No. 10-778

IN THE
SUPREME COURT OF THE UNITED STATES

BINYAM MOHAMED, ABOU ELKASSIM BRITEL, AHMED AGIZA, MOHAMED FARAG AHMAD BASHMILAH, BISHER AL-RAWI
Petitioners,

v.

JEPPESEN DATAPLAN, INC
Respondent

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

BRIEF OF *AMICI CURIAE* INTERNATIONAL LAW SCHOLARS AND HUMAN RIGHTS ORGANIZATIONS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

Binyam Mohamed; Abou Elkassim Britel; Ahmed Agiza; Mohamed Farag Ahmad Bashmilah; Bisher Al-Rawi
Petitioners

Jeppesen Dataplan, Inc.
Respondent

United States of America
Intervenor

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INTEREST OF AMICI CURIAE

This Brief of *Amici Curiae* is respectfully submitted pursuant to Supreme Court Rule 37 in support of the petition for writ of certiorari.[1] *Amici* are international law scholars and human rights organizations.[2] Although they pursue a wide variety of legal interests, they all share a deep commitment to the rule of law and respect for human rights. *Amici* believe their professional expertise on these issues will assist the Court.

SUMMARY OF ARGUMENT

This case concerns the alleged extraordinary rendition of the Petitioners by the U.S. Central Intelligence Agency (CIA) with the support and assistance of Jeppesen Dataplan Inc. As a result of their rendition, the Petitioners asserted that they were subjected to torture, other cruel, inhuman, and degrading treatment, and enforced disappearance, each of which is firmly prohibited by international law and constitute crimes under

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[1] Pursuant to Supreme Court Rule 37(2)(a), all parties received timely notice of the intent to file this brief. In addition, all parties have consented to the filing of this brief. Pursuant to Rule 37(6), *Amici* affirm that no counsel for a party authored the brief in whole or in part and no person other than *Amici* or their counsel made a monetary contribution to this brief.

[2] A complete list of *Amici* and their affiliations is set forth in the Appendix.

international law. The U.S. Executive intervened before the district court to assert the state secrets doctrine, which precludes the judiciary from hearing evidence that would be harmful to national security if disclosed. The district court held that the invocation of the state secrets privilege is a categorical bar to a lawsuit "if the very subject matter of the action is a state secret." *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128, 1134 (N.D. Cal. 2008). In this case, it found that "covert U.S. military or CIA operations in foreign countries against foreign nationals" were a state secret and, therefore, the case as a whole could not proceed. *Id.* This decision was initially reversed by the Ninth Circuit in *Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 953 (9th Cir. 2009), which held that the U.S. government had failed to establish a basis for dismissal under the state secrets doctrine. Following en banc review, the Ninth Circuit "reluctantly" reversed this decision and concluded that the Petitioners' case must be dismissed. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010) (en banc).

The decisions of both the district court and Ninth Circuit are contrary to the most fundamental principles of international law. Victims of serious violations of human rights, such as torture, other cruel, inhuman or degrading treatment, and enforced disappearance, have the right to an effective remedy under international law, including access to justice and reparations. The application of the state secrets doctrine violates this right. While the protection of national security interests may reflect a legitimate concern in judicial proceedings, the application of the state secrets doctrine cannot completely extinguish the right to a

remedy. Accordingly, procedural restrictions must be proportionate and employ the least restrictive means possible. International practice demonstrates how other courts have accommodated legitimate national security concerns within the framework of international law and without extinguishing the right to a remedy.

In this case, the Ninth Circuit failed to consider ways to accommodate national security concerns while affording the Petitioners an effective remedy. Instead, it applied the state secrets doctrine as a blanket bar to judicial review and the Petitioners' right of access to justice. In so doing, the court failed to comply with the venerable U.S. law doctrine that U.S. law must not be interpreted in a manner that conflicts with international law if any other construction is fairly possible. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). While the *Charming Betsy* doctrine has been applied in cases of statutory construction, it applies with even greater rigor to judicially created doctrines such as the state secrets doctrine.

