

## **QUESTION PRESENTED**

Whether the Court of Appeals, sitting en banc, erred in affirming the pleading-stage dismissal on the basis of the evidentiary state secrets privilege of a suit seeking compensation for Petitioners' unlawful abduction, arbitrary detention, and torture.

## **PARTIES TO THE PROCEEDINGS**

Petitioners in this case are Binyam Mohamed, Ahmed Agiza, Abou Elkassim Britel, Bisher Al-Rawi, and Mohamed Farag Ahmad Bashmilah. The respondents are Jeppesen Dataplan, Inc., and the United States of America (Intervenor-Appellee below).

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## **OPINIONS BELOW**

The en banc opinion of the Court of Appeals (App. 21a-93a) is reported at 614 F.3d 1070 (9th Cir. 2010). The opinion of the original three-judge panel of the Court of Appeals is reported at 579 F.3d 943 (9th Cir. 2009). The opinion of the district court (App. 1a-20a) is reported at 539 F.Supp.2d 1128 (N.D. Cal. 2008).

## **JURISDICTION**

The Court of Appeals for the Ninth Circuit, sitting en banc, entered its judgment on September 8, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

This petition involves application of the state secrets privilege, which has not been codified by any Act of Congress. Petitioners' underlying complaint raises claims under the Alien Tort Statute, 28 U.S.C. § 1350, which provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

## STATEMENT OF THE CASE

### A. The Petitioners

Each of the five petitioners in this action was forcibly disappeared and transported to arbitrary detention and torture on flights organized by Jeppesen Dataplan at the direction of the Central Intelligence Agency (CIA). The information collected below is corroborated by sworn declarations, government documents, flight records, official reports, and other reliable and publicly available evidence.

#### Ahmed Agiza

On December 18, 2001, Swedish authorities seized Plaintiff Ahmed Agiza, a 48-year-old Egyptian father of five seeking asylum in Sweden, and drove him to an airport, where they handed him to agents of the U.S. and Egyptian governments. Mr. Agiza's clothes were sliced from his body and a suppository was forced into his anus. He was then dressed in a diaper and overalls and dragged – barefooted, blindfolded, and shackled – to an awaiting aircraft, where he was strapped to a mattress on the floor. The flight planning and logistical support for this aircraft – a Gulfstream V jet, registered with the U.S. Federal Aviation Administration (FAA) as N379P

– were organized by Jeppesen. First Amended Compl. ¶¶ 133-38, 243-45; ER 786-87, 816.<sup>1</sup>

Mr. Agiza was flown to Egypt and transferred to authorities there. For five weeks, he was held incommunicado in a squalid, windowless, and frigid cell approximately two square meters in size. *Id.* ¶¶ 140-42; ER 787-88. During this period, Mr. Agiza was routinely beaten by interrogators, and he was often strapped to a wet mattress and subjected to electric shock through electrodes attached to his ear lobes, nipples, and genitals. *Id.* ¶¶ 143-45; ER 788-89. After two and a half years in detention, Mr. Agiza was given a six-hour show trial before a military court. He was convicted of membership in a banned Islamic organization and is presently serving a 15-year sentence in an Egyptian prison. *Id.* ¶ 148; ER 789.

Virtually every aspect of Mr. Agiza's rendition, including the torture he suffered in Egypt, has been publicly acknowledged by the Swedish government. Jeppesen's involvement is also a matter of public record. The Swedish government's decision to expel Mr. Agiza to Egypt and its subsequent decision to repeal that expulsion are substantiated in government documents. Declaration of Anna Wigenmark ("Wigenmark Decl.") ¶¶ 2, 7; ER 491 and 493. The decision-making process of the Swedish government leading up to Mr. Agiza's expulsion, as well as its involvement with the U.S. and

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<sup>1</sup> "ER" refers to the Excerpts of Record submitted to the court of appeals below.

Egyptian governments, have been exhaustively and publicly investigated by the Chief Parliamentary Ombudsman and the Swedish Parliament's Standing Committee of the Constitution.

The Ombudsman's report explicitly discusses contacts between the CIA and the Swedish government over Mr. Agiza's transport to Egypt: "Some time before the expulsion decision was made . . . the Security Police received an offer from the American Central Intelligence Agency (CIA) of the use of a plane that was said to have what was referred to as direct access so that it could fly over Europe without having to touch down." Wigenmark Decl. ¶ 11; ER 495. Quoting from a memorandum drawn up by the Swedish security police on February 7, 2002, the Ombudsman also notes: "After some consultation with the staff of the Ministry for Foreign Affairs the Foreign Minister then gave approval of the acceptance by SÄPO/RPS of the help offered by the USA for the transport of A. [Mr. Agiza]." *Id.* The Ombudsman further documents the disturbing details of Mr. Agiza's mistreatment and humiliation at Bromma airport. *Id.* ¶ 14; ER 496. The Political Director at the Ministry for Foreign Affairs at the time of Mr. Agiza's rendition, Mr. Sven-Olof Petersson, advised the Standing Committee of the Constitution of the involvement of the U.S. government in initially providing information about Mr. Agiza and in convincing Egypt to accept his return. Wigenmark Decl. ¶ 20; ER 498.

The fact of Mr. Agiza's abuse and the negotiation between Sweden and Egypt of "diplomatic assurances" for his well-being following his removal to Egypt were reviewed by the United Nations Committee Against Torture. That Committee, which based its conclusions in part on documents obtained from the Swedish government, found that Sweden had violated its obligations under international human rights law. Wigenmark Decl. ¶ 6; ER 492-93. On May 16, 2007, the Swedish government, recognizing the illegality of the order that expelled Mr. Agiza from Sweden, repealed that order and reopened his application for a residence permit in Sweden. The Swedish government thereafter agreed to pay the equivalent of \$450,000 in damages to Mr. Agiza in compensation for Sweden's participation in his rendition to Egypt. *See Ex-Terrorism Suspect to be Compensated*, WASH. POST, Sept. 20, 2008, at A14.

