" for having taken the courts at their word.

b. Arar thus misses the point when urging that "[t]orture is universally condemned." Arar Br. 23. For purposes of qualified immunity, the "inquiry . . . must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201. Here, at the time of the alleged conduct, there was no clearly established law that the Fifth Amendment *applied abroad* or *precluded removal* of unadmitted aliens to particular locations.

In *Rasul v. Myers*, 512 F.3d 644, 666 (D.C. Cir. 2008), *cert. filed*, No. 08-235 (Aug. 22, 2008), the D.C. Circuit rejected precisely the argument Arar makes here—that qualified immunity can be denied because "the prohibition on torture is universally accepted." "The issue," the court stated, "is whether the rights the plaintiffs press *under the Fifth and Eighth Amendments* were clearly established at the time of the alleged violations."

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[7] *Correa v. Thornburgh*, 901 F.2d 1166 (2d Cir. 1990), and *Ngo v. INS*, 192 F.3d 390 (3d Cir. 1999), are not to the contrary. *Correa* confirmed that, while "some constitutional due process protection may be available to the *resident* alien seeking re-entry," a non-resident "alien seeking initial entry appears to have little or no constitutional due process protection." 901 F.2d at 1171 n.5 (emphasis added). Likewise, in *Ngo*, the Third Circuit reiterated that, for "[a]n alien who is on the threshold of initial entry," the only process due is "the procedure authorized by Congress." 192 F.3d at 396 (citations and internal quotation marks omitted).

Id. The court concluded that, because the conduct in that case occurred in Guantanamo Bay, Cuba, the Constitution did not apply at all. *Id.* While that ruling may no longer be good law after *Boumediene*, it shows that a reasonable officer—like the reasonable judges of the D.C. Circuit—could have reached a contrary conclusion when the conduct was alleged to have occurred here. Indeed, the D.C. Circuit also held that qualified immunity was appropriate because "[a]n examination of the law *at the time the plaintiffs were detained* reveals that . . . courts did not bestow constitutional rights on aliens located outside sovereign United States territory." *Id.* (emphasis added) That observation should control this claim.

Boumediene v. Bush itself—decided 6 years after Arar was removed—confirms that defendants violated no clearly established law "extant at the time of the violation." *In re County of Erie*, 2008 WL 4554920, at *6. In *Boumediene*, the Supreme Court extended habeas corpus to a location subject to *de facto* (not *de jure*) U.S. sovereignty, but acknowledged that its decision was unprecedented: "[B]efore today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution." 128 S. Ct. at 2262; *accord id.* at 2302 (Scalia, J., dissenting). *A fortiori*, at the time of the conduct here, there was

no clearly established law regulating the treatment of aliens in foreign custody in Syria, where the U.S. has neither *de facto* nor *de jure* sovereignty.

Finally, *Munaf v. Geren* confirms that the issue is at best open today. Addressing the transfer of U.S. citizens detained overseas to foreign custody, the Supreme Court observed that, "[e]ven with respect to claims that detainees would be denied constitutional rights if transferred, we have recognized that it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." 128 S. Ct. at 2225. The Court acknowledged that Munaf's was "not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway." *Id.* at 2226. But this isn't either: The Executive Branch obtained assurances that Arar would not be tortured; Arar simply asks this Court to disregard those assurances and infer a conspiracy the complaint will not support. *See* Gov't Br. 60-62.

In any event, *Munaf* "*reserve[d] judgment* on an extreme case in which" the Executive transfers a detainee despite determining he "is likely to be tortured," adding that "it would be in order to ask" in such a case "*whether* substantive due process bars" that action. *See* 128 S. Ct. at 2228 (Souter, J., concurring) (emphasis added). If the transfer of a U.S. citizen

making such allegations remains unsettled following *Munaf*, it is hardly obvious that no reasonably competent officer could have thought the transfer of an unadmitted alien resolved six years before *Munaf* "reserved judgment."

