No. 20-827

In The Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

ZAYN AL-ABIDIN MUHAMMAD HUSAYN,
A.K.A. ABU ZUBAYDAH, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND COUNSEL FOR AMMAR AL BALUCHI IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*[1]

Amici are two groups who have provided counsel in recent matters implicating the intersection between the state secrets privilege and the Central Intelligence Agency's torture of individuals in the wake of the September 11, 2001 terrorist attacks. The first is the American Civil Liberties Union (ACLU), a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU represented Suleiman Abdullah Salim, Mohamed Ahmed Ben Soud, and Obaid Ullah (as personal representative of Gul Rahman) in federal civil litigation seeking damages for their torture and abuse while in the custody of the Central Intelligence Agency (CIA). And the second are certain Guantánamo Military Commissions Counsel, specifically James G. Connell, III, and Alka Pradhan ("Counsel for al Baluchi"), who are affiliated with the Military Commissions Defense Organization within the Office of Military Commissions, administered by the Department of Defense. They represent Ammar al Baluchi, one of five joint defendants in the capital case of *United States v. Khalid*

[1] The parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part, and no party or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

Shaikh Mohammad, *et al*., in the United States Military Commission at Guantanamo Bay.[2]

Amici's clients were all subjected to the same or similar torture methods as was respondent Zayn al-Abidin Muhammad Husayn (also known as Abu Zubaydah), pursuant to the CIA's former program of detention, torture, and other abuse of detainees. The CIA implemented the program in the wake of the 9/11 terrorist attacks, and held at least 119 foreign nationals in United States custody at detention sites abroad, where they were tortured under that program. *Amici* have litigated—and, in the case of Mr. al Baluchi, continue to litigate—both the factual circumstances of how the CIA's torture program was administered, and the legal consequences that result from such torture.

As part of that litigation, *amici* have confronted the core issue presented in this case: how to balance the Executive Branch's interest in preventing improper disclosure of legitimate state secrets with the Judicial Branch's interests in transparency, truth-seeking, and justice. More particularly, in the course of their litigation *amici* have examined respondents James Elmer Mitchell and John Jessen—precisely the relief requested by Abu Zubaydah in this action. *Amici* thus participate in this case to provide the Court with relevant information regarding their experience in conducting those examinations, and litigating their

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[2] Counsel for al Baluchi write only on behalf of themselves, not the United States, the Department of Defense, or the Military Commissions Defense Organization as a whole.

clients' claims regarding torture, without running afoul of the state secrets privilege.

Amicus ACLU also participates in this matter in furtherance of its core mission of preventing Government infringements upon civil liberties. The ACLU was founded in 1920, largely in response to the curtailment of liberties that accompanied America's entry into World War I. In the hundred years since, the ACLU has frequently appeared before this Court, and other federal courts, when concerns about security have been used by the government as a justification for abridging fundamental rights and access to the courts. *See*, *e.g.*, *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015 (9th Cir. 2020), *cert. granted*, No. 20-828 (June 7, 2021); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *Edmonds v. Dep't of Justice*, 161 F. App'x 6 (D.C. Cir. 2005). Over the last two decades, the ACLU's mission has included a specific focus on seeking accountability and transparency for the CIA torture program. *See*, *e.g.*, *ACLU v. Dep't of Defense*, 901 F.3d 125 (2d Cir. 2018); *ACLU v. Dep't of Defense*, No. 15 Civ. 9317 (AKH), 2017 WL 4326524 (S.D.N.Y. Sept. 27, 2017), *reconsideration granted in part*, 2017 WL 11563198 (S.D.N.Y. Nov. 13, 2017), *appeal filed*, No. 18-2265 (2d Cir.); *ACLU v. Dep't of Justice*, No. 1:16-cv-704-RC (D.D.C.); *Salim et al. v. Mitchell et al.*, No. 2:15-CV-286-JLQ (E.D. Wash.). *Amici* Counsel for al Baluchi have sought the production and declassification, where appropriate, of

information regarding Mr. al Baluchi's abuse in the CIA torture program, as part of their responsibility to provide a zealous defense in his capital case.