Judicial review is essential to a constitutional democracy and the integrity of the rule of law. To suggest that federal courts have no role to play in this case is deeply troubling. Upholding a blanket assertion of the state secrets doctrine impinges on the rights of victims and on the core principles of a society founded on the rule of law.

ARGUMENT

I. THE APPLICATION OF THE STATE SECRETS DOCTRINE IN THIS CASE VIOLATES THE RIGHT TO AN

EFFECTIVE REMEDY UNDER INTERNATIONAL LAW

The Petitioners have alleged serious violations of international law, including torture, other cruel, inhuman and degrading treatment, and enforced disappearance. Victims of such abuses have the right to an effective remedy under international law, which includes access to justice and reparations.

A. Victims of Extraordinary Rendition Have a Right to an Effective Remedy

The right to an effective remedy is one of the fundamental pillars of a democratic society.[3] It is recognized in every major human rights treaty, including treaties ratified by the United States. The International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), treaties signed and ratified by the United States, both provide for a right to an effective remedy in cases where a right is breached in territory under the effective control or custody of

[3] The principle of *ubi ius ibi remedium* – "where there is a right, there is a remedy" – is a well-established principle of international law. The leading international formulation of this principle comes from the Permanent Court of International Justice in the *Chorzów Factory* case: "[I]t is a principle of international law, and even a general conception of law, that *any breach of an engagement involves an obligation to make reparation*." *Chorzów Factory* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13) (emphasis added).

the state concerned. *See* International Covenant on Civil and Political Rights, art. 2(3), Dec. 16, 1966, 999 U.N.T.S. 171; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 13, Dec. 10, 1984, 1465 U.N.T.S. 85. The right to a remedy must be considered in light of states' obligations under international law to investigate violations of human rights law.

The ICCPR requires States Parties to provide remedies for any violation of its provisions, including torture, cruel, inhuman or degrading treatment, and enforced disappearance. These remedies include the right to bring a claim and to have that claim heard. Article 2(3)(a) of the ICCPR requires States Parties "[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy . . . ." Article 2(3)(b) adds that States Parties must "ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State . . . ." Finally, Article 2(3)(c) requires States Parties "[t]o ensure that the competent authorities shall enforce such remedies when granted."

The Human Rights Committee is the supervisory mechanism established under the ICCPR to provide authoritative interpretations regarding the scope and application of the treaty. The Committee has indicated that Article 2(3) requires States Parties to investigate and adjudicate cases of suspected violations and to provide redress in cases of established violations. Thus, the Committee has explained "Article 2, paragraph 3, requires that States Parties make

reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged." Human Rights Committee, General Comment No. 31, at ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004). The Human Rights Committee has further noted that "[a] failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy." *Id.* at ¶ 15. Significantly, the obligation to provide a remedy for a treaty violation is non-derogable, even in times of national emergency. *See* Human Rights Committee, General Comment No. 29, at ¶ 14, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

The Convention against Torture also requires states to provide an effective remedy for violating the prohibition against torture. Article 14 provides that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible."

The Committee against Torture is the supervisory mechanism established under the Convention against Torture to provide authoritative interpretations regarding the scope and application of the treaty. In relation to cases of extraordinary rendition, the Committee against Torture has indicated that the United States "should adopt all necessary measures to prohibit and prevent enforced disappearance in any

territory under its jurisdiction, and prosecute and punish perpetrators, as this practice constitutes, per se, a violation of the Convention." Committee against Torture, Conclusions and Recommendations of the Committee against Torture: United States of America, at ¶ 18, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006). Moreover, the Committee has indicated that the United States should ensure "that mechanisms to obtain full redress, compensation and rehabilitation are accessible to all victims of acts of torture or abuse, including sexual violence, perpetrated by its officials." *Id.* at ¶ 28.

