CA No. 08-15693

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BINYAM MOHAMED, *et al.*,
Plaintiffs/Appellants,
v.

JEPPESEN DATAPLAN, INC.,
Defendant/Appellee,
and

UNITED STATES OF AMERICA,
Intervenor/Appellee.

On Appeal from the United States District Court
for the Northern District of California
(No. 07-CV-2798-JW, Honorable James Ware)

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES' PETITIONS FOR REHEARING AND REHEARING EN BANC

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Washington Legal Foundation and the Allied Educational Foundation state that they are corporations organized under § 501(c)(3) of the Internal Revenue Code. Neither has a parent corporation or any stock owned by a publicly owned company.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Statutes and Constitutional Provisions:

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES' PETITIONS FOR REHEARING AND REHEARING EN BANC

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 States.[1] WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal and state courts to ensure that the United States government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Runsfeld*, 548 U.S. 557 (2006). WLF has litigated against efforts to require disclosure of classified information by the federal government where disclosure would threaten harm to national security. *See, e.g., Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004).

WLF also devotes substantial resources to opposing efforts to create expansive private rights under the Alien Tort Statute (ATS), 29 U.S.C. § 1350, because such litigation generally seeks (inappropriately, in WLF's view) to

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[1] All the parties have consented to the filing of this brief.

incorporate large swaths of customary international law into the domestic law of the United States. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009). WLF is concerned that an overly expansive interpretation of the ATS would threaten to undermine American foreign and domestic policy interests.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

WLF and AEF are concerned that permitting courts to litigate Appellants' claims would pose an unacceptable risk to national security. WLF and AEF know nothing of the details of Appellants' treatment in the period during which Appellants allege that they were detained, and we do not mean to minimize the seriousness of the claims of mistreatment. Nonetheless, WLF and AEF believe it clear from the face of the amended complaint that the CIA program of which Appellants complain is a state secret which is not an appropriate subject for judicial scrutiny. WLF and AEF are concerned that the panel's decision seriously undercuts the state secrets doctrine and would permit litigation of

matters relating to state secrets without any meaningful consideration being given to the damage inflicted on national security by the litigation.

STATEMENT OF THE CASE

Plaintiffs-Appellants are five overseas aliens who allege that they were taken into custody and tortured in connection with a clandestine CIA program designed to capture and interrogate suspected terrorists. They further allege that Defendant-Appellee Jeppesen Dataplan, Inc. assisted the CIA program by furnishing essential flight and logistical support to aircraft used by the CIA to transfer the plaintiffs between countries while they were in custody. They further allege that Jeppesen provided that assistance with knowledge that they would be subjected to forced disappearance and torture.

Appellants filed suit against Jeppesen in 2007 in U.S. District Court for the Northern District of California, asserting jurisdiction under the Alien Tort Statute (ATS), 28 U.S.C. § 1350.[2] Seeking an award of damages, Appellants assert that the assistance allegedly provided by Jeppesen to the CIA program violated their rights under customary international law.

Before Jeppesen responded to the complaint, the United States intervened

[2] The ATS grants federal district courts original jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

for purposes of asserting the state secrets privilege. After reviewing both public and classified declarations submitted by General Michael V. Hayden, the Director of the CIA, the district court agreed with the U.S. that "the very subject matter of this case is a state secret." ER 9. In support of its conclusion, the court explained: (1) the case hinges on the existence of a relationship between the CIA and Jeppesen, and whether or not such a relationship exists is a state secret; and (2) the case also hinges on Appellants' claims that the CIA has cooperated with particular foreign governments in the conduct of its detention and interrogation program, and whether or not specific foreign governments have cooperated with the CIA is a state secret. ER 8-9. Further, the court said that disclosures from a non-government source, no matter how reliable the plaintiffs allege it to be, cannot undercut the secretiveness of a state secret; only the government, through disclosures of its own, can waive the privilege. ER 9 n.7.