Separate inquiries by the Council of Europe and the European Parliament identified the aircraft – a Gulfstream V jet, then registered with the FAA, as N379P – used to transport Mr. Agiza to Egypt. Wigenmark Decl. ¶ 21; ER 499. These inquiries, as well as investigations by plaintiffs' attorneys, have also produced three documents from public records confirming that Jeppesen provided flight planning and logistical support to the aircraft and crew used for this rendition flight. First, the local "data string" for the flight plan filed for this flight contains an originator code, KSFOXLDI, uniquely identifying Jeppesen as the entity having filed the plan with European air traffic control authorities. Declaration of

Steven Macpherson Watt (“Watt Decl.”) ¶ 57; ER 298.<sup>2</sup> Second, an invoice, numbered 19122416, from Luftfartsverket Division, Stockholm to Jeppesen, notes that Jeppesen was billed for noise, landing, terminal navigation, emission, passenger, and security fees for a Gulfstream V aircraft with registration N379P for December 18, 2001. *Id.* ¶ 56; ER 297. Third, the information in the Luftfartsverket invoice is corroborated by a record from the Swedish Civil Aviation Administration, which also notes that the aircraft landed at Bromma airport at 19:54 and departed for Cairo at 20:49 on December 18, 2001 with nine passengers on board. *Id.*

#### About Elkassim Britel

On March 10, 2002, Plaintiff Abou Elkassim Britel, a 43-year-old Italian citizen of Moroccan origin, was arrested and detained in Pakistan on immigration charges. First Amended Compl. ¶¶ 90, 94; ER 777-78. While detained, Mr. Britel was interrogated by U.S. and Pakistani officials. Over the course of the following weeks, he was beaten repeatedly and suspended from the ceiling of his cell by his Pakistani captors. His

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<sup>2</sup> “KSFOXLDI” is the originator code assigned to Jeppesen in the Aeronautical Fixed Telecommunication Network (AFTN). Every flight plan submitted by Jeppesen to air traffic control authorities, including Eurocontrol, includes this originator code, which indicates the entity responsible for filing the plan. Eurocontrol’s Integrated Initial Flight Plan Processing System, IFPS Users Manual notes that the “AFTN address KSFOXLDI is a collective address for Jeppesen flight planning services in San Francisco.” Watt Decl. ¶ 51; 294-295.

numerous requests to both U.S. and Pakistani officials to meet with the Italian Embassy were refused. *Id.* ¶¶ 94-98; ER 777-79. To escape further abuse, Mr. Britel confessed falsely to being a “terrorist.”

On May 24, 2002, Mr. Britel was handed over to U.S. officials. He was stripped of his clothing, dressed in a diaper and overalls, and chained, shackled, and blindfolded, then transported to Morocco on the same Gulfstream V jet aircraft that had been used five months earlier to transport Mr. Agiza to Egypt. The flight planning and logistical support for the aircraft and its crew were once again provided by Jeppesen. *Id.* ¶¶ 96, 100, 102, 241-42; ER 778, 779-80, 815. Upon arrival in Morocco, Mr. Britel was handed over to agents of the Moroccan security services who detained him incommunicado at the notorious Temara prison.

For the next eight months, Mr. Britel was severely beaten, deprived of sleep and food, and threatened with forms of sexual violation – including being sodomized with a bottle and having his genitals cut off – by his Moroccan captors. *Id.* ¶¶ 104-05; ER 780. On February 11, 2003, Mr. Britel was released without charge. *Id.* ¶ 107; ER 781. With the assistance of his Italian wife and the Italian Embassy, Mr. Britel made arrangements to return to his home in Italy. On the eve of his return, however, Mr. Britel was caught up in a government dragnet in the wake of the May 16, 2003 bombings in Casablanca. He was once again detained incommunicado at the Temara prison, where he was coerced into signing

a false confession he was never permitted to read. *Id.* ¶¶ 111, 113-14; ER 781-82. On October 3, 2003, Mr. Britel was convicted of a terrorism-related charge by a Moroccan court and sentenced to 15 years in prison. An observer from the Italian Embassy reported that the trial was fundamentally flawed and failed to meet universally accepted minimum fair trial standards.

Citing a complete lack of evidence of any criminal wrongdoing, on September 29, 2006, Italian authorities closed an exhaustive six-year investigation into Mr. Britel's alleged involvement in terrorist activities. Declaration of Abou Elkassim Britel ("Britel Decl.") ¶ 27; ER 93. In January 2007, nearly one hundred Italian parliamentarians and members of the European Parliament supported a request calling on Moroccan authorities to pardon Mr. Britel. The Italian government also separately sought a pardon from the King of Morocco, as well as Mr. Britel's immediate release and repatriation to Italy. Mr. Britel remains incarcerated in Ain Bourja prison in Casablanca. *Id.* ¶ 28; ER 94.

Mr. Britel's allegations of forced disappearance and abuse in Morocco have been investigated and corroborated by the European Parliament and by the International Federation for Human Rights. Watt Decl. ¶ 33; ER 272-73. The European Parliament has identified the aircraft used to transport Mr. Britel from Pakistan to Morocco as a Gulfstream V jet aircraft, then registered with the FAA as N379P. Flight records examined by the European



Parliament also confirm that on May 24, 2004, this aircraft flew from Pakistan to Rabat and then on to Porto, Portugal. Britel Decl. ¶ 14; ER 91-92. Jeppesen's involvement in providing the flight planning and logistical support to the aircraft and crew is also substantiated by flight records. The local "data string" for the flight plan filed with European air traffic control authorities for this flight contains Jeppesen's originator code, KSFOXLDI. Britel Decl. ¶ 14-15; ER 91-92.

### Binyam Mohamed

On April 10, 2002, Plaintiff Binyam Mohamed, a 31-year-old Ethiopian citizen and legal resident of the United Kingdom, was arrested at the airport in Karachi, Pakistan on immigration charges. For more than three months, Mr. Mohamed was held in secret detention, interrogated, and abused by his Pakistani captors. During this time, he was also interrogated by agents of the U.S. and British governments. First Amended Compl. ¶¶ 59-60; ER 771. On July 21, 2002, Mr. Mohamed was handed over to U.S. officials, who stripped, shackled, blindfolded, and dressed him in a tracksuit before dragging him on board a Gulfstream V jet aircraft, then registered with the FAA as N379P – the same aircraft used to render plaintiffs Agiza and Britel to Egypt and Morocco – and flying him to Morocco. On information and belief, Jeppesen provided the flight and logistical support for this aircraft and its crew. *Id.* ¶¶ 65-68, 238; ER 772-73, 814.

