No. 06-1613

In the

Supreme Court of the United States

KHALED EL-MASRI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

Amicus The Association of the Bar of the City of New York ("Association") is an independent professional association of more than 22,000 lawyers, judges and legal scholars. Founded in 1870, the Association has long been devoted to promoting and preserving the role of the judiciary in our constitutional system of separation of powers as a check against unconstitutional or unlawful government conduct that violates individual rights. The Association also has been deeply involved in efforts to assure an appropriate balance between the needs of national security and the preservation of civil liberties.

Of special relevance here, the Association has extensively addressed concerns about the government's accelerating practice — accepted by the Fourth Circuit here — of prematurely invoking the state secrets privilege to deny a federal forum to alleged victims of unlawful government conduct purportedly undertaken in the name of national security. The Association has filed amicus curiae briefs addressing its concerns about this procedure in cases in the Sixth and Ninth Circuits and the Eastern District of Michigan and Southern District of New York.[2] The Association also

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus or its counsel, has made a monetary contribution to its preparation or submission. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court.

[2] *Am. Civil Liberties Union* v. *Nat'l Sec. Agency*, Nos. 06-2095/05-2140, *opinion at* 2007 U.S. App. LEXIS 16149 (6th Cir. July 6, 2007); *Hepting* v. *AT&T Corp.*, Nos. 17132/17137, *appeal argued* (9th Cir. Aug. 15, 2007); *Ctr. for Constitutional Rights* v. *Bush*, 06-CV-313 (GEL) (S.D.N.Y.); *Am. Civil Liberties Union* v. *Nat'l Sec. Agency*, No. 06-CV-10204, *opinion at* 438 F. Supp. 2d 754 (E.D.

has published a major study about the government abuses that are implicated by the claims that are the subject of Petitioner's suit. *See* The Association of the Bar of the City of New York and Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"* (2004)[3].

SUMMARY OF ARGUMENT

Amicus submits this brief in support of Petitioner and urges the Court to grant certiorari to review the procedure, adopted here by the Fourth Circuit, invoking the state secrets privilege to deny a federal forum for the enforcement of individual rights before undertaking available procedures that might permit the litigation to proceed without disclosing state secrets.

This case concerns the threshold dismissal, on state secrets grounds, of a tort suit alleging that U.S. government officials conspired to violate Petitioner's rights under the Constitution and international law to be protected from abduction, arbitrary detention and inhumane treatment. Without permitting any discovery, or considering any non-privileged evidence, and based solely on two government affidavits (one presented *in camera* and *ex parte*), and speculation about what evidence might be needed to sustain the claims or to make possible defenses, the district court dismissed the case at the pleading stage — and the Fourth Circuit affirmed that dismissal — based on the state secrets privilege.

Mich. 2006), *rev'd*, Nos. 06-2095/06-2140, 2007 U.S. App. LEXIS 16149 (6th Cir. July 6, 2007).

[3] *Available at* http://www.chrgj.org/docs/torturebyproxy.pdf.

In this brief, amicus argues that certiorari is warranted to review the procedure adopted by the Fourth Circuit because it does not reflect a proper regard for the judiciary's role in our constitutional system of separation of powers and its capacity to fulfill that role while protecting state secrets. We submit that the rule of law itself — and the basic proposition that no government official is above the law — is at stake here.

Our constitutional system of separation of powers assigns to the courts the task of acting as a check against unconstitutional or unlawful Executive conduct in cases properly brought before them by victims of such conduct. It is for the judiciary to enforce constitutional and other legal limits on Executive power and to fashion effective remedies to vindicate violations of individual rights. And it is a role the judiciary has played throughout our nation's history, even in times of grave threats to national security.

The manner in which the Court of Appeals applied the state secrets privilege here (and as it is repeatedly invoked by the government) threatens to nullify the courts' role as a check against the most grave misconduct by the Executive and effectively immunizes officials of the Central Intelligence Agency ("CIA"), and other intelligence agencies, against claims based on the most egregious violations of individual rights guaranteed by the Constitution, statute or international law. In prematurely invoking the state secrets privilege to deny any judicial forum for claims of serious abuse, the Court of Appeals did not make the obligatory effort to permit the litigation to proceed while protecting legitimate state secrets, thus effectively transforming a common law evidentiary privilege into a rule of non-justiciability.

