No. 15-1461

In the Supreme Court of the United States

AMIR MESHAL,

Petitioner,

v.

CHRIS HIGGENBOTHAM, ET AL.,

Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

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

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

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.

The central issue in this case is whether the court of appeals improperly denied a U.S. citizen any judicial recourse for alleged constitutional violations by federal law enforcement agents during a criminal counterterrorism investigation abroad. The purpose of this brief is to set out the stark contrast between the court of appeals' decision and the approach taken by democracies in the Commonwealth and human rights courts, which have permitted victims of alleged human rights violations at the hands of government officials to seek judicial redress in circumstances similar to those in this case.

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[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.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Amir Meshal, an American citizen, alleges that he was wrongfully detained and tortured over a four-month period in 2007 in the Horn of Africa by FBI agents during a terrorism investigation. Meshal was eventually released, and he returned to the United States. No charges have been filed against him.

In the decision below, the court of appeals acknowledged that Meshal raised "troubling" allegations of misconduct by federal agents. Pet. App. 4a. The court nevertheless concluded that *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), did not authorize Meshal to bring a damages action against U.S. officials for the alleged violation of his Fourth and Fifth Amendment rights. That was so, the court reasoned, because Meshal's suit touched on two "special factors"—national security and extraterritorial conduct—that together "counsel[ed] hesitation in recognizing a *Bivens* action for money damages." Pet. App. 5a. "If people like Meshal are to have recourse to damages for alleged constitutional violations committed during a terrorism investigation occurring abroad," the court concluded, "either Congress or the Supreme Court must specify the scope of the remedy." Pet. App. 27a.

The court of appeals' decision would close the courthouse doors to American citizens seeking damages for serious human rights violations that occurred during terrorism-connected criminal investigations overseas—depriving American citizens of any

remedy for even the most egregious violations of the Fourth and Fifth Amendments.

That approach stands in stark contrast to that taken by many other Western democracies, which have recognized a tort remedy for unlawful actions taken abroad and in the name of national security. To be sure, the courts in these countries 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 these courts have not concluded that national security or extraterritoriality concerns are a *complete bar* to suit, extinguishing any possibility of a remedy for the government's violation of fundamental rights.

The court of appeals acknowledged that "*Bivens* remedies for ill-executed criminal investigations" within the United States "are common." Pet. App. 5a. The justifications for *Bivens* apply equally well to ill-executed criminal investigations abroad. This Court should grant certiorari to make clear that there is no blanket immunity from a *Bivens* suit simply because alleged violations of U.S. citizens' Fourth and Fifth Amendment rights occurred outside of the United States and in the course of a putative terrorism investigation. That result would be consistent not only with *Bivens* itself, but 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 Human Rights Courts 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 American citizens who allegedly suffered serious constitutional violations abroad at the hands of their own government, the Court's judgment should be informed by the experience of other Western democracies, many of which have made damages remedies available under similar circumstances.

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—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 for-

eign 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]

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[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

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

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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 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").

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 conceptualized 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 in similar circumstances 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 For Wrongful Imprisonment And Torture Is Sharply At Odds With Foreign Decisions And Practice.

As this Court has recognized and as defendants conceded below, a citizen's constitutional rights are not "stripped away just because he happens to be in another land." *Reid v. Covert*, 354 U.S. 1, 6 (1957) (plurality opinion); Pet. App. 40a (Pillard, J., dissenting) (citing Transcript of Oral Argument at 19) (defendants' counsel acknowledged constitutional rights of U.S. citizens abroad). As "a creature of the Constitution," the government "can only act in accordance with all the limitations imposed by the Constitution." *Reid*, 354 U.S. at 6.

Even though some have argued that "[t]he United States is at war against al Qaeda and other radical Islamic terrorist organizations," Pet. App. 28a (Kavanaugh, J., concurring), this Court has "long * * * made clear that a state of war is not a blank check * * * when it comes to the rights of the Nation's citizens." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion). "Even when the United States acts outside its borders, its powers * * * are subject 'to such restrictions as are expressed in the Constitution.'" *Boumediene v. Bush*, 553 U.S. 723, 765 (2008); see also *id.* at 797 ("Security subsists, too, in fidelity to freedom's first principles, chief among them being freedom from arbitrary and unlawful restraint" and "personal liberty.").