The right to an effective remedy is also an established principle of customary international law.[4] This development was recognized by the U.N. General Assembly in 2005 when it adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles). Significantly, this General Assembly resolution was adopted by consensus, including by the United States. The Basic Principles acknowledge that the right to a remedy for victims of human rights abuses is found in numerous international instruments and

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[4] *See generally* Ricardo Mazzeschi, *Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview*, 1 Journal of International Criminal Justice 339, 347 (2003); M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 Human Rights Law Review 203, 218 (2006); and Jean-Marie Henckaerts and Louise Doswald-Beck, *ICRC Study of Customary International Humanitarian Law* 537-550 (2005).

customary international law. Principle 12 of the Basic Principles provides that:

> A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an *effective judicial remedy* as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws.

G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) (emphasis added). Similarly, the U.N. Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (Impunity Principles) also emphasize the importance of redress for human rights abuses. U.N. Commission on Human Rights, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher, Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principles 10-30, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

Regional tribunals have also recognized the right to an effective remedy under international law. For example, the Inter-American Court of

Human Rights (IACHR) held in *Velásquez Rodríguez v. Honduras* "that every violation of an international obligation which results in harm creates a duty to make adequate reparation." *Velásquez Rodríguez v. Honduras*, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 25 (July 21, 1989). *See also Durand and Ugarte v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 89, ¶ 24 (Dec. 3, 2001) ("[A]ny violation of an international obligation carries with it the obligation to make adequate reparation."); *Garrido and Baigorria v. Argentina*, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 39, ¶ 40 (Aug. 27, 1998). The Inter-American Court has repeatedly emphasized that the right to a remedy must be effective and not merely illusory or theoretical and must be suitable to grant appropriate relief for the legal right that is alleged to have been infringed. *See, e.g.*, *Velásquez Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 64, 66 (July 29, 1988). In fact, as the Inter-American Court has found, "the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking."[5]

[5] *See also Raquel Marti de Mejia v. Peru*, Case 10.970, Inter-Am. Comm'n H.R., Report No. 5/96, OEA/Ser.L/V/II.91, doc. 7 at 157 (1996) (The right to a remedy "must be understood as the right of every individual to go to a tribunal when any of his rights have been violated (whether a right protected by the Convention, the constitution or the domestic laws of the State concerned), to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that will establish whether or not a violation has taken place and will set, when appropriate, adequate compensation.").

Judicial Guarantees in States of Emergency, Advisory Opinion OC-9/87, Inter-Am. Ct. H.R. (ser. A) No. 9, ¶ 24 (Oct. 6, 1987). *See also Castillo Páez v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 34, ¶ 82 (Nov. 3, 1997).

The European Court of Human Rights has also repeatedly emphasized that the right to a remedy must be effective and not merely illusory or theoretical and must be suitable to grant appropriate relief of the legal right that is alleged to have been infringed. *See, e.g.*, *Cordova v. Italy (No. 1)*, App. No. 40877/98, 40 Eur. Ct. H.R. Rep. 974, 984 (2003); *Cruz Veras v. Sweden*, App No. 15576/89, 14 Eur. Ct. H.R. Rep. 1, 42 (1991). The right to a remedy must be effective in practice as well as in law. *See Metropolitan Church of Bessarabia v. Moldova*, App. No. 45701/99, 35 Eur. Ct. H.R. Rep. 306, 342 (2001); *Conka v. Belgium*, App. No. 51564/99, 34 Eur. Ct. H.R. Rep. 1298, 1302 (2002). Indeed, the capability to submit a claim to a judge and the access to justice are "universally 'recognised' fundamental principles of law." *Golder v. United Kingdom*, App. No. 4451/70, 1 Eur. Ct. H.R. Rep. 524, 535-36 (1975).

In sum, the right to a remedy is a fundamental principle of international law. States have an obligation to investigate and adjudicate cases of suspected human rights abuses and to provide redress for established violations. Indeed, the right to a remedy is all the more significant when the underlying violations involve non-derogable human rights and constitute crimes under international law.