Petitioner correctly argues that the state secrets privilege should only be invoked in response to specific questions and specific demands for information (as other evidentiary privileges are exercised) and that courts should carefully disaggregate and closely scrutinize each item of evidence for which the privilege is invoked to assess whether it is truly a "state secret" and whether it is needed to sustain a claim or defense. At a bare minimum, courts should not consider the state secrets privilege as a ground for dismissal until all non-privileged discovery has been completed. If privileged information is still needed for the plaintiff's or the government's case, courts should then consider ways of protecting the state secrets short of dismissal. Experience in other areas of the law demonstrates that federal courts can competently handle classified evidence without jeopardizing national security or individual rights. Only in this way can courts properly accommodate the need to protect state secrets with their paramount role as a check on unlawful government conduct.

ARGUMENT

I. Certiorari Should Be Granted Because of the Impact the Fourth Circuit's Procedure Would Have on the Judiciary's Role Under our Constitutional System of Separation of Powers and on the Rule of Law

Application of the state secrets privilege denied Mr. El-Masri access to a federal judicial forum for his claims under the Constitution and international law. Such a denial of a forum immunized the Executive from claims that it engaged in the most shocking violations of Mr. El-Masri's individual rights. As we discuss below, acceptance of the procedure adopted by the Fourth Circuit as a sufficient judicial response to invocation of the state secrets privilege

would have effects well beyond this case: It would effectively immunize from judicial scrutiny government abuses in the course of all clandestine activity purportedly undertaken for national security purposes. Such a result would severely undermine the constitutional role of the judiciary and the rule of law.

A. The Judicial Branch Has Been Assigned the Task of Providing a Check on Unconstitutional or Unlawful Executive Conduct and Enforcing Federally Protected Individual Rights

The Fourth Circuit ignored the tension between its decision and the role of the judiciary under the Constitution. Contrary to its view, the Fourth Circuit was not being asked to employ a "roving writ to ferret out and strike down executive excess." *El-Masri* v. *United States*, 479 F.3d 296, 312 (4th Cir. 2007). Rather, it had before it a "case or controversy" in which the plaintiff claimed he was a victim of unlawful Executive action that inflicted grave injury on him. This is precisely the type of claim that the Founders, in adopting the Constitution, expected the Judicial Branch to adjudicate and, if proven, to provide an appropriate remedy. The judiciary plays this role in times of war and crisis, even when issues of national security have been implicated.

In establishing our constitutional structure, the Founders understood that power ought not to be allowed to concentrate in one branch of government, unchecked.

> Basic to the constitutional structure established by the Framers was their recognition that "[the] accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may

> justly be pronounced the very definition of tyranny." To ensure against such tyranny, the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct.

N. Pipeline Constr. Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982) (quoting The Federalist No. 47, at 300 (James Madison) (H. Lodge ed., 1888)). As a result, the Framers set up a system of checks and balances to serve as "a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Id.* at 57-58 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976) (per curiam)).

In our constitutional system, the Judicial Branch has the ultimate role of enforcing the Constitution and remedying abuses of power by either the Executive or Legislative branches. Presenting the Bill of Rights to the Congress, James Madison stated that:

> If [these rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

1 Annals of Cong. 457 (Joseph Gales ed., 1834). The Framers expected that the judiciary would "guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the

influence of particular conjunctures, sometimes disseminate among the people themselves . . . ." The Federalist No. 78, at 440 (Alexander Hamilton) (Isaac Kramnick, ed., 1987).

In carrying out its responsibility to enforce legal rights against Executive abuses, the judiciary necessarily has the power to devise effective remedies. This principle was eloquently enunciated early in our nation's history by Justice Marshall in *Marbury* v. *Madison*:

> 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. One of the first duties of government is to afford that protection.
>
> . . . .
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

5 U.S. (1 Cranch) 137, 163 (1803).

Accordingly, this Court has repeatedly underscored federal courts' authority to craft remedies adequate to redress violations of constitutional rights, including damage remedies. *See Davis* v. *Passman*, 442 U.S. 228, 242 (1979) ("[W]e presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights."); *Bell* v. *Hood*, 327

U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." (citations omitted)). That is, in fact, the rationale for the damages remedy recognized in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). As Justice Harlan emphasized in concurring, "the judiciary has a particular responsibility to assure the vindication of constitutional interests . . . ." *Id.* at 407. The judiciary's role in enforcing constitutional rights is so fundamental that serious constitutional issues would be raised were Congress to deny any federal judicial forum for vindication of such rights.[4]

