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 a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENTS THOMPSON, MUELLER, ZIGLAR, BLACKMAN, AND McELROY IN OPPOSITION

JEREMY MALTBY
GEORGE JAMES BAGNALL V
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, California 90071
Counsel for Respondent Robert S. Mueller III

WILLIAM A. MCDANIEL, JR.
LAW OFFICES OF WILLIAM A. MCDANIEL, JR.
118 West Mulberry Street
Baltimore, Maryland 21201
Counsel for Respondent James W. Ziglar

JOHN J. CASSIDY
JAMIE S. KILBERG
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004

JEFFREY A. LAMKEN
Counsel of Record
MICHAEL G. PATTILLO, JR.
MOLOLAMKEN LLP
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com
Counsel for Respondent Larry D. Thompson

[List of Counsel Continued on Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

THOMAS G. ROTH
12 Fairview Avenue
West Orange, NJ 07052

Counsel for Respondent
J. Scott Blackman

STEPHEN L. BRAGA
ROPES & GRAY L.L.P.
700 12th Street, NW
Washington, D.C. 20005

Counsel for Respondent
Larry D. Thompson

DEBRA L. ROTH
SHAW, BRANSFORD & ROTH, P.C.
1100 Connecticut Ave., NW
Suite 900
Washington, D.C. 20036

Counsel for Respondent
Edward J. McElroy

QUESTIONS PRESENTED

Petitioner Maher Arar—a dual Syrian-Canadian national—was detained at the U.S. border and removed to Syria under the Immigration and Nationality Act ("INA") after being adjudicated a member of a foreign terrorist organization. Petitioner sued a number of federal officials for money damages under *Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and the Torture Victim Protection Act, 28 U.S.C. § 1350, note ("TVPA"), seeking damages arising from his detention in the U.S., his removal to Syria, and his alleged subsequent mistreatment by Syrians in Syria. The questions presented are:

1. Whether the court of appeals erred in declining to create a *Bivens* damages remedy for petitioner, based on his removal to Syria and alleged mistreatment by Syrians in Syria, where those claims would implicate serious national-security and foreign-policy concerns, and the review scheme Congress established under the INA does not provide for damages.

2. Whether the TVPA, which applies only to persons acting "under actual or apparent authority, or color of law, *of any foreign nation*," 28 U.S.C. § 1350, note § 2(a)(1) (emphasis added), extends to U.S. government officials, acting within the U.S., and exercising statutory authority provided by U.S. statutes in pursuit of U.S. policy goals.

3. Whether petitioner's *Bivens* claim alleging denial of access to U.S. courts was properly dismissed with leave to amend where petitioner failed to adequately allege the identities of and actions taken by the various defendants allegedly responsible for the claimed denial of access.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 09-923

MAHER ARAR,

Petitioner,

v.

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

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENTS THOMPSON, MUELLER, ZIGLAR, BLACKMAN, AND McELROY IN OPPOSITION

STATEMENT

This damages action arises from the detention of petitioner Maher Arar—a dual citizen of Syria and Canada—at the border and his removal to Syria, where he claims he was tortured by Syrian officials.[1] Petitioner

[1] Petitioner initially sought declaratory relief against certain officials in their official capacities, but petitioner no longer challenges the dismissal of those claims. Pet. App. 17a, 269a-272a, 352a-355a. Only petitioner's money-damages claims remain at issue.

was removed to Syria after being adjudicated a member of a foreign terrorist organization; it was determined there were reasonable grounds to believe petitioner represented a danger to U.S. security; and it was further determined that sending an al Qaeda member to Canada—which shares a porous, 5,525-mile border with the U.S.—would be prejudicial to this Nation's interests.

1. Petitioner arrived at New York's JFK airport from Tunisia on September 26, 2002, after transiting through Zürich; petitioner was booked on a connecting flight to Montreal. Pet. App. 452a. When petitioner presented his passport, an immigration officer discovered a "lookout" identifying petitioner as a member of a terrorist organization. *Id.* at 584a. Petitioner was detained and later transferred to a detention center in Brooklyn. *Id.* at 453a-455a.

On October 1, 2002, the INS initiated removal proceedings on the ground that petitioner was a member of a designated terrorist organization and thus inadmissible under 8 U.S.C. § 1182(a)(3)(B)(i)(V). Pet. App. 340a, 455a. Petitioner was informed in writing that he had five days (until October 6) to respond or face removal. *Id.* at 585a. Petitioner contacted his family, which retained counsel for him. *Id.* at 455a. Petitioner met with a Canadian Consulate representative on October 3, and with his attorney on October 5. *Id.* at 455a-456a. Petitioner's attorney took no action by the October 6 deadline or any time thereafter.

On October 7, based on classified information and petitioner's own statements, then-INS Regional Director Blackman found that petitioner was "clearly and unequivocally inadmissible" as a "member of a Foreign Terrorist Organization" (al Qaeda). Pet. App. 583a-584a. Finding "reasonable grounds to believe that [petitioner]

is a danger to [U.S.] security," the Regional Director ordered petitioner's removal without a hearing under 8 U.S.C. § 1225(c)(2)(B). *Id.* at 583a-584a, 589a-590a. While petitioner now denies membership in al Qaeda, he disclaimed any "challenge [to] the determination that he was associated with al Qaeda" in "this lawsuit." See Pet. En Banc Br. 20.

On October 8, then-Deputy Attorney General Thompson, as acting Attorney General in the Attorney General's absence, determined that removing petitioner to Canada would be "prejudicial to the United States" within the meaning of 8 U.S.C. § 1231(b)(2)(C)(iv).[2] The INS then notified petitioner that he would be removed to Syria as an alternate country of which he was "a subject, national, or citizen," under 8 U.S.C. § 1231(b)(2)(D). Pet. App. 458a. Petitioner requested protection under the Convention Against Torture ("CAT"). The INS, however, determined that petitioner could be removed to Syria consistent with the CAT; that determination was incorporated into a Final Notice of Inadmissibility. *Id.* at 458a, 582a. Petitioner was flown to Jordan; Jordanian officials then transported petitioner to Syria. *Id.* at 458a-459a.

Petitioner alleges that Syrian authorities tortured him for 12 days and threatened him with torture thereafter. Pet. App. 459a. He alleges that he was kept in a "tiny underground cell" until his release on October 5, 2003. *Id.* at 461a-463a.

---

[2] An Inspector General's report observes that Thompson rejected petitioner's request to be removed to Canada because "the porous nature of the Canadian/US border w[ould] allow [petitioner] easy access to the United States." Dep't of Homeland Security Office of Inspector General, The Removal of a Canadian Citizen to Syria 6 (Addendum Mar. 2010).

