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December 21, 2006

U.S. Court of Appeals for the Second Circuit
Office of the Clerk
Room 1802
40 Foley Square
New York, NY 10007

Re: No. 06-4216-cv, Arar v. Ashcroft

Dear Sir:

Pursuant to Local Rule 32(a)(1)(E), this letter certifies that the PDF version of the above-referenced brief submitted by Bridget Arimond on behalf of The Center for International Human Rights of Northwestern University School of Law as Amicus Curiae in Support of Plaintiff-Appellant and Urging Reversal has been scanned for viruses. No viruses were detected upon completion of such scan.

Sincerely,

Merna Smith
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cc: Barbara L. Herwig, Scott Dunn, Dennis Barghaan, Jeremy Maltby, William Alden McDaniel, Debra L. Roth, Thomas G. Roth, Stephen L. Braga, Maria Couri LaHood

06-4216-cv

In the

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 for Homeland Security; JAMES W. ZIGLAR, formerly Commissioner for Immigration and Naturalization Services; J. SCOTT BLACKMAN, formerly Regional Director of the Eastern Regional Office of the

(For Continuation of Caption See Inside Cover)

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

BRIEF OF THE CENTER FOR INTERNATIONAL HUMAN RIGHTS OF NORTHWESTERN UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND URGING REVERSAL

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Defendants-Appellees

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INTEREST OF THE *AMICUS*

The Center for International Human Rights of Northwestern University School of Law ("the Center") works to foster respect for the norms of international human rights law, both within the international community and within the domestic legal systems of the nations of the world. To this end, the Center engages in education, research, technical assistance and advocacy in support of human rights law. Based as it is in the United States, the Center has a particular concern with promoting respect for international human rights norms within the United States.

The Center files this brief because of its particular concern that all persons complicit in torture should be held accountable under law for what they have done. Within the United States, one important mechanism of accountability is the Torture Victim Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73, 28 U.S.C. § 1350, note. Because this case raises several critical issues regarding the proper interpretation and application of the TVPA, *amicus* submits this brief.

This brief is submitted with the consent of all parties.

ARGUMENT

More than a quarter century ago this Court gave voice to "the universal abhorrence with which torture is viewed" and held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights." *Filartiga v. Pena-Irala*, 630 F.2d 876, 884, 878 (2d Cir. 1980). At the time, the Court characterized its decision[1] as one "small but important step in the fulfillment of the ageless dream to free all people from [the] brutal violence" of torture. *Id.* at 890.

In the years since *Filartiga*, both the international community and the United States have taken further steps to end the impunity of torturers and hence to realize a more complete fulfillment of this enduring dream. On the international plane, 144 nations, including the United States, have committed themselves as states parties to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture").[2] Domestically, the United States has built upon its ratification of this treaty by enacting both criminal and civil

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[1] The *Filartiga* decision held that federal courts had jurisdiction to hear torture claims brought pursuant to the Alien Tort Statute, 28 U.S.C. § 1350. *Filartiga*, 630 F.2d at 878.

[2] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1990), 1465 U.N.T.S. 85.

legislation to bring to an end the impunity of those complicit in torture: the Torture Act, 18 U.S.C. § 2340 *et seq.*, to criminalize complicity in torture[3] not previously made criminal by U.S. law, and the Torture Victim Protection Act ("TVPA"),[4] to provide a federal court civil damages remedy to victims of torture.

It is this latter Act that is at issue in the present case. *Amicus* submits this brief to address several critical issues with respect to the proper interpretation and application of the Torture Victim Protection Act. In Section I, we will show that the district court was correct in its holding that the TVPA extends liability to those who aid, abet, or conspire to commit torture. Any lesser interpretation would thwart Congress' clear intent to provide a remedy against every person found to be complicit in official torture. In Sections II and III, we will show that this clear intent to reach all persons complicit in torture is determinative of two additional issues as well. In Section II, we will demonstrate that the "custody or physical control" provision[5] in the TVPA's definition of torture can be satisfied by constructive custody, and that it does not in any event provide impunity to

