No. 09-923

In the Supreme Court of the United States

MAHER ARAR,
PETITIONER

v.

JOHN ASHCROFT, FORMER ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
RESPONDENTS

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondents' opposition seeks to deflect attention from the grave allegations presented here—that respondents intentionally sent a Canadian citizen to Syria to have him arbitrarily detained and questioned under torture, and intentionally blocked his access to the congressionally mandated judicial review designed to prevent such actions. To deny petitioner Maher Arar a remedy is to reward federal officials for flouting one of the most fundamental prohibitions that our law recognizes—the prohibition on torture—and for evading the judicial check that Congress established. The court of appeals reached that result by adopting an unprecedented threshold test that virtually ensures that a *Bivens* action will never proceed, and by rejecting Congress's directive that the Torture Victim Protection Act be applied to all who act under color of foreign law in subjecting an individual to torture.

I. This Case Directly Presents the Question Whether Federal Officials Can, With Impunity, Intentionally Subject a Person to Torture and Obstruct His Access to Congressionally-Mandated Judicial Review Designed to Prevent Torture.

Respondents' oppositions read as though the case does not involve allegations of intentional conspiracy to torture and obstruction of access to congressionally guaranteed judicial review. The Solicitor General's opposition on behalf of John Ashcroft

and the official capacity respondents acknowledges that federal law and policy prohibit torture under all circumstances, but argues that the issues here have nothing to do with torture, and involve only three narrow questions regarding *Bivens* liability, the interpretation of the Torture Victim Protection Act, and the sufficiency of Arar's pleading. Ashcroft Opp. 9-10. The other respondents repeatedly assert, *without any record support and contrary to the facts alleged*, that U.S. officials obtained assurances from Syria—a country that the State Department has consistently found to use torture—that Arar would not be tortured. Thompson Opp. 5, 9, 12, 14, 18-19. In addition, the Solicitor General maintains that Arar's suit for damages is improper because he failed to pursue the statutory remedies that Congress provided to ensure that foreign nationals are not removed to countries where they face a risk of torture. Ashcroft Opp. 19-22.

Each of these statements is misleading or false. First, this case is most assuredly about torture—specifically, about whether the absolute federal prohibition on torture can be violated with impunity. The complaint alleges that respondents intercepted Arar, a Canadian citizen on his way home to Canada, kept him out of court so that he could not challenge their actions, and forcibly delivered him to Syrian security service officials for the purpose of having him arbitrarily detained and tortured. If U.S. officials are free to deliver a man to be tortured without any legal accountability, the prohibition on torture found in the Constitution and federal statutes is empty symbolism.

Second, this is not a case about mistaken reliance on assurances. On review of a motion to dismiss, the case must be decided solely on the allegations in the complaint—and the complaint says nothing about assurances. Respondents could have introduced evidence about any purported assurances that they may have received and then sought summary judgment. But they chose not to do so, and cannot now avoid review by adverting to "assurances" not part of the record. The complaint plausibly alleges that respondents intentionally conspired to send Arar to Syria to be tortured, and therefore the question is whether that allegation gives rise to a cognizable *Bivens* claim, not what factual defenses respondents might assert.

Had respondents properly raised the issue of assurances, the record would have included substantial evidence that the asserted "assurances" provided no assurance at all. The Department of Homeland Security's Inspector General reported, for example, that the INS concluded that returning Arar to Syria would more likely than not result in his torture.[1] He noted that federal officials followed none of the traditional channels for seeking assurances.[2] He con-

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[1] DEP'T OF HOMELAND SECURITY'S OFFICE OF INSPECTOR GENERAL, THE REMOVAL OF A CANADIAN CITIZEN TO SYRIA, OIG-08-18, at 22 (Mar. 2008, publicly released June 5, 2008), *available at* https://www.hsdl.org/?view&doc=90806&coll=public ("OIG Report").

