Nos. 15-1358, 15-1359, and 15-1363

In the Supreme Court of the United States

JAMES W. ZIGLAR,

Petitioner,

v.

AHMER IQBAL ABBASI, ET AL.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICUS CURIAE* COMMONWEALTH LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

GARY A. ISAAC
Counsel of Record
LOGAN A. STEINER
JED W. GLICKSTEIN
Mayer Brown LLP
71 S. Wacker Dr.
Chicago, IL 60606
gisaac@mayerbrown.com
(312) 782-0600

Counsel for Amicus Curiae

(Additional Captions Listed on Inside Cover)

JOHN D. ASHCROFT, ET AL.,

Petitioners,

v.

AHMER IQBAL ABBASI, ET AL.,

Respondents.

DENNIS HASTY, ET AL.,

Petitioners,

v.

AHMER IQBAL ABBASI, ET AL.,

Respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

Miscellaneous

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

BRIEF OF COMMONWEALTH LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*[1]

The Commonwealth Lawyers Association ("CLA") is a body dedicated to maintaining and promoting the rule of law throughout the Commonwealth.[2] One of the CLA's objectives is to promote the administration of justice and the protection of human rights. To that end, the CLA has filed *amicus curiae* briefs in this Court in numerous post-9/11 cases, including *Rasul v. Bush*, 542 U.S. 466 (2004), *Boumediene v. Bush*, 553 U.S. 723 (2008), and, more recently, *Meshal v. Higgenbotham*, No. 15-1461, in which the CLA filed an *amicus* brief in support of the still-pending petition for certiorari.

There are significant factual differences between the claims in this case and those in *Meshal*, but there is one overriding similarity. Just as in *Meshal*, the government officials charged with wrongdoing in this case contend that the plaintiffs should, as a matter of law, be denied a remedy under *Bivens v. Six Un-*

---

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

[2] The Commonwealth is a voluntary association of 53 independent sovereign states, including the United Kingdom, Canada, and Australia. Its 2.3 billion people account for nearly a third of the world's population. A large majority of the Law Societies and Bar Associations of the 53 Commonwealth countries are institutional members of the CLA.

known Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), because, *inter alia*, the plaintiffs' claims implicate national security concerns. As in *Meshal*, the CLA files this *amicus* brief to show that a *per se* rule foreclosing *Bivens* actions for damages arising out of counterterrorism efforts, as petitioners urge here, would stand in stark contrast to the approach taken by democracies in the Commonwealth and the European Court of Human Rights, which have permitted victims of alleged human-rights violations at the hands of government officials to seek judicial redress even in cases implicating counterterrorism and national security.

SUMMARY OF THE ARGUMENT

In *Bivens*, this Court recognized an implied cause of action for damages for certain constitutional violations. This case involves *Bivens* claims by non-citizens (respondents here) arrested on immigration charges after the 9/11 terrorist attacks. The dissenting judge below concluded—and petitioners now argue—that the *Bivens* remedy should not be extended to respondents' claims in part because they touch on "the executive's exercise of its national security authority." *Turkmen v. Hasty*, 789 F.3d 218, 275 (2d Cir. 2015) (Raggi, J., dissenting). As the dissent reasoned, the judiciary has only "limited competency to make national security assessments," and the subject, "'particularly in times of conflict, do[es] not admit easy answers.'" *Id.* at 276-77.

The dissent's reluctance to entertain damages actions that implicate "national security"—a reluctance echoed by petitioners here, *see* Ashcroft Br. 26-29; Hasty Br. 29-31; Ziglar Br. 21-22—would close the courthouse doors on those seeking damages for serious human-rights violations that occurred during

terrorism-connected investigations, depriving them of any meaningful remedy for even egregious violations of the Fourth and Fifth Amendments. There is no reason to conclude that government defendants should be given an absolute shield from any and all damages suits simply because the actions constituting the alleged constitutional violations assertedly were undertaken as counterterrorism measures.

Indeed, many Western democracies and the European Court of Human Rights *have* recognized a tort remedy for unlawful actions taken in the name of national security—including in a suit brought by Benamar Benatta, one of the respondents in this very case. To be sure, these foreign courts recognize that various limitations, akin to state secrecy or the act-of-state doctrine, may apply during the litigation of tort claims arising out of illegal detention or interrogation by government actors. But they have not concluded that national security concerns can be a *complete bar* to suit, extinguishing any possibility of a remedy for the government's violation of fundamental rights.