A panel of this Court reversed. Slip op. 4919-4948. The Court held that dismissal on the ground that "the very subject matter of this case is a state secret" is appropriate only in those cases in which the plaintiff has a secret contractual relationship with the government and has contractually agreed not to bring a lawsuit that would necessarily reveal the secret relationship. *Id.* at 4935 (citing *Totten v. United States*, 92 U.S. 105 (1875).

The Court also rejected the United States's contention that the suit should be dismissed under the framework established by *Reynolds v. United States*, 345 U.S. 1 (1953). The Court held that "*Reynolds* applies to evidence, not information," and thus that it is inappropriate to exclude "information" from a lawsuit simply because the information is deemed a secret whose disclosure is likely to harm national security. Slip op. at 4940. Rather, the Court held, *Reynolds* prevents "the compulsion of evidence" whose disclosure might harm national security, and "cannot be invoked to prevent a litigant from persuading a jury of the truth or falsity of an allegation by reference to non-privileged evidence otherwise available to a party." *Id.* at 4940-41. The Court concluded:

> [W]ithin the *Reynolds* framework, dismissal is justified if and only if specific privileged evidence is itself indispensable to establishing either the truth of the plaintiff's allegations or a valid defense that would otherwise be available to the defendant.

Id. at 4942.

The Court stated that if, on remand, the federal government "assert[s] the privilege with respect to secret evidence (not classified information)," the district court will be required to determine whether that evidence is privileged and "whether any such evidence is indispensable either to plaintiffs' prima facie case or to a valid defense otherwise available to Jeppesen." *Id.* at 4948.

REHEARING AND REHEARING EN BANC SHOULD BE GRANTED

The panel's decision constitutes a wholesale revamping of the state secrets doctrine. As Jeppesen and the United States have fully explained in their petitions, the panel's holding that the doctrine "applies to evidence, not information," conflicts with numerous decisions of this Court and other federal appeals courts, as well as controlling Supreme Court case law. The panel seemingly would permit a litigant to introduce into evidence any information which (s)he obtains from non-privileged sources, without regard to the damage that doing so might cause to national security. Indeed, the panel seems to have intentionally blinded itself to the possibility of such damage – there is no indication in the panel decision that the judges ever read the classified version of the Hayden Declaration that detailed the basis for the government's assertion that disclosure in this lawsuit of information about a CIA-sponsored detention and interrogation program would likely cause serious damage to national security.

The petitions also point out the untenable position in which the panel decision has left Jeppesen. The decision contemplates that Jeppesen will file an answer that admits or denies allegations that it was complicit in a CIA-sponsored detention and interrogation program. Yet, Jeppesen cannot file such an answer

and still comply with the federal government's determination that such information is classified and cannot be released without endangering national security – a determination that was upheld by the district court and was never directly addressed by the panel.

Amici write separately in order to explain in more detail why the panel's decision cannot be squared with the prior decisions of this Court, as well as the decisions of other federal appeals courts. The panel decision was silent regarding conflicting decisions from other circuits, and its reliance on prior Ninth Circuit decisions was based on a significant misreading of those decisions. Rehearing *en banc* is warranted to resolve those conflicts.

Amici also urge the Court to re-examine the panel's stated rationale for permitting wide-ranging judicial review of the Executive Branch's conduct of foreign policy. The panel stated that not permitting the Plaintiffs to proceed with their claims would constitute an abdication of the judiciary's "constitutional duty 'to say what the law is.'" Slip op. at 4937 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The federal government is not asking the Court to abdicate its responsibilities in the slightest. To the contrary, it is asking the Court to take a careful look at the Hayden Declaration and determine for itself whether permitting this action to proceed is likely to cause serious damage to

national security. Even if the Court makes that determination, it is not being asked to abdicate any responsibilities; rather, it is being asked to follow the doctrine (as established by the Supreme Court and the near-unanimous federal appellate case law) that under those circumstances the interests of protecting national security take precedence over the desire of individuals to redress their grievances through a tort action.