B. Any Procedural Rule That Affects the Right to a Remedy Must Pursue a Legitimate Aim and Employ the Least Restrictive Means

The Ninth Circuit focused on the national security implications of this case and failed to offer sufficient weight to the Petitioners' right to an effective remedy. It is respectfully submitted that the Ninth Circuit erred in its failure to consider the Petitioners' right to a remedy under international law. The proper starting point for the Ninth Circuit should have been the acknowledgement of the Petitioners' fundamental right to a remedy for serious violations of human rights law. Only then should any restrictions on this right, such as the state secrets doctrine, have been considered.

In order to determine whether the state secrets doctrine could procedurally restrict or regulate the right to an effective remedy, a two-part test must be conducted. First, the restriction must pursue a legitimate aim. Second, the effects of the restriction must be proportionate to the aim pursued and, in doing so, must employ the least restrictive means possible. Under no circumstances, however, may the right to a remedy be extinguished by procedural restrictions.

(1) Procedural Restrictions Must Pursue a Legitimate Aim

Any effort to limit the right to a remedy must be based on legitimate grounds. While national security interests may constitute a legitimate aim, they will only be considered so when they are genuinely tailored to protecting such interests rather than protecting states from embarrassment

or preventing the exposure of illegal activity.[6] Preventing disclosure of serious human rights violations would not constitute a legitimate aim. Indeed, it would be inconsistent with a state's positive obligations under international law to investigate human rights abuses and to provide victims with redress for their injuries. Accordingly, the assertion of national security concerns cannot automatically constitute a legitimate aim.[7] Rather, such concerns must be analyzed in the context of the specific case at issue.

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[6] *See* The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, at Principle 2(b), U.N. Doc. E/CN.4/1996/39 (1996) ("[A] restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest."). *See also* U.N. Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc E/CN.4/1985/4 (Sept. 28, 1984).

[7] States cannot refuse to provide classified information for the investigation of serious human rights violations solely because of national security considerations. *See, e.g.*, *Myrna Mack Chang v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 180 (Nov. 25, 2003) ("The Court deems that in cases of human rights violations, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceeding.").

In the present case, the mere assertion that the overseas activities of the CIA constitutes a state secret is insufficient.[8] Rather, the precise aspects of the CIA's overseas activities that have national security implications must be identified. Persistent concerns about the over-classification of evidence by governments highlight the need for greater judicial scrutiny of the assertion that certain information is privileged.[9]

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[8] The U.N. Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism has raised significant concerns about the state secrets privilege. In a 2009 report, the Special Rapporteur indicated that the invocation of the state secrets doctrine renders the right to a remedy illusory and may amount to a violation of the ICCPR. Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism, at ¶ 61, U.N. Doc. A/HRC/10/3 (Feb. 4, 2009). *See also id.* at ¶ 75 ("The Special Rapporteur urges Member States to reduce to a minimum the restrictions of transparency founded on concepts of State secrecy and national security. Information and evidence concerning the civil, criminal or political liability of State representatives, including intelligence agents, for violations of human rights must not be considered worthy of protection as State secrets. If it is not possible to separate such cases from true, legitimate State secrets, appropriate procedures must be put into place ensuring that the culprits are held accountable for their actions while preserving State secrecy.").

[9] *See* International Commission of Jurists, Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights 90 (2009) ("States should seek to protect the secrecy required for effective intelligence without encouraging an institutional culture of secrecy. It is particular important that States take steps to ensure that serious human rights violations can never be justified in the name of national security and that such crimes are never safe from sanction because of a culture

The subject matter of the appeal in the current case – extraordinary rendition as part of the CIA's overseas activities – formed the basis for the Ninth Circuit's dismissal of the case. The court did not assess which aspects of extraordinary rendition constitute a state secret nor how they could be dealt with in a manner that would protect the national security interests at stake while upholding the Petitioners' right to a remedy. Rather, the right to a remedy was extinguished altogether.