[2] *See* DEP'T OF HOMELAND SECURITY'S OFFICE OF INSPECTOR GENERAL, THE REMOVAL OF A CANADIAN CITIZEN TO SYRIA (REDACTED) ADDENDUM, OIG-08-18, at 3-4 (Mar. 2010), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIGa_08-

cluded that the assurances were "ambiguous regarding the source or authority purporting to bind the Syrian government to protect Arar," OIG Report at 5, and that their validity "appears not to have been examined." *Id.* at 22. Indeed, the Inspector General could not exclude the possibility that Arar was sent to be interrogated under unlawful conditions, the very possibility that Arar alleges actually occurred. *See* Pet. 14 n.7.[3]

Third, and most importantly, respondents' invocation of statutory immigration remedies as a basis for dismissing Arar's *Bivens* claims ignores a critical fact: respondents did everything within their power to ensure that Arar could *not* seek the statutory remedies that Congress prescribed. Holding

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18_Mar10.pdf ("OIG Report Addendum"). *See also* OIG Report at 26-27.

[3] The same flaw infects the Thompson respondents' contention—made for the first time in their opposition to the petition for certiorari—that Thompson chose not to return Arar to Canada, his home country, because Canada has a porous border with the United States. Thompson Opp. 2, 3 n.2, 32. This explanation is not part of the record. Moreover, unless respondents knew Arar would be arbitrarily detained by Syria, nothing would have stopped Arar from leaving Syria and returning to Canada and its assertedly porous borders. But again, this assertion was never made part of the record, was not subject to adversarial testing, and therefore is not admissible in reviewing the grant of a motion to dismiss.

Respondents' claim that Arar only "now" denies membership in Al Qaeda is also false. Thompson Opp. at 3. Arar's complaint squarely asserts that he is not involved with Al Qaeda or any other terrorist organization, and that he vehemently denied any affiliation with terrorists groups while interrogated in New York. Pet. App. 444a, 453a-454a.

him in solitary confinement, they initially denied his requests for a lawyer and to call his family. Then, as soon as Arar was able to see a lawyer, they hastily scheduled his "fear of torture" proceeding for late the next night—a Sunday night—so that his lawyer could not participate. They lied to Arar that night, telling him that his lawyer had chosen not to participate. They lied to the lawyer about Arar's whereabouts the next day, claiming he was taken to New Jersey, when in fact he was still in New York, as they prepared to transport him to Syria. They waited to serve Arar with his final order of removal—a prerequisite to judicial review—just before they placed him, shackled and bound, on a federally chartered jet to Jordan, where he was taken to Syria and locked up in solitary confinement for most of his year-long captivity.[4] They never served the order on Arar's attorney, as required by their own regulations, 8 C.F.R. § 292.5(a) (2002), or informed her that Arar had been sent to Syria. *See* Pet. 4-6. These extraor-

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[4] The Thompson respondents claim that Arar took "no action" after receiving a notice on October 1, 2002, that he might be summarily removed within five days. Thompson Opp. 2. In fact, Arar sought to consult a lawyer and a consular officer, and objected that he should not be sent to Syria because he would be tortured. As Arar has maintained throughout the proceedings, he never sought admission to the United States, but was only trying to change planes on his way home, and "removal" to Canada would have gotten him home. The October 1 notice did not inform Arar that he would be removed to Syria. OIG Report at 15. A Canadian consular official assured Arar that he would not be sent to Syria, as he was a Canadian citizen. Pet. App. 456a. *See also* OIG Report at 22 ("The usual disposition of a removal action would have involved removing Arar to Switzerland or transporting him to a nearby country where he resided and had citizenship, not to transport him to a nation where his proof of citizenship had lapsed.").

dinary measures reflect what Arar has alleged—a conscious design to keep him from the courts that would have protected him. Indeed, respondents have never suggested any other explanation.

