No. 20-827

In The Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

ZAYN AL-ABIDIN MUHAMMAD HUSAYN, AKA ABU ZUBAYDAH, ET AL.,

Respondents.

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

BRIEF OF THE CENTER FOR JUSTICE AND ACCOUNTABILITY AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amicus the Center for Justice and Accountability (CJA) is a U.S.-based human rights organization dedicated to deterring torture, crimes against humanity, extrajudicial killings, and other serious human rights abuses. Through high-impact litigation, CJA holds perpetrators of abuses accountable and seeks truth, justice, and redress for victims and survivors. Since its founding in 1998, CJA has represented survivor-plaintiffs in numerous lawsuits filed in federal courts under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note, including in cases involving torture and enforced disappearances carried out by state security actors. An important function of each of these cases was to develop a factual record contributing to a broader public understanding of state action, particularly with respect to human rights violations carried out in the name of protecting national security.

CJA has appeared before this Court on behalf of survivors of atrocities committed under Somali dictator Siad Barre in *Samantar v. Yousuf*, 560 U.S. 305 (2010), and as *amicus curiae* on issues related to the ATS, the TVPA, and international law in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), *Mohamad v.*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and that no person other than amici or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for amici also represents that all parties have consented to the filing of this brief.

Palestinian Authority, 566 U.S. 449 (2012), *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013), *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) and *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021).

This case arises from the detention and torture of Respondent Zayn al-Abidin Muhammad Husayn (Abu Zubaydah) at Central Intelligence Agency (CIA) "black sites" in foreign countries, including one reportedly operated in Stare Kiejkuty, Poland. *See* Brief for Respondent Zayn al-Abidin Muhammad Husayn (Abu Zubaydah Br.) at 1-2. Abu Zubaydah and his counsel are requesting discovery pursuant to 28 U.S.C. § 1782 for documents and oral testimony from two former CIA contractors relating to their personal knowledge of the CIA black sites and Abu Zubaydah's detention and torture at those sites. The United States seeks to quash their discovery application in its entirety based on the state secrets privilege. Petitioner presents the Court with one question for review: whether federal courts can scrutinize the United States' claims of potential harms to the national security when it asserts the state secrets privilege. *See* Brief of Petitioner United States (Pet'r's Br.) at I.

Amicus has a strong interest in the proper resolution of questions relating to the application of the state secrets privilege with respect to matters implicating violations of human rights and civil liberties.

SUMMARY OF ARGUMENT

Respondent Zayn al-Abidin Muhammad Husayn (Abu Zubaydah) was captured in Pakistan in March 2002. Now imprisoned at the U.S. detention facility in Guantánamo Bay, he was one of the first

detainees subjected to the CIA's extraordinary rendition and torture programs. *See* Abu Zubaydah Br. at 1. Following his capture, Abu Zubaydah was delivered to and detained at CIA black sites around the world, where he was interrogated and tortured. *See* Abu Zubaydah Br. at 1. As detailed by the Senate Select Committee on Intelligence Report on the CIA's Detention and Interrogation Program (SSCI Report) and in the European Court of Human Rights' judgment against Poland, Abu Zubaydah was held for almost a year at a black site reportedly in Stare Kiejkuty, Poland, referred to in the SSCI Report as "Detention Site Blue." *See* Abu Zubaydah Br. at 2.

A criminal investigation into Abu Zubaydah's treatment at this facility is now pending in Poland. The United States has invoked the state secrets privilege to quash discovery requested to aid the Polish proceedings on the basis that the information would potentially identify its foreign intelligence partners and the location of former CIA black sites, endangering national security. Pet'r's Br. at 3.

The state secrets privilege, however, exists in tension with important democratic values. This case presents all the conditions for why the Government's claim of the state secrets privilege demands careful judicial scrutiny. The Government is alleged to have engaged in serious human rights violations, but for almost two decades, it has refused to confirm or deny many of the core allegations concerning the CIA's torture and rendition program. Instead, it has used the state secrets privilege as a shield against scrutiny and accountability, corrupting the doctrine's original function and exacerbating the conflict

between government secrecy and democratic governance.

The cases litigated by CJA regarding security sector abuses in Chile, El Salvador, and Peru provide a powerful illustration of the dangers of this approach. Examples from these countries show how refusal to come to terms with human rights violations committed by state security actors can inflict lasting damage to societies, erode the rule of law, and ultimately do little to protect the nation's security. Ensuring public safety is one of the most important functions of government, but its security sector cannot be above scrutiny. Potentially illegal or rights violating conduct committed by the state is precisely the type of information that the public should have the ability to scrutinize, because, as the examples drawn from CJA's cases illustrate, these are the transgressions – if left hidden and unremedied – that pose the greatest structural risk to democratic systems. Accountability, discovery of the truth, and the development of a shared and complete historical record are critical for building secure and open societies.

ARGUMENT

I. Assertions of the State Secrets Privilege Require Careful Judicial Scrutiny and Review

The state secrets privilege in its modern form was articulated by this Court in *United States v. Reynolds*, 345 U.S. 1 (1953). It recognizes that even in open and democratic societies, there will be the rare instance where sensitive government information must be kept confidential, or otherwise threaten the nation's security and endanger the

basic function of any government – the protection of its people. The state secrets privilege, however, exists in tension with important values: *first*, that secrecy in general runs counter to open court principles; and *second*, that executive secrecy in particular conflicts with our democratic system of representative government.

Thus, as this Court recognized, the state secrets privilege "is not to be lightly invoked." *Reynolds*, 345 U.S. at 7. Under *Reynolds*, the judiciary has an important role in determining whether information constitutes a state secret for purposes of the evidentiary privilege: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Reynolds*, 345 U.S. at 9-10. *See also Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1081 (9th Cir. 2010) (the court must "'make an independent determination whether the information is privileged'") (quoting *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1202 (9th Cir. 2007)). If the court is satisfied "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose . . . matters which, in the interest of national security, should not be divulged", the privilege will be upheld. *Reynolds*, 345 U.S. at 10.