c. "The very purpose of qualified immunity is to protect officials when their jobs require them to make difficult on-the-job decisions." *Zieper v. Metzinger*, 474 F.3d 60, 71 (2d Cir. 2007); *Anderson*, 483 U.S. at 638. Confronted with a previously unanticipated terrorist threat, government officials in 2001 and 2002 were making "difficult on-the-job decisions" to maintain the Nation's security. Here, Arar alleges only *one* concrete action by Thompson: After Arar was determined to be a member of al Qaeda—a determination Arar does not challenge for present purposes—Thompson concluded that it would be against the national interest to send him to *Canada*, a country with a 5,525 mile porous border with the U.S. *See* p. 5, *supra*. Officials making that sort of decision should not be required to "err always on the side of caution" because they fear a suit such as this. *Davis v. Scherer*, 468 U.S. 183, 196 (1984).

C. Arar's Generalized Claim Relating To Domestic Detention Likewise Fails

Arar's treatment in the U.S. did not exceed constitutional boundaries, must less violate clearly established law.

1. The "distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." *Zadvydas*, 533 U.S. at 693; *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). Foreign nationals (like Arar) who are refused admission at the border "have *little or no* constitutional due process protection" "[o]ther than protection against gross physical abuse." *Correa v. Thornburgh*, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990) (emphasis added); *see Lynch v. Cannatella*, 810 F.2d 1363, 1374-76 (5th Cir. 1987). That is true whether they seek admission or not. *See* p. 40 n.6, *supra*.

Arar's complaint does not allege the "gross physical abuse" necessary to establish a constitutional violation in these circumstances. *Lynch*, 810 F.2d at 1375. He asserts that he was detained for 13 days, held in solitary confinement for a period, chained and shackled at times, strip-searched, deprived of sleep for one night (and food for the first 26 hours), interrogated in a "coercive manner" (using foul language), and denied access to counsel and a consular representative. A.30-A.33. The panel correctly concluded that those conditions, while harsh, "do not amount to a claim of gross physical abuse." 532 F.3d at 189; *see also Adras v. Nelson*, 917 F.2d 1552, 1559 (11th Cir. 1990).

Even if one could disagree with the panel's conclusion, defendants are entitled to immunity. Qualified immunity protects conduct that falls within the often "hazy border between" lawful and unlawful behavior. *Saucier*, 533 U.S. at 206. If two judges of this Court concluded that the conditions were not unlawful, a reasonable officer surely could have as well. *Wilson*, 526 U.S. at 618.

Arar asserts (Arar Br. 50) that his due-process claims should be analyzed under the standard for pre-trial detainees articulated in *Bell v. Wolfish*, 441 U.S. 520, 539 (1979). But that would require a radical departure from the standards in *Correa*, *Mezei*, and *Lynch*. In any event, as the panel properly concluded, the complaint also fails under *Wolfish* because it neither alleges the requisite "intent to punish" nor shows that the conditions were without any legitimate purpose. 532 F.3d at 190. Arar himself claims that the *purpose* was to promote the interrogation—a *purpose* that is legitimate. *Id.*; A.30. In any event, a reasonable officer surely could have believed that *Mezei*, *Correa*, and *Lynch* provided the relevant standard, or at least that the conduct was lawful under *Wolfish*, as the panel held. Accordingly, immunity must be granted.

D. Arar's Access-To-Courts Claim Does Not Save His Case

1. The District Court Properly Dismissed When Arar Refused To Identify The Claim He Would Have Asserted

Within his domestic detention count, Arar alleged that he was subject to a "communications blackout" that "interfered with his access to lawyers and the courts." A.42. Because Arar made it "clear that [he] was not asserting any challenge to his removal as such," the district court did not read that allegation to claim that defendants interfered with Arar's ability to challenge *his removal* to Syria. SPA.82. Apparently, neither did Arar. Arar's brief in district court claimed only an interference with his ability to "file a petition for *habeas corpus*"—the remedy for unlawful *detention*—or "to *otherwise* challenge *his detention*." *Id.* (quoting Pl. Opp. 32) (emphasis added). The district court gave Arar an opportunity to replead his claim to "articulate more precisely" the claim he lost because of the alleged interference with access to the courts. SPA.83, 88. Arar refused. A.467-A.468; SPA.89, SPA.92.

