[ORAL ARGUMENT NOT YET SCHEDULED]

14-5194

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMIR MESHAL

Plaintiff–Appellant,

v.

CHRIS HIGGENBOTHAM, et al.,

Defendants–Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
No. 1:09-cv-02178-EGS

REPLY BRIEF FOR PLAINTIFF–APPELLANT

Jonathan Hafetz
D.C. Circuit Bar No. 49761
169 Hicks Street
Brooklyn, NY 11201
Telephone: (917) 355-6896
hafetzj@yahoo.com
Cooperating ACLU Attorney

Arthur B. Spitzer
American Civil Liberties Union of the Nation's Capital
4301 Connecticut Avenue, NW, Suite 434
Washington, DC 20008
Telephone: (202) 457-0800
Fax: (202) 452-1868
art@aclu-nca.org

Hina Shamsi
Dror Ladin
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2500
Fax: (212) 549-2654
hshamsi@aclu.org
dladin@aclu.org

Attorneys for Plaintiff–Appellant

March 2, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

---

*Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Other Authorities

Rules

GLOSSARY

SAC	Second Amended Complaint
DTA	Detainee Treatment Act of 2005

STATUTES AND REGULATIONS

As directed by D.C. Circuit Rule 28(a)(5), Appellant states that all applicable statutes are contained in the Brief for the Appellees.

SUMMARY OF ARGUMENT

This case presents a limited, but fundamental, question: whether an American citizen has any remedy for egregious constitutional violations by FBI agents who held him for months without charge and grossly abused him to coerce a confession. This Court should reject Defendants' attempt to create a sweeping exception to *Bivens* for law enforcement action against American citizens abroad that contradicts Supreme Court precedent and that no other court has adopted.

Defendants' argument that special factors preclude a *Bivens* remedy fails for three main reasons. First, this case falls within the core of *Bivens* because it concerns Fourth and Fifth Amendment violations committed by FBI agents against a U.S. citizen during a criminal investigation. The Supreme Court has made clear that *Bivens* applies to law enforcement agents, including in cases implicating national security, and this Court should reject Defendants' attempt to create a novel exception to *Bivens* for FBI misconduct abroad. Second, Congress has recognized and preserved *Bivens* suits against law enforcement agents. Third, even if this case required the Court to do more than apply the recognized *Bivens* framework to claims by citizens against FBI agents, it should do so because no alternative remedy exists, because adjudication of Plaintiff's claims fits within the courts' existing expertise, and because special factors do not counsel hesitation.

Defendants' arguments in favor of qualified immunity also fail. Mr. Meshal properly alleged that Defendants violated his constitutional rights; Defendants' arguments to the contrary misunderstand the plausibility requirement and misstate the record. Defendants are not entitled to immunity for these violations because they had fair warning that FBI agents operating overseas may not coerce a confession by subjecting a civilian U.S. citizen to prolonged extrajudicial detention, forcible transfer, and threats of torture.

ARGUMENT

I. Special Factors Do Not Preclude A *Bivens* Remedy.

A. Plaintiff's Case Is At The Heart Of *Bivens*.

Bivens's application to this case is straightforward: a lawsuit by a U.S. citizen against the federal law enforcement officials who unlawfully detained and interrogated him is not "a new kind of litigation," *Wilkie v. Robbins*, 551 U.S. 537 (2007), nor are FBI agents "a new category of defendants," *Correctional Servs. Corp. v. Malesko*¸ 534 U.S. 61 (2001). The Supreme Court has never wavered from the proposition that *Bivens* exists to remedy constitutional violations by federal law enforcement agents, even as the Court has not extended *Bivens* to altogether different contexts. *See, e.g.*, *Wilkie*, 551 U.S. at 557 (retaliation for exercising property rights); *FDIC v. Meyer*, 510 U.S. 471 (1994) (former banking employee's suit against federal banking agency); *Schweiker v. Chilicky*, 487 U.S.

412 (1988) (Social Security disability benefits); *United States v. Stanley*, 483 U.S. 669 (1987) (military service); *Chappell v. Wallace*, 462 U.S. 296 (1983) (same); *Bush v. Lucas*, 462 U.S. 367 (1983) (compensation for federal civil servants); *see also Minneci v. Pollard*, 132 S. Ct. 617, 622-23 (2012) (summarizing cases).

Defendants' argument is premised on the novel theory that *Bivens*'s availability depends on the type of crime law enforcement agents are investigating or the locus of that investigation. No court (other than the court below) has adopted the proposition that FBI agents are exempt from *Bivens* liability because they are investigating terrorism, rather than drug trafficking, or because the investigation takes place in Kenya rather than in Kansas.

Defendants, moreover, ignore Supreme Court precedent applying *Bivens* in cases involving national security. In *Mitchell v Forsyth*, 472 U.S. 511 (1985), the Court stated that the rationale behind *Bivens* applies even more forcefully in such cases because of the heightened "danger that . . . federal officials will disregard constitutional rights in their zeal to protect the national security." *Id.* at 523.