Against this backdrop, Petitioner presents the Court with the extraordinary proposition that the deference afforded the executive in matters of national security must be so great that mere invocation of the state secrets privilege should satisfy the judicial inquiry. Pet'r's Br. at I ("Question Presented"), 22-26. However, "an executive decision to *classify* information is insufficient to establish that the information is privileged. Although

classification may be an indication of the need for secrecy, treating it as conclusive would trivialize the court's role[.]" *Jeppesen Dataplan, Inc.*, 614 F.3d at 1082 (citation omitted). Indeed, "the state secrets doctrine does not represent a surrender of judicial control over access to the courts." *El-Masri v. United States*, 479 F.3d 296, 312 (4th Cir. 2007). Rather, courts have an "obligation" to review invocations of the state secrets privilege with "a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege." *Al-Haramain Islamic Found.*, 507 F.3d at 1203. Thus, "[i]n undertaking its role to 'critically . . . examine instances of [the] invocation' of the state secrets privilege . . . the Court is mindful that 'the privilege may not be used to shield any material not strictly necessary to prevent injury to national security.'" *Edmonds v. United States DOJ*, 323 F. Supp. 2d 65, 78 (D.D.C. 2004) (citing *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983)).

Properly invoked, the state secrets privilege serves an important function in protecting from discovery sensitive government information, the disclosure of which would pose a serious risk to national security and public safety. The state secrets privilege, however, should not be wielded as a means of covering up information the Government would rather not subject to public scrutiny. In 2009, for instance, then-U.S. Attorney General Eric Holder issued a directive to the Department of Justice noting that the Department should not defend an invocation of the state secrets privilege in order to, *inter alia*, conceal violations of law or prevent embarrassment to the United States. Memorandum from Attorney Gen. to the Heads of Executive Dep'ts

and Agencies 2 (Sept. 23, 2009), https://www.justice.gov/sites/default/files/opa/legacy/2009/09/23/state-secret-privileges.pdf. The judiciary plays a critical role in making these distinctions by subjecting assertions of this evidentiary privilege to careful and skeptical review.

In cases where, as here, the Government is alleged to have engaged in serious wrongdoing, "skepticism is all the more justified . . . . Such allegations heighten the risk that government officials may be motivated to invoke the state secrets doctrine not only by their obligation to protect national security but also by a desire to protect themselves or their associates from scrutiny." *Jeppesen Dataplan, Inc.*, 614 F.3d at 1085 n.8. And in their influential analysis of the state secrets privilege, Professors William Weaver and Robert Pallitto warn of an even greater danger:

> [I]f the privilege protects the executive and agencies from investigation and judicial power, then the incentive on the part of administrators is to use the privilege to avoid embarrassment, to handicap political enemies, and to prevent criminal investigation of administrative action. In these circumstances, the privilege may have the effect of encouraging or tempting agencies to engage in illegal activity.

William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 90 (2005).

The instant case presents all the conditions for why the Government's invocation of the state secrets privilege demands careful scrutiny. The Government

is alleged to have engaged in serious human rights violations. For almost two decades, it has refused to confirm or deny many of the core allegations concerning the CIA's torture program. Rather, it has used the state secrets doctrine as a shield against accountability, corrupting its original function and exacerbating the conflict between government secrecy and democratic governance. *See, e.g.*, *Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (affirming dismissal of claims arising from the CIA's extraordinary rendition and torture programs based on the state secrets privilege); *El-Masri*, 479 F.3d 296 (same); *see also ACLU v. DOJ*, No. 10-cv-123, 2011 U.S. Dist. LEXIS 156267 (D.D.C. Feb. 14, 2011) (granting exemption from disclosure under the Freedom of Information Act materials relating to the CIA's torture program based on the state secrets privilege).

II. Resisting Public Disclosure of Abuses Committed by National Security Agencies Erodes Democratic Systems and Does Not Promote Public Safety

The cases litigated by CJA over the past twenty years provide a vivid illustration of how refusal to come to terms with human rights violations committed by state security actors can inflict lasting damage to societies, and ultimately do little to protect the nation's security or the public's safety.

A. Chile

On September 11, 1973, the Chilean Army, led by General Augusto Pinochet, overthrew the democratically elected government of President Salvador Allende. In the days that followed, the military junta embarked on a systematic crackdown

on all opposition and dissent throughout the country, including the widespread arbitrary detention, torture, and execution of individuals identified as threats to national security. According to the National Truth and Reconciliation Commission (the Rettig Commission) established by the Chilean government in April 1990, at least 2,115 individuals were killed or "disappeared," almost invariably by state agents, between September 1973 and the collapse of the military dictatorship in March 1990.[2] Subsequent commissions also documented over 28,000 cases of state-sponsored torture during this period.[3]

i. The Military Dictatorship Tortured and Killed Civilians in the Name of National Security

The Pinochet government declared a state of siege throughout Chile, claiming it necessary to suppress those "subversive of good order."[4] Civilians were the primary victims of this national security crackdown. Military authorities identified and targeted perceived opponents of the regime, including political leaders, doctors, university professors, union members, and social activists. CJA served as counsel in two civil suits brought on behalf

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[2] *See* Expert Report of Professor Steven J. Stern, filed as Exhibit A to the Declaration of Christina Hioureas in support of Plaintiffs' Motion for Summary Judgment at 33-34, *Jara v. Núñez*, No. 6:13-cv-1426-Orl-37GJK, 2016 WL 2348658 (M.D. Fla. May 3, 2016), ECF No. 137-2 [hereinafter Stern Expert Report].

[3] *Id.*, Exhibit 14.

[4] *Id.* at 12-13, 16.

of the families of Víctor Jara and Winston Cabello, civilians tortured and killed by the Chilean military: *Jara v. Núñez*, No. 6:13-cv-1426-Orl-37GJK, 2016 WL 4013899 (M.D. Fla. June 29, 2016) and *Cabello v. Fernández Larios*, No. 99-0528-CIV, 2003 WL 26047259 (S.D. Fla. Oct. 31, 2003), *aff'd*, 402 F.3d 1148 (11th Cir. 2005).