Dismissal was therefore required. Where the plaintiff asserts an access-to-courts claim, the identity of the underlying claim that was lost "is an element that must be described in the complaint." *Christopher v. Harbury*, 536 U.S. 403, 415 (2002). That makes sense. If the plaintiff had no viable claim, he suffered no injury: The right of access to the courts thus

"is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court." *Id.*

Harbury aside, district courts have broad "discretion to demand more specific factual allegations in order to protect the substance of the qualified immunity defense." *Thomas v. Independence Twp.*, 463 F.3d 285, 289 (3d Cir. 2006). Arar identifies no abuse of discretion in requiring him to identify, in the complaint, the viable cause of action he was allegedly prevented from asserting.

Arar *now* claims that his complaint in fact "gave defendants notice that [he] claimed that they blocked him from seeking *judicial review* that would have *forestalled his removal* to Syria *under the CAT*." Arar Br. 41-42 (emphasis added). Not so. As the panel majority recognized, Arar's access-to-court allegation vaguely asserted a violation of his "right . . . to petition the courts for redress of his grievances." 532 F.3d at 188 (quoting A.42) (omission in original). But "his complaint makes no mention of FARRA, the CAT, or the possibility of injunctive relief." *Id.* The district court did not abuse its discretion in failing to *guess* that Arar's lost claim was a suit to challenge the CAT determination and prevent removal.

Arar insists his complaint was sufficient because "the panel . . . was fully aware of the cause of action lost—namely a claim to 'enjoin[] his

removal to a country that would torture him, as a violation of FARRA and' " the "CAT." Arar Br. 40 (quoting 532 F.3d at 188). But the panel was "aware" because Arar identified that as the "lost" claim for the first time in his appellate brief (which the panel was quoting). Arar cannot *refuse* in district court to identify the claim he lost and then seek reversal by identifying that claim for this first time on appeal. Such sandbagging is prohibited. *See, e.g., Cont'l Cas. Co. v. Dominick D'Andrea, Inc.*, 150 F.3d 245, 252 (3d Cir. 1998).

Arar's claim that the Complaint's first paragraph mentions the CAT, Arar Br. 19, 40, fares no better. That reference—91 paragraphs removed from his putative access-to-courts claim (A.42, ¶ 93)—*nowhere* suggests Arar was denied an opportunity to challenge his removal under the CAT. And Arar's putative access-to-the-courts claim (A.42, ¶ 93) is not surrounded by references to objections to removal or the CAT but to the *conditions of his domestic detention* (*e.g.*, A.41-A.42, ¶¶ 91-92). Besides, the district court gave Arar opportunity to amend the complaint to identify the claim he allegedly lost. Having refused, Arar cannot seek reversal by pleading it the first time on appeal.

The foregoing also forecloses Arar's effort (Br. 29-33) to avoid limits on this Court's jurisdiction and on *Bivens* based on supposed interference

with his ability to challenge his removal through express statutory provisions. If Arar had a basis for overcoming those barriers, he was required to plead it in the complaint. See p. 21, *supra.* Arar did not do so, and in fact declined to amend despite a specific invitation to do so. That failure in district court precludes Arar's belated efforts here.

2. The Complaint Does Not Establish A Violation, Much Less A Clearly Established One

Arar, in any event, had no constitutional right to seek judicial relief that could have been violated. Instead, because Arar was an unadmitted alien, he was entitled only to the procedures enacted by Congress. As the Supreme Court explained in *Mezei*, 345 U.S. at 212, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *See also Correa*, 901 F.2d at 1171 n.5; *Zadvydas*, 533 U.S. at 693; *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

Arar was removed from the U.S. under 8 U.S.C. § 1225(c), which governs aliens found inadmissible on security grounds. Under that provision, the Attorney General is empowered to remove the alien "*without further inquiry or hearing* by an immigration judge." *Id.* § 1225(c)(2)(B)