Defendants rely on *Chappell* and *Stanley*, Def. Br. 29-30, in which the Court denied a *Bivens* remedy to servicemembers for conduct arising out of their military service. *Chappell*, 462 U.S. at 304 (enlisted personnel sued their superior officers for racial discrimination); *Stanley*, 483 U.S. at 683-84 (servicemember claimed he was secretly administered LSD in Army experiment). Those decisions rested on

concerns about disrupting the military's unique internal disciplinary structure, *Chappell*, 462 U.S. at 300; *Stanley*, 483 U.S. at 680-83, and about interfering with Congress's enactment of a comprehensive internal system of military justice regulating military life, *Chappell*, 462 U.S. at 300-02; *Stanley*, 483 U.S. at 683-84. This action poses no such concerns.

Doe v. Rumsfeld, 683 F.3d 390 (D.C. Cir. 2012), *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (en banc), and *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012), also do not support the exception to *Bivens* that Defendants urge. *Doe* and *Vance* were actions by *de facto* U.S. servicemembers against their military superiors, and thus controlled by *Chappell* and *Stanley*. *See Doe*, 683 F.3d at 394; *Vance*, 701 F.3d at 199; Pl. Br. 33-35. Crucially, *Doe*, *Vance*, and *Lebron* all rested on the fact that the plaintiffs challenged military decisionmaking over detainees in military custody during wartime. *See Doe*, 683 F.3d at 395-96; *Vance*, 701 F.3d at 199, 202; *Lebron*, 670 F.3d at 549-50; Pl. Br. 35-37. None of the factors essential to those decisions is present here.[1]

[1] Defendants incorrectly assert that Meshal's claims arose in "war torn East Africa." Def. Br. 29. Defendants' unlawful detention and interrogation of Meshal occurred in Kenya and Ethiopia, neither of which was war torn. Defendants instead *returned* Meshal to the war torn country (Somalia) from which he had fled, and then from that country to Ethiopia to continue his detention and interrogation. SAC ¶¶ 120-29. Defendants' expansive argument, moreover, does not turn on any such distinctions: it would preclude *Bivens* relief for *any* U.S. citizen targeted by U.S. law enforcement abroad for crimes said to implicate national security.

Defendants ignore *Doe*'s narrow holding and seize on broad dicta. Def. Br. 21. But *Doe*'s statement that the Supreme Court "has never implied a *Bivens* remedy in a case involving . . . national security," 683 F.3d at 394, is inaccurate. The Supreme Court has underscored the singular importance of a *Bivens* remedy in precisely such cases. Pl. Br. 25, 27-28, 55, 58 (discussing *Mitchell*). Because *Doe* did not address the question of a *Bivens* remedy for a private U.S. citizen abused by the FBI in a criminal investigation, the court's "overly broad language . . . [is] *obiter dicta* and not entitled to deference." *United States v. Wade*, 152 F.3d 969, 973 (D.C. Cir. 1988).

Defendants also rely on *Bivens* cases involving non-citizens. Def. Br. 23-24. The finding of "special factors" in those cases invoked the particular concern—not applicable here—that foreign nationals could use U.S. courts to obstruct U.S. foreign policy. *See Ali v. Rumsfeld*, 649 F.3d 762, 774 (D.C. Cir. 2011); *Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985); *Arar v. Ashcroft*, 585 F.3d 559, 575-76 (2d Cir. 2009) (en banc) (citing *Sanchez-Espinoza*). The *Doe* Court reaffirmed the significance of citizenship in the special factors analysis and distinguished non-citizen *Bivens* suits on that basis. *Doe*, 683 F.3d at 396 (plaintiff's citizenship "remove[s] concerns [present in those cases] about the effects that allowing a *Bivens* action would have on foreign affairs"); Pl. Br. 41-42. What the plaintiff's citizenship did not remove,

the *Doe* Court said, was the different special factor present in that suit: the threatened impact on internal military affairs of a challenge to the military detention of a military contractor in a war zone. *Doe*, 683 F.3d at 396. No aspect of *Doe* supports barring Mr. Meshal from seeking *Bivens* relief for constitutional violations by FBI agents.

Defendants' reliance on *Wilson v. Libby*, 535 F.3d 697 (D.C. Cir. 2008), is also misplaced. *Wilson* concerned a different and unique claim: a former CIA employee seeking a remedy for disclosure of her covert status. *Id.* at 701-03. But Congress had legislated a comprehensive remedial scheme that intentionally excluded a remedy for that specific claim. *Id.* at 706-07. Here, Congress has not created an alternate scheme for constitutional violations by FBI agents, and has instead repeatedly preserved *Bivens* as a remedy. *See infra* Section I.B. Moreover, CIA secrecy concerns regarding its own employees pose fundamentally different questions than the general immunity for law enforcement abuses Defendants seek here. *Wilson*, 535 F.3d at 710-11 (discussing unique concerns posed by suits over disclosure of CIA operative's covert identity). And unlike Mr. Meshal, who has no remedy other than *Bivens*, the plaintiffs in *Wilson* had an alternative remedy under the Privacy Act. *Id.* at 709.

In short, Defendants' alleged "wall of authority," Def. Br. 23, is made of sand.