(2) Procedural Restrictions Must Be Proportionate and Employ the Least Restrictive Means Possible

Even if certain restrictions on access to evidence are deemed consistent with a legitimate aim, these restrictions must be proportionate and strictly necessary to achieve that aim in a democratic society. In making such an assessment, the court should have sufficient access to the evidence to test the propriety and legitimacy of the state secrecy claim, and must consider alternative ways in which the evidence can be admitted in order to protect both the national security interests at stake and the right to an effective remedy. The burden of proof lies on the state asserting the national

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of secrecy. Victims must not be deprived of effective remedies or reparation on grounds of national doctrines such as on 'state secrecy.'"). *See also* William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 Political Science Quarterly 85, 87 (2005) (noting that, "[v]irtually all observers acknowledge that over-classification is a significant problem, and this has led to some embarrassing moments for the executive branch.").

security interests to demonstrate the proportionality of the restriction.

In *Chahal v. United Kingdom*, for example, the European Court of Human Rights noted that courts have the ability to fashion procedures that can address national security considerations.

> [T]he use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved . . . there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence and yet accord the individual a substantial measure of procedural justice.

Chahal v. United Kingdom, App. No. 22414/93, 23 Eur. Ct. H.R. Rep. 413, 469 (1996).

In *Tinnelly & Sons Ltd & Others and McElduff & Others v. United Kingdom*, the European Court of Human Rights pointed out that alternative ways of receiving and hearing privileged information must be explored and used when available. The court noted that it is possible "to safeguard national security concerns about the nature and sources of intelligence information and yet accord the individual a substantial degree of procedural justice." *Tinnelly & Sons Ltd & Others and McElduff & Others v. United Kingdom*, App. No.

20390/92, 27 Eur. Ct. H. R. Rep. 249, 291 (1998). In this case, the European Court held that the use of security-cleared advocates was adequate to protect the national security interests at stake.[10] *See also Devenney v. United Kingdom*, App. No. 24265/94, 35 Eur. Ct. H.R. Rep. 643, 647-648 (2002); *Al-Nashif v. Bulgaria*, App. No. 50963/99, 36 Eur. Ct. H.R. Rep. 655 (2002).

A similar approach has been taken by other international tribunals. In *Prosecutor v. Blaškić,* for example, the International Criminal Tribunal for the former Yugoslavia, which was established by the U.N. Security Council, rejected Croatia's attempt to withhold evidence that it claimed was privileged due to national security concerns. The Chamber held that as Croatia had consented to the jurisdiction of the court, it could not withhold important evidence relating to the guilt or innocence of a defendant, as this would defeat "[t]he very raison d'etre" of the proceeding. *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, at ¶ 65 (Int'l Crim. Trib. for the Former Yugoslavia, Oct. 29, 1997). Rather than allow the wholesale suppression of sensitive evidence, the Chamber adopted procedures designed to allow admission of evidence while protecting its privileged nature. *Id.* at ¶ 68. For example, the Appeals Chamber recommended that the Trial Chamber limit the number of judges who could

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[10] *See also* House of Commons Constitutional Affairs Committee, The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates, 2004, ¶¶ 44-66 (U.K.).

view the subpoenaed evidence; allow for the consideration of the evidence at an *ex parte*, *in camera* hearing; allow the evidence to be redacted where necessary; and return all irrelevant evidence to Croatia. *Id.*

(3) Procedural Restrictions Must Not Extinguish the Right to an Effective Remedy

Finally, it is well established that the failure to provide any remedy in judicial proceedings is considered a disproportionate restriction and a violation of the right to an effective remedy.

In *Cordova v. Italy (No. 1)*, for example, the European Court of Human Rights held that any limitations on judicial review "must not restrict the access left to the individual in such a way or to such an extent that the very essence of the right is impaired." *Cordova v. Italy (No. 1)*, *supra*, at 984. To do so would violate the right to a remedy. *See also Waite and Kennedy v. Germany,* App. No. 26083/94, 30 Eur. Ct. H.R. Rep. 261 (1999).