Congress assigned the courts a central role in promoting adherence to the federal prohibitions on torture and refoulement. Yet respondents intentionally obstructed Arar from accessing that remedy so that they could subvert those very prohibitions. Respondents maintain that the separation of powers requires the courts to stay their hand here. On the contrary, *Bivens* relief is essential precisely to reinforce the congressionally established judicial check that executive officials successfully evaded.[5] To dismiss Arar's case at the threshold is to reward federal officials for getting away with torture—and for flouting Congressional will.

II. The Unprecedented *Bivens* Standard Employed by the Court of Appeals Conflicts with Decisions of This Court and Other Circuits.

Respondents only half-heartedly attempt to defend the court of appeals' unprecedented standard for determining whether a *Bivens* remedy should be recognized. Instead, respondents principally argue that the Court should overlook the court of appeals'

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[5] Respondents also argue that because the statutory review provisions contain no damages remedy, a *Bivens* remedy for torture is precluded. Ashcroft Opp. 20-21. But statutory review, if successful, would have prevented the torture, making damages unnecessary. Congress could not have intended that government officials should be free to deny access to its review procedure altogether.

reasoning, and attempt to defend the decision on other grounds.

The court of appeals constructed out of whole cloth a threshold hurdle for *Bivens* claims that Bivens himself could not have satisfied. It held that in assessing whether to recognize a *Bivens* claim, courts should give *no consideration whatsoever* to factors in favor of recognizing a *Bivens* remedy, and should deny such claims if there is *any* reason for hesitation or doubt. Pet. App. 31a-32a. This one-sided, hair-trigger approach would effectively overrule *Bivens*, for reasonable minds will always be able to identify *some* reason for hesitation, and if no considerations in favor of a claim may even be weighed in the balance, a negative result is preordained.

The court of appeals' explicit refusal to consider factors weighing in favor of a *Bivens* claim directly conflicts with *Wilkie v. Robbins*, 551 U.S. 537 (2007), which held that *Bivens* requires "weighing reasons *for and against* the creation of a new cause of action, the way common law judges have always done." *Id.* at 554 (emphasis added). The Solicitor General maintains that there is no need to consider positive factors because they are the same in every case—providing a remedy for a constitutional violation. Ashcroft Opp. 17-18. But the Court in *Wilkie* said and did otherwise, expressly calling for the weighing of positive as well as negative factors, and then undertaking precisely that inquiry. 551 U.S. at 555-62.

The *Wilkie* Court first carefully assessed the reasons *for* granting Robbins a remedy. It found that

Robbins was seeking a remedy for the government's overly aggressive "course of dealing" with him, and that while Robbins did have other state and federal remedies available, these remedies were not fully adequate. 551 U.S. at 555. The Court expressly deemed this consideration to weigh in *favor* of recognizing a claim. *Id.* It then found, however, that the negative factors outweighed the positive. *Id.* at 561-62. By contrast, the court of appeals here engaged in no weighing whatsoever, and no consideration of positive factors.[6]

The Solicitor General does not even try to defend the court of appeals' erroneous statement that *any* reason for hesitation is an absolute bar, and instead urges the Court to overlook it because the court of appeals twice indicated that it thought the special factors here "strongly" counseled hesitation. Ashcroft Opp. 18-19. But under the court's unprecedented standard, virtually any ground for doubt would "strongly" counsel hesitation. Moreover, the court insisted that its threshold test was "integral to the holding in this in banc case, because we do not take account of countervailing factors and because

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[6] The Thompson respondents argue that courts need not consider any positive factors because the "special factors" analysis addresses "not whether a damages remedy would be good policy," but whether Congress or the courts should decide to create a remedy. Thompson Opp. 19. But in *Wilkie* itself, the Court identified the "special factors" analysis as an integral part of the court's "common-law" weighing inquiry. 551 U.S. at 550. The determination that Congress rather than the Court should decide to create a remedy is not a distinct inquiry, but simply the end result of *any* decision declining to recognize a *Bivens* claim, for it is always open to Congress to create a remedy where the Court has not.

we apply the standard we announce." Pet. App. 32a. Thus, the court itself rejected the Solicitor General's suggestion that its erroneous standard was a mere "statement[] in [an] opinion." Ashcroft Opp. 18 (quoting *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam)); Thompson Opp. 17.

