[ORAL ARGUMENT NOT YET SCHEDULED]
No. 19-5328

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BILAL ABDUL KAREEM,

Plaintiff-Appellant,

v.

GINA CHERI HASPEL, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia
No. 1:17-cv-00581 (RMC)

Brief of Victims and Families of Victims of State-Sponsored Violence in Northern Ireland as *Amici Curiae* in Support of Appellant

Hugh Southey QC
Tim James-Matthews
MATRIX CHAMBERS
Griffin Building, Gray's Inn
London WC1R 5LN

Darragh Mackin
PHOENIX LAW
92 High St.
Belfast BT1 2BG

Hyland Hunt
Ruthanne M. Deutsch
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW
Suite 900
Washington, DC 20001
(202) 868-6915
hhunt@deutschhunt.com

Counsel for Amici Curiae

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*

The parties and *amici curiae* appearing before the District Court and this Court are listed in Appellant's certificate of parties, apart from Ahmed Zaidan (a co-plaintiff in the District Court); Professor William Bowring, Professor Brenner M. Fissell, and former state and federal prosecutors (James Brady, William Broaddus, Robert Johnson, David Shapiro, Harry Shorstein and David Stetler), who have filed *amicus curiae* briefs in this Court; and Eugene Reavey, Michael O'Hare, Stephen Travers, and Eugene Oliver, appearing as *amici curiae* in this brief.

B. Ruling Under Review

Appellant's brief accurately references the ruling at issue.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel is aware of no related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

/s/Hyland Hunt
Hyland Hunt

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are individuals who have lost loved ones or suffered personal injury as victims of state-sponsored violence in Northern Ireland in the 1970s and 1980s. *Amici* Eugene Reavey, Michael O'Hare, and Eugene Oliver have lost family members to lethal action undertaken by, or in collusion with, the Government of the United Kingdom of Great Britain and Northern Ireland. *Amicus* Stephen Travers was injured—and three of his friends killed—when a bomb was planted on his tour bus.

Decades after they suffered tragic losses and grievous harms, *amici* are finally making progress toward accountability for the state actions which resulted in the death of their family members. Judicial proceedings have been an essential part of this effort, and *amici* have direct experience in the use of civil claims to promote accountability and transparency for the unlawful use of lethal force by the state. *Amici*'s efforts have begun to reveal unlawful state-sponsored killings that were shrouded in secrecy for far too long. But when the stakes are life and death, justice delayed is truly justice denied. *Amici*'s lives have been irreparably altered by unlawful state-sponsored violence that they had no opportunity to challenge *ex ante*. They have a significant interest in making sure that other families do not suffer as

[1] No counsel for a party authored this brief in whole or in part, and no person other than amici curiae or their counsel contributed money that was intended to fund this brief's preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E). *Amici* filed their notice of intent to participate as amici curiae on March 16, 2020. All parties have consented to the filing of this brief.

they have, by promoting the availability of judicial review of the use of lethal violence by the state.

Amici's experience confirms that judicial review is essential to constraining the state from unlawful violence, because only courts have the requisite independence and authority to ensure transparency; required to satisfy the obligation that international human rights law imposes upon all nations (including the United States) to investigate the government's use of potentially unlawful lethal violence; and able to adopt flexible procedures that advance accountability while avoiding true harm to national security. Those lessons should be applied here, while there is still time to stop any unlawful state killing before it occurs.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is difficult to conceive of a topic more fundamental to the rule of law than the mechanisms by which the state may be properly held to account for its use of lethal force. It is a basic and fundamental value of a democratic society that citizens ought to be free from arbitrary and unlawful violence at the hands of the state. Without robust, transparent, and effective mechanisms to determine the legality of the lawfulness of state violence, the right to life is rendered far too fragile. It is in that context that the Court must consider whether the operation of the state secrets privilege should prevent the courts of the United States from adjudicating the

constitutionality of the alleged targeting of an American citizen for extrajudicial execution, without due process of law.

At bottom, that question wrestles with the balance between the public interest in ensuring that the government does not take life without due process—and an asserted interest in national security. But in *amici*'s view, these interests can both be served by allowing judicial review to proceed. It is *amici*'s experience that claims of secrecy far too often shield government illegality, not national security; the sky does not fall when courts find the truth and hold governments to account—on the contrary, further unlawful acts are prevented and the government's international-law obligations are vindicated; and courts have proved well able to protect information from disclosure while still achieving this accountability.