In short, recognizing that damages actions are available even for constitutional violations touching on national security would be consistent not only with *Bivens* itself. It would also be consistent with this Court's longstanding role as one of the world's preeminent constitutional courts and a leader in the development of the rule of law.

ARGUMENT

I. The Court Should Consider The Practices Of Other Western Democracies And The European Court Of Human Rights In Deciding Whether To Recognize A *Bivens* Remedy.

Whether to recognize a *Bivens* action for damages for the violation of a constitutional right requires "a judgment about the best way to implement a constitutional guarantee." *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007). In deciding whether to allow damages claims by individuals who allegedly suffered serious constitutional violations in connection with counterterrorism measures, the Court's judgment should be informed by the experience of other Western democracies, many of which have made damages remedies available even in cases implicating national security.

This Court has looked to foreign law to assist in construing and implementing constitutional guarantees on many occasions. *Bivens* itself may be seen as an outgrowth of a "foreign" principle—namely, that "settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress"—first recognized by this Court in *Marbury v. Madison*, 5 U.S. 137, 163 (1803). See *Bivens*, 403 U.S. at 397 ("'The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.'") (quoting *Marbury*, 5 U.S. at 163).

In recent years, the Court has frequently considered the law in other countries in deciding constitutional issues. For example, the Court examined foreign practice concerning the execution of juvenile

and mentally disabled offenders in construing the Eighth Amendment's prohibition on "cruel and unusual" punishment. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316 (2002); *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 & n.31 (1988). Likewise, the Court consulted decisions by the European Court of Human Rights and various national high courts in holding that a law criminalizing sexual relations between consenting adults violated the Due Process Clause. *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003).

The Court has also looked abroad in deciding both substantive and remedial questions about the constitutional provisions implicated here. In *Miranda v. Arizona*, 384 U.S. 436 (1966), for instance, the Court referenced the practices of English, Scottish, and Indian courts, concluding that their experience "suggests that the danger to law enforcement in curbs on interrogation is overplayed." *Id.* at 486-90; *cf. New York v. Quarles*, 467 U.S. 649, 673 (1984) (O'Connor, J., concurring in part) ("The learning of [foreign] countries was important to the development of the initial *Miranda* rule. It therefore should be of equal importance in establishing the scope of the *Miranda* exclusionary rule today."). In *Wolf v. Colorado*, 338 U.S. 25, 27-30 (1949)—and again in *Ingraham v. Wright*, 430 U.S. 651, 673 n.42 (1977)—the Court considered the practice of Commonwealth jurisdictions to construe the Fourth Amendment's substantive guarantee and to determine the proper means of "enforcing such a basic right." *Wolf*, 338 U.S. at 28.

Quite properly, none of these cases treated foreign decisions as *determinative* of the constitutional question. In *Roper*, for example, the Court explained that "[t]he opinion of the world community, while not controlling our outcome, * * * provide[s] respected

and significant confirmation for our own conclusions" regarding the Eighth Amendment. 543 U.S. at 578. And the weight of foreign practice does not preclude this Court from going its own way. See *Mapp v. Ohio*, 367 U.S. 643 (1961) (overruling *Wolf*). At the same time, however, these cases demonstrate that foreign law—particularly from other Western democracies—is often relevant to the interpretation and implementation of constitutional provisions.

As Justice Breyer has put it, "other democracies with the same commitment to basic human rights have led the way in developing solutions to the problem we face, and * * * we may learn something from examining their practices rather than considering our own in a vacuum. * * * [T]heir examples can help us to find our own Constitution's answer to what is ultimately an American constitutional problem." STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 83 (2015).[3]

---

[3] See also, *e.g.*, Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329, 332 (2004) (suggesting that the Court should look to foreign jurisprudence to inform "the dynamism with which we interpret our Constitution" and "the extraterritorial application of fundamental rights"); Sandra Day O'Connor, *Keynote Address before the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 AM. SOC'Y OF INT'L L. PROC. 348, 350 (2002) ("While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here."); WILLIAM H. REHNQUIST, *Constitutional Courts—Comparative Remarks* (1989), *reprinted in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE 411-412 (Paul Kitchof et al. eds., 1993) ("[N]ow that constitutional law is solidly grounded in so many countries, it is time that the United States