In the hours following the coup, the Chilean Army rounded up and detained approximately 5,000 civilians at Chile Stadium, one of the regime's first mass detention centers. Among those detained was Víctor Jara, a university professor and folk singer, famous for his outspoken messages of social equality. As one of the most well-known artists associated with President Allende, Jara was a threat to the new regime. After days in detention without charge, Jara was separated from the other detainees and taken to an underground locker room for interrogation. There, Jara was tortured and killed. His body was discarded outside Chile Stadium, along with the bodies of other suspected "subversives".

The families of those killed sought answers from the Chilean government. But in the months and years following Jara's detention, interrogation, torture, and death, the government met every inquiry with silence, refusing to disclose any information regarding the details of his death or the identity of the security forces stationed at Chile Stadium.[5]

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[5] Plaintiffs' Motion for Partial Summary Judgment at 3-7, *Jara*, No. 6:13-cv-1426-Orl-37GJK, 2016 WL 2348658, ECF No. 137.

The abuses escalated. In October 1973, Pinochet organized the "Caravan of Death," a military death squad charged with eliminating perceived threats to the regime. Flying a cross-country circuit by helicopter, the Caravan of Death travelled to military bases throughout the country, interrogating, torturing, and executing at least seventy-five political prisoners. The dead were buried in unmarked graves. Among the Caravan of Death's victims was Winston Cabello, a young economist who had worked for ousted President Allende.[6]

The military dictatorship published false accounts about the Caravan of Death's executions, informing victims' families and the broader public that detainees were threats to the nation's security and had been killed trying to escape. It was not until 1990, once Pinochet had left power, that families were told where to find their relatives' bodies. The exhumed remains bore the signs of torture, and the truth of their deaths finally began to emerge.[7]

ii. The Military Dictatorship Actively Covered Up Security Sector Abuses

General Pinochet's regime lasted from 1973 to 1990, when it was voted out by popular plebiscite. While in power, the government actively worked to prevent investigations into its human rights abuses through misinformation and the suppression of

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[6] Second Amended Complaint ¶ 4, *Cabello v. Fernández Larios*, 205 F. Supp. 2d 1325 (S.D. Fla. 2002) (No. 99-0528-CIV), ECF No. 127.

[7] *Id.* ¶¶ 45-49.

evidence.[8] The National Intelligence Directorate (DINA) saw attempts by ordinary people to learn their families' fates as a threat to the stability of the government and created cover stories to insulate the regime from scrutiny. The push by victims' relatives, supported by civil society and religious organizations, to seek out the truth and obtain accountability often led the government to suppress these efforts through further abuses – perpetuating a cycle of violence and repression.[9]

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[8] *See* Stern Expert Report at 15 (inventing official stories of shoot-outs or prisoner escapes to explain extrajudicial killings), 22-23 (disseminating insinuations that state-sponsored assassinations were carried out by the regime's adversaries to create bad publicity), 23 (DINA (National Intelligence Directorate) claiming that 119 forcibly disappeared persons were extremists who left Chile for insurgency training and were eventually killed in shoot-outs among themselves and with Argentine security forces), 25-26 (fifteen disappeared persons buried alive by police, who claimed that they were killed in a shoot-out following an ambush), 26 (propaganda campaign to distract from the violent repression), 29-30 (describing CNI (political police and intelligence body) misinformation campaign).

[9] *See id.* at 24 (noting that from September to November 1975, the regime arrested several priests and lay workers with the Pro-Peace Committee, including its lead lawyer, José Zalaquett; intimidation tactics also included firebombing art gallery and menacing visits and calls to human rights activists), 26 (military and intelligence personnel sought to destroy physical evidence by exhuming and reburying or cremating remains, using machinery to churn earth and disperse bones, and dropping bodies into the ocean from helicopters), 32 (another round of efforts to hide or obliterate physical remains in 1989), 34 (957 cases of enforced disappearance "underscored that the misinformation and cover-up, like the violence itself, was too institutionalized and too

When the tension between cover-up and disclosure resulted in a crisis for the regime in 1978, it sought to insulate itself from legal accountability by passing Decree Law No. 2.191, which provided a sweeping amnesty for criminal offenses committed since the start of the coup. Even absent the threat of legal accountability, the regime continued to suppress information regarding its security sector abuses for fear of losing further support among the population. On the eve of the 1989 democratic elections, the regime attempted to institutionalize this by passing Law 18,771. This law exempted the military, police, and other security forces from their normal statutory duty to transfer government records to the National Archive, and also permitted these agencies to destroy archived materials in accordance with their internal rules.[10]

iii. A Return to Democratic Governance, and Successful Truth-Telling and Accountability Efforts Exposed the Military Dictatorship's Security Sector Abuses

In 1989, the people of Chile held their first free and democratic election in seventeen years. The newly elected government quickly established the Rettig Commission to investigate and reveal the regime's abuses. In February 1991, the Commission published its findings, though in the end, the Rettig Report was a political compromise: with the 1978 amnesty law in force, there would be no prosecutions. Still, its publication brought a measure

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entangled with secret police operations to be explained away as occasional excesses by rogue subordinates in the heat of war.").

[10] *See id.* at 31.

of vindication for Pinochet's victims and helped acknowledge the breadth and systematic nature of the government's human rights violations. In a series of decisions handed down over the next decade, the Chilean Supreme Court eventually curtailed the reach of the 1978 amnesty, creating the opening for legal accountability. In 2003, a new truth commission (the Valech Commission) took up the massive legacy of the security agencies' use of torture.

That same year – on October 15, 2003 – a Miami jury found Fernández Larios, a member of the Caravan of Death, liable for the torture and extrajudicial killing of Winston Cabello.[11] The *Cabello* case marked the first verdict handed down by a U.S. jury for crimes against humanity and one of the first times any court ruled on claims of atrocities committed by the military dictatorship following the coup. For the Cabello family, the verdict provided the first judicial acknowledgment that state actors were responsible for carrying out and covering up Winston's extrajudicial killing.