Mr. Mohamed was handed over to agents of the Moroccan security services. Over the next 18 months, he was routinely beaten to the point of losing consciousness, and a scalpel was used to make incisions all over his body, including his penis, after which a hot stinging liquid was poured into his open wounds. *Id.* ¶¶ 69-71; ER 773. On January 22, 2004, Mr. Mohamed was returned to the custody of U.S. officials. These officials photographed him, stripped him, dressed him in overalls, handcuffed, shackled, and blindfolded him, and then put him on board an aircraft and flew him to Afghanistan. The flight planning and logistical support to the aircraft – a Boeing 737 business jet, then registered with the FAA as N313P – were provided by Jeppesen. *Id.* ¶¶ 73-75, 239-40; ER 774, 814-815.

Immediately after arriving in Afghanistan, Mr. Mohamed was taken to a CIA-run prison outside Kabul commonly known as the “Dark Prison.” He was held there for the next four months. He was physically beaten, had his head repeatedly slammed against a wall, and was suspended by his arms from a pole. He was deprived of sleep by being subjected to excruciatingly loud noises, including the screams of women and children, thunder, and loud rock music 24 hours a day. *Id.* ¶¶ 76-80; ER 774-75. Deprived of adequate food, Mr. Mohamed lost between 40 and 60 pounds. He was permitted outside once during this time and then only for five minutes – the only time he had seen the sun in two years. *Id.* ¶¶ 78, 80, 83; ER 775-76. In September 2004, Mr. Mohamed was transferred to Guantánamo. *Id.* ¶ 88; ER 777. Mr. Mohamed

was released from Guantánamo during the pendency of this litigation, and he now resides in the United Kingdom.

Mr. Mohamed's allegations have been extensively investigated and his account corroborated by the Council of Europe, the European Parliament, and human rights organizations. In November of 2010, in order to settle litigation that Mr. Mohamed brought against the U.K. government for its role in his unlawful detention and torture, that government reportedly paid Mr. Mohamed and fifteen other current and former Guantánamo detainees several million dollars. John F. Burns & Alan Cowell, *Britain to Compensate Former Guantánamo Detainees*, N.Y. TIMES, Nov. 16, 2010. That settlement followed years of judicial proceedings and official investigations into the circumstances of Mr. Mohamed's detention and interrogation in U.S. and Moroccan custody. For example, inquiries by both the European Parliament and the Council of Europe, through examination of flight records, identified the aircraft used in both Mr. Mohamed's rendition from Pakistan to Morocco in 2002 and his rendition from Morocco to Afghanistan in 2004, determining that the aircraft – respectively, a Gulfstream V jet, registered N379P and a Boeing Business Jet, then registered N313P – had been involved in numerous other rendition flights. Stafford-Smith Decl. ¶¶ 6-7; ER 21-22.

Documentation uncovered in a criminal investigation by a Spanish prosecutor concerning the CIA's use of Spanish airports as a “staging

post” for unlawful rendition flights and by the Council of Europe’s similar inquiry substantiates Jeppesen’s role in furnishing the flight planning and logistical support to the aircraft and crew used for Mr. Mohamed’s second rendition. The Spanish prosecutor obtained a telex from Jeppesen to its agent in Mallorca, Spain, Mallorcair requesting that Mallorcair provide ground handling services and pay airport fees for N313P from January 25-27, 2004. Declaration of Clive Stafford-Smith (“Stafford-Smith Decl.”) ¶ 8; ER 22. In a statement to Spanish police, Mallorcair confirmed receipt of instructions for this aircraft from Jeppesen. *Id.* ¶ 9; ER 22-23.

#### Bisher Al-Rawi

On November 8, 2002, Plaintiff Bisher Al-Rawi, a 42-year-old Iraqi citizen and legal resident of the United Kingdom, was arrested at the international airport in Banjul, Gambia, where he had traveled with several colleagues to commence a business venture. First Amended Compl. ¶¶ 193, 203; ER 800, 803. On the first day of his detention, U.S. officials, who appeared to be in control of the situation, met with and interrogated Mr. Al-Rawi. *Id.* at 204; ER 803-04.

On December 8, 2002, Mr. Al-Rawi was driven to an airport. There, U.S. agents stripped him, dressed him in a diaper and overalls, chained and shackled him, and dragged him on board an awaiting aircraft. The flight planning and logistical support services for this aircraft – a Gulfstream V jet, then registered with the FAA as N379P – were provided by Jeppesen. *Id.* ¶¶ 204,

212, 215, 248-49; ER 803-04, 806, 816-17; *see also* Declaration of Bisher Al-Rawi (“Al-Rawi Decl.”) ¶¶ 43-44; ER 116.

Mr. Al-Rawi was flown to Afghanistan and detained at the CIA-run “Dark Prison” where, for two weeks, he was held in isolation in a tiny, pitch-black cell, constantly chained and shackled. Loud noises were blasted into his cell 24 hours a day, making sleep almost impossible. First Amended Compl. ¶¶ 215-17; ER 806-07. Mr. Al-Rawi was later transferred to the U.S.-run Bagram Air Base, where he was beaten, kept shackled with heavy chains for extended periods, and deprived of adequate sleep, water, and clothing. *Id.* at ¶¶ 219-22; ER 807-808. In January 2003, Mr. Al-Rawi was transferred to the Guantánamo Bay Naval Station. On March 20, 2007, after four and a half years in U.S.-controlled detention without charge, he was released back to his home and family in the United Kingdom. *Id.* ¶¶ 223, 227; ER 808, 809.

In November of 2010, in order to settle litigation that Mr. Al-Rawi brought against the U.K. government for its role in his unlawful detention and torture, that government reportedly paid him and fifteen other current and former Guantánamo detainees several million dollars. John F. Burns & Alan Cowell, *Britain to Compensate Former Guantánamo Detainees*, N.Y. TIMES, Nov. 16, 2010. That settlement was preceded by the British government’s disclosure of numerous documents corroborating Mr. Al-Rawi’s allegations. According to a report published by the U.K. Parliamentary Intelligence

and Security Committee on July 25, 2007, the British Security Service “was informed by the U.S. authorities that they intended to conduct . . . a ‘Rendition to Detention’ operation, to transfer [Mr. Al-Rawi and others] from The Gambia to Bagram Air Base in Afghanistan. The Service registered strong concerns, both orally and in writing, at this suggestion and alerted the FCO (U.K. Home, Foreign and Commonwealth Office).” British diplomats in both Gambia and the United States raised protests with their counterparts at the U.S. State Department and the National Security Council. Al-Rawi Decl. ¶¶ 44-45; ER 116-17.