SUMMARY OF ARGUMENT

The state secrets privilege is a common-law evidentiary rule that permits the Government to object to litigation discovery demands and preclude the production of evidence upon an appropriate showing from an Executive Branch official that "compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *United States v. Reynolds*, 345 U.S. 1, 10 (1953). The state secrets doctrine "recognize[s] the sometimes-compelling necessity of governmental secrecy by acknowledging a Government privilege against court-ordered disclosure of state and military secrets." *Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 484 (2011). At the same time, the state secrets privilege extends only so far as is necessary: "privileged information is excluded," *id.* at 485, while non-privileged information is unaffected. Thus, even in matters involving state secrets, courts properly permit disclosure of unprivileged material.

Amici have experience applying these fundamental doctrinal tenets in the specific context of this case, which is the CIA's Rendition, Detention, and Interrogation (RDI) program (hereinafter, "the CIA torture program"), through which the CIA, following the 9/11 terrorist attacks, captured persons it believed to have

information regarding terrorist activity, transferred them to U.S.-run detention facilities in foreign countries, and tortured them. As *amici*'s litigation experience demonstrates, judges are capable of overseeing discovery regarding the CIA torture program, and permitting inquiry into non-privileged information while protecting information deemed legitimately confidential. Much information regarding the CIA torture program is already in the public domain, including in the unclassified portions of the Senate Select Committee on Intelligence's 2014 Study of the Central Intelligence Agency's Detention and Interrogation Program (the "SSCI Report"). *See* S. Rep. No. 288, 113th Cong., 2d Sess. (2014). Subsequent litigation, including matters that *amici* have litigated and continue to litigate, has expanded upon the SSCI Report with respect to particular factual and legal issues involving the administration of the torture program.

As particularly relevant here, *amici* have been involved in lengthy, detailed discovery regarding the CIA torture program, including eliciting testimony from James Mitchell and John "Bruce" Jessen—the two CIA contractors who are respondents in the district court here. *Amicus* ACLU represented the plaintiffs in *Salim v. Mitchell*, a lawsuit filed in the Eastern District of Washington against Mitchell and Jessen alleging that they were liable under the Alien Tort Statute, 28 U.S.C. § 1350, for aiding and abetting the torture of three CIA detainees, one of whom (Gul Rahman) was tortured to death. *Amici* Counsel for al Baluchi represent Ammar al Baluchi, who is currently detained at Guantánamo

Bay while he awaits trial on charges related to the 9/11 attacks. Mr. al Baluchi was subjected to torture and is currently seeking to exclude tainted statements that he made, as well as statements made by others who were tortured, in his proceedings before a military commission established pursuant to the Military Commissions Act of 2009. Both of these matters proceeded through discovery and evidentiary hearings, permitting the parties to discuss and elicit nonprivileged information without running afoul of the state secrets privilege.

Amici's cases thus serve as models for how courts can navigate these issues, and provide a roadmap showing that it is feasible to proceed with discovery, even into sensitive topics, without compromising the nation's safety or risking disclosure of privileged secrets.

ARGUMENT

I. THE STATE SECRETS EVIDENTIARY PRIVILEGE DOES NOT BAR DISCOVERY OF NON-PRIVILEGED MATERIAL.

The state secrets privilege, recognized by this Court in *United States v. Reynolds*, 345 U.S. 1 (1953), protects the Executive Branch's interest in preventing the "compulsion of the evidence [that] will expose military matters which, in the interest of national security, should not be divulged." *Id.* at 10. The privilege derives from "the sometimes-compelling necessity of

governmental secrecy" and "acknowledg[es] a Government privilege against court-ordered disclosure of state and military secrets." *Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 484 (2011). Like other evidentiary privileges, the state secrets privilege is an "exception[ ] to the demand for every man's evidence," and thus should not be "expansively construed" because it is "in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974).