In 2012, Pedro Pablo Barrientos Núñez was criminally charged in Chile in the death of Víctor Jara following revelations made by conscripts who took part in the military coup. While Barrientos Núñez, now living in Florida, remained beyond the reach of the Chilean courts, the Jara family successfully held him to account for his role in the torture and killing of Jara at Chile Stadium (now

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[11] Judgment, *Cabello*, No. 99-0528-CIV (S.D. Fla. Oct. 31, 2003), ECF No. 311.

renamed Víctor Jara Stadium) following an eight-day jury trial in the Middle District of Florida.[12] The courts in both the *Jara* and *Cabello* cases specifically acknowledged that the military dictatorship had actively covered up its security sector abuses.[13]

Almost immediately after the end of the Pinochet dictatorship, Chile embarked on a decades-long process of truth-seeking and accountability. The Chilean government even supported the Jara family's case against Barrientos Núñez. In an *amicus curiae* brief filed in the Eleventh Circuit, the Chilean government noted that "[t]he gravity and broader social significance of these crimes, both individually and collectively, makes addressing them a matter of great national importance to Chile."[14] These efforts laid bare the scope of the regime's abuses, carried out in the name of protecting the nation's security. These efforts also revealed how a fear of disclosure and accountability perpetuated a cycle where new abuses were continually committed

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[12] Judgment, *Jara,* No. 6:13-cv-1426-Orl-37GJK (M.D. Fla. June 29, 2016) ECF No. 187 (holding Barrientos Núñez responsible for the torture and extrajudicial killing of Jara and awarding his family $28 million in compensatory and punitive damages).

[13] *See Cabello*, 205 F. Supp. 2d at 1331 (finding that the Pinochet regime concealed the decedent's burial location and cause of death); *Jara v. Núñez*, No. 6:13-cv-1426-Orl-37GJK, 2016 WL 2348658, at *3-4, *8-9 (M.D. Fla. May 3, 2016) (acknowledging Pinochet's regime suppressed "evidence through denial of fact or through cover stories that attempted to deflect responsibility" (internal citations omitted)).

[14] Brief of *Amicus Curiae* Directorate of Legal Affs. of the Ministry of Foreign Affs. of the Republic of Chile at 8, *Jara v. Núñez*, 878 F.3d 1268 (11th Cir. 2018) (No. 16-15179).

to cover up past ones. Only by putting an end to the policies of denial and concealment has Chile finally moved forward from the Pinochet-era atrocities and the suppression of information surrounding the human rights abuses that defined the regime.

B. El Salvador

The Salvadoran Civil War, which ran from 1980 to 1992, killed an estimated 75,000 civilians.[15] Salvadoran security forces and paramilitary death squads targeted "subversives" – perceived threats to political and social stability – for torture, enforced disappearances and extrajudicial killings.[16] A 1993 United Nations Truth Commission Report found that "[a]nyone who expressed views that differed from the Government line ran the risk of being eliminated as if they were armed enemies on the field of battle." [17] CJA served as counsel in three civil suits related to atrocities carried out by security actors in El Salvador: *Doe v. Saravia*, 348 F. Supp.

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[15] Amnesty Int'l, *El Salvador: No Justice 20 Years on from Truth Commission* (Mar. 15, 2013), https://www.amnesty.org/en/latest/news/2013/03/el-salvador-no-justice-years-un-truth-commission; *see generally* Report of the Comm'n on the Truth for El Salvador, *From Madness to Hope: the 12-Year War in El Salvador*, transmitted by Letter Dated 29 March 1993 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/25500 (Apr. 1, 1993), https://undocs.org/pdf?symbol=en/S/25500 [hereinafter U.N. Truth Commission Report].

[16] Guy Gugliotta & Douglas Farah, *12 Years of Tortured Truth on El Salvador*, Wash. Post, Mar. 21, 1993; U.N. Truth Commission Report at 43 (attributing the commission of almost 85 percent of reports of serious human rights abuses to state actors and their affiliated groups).

[17] U.N. Truth Commission Report at 43.

2d 1112 (E.D. Cal. 2004); *Chavez v. Carranza*, 407 F. Supp. 2d 925 (W.D. Tenn. 2004), *aff'd*, 559 F.3d 486 (6th Cir. 2009); and *Arce v. Garcia*, No. 99-8364-CV, 2002 WL 34587854 (S.D. Fla. July 23, 2002), *aff'd*, 434 F.3d 1254 (11th Cir. 2006).

i. Salvadoran Security Forces Attempted to Suppress "Subversion" With Violence

From the outset of the civil war, Catholic priests were among the most vocal critics of the ruling government. Saint Oscar Romero, then Archbishop of San Salvador, used his weekly homilies to denounce the state security forces for their brutality and repression. The homilies, broadcast throughout the country and listened to by millions of Salvadorans, were often the only public source of information about state abuses, identifying victims of violence and disappearances.[18] On March 23, 1980, he publicly called on Salvadoran security forces to end their abuses, saying: "No soldier is obliged to obey an order counter to the law of God . . . . In the name of this suffering people, whose cries rise to heaven each day more tumultuous, I beseech you, I beg you, I order you, in the name of God, stop the repression." The very next day, he was assassinated by state security forces – an act a U.S. court later found was a crime against humanity because of its impact on the Salvadoran people.[19]

Ordinary Salvadorans suspected of "subversion" were kidnapped, tortured, disappeared, or killed. Cecilia Moran Santos, a government statistician,

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[18] *Saravia*, 348 F. Supp. 2d at 1121.

[19] *Id.* at 1121-23.

was accused of planting a bomb and arrested by the National Police. While in police custody, she was tortured and sexually assaulted.[20] Manuel Franco was a professor at the University of El Salvador and a prominent leader of the Democratic Revolutionary Front. He was kidnapped, tortured, and killed by Salvadoran security forces in 1980.[21] Engineering student Daniel Alvarado was abducted by the Treasury Police while attending a soccer game, shortly after a US military advisor was shot in San Salvador in 1983. He was interrogated and tortured until he falsely confessed to the killing.[22] Juan Romagoza Arce, a country doctor to the rural poor, was detained, interrogated, and tortured by state security forces as a "subversive leader" because he possessed medical and surgical instruments.[23] Neris González, a health care and education activist, was detained, interrogated, and tortured by members of the National Guard over suspected ties to the guerrillas. She was eight months pregnant at the time of her detention and torture.[24]

Efforts to seek information from the government about these abuses were met with silence, cover-ups, or threats of further violence.[25]

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[20] *Chavez v. Carranza*, 559 F.3d 486, 491 (6th Cir. 2009).