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[3] The Torture Act criminalizes torture, attempts to commit torture, and conspiracy to commit torture, under the circumstances prescribed in the law. 18 U.S.C. § 2340A.
[4] Pub. L. No. 102-256, 106 Stat. 73, 28 U.S.C. § 1350, note.
[5] TVPA, § 3(b)(1).

aiders, abettors, and co-conspirators whose conduct in furtherance of an act of torture takes place outside the torture chamber. In Section III, we will show that the requirement that a defendant must have acted "under actual or apparent authority, or color of law, of any foreign nation,"[6] was intended to import into the TVPA the expansive "color of law" jurisprudence of 42 U.S.C. § 1983, so that TVPA liability will extend to anyone who acts in concert with officials of a foreign nation in subjecting an individual to torture. Finally, in Sections IV and V we will address two additional errors made by the district court. In Section IV we will demonstrate that there is no basis whatsoever for the court's unprecedented holding that the TVPA remedy is restricted to U.S. citizens, and in Section V we will show that, contrary to the view of the district court, the absence of a private right of action under the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA")[7] casts no light whatsoever on the issue of whether a TVPA suit can proceed in the circumstances of this case.

[6] *Id.*, § 2(a).
[7] Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681-822 (Oct. 21, 1998) (codified as Note to 8 U.S.C. § 1231).

I. The TVPA Encompasses Aiding and Abetting and Conspiracy Liability

The district court correctly held that TVPA liability extends to individuals who aid, abet or conspire with torturers. *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 261-62 (E.D.N.Y. 2006). Both the statutory language and the clear legislative history of the TVPA support this conclusion. Accordingly, it is not surprising that "every court construing this question" has concluded "that the TVPA can be interpreted to allow claims for secondary liability." *Id*. at 261. Nothing in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), is to the contrary.

By its express terms, the TVPA extends liability not just to those who themselves *commit* the act of torture, but to anyone who "*subjects*" an individual to torture. Section 2(a), the liability provision, states that "[a]n individual who . . . *subjects* another individual to torture . . . shall be liable for damages . . .." TVPA, § 2(a) (emphasis added).[8] Thereafter, Section 3(b) defines torture, for purposes of the TVPA, as "any act" which meets certain criteria. Having defined torture as an "act," it would have been simple enough, had Congress meant to do so, to draft the liability provision

[8] Section 2(a)(1) reads in full: "Liability. An individual who, under actual or apparent authority, or color of law, of any foreign nation – (1) *subjects* an individual to torture shall, in a civil action, be liable for damages to that individual; or [text continues to § 2(a)(2) regarding extrajudicial killing]" (emphasis added).

to reach only those who themselves had committed the act of torture. For example, such a provision might read: "An individual who . . . commits an act of torture against another individual . . . shall be liable for damages . . .."

But Congress did not do so. Instead of focusing solely on the individual who commits an act of torture, the TVPA makes liable an individual who "subjects" another individual to torture. Under its dictionary definition, the verb "subject" means "to cause someone 'to undergo the action of something specified; to expose . . . to make liable or vulnerable.'" *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386, 2002 U.S. Dist. LEXIS 3293, at *50 (S.D.N.Y. Feb. 22, 2002), *quoting* Random House Webster's College Dictionary (1999). "Using this definition," *Wiwa* correctly held, "individuals who 'cause someone to undergo' torture . . . , as well as those who actually carry out the deed, could be held liable under the TVPA." *Id.*

The legislative history of the TVPA further underscores the statute's reach. The Senate Report accompanying the TVPA states clearly that the Act permits "lawsuits against persons who *ordered, abetted, or assisted in the torture*." S. Rep. No. 102-249, at 8 (emphasis added) (hereinafter "Senate Report"). This extension of liability to all responsible parties reflects both Congress' own abhorrence of torture, and its recognition that

the Convention Against Torture – the intent of which the TVPA was designed to carry out[9] – condemns not only "all acts of torture" but also any "*act by any person which constitutes complicity or participation in the torture*." Senate Report at 9 n.16, *quoting* Art. 4(1) of the Convention Against Torture (emphasis in Senate Report).