I. THE PANEL DECISION CONFLICTS WITH CIRCUIT PRECEDENT REGARDING WHEN "THE VERY SUBJECT MATTER OF A LAWSUIT" SHOULD BE DEEMED A STATE SECRET

It is well-settled law that when "the very subject matter of a lawsuit is a matter of state secret," the suit must be dismissed at its inception without regard to the question of evidence. *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1197 (9th Cir. 2007).[3] The panel adopted what it described as a "narrow construction" of the very-subject-matter bar: it held that the bar is applicable only in those cases in which the plaintiff has a secret contractual relationship with the government and has contractually agreed not to bring a lawsuit that would necessarily reveal the secret relationship. Slip op. at 4935-

[3] Cases to which the very-subject-matter-of-the-lawsuit-is-a-state-secret doctrine applies will be referred to hereinafter as "very-subject-matter" cases.

36.[4]

The panel's opinion makes no mention of the fact that other federal appeals courts have applied the very-subject-matter bar to a far broader category of cases. Indeed, in a decision not cited by the panel, the Fourth Circuit dismissed a nearly identical claim for damages filed by a German citizen who alleged that he was abducted and subjected to torture under the CIA's detention and interrogation program – on the grounds that it was barred as a very-subject-matter case. *El-Masri v. United States*, 479 F.3d 296 (4th Cir.), *cert. denied*, 128 S. Ct. 373 (2007). Additional decisions in which other federal appellate courts have dismissed suits under the state secrets doctrine by invoking a far broader definition of the very-subject-matter bar than the one the panel adopted include *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006 (Fed. Cir. 2003); and

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[4] In adopting that narrow construction, the panel concluded that the very-subject-matter bar is synonymous with the *Totten* rule, under which lawsuits "premised on alleged espionage agreements" have long been categorically barred. *Tenet v. Doe*, 544 U.S. 1 (2005); *Totten v. United States*, 92 U.S. 105 (1875). Jeppesen has also sought dismissal of this case under the per se *Totten* rule, noting that "'public policy forbids the maintenance of *any* suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential.'" *Tenet*, 544 U.S. at 1 (quoting *Totten*, 92 U.S. at 107) (emphasis supplied by *Tenet*). The panel held the *Totten* rule inapplicable to this case because, unlike the plaintiffs in *Totten* and *Tenet*, Appellants never entered into any sort of contractual relationship with the federal government. Slip op. at 4935.

Fitzgerald v. Penthouse Intern., Ltd., 776 F.2d 1236 (4th Cir. 1985). In none of the cases was dismissal premised on a government claim that the plaintiff had contractually agreed not to disclose the state secrets at issue.

The panel contended that its narrow definition of a very-subject-matter case was supported by the Court's prior decisions in *Al-Haramain* and *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998). Slip op. at 4936 n.5. That contention was based on a serious misreading of those two decisions.

Kasza involved a claim that the Air Force violated the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6972, in connection with its operation of a classified facility in Nevada. Although the government never contended that the plaintiff (who filed suit under RCRA's citizen-suit provision) had a contractual relationship with the government, this Court affirmed the district court's ruling that the state secrets doctrine required dismissal because the need to maintain state secrets "made discovery and trial impossible." *Kasza*, 133 F.3d at 1162-63.

The panel labeled as "wrong" the government's contention that *Kasza* applied the very-subject-matter bar "outside the *Totten* context." Slip op. at 4936 n.5. The panel's view of *Kasza* is belied by that decision's language, which explicitly adopted a very-subject-matter rationale:

> Not only does the state secrets privilege bar Frost from establishing her *prima facie* case on any of her eleven claims, but any further proceedings in this matter would jeopardize national security. No protective procedure can salvage Frost's suit. Therefore, *as the very subject of Frost's action is a state secret*, we agree with the district court that her action must be dismissed.