The Inter-American Court of Human Rights has also consistently stressed that procedural rules cannot be used to create a blanket ban on the exercise of the right to an effective remedy.[11] In the *Five Pensioners Case*, the Inter-American Court reiterated that the right to a remedy must be effective.

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[11] *See generally* Report on Terrorism and Human Rights, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr. ¶ 261 (2002).

> Those recourses that are illusory, owing to the general conditions in the country or to the particular circumstances of a specific case, shall not be considered effective. Recourses are illusory when it is shown that they are ineffective in practice, when the Judiciary lacks the necessary independence to take an impartial decision, or in the absence of ways of executing the respective decisions that are delivered. They are illusory when justice is denied, when there is an unjustified delay in the decision and when the alleged victim is impeded from having access to a judicial recourse.

"Five Pensioners" v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 98, ¶ 136 (Feb. 28, 2003). *See also Barrios Altos* Case (*Chumbipuma Aguirre et al. v. Peru*), Interpretation of the Judgment on the Merits, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶¶ 3, 41, 43 (Mar. 14, 2001).[12]

Several national courts have followed a similar approach for addressing national security concerns in judicial proceedings. In *R (Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*, [2010] EWCA (Civ) 65, for example, the

[12] The Inter-American Commission on Human Rights has made similar determinations. *See, e.g.*, *Herrera v. Argentina*, Case No. 10.147, Inter-Am. Comm'n. H.R., Report No. 28/92, OEA/Ser.L/V/II.83, doc. 14 (1992).

Court of Appeal of England and Wales considered whether information regarding interrogation practices performed against suspected terrorists should be redacted from a lower court judgment. According to the Secretary of State, publication would lead to a real risk of serious harm to the national security of the United Kingdom. The Court of Appeal, however, disagreed and allowed the information to be released. In its opinion, the Court of Appeal recognized the importance of dissemination for promoting "democratic accountability, and, ultimately, the rule of law itself." *Id.* at ¶ 57.

In *Minister of Justice v. Khadr*, 2 S.C.R. 125 (2008), the Canadian Supreme Court considered whether a Guantanamo detainee could access documents in the possession of the Canadian government. The Canadian government refused to provide unredacted copies of the documents. While a lower court initially upheld the refusal, the Canadian Supreme Court reversed. It found that "the principles of fundamental justice impose a duty on the prosecuting Crown to provide disclosure of relevant information in its possession to the accused whose liberty is in jeopardy . . . ." *Id.* at ¶ 30.

In this case, the Ninth Circuit recognized that "[d]enial of a *judicial forum* based on the state secrets doctrine poses concerns at both individual and structural levels." *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d at 1091 (emphasis added). However, the majority erred by concluding that hypothetical non-judicial remedies could alleviate the harsh effect of its denial of Petitioners' claims. As Judge Hawkins stated in his dissenting opinion, "[n]ot only are these remedies insufficient, but their

suggestion understates the severity of the consequences to Plaintiffs from the denial of *judicial* relief." *Id.* at 1101 (emphasis added). Not one of the alternative remedial avenues proposed by the majority actually exists, or is even in the process of being implemented by the legislative or executive branches at this time. Thus, the Ninth Circuit's analysis and application of the state secrets doctrine in this case completely extinguishes Petitioners' right to an effective remedy without considering more proportionate and less restrictive alternatives.

II. U.S. LAW, INCLUDING THE STATE SECRETS DOCTRINE, SHOULD BE INTERPRETED CONSISTENT WITH INTERNATIONAL LAW

Federal courts have long recognized the doctrine of statutory construction that federal statutes must not be interpreted in a manner that conflicts with international law if any other construction is fairly possible. While this doctrine has been applied to statutory construction, it applies with even greater rigor to judicially created doctrines.

The Supreme Court's decision in *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801), perhaps represents the first elaboration of this principle of statutory construction. In *Talbot*, the Court, per Chief Justice Marshall, held that "the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law." *Id.* at 43. The doctrine, however, is

more generally attributed to a case decided three years later, *Murray v. Schooner Charming Betsy*.