Respondents have cited no other decision applying as one-sided or restrictive a standard as the court of appeals did here. Without saying so, the court effectively eviscerated *Bivens*. That is beyond the court's authority. For that reason alone, its decision warrants certiorari.

III. Arar's Allegations of Torture and Obstruction of Arar's Access to Remedies Prescribed by Congress Are Critical Factors Supporting *Bivens* Relief Here.

Had the court of appeals not artificially closed its eyes to factors favoring a *Bivens* remedy, it would have had substantial positive factors to consider. The fact that respondents allegedly subjected a man in their custody to torture is itself an extraordinarily strong factor supporting a remedy under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). One of the Court's earliest *Bivens* decisions held that damages were an appropriate remedy for abuse of a federal detainee, even where the allegations did not rise to the level of torture. *Carlson v. Green*, 446 U.S. 14 (1980). This Court has identified torture as the paradigmatic violation of substantive due process. *See Rochin v. California*, 342 U.S. 165, 172 (1952) (holding that stom-

ach pumping violates substantive due process as "too close to the rack and screw"). International law treats the prohibition on torture as a non-derogable *jus cogens* norm, the highest form of legal prohibition recognized in international law, reserved for the most egregious wrongs, such as genocide. *See, e.g.*, *Filártiga v. Peña-Irala*, 630 F.2d 876, 885 (2d Cir. 1980). As the Solicitor General notes, torture is absolutely forbidden by both federal statute and policy. Ashcroft Opp. 9. And the State Department has represented that the United States meets its obligations under the Convention Against Torture (CAT) in part by recognizing *Bivens* actions against federal officials who torture.[7] In light of the gravity of torture and our obligations to refrain from it, the need for deterrence, which this Court has previously identified as a positive factor, takes on enhanced weight here. *See, e.g.*, *Bivens*, 403 U.S. at 395-97; *Carlson*, 446 U.S. at 20-21; *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 70-71 (2001).

That respondents are alleged to have violated such a fundamental prohibition is surely a strong factor favoring a damages remedy—particularly where, as here, and as in *Bivens*, *Carlson*, and *Davis v. Passman*, 442 U.S. 228 (1979), this is the only remedy Arar can obtain from the federal respondents. If the court of appeals' decision stands, fed-

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[7] *See* U.S. Dep't of State, *United States Written Response to Questions Asked by the United Nations Committee Against Torture*, pt. 5 (bullet-point 5) (Apr. 28, 2006), *available at* http://www.state.gov/g/drl/rls/68554.htm; U.S. Dep't of State, *United States Report to the United Nations Committee Against Torture*, ¶ 51 (bullet-point 5), ¶ 274, U.N. Doc. CAT/C/28/Add/5 (Feb. 9, 2000), *available at* http://www.state.gov/documents/organization/100296.pdf.

eral officials who, for purposes of this motion to dismiss, must be presumed to have intentionally subjected Arar to torture, will escape all accountability.

The second factor that strongly supports *Bivens* relief is the fact that, as part of their conspiracy, respondents intentionally obstructed Arar's access to the remedies Congress provided to forestall torture. Respondents do not dispute that had Arar been able to get to court, he could have sought redress in the form of an order barring respondents from delivering him to his torturers in Syria. Instead, respondents argue that the (entirely theoretical) availability of these alternative avenues supports preclusion of a *Bivens* claim now. But this argument ignores the allegations, recited above, *supra* pp. 4-6, that respondents obstructed those very avenues of review.[8]

Respondents object that Arar's access to court claim was pleaded with insufficient particularity. In