Separate inquiries by the Council of Europe and the European Parliament identified the aircraft – a Gulfstream V jet, then registered with the FAA, as N379P – used to transport Mr. Al-Rawi to Afghanistan. Al-Rawi Decl. ¶ 42; ER 116. These flight records also confirm that Jeppesen provided flight planning and logistical support to the aircraft and crew used for this rendition flight. The local “data string” for the flight plan filed for this flight contains Jeppesen’s originator code, KSFOXLDI. Al-Rawi Decl. ¶¶ 42-43; ER 116.

#### Mohamed Farag Ahmad Bashmilah

On October 21, 2003, Plaintiff Mohamed Farag Bashmilah, a 42-year-old Yemeni citizen, was apprehended by agents of the Jordanian government while he was visiting Jordan to care for his ailing mother. First Amended Compl. ¶ 152, 154; ER 790-91. After several days of

detention and interrogation under brutal torture, Mr. Bashmilah was coerced into signing a false confession. *Id.* ¶ 156; ER 791. The Jordanians then handed him over to agents of the U.S. government, who beat and kicked him, sliced off his clothes, replaced them with a diaper and a blue outfit, shackled and blindfolded him, then dragged him on board an awaiting aircraft. Declaration of Mohamed Farag Ahmad Bashmilah (“Bashmilah Decl.”) ¶¶ 36-41; ER 311-13. The flight planning and logistical support for this aircraft – the same Gulfstream V jet that had been used in the transportation of the other four plaintiffs – were organized by Jeppesen, First Amended Compl. ¶¶ 160, 246-47; ER 792, 816, and used Jeppesen’s unique originator code, Bashmilah Decl. ¶ 42; ER 313.

On October 26, 2003, Mr. Bashmilah was flown to Afghanistan, where he spent nearly six months in secret incommunicado detention at a U.S.-run facility. *Id.* ¶ 163; ER 793. For the first three months, he was held in a windowless six-square-meter cell with a bucket as a toilet; during his first 15 days, he was kept in the same diaper that had been forced on him in Jordan, and his hands and legs remained tied. Bashmilah Decl. ¶¶ 56-64; ER 317-19. On three separate occasions during these initial months of detention, Mr. Bashmilah tried to end his life. *Id.* ¶ 66; ER 319-20.

In April 2004, Mr. Bashmilah was “rendered” a second time to a site in an unknown country, where he was subjected to similar physical and psychological abuse. First Amended

Compl. ¶¶ 171-72; ER 794-95. At one point during his detention in this facility, Mr. Bashmilah cut himself and used his own blood to write “I am innocent” and “This is unjust” on his cell walls. Bashmilah Decl. ¶ 116; ER 336. On May 5, 2005, U.S. authorities transferred Mr. Bashmilah to Yemen, his country of birth. Bashmilah Decl. ¶¶ 172-76; ER 352-54. On February 13, 2006 Mr. Bashmilah was tried for the crime of forgery based on his admission that he had used a false identity document while living in Indonesia. Bashmilah Decl. ¶ 178; ER 354. On February 27, 2006, the Yemeni court sentenced him to time served both inside and outside of Yemen – which included the 18 months he was held in U.S. detention facilities. Bashmilah Decl. ¶ 181; ER 354-55.

Flight records detail Mr. Bashmilah’s rendition flight from Jordan to Afghanistan on October 26, 2003 on board a CIA-owned Gulfstream V jet, registered N379P. Jeppesen’s involvement in providing the flight planning and logistical support services to the aircraft and crew is a matter of public record. Bashmilah Decl. ¶ 42; ER 313.

## **B. Jeppesen’s Role in the Rendition Program**

Jeppesen’s involvement in the rendition flights described above, as well as many others, is a matter of public record, traceable in flight plans and other documents filed with national and inter-governmental aviation authorities in the United States and across Europe. Jeppesen was



not only providing crucial flight planning and logistical support services to the aircraft and crew – including filing flight plans, planning itineraries, obtaining landing permits, and arranging for fuel and ground handling – it was also using its legitimacy as a well-known aviation services company to enable the CIA to disguise the true nature of these flights. The Council of Europe has revealed that Jeppesen filed “multiple ‘dummy’ flight plans” for many of the CIA flights it supported, further contributing to the concealment of the flights’ unlawful purposes. Watt Decl. ¶ 34, Exh. S(b); ER 274-79.

Jeppesen participated in the rendition program with full knowledge of the consequences of its actions. On August 11, 2006, Sean Belcher, who then worked for Jeppesen, attended a meeting for new employees convened by Bob Overby, director of Jeppesen International Trip Planning Service at Jeppesen’s San Jose office. During his presentation, Overby said: “We do all the extraordinary rendition flights.” Apparently believing that only a few people present knew what he was referring to, Overby clarified that these were “torture flights,” explaining, “let’s face it, some of these flights end up this way,” or words to that effect. He added that the flights paid very well and that the government spared no expense. He also revealed that two employees, one mentioned by name, handled rendition flights for the company. Declaration of Sean Belcher (“Belcher Decl.”) ¶4; ER 16.

### **C. Proceedings Below**

On May 30, 2007, petitioners filed suit against Jeppesen, seeking compensation for its complicity in their unlawful abduction, arbitrary detention, and torture. The complaint alleged violations of the Alien Tort Statute, 28 U.S.C. § 1350. Although not named as a defendant, the United States moved to intervene before Jeppesen had answered the complaint, and before discovery had commenced, for the purpose of seeking dismissal of the suit pursuant to the evidentiary state secrets privilege. The government argued that the subject matter of the suit was a state secret as a matter of law, and that any litigation of petitioners' claims would cause harm to national security. On February 13, 2008, the district court granted the motion to dismiss.

On April 28, 2009, a three-judge panel of the Ninth Circuit reversed. The court held that the government's invocation of the state secrets privilege had been premature and overbroad, and that the privilege must be invoked with respect to specific evidence as opposed to broad categories of information. It remanded the case to permit the government to assert the privilege over discrete evidence and to permit the district court to assess the consequences of the government's proper privilege assertion.