Moreover, the judiciary acts as a check on *all* unlawful conduct by the Executive. This is implicit in the concept that this is a "government of laws, not men" and that no one — including the Executive — is above the law. *See United States* v. *Lee*, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the

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[4] *See Webster* v. *Doe*, 486 U.S. 592, 603 (1988) ("We [have] emphasized . . . that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." (citations omitted)); *see also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2063 (2007) (arguing that the Constitution requires that "some court must always be open to hear an individual's claim to possess a constitutional right to judicial redress of a constitutional violation." (citing Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1372 (1953) and *Hart and Wechsler's The Federal Courts and the Federal System*, 345-57 (5th ed. 2003))).

officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.")[5]; *Nixon* v. *Fitzgerald*, 457 U.S. 731, 781 (1982) (White & Blackmun, JJ., dissenting) ("[I]t is the rule, not the exception, that executive actions — including those taken at the immediate direction of the President — are subject to judicial review . . . . [T]he constitutionality of the President's actions or their legality under the applicable statutes can and will be subject to review."). As this Court confirmed in *Clinton* v. *Jones*, 520 U.S. 681 (1997), it has "long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law." *Id.* at 703.[6]

The judiciary's role in enforcing the Constitution, laws, and treaties of the United States is embodied in Article III of the Constitution and by the congressional enactments conferring jurisdiction over cases "arising under the Constitution, laws, or treaties of the United States" (28 U.S.C. § 1331) and civil actions by aliens for torts "committed in violation of the law of nations or a treaty of the United States" (Alien Tort Statute, 28 U.S.C. § 1350). In dismissing Mr. El-Masri's claim at the pleading stage, the lower courts refused to perform the role assigned to them by the Constitution and Congress, without any effort to consider or avail themselves of procedures that might have permitted the case to proceed while protecting state secrets.

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[5] The holding of this case, which was based on common law, was subsequently superseded by federal legislation. *See Block* v. *North Dakota*, 461 U.S. 273, 282 (1983).

[6] *See also Sanchez-Llamas* v. *Oregon*, -- U.S. --, 126 S. Ct. 2669, 2684 (2006) ("If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution." (citing *Marbury*, 5 U.S. at 177)).

As discussed in Point I.B below, that refusal has grave implications for our constitutional system and the rule of law that go well beyond this case.

B. Accepting the Fourth Circuit's Procedure for Applying the State Secrets Privilege Would Nullify the Court's Role as a Check on a Broad Category of Unconstitutional or Unlawful Executive Conduct

Since the terrorist attacks of September 11, 2001, the Government has greatly accelerated the invocation of the state secrets privilege as a ground for dismissing at the pleading stage cases involving alleged abuses by the Executive in the course of various clandestine activities purportedly intended to protect national security. Pet'r Br. 13-14. Such an application of the privilege is likely to immunize from judicial scrutiny a broad category of government conduct at a time when there is a special need for judicial protection against government infringements of individual rights.

In its efforts to combat terrorism in the post-9/11 period, the government is alleged to have adopted, and in some respects has acknowledged adopting, a variety of practices that raise the most serious civil liberties and human rights issues. These include secret detentions, the use of torture and other inhumane interrogation methods, kidnapping and sending suspects to countries known to employ such interrogation methods, and warrantless surveillance.[7] Because of the clandestine nature of these

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[7] *See* Human Rights First, *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan* (2006), *available at* http://www.humanrightsfirst.info/pdf/06221-etn-hrf-dic-rep-web.pdf; Eur. Parl. Ass., *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*, AS/Jur

activities, the state secrets privilege, if applied in the superficial manner employed by the Fourth Circuit, would routinely shield officials of the CIA and other national security agencies from judicial scrutiny of claims that they have engaged in these or other infringements of individual rights. In such cases, the Government can — and as Petitioner shows, frequently does — invoke the state secrets privilege to assert that clandestine intelligence or enforcement activity is a state secret and that accordingly, nothing pertaining to those activities can be adjudicated without disclosing a state secret. At bottom, this is the reasoning adopted by the Fourth Circuit.