[8] Respondents' contention that certiorari should be denied because the district court lacked jurisdiction—a position rejected by the district court and not reached by the court of appeals—is meritless. To hold that Congress's immigration review statutes preclude jurisdiction here would require the Court to conclude that in establishing judicial review of removal decisions, Congress intended to preclude damages actions for torture, arbitrary detention, and denial of access to court where executive officials affirmatively obstruct foreign nationals from pursuing the very avenues for judicial review that Congress established. There is no support in the statute or its legislative history for that perverse result. On the contrary, a *Bivens* action here would reinforce Congress's statutory scheme, by preventing federal officials from evading with impunity the congressional bans on torture and refoulement and the congressionally established procedures for judicial review.

fact, Arar identified a specific and detailed chronology of events, recited above, *supra* pp. 4-6, that is susceptible to one and only one explanation—respondents' conscious intent to ensure that Arar's removal for torture not be reviewed by a court. As Judge Parker noted in dissent, to require anything more of a person who was held in solitary confinement until he was removed would be entirely unreasonable. Pet. App. 145a-146a. And while Arar did not seek to replead his access-to-court claim, to do so would have been futile. The district court ordered him to amend without reference to his being removed to Syria for torture—but the claim that respondents obstructed him from adjudicating was precisely his claim that sending him to Syria to be tortured would violate the CAT.[9]

Moreover, whether or not Arar's access-to-court claim stands as an independent constitutional claim, his allegations concerning respondents' interference with his ability to seek judicial intervention support his *Bivens* claim for torture and arbitrary detention. The alleged obstruction was part and parcel of the plan to subject him to torture and arbitrary detention. Having decided to send Arar to Syria so that security forces there could arbitrarily detain and torture him, respondents had to keep Arar out of court—because no court would allow his removal to Syria under these circumstances. The fact that re-

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[9] Respondents also contend that the access-to-court claim fails because Arar did not identify the legal claim he was foreclosed from pursuing. Ashcroft Opp. 27. In fact, Arar's complaint specifically identified the foregone claim in its opening paragraph—his right under the Convention Against Torture not to be removed to Syria, where he faced a risk of torture. Pet. App. 440a.

spondents furthered their conspiracy to torture Arar by keeping him away from the judicial review that Congress prescribed strongly supports *Bivens* relief, because such relief would ensure that federal officials are not free to evade congressionally prescribed review procedures designed to prevent removal to torture in the first place.

A third factor strongly favoring *Bivens* is the fact—undenied by respondents—that had these officials tortured Arar while he was in custody in Brooklyn, a *Bivens* action would now be available. *See Carlson v. Green*, 446 U.S. 14. There is no justification for denying Arar a *Bivens* claim simply because respondents instead intentionally delivered him to Syria for the purpose of subjecting him to the same abuse there. As Judge Sack stated in his dissent, "we do not think that the question whether the defendants violated Arar's substantive due process rights turns on whom they selected to do the torturing, or that such 'outsourcing' somehow changes the essential character of the acts within the United States to which Arar seeks to hold the defendants accountable." Pet. App. 96a-97a.[10]

Because the court of appeals artificially precluded any consideration of factors favoring *Bivens*

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[10] As the Canadian Minister of Foreign Affairs has recently reiterated, at no point did Canada oppose Arar's entry into Canada. *See* May 24, 2010 Request by Petitioner to Lodge Letter from Canada's Minister of Foreign Affairs. Respondents do not dispute that the court of appeals' statement to the contrary—that Canada was "unwilling to receive him," Pet. App. 48a—was utterly false. *See* Pet. 9 n.5.

review, it took no account of any of these factors in assessing whether a *Bivens* remedy should lie.[11]

IV. None of the "Special Factors" Cited by Respondents or the Court of Appeals Warrants Preclusion of the *Bivens* Claims Here.

Respondents argue that the court of appeals correctly cited national security, foreign policy, and the need for confidential communications as "special factors" barring a *Bivens* action. These factors, however, do not support preclusion of *Bivens* relief for a claim of torture and arbitrary detention, particularly when weighed against the factors favoring relief.