B. Congressional Action Supports A *Bivens* Remedy.

Congress has consistently reaffirmed *Bivens*' availability for American citizens whose constitutional rights are violated by FBI agents. Pl. Br. 42-48; Br. of *Amici Curiae* Law Professors 12-15. Congress expressly preserved *Bivens* when it preempted non-federal remedies against federal employees acting within the scope of their employment. *See* 28 U.S.C. § 2679(b)(2)(A); *see also Hui v. Castaneda*, 559 U.S. 799, 807 (2010) (Congress preserved *Bivens* claims through Westfall Act's exception); James E. Pfander & David Baltmanis, *Rethinking* Bivens: *Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 133 (2009) (Westfall Act "broadly preserves the availability of a *Bivens* action for '[v]iolations of the Constitution'" (quoting 28 U.S.C. § 2679(b)(2)(A))). And Congress *twice* rebuffed Justice Department proposals to eliminate *Bivens*. Pl's Br. 45.[2]

Defendants mistakenly assert that the Detainee Treatment Act of 2005 (DTA), which prohibits torture and other cruel, inhuman, or degrading treatment, 42 U.S.C. § 2000dd(a), precludes *Bivens* liability for their constitutional torts. Def. Br. 40–41. The DTA addressed the distinct context of military affairs, military custody, and U.S. military operations in war zones. *See Doe*, 683 F.3d at 397.

[2] Defendants suggest that the Westfall Act establishes only that Westfall immunity does not apply to *Bivens* claims. Def. Br. 44. But Congress deliberately included the savings provision in the Westfall Act to preserve preexisting *Bivens* liability for constitutional torts by federal officials. *See* H. Rep. No. 100-700, at 6 (1988); Pl. Br. 45.

Nothing about providing statutory protection against torture and other mistreatment to *military detainees*—mainly noncitizens who may lack constitutional protections—suggests any intent to erase U.S. citizens' longstanding right to *Bivens* relief for constitutional violations by FBI agents. Defendants' theory that the DTA bars this suit would apply with equal force to *Bivens* claims by U.S. citizens seeking relief for mistreatment by FBI agents in the United States, since the DTA applies "regardless of nationality or physical location." 42 U.S.C. § 2000dd(a). Congress did not intend such a *sub silentio* overruling of *Bivens*.[3]

Defendants' reliance on the Military Claims Act and Foreign Claims Act, Def. Br. 42, is also misplaced. These statutes create remedies for conduct by *military* officials, an area historically subject to comprehensive congressional regulation. *See* Military Claims Act, 10 U.S.C. § 2733 (providing for *military authorities* to pay claims for damage to persons or property); Foreign Claims Act, 10 U.S.C. § 2734 (providing for *military authorities* to pay claims for damages to foreign nationals outside the U.S.). Defendants cannot support their suggestion that by authorizing administrative remedies for damages caused by the military,

[3] Defendants cite *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), Def. Br. 40, but *Kiobel* merely applied the ordinary presumption against the extraterritorial application of federal statutes. *Id.* at 1664. *Bivens* provides a remedy in the absence of statutory authorization.

Congress intended to bar federal courts from determining whether FBI agents violated the constitutional rights of American citizens.[4]

C. The Exercise Of Judgment Requires A *Bivens* Remedy.

If Mr. Meshal's claims did require the Court to "devise a new *Bivens* damages action," rather than simply apply the recognized *Bivens* framework for claims by citizens against law enforcement officers, this Court would be required to "weigh[] reasons for and against the creation of a new cause of action, the way common law judges have always done." *Wilkie*, 551 U.S. at 554. Because no alternative remedy exists, because adjudication of Mr. Meshal's claims fits squarely within the courts' expertise, and because, as described above, special factors do not counsel hesitation, this Court should find that a damages remedy represents "the best way to implement [the] constitutional guarantee" to which U.S. citizens are entitled when U.S. law enforcement abuses them abroad. *Id.* at 550.

The Supreme Court has repeatedly underscored the importance of alternative remedies in determining whether a constitutional cause of action is available. *See, e.g.*, *Minneci*, 132 S. Ct. at 623 (denying *Bivens* remedy for claim against

[4] Defendants' reliance on the Torture Victim Protection Act, 28 U.S.C. § 1350 note, Def. Br. 41, is similarly misplaced. That statute authorizes U.S. residents to sue *foreign* officials for abusive treatment under color of *foreign* law. It does not purport to address or otherwise cast doubt on the preexisting right of U.S. citizens to sue *U.S.* officials for violations of *U.S.* law.

employees of privately-operated prison because of "'alternative, existing process' capable of protecting the constitutional interests at stake"); *Schweiker*, 487 U.S. at 425 (noting elaborate remedial scheme created by Congress to protect Social Security disability recipients). As the Court explained in its most recent *Bivens* decision, while an alternative remedy "need not be perfectly congruent" with *Bivens*, there should be some alternative that "provide[s] roughly similar incentives for potential defendants to comply [with the Constitution,] while also providing roughly similar compensation to victims of violations. *Minneci*, 132 S. Ct. at 624. This consideration strongly supports Mr. Meshal, because for him, "it is [*Bivens*] or nothing." *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

Another consideration in determining whether to recognize a *Bivens* claim is whether there are existing standards of adjudication. *Wilkie*, 551 U.S. at 555-62.[5] Although Defendants urge this Court to ignore judges' expertise in evaluating constitutional violations similar to those alleged here, Def. Br. 30–32, this consideration too weighs strongly in Mr. Meshal's favor. Courts regularly adjudicate claims of unlawful extrajudicial detention and coercion occurring abroad under established standards (see cases cited at Pl. Br. 50-54) and have tools

[5] The Court observed that recognizing *Bivens* liability for the claims in *Wilkie* could generate an "enormous swath of potential litigation." *Id.* at 561. This suit does not present those concerns. Pl. Br. 42 n.11.