2. a. On January 22, 2004, petitioner filed this action against Attorney General John Ashcroft, Deputy Attorney General Larry D. Thompson, FBI Director Robert Mueller, INS Commissioner James W. Ziglar, INS Regional Director J. Scott Blackman, and INS officer Edward J. McElroy, all in their individual capacities. See Pet. App. 438a-472a. Petitioner has abandoned his claims for non-monetary relief. See p. 1 n.1, *supra*.[3]

Count I of the complaint asserts that respondents violated the Torture Victim Protection Act, 28 U.S.C. § 1350, note, by "acting in concert with," "conspir[ing] with," or "aid[ing] and abett[ing]" Jordanian and Syrian officials "in bringing about" the violation of petitioner's "right not to be tortured." Pet. App. 465a. Counts II and III assert claims under *Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that respondents conspired "to deport [petitioner] to Syria for the purpose [of] coercive interrogation and torture in that country" (Count II), Pet. App. 466a, and "for the purpose [of] arbitrary, indefinite detention" there (Count III), *id.* at 468a. Count IV asserts *Bivens* claims arising from petitioner's detention in the U.S., including interference with his access to counsel and the courts. *Id.* at 470a-471a. The complaint also alleges that petitioner's conditions of confinement in the U.S. violated due process, *id.* at 470a, but petitioner does not challenge the dismissal of those claims, see *id.* at 265a-269a, 425a-426a. Petitioner alleges that respondents acted "under * * * their authority as federal officers." *Id.* at 466a, 468a, 469a.

---

[3] This brief is submitted by respondents Thompson, Mueller, Ziglar, Blackman, and McElroy in their individual capacities.

While not legally relevant at this stage, respondents should be clear: They did *not* conspire or seek to deport petitioner for the purpose of or knowing that he would be tortured in Syria. Respondents thus take issue with petitioner's claim that the reports of a Canadian commission and of the Inspector General of the U.S. Department of Homeland Security "confirm" "most of" his allegations. Pet. 7. Neither report supports petitioner's allegation that respondents removed him to Syria intending that he be tortured there. To the contrary, both documents acknowledge that Syria assured U.S. officials that petitioner would *not* be tortured. *See* Dep't of Homeland Security Office of Inspector General, The Removal of a Canadian Citizen to Syria 5, 22 (Mar. 2008); Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar: Analysis and Recommendations 156 (2006). Nor is there any basis for petitioner's claim that respondents sought to deny him access to the courts. Nonetheless, taking the complaint's well-pleaded factual allegations as true, further review is still unwarranted, for the reasons below.

b. On February 16, 2006, the district court dismissed the complaint. Pet. App. 335a-426a. The court held that the Immigration and Nationality Act ("INA") did not deprive it of jurisdiction. Pet. App. 391a. But it dismissed each count for failure to state a claim. *Id.* at 355a-373a, 391a-426a.

As to Count I, the district court observed that 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.'" Pet. App. 356a (quoting 28 U.S.C. § 1350, note § 2(a)(1)). The court ruled that respondents had not acted under color of foreign law. *Id.* at 372a-373a, 425a.

To the contrary, they had acted under color of U.S. law. *Id.* at 368a.

The district court also dismissed the two *Bivens* claims (Counts II and III) related to petitioner's removal to, detention in, and alleged mistreatment in Syria. Those claims, the court observed, "present[] broad questions touching on the role of the Executive branch combating terrorist forces," on "coordination between law-enforcement and foreign-policy officials," and on "complex relationships with foreign governments." Pet. App. 409a. Extending *Bivens* to a context so laden with "national-security and foreign policy" concerns, the court held, would "trammel[] upon matters best decided by co-ordinate branches of government." *Id.* at 405a, 408a-414a. The court also dismissed petitioner's claim of interference with access to the courts (Count IV). *Id.* at 423a. Petitioner's complaint failed to "adequately detail which defendants directed, ordered and/or supervised the alleged" denial of access. *Ibid.* Nor did the complaint "articulate * * * the judicial relief [petitioner] was denied." *Id.* at 421a. The court gave petitioner leave to re-plead and cure those deficiencies. *Id.* at 425a-426a. Petitioner declined and requested entry of judgment. C.A. Spec. App. 92; see Pet. App. 421a.

3. The court of appeals affirmed. Pet. App. 195a-275a. The panel acknowledged that there was a substantial question whether "the INA deprived the District Court of subject matter jurisdiction." *Id.* at 224a. Rather than address jurisdiction, however, the court affirmed on other grounds. *Id.* at 224a-225a.

The panel unanimously agreed that petitioner's TVPA claim was properly dismissed because respondents did not act under color of foreign law. Pet. App. 234a-235a. A majority of the panel also agreed with the district court

that *Bivens* could not be extended to encompass the claims arising from petitioner's removal to and alleged mistreatment in Syria (Counts II and III). "[T]he review procedures set forth by the INA," the majority held, "provide a convincing reason for us to resist recognizing a *Bivens* cause of action for [petitioner's] claims arising from his alleged detention and torture in Syria." *Id.* at 245a (citation and internal quotation marks omitted). Alternatively, 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 246a.

The panel majority also held that petitioner's claim relating to his treatment in the U.S. (Count IV) was properly dismissed. Petitioner had failed to establish that, as an unadmitted alien, "he possessed any entitlement to a pre-removal hearing" or to "the assistance of counsel." Pet. App. 262a-263a. The majority further explained that *Christopher* v. *Harbury*, 536 U.S. 403 (2002), required petitioner to identify the cause of action he was prevented from asserting. Pet. App. 263a-264a. The complaint, however, "fail[ed] to set forth adequately 'the underlying cause of action'" that "defendants' conduct compromised." *Id.* at 264a (quoting 536 U.S. at 418).

Judge Sack dissented from the portion of the opinion dismissing the *Bivens* claims. Pet. App. 276a-334a.

4. On rehearing *en banc*, the court of appeals affirmed. Pet. App. 1a-53a. The seven-judge *en banc* majority acknowledged the possibility that "the INA bar defeats [subject-matter] jurisdiction," but declined to address jurisdiction because petitioner's claims were properly "dismissed at the threshold for other reasons." *Id.* at 25a.

The majority agreed that Count I failed to state a TVPA claim because it contained "no * * * allegation" that respondents acted under color of foreign law. Pet. App. 18a. To the contrary, respondents are federal officials who "are alleged to have acted under color of *federal* [law], * * * in accordance with alleged *federal* policies and in pursuit of the aims of the *federal government* in the international context." *Id.* at 19a (emphasis added).