Respondents argue that reviewing Arar's claim risks intruding on executive prerogative with respect to foreign policy and national security authority. But as the Solicitor General concedes, federal policy and federal law are crystal-clear: torture is never a policy option. Ashcroft Opp. 9. Awarding damages on a claim that federal officials conspired to torture would interfere with no legitimate executive

[11] Both briefs in opposition point to a single boilerplate sentence in the court of appeals' opinion to suggest that the court considered positive factors *sub silentio*, despite the court's own statement that its refusal to "take account of countervailing factors" was "integral to the holding." Pet. App. 32a, n.7; Thompson Opp. 20; Ashcroft Opp. 18 (both quoting Pet. App. 31a-32a). That sentence, which simply states that the "special factors should be substantial enough to justify the absence of a damages remedy for a wrong," Pet. App. 31a-32a, provides no indication that the court somehow considered the factors it expressly said that it would *not* consider.

discretion, as there is no discretion to subject a human being to such treatment.

Moreover, Congress has expressly authorized *courts* to review and reverse removal orders where they find, contrary to the executive's judgment, that even a risk of torture is present. Congress does not consider these matters beyond judicial purview; on the contrary, it deems judicial review essential. The existence of a statutory directive for courts to review torture claims in the removal setting sharply distinguishes this case from *Munaf v. Geren*, 128 S. Ct. 2207 (2008), in which no such express statutory directive existed. In *Munaf*, this Court held that absent an extreme case, courts cannot interfere with the transfer of a citizen captured in Iraq during wartime to the Iraqi government for prosecution of crimes committed in Iraq. The Court in *Munaf* stressed that "this is 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. Arar's case is even more extreme than the "extreme" case hypothesized in *Munaf*, for Arar alleges that defendants intentionally sent him to Syria not simply knowing he would likely be tortured, but *because* he would be tortured. And here, unlike *Munaf*, Arar was in the United States, not in a war zone, and Congress explicitly authorized review of his claims.

Respondents contend that judicial review of CAT claims is generally based on country reports and transcripts of witness testimony, and does not usually involve review of, for example, executive communications regarding assurances. Thompson

Opp. 15. But Congress provided for judicial review in *all* removal cases where a risk of torture is allegedly present, and made no exception for cases involving "diplomatic assurances." In fact, federal courts have reviewed removal cases involving assurances, and the Third Circuit has held that foreign nationals must be afforded an opportunity to challenge the reliability of those assurances—an opportunity Arar never received. *Khouzam v. Attorney General of the United States*, 549 F.3d 235, 259 (3d Cir. 2008). Reviewing assurances, far from being improper for judicial review, is essential if the protections afforded by law are to be enforceable. Courts overseas accordingly routinely review assurances in national security cases to assess whether they are adequate to eliminate the risk of torture.[12]

Respondents also point to the risk that classified information might be revealed, including confidential communications between the United States and Canada and Syria. Thompson Opp. 16-17; Ashcroft Opp. 13. But Canada has fully investigated Arar's case, and has stated that litigating Arar's

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[12] *See, e.g.*, *Trabelsi v. Italy*, App. No. 50163/08 (Eur. Ct. H.R. 2010) (finding diplomatic assurances Italy obtained from Tunisia insufficient to permit removal); *Klein v. Russia*, App. No. 24268/08 (Eur. Ct. H.R. 2010) (finding diplomatic assurances from Colombia insufficient to permit extradition); *Saadi v. Italy*, App. No. 37201/06, at ¶138 (Eur. Ct. H.R. 2008) (finding diplomatic assurances from Tunisia insufficient to permit removal); *RB & U (Algeria) and OO (Jordan) v. Sec'y of State for the Home Dep't*, [2009] UKHL 10 (appeal taken from Eng.) (U.K.) (finding diplomatic assurances sufficient to permit removal); *Suresh v. Canada (Minister of Citizenship and Immigration*), [2002] 1S.C.R. 3, 2002 SCC 1 (Can.) (finding diplomatic assurances from Sri Lanka insufficient to permit removal).