Resort to foreign law is particularly appropriate in the *Bivens* context, which concerns not the substantive content of a constitutional provision, but rather "the best way to *implement* a constitutional guarantee." *Wilkie*, 551 U.S. at 550 (emphasis added). In other words, the *Bivens* inquiry does not ask what types of governmental conduct should be prohibited by the Constitution. Instead, it takes the Fourth and Fifth Amendments' guarantees as given and asks what *remedy* should be available to litigants—absent an "explicit congressional declaration" of policy (*Bivens*, 403 U.S. at 397)—when those guarantees are violated. What is more, the Court's decision to authorize a *Bivens* remedy is itself revisable by Congress. *Bush v. Lucas*, 462 U.S. 367, 378 (1983) ("When Congress provides an alternative remedy, it may, of course, indicate its intent * * * that the Court's power should not be exercised."); William Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 640 (2006) ("the *Bivens* remedy is best con-

---

courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process."). Of course, the path of influence runs both ways: foreign courts periodically look to this Court's decisions for guidance. See, *e.g.*, Paul von Nessen, *Is There Anything to Fear in Transnationalist Development of Law? The Australian Experience*, 33 PEPP. L. REV. 883, 917 (2006) (noting that the High Court of Australia cited this Court's decisions on more than 1500 occasions between 1991 and 2002); Gérard V. La Forest, *The Use of American Precedents in Canadian Courts*, 46 ME. L. REV. 211, 220 (1994) (article by then-Justice of the Supreme Court of Canada observing that "the use of foreign material affords another source, another tool for the construction of better judgments," and that "[i]n this era of increasing global interdependence, and in particular of even closer American-Canadian relations, it seems normal that there should be increased sharing in and among our law and lawyers as well").

ceptualized as a federal common law remedy * * * subject to congressional control").

At bottom, applying *Bivens* necessarily "is a subject of judgment: 'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal.'" *Wilkie*, 551 U.S. at 550 (quoting *Bush*, 462 U.S. at 378). That, in turn, requires the Court to take into account the likely consequences of implying a damages remedy. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-33 (2004) ("whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts"). And the experiences of other judicial systems that have allowed plaintiffs to maintain similar claims provide strong evidence of whether adverse consequences might follow from recognizing a *Bivens* remedy here—"cast[ing] an empirical light on the consequences of different solutions to a common legal problem." *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting). It is therefore entirely appropriate to consider foreign law in determining the scope of the *Bivens* remedy.

II. Barring Any Remedy In This Case Would Be At Odds With Foreign Decisions And Practice.

There is nothing unusual, or unworkable, about recognizing a damages remedy for human-rights violations committed by government officials in connection with counterterrorism measures. Indeed, several Western democracies and the European Court of Human Rights have permitted victims of such violations to seek redress.

A. Other Nations Provide Monetary Remedies For Human-Rights Abuses In Alleged Terrorism-Related Cases.

Other Western democracies participating in global counter-terrorism efforts have consistently provided remedies for human-rights violations allegedly committed by government officials, as the following examples show.

Canada. In several recent cases, Canada has recognized its obligation to provide an effective monetary remedy when its officials are complicit in human-rights violations. Notably, the list includes litigation brought by one of the respondents here: Benamar Benatta.

In the Second Circuit's words, Benatta, an Algerian national, "was originally detained by Canadian authorities on September 5, 2001, after crossing the Canadian border with false documentation. Following the September 11 attacks, Benatta was transported back to the United States and detained in the challenged conditions of confinement and pursuant to the post-9/11 investigation." *Turkmen*, 789 F.3d at 225 n.4. He was cleared of any involvement in the attacks but remained in U.S. custody for five more years.[4] Benatta ultimately returned to Canada, where he was granted refugee status.