The United State thereafter petitioned for en banc review; the court of appeals granted the petition and held argument on December 15, 2009. On September 8, 2010, the en banc court affirmed the district court's dismissal of the action by a 6-to-5 vote. The court "assume[d]

without deciding that plaintiffs’ prima facie case and Jeppesen’s defenses m[ight] not inevitably depend on privileged evidence.” App. 60a. But the court held that “dismissal [was] nonetheless required . . . because there [was] no feasible way to litigate Jeppesen’s alleged liability without creating an unjustifiable risk of divulging state secrets. . . .” *Id.*

Judge Hawkins dissented. Writing for five judges, Judge Hawkins asserted that dismissal of a suit pursuant to the state secrets privilege is “justified if and only if specific privileged evidence is itself indispensable to establishing either the truth of the plaintiffs’ allegations or a valid defense that would otherwise be available to the defendant.” App. 74a-75a. The dissenting judges “would [have] remand[ed] to the district court to determine whether Plaintiffs can establish the prima facie elements of their claims or whether Jeppesen could defend against those claims without resort to state secrets evidence.” App. 93a.

## **REASONS FOR GRANTING THE PETITION**

### **I. The Government’s Increased Reliance on the Evidentiary State Secrets Privilege to Preclude Any Judicial Inquiry Into Serious Allegations of Intentional and Grave Executive Misconduct Presents an Issue of Overriding National Significance.**

In *United States v. Reynolds*, 345 U.S. 1 (1953), this Court recognized the government’s limited right to prevent disclosure through

discovery of “military and state secrets,” cautioning that the privilege was “not to be lightly invoked.” *Id.* at 7-8. *Reynolds* arose out of a damages action brought by the families of civilians who died in the crash of a military aircraft. In response to a discovery request for the flight accident report, the government asserted the state secrets privilege, arguing that the report contained information about secret military equipment that was being tested aboard the aircraft during the fatal flight. 345 U.S. at 3-4. The Court upheld the Executive’s authority to assert the state secrets privilege, requiring “a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.” *Id.* at 7-8. Mindful that misuse of the privilege might lead to “intolerable abuses,” the Court admonished that “judicial control in a case cannot be abdicated to the caprice of executive officers.” *Id.* at 9-10.<sup>3</sup> The greater the necessity for the allegedly privileged information in presenting the case, the more a “court should probe in satisfying itself that the occasion for invoking the privilege is appropriate.” *Id.* at 11.

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<sup>3</sup> The Court’s concern was well-founded. In 1996, the accident report at issue was declassified. A review of the report revealed no “details of any secret project the plane was involved in,” but “[i]nstead, . . . a horror story of incompetence, bungling, and tragic error.” Garry Wills, *Why the Government Can Legally Lie*, 56 N.Y. REV. OF BOOKS 32, 33 (2009).

This Court has not directly addressed the scope and application of the privilege since *Reynolds*. In the intervening years, the privilege has become unmoored from its evidentiary origins. No longer is the privilege invoked solely with respect to discrete evidence; rather, the government now routinely invokes the privilege at the pleading stage, before any evidentiary disputes have arisen. *Reynolds*' instruction that courts are to weigh a plaintiff's showing of need for particular evidence in determining how deeply to probe the government's claim of privilege is rendered wholly meaningless when the privilege is invoked before any request for evidence has been made. Moreover, the government has invoked the privilege with greater frequency;<sup>4</sup> in cases of greater national significance;<sup>5</sup> and in a

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<sup>4</sup> Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 *FORDHAM L. REV.* 1931, 1939 (2007) ("The Bush Administration has raised the privilege in twenty-eight percent more cases per year than in the previous decade, and has sought dismissal in ninety-two percent more cases per year than in the previous decade."); William G. Weaver & Robert M. Pallitto, *State-secrets and Executive Power*, 120 *POL. SCI. Q.* 85, 100 (2005) (concluding that the executive is asserting the privilege with increasing frequency, and declaring that the "Bush administration lawyers are using the privilege with offhanded abandon"); see also Ryan Devereaux, *Is Obama's Use of State Secrets Privilege the New Normal?*, *THE NATION*, Sept. 29, 2010 (noting Obama administration's continuation of Bush administration's state secrets policies).

<sup>5</sup> Editorial, *Too Many Secrets*, *N.Y. TIMES*, Mar. 10, 2007, at A12, available at 2007 WLNR 4552726 ("It is a challenge to keep track of all the ways the Bush administration is eroding constitutional protections, but one that should get more attention is its abuse of the state secrets doctrine.").

manner that seeks effectively to transform it from an evidentiary privilege into an immunity doctrine, thereby “neutraliz[ing] constitutional constraints on executive powers.” Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570, 581 (1982). The consequence of this transformation has been that a broad range of official misconduct has been shielded from judicial review after government officials have invoked the privilege to avoid adjudication.

In particular, since September 11, 2001, the government has invoked the privilege frequently in cases that present serious and plausible allegations of grave executive misconduct. For example, it has sought to foreclose judicial review of the National Security Agency’s warrantless surveillance of United States citizens in contravention of the Foreign Intelligence Surveillance Act, *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006). And, as here, it has invoked the privilege to seek dismissal of suits challenging the government’s seizure, transfer, and torture of innocent foreign citizens. See *Jeppesen, supra*; *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (dismissed on other grounds). Most recently, it has invoked the privilege to seek dismissal of a suit challenging the Executive’s authority to use lethal force against a United States citizen outside of armed conflict and without due process, albeit as a “last resort” if other grounds are rejected. See Spencer Hsu, *Obama invokes ‘state secrets’ claim to*

*dismiss suit against targeting of U.S. citizen al-Aulaqi*, Washington Post, Sept. 25, 2010.<sup>6</sup>

These qualitative and quantitative shifts in the government's use – and the courts' acceptance – of the state secrets privilege warrant Supreme Court review.

## **II. The Court Should Grant Review to Clarify the Proper Scope and Application of the State Secrets Privilege**

### **A. There is conflict and confusion in the lower courts as to the application and scope of the privilege.**

The proliferation of cases in which the government has invoked the state secrets privilege, and the lack of guidance from this Court since its 1953 decision in *Reynolds*, have produced conflict and confusion among the lower

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<sup>6</sup> The Attorney General recently issued a new set of guidelines to regulate the Executive Branch's use of the privilege. See Memorandum from Eric Holder, Attorney Gen., to Heads of Executive Dep'ts and Agencies and Heads of Dep't Components (Sept. 23, 2009), *available at* <http://www.justice.gov/opa/documents/state-secrets-privileges.pdf>. Even under the new policy, however, the Executive continues to assert (as it has in this case) that the privilege may be used to dismiss cases at the pleading stage, before the opposing party has a chance to prove its case using non-privileged evidence. In any event, voluntary executive-branch self-policing is no substitute for checks and balances.

courts regarding the proper scope and application of the privilege.