The *Reynolds* privilege operates only to bar the disclosure of privileged evidence. "*Reynolds* was about the admission of evidence," and "decided a purely evidentiary dispute by applying evidentiary rules." *Gen. Dynamics Corp.*, 563 U.S. at 485. The state secrets evidentiary privilege is thus distinct from the so-called *Totten* doctrine, which involves the non-justiciability of disputes over sensitive governmental contracts. *See Totten v. United States*, 92 U.S. 105, 106 (1875) (barring judicial review of claims arising out of an alleged contract to perform espionage activities). This Court has taken pains to distinguish the "evidentiary 'state secrets' privilege" of *Reynolds* from the narrow non-justiciability rule set forth in *Totten*. *See Tenet v. Doe*, 544 U.S. 1, 8 (2005). In *Tenet*, for example, the Court explained that "cases . . . where success depends upon the existence of [a] secret espionage relationship with the Government" were subject to a "unique and categorical . . . bar—a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry[.]" *Id.* at 6 n.4, 8. By contrast, the Court explained, *Reynolds* involved "the balancing of the state secrets

evidentiary privilege," under which ordinary discovery may proceed subject to the exclusion of privileged material. *Id.* at 10. In *General Dynamics*, the Court reinforced this distinction in a Government-contracting dispute over the development of stealth aircraft for the Navy. There, the Court emphasized, dismissal of the litigation was the result of the "common-law authority to fashion contractual remedies in Government-contracting disputes," rather than the state secrets evidentiary privilege recognized in *Reynolds*. 563 U.S. at 485. The Court contrasted its dismissal of the contracting dispute from the consequences of the *Reynolds* privilege, under which only "privileged information is excluded." *Id.*

A court that has sustained an invocation of the state secrets evidentiary privilege may therefore properly continue to oversee discovery of unprivileged evidence. As *Reynolds* held, when only the state secrets evidentiary privilege is at issue, a party may still seek to discover unprivileged evidence regarding the "essential facts" of the action. 345 U.S. at 11. Here, the court of appeals recognized that "the record suggests that Petitioners can obtain nonprivileged information from Mitchell and Jessen." *Husayn v. Mitchell*, 938 F.3d 1123, 1136 (9th Cir. 2019). As *amici* describe in detail below, their experience demonstrates that discovery of nonprivileged information is in fact possible with

respect to Mitchell and Jessen's participation in the CIA torture program.[3]

II. *AMICI*'S EXPERIENCE DEMONSTRATES THAT DEPOSITIONS OF MITCHELL AND JESSEN CAN PROCEED WITHOUT IMPLICATING LEGITIMATELY PRIVILEGED STATE SECRETS.

Amici have, collectively, litigated two matters involving several individuals who were subjected to the CIA torture program, in which they conducted thorough, public discovery on the claims before the court, notwithstanding assertions of the state secrets privilege. The CIA torture program plainly involves certain facts that are public,[4] and others that are arguably protected by the state secrets privilege. In fact, the court

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[3] This case, unlike *amici*'s litigation, arises in the context of 28 U.S.C. § 1782(a), which "authorizes, but does not require," a court to permit discovery for use in foreign proceedings. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004). This *amici* brief focuses on the state secrets privilege alone, and does not address the "factors that bear consideration in ruling on a § 1782(a) request." *Id.* at 264.

[4] A significant amount of material regarding the CIA torture program has long been public, as the Fourth and Ninth Circuits previously recognized. *See Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1087-88 (9th Cir. 2010) (en banc) (acknowledging extensive public record); *El-Masri v. United States*, 479 F.3d 296, 308 (4th Cir. 2007) (same). The unclassified portions of the 2014 SSCI Report, which was issued subsequent to these decisions, includes hundreds of pages of public material regarding the program. *Amici*'s litigation in the Eastern District of Washington and the Ninth Circuit, as well as at Guantánamo Bay, has also made public additional information regarding the CIA torture program.

of appeals in this case asserted that "much . . . of the information requested by Petitioners is covered by the state secrets privilege." *Husayn*, 938 F.3d at 1135. *Amici*'s experience shows that appropriate protections can be implemented in order to address and prevent disclosure of state secrets. Indeed, those procedures have been used for the exact deponents at issue in this case—respondents Mitchell and Jessen—as set forth in detail below.