(emphasis added). Under *Mezei*, the Constitution provides no right to additional process.[8]

While Arar now contends on appeal that defendants obstructed his ability to pursue a CAT claim, Arar Br. 38-40, Arar identifies no case recognizing a constitutional right to pursue such a claim. Citing prison law-library and inmate-attorney visitation cases, Arar asserts that "[i]f it violates the Constitution to fail to provide an adequate law library, then *a fortiori* it violates the Constitution to affirmatively frustrate access to court." Arar Br. 39. But Arar has it backwards. Both the prison-library case, *Bounds v. Smith*, 430 U.S. 817, 821 (1977), and the attorney-visitation case, *Benjamin v. Kerik*, 102 F. Supp. 2d 157, 175-78 (S.D.N.Y. 2000), addressed prison inmates who had a *recognized* right of access to the courts; the cases address collateral rights *derivative of* that previously recognized right. Thus, in *Bounds*, the Supreme Court began by noting that "prisoners have a constitutional right of access to the courts," 430 U.S. at 821, and ultimately concluded that this right also "requires prison authorities to . . . provid[e] prisoners with adequate law libraries," *id.* at 828. Neither of those cases

[8] To the extent Arar claims denial of counsel, that suffers from similar defects. *Michel v. INS*, 206 F.3d 253, 256 (2d Cir. 2000), *Montilla v. INS*, 926 F.2d 162, 165 (2d Cir. 1991), and *Waldron v. INS*, 17 F.3d 511, 512 (2d Cir. 1994), involved resident aliens, not aliens at the border, and deportation hearings, not a removal under 8 U.S.C. § 1225(c).

support the conclusion that unadmitted aliens facing removal have a right of access to the courts.

The specific conduct alleged, moreover, does not support the claimed denial of access. By September 27, 2002, Arar was aware that he might be removed to Syria, and on October 1, Arar was served with formal notice that he had *five days* (to October 6) to respond or face removal. A.88-A.89. Arar contacted his family in Canada; met with a representative of the Canadian Consulate on October 3; and met with his attorney on October 5. A.31-A.32. No one precluded his attorney, who had notice that Arar could be removed as quickly as October 6, from seeking relief before that deadline. The attorney, moreover, could have brought a CAT claim even after Arar's removal. *See* 8 U.S.C. § 1252(b)(1) (deadline for filing petition for review); *cf. Lopez v. Gonzales*, 127 S. Ct. 625, 629 n.2 (2006) (deported alien may pursue application for cancellation of removal). But no petition for review was ever filed. No habeas petition was ever filed. In short, there could have been no obstruction because Arar's attorney never attempted to do anything.

In any event, it would not have been "obvious to any reasonable officer" confronting *Mezei*, *Zadvydas*, and the other cases that Arar had any access-to-court right that could be violated. Nor would it have been

"obvious" to any reasonable officer that there was an access-to-courts violation on these particular facts. Accordingly, at the very least, immunity should be granted.

IV. THE TVPA CLAIM WAS PROPERLY DISMISSED

The district court and the panel unanimously and correctly rejected Arar's TVPA claim. Thompson and the other U.S. officials acted under color of U.S. law, not under color of law of a "foreign nation." Arar was not subjected to torture while in defendants' "custody or physical control." And defendants are entitled to qualified immunity in any event.[9]

A. Defendants Acted Under Color Of U.S. Rather Than Syrian Law

The TVPA creates a damages remedy against anyone "who, under actual or apparent authority, *or color of law, of any foreign nation* . . . subjects an individual to torture." 28 U.S.C. § 1350, note § 2(a)(1) (emphasis added). But Arar's complaint alleges that, when Thompson allegedly "signed an order on or about October 8, 2002, removing Arar to Syria," he acted as the "Deputy Attorney General, in his capacity as Acting Attorney General"—not as an agent of a foreign power. A.24, A.31. The complaint further alleges all defendants "act[ed] under color of law and their

[9] Moreover, as Mueller (Br. 20-32) and the government (Br. 80-84) point out, Arar's TVPA claim depends entirely on a theory of co-conspirator and aider-and-abettor liability that cannot be read into the TVPA.

authority as federal officers." A.39, A.40-A.41. Thus, by Arar's admission, the source of defendants' authority was the Constitution and laws of the U.S., not the law of "any foreign nation."