In *Charming Betsy*, the Supreme Court considered whether an Act of Congress adopted to suspend trade between the United States and France authorized the seizure of neutral vessels, an action that would violate customary international law. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Writing for the Court, Chief Justice Marshall stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ." *Id.* at 118. This does not mean that international law supersedes or overrides domestic law. Rather, *Charming Betsy* stands for the proposition that "courts will not blind themselves to potential violations of international law where legislative intent is ambiguous." *United States. v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991).

The *Charming Betsy* doctrine is a long-standing doctrine of statutory construction that the Supreme Court has affirmed in numerous decisions. *See, e.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 178 n.35 (1993); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *United States v. Payne*, 264 U.S. 446, 448-49 (1924); *MacLeod v. United States*, 229 U.S. 416, 434 (1913); *Brown v. United States*, 12 U.S. 110, 125 (1814).

Under *Charming Betsy*, ambiguous statutes are to be interpreted consistent with both customary international law and treaties. *See* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 Vanderbilt Law Review 1103, 1161 (1990). Accordingly, in *F. Hoffmann-La Roche Ltd. v.*

Empagran S.A., 542 U.S. 155, 164 (2004), the Supreme Court stated, "[t]his rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow."

While the *Charming Betsy* doctrine has been applied by federal courts as a canon of statutory construction, its reasoning applies with even greater rigor to judicially created doctrines. The United States has an international obligation to afford victims of human rights abuses the right to seek redress for their injuries. This obligation was accepted by the United States when it ratified both the ICCPR and the Convention against Torture. It also binds the United States as a principle of customary international law. Courts should be particularly cautious when using judicially created doctrines that may affect U.S. compliance with international law. Indeed, courts should seek to remedy violations of international law and not cause them. Regrettably, the Ninth Circuit failed on both counts.

Another reason for applying the *Charming Betsy* doctrine to judicially created doctrines is to avoid separation of powers concerns. The division of power among the three branches of government is best served by implementing judicial doctrines consistently with the actions of the coordinate branches of government. Article II, Section 2 of the U.S. Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." The application of the state secrets doctrine in this case is contrary to the obligations set forth in both the ICCPR and the Convention against Torture, thereby placing the

judiciary in conflict with the coordinate branches of government.

Interpreting the state secrets doctrine in a manner consistent with the fundamental right to a remedy embodied in international law allows the United States to live up to its promises, ideals, and values. It ensures that the right of all people to be free from torture, other cruel, inhuman or degrading treatment, and enforced disappearance has practical meaning.

CONCLUSION

The practice of extraordinary rendition has created a class of individuals, namely "terror suspects," who have been subjected to torture, other cruel, inhuman, or degrading treatment, and enforced disappearance, and who were provided with no form of due process during their detention. The application of the state secrets doctrine exacerbates these violations of international law by denying these individuals the opportunity to state their case and seek redress for their injuries through judicial review.

Amici respectfully submit that the Ninth Circuit erred in affirming the district court's dismissal granting the U.S. Government motion to dismiss on the basis of the state secrets doctrine. In doing so, the court's decision denies the Petitioners their right to an effective remedy for serious violations of international law. For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted January 12, 2011

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APPENDIX

Human Rights Organizations

INTERIGHTS is an international human rights law center, based in London, which has held consultative status with the Council of Europe since 1993. It works to promote the effective realization of international human rights standards through law. To this end, INTERIGHTS provides advice on the use of international and comparative law, assists lawyers in bringing cases to international human rights bodies, disseminates information on international and comparative human rights law and undertakes capacity building activities for lawyers and judges. A critical aspect of INTERIGHTS' litigation work involves the selective filing of third party interventions before national and international courts and tribunals on points of law of key importance to human rights protection, and on which our knowledge of international and comparative practice might assist the Court. Ensuring legal protections in the context of counter-terrorism measures and national security is a thematic priority for INTERIGHTS.