to address any evidentiary concerns that may arise (see cases cited at Pl. Br. 54-57). As Judge Bates explained, whether U.S. law enforcement agents violated a U.S. citizen's constitutional rights overseas "are not inquiries that are unusual for the courts." *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 64 (D.D.C. 2004).[6]

There is no support for Defendants' argument, Def. Br. 32–35, that courts cannot examine or manage litigation adjudicating Defendants' abuses. Mr. Meshal's coercive interrogation claims do not require any inquiry into Defendants' relationship with foreign officials. Nor is there anything unique about examining the extent of Defendants' control over Mr. Meshal's detention. *See Abu Ali*, 350 F. Supp. 2d at 62–64. None of his claims requires discovery against high-level U.S. officials because Mr. Meshal has sued only those U.S. agents directly involved in his illegal detention and torture. Higher officials' actions or knowledge are irrelevant because "[t]his Court has never held that qualified immunity permits an officer to escape liability for his unconstitutional conduct simply by invoking the defense that he was 'just following orders.'" *Wesby v. District of Columbia*, 765 F.3d 13, 29 (D.C. Cir. 2014).

[6] Defendants' efforts to distinguish this Court's en banc decision in *Ramirez de Arellano*, Def. Br. 31 n.5, fail for the reasons previously explained. Pl. Br. 20 n.5. Additionally, on remand, this Court rejected the plaintiff's claim for equitable relief only because the unconstitutional conduct stopped. *See Ramirez de Arellano v. Weinberger*, 788 F.2d 762, 763-64 (D.C. Cir. 1986). The Court cast no doubt on the plaintiff's ability to bring a damages action and further instructed the district court to dismiss the case without prejudice to allow plaintiff to renew his claim for equitable relief if the conduct resumed. *Id.* at 764.

Defendants cite *Munaf v. Geren*, 553 U.S. 674 (2008), and *Omar v. McHugh*, 646 F.3d 13 (D.C. Cir. 2011), Def. Br. 32, but those cases merely applied the well-settled rule that individuals facing extradition to a foreign country cannot obtain review of the conditions in that country and that U.S. courts will not pass judgment on the legitimacy of that country's tribunals. *Munaf*, 553 U.S. at 697-700 (transfer of U.S. citizen to Iraq to face charges for crimes committed there); *Omar*, 646 F.3d at 20-21 (transfer of U.S. citizen to Iraq where he had already been convicted of criminal charges). The Supreme Court, moreover, maintained the federal judiciary's authority to determine the legality of a U.S. citizen's detention and treatment by U.S. officials, even when those officials act as part of an international coalition. *Munaf*, 553 U.S. at 687-88. *Munaf* and *Omar* thus support Mr. Meshal's claims here since he challenges solely actions by U.S. officials.

II. Defendants Are Not Entitled To Qualified Immunity.

A. Plaintiff Has Pleaded Plausible Violations Of His Constitutional Rights.

The district court correctly found that Mr. Meshal plausibly alleged Fourth and Fifth Amendment violations "particularly when Defendants told him over and over that they had the power to send him back to the United States at any time" and when they "threatened him with torture, disappearance, and death if he did not immediately confess to his interrogators that he was a terrorist." Joint Appendix

(JA) 90, 92. Mr. Meshal further plausibly alleged that Defendants participated in his unlawful rendition for further unconstitutional interrogation.

Yet Defendants now maintain that Mr. Meshal "alleges no specific facts" regarding Defendants' personal involvement in his detention and rendition and that "the most plausible explanation" for Defendants' own admissions of personal control is they merely "exaggerat[ed] the degree of their control over" him. Def. Br. 51. Defendants mischaracterize the complaint and misunderstand the law; Mr. Meshal has more than satisfied the plausibility standard.

The plausibility standard is not a "probability requirement . . . ." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Defendants do not suggest it is implausible that they admitted to Mr. Meshal their personal involvement in his detention and transfers; they maintain only that it is *more likely* that these representations were dishonest. But on a motion to dismiss, jury arguments about the "most plausible explanation" for Defendants' admissions are beside the point. As the Seventh Circuit has explained, "'[p]lausibility' in this context does not imply that the district court should decide whose version to believe, or which version is more likely than not." *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010). Defendants may choose to argue on the merits that they consistently lied to Mr. Meshal about their personal involvement in his captivity and rendition. But at this

stage, the inference that Defendants' contemporaneous statements to Mr. Meshal were truthful is certainly plausible, and therefore sufficient.

Defendants seriously misstate the record in claiming that "the complaint offers only boilerplate, wholly conclusory allegations" of their personal control over Mr. Meshal. Def. Br. 50. Mr. Meshal has pleaded an array of non-conclusory, specific facts, each of which must be accepted as true, alleging that Defendants repeatedly admitted their personal control over him:

- When Mr. Meshal was detained in Kenya, Defendant Hersem informed him that, if he was not truthful, Defendant Hersem "would not allow Mr. Meshal to go home." Second Amended Complaint (SAC) ¶ 66; JA 35.

- Defendant Hersem promised that if Mr. Meshal confessed, he "would be returned to the United States and would face civilian courts there. When Mr. Meshal asked what would happen if he refused to answer any more questions, Defendant Hersem told him that he would be sent back to Somalia." SAC ¶ 87, JA 41.