Against this background, courts have repeatedly held that the TVPA encompasses liability for aiding or abetting, or conspiracy to commit, torture. *See, e.g., Cabello v. Fernandez-Larios,* 402 F.3d 1148, 1157-59 (11th Cir. 2005) (TVPA defendant could be held liable both for aiding and abetting and for conspiracy); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1174 (C.D. Calif. 2005) (noting that "the legislative history of the TVPA rather unequivocally states that the statute encompasses aiding and abetting theories of liability"); *Doe v. Saravia,* 348 F. Supp. 2d 1112, 1148-49 (E.D. Cal. 2004) (finding defendant liable under TVPA as both an aider and abettor and a co-conspirator); *Wiwa,* 2002 U.S. Dist. LEXIS 3293, at *49-52 ("language and legislative history of the TVPA supports liability for aiders and abettors of torture"); *Mehinovic v. Vukovic,* 198 F. Supp. 2d 1322, 1355-56 (N.D. Ga. 2002).

[9] "This legislation will carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was ratified by the U.S. Senate on October 27, 1990." Senate Report, at 3.

Nothing in *Central Bank* – which predates all of the cases cited above – undermines these holdings. *Central Bank* involved the issue of whether aiding and abetting liability is available under the particular statutory scheme of § 10(b) of the Securities and Exchange Act of 1934. 511 U.S. at 170. The Court held, in the particular context of § 10(b), that the absence of a prohibition against "aiding and abetting" in the text of § 10(b) precluded recognition of aiding and abetting liability. *Id*. at 177. The Court did not, however, set a general rule that aiding and abetting liability could only be recognized where the statutory language expressly used those terms. Instead, several critical factors led the Court to find that, in the particular context of § 10(b), the absence of explicit "aiding and abetting" language ruled out a finding of such liability.

First, the Court noted that the interpretive task in *Central Bank* was complicated by the fact that § 10(b) does not provide an express private right of action at all. Because the §10(b) cause of action is an implied one, the Court was required to infer whether Congress *would* have included aiding and abetting liability, *had* it created an express private right of action. *Id*. at 173. To find aiding and abetting liability in such circumstances would have required the Court, in essence, to endorse a two-tiered implication: first an

implication of a private right of action, and then an implication of aiding and abetting liability.

Second, the Court was deciding the issue against the backdrop of a long line of cases that had established a "settled methodology" for determining the scope of liability in § 10(b) cases. *Id*. at 177, 173-75. Under this "settled methodology," § 10(b) liability could extend no further than the specific conduct expressly prohibited by the pertinent statutory provision. *Id*. at 177. Hence, the Court concluded, "*[b]ecause this case concerns the conduct prohibited by § 10(b),* the statute itself resolves the case." *Id.* at 178 (emphasis added).

Two other factors reinforced the Court's conclusion. First, a comparison with other liability provisions in the 1934 Securities Act showed that "none of the express causes of action in the 1934 Act further impose liability on one who aids or abets a violation." *Id.* at 179. "From the fact that Congress did not attach private aiding and abetting liability to any of the express causes of action in the securities Acts," the Court concluded, it could "infer that Congress likely would not have attached aiding and abetting liability to § 10(b) had it provided a private § 10(b) cause of action." *Id.* Finally, the Court emphasized, this was a case where "nothing in the text or

history of § 10(b) even implies that aiding and abetting was covered by the statutory prohibition." *Id.* at 183.

Subsequent cases confirm that the *Central Bank* does not preclude aiding and abetting liability in the absence of statutory language incorporating those precise terms. In a context much closer to the subject matter of the TVPA than the securities laws, the Seventh Circuit held that aiding and abetting liability is available under the Anti-Terrorism Act ("ATA"), 18 U.S.C. §2331 *et seq.*, notwithstanding the absence in the statutory language of the words "aiding and abetting." *Boim v. Quaranic Literacy Inst.*, 291 F.3d 1000, 1017-1021 (7th Cir. 2002). It did so, significantly, with the support of the United States, which argued as an *amicus* that "the language and legislative history" indicated a Congressional intent to allow aider and abettor liability, notwithstanding the absence of "aider and abettor" in the statutory language. *Id.* at 1017.