The **International Commission of Jurists** (ICJ) is an international non-governmental organization dedicated to the promotion and observance of the rule of law and human rights. The ICJ was created in 1952 and is composed of 60 well-known jurists representing different legal systems. It has its headquarters in Geneva, Switzerland, has three regional offices, and approximately 90 national sections and affiliated organizations throughout the world. It enjoys consultative status before the

United Nations Economic and Social Council, UNESCO, the Council of Europe, and the Organization of the African Union. It maintains cooperative ties with the Organization of American States. The ICJ regularly addresses the United Nations Human Rights Council and other U.N. bodies to provide authoritative statements of international human rights law. It also provides legal expertise in international law in the context of national and international litigation.

The **World Organisation Against Torture** (OMCT) is the main coalition of non-governmental organizations fighting against torture, summary execution, enforced disappearance, and all other cruel, inhuman or degrading treatment. With 297 affiliated organizations in its SOS-Torture Network, OMCT is one of the most important networks of non-governmental organizations working for the protection and the promotion of human rights in the world. OMCT's International Secretariat provides personalized medical, legal and/or social assistance to hundreds of torture victims and ensures the daily dissemination of urgent appeals across the world, in order to protect individuals and to fight against impunity. In the framework of its activities, OMCT also submits individual cases and reports to the special mechanisms of the United Nations, and actively collaborates in the development of international norms for the protection of human rights. It also provides amicus curiae briefs before domestic and regional courts or bodies on questions of international human rights law. OMCT enjoys consultative status with ECOSOC (United Nations), the International Labour Organization,

the African Commission on Human and Peoples' Rights, the Organisation Internationale de la Francophonie, and the Council of Europe.

The **Redress Trust** (REDRESS) is an international human rights non-governmental organization based in the United Kingdom with a mandate to assist torture survivors, to prevent further torture, and to seek justice and other forms of reparation. It has accumulated a wide expertise on the rights of victims of torture to gain both access to the courts and redress for their suffering and has advocated on behalf of victims from different regions throughout the world. Since its establishment more than 15 years ago, REDRESS has regularly taken up cases on behalf of individual torture survivors at the national and international level and provides assistance to representatives of torture survivors. REDRESS has extensive experience in interventions before national and international courts and tribunals, including the United Nations Committee against Torture and Human Rights Committee, the European Court of Human Rights, the Inter-American Commission on Human Rights, the International Criminal Court, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia.

International Law Scholars

Robert K. Goldman is a Professor of Law and Louis C. James Scholar at American University, Washington College of Law. He is the former President of the Inter-American Commission on Human Rights and the Former Independent Expert

on Human Rights & Terrorism of the U.N. Human Rights Commission.

Senator Dick Marty (Switzerland) is a member of Parliament in Switzerland. He is currently serving as the Rapporteur on Abuse of State Secrecy and National Security: Obstacles to Parliamentary and Judicial Scrutiny of Human Rights Violations for the Parliamentary Assembly of the Council of Europe (PACE). He previously served as the chairman of the PACE Committee on Legal Affairs and Human Rights. He also served as the PACE Rapporteur on Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees involving Council of Europe Member States.

Manfred Nowak recently served as the United Nations Special Rapporteur on Torture (2004-2010). He is a Professor of Constitutional Law and Human Rights at the University of Vienna and the co-director of the Ludwig Boltzmann Institute of Human Rights. He has published numerous works on human rights law and international law. He was a judge of the Human Rights Chamber for Bosnia and Herzegovina from 1996 through 2003. He also served as a member of the Austrian delegation to United Nations Commission on Human Rights from 1986-1993.

Judge Stefan Trechsel serves as a Judge Ad Litem on the International Criminal Tribunal for the Former Yugoslavia. He has served as the President of the European Commission on Human Rights and in that role participated in numerous counter-terrorism cases. He is an Emeritus Professor of Criminal Law and Procedure at the

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