A. *Salim v. Mitchell*

On October 13, 2015, *amicus* ACLU filed suit against Mitchell and Jessen in the Eastern District of Washington on behalf of three individuals: Suleiman Abdullah Salim, Mohamed Ahmed Ben Soud, and Obaid Ullah (as personal representative of Gul Rahman). *See* Compl., *Salim v. Mitchell*, Civil Action No. 2:15-cv-286-JLQ, ECF No. 1 (E.D. Wash. Oct. 13, 2015). Plaintiffs Salim and Ben Soud were subjected to extended detention and torture while in the custody of the United States. *See id.* ¶¶ 71-116 (allegations regarding Salim) & ¶¶ 117-54 (allegations regarding Ben Soud). Gul Rahman was held in United States custody during November 2002, subjected to repeated acts of torture, and died as a result on November 20, 2002. *See id.* ¶¶ 155-67. Plaintiffs' Complaint described how all three detainees were "experimented on and subjected by [Mitchell and Jessen] and the CIA to the most coercive methods of torture," *id.* ¶ 70, including: prolonged sleep deprivation; being slammed against a wall ("walling"); chaining to cell walls in painful stress

positions; facial and abdominal slaps; dietary manipulation; prolonged nudity; cramped confinement in small containers; and waterboarding. *See*, *e.g.*, *id.* ¶¶ 79-82 (Salim subjected to stress positions and dietary manipulation); *id.* ¶¶ 86-92 (Salim subjected to nudity, water torture, and cramped confinement); *id.* ¶¶ 126-27 (Ben Soud subjected to forced nudity for more than a month); *id.* ¶¶ 130-31 (Ben Soud subjected to stress positions and sleep deprivation); *id.* ¶¶ 136-46 (Ben Soud subjected to walling, slapping, water torture, waterboarding, forced nudity, cramped confinement, stress positions, and sleep deprivation); *id.* ¶¶ 160-64 (Rahman subjected to slapping, water torture, sleep deprivation, stress positions, and forced nudity, resulting in his death from hypothermia, dehydration, lack of food, and immobility). The lawsuit alleged three counts of violations of the Alien Tort Statute, 28 U.S.C. § 1350, and sought compensatory, punitive, and exemplary damages. *Id.* ¶¶ 168-85.

Even though it involved allegations regarding the CIA torture program, the lawsuit, including discovery, proceeded apace. The trial court denied two motion to dismiss, 183 F. Supp. 3d 1121 (E.D. Wash. 2016); 2017 WL 390270 (E.D. Wash. Jan. 27, 2017), and the parties' cross-motions for summary judgment, 268 F. Supp. 3d 1132 (E.D. Wash. 2017), and the matter was scheduled for trial before the parties reached a settlement. As part of the path to trial, the parties engaged in extensive discovery of nonprivileged information. Most relevant to this case, the *Salim* matter involved depositions of both Mitchell and Jessen.

These depositions were lengthy and thorough—in stark contrast to the district court's order here, which prohibited depositions of Mitchell and Jessen altogether. Transcripts of the *Salim* testimony are now publicly available.[5] The depositions took place in the presence of several government officials, including attorneys from the Department of Justice, the CIA, and the Department of Defense, as well as an Information Review Officer from the CIA. *Salim* Mitchell Transcript at 9:4 – 10:4; *Salim* Jessen Transcript at 9:4 – 10:4. The Government provided classification guidance from the CIA and DOD, *see Salim* Mitchell Transcript at 10:24 – 12:12, and instructed the deponents not to provide answers that included "any of the information identified as classified in [the] classification guidance." *Id.* at 12:13 – 12:22; *accord Salim* Jessen Transcript at 11:1 – 13:16.