In 2007, Benatta sued the Canadian government for its role in his extended detention and mistreat-

---

[4] The government indicted Benatta for allegedly possessing a false identity card and a fraudulently procured U.S. Alien Registration Receipt card, but the charges were dismissed after the magistrate judge recommended dismissal on speedy trial grounds. *United States v. Benatta*, 2003 WL 22202371 (W.D.N.Y. Sept. 12, 2001).

ment, alleging several violations of his Canadian Charter rights. Statement of Claim, *Benatta v. Canada*, 07-cv-3366B PD3 (Ont. S.C. July 16, 2007), *available at* http://www.cbc.ca/toronto/news/pdf/benatta-statement-091207.pdf. The parties litigated the case on the merits, *see Benatta v. Attorney General of Canada*, 2009 O.J. 5392 (Ont. S.C. Dec. 11, 2009), and eventually reached a large monetary settlement in 2015, on the eve of trial. Paul McLeod, *Canada Paid $1.7 Million To A Man Deported One Day After 9/11*, BuzzFeed News, Dec. 7, 2015, https://www.buzzfeed.com/paulmcleod/canada-paid-17-million-to-man-deported-one-day-after-911; Jim Bronskill, *Refugee sent to U.S. after 9/11 settles lawsuit against Ottawa*, THE GLOBE AND MAIL, Mar. 9, 2015.

Canada has recognized its obligation to pay damages in other national security-related cases as well. Canadian citizen Maher Arar brought a civil suit seeking damages for the Canadian government's role in his torture and detention in Syria following his arrest by American officials in September 2002 based on inaccurate information provided by Canadian officials. See Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* 57 (2006); Ian Austen, *Canada Reaches Settlement With Torture Victim*, N.Y. TIMES, Jan. 26, 2007. The Canadian government settled Arar's claims for $9 million and offered a formal apology for its role in Arar's "terrible ordeal." *Ibid*.[5]

[5] Arar brought a similar suit against the United States, but the Second Circuit dismissed it outright, holding, over several strong dissents, that he had no cause of action for the govern-

Three other Canadian citizens asserted similar tort claims after a government investigation found that they were confined and tortured in Syria as the indirect result of actions of Canadian officials. Frank Iacobucci, *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* 35-39 (2008). Although the Canadian government has sought to bar or limit access to documents and other evidence on national security grounds, *e.g.*, *Attorney General of Canada v. Almalki*, 2015 FC 1278 (DES-1-11 Nov. 23, 2015), it has not objected to the maintenance of a civil suit for damages. And in 2014, the Federal Court of Ontario permitted Omar Khadr, a Canadian detained at Guantánamo at the age of fifteen, to sue the Canadian government for damages for allegedly violating his Canadian Charter rights. *Khadr v. Canada*, 2014 FC 1001 (T-536-04 Nov. 4, 2014).

United Kingdom. Cases brought by Binyam Ahmed Mohamed, a U.K. resident and asylum grantee, similarly illustrate how U.K. courts have handled damages claims in cases involving national security considerations. Following his arrest in Pakistan in 2002 for suspected membership in al-Qaeda, Mohamed was forcibly transferred to Morocco, where he was allegedly detained and tortured by local authorities. U.S. authorities subsequently detained and allegedly tortured Mohamed at several locations, including, ultimately, Guantánamo. *The Queen on the Application of Mohamed v. Secretary of State for Foreign and Commonwealth Affairs*, [2008] EWHC (Admin) 2048 [2], [5]-[7], [41], [65]-[68] (Q.B.). The

---

ment's violation of his basic human rights. *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc).

United States dropped all charges against Mohamed and released him in 2009. Kevin Sullivan, *Freed Detainee in U.K. Tells of Abuse by U.S.*, WASH. POST, Feb. 24, 2009, at A1.

While detained at Guantánamo, Mohamed filed a civil case seeking to compel the U.K. Foreign Secretary to provide information about his rendition and treatment for his trial before a U.S. Military Commission. *Application of Mohamed*, [2008] EWHC (Admin) 2048 [2], [45], [123]-[126], [135]-[138], [147]. A U.K. court determined that factors including "[t]he importance of the state's prohibition on torture" justified compelling production of certain materials. *Id.* at [3], [46], [87]-[91], [98]-[108], [123]-[126], [139]-[147].

Following his release from Guantánamo, Mohamed and five other British citizens and residents also formerly detained at Guantánamo filed tort claims seeking damages from U.K. government agencies for complicity in their alleged arbitrary detention and torture at Guantánamo and other foreign locations. *Al Rawi v. Security Service*, [2010] EWCA (Civ) 482, [2010] W.L.R. 1069 [1071]-[1075] (A.C.) (Eng.). The government did not seek to bar the claims from the outset, nor did the court suggest that such a result would be permissible. Instead, the lower court and the court of appeal adopted procedural accommodations to address the government's national security concerns. *Id.* at [1072]-[1078], [1088]-[1089]. The government ultimately settled with the *Al Rawi* claimants for significant, confidential sums. *Government to compensate ex-Guantánamo Bay detainees*, BBC NEWS (Eng.), Nov. 16, 2010.