claims in this proceeding would raise no concerns from its vantage point. *See* May 24, 2010 Request by Petitioner to Lodge Letter from Canada's Minister of Foreign Affairs ("the Government of Canada confirms that it does not have reason to believe that Mr. Arar's civil suit in the United States would risk harming diplomatic relations between Canada and the United States"). Any legitimate secrecy concerns on the part of the United States may be addressed by a proper assertion of the state secrets privilege, which has its own particular procedures and parameters to prevent the disclosure of privileged evidence. *See, e.g.*, *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953). The district court and court of appeals bypassed that process entirely, and dismissed the case at the threshold on the mere *possibility* that classified evidence might be implicated. As this Court noted in *Boumediene v. Bush,* if privileged evidence is implicated, the courts have procedures for addressing it. 128 S. Ct. 2229, 2276 (2008). To dismiss a case at the threshold based on the mere possibility that privileged material may be implicated, without pursuing the "state secrets" process set forth by this Court is contrary to *Reynolds* itself.

V. By Willfully Participating in Joint Action With Syrian Officials to Subject Arar to Torture in Syria, Respondents Acted Under Color of Both U.S. and Syrian Law.

Respondents' opposition to this Court's review of Arar's Torture Victim Protection Act (TVPA) claim rests entirely on their argument that they cannot have acted under color of Syrian law because they

acted as federal officials when they delivered Arar to Syria and conspired with Syrian security officials to have him tortured there. But respondents offer no reason why federal officials do not act under *both* federal law and foreign law when they conspire with foreign officials to have a person in their custody tortured by those foreign officials. If a private party had delivered Arar to Syria to be tortured, he would plainly be liable under the TVPA; there is no reason why the fact that respondents also abused federal power should immunize them from accountability for their collusion in subjecting Arar to torture under color of Syrian law.

The TVPA imposes liability on any "individual" who subjects another to torture under color of foreign law, and creates no exemption for United States officials. 28 U.S.C. § 1350 note.[13] A government official can act under color of law of more than one state or nation, and the majority did not find otherwise. *See* Pet. App. 170a (Pooler, J., dissenting) (majority did not adopt "questionable reasoning" that "federal official can act under color of only one sovereign's authority at a time").

Respondents concede that "color of law" under the TVPA is to be construed in accordance with jurisprudence under 42 U.S.C. § 1983,[14] and do not dis-

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[13] President Bush's statement expressing his belief that Congress did not intend that the TVPA "should apply to United States Armed Forces or law enforcement operations," *see* Ashcroft Opp. 24 n.8, sheds no light on *congressional* intent, and is especially suspect given that it is a self-serving assertion of executive immunity from legal accountability.

pute that TVPA liability extends to those who conspire to torture. Moreover, respondents concede that there are a variety of alternative "color of law" tests, Thompson Opp. 29, and do not seriously refute that "willful participation in joint action" is one of them. *See, e.g.*, *Dennis v. Sparks*, 449 U.S. 24 (1980). The court of appeals' decision is at odds with this Court's section 1983 jurisprudence, and respondents fail to convincingly argue to the contrary.[15]

Respondents claim that an unarticulated "normative judgment" calls for using only the "traditional test" of *West v. Atkins*, 487 U.S. 42 (1988), here. Thompson Opp. 29-30. Yet respondents provide no rationale for why the TVPA "color of law" formulation should be limited to that used in *West*, and should not include the alternative "color of law" tests applicable to section 1983, including the "willful participation" test articulated in *Dennis v. Sparks*.

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[14] Thompson Opp. 28 n. 15. Respondents' resurrection of the district court's contention that it is no "simple matter to equate" domestic actions with those "undertaken under color of foreign law," *Id.* at 31, quoting Pet. App. 371a, ignores Congress's explicit direction to look to section 1983 in construing "color of law" in the TVPA, even though it *always* involves action under foreign law. H.R. Rep. No. 102-367, at 5 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 84, 87; S. Rep. No. 102-249, 1991 WL 258662, at *8 (1991).