Kasza, 133 F.3d at 1170 (emphasis added).[5]

The panel's account of *Al-Haramain*'s understanding of the very-subject-matter bar is similarly inaccurate. The panel cited *Al-Haramain* to bolster its interpretation of *Kasza*, stating:

> Indeed, we have already clarified that *Kasza* does no more than "confirm that some cases are, indeed, non-justiciable as a consequence of the very subject matter of the action being a state secret," and that it otherwise "provides scant guidance" for applying the state secrets privilege. *Al-Haramain*, 507 F.3d at 1200.

Slip op. at 4936 n.5. *Al-Haramain* said no such thing. To the contrary (and contrary to the panel's understanding of *Kasza*), the Court explicitly stated that

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[5] Directly refuting the panel's contention that the "real" reason for dismissal was the plaintiffs' failure to establish a *prima facie* case and that the discussion of the very-subject-matter bar was mere dicta, the Court stated:

> "It is evident that any attempt on the part of the plaintiff to establish a prima facie case would so threaten the disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue this litigation."

Id. (quoting *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (*en banc*)).

in *Kasza* the Court had "dismissed the action on the basis that its very subject matter was a state secret." *Al-Haramain*, 507 F.3d at 1200.[6]

Al-Haramain ultimately disagreed with the Fourth Circuit's formulation (set forth in *El-Masri*) regarding what constitutes a very-subject-matter case, but the Court did not express disagreement with the Fourth Circuit's ultimate determination that the very-subject-matter of the CIA's detention and interrogation program is a state secret; indeed, it acknowledged that facts surrounding the program "may have counseled for such an approach." *Id*. at 1201. Rather, the Court in *Al-Haramain* determined that the very-subject-matter bar did not apply to the program at issue in that case (the Terrorist Surveillance Program, or "TSP") because the Bush Administration had released so much information about the TSP that it could no longer be deemed a state secret. *Id.* at 1197-1201. The clear implication of *Al-Haramain* was that the Court would have deemed the very-subject-matter bar to be applicable but for this extensive disclosure – even though the lead plaintiff in *Al-Haramain* (an Islamic charity that claimed to have been subject to surveillance under the TSP) had not entered

[6] *Al-Haramain* went on to acknowledge that *Kasza* provided little guidance regarding the precise contours of the very-subject-matter bar, but it left no doubt that it understood *Kasza* to have invoked that bar as the basis for affirming dismissal. *Id.*

into any sort of contractual relationship with the government.

In sum, *en banc* rehearing is warranted because the panel's understanding of the very-subject-matter bar directly conflicts with earlier Ninth Circuit decisions in *Kasza* and *Al-Haramain*.

II. THE PANEL DECISION CONFLICTS WITH *AL-HARAMAIN* REGARDING WHETHER *REYNOLDS* APPLIES ONLY TO EVIDENCE, NOT TO INFORMATION

The petitions have fully explained why the panel's "*Reynolds* applies to evidence, not information" holding constitutes a radical transformation of the state secrets doctrine and conflicts with numerous decisions from the Supreme Court and federal appellate courts. *Amici* write separately to explain why the panel decision also conflicts with *Al-Haramain*, the Court's most recent explication of the doctrine prior to the panel decision.

Al-Haramain determined that a document of which the plaintiffs were aware (the "Sealed Document") included classified information and thus would not have to be produced to the plaintiffs – even though the plaintiffs contended that the document would demonstrate that they had been subjected to surveillance under the TSP. The plaintiffs nonetheless insisted that they should be permitted to go ahead with their lawsuit even without the Sealed Document because they had sufficient evidence independent of the Sealed Document (*e.g.*,

their personal memories of the Sealed Document, based on having seen it previously) to establish a *prima facie* case. The Court rejected that contention because it determined that the evidence (affidavits attesting to individuals' memories of the Sealed Document) "touch[ed] upon military secrets" and thus was similarly barred under the state secrets doctrine. *Al-Haramain*, 507 F.3d at 1204.