About a year after the *Al Rawi* settlement, two U.K. citizens brought a similar tort suit alleging that

the government participated in their illegal arrest, detention, and torture in Somaliland. Again, the U.K. court allowed the case to proceed after granting the government's request for procedural accommodations to address its national security concerns. *Mohamed v. Foreign and Commonwealth Office*, [2013] EWHC (Q.B.) 3402, [2014] 1 W.L.R. 1699 (Q.B.).

Nor has the U.K. limited remedies for arbitrary detention and torture to its own citizens and residents. It paid £14 million in compensation to Iraqis who brought civil cases alleging arbitrary detention and torture by the U.K. government during the Iraq war. Ian Cobain, *MoD pays out millions to Iraqi torture victims*, THE GUARDIAN (Eng.), Dec. 20, 2012. And it paid £2.2 million to settle a civil suit by a Libyan citizen for damages based on the U.K.'s alleged complicity in his rendition to Libya, where he was detained and tortured. Dominic Casciani, *UK pays £2.2m to settle Libyan rendition claim*, BBC NEWS (Eng.), Dec. 13, 2012.[6]

In short, the U.K. has permitted its citizens and others to bring civil actions to recover damages for alleged human-rights violations by U.K. officials. And U.K. courts address potential national security implications in these cases—such as concerns about the disclosure of sensitive information—through tailored procedural accommodations, not peremptory dismissal.

---

[6] Appeals from two other civil judgments involving allegations by non-citizens of rendition and torture are currently pending before the U.K. Supreme Court. *Belhaj v. Straw*, [2014] EWCA (Civ) 1394, [2014] 2 W.L.R. 1105 (A.C.) (Eng.); *Rahmatullah v. Ministry of Defence*, [2014] EWHC 3846 (Q.B.).

Australia. Following his release from Guantánamo without charge in 2005, Mamdouh Habib, an Australian citizen, brought a tort suit alleging that Australian officials aided and abetted his unlawful detention in Pakistan after 9/11 and his subsequent detention and torture by U.S. agents in foreign locations, including Guantánamo. *Habib v. Commonwealth of Australia,* (2010) 183 F.C.R. 62. The government of Australia did not seek to bar Habib's claims on the grounds that they involved national security. However, it did raise a related argument that Australia's act-of-state doctrine rendered some of Habib's claims non-justiciable. Citing this Court's decision in *Underhill v. Hernandez*, 168 U.S. 250 (1897), the Australian court explained that under that doctrine, "'the Courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.'" *Habib*, 183 F.C.R. 62 at ¶¶ 22, 72 (quoting *Underhill*, 168 U.S. at 252).

But the panel unanimously determined that the act-of-state doctrine did not bar Habib's claims. *Id.* ¶ 2 (Order). One judge explained that when a plaintiff "alleges before a Court exercising federal jurisdiction that Commonwealth officers acted outside the law," "[t]he justiciability of such allegations is axiomatic." *Id.* at ¶ 37 (Perram, J.).[7] And the two other judges opined that the government's "invocation of the act of state doctrine, if accepted, [would] preclude the truth or otherwise of the allegations founding the claim from being tested and determined," meaning

[7] In reaching this conclusion, Judge Perram relied heavily on the "constitutional norms" that Australian courts had drawn from *Marbury v. Madison*, 5 U.S. 137 (1803)—a case that, as explained *supra* at p. 4, also grounds the *Bivens* remedy. *See Habib*, 183 F.C.R. 62 at ¶¶ 25, 27, 29.

that Australian government "officials could not be held accountable in any court." *Id.* ¶¶ 110, 114 (Jagot, J.); *see also id.* ¶ 1 (Black, C.J.) (agreeing with Judge Jabot's reasons for judgment).

Australia's willingness to provide a damages remedy even when underlying conduct implicates the national-security efforts of *other* governments underscores how anomalous it would be for this Court to deny respondents a remedy for alleged misconduct by agents of the U.S. government itself. Indeed, after the Federal Court's decision in the case above, the Australian government ultimately settled Habib's case for an undisclosed sum. Dylan Welch, *Secret Sum Settles Habib Torture Compensation Case*, SYDNEY MORNING HERALD, Jan. 8, 2011.