- Defendant Higgenbotham and Doe Defendant 1 similarly threatened Mr. Meshal during the Kenyan interrogations. *Id.*

- After Mr. Meshal refused to confess and was subsequently transferred to Somalia and then Ethiopia, Doe Defendant 1 confirmed that Mr. Meshal had been forcibly transferred because Defendants "thought Mr. Meshal wasn't 'being truthful' with them in Kenya." SAC ¶ 148, JA 60.

- Once Defendants' threats of transfer had been realized, "Doe Defendant 1 also told Mr. Meshal that his truthfulness now would determine whether he could ever go home." *Id.*

- "Doe Defendant 1 made Mr. Meshal believe that . . . he and other FBI agents would determine whether and when Mr. Meshal could go home." SAC ¶ 149, JA 60.

- In the course of interrogating Plaintiff in Ethiopia, Doe Defendant 1 told Mr. Meshal that he "would not be allowed to go home unless Mr. Meshal told him what he wanted to hear." SAC ¶ 156, JA 62.

In addition to Defendants' own admissions, the complaint provides numerous other specific, non-conclusory factual allegations supporting Defendants' control of Mr. Meshal's detention and forcible transfers. These allegations belie Defendants' proposed inference "that Kenya, Somalia, and Ethiopia retained ultimate say over plaintiff's circumstances." Def. Br. 52:

- A "U.S. government official posted to Addis Ababa during Amir Meshal's detainment and interrogation in Ethiopia" was informed Mr. Meshal "was being transferred to the custody of the Ethiopians to further US interrogations of this US citizen." SAC ¶ 170C, JA 67-68.

- The same U.S. government official later confirmed that "U.S. officials used foreign proxies to detain Mr. Meshal when said foreign governments would not normally have detained" him. SAC ¶ 170D, JA 68.

- The U.S. ambassador to Ethiopia admitted to Mr. Meshal's father that the Ethiopian military tribunal would not impact whether or when Mr. Meshal would be returned home. SAC ¶ 161; JA 64.

- Senior Kenyan police officers stated that the FBI was in charge of Mr. Meshal's detention, explaining that "It's not our operation. Go and ask the Americans." SAC ¶ 96, JA 44.

- A Kenyan police officer informed Mr. Meshal that his detention in Kenya was contingent on "what the United States wanted to do with him." SAC ¶ 52, JA 30-31.

- Defendants Higgenbotham and Hersem arranged for Mr. Meshal to be moved to a prison closer to their Kenyan villa to facilitate their interrogation. SAC ¶ 79, JA 39.

- Two U.S. officials who were familiar with Mr. Meshal's case stated that he was not returned to the United States because, unlike Daniel Maldonado, Mr. Meshal did not confess to a crime. SAC ¶ 121, JA 51.

- A senior Western government official based in Kenya stated publicly that that the U.S. was "sending prisoners to Ethiopia" because it offered "a convenient place to interrogate people." SAC ¶ 122, JA 51.

Defendants' only response to these specific allegations is to speculate about yet another alternate inference: Perhaps, Defendants argue, Ethiopia, Kenya, and Somalia did not, in fact, control Mr. Meshal's detention, but instead "the United States controlled plaintiff's detention"—without Defendants' taking any personal role. Def. Br. 52. This is another tortured reading of the complaint and the plausibility standard. Mr. Meshal has provided as much factual support for Defendants' personal involvement in his prolonged detention and unlawful rendition as a person held near-incommunicado on foreign soil could reasonably be expected to offer. *See Nattah v. Bush*, 605 F.3d 1052, 1058 (D.C. Cir. 2010) (rejecting contention that plaintiff must "plead every conceivable fact or face dismissal of his claim"). As the Supreme Court recently reaffirmed, a complaint that "state[s] simply, concisely, and directly" the facts that support a claim is sufficient. A plaintiff is "required to do no more to stave off threshold dismissal

for want of an adequate statement of [his] claim." *Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346 (2014).[7]

Defendants' additional contention that Mr. Meshal did not sufficiently allege Doe 1's personal involvement in the coercive interrogations is equally meritless. The complaint specifically alleges that Doe 1 directly made rendition threats similar to those made by Defendant Hersem. *See* SAC ¶ 87, JA 41. It also alleges that Doe 1 led all but one of the Ethiopian interrogations, *id.* ¶ 149, JA 60, and personally employed coercive techniques during those interrogations, including threatening that Mr. Meshal would "not be allowed to go home unless he told [Doe 1] what he wanted to hear," *Id.* ¶ 156, JA 62. Doe 1 cannot escape liability on the basis that he merely threatened Mr. Meshal with forcible transfer and permanent detention, while not uttering death and torture threats as egregious as those made by Hersem and Higgenbotham.

This Court recently rejected a similar claim in *Wesby*, where defendant law enforcement officers undertook the predicate actions that resulted in unconstitutional arrests but argued that they "cannot be held liable because they

[7] The Daniel Maldonado transcript cited by Defendants does not undermine the complaint's allegations. The fact that Defendants consider Meshal and Maldonado to have been in Kenyan "custody" during their interrogations says nothing about who actually controlled their freedom. Indeed, Maldonado's immediate return to the United States once he confessed to FBI agents, and Defendants' representations that Mr. Meshal would also be returned home if he confessed to those same agents, confirm that Defendants were in control.

did not personally arrest each of the Plaintiffs." 765 F.3d at 29. As the Court explained, this argument "misapprehends the applicable legal standard for causation" in the constitutional tort context, which requires personal involvement in the constitutional violation but does not require participation in every action related to the violation. *Id.* (citing *James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990) (officers who did not perform pat-down but who "remained armed on the premises throughout the entire search" could be held liable as "participants rather than bystanders")).