[21] *Id.*

[22] *Id.*

[23] Second Amended Complaint ¶¶ 12-21, *Arce v. Garcia*, No. 99-8364-CV, 2002 WL 34587854 (S.D. Fla. July 23, 2002), *aff'd*, 434 F.3d 1254 (11th Cir. 2006), ECF No. 39.

[24] *Id.* ¶¶ 25-33.

[25] *See Saravia*, 348 F. Supp. 2d at 1134-35; *Carranza*, 559 F.3d at 493-94; *Arce v. Garcia*, 434 F.3d 1254, 1265 (11th Cir. 2006); *see also* U.N. Truth Commission Report at 23-24.

ii. The Salvadoran Military's Rejection of Any Form of Scrutiny Corroded Salvadoran Institutions

Throughout the civil war, the Salvadoran security forces prevented efforts to expose their abuses through violence and in so doing, further solidified their political power.[26] Victims and their families seeking information or accountability faced serious risk of violent reprisal.[27] The military engaged in active cover-ups of abuses and obstructed any attempts to investigate.[28]

U.S. embassy officials in El Salvador described an intractable scenario. The military "circle[d] its wagons when faced with human rights scrutiny, in part from a skeleton in the closet syndrome that keeps one officer from tattling on another for fear each accused will become an accuser . . . ."[29] The

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[26] *Arce*, 434 F.3d at 1263-64 (affirming that during the civil war, "the military would have used its significant power to thwart any efforts to redress the human rights violations that it perpetrated" through suppressing evidence and intimidating witnesses).

[27] *Carranza*, 559 F.3d at 493-4 (finding evidence of widespread human rights abuses carried out by the Salvadoran military and serious risk of reprisal against anyone seeking to investigate the military's abuses).

[28] Tr. of Testimony & Proceedings at 1962-63, *Arce*, No. 99-8364-CV, ECF No. 280 [hereinafter *Arce* Trial Tr.]; *see also* Trial Exhibit #557, Cable from U.S. Embassy in San Salvador to Sec'y of State Washington DC, Subject: Military's Response to Human Rights Accusations (June 29, 1988) at 5, *Arce*, No. 99-8364-CV, 2002 WL 34587854 [hereinafter *Arce* Exhibit #557] (describing Salvadoran military's efforts to obstruct justice for death squad killings and human rights abuses).

[29] *Arce* Trial Tr. at 1964; *Arce* Exhibit #557 at 2.

vicious cycle of cover-ups that enveloped the Salvadoran military went beyond human rights violations to include corruption, and even officers with nothing to hide were "inculcated with a concept of corporate military honor that d[id] not permit any public admission of military wrongdoing, no matter how grievous the crime[,] and reject[ed] all scrutiny by civilians."[30]

The US embassy went on to observe that not only had the Salvadoran military rejected civilian review of its conduct, it also rejected establishment of a system of military justice to provide internal accountability for criminal conduct.[31] The cycle of violations and impunity had firmly entrenched a culture of secrecy and impunity in the military.[32]

In the face of the Salvadoran military's virtually unchecked power, civilian institutions eroded. The court in *Doe v. Saravia*, for example, recognized that civilian courts had a "glaring inability" to investigate or prosecute crimes by the military and that "[n]one of the branches of government were capable of restraining the military's overwhelming control of society."[33] Similarly, the Eleventh Circuit in *Arce v. Garcia* noted that the Salvadoran judiciary was simply "too meek to stand against the regime."[34]

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[30] *Arce* Exhibit #557 at 2.

[31] *Id.* at 10.

[32] *Id.* at 12 ("the immunity of the military from unwanted investigation and prosecution is well entrenched and will be difficult to eradicate").

[33] *Saravia*, 348 F. Supp. 2d at 1132.

[34] *Arce*, 434 F.3d at 1264.

Given the stranglehold the Salvadoran security forces had on domestic institutions, efforts to document abuses often took place at the international level. In response to the November 1989 assassination of six prominent Jesuit priests, their housekeeper, and her daughter by Salvadoran security forces, the U.S. Congress created a special task force to monitor the investigation into the murders.[35] Individuals in the Salvadoran military came forward with information about the case, but only on the condition of confidentiality, "cit[ing] the risk of retribution against themselves or their families by extreme rightwing elements of the armed forces."[36] While these members of the Salvadoran Armed Forces recognized the harm that human rights abuses had on the country and the military itself, they did not believe the Salvadoran judicial system could hold those responsible for the killings accountable.[37] Secrecy and impunity created a system where even potential reformers feared for their safety.

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[35] *Head of El Salvador Task Force Sees Progress but Fears Coverup*, Wash. Post, Jan. 13, 1990; Clifford Krauss, *Salvadoran Defense Chief Linked to Jesuit Killings by House Panel*, N.Y. Times, Nov. 17, 1991.

[36] Representative Joe Moakley, Chairman, Speaker's Task Force on El Salvador, Final Statement at 2 (Nov. 18, 1991), https://cja.org/wp-content/uploads/downloads/Final_Task_Force_ElSalvador-1.pdf.