Based on a thoughtful and detailed discussion of *Central Bank,* the *Boim* court concluded that there was simply "no support for the defendants' claim that *Central Bank* eliminates all aiding and abetting liability in federal civil cases except when the words 'aid and abet' appear in a statute." *Id.* at 1019 (fn. omitted). Instead, the court found, "[t]he [Supreme] Court carefully crafted *Central Bank's* holding to clarify that aiding and abetting

liability would be appropriate in certain cases, albeit not under 10(b)." *Id.* The Seventh Circuit then distinguished the statute at issue in *Boim* from the one considered in *Central Bank* on a number of important grounds, each of which is equally applicable with respect to the TVPA. "First," the court noted, "*Central Bank* addressed extending aiding and abetting liability to an implied right of action, not an express right of action as we have here in section 2333." *Id.* Thereafter, the court emphasized that, unlike in *Central Bank*, in the case before it the "terms and history" as well as the "purpose" of the statute favored recognizing aiding and abetting liability. *Id.* *See also*, *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 583 (E.D.N.Y. 2005) (adopting *Boim's* reasoning and conclusion recognizing ATA aiding and abetting liability, and also recognizing ATA civil conspiracy liability).

The same reasons that led *Boim* and *Linde* to distinguish *Central Bank* and find liability under the ATA for aiders, abettors, and (in *Linde*) co-conspirators, warrant a comparable finding with respect to the TVPA. Like the ATA, the TVPA provides an express cause of action, not an implied one as was at issue in *Central Bank*. And, as has already been demonstrated, the language, legislative history, and purpose of the TVPA all strongly support recognition of aider, abettor, and co-conspirator liability for those complicit in torture. *See supra*, at 5-7. For these reasons, courts have properly

rejected the argument that *Central Bank* precludes aider, abettor, or co-conspirator liability under the TVPA. *See, e.g., Mujica*, 381 F. Supp. 2d at 1172-74 (aiding and abetting); *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *51-52 (aiding and abetting and conspiracy).

II. The TVPA's "Custody or Physical Control" Requirement Can Be Met By Constructive Custody, and Does Not In Any Event Require Aiders, Abettors, or Co-conspirators to Personally Have Custody of the Victim of Torture

Because it rejected plaintiff's TVPA claim on other grounds, the district court declined to decide whether plaintiff's allegations satisfy the "custody or physical control" provision of the TVPA. As we now show, this question must be answered in the affirmative, for two reasons. First, on the facts alleged in this case, Mr. Arar was effectively within the constructive custody and control of the defendants. But even were this not true, defendants could still be held liable under the TVPA. Because the TVPA extends liability to those who aid, abet, or conspire with torturers, it necessarily follows that a TVPA defendant need *not* have been the one with custody or physical control of the victim at the time of the act of torture.

The TVPA's custody or control requirement has been broadly construed in favor of the plaintiff, so as to permit liability in cases of constructive custody or control. As was recognized in *Xuncax v. Gramajo*,

886 F. Supp. 162, 178 n.15 (D. Mass. 1995), "[w]hile it may be argued that [the plaintiff] was never in [the defendant's] personal custody or physical control, the legislative history of the TVPA indicates that this circumstance does not preclude his liability for her ordeal." The court proceeded to find that the plaintiff "was in the defendant's 'custody' for purposes of TVPA liability, given that the defendant had authority and discretion to order that [she] be released." *Id.*