Turning to petitioner's *Bivens* claims, the court held that the denial-of-access claims were properly dismissed because petitioner failed to "allege facts indicating that the defendants were personally involved in the claimed constitutional violation." Pet. App. 20a-21a. The complaint "fail[ed] to specify culpable action taken by any single defendant, and [did] not allege the 'meeting of the minds' that a plausible conspiracy claim requires." *Id.* at 21a. Under *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), and *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937 (2009), that "omission," coupled with "[petitioner's] rejection of an opportunity to replead," required dismissal. Pet. App. 20a-21a.

Finally, the majority declined to extend *Bivens* to create a damages action for petitioner's removal to Syria and mistreatment there by Syrian officials. The majority observed that the judicially created *Bivens* remedy "should rarely if ever be applied in 'new contexts.'" Pet. App. 26a. In this case, the majority held, "special factors sternly counsel hesitation." *Id.* at 31a.[4] The majority

[4] The majority also noted "several possible alternative remedial schemes" bearing on petitioner's allegations—including those under the INA and the Foreign Affairs Reform and Restructuring Act of 1998, 8 U.S.C. § 1231 note ("FARRA")—that ordinarily would raise "a strong inference that Congress intended the judiciary to stay its hand and refrain from creating a *Bivens* action in this context." Pet.

observed that this Court "has expressly counseled that matters touching upon foreign policy and national security fall within 'an area of executive action in which courts have long been hesitant to intrude' absent congressional authorization." Pet. App. 35a (quoting *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993) (some quotation marks omitted)). *Bivens* damages actions like petitioner's—a suit by an alien claiming that he was detained at the border and removed to a foreign nation where he was mistreated by foreign officials, allegedly because of secret national-security and diplomatic communications between the U.S. and foreign powers—would "intrude" deeply into those areas. Such a suit would not merely "enmesh the courts ineluctably in an assessment of the validity and rationale of [the government's extraordinary rendition] policy and its implementation," implicating both foreign relations and national security issues. *Id.* at 34a-35a. It would also require the courts to delve into confidential information "that cannot be introduced into the public record," *id.* at 40a, including "what was done by the national security apparatus of at least three foreign countries, as well as the United States" when they determined that petitioner was affiliated with al Qaeda and that his removal to Syria was appropriate, *id.* at 39a.

For example, it would require inquiry into the nature and validity of Syria's "private diplomatic assurance" to the U.S. that petitioner would not be tortured consistent with the CAT; that issue by itself would implicate "the extent of secret diplomatic relationships," harming foreign policy and national security. Pet. App. 42a-43a. The majority also noted that creating a *Bivens* action in

---

App. 29a-30a. The majority, however, declined to decide the case on those grounds.

this context creates opportunities for "graymail," *i.e.*, lawsuits brought to force the government to settle for fear that litigation would reveal classified information. *Id.* at 44a. The majority thus concluded that "Congress is the appropriate branch of government to decide under what circumstances (if any) these kinds of policy decisions—which are directly related to the security of the population and the foreign affairs of the country—should be subjected to the influence of litigation brought by aliens." *Id.* at 49a.[5]

Judges Sack (Pet. App. 54a-124a), Parker (*id.* at 125a-156a), Pooler (*id.* at 157a-172a), and Calabresi (*id.* at 173a-194a) each dissented.

REASONS FOR DENYING THE PETITION

The decisions below are correct and do not conflict with any decision of this Court or any other court of appeals. Petitioner's principal claim (embodied in Counts II and III of his complaint) is that the Court should extend *Bivens* to create a damages action in favor of an alien claiming he was denied entry at the border and removed to a foreign country—and then mistreated by foreign officials there—because of alleged secret national-security and diplomatic communications with that foreign country's government. The factors that counsel hesitation before extending *Bivens* damages actions to a context so laden with foreign-policy and national-security concerns are obvious.

This case, moreover, is a singularly unsuitable vehicle. Nowhere does the petition address the jurisdictional barriers to this action. And petitioner's departure from the

[5] Given their disposition of the case, none of the courts below reached qualified immunity or the government's request for dismissal based on the state-secrets privilege. Pet. App. 17a, 422a, 423a-424a.

theory of the complaint makes further review more problematic still. The complaint challenged petitioner's removal to Syria and alleged mistreatment by Syrian officials there—including the claim that respondents removed petitioner to Syria intending or knowing that mistreatment would result—in Counts I through III. Pet. App. 465a-470a. Count IV, by contrast, asserted claims relating to petitioner's alleged mistreatment *while detained in the U.S.*, including the claim that respondents denied him access to U.S. courts. *Id.* at 470a-471a. Petitioner now blends those claims together. Indeed, the denial of access (previously asserted in Count IV), we are now told, is the "most important factor favoring" recognition of a *Bivens* damages action to challenge petitioner's removal to Syria and alleged mistreatment there. Pet. 19. But the denial-of-access claim was rejected by the district court, the court of appeals panel, and the *en banc* court on multiple grounds—all of which are fact-bound and none of which warrant further review. That petitioner's supposedly "most important" reason for review turns out to be a fact-bound and fatally defective denial-of-access claim weighs strongly against review.

I. REVIEW OF PETITIONER'S *BIVENS* CLAIMS RELATING TO MISTREATMENT ABROAD (COUNTS II-III) IS UNWARRANTED

Petitioner first claims that the courts below erred in declining to recognize a *Bivens* action for damages based on his removal to Syria and alleged mistreatment there. The decisions below, however, are correct and consistent with the decisions of this Court and other courts. Further review is unwarranted.

A. The Second Circuit Correctly Declined To Extend *Bivens* To This Highly Sensitive Context

For nearly three decades, this 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) (emphasis added). See, *e.g.*, *Wilkie* v. *Robbins*, 551 U.S. 537, 562 (2007); *FDIC* v. *Meyer*, 510 U.S. 471, 484-486 (1994); *Schweiker* v. *Chilicky*, 487 U.S. 412, 429 (1988); *United States* v. *Stanley*, 483 U.S. 669, 681-684 (1987); *Bush* v. *Lucas*, 462 U.S. 367, 380-390 (1983); *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983) (each refusing to extend *Bivens*). In determining whether to extend *Bivens*, this Court pays "particular heed * * * to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Wilkie*, 551 U.S. at 550. The Second Circuit properly concluded that "special factors sternly counsel hesitation" before recognizing a *Bivens* action in this context—a claim that federal officials, pursuant to federal statutes and federal policy, removed an alien identified as a terrorist to Syria after receiving assurances from Syria that he would not be tortured there. Pet. App. 30a. Indeed, such a suit would inevitably require inquiry into the substance of diplomatic and other communications between the U.S. and foreign governments and touch upon sensitive matters of national security.

1. 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, "foreign policy and national security are rarely proper subjects for judicial intervention." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981). Thus, while courts will wade into issues bearing on foreign policy and national security where

"Congress has specifically provided" authority to do so, *Dep't of Navy* v. *Egan*, 484 U.S. 518, 529-530 (1988); cf. *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2262 (2008), there could hardly be a less appropriate arena for the judiciary to enter uninvited.