B. Defendants Could Not Reasonably Have Believed That They Were Entitled To Subject Plaintiff To Months Of Extrajudicial Detention And Coercive Interrogation.

Although the district court found that the complaint properly alleged violations of Mr. Meshal's Fourth and Fifth Amendment rights, JA 92, Defendants now argue that this Court should avoid deciding whether U.S. citizens have any rights under the Constitution not to be detained, forcibly transferred, and tortured abroad by U.S. law enforcement officers. Def. Br. 54. The Court should reject that argument. Determining whether Defendants' conduct violates the Constitution "promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *see also Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014) ("Heeding our guidance in

Pearson, we begin in this case with the question whether the officers' conduct violated the Fourth Amendment.").

Defendants themselves assert a "need for more clear guidance from the case law" as to whether they may forcibly transfer a U.S. citizen to third countries for proxy detention in aid of law enforcement interrogations. Def. Br. 65. The Court should accommodate that request and hold that such conduct violates the Constitution, providing "conscientious officers . . . the guidance necessary to ensure that they execute their responsibilities in a manner compatible with the Constitution." *United States v. Garcia-Hernandez*, 659 F.3d 108, 116 (1st Cir. 2011).

Turning to whether Mr. Meshal's rights were clearly established, officials are not granted immunity simply because "the very action in question" has not "previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009) (same); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances."). Plaintiffs "need not identify cases with materially similar facts, but have only to show that the state of the law at the time of the incident gave the officers fair warning that their particular conduct was unconstitutional." *Wesby*, 765 F.3d at 26 (quotation and alteration marks omitted).

The question, therefore, is whether reasonable FBI agents conducting a law enforcement investigation abroad had "fair warning" that the Fourth and Fifth Amendments protected a civilian American citizen against lawless detention, rendition, and threats of torture and disappearance. The answer is yes.

1. Defendants Had Fair Warning That The Fourth And Fifth Amendments Protect Civilian U.S. Citizens Abroad.

More than fifty years ago, the Supreme Court emphatically "reject[ed] the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights." *Reid v. Covert*, 354 U.S. 1, 6 (1957) (plurality opinion). Justice Harlan's separate speculation that in some unforeseen circumstance Congress might not be bound by an "altogether impracticable and anomalous" constitutional requirement, *id.* at 74 (Harlan, J., concurring in the result), has never been understood to undermine the "well settled" rule "[t]hat the Bill of Rights has extraterritorial application to the conduct abroad of federal agents directed against United States citizens," *United States v. Toscanino*, 500 F.2d 267, 280-81 (2d Cir. 1974).

Contrary to Defendants' novel reading of *Reid*, Def. Br. 55–56, courts are clear that federal law enforcement officers may not disregard the Fourth and Fifth Amendments when they act against civilian U.S. citizens abroad. *See, e.g.*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265-66 (1990) (the Fourth Amendment protects "persons who are part of [our] national community" from "arbitrary action

by their own Government"); *id.* at 270 ("*Reid* . . . decided that United States citizens stationed abroad could invoke the protection of the Fifth and Sixth Amendments."); *Al Bahlul v. United States*, 767 F.3d 1, 65.n.3 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring in part and dissenting in part) ("As a general matter, the United States Constitution applies to U.S. citizens worldwide[.]"); *see also* Pl. Br. 17–21; Amicus Br. of Former FBI Agent Donald Borelli 9-15 (collecting cases). Nor, as this Court has stated, may federal agents evade these protections by "teaming up" with foreign actors. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1542-43 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985); *see also United States v. Mount*, 757 F.2d 1315, 1318 (D.C. Cir. 1985) ("The exclusionary rule does apply to a foreign search if American officials or officers participated in some significant way. . . ."). Nor do U.S. citizens lose constitutional protections because law enforcement officers are investigating possible crimes implicating terrorism or national security. *See, e.g.*, *In re Terrorist Bombings of U.S. Embassies in E. Afr. (Fourth Amendment Challenges)*, 552 F.3d 157, 170 n.7 (2d Cir. 2008) (U.S. citizens targeted by the U.S. government overseas entitled to "constitutional protection").

Defendants appear to argue that either *Boumediene v. Bush*, 533 U.S. 723 (2008), or *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012), calls into question the long-recognized application of the Bill of Rights to U.S. citizens abroad. But as

this Court has explained, "the Supreme Court in *Boumediene* explicitly confined its constitutional holding only to the extraterritorial reach of the Suspension Clause and disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions." *Ali*, 649 F.3d at 771 (quotation marks and citation omitted). And *Padilla* concerned only the "unique" detention and interrogation of a U.S. citizen "designated an enemy combatant and confined to military detention by order of the President." *Padilla*, 678 F.3d at 761. Mr. Meshal was never designated or held as an enemy combatant, was never detained by the military, and was never even charged with a crime. No reasonable FBI agent could believe that he could was free to treat Mr. Meshal as Defendants treated him. *Cf.* Amicus Br. of Former FBI Agent Donald Borelli 9 ("The FBI's longstanding commitment to respect the Constitution—including when it acts abroad in respect of U.S. citizens—reflects and implements the long- established rule that the Constitution applies to and constrains U.S. government action against U.S. citizens abroad.").[8]