1. Every judge to have examined this case has come to the same conclusion. The district court ruled that the TVPA "does not apply here" because "the color of 'foreign law' requirement" was not met. SPA.37. The panel unanimously agreed. A "defendant alleged to have violated the TVPA acts under color of foreign law," the panel explained, "when he 'exercise[s] power possessed by virtue of [foreign] law' and commits wrongs 'made possible only because the wrongdoer is clothed with the authority of [foreign] law.'" 532 F.3d at 175 (quoting *West v. Atkins*, 487 U.S. 42, 49 (1988). "Nowhere does [Arar] contend that defendants possessed any power under Syrian law, that their allegedly culpable actions resulted from the exercise of power under Syrian law, or that they would have been unable to undertake these culpable actions had they not possessed such power." *Id.* at 176. Judge Sack came to the same conclusion. *See id.* at 201.

Other courts agree that U.S. officials pursuing federal policy under federal statutes act under color of U.S., not foreign, law. In *Harbury v. Hayden*, 444 F. Supp. 2d 19, 41-43 (D.D.C. 2006), *aff'd*, 522 F.3d 413 (D.C. Cir. 2008), the district court held that CIA officers cooperating with the

Guatemalan military acted under color of U.S. law because they were "within the scope of their employment serving the United States" and "carrying out the policies and directives of the CIA." In *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 267 (D.D.C. 2004), *aff'd*, 412 F.3d 190 (D.C. Cir. 2005), the court similarly concluded that the U.S. national security adviser "was most assuredly acting pursuant to U.S. law . . . despite the fact that his alleged foreign co-conspirators may have been acting under color of Chilean law." Arar does not—and cannot—point to "a single case that stands for the principle that a U.S. agent serving the interests of the United States and acting within his or her employment can be held liable pursuant to the TVPA." *Harbury*, 444 F. Supp. 2d at 42.

Arar in essence claims that the Deputy Attorney General of the United States acts "under color of" the law of a "foreign nation" when he signs an official U.S. government document, ordering the removal of a nonresident alien, in pursuit of U.S. policies, under authority of Acts of Congress codified in the U.S. Code. That theory is absurd. It "would expose every federal employee working abroad daily with employees of foreign governments—*i.e.*, employees in intelligence agencies, military agencies, diplomatic and foreign aid agencies, and law enforcement agencies—to personal liability under the construct that they were somehow actually or

apparently acting under foreign law." *Harbury*, 444 F. Supp. 2d at 41.[10] The notion that defendants acted under color of the law of a "foreign nation" when removing Arar to Syria, pursuant to federal law, is a "far fetched proposition at best." *Id.* at 42.

2. To press that "far fetched proposition," Arar invokes cases applying the "under color of law" requirement in 42 U.S.C. § 1983. *See* Arar Br. 45-47. The TVPA's legislative history explains that its "color of law" element, like § 1983's, requires proof of the requisite degree of *"governmental involvement* in the torture," since the TVPA "does not attempt to deal with torture or killing by purely private groups." H.R. Rep. No. 102-367, at 5 (1991) (emphasis added). Consistent with that, *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995), directs courts to look to 42 U.S.C. § 1983 "i[n] construing . . . 'color of law,'" *i.e.*, in determining whether the required "governmental involvement" is present. But neither the House Report nor *Kadic* directs courts to look to § 1983 to determine whether "the law" under which the defendant acted is U.S. law or that of "any foreign nation." Here, the question is not "governmental involvement."

[10] *See also* Statement By Pres. George H. W. Bush Upon Signing H.R. 2092, 22 Weekly Comp. Pres. Doc. 465 (Mar. 16, 1992) ("I do not believe it is the Congress' intent that [the TVPA] should apply to United States . . . law enforcement operations, which are always carried out under the authority of the United States.").