That, however, is precisely what petitioner requests of this Court. The Second Circuit explained that extending the *Bivens* damages action to this context would necessarily "enmesh the courts" in second-guessing the Executive Branch's judgments on "significant diplomatic and national security concerns." Pet. App. 34a-35a. Suits like this one would not merely require judicial "inquiry into the perceived need for the policy" under which petitioner allegedly was removed to Syria and "the propriety of adopting specific responses to particular threats in light of apparent geopolitical circumstances and our relations with foreign countries." *Id.* at 35a. They would also require extensive discovery into classified "exchanges among the ministries and agencies of foreign countries on diplomatic, security, and intelligence issues." *Id.* at 38a. Indeed, the district court here would be required to consider "what was done by the national security apparatus of at least three foreign countries, as well as the United States." *Id.* at 39a. Petitioner has already argued that it would be "presumptively unconstitutional" for the district court to consider such information *ex parte* and *in camera*. *Id.* at 40a. And the complications that would be posed to U.S. foreign policy and national-security efforts by requiring such sensitive information to be disclosed to *Bivens* plaintiffs in dis-

covery are "too obvious to call for enlarged discussion." *Egan*, 484 U.S. at 529.[6]

Petitioner's damages suit, moreover, challenges the veracity of Syria's "private diplomatic assurance" that petitioner would not be tortured. Pet. App. 42a-43a; p. 9, *supra*. In *Munaf* v. *Geren*, 128 S. Ct. 2207 (2008), this Court confronted a similar executive determination based on "foreign assurances" that a prisoner would not be mistreated following transfer. *Id.* at 2226. Although Congress had provided an otherwise available *statutory* action for *habeas corpus*, the Court ruled that, "[e]ven with respect to claims that detainees would be denied constitutional rights if transferred," "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 2225-2226. *Munaf* thus declined to exercise the statutory jurisdiction Congress had granted. *A fortiori*, federal courts should not *extend* the judicially created *Bivens* damages action where it would raise similar concerns. This Court has previously refused to extend *Bivens* based on far less compelling separation-of-powers concerns. See *Chappell*, 462 U.S. at 300-304 (declining *Bivens* for racial-discrimination claims by military servicemen in part because "the Constitution contemplated that the Legislative Branch have plenary control over * * * the military"); *Stanley*, 483 U.S. at 681 (refusing, for similar reasons, *Bivens* claim for serviceman alleging he was used for human experimentation). Separation-of-

---

[6] Indeed, the U.S. moved to dismiss this suit on state-secrets grounds. Gov't C.A. Replacement Br. 13-15. The fact that state secrets would often arise in this context underscores the impropriety of creating a *Bivens* damages claim here.

powers principles overwhelmingly counsel hesitation against extending *Bivens* here. See Pet. App. 36a.

2. Petitioner does not seriously dispute that this case implicates those "special factors." Rather, he urges that extending *Bivens* to this context "raises no issues of foreign policy, national security, or classified information" that would not also arise through "the judicial review" of removal decisions that Congress provided for in the INA. Pet. 12; see *id.* at 24-25. Not so. Here, petitioner would seek discovery into sensitive international negotiations and communications to prove the multination conspiracy he posits; hale former U.S. officials into court; and then ask a jury to render its own decision on the propriety of petitioner's removal. By contrast, a petition for review under 8 U.S.C. § 1252(b)(4) is decided "only on the administrative record." Moreover, the only issue in such review is whether there was "substantial evidence" in the agency-created record.[7] That bears no resemblance to the far-reaching inquiries in which petitioner's suit would "enmesh the courts." Pet. App. 34a-35a.

Indeed, Congress's provision of deferential on-the-record review under the INA underscores the impropriety of judicially implying a wide-ranging *Bivens* damages action.[8] Even if courts *could* craft *ad hoc*

---

[7] "[A]dministrative 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 * * * is conclusive unless manifestly contrary to law." 8 U.S.C. § 1252(b)(4)(A)-(C).

[8] *Bivens* is thus also inappropriate because "alternative, existing process[es] exist for protecting the interest[s]" petitioner presses here. *Wilkie*, 551 U.S. at 550. The INA's judicial-review procedures alone constitute "a convincing reason * * * to resist recognizing a *Bivens* cause of action for petitioner's claims arising from his alleged

protective measures to mitigate the potential intrusion—and even if foreign governments were willing to work with the U.S. absent *ex ante* protection for communications—decisions regarding the creation of causes of action and any correspondingly necessary protective procedures in this sensitive arena must rest with Congress. "[T]he special needs of foreign affairs must stay [the courts'] hand in the creation of damage remedies against * * * 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); see also *Wilson* v. *Libby*, 535 F.3d 697, 710 (D.C. Cir. 2008) (refusing *Bivens* action that "would inevitably require judicial intrusion into matters of national security and sensitive intelligence").

The Second Circuit thus did not "err" in relying on "the fact that classified information may be implicated by the suit." Pet. 25. Courts should not unilaterally imply a damages action that would create the risk of disclosing sensitive national security and foreign relations materials, much less justify doing so based on speculation that they can mitigate that self-created risk using other judicially created "tools." *Ibid.* Petitioner cites no authority for the proposition that it is error for a court to "hesitate" before implying a cause of action in favor of a foreign national in a context that would often entail discovery into and disclosure of classified information—

---

detention and torture in Syria." Pet. App. 245a (citation and internal quotation marks omitted). Petitioner himself concedes that Congress provided a "[s]pecific [r]emedy" for his grievances in the INA. Pet. 11. That "[s]pecific [r]emedy," however, simply does not include damages. See 8 U.S.C. §§ 1252(a)(2)(D), (a)(4), (b)(9). See *Chilicky*, 487 U.S. at 424-429 (declining to extend a *Bivens* remedy when Congress created an administrative scheme that did not provide for recovery of money damages).

including "the extent of secret diplomatic relationships"—with potentially damaging diplomatic and national-security consequences. Pet. App. 39a, 42a-43a. In such a sensitive context, "Congress is the appropriate branch of government to decide" whether a damages remedy should lie. *Id.* at 49a.[9]

B. Petitioner's Complaints About The Reasoning Below Provide No Basis For Further Review

Petitioner asserts various complaints about the Second Circuit's analysis. But the impropriety of extending *Bivens* here is patent, and this Court "'reviews judgments, not statements in opinions.'" *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black* v. *Cutter Lab.*, 351 U.S. 292, 297 (1956)). In any event, petitioner's criticisms lack merit.