[8] Furthermore, the official actions at issue in *Padilla* occurred prior to the Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). *See Padilla*, 678 F.3d at 761 ("*Hamdi* . . . was not decided until 2004, so it could not have placed Yoo on clear notice of Padilla's constitutional rights in 2001–03 when Yoo was at the Department of Justice."). After *Hamdi*, it is clear that even a U.S. citizen detained on the battlefield as an enemy combatant retains a "fundamental . . . right to be free from involuntary confinement by his own government without due process of law." *Hamdi*, 542 U.S. at 531 (plurality opinion).

2. Defendants Had Fair Warning That They Could Not Subject A U.S. Citizen Abroad To Four Months Of Incommunicado Extrajudicial Detention.

That the Fourth Amendment limits extrajudicial detention has been clear for decades. It is clear that a detainee must be promptly presented before a neutral magistrate following a warrantless arrest to determine if there is probable cause for continued detention. *See Gerstein v. Pugh*, 420 U.S. 103, 112-13 (1975). It is clear that officers may not substitute their own assessment of probable cause for that of a neutral magistrate. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) ("inferences [must] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime"). It is clear that presentment within 48 hours is required absent a showing of "a bona fide emergency or other extraordinary circumstance." *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991).[9] It is clear that law enforcement

[9] Defendants' reliance on *Kar v. Rumsfeld*, 580 F. Supp. 2d 80 (D.D.C. 2008), is misplaced. *Kar* merely held that the normal requirement that a suspect receive a probable cause hearing within 48 hours of his seizure under *County of Riverside* did not apply to the unique context of the military's "detention in hostile territory" of a suspected enemy combatant who had been apprehended in Iraq with improvised explosive device components and was "detained in a war zone." *Kar*, 580 F. Supp. 2d at 85. Mr. Meshal was not detained by the military during an armed conflict in a war zone, and the clearly-established rules for law enforcement continued to apply. *See, e.g., United States v. Yunis*, 859 F.2d 953, 967-69 (D.C. Cir. 1988) (applying law enforcement rules on prompt presentment to overseas arrest of terrorism suspect). Defendants themselves recognized as much because they sought to compel Mr. Meshal to waive his *Miranda* rights when they were interrogating him. SAC ¶ 71, JA 37; *see also supra* n.1. Further, *Kar* determined

officers may never delay presentment "for the purpose of gathering additional evidence to justify the arrest." *Id*. at 56; *Corley v. United States*, 556 U.S. 303, 308 (2009) ("delay for the purpose of interrogation is the epitome of 'unnecessary delay'"). And it is clear that this requirement applies to arrests by U.S. law enforcement agents overseas. Fed. R. Crim. Pro. 5(a)(1)(B) ("A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise."); *United States v. Yunis*, 859 F.2d 953, 967-69 (D.C. Cir. 1988) (evaluating reasonableness of four-day delay between capture of suspected terrorist in Eastern Mediterranean and arraignment in U.S.); *United States v. Purvis*, 768 F.2d 1237, 1238-39 (11th Cir. 1985) (evaluating reasonableness of five-day delay between capture of individuals at sea and arraignment).[10]

Whatever the outer bounds of promptness might be when U.S. citizens are detained by U.S. law enforcement officials abroad, it would have been plain to any FBI officer that four months of extrajudicial detention, regardless of whether it was accomplished through the use of proxy jailors, far exceeded constitutional limits.

---

that even in the unique context of battlefield detention by the military, an American citizen's detention for 48 days without a judicial hearing is unreasonable under the Fourth Amendment. 580 F. Supp. 2d at 84-85.

[10] Although the district court did not reach this additional violation, Defendants' actions in subjecting Meshal to months of detention without any process also violated Meshal's clearly-established right under the Fifth Amendment "to be free from involuntary confinement by his own government without due process of law." *Hamdi*, 542 U.S. at 531 (plurality opinion); *see also id.* at 539.

3. Defendants Had Fair Warning That The Fifth Amendment Forbids Coercive Interrogation Of U.S. Citizens Abroad.

As the district court found, and as Mr. Meshal previously explained, it is "deeply embedded in our criminal law" that due process prohibits law enforcement officials from employing coercive interrogation techniques, including psychological torture. *Miller v. Fenton*, 474 U.S. 104, 109 (1985); *see also Palko v. Connecticut*, 302 U.S. 319, 326 (1937) (Due Process Clause must at least "give protection against torture, physical or mental"), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784 (1969); Pl. Br. 18-19; JA 91-92.