Based on plaintiff's allegations, which must be construed liberally in his favor on a motion to dismiss, Mr. Arar, too, was in the constructive custody of the defendants at the time of his torture. As alleged in the complaint, Mr. Arar was removed to Syria for the express purpose of interrogation under torture, Complaint at ¶ 57, Joint Appendix ("J.A.") 35, his interrogation was orchestrated by the defendants, who "suggested matters to be covered by Syrian security officers during Mr. Arar's interrogation," *id.* at ¶ 55, J.A. 34-35, and "during Mr. Arar's detention in Syria, the Syrian government shared information gleaned from its interrogation and investigation of Mr. Arar with the United States government," *id.* at ¶ 56, J.A. 35. The clear inference from these facts is that the defendants – having orchestrated Mr. Arar's interrogation and having been kept abreast of the information it was producing – were involved in

such a way that they, like the defendant in *Xuncax*, "had authority and discretion to order that [the torture victim] be released," *Xuncax*, 886 F. Supp. at 178 n.15. Accordingly, Mr. Arar should be deemed, for purposes of the TVPA, to have been in the constructive custody or control of the defendants at the time of his torture. However, even were this not the case, Mr. Arar's TVPA claim against the defendants would still stand because, as we now show, there is no requirement that each aider, abettor, or co-conspirator have the torture victim in his/her personal custody or physical control.

The TVPA's "custody or physical control" requirement appears in the Act's definition of torture. As part of that definition, an act of torture must be "directed against an individual in the offender's *custody or physical control*." TVPA, § 2(a) (emphasis added). Thus, in order for an act to constitute torture, the victim must be in the custody or physical control of the person who actually commits the act of torture. But this is *not* to say that everyone responsible for the torture – everyone who "subjects" the victim to the torture – must have the victim in his/her custody or physical control.

This conclusion is inherent in the idea of aider/abettor and conspiracy liability. To establish aider/abettor liability under the TVPA, a plaintiff must show: (1) that "one or more wrongful acts that comprise the claim were

committed;" (2) that the defendant "substantially assisted some person or persons who personally committed or caused one or more of [those] wrongful acts;" and (3) that the defendant "knew his actions would assist in the illegal or wrongful activity at the time he provided the assistance." *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005). To satisfy the first prong of this analysis – that a wrongful act comprising the claim of torture was committed – the plaintiff must show that s/he was tortured while in the custody or physical control of the person who committed the act of torture. This flows from the definition of torture in TVPA § 3(b)(1).

But neither of the remaining two prongs of aider/abettor liability requires a showing of custody or physical control. A defendant can knowingly provide substantial assistance to a torturer even when the defendant is physically far removed from the actual act of torture.

A comparable analysis applies to conspiracy. To show TVPA conspiracy liability, a plaintiff must show: (1) that "two or more persons agreed to commit a wrongful act;" (2) that the defendant "joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it;" and (3) that "one or more of the violations was committed by someone who was a member of the conspiracy and acted

in furtherance of the conspiracy." *Cabello*, 402 F.3d at 1159. To meet the third prong, in the context of a torture claim, the plaintiff must prove that an act of torture "was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy." And, to show that an act of torture was committed, the plaintiff must show that he was in the custody or physical control of the person who directly committed that act. But neither of the other two prongs of conspiracy – that two or more people agreed to commit a wrongful act, and that the defendants joined the conspiracy with knowledge of at least one of its goals and with the intent to help in its accomplishment – require that the co-conspirators have custody or physical control of the victim.

In this case, there is no dispute whatsoever that Mr. Arar was in the custody and physical control of his torturers at the time of the torture. This is all that is necessary to satisfy the TVPA's custody or physical control requirement in the context of the liability of defendants who aid, abet, or conspire to commit torture. To hold otherwise would shield with impunity many of the very people Congress meant to hold accountable in enacting the TVPA.

III. TVPA Liability Extends to Anyone Who Works in Concert with Foreign Officials in Subjecting an Individual to Torture

The TVPA makes liable any individual "who, under actual or apparent authority, or color of law, of any foreign nation," subjects another individual to torture. TVPA, § 2(a). As this Court has recognized, by using the phrase "under . . . color of law," Congress intended to incorporate the expansive reach that this phrase has taken on in jurisprudence under 42 U.S.C. § 1983. *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995). Thus, because an "individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid," *id.* at 246, an individual acts – for purposes of the TVPA – under color of foreign law when he or she "acts together with" foreign officials or acts "with significant [foreign] state aid."