As is evident from the transcripts, counsel for the *Salim* plaintiffs abided by this guidance. Whenever the government officials present deemed it necessary, counsel for the Government interposed objections to protect its interests and instructed the testifying witness not to answer a particular question. *See*, *e.g.*,

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[5] *See* Transcript, Deposition of James E. Mitchell, *Salim v. Mitchell*, Docket No. 2:15-CV-286-JLQ (E.D. Wash.), Jan. 16, 2017, *available at* https://www.thetorturedatabase.org/files/foia_subsite/mitchell_james_01.16.17_2.pdf (hereinafter "*Salim* Mitchell Transcript"); Transcript, Deposition of John Bruce Jessen, *Salim v. Mitchell*, Docket No. 2:15-CV-286-JLQ (E.D. Wash.), Jan. 20, 2017, *available at* https://www.thetorturedatabase.org/files/foia_subsite/jessen_john_01.20.17.pdf (hereinafter "*Salim* Jessen Transcript").

Salim Mitchell Transcript at 306:16 – 306:20 (Government attorney instructing witness not to answer a question). When that occurred, counsel withdrew the question and proceeded to another topic. *Id.* at 306:21. On other occasions, the Government and the deponent paused the deposition to consult, off the record, about the scope of the answers that could be provided. *See Salim* Jessen Transcript at 75:11 – 75:23. Throughout, the Government attempted "to avoid . . . interposing unnecessary objections to broad questions that could conceivably elicit classified information," *id.* at 104:18 – 104:21, instead allowing the deponent to provide information that was not privileged while also reserving the ability to "put up a stop sign" if it believed the answer ventured into protected areas, *id.* at 104:11. The result was that the parties created the full record necessary for the litigation and adjudication of the case, while the Executive Branch was able to preserve its ability to protect information validly covered by the state secrets privilege. Most specifically for this matter, plaintiffs' counsel questioned Mitchell and Jessen about the torture methods imposed upon Abu Zubaydah in particular, including but not limited to waterboarding. *See Salim* Mitchell Transcript at 285:23 – 290:7; *Salim* Jessen Transcript at 273:7 – 273:21.

In still other respects, the *Salim* litigation illustrates how discovery of nonprivileged material concerning the CIA torture program can proceed without disclosing legitimately protected information. In one instance, the Government sought a protective order to

prevent depositions of several individuals, including John Rizzo (the former Acting General Counsel of the CIA) and Jose Rodriguez (the former Director of the CIA National Clandestine Service), arguing that "the spontaneous nature of oral depositions could result in the inadvertent disclosure of classified information." 2016 WL 5843383, at *3 (E.D. Wash. Oct. 4, 2016). The district court denied the Government's motion, reasoning that "a deposition could occur, within the scope of discovery in this case concerning these two Defendants and the three Plaintiffs, that would not necessitate the disclosure of classified information." *Id.* at *4. And in fact, depositions of Rizzo and Rodriguez did take place, again subject to the Government's classification guidance and presence, and those transcripts (like the Mitchell and Jessen transcripts) are also publicly available.[6] As with the depositions of Mitchell and Jessen, the Government interposed objections or requested the opportunity for an off-the-record consultation with the witness whenever it deemed necessary to prevent disclosure of classified information. *See*, *e.g.*, *Salim* Rodriguez Transcript at 27:12 – 28:3 (objection); *id.* at 151:15 – 151:20 (consultation); *id.* at

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[6] See Transcript, Deposition of John Rizzo, *Salim v. Mitchell*, Docket No. 2:15-CV-286-JLQ (E.D. Wash.), Mar. 20, 2017, *available at* https://www.thetorturedatabase.org/files/foia_subsite/rizzo_john_03.20.17.pdf (hereinafter *Salim* Rizzo Transcript); Transcript, Deposition of Jose Rodriguez, *Salim v. Mitchell*, Docket No. 2:15-CV-286-JLQ (E.D. Wash.), Mar. 7, 2017, *available at* https://www.thetorturedatabase.org/files/foia_subsite/rodriguez_jose_03.07.17.pdf ("hereinafter *Salim* Rodriguez Transcript").