Defendants concede that torture is clearly unlawful. Def. Br. 59. They nonetheless argue that "no case establish[es] that the threats alleged here, in this particular context" violate the Fifth Amendment. *Id*. at 60. But "[q]ualified immunity need not be granted every time police act unlawfully in a way that courts have yet to specifically address." *Wesby*, 765 F.3d at 26-27. Defendants describe their threats as "vague," yet they could not reasonably believe that the Constitution forbids only threats of torture and disappearance that include a precise date and method by which the threat will be carried out. Defendants minimize their threats as "contingent," Def. Br. 61, but that hardly excuses them, as threats are by definition contingent: "your money or your life." No reasonable law enforcement agent could believe that threatening with disappearance a citizen at the mercy of U.S. officials in a foreign country is permissible so long as the citizen is told he

can avoid being disappeared by giving a satisfactory confession. Defendants are correct that their threats are "not to be condoned," Def. Br. 61; those threats were also clearly unconstitutional. *See, e.g.*, *Giuffre v. Bissell*, 31 F.3d 1241, 1258 (3d Cir. 1994) (substantive due process violated by use of "coercive conduct through threats and intimidation in order to induce a suspect to make a statement").

If there were any doubt, the FBI's own guidance made clear that Defendants' particular threats were unlawful. *See Hope*, 536 U.S. at 744 (specific advice that practice is unlawful indicates a reasonable person would have known that it violated the Constitution). The FBI itself cautioned its agents that the Constitution prohibits the "[u]se of scenarios designed to convince [a] detainee that death or severe pain is imminent for him" and that it is *per se* unlawful for an interrogator to threaten a detainee with transfer "either temporarily or permanently to Jordan, Egypt, or another third country to allow those countries to employ interrogation techniques that will enable them to obtain the requisite information." SAC ¶ 89, JA 42. The FBI's Legal Handbook for Special Agents placed any reasonable FBI officer on notice in at least 2007 that threatening a U.S. citizen with abuse and placing psychological pressure on him during an interrogation was coercive, prohibited, and a deprivation of due process. *See* "A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantánamo Bay, Afghanistan, and Iraq," U.S. Department of Justice, Office of the Inspector

General (October 2009) (Revised) 47-49, http://www.justice.gov/oig/special/s0805/final.pdf.

Finally, there is no merit to Defendants' argument that the "context" of their coercive interrogation of Mr. Meshal absolved them from obeying the Constitution. Def. Br. 60–63. *Padilla* is again inapposite. *See Padilla*, 678 F.3d at 763 n.9 ("What has not been clearly established is how [the shocks-the-conscience] standard applies to citizens detained as enemy combatants."). The Ninth Circuit specifically limited its holding to the law concerning enemy combatants held by the military in 2001–2003, pre-*Hamdi*, and did not suggest that the law was unsettled in any other context. Whether Defendants suspected Mr. Meshal of terrorism or other serious crimes, they were still required to respect his constitutional rights. That Defendants made their threats in a foreign country—when Mr. Meshal was most vulnerable—makes those threats more, not less, credible and conscience-shocking. JA 92.

4. Defendants Had Fair Warning That They Could Not Transfer A U.S. Citizen For Extrajudicial Detention And Coercive Interrogation.

Defendants' transfer of Mr. Meshal to Somalia and Ethiopia in an effort to coerce a confession is clearly prohibited for the same reasons.

Defendants' citations to *Omar* and *Arar* do not support them; neither case condones the forcible transfer of American citizens for detention and interrogation

by U.S. officials. *Arar* rejected a challenge to a government policy of subjecting noncitizens to rendition because of the court's concern that the policy would "be subjected to the influence of litigation brought by aliens." *Arar*, 585 F.3d at 581; *see supra* at 5 (distinguishing *Arar*'s special factors ruling). The Second Circuit neither addressed the constitutionality of rendition nor suggested that FBI agents were free to forcibly transfer U.S. citizens to further their own investigations. *Omar* concerned the specific due process rights possessed by a "military detainee captured during war . . . facing transfer to the custody of another sovereign that has convicted him of a crime." *Omar*, 646 F.3d at 19.

No reasonable FBI agent could believe that he was free to order or otherwise effect the transfer of a U.S. citizen to another country's detention facilities to further his detention by the FBI or to coerce a confession. *See United States v. Lanier*, 520 U.S. 259, 271 (1997) ("There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages . . . ." (quotation marks omitted)). Defendants threatened to transfer Mr. Meshal for failing to confess and Doe 1 confirmed that the forcible transfers to Somalia and Ethiopia were the realization of those threats. Defendants' conduct was clearly unconstitutional, and Mr. Meshal is entitled to a remedy.

CONCLUSION

For the reasons Mr. Meshal has provided, the judgment of the district court should be reversed.

Respectfully submitted,

/s/ Jonathan Hafetz
Jonathan Hafetz
169 Hicks Street
Brooklyn, NY 11201
Telephone: (917) 355-6896
hafetzj@yahoo.com
Cooperating ACLU Attorney

Hina Shamsi
Dror Ladin
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2500
Fax: (212) 549-2654
hshamsi@aclu.org
dladin@aclu.org

Arthur B. Spitzer
American Civil Liberties Union of the Nation's Capital
4301 Connecticut Avenue, NW,
Suite 434
Washington, DC 20008
Telephone: (202) 457-0800
Fax: (202) 452-1868
art@aclu-nca.org

Counsel for Plaintiff–Appellant

March 2, 2015

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6, 988 words (as counted by Microsoft Word Version 14), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

/s/ Jonathan Hafetz
Jonathan Hafetz

Dated: March 2, 2015

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing BRIEF FOR APPELLANTS and the JOINT APPENDIX in this appeal upon counsel for defendants-appellees via this Court's electronic filing system, this 2nd day of March, 2015.

/s/ Jonathan Hafetz
Jonathan Hafetz