No other interpretation would be consistent with the Congressional intent to reach all those who aid, abet, or conspire with torturers. Under this interpretation, there can be no doubt that the allegations against the *Arar* defendants describe conduct under color of foreign law. For this reason, as well as for the reasons set forth in the Brief for Plaintiff-Appellant, at 20-28,

the district court erred in holding that Mr. Arar's complaint failed to satisfy the "under color of foreign law" requirement.[10]

IV. Non-Citizens As Well As Citizens May Sue Under the TVPA

The district court's conclusion that only United States citizens may bring an action under the TVPA is utterly unprecedented and entirely wrong. No court but this one, so far as we know, has ever so much as questioned whether non-citizens can sue under the TVPA. But numerous courts have entertained TVPA cases brought by non-citizens,[11] and the Ninth Circuit has recently commented, in discussing the TVPA, that "the TVPA is available to aliens *and* U.S. citizens." *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1092 (9th Cir. 2006) (emphasis in original).

As plaintiff-appellant's brief conclusively demonstrates, both the TVPA's text and its legislative history admit of only one construction: that TVPA actions can be brought by citizens and non-citizens alike. *See* Brief for Plaintiff-Appellant, at 18-20. Because this issue is so clear cut, and was

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[10] *Amicus* joins, but will not repeat here, the arguments made in the Brief for Plaintiff-Appellant, at 20-28.

[11] *See, e.g., Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005) (Guatemalan plaintiffs); *Cabello v. Fernandez-Larios,* 402 F.3d 1148 (11th Cir. 2005) (Chilean plaintiff); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Calif. 2005) (Colombian plaintiffs); *Wiwa v. Royal Dutch Petroleum Co.,* No. 96 Civ. 8386, 2002 U.S. Dist. LEXIS 3293, at *49-52 (S.D.N.Y. 2002) (Nigerian plaintiffs).

dealt with so completely by plaintiff-appellant, *amicus* will adopt but not revisit the arguments made in plaintiff-appellant's brief.

V. The Absence of a Cause of Action Under FARRA Does Not Undercut TVPA Liability on the Facts Alleged by Mr. Arar

According to the district court, the absence of any private right of action under a 1998 statutory provision declaring it the policy of the United States not to remove any person "to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture"[12] "casts important light" on the intended reach of the 1991 TVPA," 414 F. Supp. 2d at 264, and "militates against creating [a private right of action] in this case under the [TVPA]," *id.* at 266. As we now show, this attempt to gauge the intent of the 1991 Congress by reference to a provision enacted by a much later Congress is deeply flawed for multiple reasons.

At the outset, no one is asking the court to "creat[e]" a cause of action in this case. The cause of action already exists – it is the cause of action supplied by the Torture Victim Protection Act. And, for all the reasons set forth above, it is a cause of action that is available to a person in Mr. Arar's situation.

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[12] Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681-822 (Oct. 21, 1998) (codified as Note to 8 U.S.C. § 1231).

Moreover, a review of the chronology of the TVPA and the subsequent legislation relied on by the district court – the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA")[13] – demonstrates why FARRA sheds no light whatsoever on the intended reach of the earlier law. The TVPA was enacted into law in 1991. FARRA was not enacted until seven years later, in 1998. This alone is reason enough to disregard FARRA in interpreting the reach of the earlier statute. The Supreme Court has made clear that the views of a later Congress on the interpretation of a law enacted by a prior Congress are entitled to no weight: "[W]e have observed on more than one occasion that the interpretation given by one Congress . . . to an earlier statute is of little assistance in discerning the meaning of that statute." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185-86 (1994), *quoting Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168 (1989). Hence, nothing in FARRA can shed any light on whether the TVPA should be construed to reach a claim like Mr. Arar's.