163:10 – 163:13 (consultation); *id.* at 174:1 – 174:3 (objection); *id.* at 198:21 – 198:25 (consultation).

The district court in *Salim* limited discovery and upheld the Government's invocation of the state secrets privilege where the court determined that the privilege applied, but it did not bar all inquiry. Specifically, in response to a motion brought by Mitchell and Jessen to compel the production of documents in the Government's possession, as well as additional depositions of Government officials, the district court applied the "balancing approach" required by this Court's precedents, *e.g.*, *Tenet*, 544 U.S. at 9.[7] Thus, for certain documents that were produced in redacted form or withheld in full based on the Government's assertion of the state secrets privilege, the district court judge reviewed the documents and assessed whether the privilege was, in fact, applicable. *See Salim* State Secrets Order at 10 (holding that redactions of two documents and withholding of a third document were justified by the state secrets privilege); *id.* at 12 (denying motion to compel as to one document covered by state secrets privilege); *id.* at 13-14 (granting motion to compel as to three other documents, while permitting Government to "produce those documents with appropriate redactions of information covered by [the] state secrets privilege"). The district court conducted a similar, careful review with respect to Defendants'

[7] *See* Order re: Third and Fourth Motion to Compel and Assertion of State Secrets Privilege, *Salim v. Mitchell*, No. 16-MC-0036-JLQ, ECF No. 91 (E.D. Wash. May 31, 2017) (hereinafter "*Salim* State Secrets Order").

request for the additional depositions of Gina Haspel, then the Deputy Director of the CIA, and James Cotsana, a former CIA employee. *See id.* at 16-17. Because "[t]he Government . . . refused to confirm or deny Ms. Haspel and Mr. Cotsana's involvement with the [CIA torture] [p]rogram," the district court granted the Government's request to preclude those depositions. *Id.* at 17-18. But a crucial part of the district court's analysis, guided by *Reynolds*, was the "necessity of the requested information." *Id.* at 18 (citing *Reynolds*, 345 U.S. at 11). The district court explained that "the Haspel and Cotsana testimony would appear supplemental or confirmatory to" the deposition testimony provided by Mitchell and Jessen themselves, as well as declarations and deposition testimony provided by Rizzo and Rodriguez. *Id.* at 19. Accordingly, the district court concluded that "the showing of necessity is lessened by the availability of alternative sources of evidence." *Id.* at 20; *see also id.* at 18 (explaining that the *Reynolds* analysis includes consideration of available, nonprivileged alternative sources of evidence). In light of the "dubious" necessity of the requested discovery, then, the district court concluded that "the claim of privilege will prevail." *Id.* at 18 (citing *Reynolds*, 345 U.S. at 11).

Critically, however, though the *Salim* court upheld the Government's invocation of the state secrets privilege in a number of instances, it did not dismiss the case. *See id.* at 20-21 ("As to the impact of successful assertion of the state secrets privilege on the litigation, the court finds, at this juncture, the Government's

assertion of the state secrets privilege does not prevent this matter from proceeding."). The *Salim* case thus represents a concrete example of the way in which litigation that may implicate privileged material should proceed: with appropriate limitations on discovery that will, through the vigilance and professionalism of the court and counsel, protect against disclosure of material that falls within the state secrets doctrine.

B. Ammar al Baluchi's motion to suppress

Ammar al Baluchi currently faces charges in a United States Military Commission arising out of his alleged connection with the 9/11 terrorist attacks. *See* 10 U.S.C. § 948c (providing that "[a]ny alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter"). The Government claims that Mr. al Baluchi transferred money from the United Arab Emirates to enable the hijacking of commercial airplanes, and did so on behalf of Khalid Shaikh Mohammed, the alleged "mastermind" of the attacks. *See* Carol Rosenberg, *Trial Guide: The Sept. 11 Case at Guantánamo Bay*, N.Y. TIMES, July 9, 2021, https://www.nytimes.com/article/september-11-trial-guantanamo-bay.html. Mr. al Baluchi is being detained in, and prosecuted at, Naval Station Guantánamo Bay ("NSGB"), and is represented by his appointed counsel, *amici* herein.