1. Petitioner claims that the Second Circuit erred by describing extensions of *Bivens* as the "rare exception" rather than "the ordinary rule." Pet. 17. But extensions of *Bivens are* the exception: This Court has "consistently refused to extend *Bivens* liability to any new context" for more than 30 years. *Malesko*, 534 U.S. at 68; p. 12, *supra*; see also *Wilkie*, 551 U.S. at 550 ("[I]n most instances we have found a *Bivens* remedy unjustified."). It is petitioner's position—that *Bivens* damages claims

---

[9] Petitioner recognizes that Congress is the appropriate forum, having sought investigations by and relief from Congress itself. See *Rendition to Torture: The Case of Maher Arar: Joint Hearing Before the Subcomm. on Int'l Organizations, Human Rights and Oversight of the H. Comm. on Foreign Affairs and the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2007). Petitioner's counsel asked Congress to provide "reparations." *Id.* at 95 (statement of David Cole, Esq.). Congress did not do so.

should be the ordinary rule—that is "in sharp conflict with [this Court's] *Bivens* jurisprudence." Pet. 20.

Petitioner's complaint that the Second Circuit "characterized the 'special factors' threshold as 'remarkably low,'" Pet. 20 (quoting Pet. App. 32a), likewise fails. In context, that statement acknowledges that extensions of *Bivens* are rare. The preceding paragraph articulates the governing standard: The "special factors should be *substantial enough to justify the absence of a damages remedy* for a wrong." Pet. App. 31a-32a (emphasis added). That standard, which the Second Circuit applied, is correct.[10]

2. Petitioner also urges that the Second Circuit "erred in treating the 'context' of this action as 'new'" so as to necessitate special-factors analysis of any sort. Pet. 21. But petitioner's failure to cite a single case applying *Bivens* in remotely analogous circumstances—the removal of an alien found to be a threat to national security resulting in alleged mistreatment by a foreign power—proves the context is "new." Petitioner's *ipse dixit* that the relevant context is "torture," *id.* at 22, deprives special-factors analysis of meaning (one could just as easily call the context "constitutional violations"). Petitioner's claim is not that respondents tortured him "themselves while he was in their custody on American soil." *Ibid.* It is that, acting pursuant to federal statutes and federal policy, they removed a Syrian national identified as a terrorist to Syria after receiving assurances

[10] Petitioner suggests that the "special factors" threshold cannot be "remarkably low" because there were "substantial dissents" in *Bivens*, *Carlson*, and *Davis*. Pet. 20. Those decades-old cases, however, were decided under a more permissive view of "implying private damages actions" from which this Court has long since "retreated." *Malesko*, 534 U.S. at 67 & n.3.

from Syria that he would not be tortured. See pp. 8-10, *supra*. Petitioner's effort to change the *characterization* cannot eliminate the real-world foreign-policy and national-security concerns that "counsel hesitation" with breathtaking clarity in this context.

3. Petitioner also asserts that the Second Circuit erroneously took "[no] account of countervailing factors" in favor of *Bivens*. Pet. App. 32a. According to petitioner, *Wilkie* requires *Bivens* analysis to include "weighing reasons for and against the creation of a new cause of action, the way common law judges have always done." 551 U.S. at 554. But the "weighing" in *Wilkie* concerned whether "it would be good *policy*" to permit a damages action for the harm alleged. *Lucas*, 462 U.S. at 390 (emphasis added). In *Wilkie*, for example, the Court thought it too difficult to "defin[e] a workable cause of action." 551 U.S. at 555. That sort of weighing of "the *merits* of the particular remedy" is a common-law function. *Lucas*, 462 U.S. at 380. But the focus of the "special factors" analysis here is not whether a damages remedy would be good policy. It is "*who* should decide" whether to create that remedy in this particularly sensitive context—Congress or the courts. *Ibid.* (emphasis added). Here, the Second Circuit properly concluded that the foreign-policy and national-security implications dictate that "*Congress* is the appropriate branch of government" to decide whether a remedy is appropriate. Pet. App. 49a (emphasis added).

Petitioner in essence asserts that the Second Circuit, having found that "Congress * * * alone has the institutional competence" to weigh the competing policy arguments regarding a damages action in this context, Pet. App. 9a-10a, should have gone back to decide whether there are countervailing policy concerns that would justi-

fy forging ahead with a new, judicially created remedy anyway, Pet. 15. That position has no basis in logic, much less in *Wilkie*. Petitioner's claim of conflict with court of appeals decisions using "weighing" language like *Wilkie*'s, Pet. 18 (citing *Bagola* v. *Kindt*, 131 F.3d 632 (7th Cir. 1997); *Smith* v. *United States*, 561 F.3d 1090 (10th Cir. 2009); *Wilson* v. *Libby*, 535 F.3d 697 (D.C. Cir. 2008)), fails for the same reason. In none of those cases did the court do what petitioner claims the Second Circuit should have done here—weigh the policy arguments in favor of extending *Bivens* against special factors indicating that the decision is best left to Congress.

In any event, the Second Circuit held that the "special factors should be *substantial enough to justify the absence of a damages remedy* for a wrong." Pet. App. 31a-32a (emphasis added). It thus did conduct weighing. Given the overwhelming foreign-policy and national-security concerns in this context, the Second Circuit did not err in concluding that the concerns were indeed "sufficiently substantial."[11]

4. Finally, petitioner contends the Second Circuit erred in considering "foreign policy and national security

---

[11] Urging a conflict with *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), petitioner asserts that the Second Circuit "impermissibly treated as a 'special factor' the fact that [petitioner's] claim was brought 'against senior officials' for implementing a federal 'policy.'" Pet. 22, 23-34 (quoting Pet. App. 34a). But the Second Circuit did not rely on respondents' rank or pursuit of policy by themselves. It found reason to hesitate because senior officials were implementing policy decisions *in the context of "foreign policy and national security*," arenas in which "'courts have long been hesitant to intrude.'" Pet. App. 35a (quoting *Lincoln*, 508 U.S. at 192). Besides, *Mitchell* was about whether the officers should receive qualified or absolute immunity, 472 U.S. at 513—not whether to extend *Bivens* to a sensitive new context.

concerns" as special factors because Congress has, under the INA, "expressly authorized courts to adjudicate claims that the executive is planning to send an alien to a country where he faces a risk of torture." Pet. 24. He thus claims that a *Bivens* remedy "would *enforce* federal foreign policy, not conflict with it." *Id.* at 25. But *Bivens* damages suits are very different from the remedy Congress provided, see p. 15, *supra*, and this Court long ago gave up attempting to "assist" federal policy by creating new causes of action Congress did not contemplate. See *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001). Besides, creating a damages action here would defy Congress's intent: The "theme" of the INA is "protecting the Executive's discretion from the courts," *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999); that is why Congress channeled actions challenging that discretion into a singular avenue of review. The fact that Congress provided review of removal decisions but decided *not* to offer damages is a "convincing reason" this Court should *not* create a new damages remedy here. See *Chilicky*, 487 U.S. at 424-429.