[15] Respondents' suggestion that *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999), questioned the "joint participation" test is unfounded. *Sullivan* merely reiterated that the holding in *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982) is limited to the context of prejudgment attachment procedures. *Sullivan,* 526 U.S. at 58; *see also Lugar*, 457 U.S. at 939 n.21. *Sullivan* did not even cite *Dennis v. Sparks*, much less purport to undercut its holding.

See, e.g., *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001) (willful participation in joint activity is one of various color of law tests). Congress directed that the same standards should apply to the TVPA, and thus the *Sparks* test is applicable.

Sparks held that private parties who influenced a government official to abuse his government position acted under color of state law because they willfully participated in joint action with the official. *Sparks*, 449 U.S. at 27-29.[16] The test in *Sparks* is easily satisfied here, as respondents are alleged to have delivered Arar to Syria to have him tortured by Syrian officials, provided information to them to guide their questions under torture, and received the answers from them. That is more than enough to establish willful participation in joint action.

As Judge Pooler noted in dissent below, any distinction between directly exercising power under foreign law and facilitating that exercise of power is "unprincipled," Pet. App. 170a, given that conspirators are deemed "agents of one another," a point respondents do not dispute. *Anderson v. United States*, 417 U.S. 211, 218 n.6 (1974). As Judge Pooler ex-

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[16] *West*, on the other hand, found that a private physician with a part-time contract with the state to treat inmates acted under color of state law in providing medical treatment. *West*, 487 U.S. at 56-57. Therefore the doctor "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West*, 487 U.S. at 49 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). Nothing in *West* purports to overrule *Sparks*, or to limit "color of law" jurisprudence to the particular facts presented.

plained, "Arar alleges that U.S. officials, recognizing that Syrian law was more permissive of torture than U.S. law, contacted an agent in Syria to arrange to have Arar tortured under the authority of Syrian law." Pet. App. 169a. "[D]efendants' wrongdoing was only possible due to the latitude permitted under Syrian law and their joint action with Syrian authorities." *Id.* Under these circumstances, it is the height of formalism to say that U.S. officials did not act under color of Syrian law merely because they simultaneously abused their own authority.

The majority's dismissal of Arar's TVPA claim conflicts not only with this Court's color of law jurisprudence, but also with the Eleventh Circuit's TVPA decision in *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242 (11th Cir. 2005). *Aldana* found that allegations that defendant colluded in the torture of plaintiffs by a group that included a Guatemalan official were sufficient to state a claim for TVPA purposes. *Id.* at 1249. Respondents attempt to distinguish *Aldana* because the defendant there was not a federal official. Thompson Opp. 29 n.7. But again, neither respondents nor the court of appeals offer a principled reason for treating a private party and a federal official differently when they conspire with foreign officials to subject an individual to torture under color of foreign law, as alleged here. Absent a principled distinction, the court of appeals' decision squarely conflicts with *Aldana*.[17]

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[17] Respondents incorrectly assert that every court to consider the issue has ruled that U.S. officials pursuing federal policy cannot act under color of foreign law for TVPA purposes. Thompson Opp. 28; *cf.*, Ashcroft Opp. 25-26. In fact, *Gonzalez-Vera v. Kissinger* did not adopt defendant's argument that as a

CONCLUSION

For all the above reasons, the petition for a writ of certiorari should be granted.

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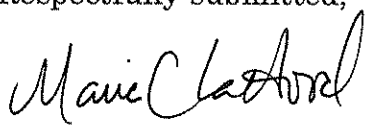
Respectfully submitted,



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U.S. official he could not have acted under color of law of a foreign nation. No. 02-cv-02240, 2004 WL 5584378 at *8 (D.D.C. Sept. 17, 2004), *aff'd on other grounds*, 449 F.3d 1260 (D.C. Cir. 2006). Plaintiffs' TVPA claims were dismissed because their complaint did not allege that defendant was a "willful participant in joint action with the state or its agents." *Id.* at *9 (internal quotations omitted).