Mr. al Baluchi, like respondent Abu Zubaydah and the plaintiffs in the *Salim* litigation, was subjected to the CIA torture program after he was captured and

detained in United States custody abroad in April 2003. *See id.* He has moved to suppress his statements, which the Government seeks to use against him, by arguing that the statements were a direct result of his torture and were therefore involuntary.[8] As part of the evidentiary hearing being held in connection with that motion, Mr. al Baluchi moved to compel testimony from a number of witnesses, including former CIA employees, regarding the CIA torture program. Thus far, the Government has agreed only to permit Mitchell and Jessen to testify specifically about the CIA torture program, asserting that they are the appropriate witnesses.

As a result, Mitchell and Jessen have testified extensively and publicly at NSGB in connection with Mr. al Baluchi's motion to suppress.[9] Mitchell and Jessen did not contest their personal appearance at NSGB and voluntarily appeared in person to testify. Military Commission Jan. 21 Transcript at

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[8] *See* Unclassified Notice, Mr. al Baluchi's Motion to Suppress Alleged Statements as Involuntary and Obtained by Torture, *United States v. Khalid Shaikh Mohammad*, AE628 (AAA) (MCA May 15, 2019), *available at* https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE628(AAA)).pdf.

[9] *See*, *e.g.*, Unofficial/Unauthenticated Transcript, *United States v. Khalid Shaikh Mohammad*, Jan 21, 2020, *available at* https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS 21Jan2020-MERGED).pdf (hereinafter "Military Commission Jan. 21 Transcript"); Unofficial/Unauthenticated Transcript, *United States v. Khalid Shaikh Mohammad*, Jan. 22, 2020, *available at* https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20 (TRANS22Jan2020-AM-MERGED).pdf (hereinafter "Military Commission Jan. 22 Transcript").

30185:15 – 30185:18. That testimony took place in conjunction with multiple measures designed to prevent the improper disclosure of privileged or classified information. First, the military commission has entered a protective order—which was amended after the release of the SSCI Report—that limits, to some extent, disclosure of information about treatment of detainees; like the classification instructions in *Salim*, this order barred questions regarding the identity of persons who were involved in the capture, transfer, detention, or interrogation of Mr. al Baluchi and the locations in which he was held.[10] Second, several months before Mitchell and Jessen were to testify, the Government provided additional guidance specific to the scope of their public testimony, including their role in the design of the CIA torture program; their observations of and participation in interrogations and the application of enhanced interrogation techniques; information in Dr. Mitchell's book titled "Enhanced Interrogation"; the psychological effects that the program was designed to have on the detainees; the psychological effects that the program actually had on the detainees; and what individuals (to be identified only by "unique functional identifiers," or pseudonyms) were present with them during events involving Mr. al Baluchi and the other

[10] *See United States v. Khalid Shaikh Mohammad*, AE 013BBBB (Sup) (MCA Feb. 21, 2017), *available at* https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE013BBBB(Sup)(Corrected%20Copy)).pdf.

defendants.[11] This guidance was updated in advance of, and during, Mitchell's testimony. And third, prior to the testimony, the Government provided defense counsel with the same classification guidance that was used in *Salim*. *See* Military Commission Jan. 21 Transcript at 30148:3 – 30148:9.

The Government could have decided, when asked to produce evidence regarding Mr. al Baluchi's torture, to refuse production, and either concede the motion to suppress and proceed without that evidence or even dismiss the prosecution. *See United States v. Moussaoui*, 382 F.3d 453, 474 (4th Cir. 2004) (explaining that where Government refuses to produce information required by defense, "the result is ordinarily dismissal"). But instead, the Government flew Mitchell and Jessen to NSGB for their testimony, which was open to media, non-governmental organization observers, victim family members, and other persons at NSGB. The testimony was also transmitted via closed-circuit television to the continental United States. Military Commission Jan. 21 Transcript at 30116:1 – 30116:3; *id.* at 30140:4 – 30140:8 (military judge stating that "the general public is welcome and free to observe the proceedings in this case").[12] Under those conditions, Mitchell testified in open court for eight days, and was extensively

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[11] *United States v. Khalid Shaikh Mohammad*, AE658A (GOV) Government Notice of Revised Classification Guidance, att. B at 22 (citing unclassified paragraph of classified filing).