It is precisely in circumstances like those existing today — a time of great concern and fears about terrorism — that the judiciary's role as a check on over-zealous and unlawful Executive conduct is both most needed and most sorely tested. Accordingly, the judiciary's power to enforce the Constitution against unlawful Executive conduct has long been exercised in times of crisis, even when the country was facing grave threats to its national security. *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 587-89 (1952) (enjoining President Truman's seizure of the steel mills as beyond his Executive powers,

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(2007) 36 (2007), *available at* http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf; *Arar* v. *Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *appeal docketed* No. 06-4216-cv (2d Cir. Sept. 12, 2006); *Hepting* v. *AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006), *appeal argued* Nos. 17132/17137 (9th Cir. Aug. 15, 2007); *see also Am. Civil Liberties Union* v. *Nat'l Sec. Agency*, Nos. 06-2095/05-2140, 2007 WL 1952370 (6th Cir. July 6, 2007).

despite the possibility that a threatened strike would cripple our Nation's military power in the middle of the Korean War); *New York Times Co.* v. *United States*, 403 U.S. 713, 722-23 (Douglas, J., concurring), 741-42 (Marshall, J., concurring) (1971) (per curiam) (refusing to enjoin the publication of classified documents concerning the prosecution of the Vietnam War, notwithstanding the government's claims that disclosure of the documents would undermine the war effort and damage national security).

These principles have recently been applied in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004). In *Hamdi*, this Court rejected arguments that the prosecution of war justified denying basic due process even to an American citizen captured in hostile combat on a battlefield in Afghanistan. Balancing the competing interests in national security and liberty, the Court cautioned that "[i]t is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." *Id.* at 532 (citing *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963); *United States* v. *Robel*, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile[.]")).

The Fourth Circuit ignored these teachings and failed to recognize the serious consequences its approach has for our constitutional system and the rule of law. It also failed to consider the ways in which it could accommodate the role assigned to the judiciary under the Constitution and federal statutes without compromising national security. Certiorari is warranted to make clear that such an approach is unacceptable.

II. Certiorari Should Be Granted To Clarify the Procedures Available To Protect State Secrets While Permitting Adjudication of Claims

It is vital that the methods and procedures used to protect state secrets account for the need to preserve the role of the courts as the guardian of individual rights against Executive abuse. The approach taken by the Fourth Circuit ignores this need and the many tools available to accomplish this task without harming national security.

In dismissing Mr. El-Masri's claims, the Fourth Circuit applied the state secrets privilege based on its speculation, without assessing the actual testimony or evidence sought or needed, that the subject matter of Mr. El-Masri's claims was likely to require disclosure of information adverse to national security. But, as Petitioner persuasively argues, more careful procedures should have been invoked, which might have permitted the litigation to proceed without disclosing state secrets. Pet'r Br. 15-22, 24-27.

First, the state secrets privilege should only be invoked in response to specific questions and specific demands for information. *Id.* at 16-17. This is the approach that has been followed by numerous courts. *Id*. And this is the approach that courts take with respect to other evidentiary privileges with arguably constitutional grounding. *See United States* v. *Carroll*, 567 F.2d 955, 957 (10th Cir. 1977) (Fifth Amendment); *United States* v. *Antelope*, 395 F.3d 1128, 1134 (9th Cir. 2005) (Fifth Amendment); *United States* v. *O'Neill*, 619 F.2d 222, 227 (3d Cir. 1980) (executive privilege); *see also Nat'l Lawyers Guild* v. *Attorney General*, 96 F.R.D. 390, 392-93 (S.D.N.Y. 1982) (executive privilege).

Such a procedure would permit the court to examine the specific evidence for which the privilege is invoked and

determine whether it is truly a "state secret." Courts should not be reluctant to make that assessment *in camera*. *See* Pet'r Br. 23-24. The experience of federal courts in handling classified information in criminal prosecutions, including terrorism cases, demonstrates that they are competent to do so. *See* pp. 15-17, *infra*. Experience also shows that the Court's failure to directly examine evidence claimed to involve state secrets can result in mistaken applications of the privilege. This is illustrated by facts discovered years after this Court's decision in *United States* v. *Reynolds*, 345 U.S. 1 (1953), which excluded evidence on state secrets grounds. Subsequent disclosure of the government accident report that the *Reynolds* Court, relying solely on a government affidavit, held to be privileged shows that the report contained no state secret. In fact, it contained an admission of the government's negligence that was the subject of plaintiff's claim. *See* Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the* Reynolds *Case*, xi, 113, 181-82 (2006).