* * *

As these examples demonstrate, Commonwealth democracies on three continents have provided a damages remedy for alleged human-rights violations by their agents, even where the actions giving rise to the claims were taken in the name of national security.

B. The European Court Of Human Rights Likewise Provides Monetary Remedies For Human Rights Violations In Cases Implicating National Security.

The European Court of Human Rights—an international court established by and charged with enforcing the European Convention on Human Rights (the "Convention")—likewise has awarded damages in several recent terrorism cases. As that Court recently explained, "[w]here an individual has an arguable claim that he has been ill-treated by agents of the State," an "effective remedy" under the

Convention entails "payment of compensation where appropriate," "a thorough and effective investigation," and judicial "scrutiny * * * carried out without regard to what the person may have done * * * or to any perceived threat to the national security" posed by judicial review of the defendant's acts. *El-Masri v. The Former Yugoslav Republic of Macedonia*, Eur. Ct. H.R., 75-76 (2012).

In *El-Masri*, the plaintiff (a German and Lebanese citizen) was suspected of having ties to al-Qaeda, taken into custody by Macedonian agents while traveling in Macedonia, and then turned over to U.S. intelligence officials, who detained him incommunicado for months and tortured him in an attempt to extract a confession regarding his suspected terrorist connections. *Id.* at 3-8, 12-17, 21-24, 47-52. El-Masri was never charged with a crime and ultimately was released. *El-Masri*, Eur. Ct. H.R. at 21-22.

The European Court in *El-Masri* held Macedonia responsible for participating in and enabling the CIA's torture and arbitrary detention of El-Masri in violation of the Convention. *El-Masri*, Eur. Ct. H.R. at 52-73, 78-79. The European Court determined that conduct by Macedonian agents including incommunicado detention, interrogation, solitary incarceration, and repeated threats of death violated El-Masri's fundamental rights. *Id.* at 62. As a remedy for its violations of the Convention, the European Court ordered Macedonia to pay €60,000 to El-Masri, citing in support several of the cases discussed above, including Canada's settlement in *Arar* and the U.K.'s settlement in *Al Rawi*, as well as two compensatory payments made by Sweden to individ-

uals for its complicity in violations of their human rights. *Id.* at 35, 41, 78-79.[8]

The European Court in *El-Masri* emphasized that:

> [A]n adequate response by the authorities in investigating allegations of serious human rights violations * * * may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

Id. at 60. This remains the case, the European Court explained, "even in the most difficult circumstances, such as the fight against terrorism." *Ibid.*

The European Court reiterated the same principle a year-and-a-half later in the companion cases of *Al Nashiri v. Poland*, Eur. Ct. H.R., 187 (2014), and

---

[8] In a pair of decisions issued in 2005 and 2006, United Nations Committees determined that Sweden violated the rights of two Egyptian citizens who had sought asylum in Sweden, Ahmed Agiza and Mohammad al-Zery. Sweden denied asylum to Agiza and al-Zery and approved their expulsion to Egypt, where they were detained and tortured by Egyptian authorities notwithstanding Egypt's diplomatic assurances that they would not be mistreated. *Agiza v. Sweden*, Commc'n No. 233/2003, U.N. Doc, CAT/C/34/D/233/2003 (2005); *al-Zery v. Sweden*, Commc'n No. 1416/2005, U.N. Doc, CCPR/C/88/D/1416/2005 (2006). In its *Agiza* decision, the U.N. Committee Against Torture "observe[d] that in the case of an allegation of torture or cruel, inhuman or degrading treatment * * * the right to a remedy requires * * * an effective, independent and impartial investigation of such allegations," even where a case presents "national security concerns." *Agiza*, at 13.7-13.8. Sweden subsequently agreed to pay Agiza and al-Zery $450,000 each in compensation for its role in their abuse. *Sweden Compensates Egyptian Ex-Terror Suspect*, USA TODAY, Sept. 19, 2008.