Nor can the substance of FARRA be read to repeal, *sub silentio*, the cause of action available under the TVPA against defendants who, as alleged

[13] Pub. L. No. 105-277, div. G, Title XXII, § 2242, 112 Stat. 2681-822 (Oct. 21, 1998) (codified as Note to 8 U.S.C. § 1231).

here,[14] intentionally send an individual from the United States to another country for interrogation under torture. As an initial matter, "absent 'a clearly expressed congressional intention,' . . . 'repeals by implication are not favored . . ..' An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch v. Smith*, 538 U.S. 254, 273 (2003) (citations omitted).

Here, FARRA quite clearly does not purport to cover the whole subject matter of the TVPA. Further, there is no conflict whatsoever, much less an irreconcilable one, between the TVPA's grant of a cause of action against those who aid, abet, or conspire with torturers by sending an individual abroad for the purpose of interrogation under torture, and the later decision of the FARRA Congress not to create a new cause of action under FARRA. "Congressional inaction" – as here, where the FARRA Congress did not act to provide a cause of action under FARRA – "lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change."[15] *Central Bank*, 511 U.S. at 187. As this

[14] *See supra* at 13.

[15] *Central Bank* was discussing the situation where a bill is introduced to accomplish a particular result, but is not enacted by Congress. However, the

Court has aptly recognized, "the legislative decision not to create a new private remedy does not imply that a private remedy is not already available" under a pre-existing statute. *Kadic v. Karadzic*, 70 F. 3d 232, 242 (2d Cir. 1995).

Finally, there is an additional important reason why a TVPA cause of action must be allowed for the conduct at issue here, even though there is no comparable cause of action under FARRA for a violation of the policy – expressed in FARRA – that the United States will not remove someone to a country where there are "substantial grounds" for believing that the person would be in danger of being tortured. It is one thing for a country to send an individual to another country where conditions are such that the person faces the requisite risk of being tortured. Grave as that is, it is a far graver offense to quite intentionally send a person to another country for the very purpose of being interrogated under torture. And that is precisely what Mr. Arar alleges that these defendants have done: "Upon information and belief, United States officials removed Mr. Arar to Syria *so that Syrian security officers could interrogate him under torture* and thereby obtain information for United States counter-terrorism operations. Complaint, at ¶ 57, J.A. 35

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reasoning is equally applicable here, where the district court has suggested that the failure to include a cause of action in FARRA should be read as implying Congressional intent to disallow any TVPA action arising out of the torture of an individual following his removal from the United States.

(emphasis added); *see also* ¶¶ 1, 2, 55, 77, J.A. 20, 36, 38-39. The conduct alleged here, without a doubt, comes within the ambit of the TVPA. Nothing in FARRA can properly be construed to suggest otherwise.

CONCLUSION

For the reasons set forth above, *amicus* urges this Court to reverse the district court's order dismissing Mr. Arar's claims under the Torture Victim Protection Act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32

I, Bridget Arimond, hereby certify pursuant to F.R.A.P. 32(a)(7) that, according to the word count feature of Microsoft Word 2003, the foregoing Brief of the Center for International Human Rights of Northwestern University School of Law as *Amicus Curiae* in Support of Plaintiff-Appellant and Urging Reversal contains 5188 words (exclusive of the table of contents, table of authorities, and certificates) and therefore is in compliance with the 7000 word limit for *amicus* briefs.

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CERTIFICATE OF FILING AND SERVICE

This is to certify under penalty of perjury that I have this day filed with the United States Court of Appeals for Second Circuit the original and nine copies of the foregoing **BRIEF OF THE CENTER FOR INTERNATIONAL HUMAN RIGHTS OF NORTHWESTERN UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND URGING REVERSAL** by Overnight Courier Service (Federal Express), and that I have also caused two true and correct copies of said brief to be served by Overnight Courier Service (Federal Express) and via email (in PDF form) upon the following:

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Further, I have filed a PDF document containing the entire above-referenced brief by submitting it as an attachment to an email to:

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