The court of appeals' decision nonetheless denies an American citizen a claim for serious constitutional violations solely because those violations occurred outside U.S. borders and in the name of national security. That holding is contrary not only to this

Court's precedents but to law and practice in other Western democracies and human rights courts, which have permitted victims of human rights violations at the hands of government officials to seek redress even where the violations occurred extraterritorially and during terrorism-related investigations.

A. Other Nations Provide Monetary Remedies For Extraterritorial Detention And Torture In Alleged Terrorism-Related Cases.

Other Western democracies participating in global counter-terrorism efforts have consistently provided remedies to their own citizens and legal residents for extraterritorial human rights violations allegedly committed by state agents, as the following examples show.

United Kingdom. Cases brought by Binyam Ahmed Mohamed, a U.K. resident and asylum grantee, illustrate how U.K. courts have handled damages claims in cases involving national security considerations and alleged torture in other countries. 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 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 acting extraterritorially 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.[4]

In short, the U.K. has permitted its citizens and others to bring civil actions to recover damages for alleged arbitrary detention and torture by U.K. officials, even where the U.K. officials allegedly acted extraterritorially. 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.

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[4] 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.).

Canada. Canada has likewise recognized its obligation to provide an effective monetary remedy when its officials are complicit in human rights violations. Canadian citizen Maher Arar brought civil suits in Canada and the U.S. seeking damages for those governments' roles 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 Dennis R. O'Connor, *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 ultimately settled Arar's claims for $9 million and offered a formal apology for Canada's role in Arar's "terrible ordeal." *Ibid*.[5]

Three other Canadian citizens asserted tort claims after a government investigation found that they were confined and brutally 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.

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[5] In the United States, by contrast, the Second Circuit dismissed Arar's case outright, holding that he had no cause of action for the government's violation of his basic human rights. *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc).

Likewise, Omar Khadr, a Canadian detained at Guantánamo at the age of fifteen, has sued the Canadian government for violating his Canadian Charter rights. In permitting Khadr to add claims of conspiracy between Canada and the United States, the trial court recognized that "the fact that Canada's agents act on foreign soil, in concert with foreign governments, does not grant them a license to violate the constitutional rights of Canadian citizens." *Khadr v. Canada*, 2014 FC 1001, at 16 ¶ 40 (T-536-04 Nov. 4, 2014). The court could find "no principled basis for accepting that Canadian officials may escape the reach of tort law * * * simply by virtue of collaborating with foreign agents when committing harm to a Canadian citizen abroad." *Ibid.*

Australia. Recognizing the judiciary's fundamental obligation to hear claims of government complicity in human rights abuses, the Federal Court of Australia has affirmatively ruled that the extraterritorial nature of governmental conduct *does not* preclude judicial consideration of a civil damages claim. 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 argued that some of Habib's claims were non-justiciable under Australia's act-of-state doctrine because they "would require a determination of the unlawfulness of acts of foreign states within the territories of foreign states." *Id.* ¶ 4 (Or-

der). Citing *Underhill v. Hernandez*, 168 U.S. 250, 252 (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*).

But the three judges in Habib's case agreed that the act-of-state doctrine did not render his claims non-justiciable. *Id.* ¶ 2 (Order). One judge opined that the doctrine is inapplicable "where it is alleged that Commonwealth officials have acted beyond the bounds of their authority under Commonwealth law," citing this Court's decision in *Marbury*, 5 U.S. 137, for the important principle of judicial review of government action alleged to be outside the law. *Habib*, 183 F.C.R. 62 at ¶¶ 22-25, 37 (Perram, J.).

Another judge opined that the act-of-state doctrine does not apply to allegations of "torture constituting grave breaches of human rights." *Id.* ¶ 135 (Jagot, J.). She explained 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 that Australian government "officials could not be held accountable in any court." *Id.* ¶¶ 110, 114. That would be directly contrary to the "international consensus that the torturer must have no safe haven." *Id.* ¶ 117. The third judge agreed that "[t]orture offends the ideal of a common humanity" and that "authorities do not support the application of the act of state doctrine" in Habib's case. *Id.* ¶¶ 7-8 (Black, C.J.).