In *Tenet v. Doe*, 544 U.S. 1 (2005), the Court clarified the distinction between the evidentiary state secrets privilege, which may be invoked to prevent disclosure of specific evidence during discovery, and the so-called *Totten* rule, which requires outright dismissal at the pleading stage of cases involving unacknowledged espionage agreements.<sup>7</sup> As the Court explained, *Totten* is a “unique and categorical . . . bar—a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry.” *Tenet*, 544 U.S. at 6. By contrast, the Court noted, the state secrets privilege deals with evidence, not justiciability. *Id.* at 9-10. Nevertheless, some courts—including the court of appeals below—have permitted the government to invoke the evidentiary state secrets privilege to terminate litigation even before there is any evidence at issue.

Because the state secrets privilege was discussed in *Tenet* only to contrast it with the *Totten* rule, the *Tenet* Court had no occasion to clarify the proper scope and use of the state secrets privilege. This Court should accept review in the present case to resolve conflicting decisions and widespread confusion in the lower courts about when a case may be dismissed on the basis of the privilege.

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<sup>7</sup> In *Totten v. United States*, 92 U.S. 105 (1875), the Court dismissed at the pleading stage an action to enforce an alleged secret espionage contract, because the government could neither confirm nor deny the contract’s existence.



The greatest source of confusion in the lower courts with respect to the privilege is whether a case may properly be dismissed at the pleading stage on the basis of the state secrets privilege – a stage at which the invocation must be asserted over abstract or predictive categories of information, and must be assessed in a vacuum without actual contested evidence. Decisions permitting pleading-stage dismissal of entire actions or claims on state secrets grounds often stem from an erroneous conflation of the *Totten/Tenet* doctrine and the evidentiary state secrets privilege.

A number of courts have held that a case may be dismissed at the pleading stage pursuant to the state secrets privilege if the “very subject matter” of the suit is a state secret. *See, e.g., El-Masri*, 479 F.3d at 306, 311 (affirming pleading-stage dismissal of suit alleging arbitrary detention and torture at CIA-run prison on ground that the suit’s very subject matter was a state secret); *Zuckerbraun v. Gen.-Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991) (dismissing wrongful death claim implicating ship’s weapons system at the pleading stage because the very subject matter was a state secret). This application of the state secrets privilege, which effectively imports *Totten*’s justiciability regime into the evidentiary doctrine of Reynolds, has not been accepted by other courts. *See In re Sealed Case*, 494 F.3d 139, 158 (D.C. Cir. 2007) (Brown, J., concurring and dissenting) (observing that D.C. Circuit, which hears numerous state secrets cases, “has had no occasion to apply the ‘very subject matter’

ground”); *Jeppesen*, App. 35a (distinguishing “very subject matter” rule of *Totten* from evidentiary rule of *Reynolds*).

Still other courts, like the en banc Ninth Circuit below, have dismissed suits at the pleading stage not because the “very subject matter” was a state secret, but because the court accepted the government’s wholly predictive judgment that state secrets would be so central to proving the parties’ claims or defenses that the litigation could not conceivably reach resolution. *See, e.g., Jeppesen*, App. 60a (assuming that privilege would not interfere with plaintiffs’ claims or defendants’ defenses but affirming dismissal on ground that there was “no feasible way to litigate Jeppesen’s alleged liability without creating an unjustifiable risk of divulging state secrets” (emphasis omitted)); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (dismissing contract suit between defense contractors at pleading stage because any trial would “inevitably” reveal state secrets); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992) (dismissing case because trial “would inevitably lead to a significant risk” that state secrets would be disclosed).

A third set of cases, however, have properly refused to dismiss suits at the pleading stage, rejecting the government’s invitation to assess the effect of a privilege claim in the absence of actual evidence, and recognizing the impossibility of determining at the pleading stage what evidence would be relevant and necessary to the parties’ claims and defenses. *See, e.g., In re United States*,

872 F.2d 472, 477 (D.C. Cir. 1989) (refusing to dismiss Federal Tort Claims action merely on basis of the government’s “unilateral assertion that privileged information lies at the core of th[e] case.”); *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 334-35 (4th Cir. 2001) (upholding claim of privilege but rejecting premature dismissal of trade secret misappropriation suit and remanding for further discovery); *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1364 (Fed. Cir. 2001) (reversing premature dismissal of contract suit on basis of the privilege so that plaintiff could engage in further discovery to support claim with non-privileged evidence); *Spock v. United States*, 464 F. Supp. 510, 519 (S.D.N.Y. 1978) (rejecting pre-discovery motion to dismiss Federal Tort Claims Act suit on state secrets grounds as premature); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 994 (N.D. Cal. 2006) (refusing to evaluate whether parties could prove claims and defenses without state secrets—and to dismiss on that basis—at pleading stage).

This confusion among lower courts as to when dismissal of complaints may be permissible reflects uncertainty about the proper balance between robust judicial review and deference to the Executive. Compare *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998) (holding that government’s privilege claim is owed “utmost deference”), with *In re United States*, 872 F.2d at 475 (“[A] court must not merely unthinkingly ratify the Executive’s assertion of absolute privilege, lest it inappropriately abandon its important judicial role.”). The court of appeals below applied a degree of deference that is

difficult to reconcile with ordinary pleading-stage practice. As this Court has made clear, “[w]hen a federal court reviews the sufficiency of a complaint, before the reception of any evidence . . ., its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

The court of appeals abandoned that well-settled practice, opting instead for predictive judgments about a nascent litigation and concluding that “the facts underlying plaintiffs’ claims are so infused with . . . secrets, [that] *any* plausible effort by Jeppesen to defend against them would create an unjustifiable risk of revealing state secrets, even if plaintiffs could make a *prima facie* case on one or more claims with nonprivileged evidence.” *Jeppesen*, App. 61a-62a. The court denied the petitioners any opportunity to attempt a *prima facie* showing based on evidence already assembled and on nonprivileged discovery. Nor did it require the defendant to demonstrate any actual defense that it might be precluded from advancing by the elimination of evidence. In so doing it “abandon[ed] the practice of deciding cases on the basis of evidence . . . in favor of a system of conjecture.” *In re Sealed Case*, 494 F.3d at 150.