Husayn (Abu Zubaydah) v. Poland, Eur. Ct. H.R., PDF pp. 151-52 (2014). In those cases, the European Court ordered Poland to pay a combined €262,000 in damages for its role in enabling the CIA's detention in a secret CIA prison in Poland and subsequent forcible transfer to Guantánamo of al Nashiri and Husayn, both suspected of being al-Qaeda terrorists. *Al Nashiri*, Eur. Ct. H.R. at 1, 215-216; *Husayn*, Eur. Ct. H.R. at PDF pp. 9, 168-170. The European Court found that because Poland was complicit in or should have foreseen multiple violations of the Convention, both in its territory and at Guantánamo, Poland was liable for those violations under the Convention. *Al Nashiri*, Eur. Ct. H.R. at 161-216; *Husayn*, Eur. Ct. H.R. at PDF pp. 137-170.

The European Court in *Al Nashiri* and *Husayn* explained that even where a case implicates "national-security issues" and arises in the context of "the fight against terrorism,"

> it is essential that as much information as possible about allegations and evidence should be disclosed to the parties in the proceedings without compromising national security. Where full disclosure is not possible, the difficulties that this causes should be counterbalanced in such a way that a party can effectively defend its interests.

Al Nashiri, Eur. Ct. H.R. at 187; *Husayn*, Eur. Ct. H.R. at PDF pp. 151-152. The European Court condemned (and drew negative inferences based on) Poland's invocations of national security and state secrecy to justify a blanket "refusal to submit evidence" relevant to these cases. *Al Nashiri*, Eur. Ct. H.R. at 142-146; *Husayn*, Eur. Ct. H.R. at PDF pp. 121-124. The proper course, the European Court held, is in-

stead to implement procedural accommodations tailored to the specific evidence posing security concerns. *Ibid.*

Most recently, in February of this year, the European Court ordered Italy to pay a combined €115,000 to terrorist suspect Osama Mustafa Hassan Nasr and his wife Nabila Ghali for multiple violations of the Convention. Press Release, Eur. Ct. H.R., *Nasr and Ghali v. Italy* (Feb. 23, 2016). (The opinion itself has not yet been translated into English.) Building from principles established in *El-Masri*, *Al Nashiri*, and *Husayn*, the European Court determined that the CIA's abduction of Nasr on the streets of Italy and subsequent incommunicado detention and ill-treatment of Nasr in Egypt qualified as arbitrary detention and torture of Nasr, inhuman and degrading treatment of his wife Ghali, and interference with Nasr's and Ghali's privacy and family rights in violation of the Convention. *Id.* at 4-6. The European Court found Italy responsible for failing to take measures to prevent these actions, *ibid.*, and further determined that "the investigation carried out by [Italian] national authorities * * * had been deprived of its effectiveness" through improper invocations of state secrecy in an attempt to "ensure that those responsible did not have to answer for their actions." *Id.* at 4, 6. The Court reiterated the need for "practical and effective remedies" for torture and arbitrary detention, including "an award of compensation" where appropriate. *Id.* at 6.

C. Other Western Democracies And The European Court Of Human Rights Recognize Damages Actions Even Where National Security Is Implicated.

Other Western democracies and international

courts ensure effective monetary remedies for human rights violations by state officials. They reject government arguments that state secrecy and national security considerations should foreclose judicial review entirely, instead addressing such considerations through tailored procedural accommodations.

The responses of other Western democracies to allegations of their own governments' involvement in human rights abuses, including abuses committed in terrorism-related investigations, reflect their recognition that "a civilized polity, when it errs, admits it and seeks to give redress." *Arar v. Ashcroft*, 585 F.3d 559, 638 (2d Cir. 2009) (Calabresi, J., dissenting). As the European Court of Human Rights has recognized, a vehicle for judicial scrutiny is "essential" to "maintain[] public confidence" and "prevent[] any appearance of collusion in or tolerance of unlawful acts." *El-Masri*, Eur. Ct. H.R. at 60. Just as in other Western democracies, individuals in the United States should not be barred from seeking judicial redress for alleged violations of their constitutional rights by government officials, even when the actions constituting the alleged violations were taken in the name of national security.

CONCLUSION

This Court should affirm the appellate court's conclusion that the respondents are entitled to pursue an implied right of action under *Bivens* for the alleged violations of their constitutional rights.

Respectfully submitted.

GARY A. ISAAC
Counsel of Record
LOGAN A. STEINER
JED W. GLICKSTEIN
Mayer Brown LLP
71 S. Wacker Dr.
Chicago, IL 60606
gisaac@mayerbrown.com
(312) 782-0600

Counsel for Amicus Curiae

DECEMBER 2016