At a minimum, this Court should clarify that courts should not consider the state secrets privilege as a ground for dismissal until all non-privileged discovery has been exhausted. Dismissal should be a last resort, not a first. Courts should first be required to assess the non-privileged evidence to determine whether the plaintiff's case and the government's defense can be made without privileged evidence. *See* Pet'r Br. at 17-22. If privileged information is still needed for the plaintiff's or the government's case, courts should then consider ways of protecting the state secrets short of outright dismissal.

Two broad statutes, the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3, and the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, *et seq.*, show ways in which federal courts can craft procedures to handle

classified evidence without resorting to threshold dismissal or any compromise of governmental interests in secrecy. The methods developed under these two statutes can be effectively adapted to deal with evidence assertedly subject to the state secrets privilege.

CIPA supplies procedural tools to maximize the evidence available in the pre-discovery, discovery and trial phases of federal criminal cases, to mitigate tensions between fairness and security.

First, prior to discovery, CIPA § 3 provides the court with the flexibility to craft protective orders governing the production and handling of evidence to establish conditions for the secure handling of classified information. *See United States* v. *Bin Laden*, 58 F. Supp. 2d 113, 116 (S.D.N.Y. 1999) ("[P]ursuant to Section 3 of the Classified Information Procedures Act . . . the Court has the authority to 'issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.'"); *see also United States* v. *Poindexter*, No. 88-0080, 1988 WL 148597, *1 (D.D.C. Apr. 15, 1988) (granting government's motion for a protective order). In developing protective orders, courts can require defense counsel and the defense team to obtain security clearance to permit them at least to participate in discussions about what might be discoverable. *See* Serrin Turner & Stephen J. Schulhofer, *The Secrecy Problem In Terrorism Trials* 26 (2005),[8] as well as the appointment of Court Security Officer(s) to advise parties on the handling of classified materials. *See also Reliance Ins. Co.* v. *Barron's*, 428 F. Supp. 200, 203 (S.D.N.Y. 1977) (using protective order procedure in a civil

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[8] *Available at* http://www.brennancenter.org/dynamic/subpages/download_file_34654.pdf

case). By distinguishing classified material that security-cleared counsel can handle from the narrower category of state secrets, courts can promote effective narrowing of the evidentiary issues in a case.

Second, in discovery, courts applying CIPA have developed procedures allowing the government to delete information from classified documents presented to the defense or to furnish substitutions for the classified information in the form of summaries or admissions. *See, e.g.*, *United States* v. *Libby*, 429 F. Supp. 2d 18, 26 (D.D.C. 2006). These forms of securely handling classified evidence can be adopted beyond their initial applications. *See, e.g.*, *United States* v. *Yunis*, 867 F.2d 617, 624-25 (D.C. Cir. 1989) (Court of Appeals adopted CIPA-like procedures promulgated for district courts to examine *ex parte* and *in camera* evidence relevant to an appeal). Balancing governmental security interests with the defense's need to access information relevant to their case, CIPA allows the government to request the redaction, substitution, or summary of discoverable information via an *ex parte* written statement to the court.

Third, CIPA facilitates closely regulated use of classified information in the trial phase by requiring that the defense notify the court and the government of any classified information that it "reasonably expects to disclose or to cause the disclosure of" in trial. CIPA § 5. Courts use flexibility in determining the precise kind of notice required, s*ee, e.g.*, *United States* v. *Bin Laden*, No. S(7) 98 CR. 1023 (LBS), 2001 WL 66393, *6 (S.D.N.Y. Jan. 25, 2001), and the government then may request an *in camera* pretrial hearing for rulings on the relevancy of each piece of classified information. *See* CIPA § 6. "[W]here the judge finds classified information to be relevant, CIPA permits the information to be replaced with an unclassified 'substitute'"

for use at trial, Turner & Schulhofer, *supra*, at 20, provided that the alternative affords "the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." CIPA § 6.