[37] *Id.* at 1.

iii. Despite Efforts to Reestablish the Rule of Law, El Salvador Remains Hobbled by Impunity

The signing of a U.N.-brokered peace accord on January 16, 1992 marked the formal end of the civil war. The agreement established a U.N.-appointed Truth Commission to investigate the abuses committed during the war. The Truth Commission's 1993 report represented the most comprehensive examination to date of abuses committed by all sides to the conflict. It found that state security forces were responsible for an overwhelming majority of extrajudicial killings, enforced disappearances, and torture.[38] But, as Human Rights Watch reported, "[m]ilitary officers, conservative politicians, and government officials vehemently repudiated the report, a reaction stemming principally from its thoroughness in documenting official abuses."[39] On March 20, 1993, five days after the U.N. Truth Commission's findings were released, the Salvadoran Legislative Assembly adopted a blanket amnesty law shielding all military and guerilla forces from prosecution for human rights abuses committed during the war. Fifteen years later, in an *amicus curiae* brief submitted to the Eleventh Circuit, the Salvadoran government maintained that this amnesty should extend to the civil suit CJA's clients brought against former Salvadoran Vice-Minister of Defense Nicolas Carranza.[40]

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[38] U.N. Truth Commission Report at 43.

[39] Human Rights Watch, *World Report 1994: El Salvador* (1994), https://www.refworld.org/docid/467fca7f7.html.

[40] *Carranza*, 559 F.3d at 495.

The Salvadoran Supreme Court declared the blanket amnesty unconstitutional in 2016. However, efforts to investigate and prosecute since have faced resistance and backlash, including a renewed attempt by the legislature to create an amnesty.[41] To date, the only civil-war era crime that the country has set out to investigate is the 1981 El Mozote Massacre, in which the Salvadoran Armed Forces tortured and killed nearly 1,000 people in El Mozote and nearby villages.[42] But even in that case, which is still ongoing, the military has repeatedly defied court orders to turn over files and open their archives, with the current president's support.[43]

To this day, justice for the military's abuses remains elusive in El Salvador and security sector abuses continue. In its most recent report on human

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[41] Nelson Renteria, *El Salvador Wartime Parties Suspend Controversial Amnesty Bill*, Reuters (May 23, 2019), https://www.reuters.com/article/us-el-salvador-amnesty/el-salvador-wartime-parties-suspend-controversial-amnesty-bill-idUSKCN1ST2TC.

[42] Elizabeth Malkin, *Survivors of Massacre Ask: 'Why Did They Have to Kill Those Children?'*, N.Y. Times (May 26, 2018), https://www.nytimes.com/2018/05/26/world/americas/el-salvador-el-mazote-massacre.html.

[43] Naomi Roht-Arriaza, *On El Salvador's 1981 El Mozote Massacre, President Bukele Sides with Impunity*, Just Security (Oct. 28. 2020), https://www.justsecurity.org/73089/on-el-salvadors-1981-el-mozote-massacre-president-bukele-sides-with-impunity/; *see also* José Miguel Vivanco, *Con el respaldo de Bukele, el Ejército bloquea una investigación sobre la masacre de El Mozote* [*El Salvador's Army, with the President's Help, Blocks El Mozote Massacre Investigation*], L.A. Times en Español (Nov. 20, 2020), (English version available at https://www.hrw.org/news/2020/11/09/el-salvadors-army-presidents-help-blocks-el-mozote-massacre-investigation).

rights in El Salvador, the U.S. State Department documented ongoing allegations of extrajudicial killings, enforced disappearances, and torture by Salvadoran security forces.[44]

C. Peru

From 1980 to 2000, Peru also experienced a period of civil war. As part of its fight against the Maoist guerilla group *Sendero Luminoso* (Shining Path), Peruvian security forces began a brutal crackdown pursuant to a 1981 Emergency Law.[45] Over the course of the twenty-year civil war, all sides of the conflict committed serious human rights abuses, at times so widespread and systematic that they have been characterized as crimes against humanity.[46] According to the findings of the Peruvian Truth and Reconciliation Commission (TRC), appointed after the fall and resignation of

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[44] U.S. Dep't of State, Bureau of Democracy, Human Rights and Labor, *2020 Country Reports on Human Rights Practices: El Salvador* 1-2 (Mar. 30, 2021), https://www.state.gov/wp-content/uploads/2021/03/EL-SALVADOR-2020-HUMAN-RIGHTS-REPORT.pdf.

[45] Int'l Ctr. for Transitional Justice, *Peru: Background*, https://www.ictj.org/our-work/regions-and-countries/peru (last visited Aug. 17, 2021).

[46] Final Report of the Peruvian Truth and Reconciliation Comm'n, General Conclusions ¶ 55 (2003), http://www.cverdad.org.pe/ingles/ifinal/conclusiones.php [hereinafter Peruvian TRC Report]; *see also* Amnesty Int'l, *Peru: The Truth and Reconciliation Commission – the first step toward a country without injustice* 5 (2004), https://www.amnesty.org/download/Documents/92000/amr460032004en.pdf.

President Alberto Fujimori, the conflict resulted in an estimated 69,280 dead or disappeared.[47]

While no part of Peru was left untouched by the conflict, the worst of the violence during the first decade of the war was concentrated in small, rural communities.[48] In the Andes and the Amazon, guerilla and government forces vied for control. There, indigenous communities bore the brunt of the terror, particularly those living in the Ayacucho Andean highland region.[49] Violence against civilians became normalized. Racism, and ethnic and cultural differences, played a significant role in who the Peruvian Army targeted.[50] Government and paramilitary forces were given license to engage in systematic torture and sexual violence, and even to massacre entire villages.

iv. The Accomarca Massacre

One such massacre occurred on August 14, 1985, in the Ayacucho region near the village of Accomarca. Known as the Accomarca Massacre, it was the subject of two civil suits brought by CJA clients Teófila Ochoa Lizarbe and Cirila Pulido Baldeón: *Lizarbe v. Hurtado,* Case No. 07-21783-CIV-JORDAN, 2007 WL 9702177 (S.D. Fla. Nov. 21, 2007) and *Lizarbe v. Rondon*, 642 F. Supp. 2d 473 (D. Md. 2009). These suits sought accountability

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[47] Peruvian TRC Report ¶ 2.

[48] *See Id.* ¶ 5 (noting that "of the total victims reported, 79 percent lived in rural areas").

[49] *See id.* ¶ 8.