This Court should clarify that dismissal of a suit on the basis of the state secrets privilege is appropriate solely when the removal of privileged evidence renders it impossible for the plaintiff to put forth a *prima facie* case, or for the defendant

to assert a valid defense—a determination that cannot be made at the pleading stage. And it should permit the plaintiff to submit all non-privileged evidence before the court evaluates the consequences of the government’s invocation of the privilege.

**B. This case is illustrative of the lower courts’ departure from the privilege’s evidentiary roots and from the principles of *Reynolds*.**

This case provides a compelling example of the lower courts’ acquiescence in the government’s expansion of the privilege beyond its evidentiary foundation. In this case, the government sought outright dismissal of all claims by invoking an evidentiary privilege before any evidence had even been requested. Relying entirely on the CIA Director’s speculative assessment of what evidence might be required to adjudicate petitioners’ claims, the court of appeals acceded to the government’s demand that petitioners be denied any judicial remedy for the unconscionable and unlawful treatment to which they were subjected.

As the court of appeals acknowledged, the CIA’s extraordinary rendition program is not a state secret. App. 66a. Moreover, Jeppesen’s involvement in that program, as petitioners have amply demonstrated, is a matter of public record, confirmed through sworn testimony, public flight records, and other documentary evidence. As a matter of law and common sense, the government cannot legitimately keep secret what is already

widely known. *See, e.g., Ellsberg v. Mitchell*, 709 F.2d 51, 61 (D.C. Cir. 1983) (rejecting portion of privilege claim on ground that so much relevant information was already public); see also *Snepp v. United States*, 444 U.S. 507, 513 n.8 (1980) (suggesting that the government would have no interest in censoring information already “in the public domain”)

Indeed, the volume of publicly confirmed information about the CIA’s rendition program, Jeppesen’s role in that program, and the participation of other nations in the rendition, detention, and interrogation of the petitioners is vast and growing. Britain and Sweden have provided compensation to three of the petitioners, as noted earlier, and the British government has recently announced an independent inquiry, headed by a retired appeals court judge, into the accusations of the British Intelligence agencies collusion with the CIA and other foreign organizations in the torture of terrorism suspects. *See* Ian Cobain, *David Cameron Announces Torture Inquiry*, THE GUARDIAN (LONDON), July 6, 2010. It would be a remarkable irony if U.S. courts were persuaded to affirm the dismissal of this suit in order to protect from disclosure the roles played by other nations -- when those very nations have been engaged in proceedings that continue to expose precisely the relationships and information that the United States here characterizes as “state secrets.”

Furthermore, in other contexts, U.S. courts have already taken note of the facts underlying this litigation and assessed their legal

significance. In a habeas corpus case in the District of Columbia brought by a Guantánamo Bay detainee named Farhi Saeed Bin Mohammed, the government sought to rely on statements obtained from Binyam Mohamed, a petitioner in this case, in an attempt to establish that the habeas petitioner had trained in al-Qaeda camps. *Mohammed v. Obama*, 704 F. Supp. 2d 1 (D.D.C. 2009). The government contended that the statements, obtained after Binyam Mohamed's transfer to Guantánamo, were uncoerced and therefore reliable. *Id.* at 18. However, Judge Kessler made clear that the "Government's claims of reliability [were] undermined by the sworn declaration of Binyam Mohamed that he was brutalized for years while in United States custody overseas at foreign facilities." *Id.* at 20.

Judge Kessler summarized Binyam Mohamed's "harrowing story" of detention and torture in Pakistan, Morocco, and Afghanistan, noting that the government did "not challenge or deny the accuracy of Binyam Mohamed's story of brutal treatment," *id.* at 24. Notwithstanding the government's position, Judge Kessler found that Mohamed's account of rendition and torture was credible, explaining that it was "extraordinarily detailed," it "provide[d] approximate dates at multiple points in the narrative, describe[d] the physical features and conduct of guards and interrogators, and [wa]s consistent throughout several accounts." *Id.* at 25. Moreover, "the fact that Binyam Mohamed . . . vigorously and very publicly pursued his claims in British courts subsequent to his release from Guantánamo Bay

suggests that the horrific accounts of his torture were not simply stories created solely to exculpate himself. . . . His persistence in telling his story demonstrates his willingness to test the truth of his version of events in both the courts of law as well as the court of public opinion.” *Id.* at 25-26.

Having deemed Mohamed’s allegations credible, Judge Kessler assessed their significance:

Binyam Mohamed’s trauma lasted for two long years. During that time, he was physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one foreign prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell. All the while, he was forced to inculcate himself and others in various plots to imperil Americans.

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[T]here is no question that throughout his ordeal Binyam Mohamed was being held at the behest of the United States. Captors changed the sites of his detention, and frequently changed his location within each detention facility. He was shuttled from country to country, and interrogated and beaten without having access to counsel until arriving at Guantánamo Bay. . . .



*Id.* at 26-28. Accordingly, “based on the factors discussed above,” Judge Kessler held that “Binyam Mohamed’s will was overborne by his lengthy prior torture, and therefore his confessions to Special Agent [Redacted] do not represent reliable evidence to detain Petitioner.” *Id.* at 29. Judge Kessler ordered the government to release the petitioner.<sup>8</sup>

That Binyam Mohamed’s credible account of rendition and torture could form the basis for another detainee’s successful habeas corpus petition, but may not be put forward in support of his own petition for redress, demonstrates that the state secrets doctrine has been stretched beyond coherence. The abundant documentary, testimonial, and physical evidence submitted by petitioners below and collated by the dissenting judges of the court of appeals into an appendix of publicly available information corroborating petitioners’ claims demonstrate that this case could be litigated without recourse to state secrets.

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<sup>8</sup> In the habeas corpus litigation, as in the courts below, the government refused to confirm or deny Binyam Mohamed’s allegations of torture. However, Judge Kessler did not permit the government’s refusal to confirm or deny the allegations to prevent her from evaluating their credibility and assessing their legal consequences.