It is whether the U.S. defendants acted under color of Syrian rather than U.S. law.

The cases Arar invokes (at 45-47) address the sufficiency of "governmental involvement" in otherwise private conduct, not whether the "law" is U.S. or foreign. *See*, *e.g.*, *Kadic*, 70 F.3d at 245. While some of Arar's cases (Arar Br. 45, 48) address whether federal officers acted under color of *state* or *federal* law (*e.g.*, *Kletschka v. Driver*, 411 F.2d 436 (2d Cir. 1969)), the effort to extend those cases to the international context "ultimately fails." SPA.35. It is not unthinkable that state and federal officers might act under authority of each other's laws. Both are "acting under a legal regime established by our constitution and our well-defined jurisprudence in the domestic arena." *Id*. The law recognizes their reciprocal authority. *See, e.g., United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983). And the Framers long ago observed that "the national and State systems are to be regarded as ONE WHOLE." Federalist No. 82.

But the United States and foreign nations are in no sense "ONE WHOLE." It is therefore "by no means a simple matter to equate actions taken under the color of state law in the domestic front to conduct undertaken under color of foreign law." SPA.36. Simply put, it is improbable that Congress intended federal officers who pursue U.S. policy

by executing federal statutes codified in the U.S. Code to be deemed to act under authority of "foreign" rather than U.S. law.

3. Even if the § 1983 cases were relevant, Arar admits that, under *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 296 (2001), "there is no single test for action 'under color of law.'" Arar Br. 46. Instead, the question is one of "normative judgment," not application of "criteria" with "rigid simplicity." *Brentwood Acad.*, 531 U.S. at 295. Here, the only possible "normative"—even commonsense—judgment is that U.S. officials, sitting in U.S. government buildings, behind government-issued desks, and exercising authority—indeed, signing official orders—pursuant to an Act of Congress in pursuit of federal interests do so under color of U.S., not foreign law.[11]

Under § 1983, moreover, a federal official's act "pursuant to his or her federal authority . . . is not deemed" to have been "taken under color of state law," *Harbury*, 444 F. Supp. 2d at 42, unless the federal official was

[11] Arar urges that, under *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247-48 (11th Cir. 2005), "participat[ion] in joint action with a foreign official [is] sufficient." Arar Br. 48. But *Aldana* addressed whether violence from a private security force in Guatemala involved "state action." There, the court concluded that "the alleged acts are sufficient for now to establish state action *on the part of the Mayor*." 416 F.3d at 1250 (emphasis added). The court thus was not addressing whether the U.S. corporation was acting in Guatemala under color of U.S. or Guatemalan law. And had the court addressed that question, analysis concerning a private corporation would be largely inapplicable to actions by federal officials.

controlled by state officials such that his act can be said to have been *their act*. A "person acts under color of *state law only* when exercising power '*possessed by virtue of state law* and made possible only because the wrongdoer is *clothed with the authority of state law*.'" *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981) (emphasis added). In *Kletschka*, for example, this Court ruled that the federal defendants did not act under color of state law because there was insufficient evidence that they acted "under the control or influence of the State defendants." 411 F.2d at 449. Likewise here, Thompson could not have acted under color of Syrian law because he was not "under the control or influence of" Syrian officials.

Billings v. United States, 57 F.3d 797 (9th Cir. 1995), yields the same result. In that case, the plaintiff brought a § 1983 claim against Secret Service agents who "initiated and effected" her arrest "pursuant to the procedures and protocols of their agency" before turning her over to the local sheriff's custody. 57 F.3d at 801. The court held that, even "[i]f the Secret Service Agents and the Sheriff's officers acted jointly, it was under the color of federal law." *Id.* Likewise here, federal officers "initiated and effected" Arar's removal to Syria under the "procedures and protocols" of federal law and thus acted under color of *federal* law.