Following the Federal Court of Australia's ruling, the Australian government settled Habib's case for

an undisclosed sum. Dylan Welch, *Secret Sum Settles Habib Torture Compensation Case*, SYDNEY MORNING HERALD, Jan. 8, 2011.

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As these examples demonstrate, Commonwealth democracies on three continents have provided a damages remedy for alleged torture and illegal detention by their agents, even where the actions giving rise to the claims occurred extraterritorially and were taken in the name of national security.

B. The European Court Of Human Rights Likewise Provides Monetary Remedies For Detention And Torture 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).

The facts in *El-Masri* are closely analogous to those alleged by Meshal here. Khaled El-Masri (a German and Lebanese citizen) was suspected of hav-

ing 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; Pet. App. 4a-7a. Also like Meshal, El-Masri was never charged with a crime and ultimately was released. *El-Masri*, Eur. Ct. H.R. at 21-22; Pet. App. 7a.

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 individuals for its complicity in violations of their human rights abroad. *Id.* at 35, 41, 78-79.[6]

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[6] 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

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.*[7]

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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.

[7] As the European Court in *El-Masri* noted, a prior *Bivens* action brought by El-Masri against CIA officials in the U.S. had been dismissed. *Id.* at 18-19; see *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007). Notably, even though, in the words of the court of appeals in *Meshal*, "the agents' actions" in *El-Masri* "took place during a terrorism investigation and those actions occurred overseas" (Pet. App. 5a), the Fourth Circuit in *El-Masri* never questioned the availability of a *Bivens* remedy. Instead, it affirmed dismissal on state secrets privilege grounds based on a classified declaration of the Director of the CIA providing "extensive information" "spell[ing] out why" litigating that particular case would disclose secret CIA methods and pro-

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 *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—violations that included conduct amounting to torture and arbitrary detention—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 "nation-

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cedures. *El-Masri*, 479 F.3d at 301-12. The Fourth Circuit "recognize[d] the gravity of [its] conclusion" and "reiterate[d its] past observations that dismissal on state secrets grounds is appropriate only in a narrow category of disputes." *Id.* at 313. Here, by contrast, the government has neither invoked the state secrets privilege nor submitted specific evidence akin to the declaration in *El-Masri* asserting that litigating this case would threaten national security. *E.g.*, Pet. App. 21a ("At oral argument, the government had few concrete answers concerning what sensitive information might be revealed if the litigation continued."); Pet. App. 35a (Pillard, J., dissenting) (the government "submitted no certification or declaration" supporting its "sweeping national security * * * claims").

al-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 instead 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. The Court Of Appeals' Decision Is Significantly Out Of Step With The Practices Of Other Western Democracies And The European Court Of Human Rights.

Other Western democracies and international courts thus 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 court of appeals in Meshal's case, by contrast, did not even consider procedural accommodations to alleviate the defendants' stated concerns that allowing the case to go forward would harm national security. Pet. App. 8a-27a; Pet. App. 64a (Pillard, J., dissenting) (noting the judiciary's "wide range of tools to address national security concerns"); see also p. 19 n.7, *infra.* Rather, it allowed the mere

assertion of such concerns—unsupported by *any* evidence—to deprive an American citizen of a judicial remedy for the alleged deprivation of his Fourth and Fifth Amendment rights by U.S. government officials. Pet. App. 8a-27a; Pet. App. 41a (Pillard, J., dissenting) ("Defendants * * * have done nothing to explain why the more targeted tools available to courts to protect [sensitive] information, such as confidential or *in camera* processes or the state secrets privilege, would be inadequate here.").

The court of appeals' decision markedly diverges from foreign law. The responses of other Western democracies to allegations of their own governments' involvement in human rights abuses, including abuses committed abroad 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). This Court should follow the approach of these Western democracies and the European Court of Human Rights, grant certiorari, and recognize that 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. Like the citizens of other Western democracies, American citizens should not be barred from seeking judicial redress for alleged violations of their constitutional rights by U.S. government officials, even when those violations allegedly occurred abroad and during a purported terrorism investigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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