C. Petitioner's Denial-Of-Access Claims Do Not Support Review

Petitioner repeatedly asserts that a *Bivens* damages remedy for his alleged mistreatment in Syria (requested in Counts II and III) is necessary because respondents allegedly "obstructed [his] access to the judicial remedy provided by Congress to prevent torture," *i.e.*, the INA's review mechanisms. Pet. i; see also *id.* at 11-15. That denial of access, petitioner claims, is the "most important factor favoring" *Bivens*' expansion here. *Id.* at 19. But petitioner asserted an access-to-courts theory as a stand-alone claim in Count IV of his complaint. And each of the courts below rejected that claim—for multiple reasons.

The fact that the petition invokes a fact-bound theory, discredited by all of the courts below, as the "most important factor favoring" creation of a new *Bivens* action for his removal and alleged mistreatment by Syrian officials in Syria, *ibid.*; see also *id.* at i, 11-14, weighs against further review.

1. As explained in greater detail below, the courts below properly rejected petitioner's access-to-courts claim because the complaint failed to allege the *personal* involvement of each respondent, as required by *Twombly* and *Iqbal*. See pp. 31-33, *infra*. Petitioner seeks damages from respondents. But nowhere does petitioner explain why *a denial-of-access claim* should render *respondents* liable for damages for his removal, in an otherwise unavailable *Bivens* action, where he did *not* properly allege that *respondents were responsible for* that denial of access. Petitioner, moreover, refused an opportunity to re-plead to fix that defect.

2. The district court and the court of appeals panel, moreover, both concluded that petitioner's denial-of-access claim fails under this Court's decision in *Christopher* v. *Harbury*, 536 U.S. 403 (2002). *Harbury* held that, where a *Bivens* action alleges "the loss of an opportunity to seek some particular order of relief," the identity of the underlying claim that was lost "is an element that must be described in the complaint." 536 U.S. at 414, 415. In this case, the complaint asserted that respondents "interfered with [petitioner's] access to lawyers and the courts" such that he could not "petition the courts for redress of his grievances." Pet. App. 471a. But petitioner failed to "state the underlying claim" he was prevented from asserting. 536 U.S. at 417. The district court therefore gave petitioner an opportunity to re-plead to "articulate more precisely the judicial relief

he was denied." Pet. App. 421a, 426a. Petitioner refused that opportunity, electing to "stand on the allegations of his original complaint." *Id.* at 20a; C.A. Spec. App. 92. The court of appeals panel agreed that the complaint was fatally deficient under *Harbury*. Pet. App. 264a-265a.[12] Petitioner nowhere asserts those fact-bound rulings warrant review.

The facts as pleaded, moreover, do not make out a denial-of-access claim of any sort. By September 27, petitioner was on notice he might be removed to Syria and was served, on October 1, with a formal notice that he had *five days* (to October 6) to respond or face removal. Pet. App. 585a. Petitioner contacted his family that same day; met with a Canadian Consulate representative on October 3; and met with his attorney on October 5. *Id.* at 455a-456a. But his attorney, with full notice petitioner could be removed as soon as October 6, never sought relief either before that deadline or anytime after petitioner's removal on October 8. *Id.* at 458a; see 8 U.S.C. § 1252(b)(1) (deadline for filing petition for review); cf. *Lopez* v. *Gonzales*, 549 U.S. 47, 52 n.2 (2006) (alien may apply for cancellation of removal after deportation).

3. Finally, petitioner's theory makes no sense. Petitioner nowhere explains why the claim that he was denied access to the courts should justify giving him a *Bivens* damages remedy for the operative conduct alleged in

---

[12] On appeal, petitioner claimed that respondents "compromised his right to seek a court order" under the INA "'enjoin[ing] his removal to a country that would torture him, as a violation of FARRA and the [CAT].'" Pet. App. 264a (quoting Pl. C.A. Br. 34). But the panel properly rejected the attempt to re-plead the complaint in an appellate brief. The "complaint makes no mention of FARRA, the CAT, or the possibility of injunctive relief" under the INA. Pet. App. 264a.

Counts II and III. The remedy (if any) for denial of access would be a *Bivens* action for the denial of access *itself*—the claim petitioner briefly attempted to assert in Count IV—not the creation of a *Bivens* action to seek damages from officials for alleged mistreatment abroad.

This Court's decision in *Harbury* makes that clear. In *Harbury*, too, the plaintiff claimed that U.S. officials arranged for the victim's torture abroad and then thwarted access to the courts to prevent it. The D.C. Circuit rejected the claim that U.S. officials had violated the Fifth Amendment by ordering, conspiring in, and participating in that conduct because Due Process claims are not viable where the primary "conduct at issue * * * — * * * torture [of a foreign national]—occurred outside the United States." *Harbury* v. *Deutch*, 233 F.3d 596, 603 (D.C. Cir. 2000). This Court reviewed Harbury's claim that federal officials violated the Constitution by impeding access to federal courts. But the Court did not hold—as petitioner would have it—that the denial of access should permit an otherwise impermissible *Bivens* action for the mistreatment of an alien abroad. Instead, the Court addressed whether the plaintiff had stated a stand-alone claim for violating her right of access to the courts (like the one petitioner asserted in Count IV). 536 U.S. at 413. The courts below did not err in addressing the claims in the same manner here. *Harbury*, moreover, underscores a further reason for denying review—other threshold issues, like qualified immunity, preclude relief.[13]

---

[13] Respondents are entitled to qualified immunity at the threshold unless the unconstitutionality of the alleged conduct was so "clearly established" that "it would be *clear* to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (emphasis added). Here, no *clearly*

D. Threshold Jurisdictional Issues Make This Case An Unsuitable Vehicle

There is yet another reason this case is a poor vehicle—the unaddressed jurisdictional issues that stand between this Court and the *Bivens* issues petitioner raises. By its terms, the INA deprives the courts of jurisdiction over "*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," "[e]xcept as provided" by the INA itself. 8 U.S.C. § 1252(g) (emphasis added). The INA further 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)]." 8 U.S.C. § 1252(b)(9) (emphasis added). Those provisions "emphatically provide[] that federal courts lack jurisdiction" over suits seeking review of removal actions—including determinations under the Convention Against

---

established violation occurred: Petitioner was allegedly injured abroad, and this Court has made clear that the Due Process Clause does not apply to aliens abroad. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990); *Johnson* v. *Eisentrager*, 339 U.S. 763, 784-785 (1950). *Harbury* held that, even if the alien claims a "conspiracy" in the U.S. to injure him abroad, due process still is not violated, because the "location of the *primary constitutionally significant conduct* at issue"—"the torture"—is dispositive. 233 F.3d at 604 (emphasis added); see *Linnas* v. *INS*, 790 F.2d 1024, 1031 (2d Cir. 1986) (removing alien to foreign nation knowing he will be unlawfully executed there not unconstitutional). *Harbury* dispels any notion that there is "clearly established" law that a supposed conspiracy to subject an alien to mistreatment abroad violates the Fifth Amendment.