That rationale is directly at odds with the panel's "*Reynolds* applies only to evidence, not to information" rationale. Under the panel's interpretation of *Reynolds*, the *Al-Haramain* plaintiffs should have been permitted to go forward with their case based on their affidavits, because the state secrets doctrine only applies to evidence (the Sealed Document itself), not to the information contained in the Sealed Document. Accordingly, the panel's rationale is in direct conflict with *Al-Haramain*'s holding that the state secrets doctrine was not limited to the Sealed Document itself but also rendered inadmissible a piece of information (the fact that the plaintiffs had been subject to surveillance under the TSP), thereby providing an additional reasons to grant the petitions.

III. DISMISSING THIS LAWSUIT WOULD NOT CONSTITUTE ABDICATION OF THE JUDICIARY'S RESPONSIBILITIES

Amici also urge the Court to re-examine the panel's stated rationale for

permitting wide-ranging judicial review of the Executive Branch's conduct of foreign policy. The panel stated that not permitting the Plaintiffs to proceed with their claims would constitute an abdication of the judiciary's "constitutional duty 'to say what the law is.'" Slip op. at 4937 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The federal government is not asking the Court to abdicate its responsibilities in the slightest. To the contrary, it is asking the Court to take a careful look at the Hayden Declaration and determine for itself whether permitting this action to proceed is likely to cause serious damage to national security.

The district court reviewed both the redacted version of the declaration and the classified version and determined that the very subject matter of this case is a state secret whose disclosure would pose unacceptable risks to national security. E.R. 8-9. The panel apparently did not look at the classified version of the Hayden Declaration; more importantly, it did not dispute the district court's findings regarding the risks inherent in permitting this case to go forward. If those findings are accurate, *amici* submit that it is inappropriate to equate dismissal of this lawsuit with abdication of the judiciary's Article III responsibilities. Undertaking a searching examination of the classified Hayden Declaration and then dismissing this lawsuit if the Court determines that Hayden

has demonstrated that its continuation would jeopardize national security is not the same as "categorically immunizing the CIA or its partners from judicial scrutiny." Slip op. at 4939.

Indeed, it is not the role of the judiciary to oversee the conduct of the elected branches of government. Rather, under Article III of the Constitution, federal courts are empowered to decide "Cases" or "Controversies." Appellants contend that the federal courts, exercising the jurisdiction granted them by the ATS, ought to recognize a federal common-law cause of action in their favor based on the allegations set forth in their complaint. The existence of such a cause of action is subject to serious question, given that no federal court has heretofore recognized a federal common-law right of action even remotely resembling the one asserted by Appellants and that the Supreme Court has instructed the federal courts to exercise "great caution" in recognizing any such rights. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004). While the Court has no occasion to decide any issues regarding the scope of ATS causes of action in this appeal from dismissal under the state secrets doctrine, *amici* submit that a finding that Appellants' damages claims are barred under the state secrets doctrine would hardly constitute an abridgement of well-recognized liberty interests of the sort at issue in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), and

other recent habeas corpus challenges to Executive Branch detention policy.

In sum, the petitions ought to be granted to examine the panel's contention that a merits-based review of Appellants' claims is all but mandated by separation-of-powers principles.

CONCLUSION

The Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court grant the petitions for panel rehearing or rehearing *en banc*.

Respectfully submitted,

/s/ Richard A. Samp
Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: June 22, 2009

CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* Washington Legal Foundation, *et al.*. Pursuant to Fed.R.App.P. 29(d) and Ninth Circuit Rule 29-2(c)(2), I hereby certify that the foregoing brief of *amicus curiae* is in 14-point, proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 12.0), the brief contains less than 4,200 words (the actual word count is 3,690), not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of June, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that I deposited two copies of the foregoing brief in the U.S. Mail, First Class postage prepaid, addressed to the following individual who is counsel for a party but is not a CM/ECF participant:

Steven M. Watt
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

/s/ Richard A. Samp
Richard A. Samp