In enacting CIPA, therefore, "Congress expected trial judges to fashion creative solutions in the interests of justice for classified information problems." *Libby*, 429 F. Supp. 2d at 22 (citation omitted); *accord United States* v. *Rewald*, 889 F.2d 836, 847 (9th Cir. 1989). Experience in criminal cases with CIPA strongly suggests that courts facing claims of state secret privilege in civil cases can fashion protective orders employing similarly effective procedures to avoid dismissal of claims of government misconduct while protecting such secrets.[9]

FOIA also provides tools that can be adapted to cases involving state secrets. The Court of Appeals for the D.C. Circuit has developed ways to carry out Congress's mandate

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[9] A majority of cases in which courts have dismissed claims at the pleadings stage based on the state secrets privilege did not implicate constitutional rights or significant questions of executive wrongdoing. *See Monarch Assurance P.L.C.* v. *United States*, 244 F.3d 1356 (Fed. Cir. 2001) (breach of contract action); *DTM Research, LLC* v. *AT&T Corp.*, 245 F.3d 327 (4th Cir. 2001) (trade secrets claims); *Kasza* v. *Browner*, 133 F.3d 1159, 1162-63 (9th Cir. 1998) (dismissing claims regarding reporting and inventory requirements at a classified Air Force location); *Bareford* v. *General Dynamics Corp.*, 973 F.2d 1138, 1142-44 (5th Cir. 1992) (dismissing a negligence claim against the government that implicated classified information about a weapons system); *Zuckerbaum* v. *General Dynamics Corp.*, 935 F.2d 544, 547-48 (2d. Cir. 1991) (same); *Fitzgerald* v. *Penthouse Int'l*, 776 F.2d 1236, 1242-44 (4th Cir. 1985) (dismissing a libel suit that involved the unauthorized disclosure of a top secret marine mammal weapons system). Amicus takes no position on whether a different rule would apply in these cases, which do not present the same separation of powers concerns.

in FOIA, for example an indexing procedure that "has proved useful, forcing agencies to review each withheld document and specifically justify withholding." Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 Admin. L. Rev. 131, 172 (2006); *see generally Vaughn* v. *Rosen*, 484 F.2d 820, 825-26 (D.C. Cir. 1973). The resulting procedure — known as a *Vaughn* index — is suggestive of how secrecy claims can be addressed in fine-grained ways.

Under *Vaughn*, the government must provide "a relatively detailed analysis in manageable segments" of information it contends is exempted from FOIA release "by formulating a system of itemizing and indexing that would correlate statements made in the Government's refusal justification with the actual portions of the document." *Id.* at 827; *see also* S. Rep. No. 93-854, at 167 (1974) (approving the use of the *Vaughn* Index in situations calling for *in camera* inspection of withheld materials). By providing an index "specific enough to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding," counsel for both parties could narrow the scope of the court's inquiry to only those elements which were disputed. *King* v. *United States Dep't of Justice*, 830 F.2d 210, 218 (D.C. Cir. 1987). Use of the *Vaughn* Index assures that the claim of secrecy will be limited to discrete pieces of information clearly falling within FOIA's enumerated exemptions to disclosure, enabling the court to perform its role of adjudicating claims whenever possible. It thus enables precisely the kind of narrowing and

accommodation that the Fourth Circuit improperly eschewed in this case.[10]

* * *

These procedures — rather than outright dismissal at the pleading stage — appropriately allow courts to fulfill their judicial duty of protecting individual rights in the face of Executive abuse and to provide a forum for individuals to seek judicial remedies. *See Halkin* v. *Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982) (invocation of the state secrets privilege "must be carefully considered to assure that the proper balance is struck between the interest of the public and the litigant in vindicating private rights and the public's interest in safeguarding of the national security."). The rule of law demands no less than the greatest possible exertion by the federal courts to ensure not only the protection of state secrets but also the vindication of individual liberties.

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[10] A good example of the careful procedures that can be employed to avoid unnecessary, premature dismissal of cases seeking to enforce fundamental individual rights is the D.C. Circuit's recent decision in *In re Sealed Case*, No. 04-5313, 2007 WL 2067029 (D.C. Cir. July 20, 2007) *deadline for en banc motion set* (D.C. Cir. Aug. 9, 2007). The Court of Appeals, reversing and remanding a dismissal of a *Bivens* suit seeking enforcement of Fourth Amendment rights first reviewed the nonprivileged information to establish that a prima facie case could be made out on the basis of non-privileged information; it then directed the district court to evaluate *in camera* the privileged information the government claimed was necessary to its defense to determine if in fact that evidence supported a valid defense; and before accepting the assertion that the case was one where "the very subject matter of the case" would require the disclosure of state secrets, directed the district court to carefully disentangle the privileged information from the nonprivileged information and to consider whether CIPA procedures could be used to protect any state secrets without dismissing the case. *Id.* at *12.

CONCLUSION

The Court should grant certiorari to review the judgment of the Court of Appeals.

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