**II. If The Court Believes that *Reynolds* Requires Dismissal of Petitioners' Claims, then This Case Presents an Appropriate Vehicle for Partial Reexamination of *Reynolds*.**

This Court has not revisited its holding in *Reynolds* in more than half a century.<sup>9</sup> *Reynolds* was a wrongful death suit in which the privilege was invoked during discovery to block disclosure of a single document. The Executive Branch's assertion of the state secrets privilege in such a case is quite unlike a sweeping assertion of the privilege to foreclose judicial review of entire categories of executive misconduct. Experience has shown that a set of rules devised to govern the former situation may be inadequate as a check on the latter.

Two developments since *Reynolds* further undermine any reliance on that decision to support pleading-stage dismissals. First, the privilege is now routinely invoked to block adjudication of disputes that raise profound constitutional questions about the enumerated powers of the three branches and, more

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<sup>9</sup> The Court has granted certiorari in consolidated cases involving the government's invocation of the state secrets privilege to prevent military contractors from obtaining evidence to defend against a government breach-of-contract claim. See *Gen. Dynamics Corp. v. United States*; *Boeing Co. v. United States*, Nos. 09-1298 & 09-1302. Those cases, however, raise a question distinct from the question presented here and in the lion's share of state secrets cases; that is, whether the government may maintain a claim *against* a party when it has invoked the state secrets privilege to deny that party a defense to the claim.

specifically, the role of courts in safeguarding individual rights against serious abuses of government power. (See Point I, *supra*). Second, courts have become more accustomed to assessing claims regarding access to sensitive information than they were in 1953. Under the Freedom of Information Act (FOIA), for instance, Congress authorized courts to determine whether the government has properly classified information. See 5 U.S.C. § 552(a)(4)(B) & (b)(1) (2002); *Ray v. Turner*, 587 F.2d 1187, 1191-95 (D.C. Cir. 1978) (describing de novo review procedures required by FOIA). Similarly, under the Foreign Intelligence Surveillance Act (“FISA”), Article III judges must independently review the government’s assertion that electronic surveillance is needed for foreign intelligence purposes. See 50 U.S.C. § 1805 (2006). FISA empowers all federal district courts, not just the special FISA court, to review highly sensitive information in camera and ex parte to determine whether the surveillance was authorized and conducted in accordance with FISA. See 50 U.S.C. § 1806(f) (2006).

Finally, the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3, empowers federal judges to craft special procedures to determine whether and to what extent classified information may be used at trial. See generally *United States v. Pappas*, 94 F.3d 795, 799 (2d Cir. 1996). Section 4 of CIPA, which allows for defense discovery of classified information, explicitly provides courts with discretion to deny government requests to delete specific data from classified materials or substitute summaries or stipulations of facts. 18

U.S.C. App. 3 § 4. When section 4 of CIPA is invoked, a judge must determine the relevance of the information in light of the asserted need for information and any claimed government privilege.

Most recently, courts have weighed classified and other highly sensitive evidence in the habeas corpus proceedings of petitioners detained in Guantánamo Bay. *See Boumediene v. Bush*, 553 U.S. 723 (2008). Notwithstanding the government's objections to the adversarial testing of that evidence, courts have employed security clearances and protective orders to fashion proceedings that safeguard both the government's legitimate security interests and the rule of law.

These developments call for the reexamination of *Reynolds*, if *Reynolds* is deemed to support the pleading stage dismissal that occurred in this case. At a minimum, the Court should require in all instances that the government produce the evidence as to which it has invoked the privilege for in camera inspection by the district court. Courts are plainly equipped to evaluate such evidence, and requiring in camera inspection would avoid the doctrinal confusion attendant to adjudicating the effects of an evidentiary privilege in the absence of actual evidence. And, in cases in which the government (or its agents) is a party and plaintiffs raise serious allegations of grave executive misconduct – such as the kidnapping and torture claims at the heart of this suit – the evidentiary consequences of the government's invocation of the state secrets privilege should not be borne by

the plaintiffs alone. In such cases, even if the privilege is validly invoked to prevent disclosure of sensitive evidence, compensatory action – such as construing facts in favor of deprived litigants or shifting burdens against the government or defendant – may be the only means for the courts to enforce constraints on executive power. Finally, this Court should consider adopting the “proportionality” analysis routinely employed by foreign courts applying parallel secrecy privileges,<sup>10</sup> and by U.S. courts in analogous circumstances,<sup>11</sup> to permit lower courts to weigh the competing public, private, and constitutional interests that have been wholly overridden by the “absolute” nature of the *Reynolds* privilege.

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<sup>10</sup> See, e.g., *Khadr v. Attorney Gen. of Can.*, [2008] F.C. 807 para. 27 (Can.) (noting that the disclosure of records is required, but it is “subject to the balancing of national security and other considerations”); *Mohamed v. Sec’y of State for Foreign and Commonwealth Affairs*, [2008] EWHC (Admin) 2048, [2008] All E.R. (D) 123, [148] (Q.B.) (Eng.) (weighing the government’s interest in national security against plaintiffs’ interest in document disclosure and finding in favor of the plaintiff); *Conway v. Rimmer*, [1968] A.C. 910, 918, 951-52 (H.L.) (Eng.); *People’s Union for Civil Liberties v. Union of India*, (1998) 1 S.C.C. 301; *Adalah Legal Ctr. for Arab Minority Rights in Isr. v. Minister of Interior*, 2006 Isr. HCJ 7052/03 443, 692-93; *Glasgow Corp. v. Cent. Land Bd.*, [1956] S.C. (H.L.) 1 (Scot.).

<sup>11</sup> See, e.g., *Halpern v. FBI*, 181 F.3d 279, 297 (2d Cir. 1999) (weighing public interest in FOIA disclosure against governmental interest in non-disclosure); *United States v. Sarkissian*, 841 F.2d 959 (9th Cir. 1988) (holding that, in deciding whether to disclose confidential material submitted by the government in criminal prosecution pursuant to CIPA, judge was free to balance defendant’s need for documents against national security concerns).

This Court allocated the evidentiary burdens in *Reynolds*, and it has both the authority and the obligation to amend those burdens if they interfere with the judiciary's constitutional role in reviewing the legality of executive actions. Otherwise, the government may engage in torture, declare it a state secret, and by virtue of that designation avoid any judicial accountability for conduct that even the government purports to condemn as unlawful under all circumstances. Under a system predicated on respect for the rule of law, the government has no privilege to violate our most fundamental legal norms, and it should not be able to do so with impunity based on a state secrets privilege that was developed to achieve very different ends.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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