[50] *See id.* ¶¶ 6, 9; *see also Lizarbe v. Hurtado*, Case No. 07-21783-CIV-JORDAN, 2007 WL 9702177, at *1 (S.D. Fla Nov. 21, 2007).

against Telmo Hurtado and Juan Rivera Rondón, two lieutenants in the Peruvian Army and the ringleaders of the massacre.

The Accomarca Massacre was the culmination of a two-year countersubversive campaign by the Peruvian Army in the Ayacucho region.[51] The arrival of the Peruvian Army in the Ayacucho region led to a major increase in killings and disappearances of civilians by both the Army and the Shining Path.[52] During this campaign, the Peruvian Army sent special countersubversive patrols to carry out military operations in areas they believed the Shining Path controlled or influenced, so-called *zonas rojas* (red zones).[53] The Army would enter towns in the *zonas rojas*, killing anyone suspected of providing support or even speaking to the Shining Path, often systematically raping women and murdering villagers.[54]

In this context, in early August 1985, the chief of the Political-Military Command in Ayacucho ordered the battalion stationed there to devise a plan to "capture and/or destroy terrorist elements in Quebrada de Huancayoc."[55] During a meeting at which both Lieutenant Rivera Rondón and Lieutenant Hurtado were present, "Operation

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[51] *See Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 478 (D. Md. 2009), *aff'd in part, appeal dismissed in part sub nom. Ochoa Lizarbe v. Rivera Rondon*, 402 F. App'x 834 (4th Cir. 2010).

[52] Complaint ¶ 20, *Lizarbe v. Hurtado*, Case No. 07-21783-civ-JORDAN, 2007 WL 9702177, ECF No. 1 [hereinafter *Hurtado* Complaint].

[53] *Hurtado* Complaint ¶ 20-21.

[54] *Id.*

[55] *Rondon*, 642 F. Supp. 2d at 478.

Huancayoc" was conceived. As part of this operation, the units they commanded – two specialized mobile countersubversive intelligence units – would be deployed to the region near Accomarca.[56] On August 14, 1985, Hurtado's unit moved into position. Despite finding no trace of the Shining Path, the unit rounded up the villagers, including CJA's client's family members, and proceeded to torture, rape, and kill them.[57] Teófila Ochoa and Cirila Pulido, just twelve and thirteen years old at the time, watched from their hiding place as their family members were abused and murdered by Hurtado's subordinates.[58] Meanwhile, Lieutenant Rivera Rondón's unit, stationed a short distance away, "fired shots, burned houses, and blocked a possible escape route for the villagers."[59] Approximately sixty-nine unarmed civilians were killed by the Army during Operation Huancayoc.[60]

v. The Cover-up and Ongoing Impunity in Peru under President Fujimori

Following the massacre, both Hurtado and Rivera Rondón filed written reports about the operation.[61] Neither made any mention of their interactions with the civilians in Accomarca or the nearby town of Quebrada de Huancayoc, or the fact

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[56] *Id.* at 478; *Hurtado*, 2007 WL 9702177, at *1; *Hurtado* Complaint ¶¶ 29-30.

[57] *Rondon*, 642 F. Supp. 2d at 478; *Hurtado*, 2007 WL 9702177, at *1.

[58] *Rondon*, 642 F. Supp. 2d at 478; *Hurtado*, 2007 WL 9702177, at *1.

[59] *Rondon*, 642 F. Supp. 2d at 479.

[60] *Id.*

[61] *Id.*

that scores of people were killed by their subordinates.[62] Less than two weeks later, another fifty-nine civilians were murdered by the Peruvian Army in nearby towns.[63] Soon thereafter, the Peruvian Senate created a commission to investigate the massacres and learn the truth of what had happened. In response, members of the Army returned to Accomarca to murder the surviving eyewitnesses.[64]

Though the Peruvian Senate commission concluded civilians had been murdered at Accomarca and recommended criminal prosecutions, the Peruvian Supreme Court delegated the case to the military justice system. There, all charges against the military personnel involved, including Hurtado and Rivera Rondón, were dismissed – effectively cutting off attempts to shed light on what happened in Accomarca and the surrounding villages.[65] Rivera Rondón was later promoted by the Army.[66] The roadblocks to accountability CJA's clients faced in Peru were not the exception, but the rule. And thus, the human rights situation in Peru continued to deteriorate over the next 15 years.

Alberto Fujimori came to power in 1990. Initially democratically elected, he staged a self-coup in 1992, closing Peru's Congress and dismantling the

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[62] *Id.*

[63] *Hurtado* Complaint ¶ 48.

[64] *Id.* ¶¶ 49-50.

[65] *Rondon*, 642 F. Supp. 2d at 479.

[66] *See id.*; *Hurtado* Complaint ¶ 7; Complaint ¶ 83, *Rondon*, 642 F. Supp. 2d 473 (No. 07-cv-01809-PJM), ECF No. 1.

country's judicial system.[67] After the coup, Fujimori implemented a clandestine, parallel strategy of countersubversion that included widespread domestic surveillance against political rivals, secret tribunals with hooded prosecutors and anonymous judges, and a campaign of torture and extrajudicial killing targeting suspected leftists.[68] Government death squads became part of the state security apparatus, operating with impunity.[69] In 1995, Fujimori passed a broad amnesty retroactive to 1980 for all members of the military, Rivera Rondón and Hurtado included, for actions taken to fight terrorists.[70] Fujimori's gloves-off campaign against suspected subversives did little to counter the threat of the Shining Path, however. Military victories and the arrests of high-level Shining Path leaders were accomplished largely through conventional military and policing operations, while most targets of

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[67] *See Vásquez v. Peru*, Case 11.166, Inter-Am. Comm'n H.R., Report No. 46/97, OEA/Ser.L./V/II.98, doc. 6 rev. ¶ 1 (1997).