Torture ("CAT")—unless the claims are raised under the review provisions of the INA itself. Gov't C.A. Replacement Br. 26.

Petitioner's *Bivens* claims relating to his mistreatment abroad (Counts II and III) clearly "aris[e] from" his removal. Petitioner's theory is that respondents conspired "to remove [petitioner] to Syria" for coercive interrogation "in direct contravention of the [CAT]." Pet. App. 440a (complaint); see *id.* at 466a, 468a (*Bivens* based on "deport[ation] * * * to Syria"); *id.* at 446a (respondents "failed to consider * * * CAT"). Petitioner thus "challenge[s] [petitioner's] removal and the CAT determination that he was not likely to be tortured in Syria." Gov't C.A. Replacement Br. 27. Because those claims arise from his removal and question the validity of determinations incorporated into the removal orders, 8 U.S.C. §§ 1252(b)(9) & (g) preclude their assertion outside the procedures established by the INA itself. *Id.* at 27-28; see also *Sissoko* v. *Rocha*, 509 F.3d 947, 950-951 (9th Cir. 2007); *Foster* v. *Townsley*, 243 F.3d 210, 214-215 (5th Cir. 2001).

That threshold jurisdictional barrier weighs against review with special force here. Neither the decision below nor the decision of any other court of appeals has addressed whether "the INA bar defeats [subject-matter] jurisdiction" over an alien's *Bivens* claim in similar circumstances. Pet. App. 25a.[14] Petitioner asks this

---

[14] The Second Circuit declined to address jurisdiction because "the case must be dismissed at the threshold for other reasons." Pet. App. 25a; see *id.* at 215a-227a. Generally, courts must address subject-matter jurisdiction. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 101-102 (1998). This Court surely could not resolve any legal issue *in petitioner's favor* without first deciding jurisdiction. See *ibid.*

Court to be the first. But this Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). "Prudence * * * dictates awaiting * * * the benefit of * * * lower court opinions squarely addressing the question." *Yee* v. *City of Escondido*, 503 U.S. 519, 538 (1992). Petitioner may argue that he should be able to raise a claim "arising from" his removal under *Bivens* because respondents interfered with his access to statutory remedies. But, as explained above, the lower courts rejected petitioner's access-to-courts claim on the merits. See pp. 6-8, *supra*. And petitioner has never sought INA review (invoking equitable tolling or otherwise). Petitioner cannot rely on a failed access-to-courts claim to evade express jurisdictional limits, particularly where (as here) that fact-bound access-to-courts claim does not itself warrant review.

II. Review Of Petitioner's TVPA Claim Is Unwarranted

The TVPA creates a damages action 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). The TVPA thus applies only to defendants acting under color of *foreign law*. Because respondents—U.S. officials, in U.S. government buildings, exercising authority pursuant to an Act of Congress in pursuit of federal interests—plainly were acting under color of U.S., not Syrian, law, the TVPA claims were properly dismissed. Pet. App. 19a.

1. As the Second Circuit observed, the "traditional definition of acting under color of [a jurisdiction's] law requires that the defendant * * * have exercised power possessed by virtue of [that] law and made possible only because the wrongdoer is clothed with the authority of [that] law." Pet. App. 17a-18a (quoting *West* v. *Atkins*,

487 U.S. 42, 49 (1988)) (some quotation marks omitted).[15] Here, petitioner did not "adequately allege that the defendants possessed power under Syrian law, and that the offending actions (*i.e.*, [petitioner's] removal to Syria and subsequent torture) derived from an exercise of that power, or that defendants could not have undertaken their culpable actions absent such power." *Id.* at 18a. To the contrary, far from acting under color of Syrian law, respondents "are alleged to have acted under color of *federal* [law], * * * in accordance with alleged *federal* policies and in pursuit of the aims of the *federal government* in the international context." *Id.* at 19a (emphasis added); see *id.* at 444a-448a 466a-469a.[16]

Petitioner claims the Second Circuit's application of "under color of law" here "conflicts with decisions of this Court and other courts of appeals." Pet. 27. Not so. Every court to have considered this issue has concluded that U.S. officials, pursuing federal policy, under federal statutes, act under color of U.S. rather than foreign law for TVPA purposes. For example, 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), *cert. denied* 129 S. Ct. 195 (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

---

[15] *West* involved an action under 42 U.S.C. §1983. See 487 U.S. at 49. The TVPA's legislative history suggests that "[c]ourts should look to" cases decided under §1983 in "construing [the TVPA's] 'color of law'" requirement, H.R. Rep. No. 102-367, at 5 (1991), *i.e.*, in deciding whether actions were private or governmental.

[16] See 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.").

employment serving the United States" and "carrying out the policies and directives of the CIA." Accord *Schneider* v. *Kissinger*, 310 F. Supp. 2d 251, 267 (D.D.C. 2004) (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"), *aff'd*, 412 F.3d 190 (D.C. Cir. 2005). Petitioner does not point to "a single case" holding "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." *Hayden*, 444 F. Supp. 2d at 42.[17]

Petitioner claims that the standard applied below conflicts with this Court's §1983 decisions. Pet. 26-29. But the standard the Second Circuit applied—that, to act under color of foreign law, respondents must "have exercised power possessed by virtue of [that] law and made possible only because the wrongdoer is clothed with the authority of [that] law," Pet. App. 17a-18a—is a direct quote from this Court's decision in *West* v. *Atkins* (a §1983 case). See Pet. App. 17a-18a. It is also the "*traditional definition* of acting under color of * * * law." 487 U.S. at 49 (emphasis added). Petitioner can point to cases applying different verbal formulae. But, as this Court explained in *Brentwood Academy* v. *Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), there are a "variety" of tests, *id.* at 296, and the

---

[17] The only TVPA case petitioner cites is *Aldana* v. *Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005). But the defendant there was a corporation, not a federal official pursuing federal policy. As a result, the only question was whether the plaintiff had alleged government action at all, not whether a U.S. official was acting under color of U.S. or foreign law. See *id.* at 1247-1249

propriety of any particular test requires "normative judgment" based on context, *id.* at 295. Here, "normative judgment" called for *West*'s "traditional test."