[12] The broadcast of the proceedings was delayed for 40 seconds to permit original classification authorities and other security personnel to screen for any inadvertent disclosure of classified information.

examined by six different attorneys regarding the CIA torture program, without disclosure of any classified or privileged material. Jessen was also examined for one day; his public testimony has yet to be completed, due, in part, to the COVID-19 pandemic. The transcripts of this testimony (with some redactions) were publicly posted online.[13]

On occasion during the testimony of Mitchell and Jessen, the Government invoked the national security privilege (the equivalent of the state secrets privilege in the military commission context). As in *Salim*, counsel abided by the restrictions, withdrawing questions when necessary under the guidelines provided. *See*, *e.g.*, Military Commission Jan. 21 Transcript at 30307:17 – 30310:15. The Government also indicated, as it had in *Salim*, that it sought not to interpose objections where they were not necessary. *See id.* at 30282:15 – 30283:5 (Government declining to object to question when asked for its position). In one instance when counsel disputed the applicability of the privilege, the court heard argument and reserved decision. *See id.* at 30266:18 – 30272:15. In order to protect national security interests, Mitchell and Jessen also used "unique functional identifiers" to refer to people whose identities were known to the witnesses, but remained classified. *See*, *e.g.*, *id.* at 30280:18 – 30280:21 (referring to individuals as "DF7," "PJ1," and "EX2").

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[13] Transcripts are available on the Military Commission's website, https://www.mc.mil/CASES/MilitaryCommissions.aspx, by searching for the case "9/11: Khalid Shaikh Mohammad et al. (2)."

The questioning in *al Baluchi* allowed the parties to elicit evidence of the development of torture techniques used on Abu Zubaydah, *see id.* at 30394:1 – 30395:12, and the physical and psychological effects on Abu Zubaydah of numerous techniques, including waterboarding, *see* Military Commission Jan. 22 Transcript at 30442:7 – 30443:11. The lengthy and extensive public testimony given by Mitchell and Jessen in the *al Baluchi* matter, like their depositions in the *Salim* case, demonstrates the reasonableness and feasibility of deposing them in the matter before this Court as well; testimony can be elicited subject to controls designed to prevent improper disclosure of legitimately classified or privileged information.

* * * * *

In this case, the court of appeals similarly directed the district court to "employ[] tools such as in camera review, protective orders, and restrictions on testimony in tailoring the scope of Mitchell's and Jessen's deposition and the documents they may be required to produce." *Husayn*, 938 F.3d at 1137 (citation omitted). The *Salim* and *al Baluchi* matters discussed above provide a roadmap for this process. *See id.* ("Mitchell and Jessen have already provided nonprivileged information similar to that sought here in the *Salim* lawsuit before the district court, illustrating the viability of this disentanglement [between privileged and nonprivileged evidence]."). Each matter involved extensive testimony, made publicly available, about the post-9/11 torture of detainees held in CIA custody abroad. Indeed, in *Salim*, the district court held that

the availability of Mitchell, Jessen, and others for depositions was crucial to its determination to limit discovery in other respects based on state secrets. *See Salim* State Secrets Order, *supra*, at 19-20. The *Salim* and *al Baluchi* matters thus demonstrate that Mitchell and Jessen can provide nonprivileged testimony concerning their role in the CIA torture program without divulging materials legitimately protected by the state secrets privilege.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals, which properly instructed the district court to inquire whether discovery could proceed without infringing on state secrets, should be affirmed.

Respectfully submitted,

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