[68] *See e.g.*, *Fujimori on Trial: Secret DIA Intelligence Cable Ties Former President to Summary Executions*, Nat'l Sec. Archive Briefing Book No. 237 (Peter Kornbluh and Jeremy Bigwood eds., 2007), https://nsarchive2.gwu.edu/NSAEBB/NSAEBB237/index.htm; Human Rights Watch, *Presumption of Guilt: Human Rights Violations and the Faceless Courts in Peru* (1996), https://www.hrw.org/legacy/reports/1996/Peru.htm; Human Rights Watch, *Peru: The Two Faces of Justice* (1995), https://www.hrw.org/reports/PERU957.PDF.

[69] *See* Peruvian TRC Report ¶¶ 36-37.

[70] *Rondon*, 642 F. Supp. 2d at 479.

Fujimori's campaign turned out to be innocent civilians.[71]

vi. Truth, Accountability, and a Return to Democracy

In 2000, Fujimori fled Peru and the transitional government created the TRC, opening the door to an accounting of two decades of gross human rights violations. The transitional government repealed the amnesty law and the TRC issued its report in 2003. Prosecutors began to file criminal charges against perpetrators of human rights abuses in Peru,

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[71] *See generally* Catherine M. Conaghan, *Fujimori's Peru: Deception in the Public Sphere* (2005). Any country's national security policies and practices must be effective in order to protect public safety. The instant case also provides us with this lesson. In 2014, the Senate Select Committee on Intelligence concluded its study of the detention and torture program at the heart of this appeal. The first conclusion in its final report to the Senate left little room for doubt: "The CIA's use of its enhanced interrogation techniques was not an effective means of acquiring intelligence or gaining cooperation from detainees." Senate Select Comm. on Intel., *Report on the CIA's Detention and Interrogation Program* xi (2014), https://www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srpt288.pdf. In particular:

> [T]he CIA's enhanced interrogation techniques produced no intelligence while [many of the detainees were] in CIA custody . . . . While being subjected to the CIA's enhanced interrogation techniques and afterwards, multiple CIA detainees fabricated information, resulting in faulty intelligence. Detainees provided fabricated information on critical intelligence issues, including the terrorist threats which the CIA identified as its highest priorities.

Id.

including in 2005 against Rivera Rondón, Hurtado, and others involved in the Accomarca Massacre.[72] Following a judgment against Hurtado for $37 million in the Southern District of Florida[73] – the first instance of truth-telling and accountability for the Accomarca Massacre[74] – both he and Rivera Rondón were removed to Peru to face criminal prosecution.[75] In 2016, a criminal court in Lima, Peru, found both Hurtado and Rivera Rondón, along with five others, guilty of grave human rights violations.[76] In the meantime, Fujimori was also extradited back to Peru, and, in 2009, convicted on charges of crimes against humanity and sentenced to twenty-five years in prison.[77]

The TRC's findings and subsequent accountability efforts, including the *Lizarbe* cases in the United States and prosecutions in Peru, made

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[72] *Rondon*, 642 F. Supp. 2d at 479.

[73] *Hurtado*, 2007 WL 9702177.

[74] *Id.* at *1.

[75] *See Rondon*, 642 F. Supp. 2d at 479; Press Release, U.S. Immigration & Customs Enf't, *Peruvian Army major wanted for his participation in the death of 69 unarmed men, women and children extradited* (July 14, 2011), https://www.ice.gov/news/releases/peruvian-army-major-wanted-his-participation-death-69-unarmed-men-women-and-children.

[76] *Peru Sentences Ex-Soldiers to Prison for Killing Villagers in 1985*, N.Y. Times (Sept. 1, 2016), https://www.nytimes.com/2016/09/02/world/americas/peru-shining-path-massacre-accomarca.html.

[77] Joshua Partlo & Lucien Chauvin, *Peru's Fujimori Gets 25 Years*, Wash. Post (Apr. 8, 2009), https://www.washingtonpost.com/wp-dyn/content/article/2009/04/07/AR2009040701345.html.

clear that the Peruvian Army and Fujimori's regime suppressed open investigations into their actions to consolidate their power, while justifying their abuses in the name of fighting terrorism. The result was a catastrophic cycle of worsening violence carried out by both the state and the Shining Path, culminating in close to 70,000 dead or disappeared, and many others tortured and abused. It was not until Peru began to reckon with the truth of its decades long civil war that the country emerged into a democracy, where civil and political rights are largely respected.

III. International Experience Demonstrates That Transparency and Accountability Are Critical for Ensuring Open and Secure Societies

Ultimately, a nation's security cannot be protected by covering up government abuses, particularly those carried out in the name of national security. Protecting public safety is one of the most important functions of government, yet the work of its security sector cannot be above scrutiny. As these examples illustrate, secrecy and denial do not promote better security. Accountability, discovery of the truth, and the development of a common understanding of events, on the other hand, are critical components towards building secure and stable societies.

Potentially illegal or rights violating conduct committed by the state is precisely the type of information the public should have the ability to scrutinize, because these are the transgressions – if left unremedied – that pose the greatest structural risk to democratic systems. When there are credible allegations that national security activities have

resulted in human rights abuses, it is imperative that the public know the truth of what has happened, and that the government take responsibility for its conduct. The Petitioner notes that the current CIA director "has made clear his commitment" that there will be no repeat of the program at issue in this litigation. Pet'r's Br. at 19. Yet the CIA maintains that to either confirm or deny basic facts concerning the program would constitute a serious threat to national security. It is puzzling how anyone could hold the director or any successor to this commitment of nonrepetition without a common understanding and acceptance of what the program entailed.

These examples also make clear that authoritarian regimes use cover-ups to maintain their grip on power by hiding the truth of their actions. The United States operates under different, better principles. A democracy is based on the premise that individual citizens have the capacity to govern themselves, but that capacity can only be meaningfully exercised when the people have access to information about the operation of their government. As James Madison observed: "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 *The Writings of James Madison, 1819-1836*, 103 (G. Hunt ed., 1910).

The cover-up is antithetical to our system of government, and the state secrets privilege cannot be perverted to serve this purpose.

CONCLUSION

For the foregoing reasons, and those put forth by the Respondents and other *amici* in support of Respondents, the judgment of the Ninth Circuit Court of Appeals should be upheld.

Respectfully submitted,

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