Petitioner's claim (Pet. 27, 29) that the Second Circuit should have applied a "willful participation in joint action" standard from *Dennis* v. *Sparks*, 449 U.S. 24, 27 (1980), and other cases is mistaken. This Court has since "refined" the "vague 'joint participation' test" and cautioned that it is inappropriate to "fall[] back on" "general language about 'joint participation' as a test" even under § 1983. *Sullivan* v. *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. 40, 57-58 (1999); see also *id.* at 62 (*Sullivan* "clean[ed] up and rein[ed] in" prior "'state action' precedent[s]") (Ginsburg, J., concurring). And *Dennis* concerned whether the defendants, private individuals who bribed a judge, acted under color of state law. 449 U.S. at 27-28. As *Brentwood* explains, the proper formulation and application of the test is context-specific. See 531 U.S. at 296. *Dennis* thus did not purport to establish the test governing the context and question here—whether *federal officials* acting within the scope of their federal employment within the U.S. acted *under color of foreign law*.[18]

As the district court recognized, state and federal officers "act[] under a legal regime established by our constitution and our well-defined jurisprudence in the domestic arena." Pet. App. 371a. The law recognizes

---

[18] Moreover, courts routinely require more than "joint action" for finding that a federal official acts under color of state law in the § 1983 context. For example, in *Kletschka* v. *Driver*, 411 F.2d 436 (2d Cir. 1969), the Second Circuit required proof that the federal-official defendants acted "under the control or influence of the State defendants." *Id.* at 449. Here, there is no claim the federal officials acted under Syrian control.

their reciprocal authority. See, *e.g.*, *United States* v. *Garrett*, 172 F. App'x 295, 298 (11th Cir. 2006); *United States* v. *Janik*, 723 F.2d 537, 548 (7th Cir. 1983). The "national and State systems are to be regarded as ONE WHOLE." The Federalist No. 82. But the United States and foreign nations—here, Syria—are in no sense "one whole." "Thus, it is 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." Pet. App. 371a. Petitioner identifies no case that has held that a U.S. official acted under color of foreign law, much less a decision that does so in conflict with the decision below.[19]

III. THE DENIAL-OF-ACCESS CLAIM (COUNT IV) DOES NOT WARRANT REVIEW

Finally, petitioner challenges the dismissal of his denial-of-access claim (Count IV). See Pet. 30. That fact-bound claim warrants no further review.

In *Iqbal*, this Court held that a plaintiff asserting a *Bivens* claim "must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." 129 S. Ct. at 1948. The courts here agreed that petitioner's complaint did not do so: Petitioner "fail[ed] to specify culpable action taken by any single defendant, and [did] not allege the 'meeting of the minds' that a plausible conspiracy claim requires." Pet. App. 21a; see *id.* at 423a. Challenging that ruling, petitioner recounts his allegations at length and recites

---

[19] Petitioner also claims a conflict with *Hindes* v. *FDIC*, 137 F.3d 148 (3d Cir. 1998), see Pet. 29, but the Second Circuit acknowledged that *Hindes*' conspiracy-based standard might apply in some circumstances. See Pet. App. 18a-19a. The court simply found that petitioner's allegations of conspiracy came up short. *Ibid.*

the inferences he wants drawn. See Pet. 30-34. Whether petitioner's complaint meets *Iqbal*'s requirements, however, is precisely the sort of case-specific dispute that rarely warrants this Court's review. See *Gonzalez* v. *Crosby*, 545 U.S. 524, 544 n.7 (2005) (Stevens, J., concurring). Petitioner half-heartedly asserts that the standards employed below "conflict with this Court's decisions" in *Twombly* and *Iqbal*. Pet. 34. But the Second Circuit specifically cited and applied both cases in assessing petitioner's pleadings. See Pet. App. 20a. Petitioner's claimed "misapplication of a properly stated rule of law" does not warrant review. S. Ct. R. 10. Indeed, having refused the district court's "invit[ation] * * * to re-plead the claim" to cure the deficiencies, Pet. App. 20a, petitioner is ill-positioned to demand that this Court give him relief he could have provided himself by re-pleading.

Besides, the court of appeals' decision was correct. To give but one example, petitioner nowhere identifies anything Thompson did to deny petitioner access to the courts. The sole concrete act petitioner attributes to Thompson is the determination that removing petitioner—then an adjudicated member of al Qaeda—to Canada would be "prejudicial to the United States" within the meaning of 8 U.S.C. § 1231(b)(2)(C)(iv) given the porous 5,525-mile U.S.-Canadian border. See p. 3 & n.2, *supra*. But that facially sensible determination, which by statute Thompson, as acting Attorney General, was required to make, hardly raises an inference of conspiracy to prevent access to the courts. Petitioner's remaining allegations likewise show only that each re-

spondent performed the role he was supposed to perform under the INA.[20]

Petitioner's claim, moreover, also fails for the reasons given above. Two courts have recognized that his denial-of-access claim is fatally defective under *Harbury*. See pp. 22-23, *supra*; Pet. App. 264a-265a, 420a. And the facts as pleaded do not make out a denial-of-access claim in any event. See p. 23, *supra*. Further review is unwarranted.

CONCLUSION

The petition should be denied.

---

[20] Petitioner errs in claiming (Pet. 32-33) a conflict between the court of appeals' holding that personal involvement was not sufficiently pleaded and its "affirm[ance of] *the district court's conclusion* that [petitioner] sufficiently alleged personal jurisdiction." Pet. App. 6a-7a (emphasis added). For the denial-of-access claim (Count IV), the district court found personal jurisdiction was *not* established, dismissing that count precisely because "the complaint lacks the requisite amount of personal involvement needed * * * to establish personal jurisdiction." *Id.* at 423a.

Respectfully submitted.

JEREMY MALTBY
GEORGE JAMES BAGNALL V
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, California 90071

Counsel for Respondent
Robert S. Mueller III

WILLIAM A. MCDANIEL, JR.
LAW OFFICES OF
WILLIAM A. MCDANIEL, JR.
118 West Mulberry Street
Baltimore, Maryland 21201

Counsel for Respondent
James W. Ziglar

THOMAS G. ROTH
12 Fairview Avenue
West Orange, NJ 07052

Counsel for Respondent
J. Scott Blackman

JOHN J. CASSIDY
JAMIE S. KILBERG
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004

JEFFREY A. LAMKEN
Counsel of Record
MICHAEL G. PATTILLO, JR.
MOLOLAMKEN LLP
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

STEPHEN L. BRAGA
ROPES & GRAY L.L.P.
700 12th Street, NW
Washington, D.C. 20005

Counsel for Respondent
Larry D. Thompson

DEBRA L. ROTH
SHAW, BRANSFORD & ROTH,
P.C.
1100 Connecticut Ave., NW
Suite 900
Washington, D.C. 20036

Counsel for Respondent
Edward J. McElroy

MAY 2010