Finally, Arar's reliance on the expansive "joint action" (Br. 47) language in older cases like *Kletschka* and *Dahlberg v. Becker*, 748 F.2d 85 (2d Cir. 1984), is problematic because the Supreme Court has disapproved their loose standards. Those cases rely on the color-of-law formulation from *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). The Supreme Court, however, has made it clear that its more recent cases "have refined" that opinion's "vague 'joint participation' test," making it inappropriate to "fall[] back on language in . . . *Burton*" or "general language about 'joint participation' as a test for state action." *Sullivan v. Am. Mfrs. Mut. Ins. Co.*, 526 U.S. 40, 57 (1999). *Sullivan* "clean[ed] up and rein[ed] in" those prior "'state action' precedent[s]." *Id.* at 62 (Ginsburg, J., concurring in part and concurring in the judgment).

Under *Sullivan*, the plaintiff must show that "the State 'has exercised coercive power or has provided such significant encouragement'" to the private individual "'that the choice must in law be deemed to be that of the State.'" *Id.* at 52 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). Here, the complaint does not suggest that a foreign nation "exercised such coercive power" or provided "such significant encouragement" that Thompson's actions "must in law be deemed that of" the foreign nation.

Nor could it. Thompson at all times acted on behalf, in the interests, and as an officer, of the U.S.

B. Arar Failed To Allege That Defendants Had "Custody Or Physical Control" Over Him In Syria

The TVPA is also inapplicable unless the alleged torture was "directed against [the plaintiff] *in the offender's custody or physical control*." 28 U.S.C. § 1350, note § 3(b)(1) (emphasis added). Here, Arar admits that Thompson did not have "custody" or "physical control" of him when he was subjected to the alleged torture in Syria. *See* A.33-A.34. Accordingly, Arar's claim falls outside the TVPA.

Nor can the concept of *constructive custody* correct that defect. SPA.27. The statute does not contain a "constructive" custody standard. It requires actual "custody," 28 U.S.C. § 1350, note § 3(b)(1), *i.e.*, "[t]he care and control of . . . a person," *Black's Law Dictionary* 412 (8th ed. 2004). When Arar was in Syria, he was not in Thompson's "care and control." Arar was not even in Thompson's "constructive custody," *i.e.*, custody "of a person (such as a parolee or probationer) whose freedom is controlled by legal authority but who is not under direct physical control." *Id.* Arar's "freedom" in Syria was not curtailed by "legal impediments" (as with "a parolee or probationer"), much less by U.S. legal impediments. He was subjected to direct physical custody and control. Because that custody and

control was exercised by Syrians rather than defendants, the TVPA claim fails.

C. Defendants Are Entitled To Qualified Immunity Under The TVPA

Finally, defendants are entitled to qualified immunity on the TVPA claims. *See Schneider*, 310 F. Supp. 2d at 267.[12] It surely is not "clearly established" that defendants' actions occurred under color of Syrian law rather than U.S. law, as the unanimous panel decision and case law attest. *See* pp. 57-59, *supra.* And, it was hardly "clearly established" that Arar was, while in Syria, under defendants' "custody or physical control." Accordingly, immunity must be recognized.

[12] Qualified immunity is generally available to officers executing official duties, even when the statute is silent. *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974); *Procunier v. Navarette*, 434 U.S. 555, 561 (1978). This Court has recognized qualified immunity under various statutes. *See, e.g.*, *Brown v. City of Oneonta*, 106 F.3d 1125, 1132 (2d Cir. 1997) (Family Educational Rights and Privacy Act), *abrogated in part not relevant, Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Christopher P. v. Marcus*, 915 F.2d 794, 798-802 (2d Cir. 1990) (Education of All Handicapped Children Act); *P.C. v. McLaughlin*, 913 F.2d 1033, 1041-42 (2d Cir. 1990) (Rehabilitation Act).

CONCLUSION

For all the foregoing reasons—and those set forth in the briefs and letters of the other defendants—the judgment of the district court should be affirmed.

Dated: November 4, 2008

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,994 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: November 4, 2008

_____
Jeffrey A. Lamken

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