This brief is presented in four sections. **Section I** describes the use of lethal force by the Government of the United Kingdom in the course of the "Troubles" in Northern Ireland, and *amici*'s experience with that violence and long-delayed efforts to obtain transparency and accountability. **Section II(A)** argues that, as a matter of principle, the judiciary must be able to review the use of lethal violence by the state because of the judiciary's independence and authority. Indeed, international human rights law obliges nations to control the use of potentially lethal force through independent mechanisms, as argued in **Section II(B)**. This obligation is inherent in states' international law duty to safeguard the right to life. Finally, **Section II(C)**

argues that the experience of analogous civil claims and judicial review proceedings in the United Kingdom teaches that courts are well suited to develop procedures that protect security while ensuring effective judicial control of the state's use of lethal violence.

Amici hope that the experience in Northern Ireland—where judicial review is achieving accountability without harm to national security, albeit decades too late to save *amici*'s family members—may be instructive as to the potential consequences of this Court's decision regarding the state secrets privilege in the United States. The state secrets privilege ought not operate as a complete bar to any review of an American citizen's claim that the government is targeting him for death without due process. It is imperative to allow Appellant's claim, and claims of a similar nature, to proceed to an effective civil trial in order to ensure a proper investigation of the use of (potentially) lethal force by agents of the state. And *amici's* experience shows that it is also practically feasible to do so while protecting national security interests.

ARGUMENT

I. Hundreds of British Citizens Were Killed By the State, Directly or Indirectly, During the Troubles in Northern Ireland.

There has been violent conflict in Northern Ireland since at least the 1960s. The conflict was, and is, primarily divided upon religious lines: between the predominantly Protestant population who would affiliate with "Unionist" political views, and the predominantly Catholic population who in turn affiliated with

"Republican" political views. Estimates suggest that the conflict, commonly referred to as the "Troubles," has resulted in over 3,500 deaths since 1969. Malcolm Sutton, *Appendix: Statistical Summary*, Conflict Archive on the Internet (Oct. 2002), https://tinyurl.com/sfp5phb. The Troubles are often said to have ended in 1998 with the conclusion of the Good Friday Agreement between the Government of the United Kingdom, the Government of the Republic of Ireland, and the political parties in Northern Ireland. However, some acts of violence have continued to the present day.

In August 1969, the British Armed Forces were deployed to Northern Ireland in response to violent conflict between paramilitary groups. The deployment, known as "Operation Banner," concluded in July 2007. Researchers suggest that the British Army, together with the Royal Ulster Constabulary (now the Police Service of Northern Ireland), are directly responsible for over 300 deaths during the conflict (of whom over 150 were civilians). *Id.* Beyond these direct casualties of military/police operations, however, a considerable number of additional deaths were caused by state agents or informants acting in collusion with paramilitary organisations.[2]

One example is a British Army informant with the codename "Stakeknife." Senior republicans have alleged that Agent Stakeknife was responsible for the murder of Tom Oliver, the father of *amicus* Eugene Oliver. *IRA murder of Tom Oliver 'ordered by Stakeknife'*, Irish Mirror (Sept. 5, 2017), https://tinyurl.com/tjl8hez.

[2] Note that British usage and spelling is used throughout this brief.

Stakeknife was purportedly a senior member of the Irish Republican Army's Internal Security Unit (known as the "Nutting Squad"). It is alleged that the Government of the United Kingdom allowed up to 40 people to be killed by the Nutting Squad in order to protect Stakeknife's cover. Ken Sengupta, *StakeKnife: 'IRA informer' Fred Scappaticci arrested over dozens of murders'*, The Independent (Jan. 30, 2018), https://tinyurl.com/whneotj.

In recent years, the courts have begun to oversee inquiries into Stakeknife's activities. In 2016, the son of a woman abducted and killed by the Irish Republican Army challenged the failure of the Police Service of Northern Ireland to investigate the responsibility of Stakeknife, and by extension the Government of the United Kingdom, in the death of his mother. *Re Moreland* [2016] NIQB 45. And in 2018, the father of a man killed by the Nutting Squad challenged the failure by the Public Prosecution Service to bring criminal proceedings against the man widely thought to be Stakeknife. *Re Mulhern* [2018] NIQB 33. Because of these lawsuits, Stakeknife is now the subject of a comprehensive investigation by the Police Service of Northern Ireland called "Operation Kenova," as well as additional legal claims. *See* Operation Kenova: An investigation into the alleged activities of the person known as Stakeknife, https://tinyurl.com/v3dfyuy. Counsel for the police reported in open court that the investigation could lead to more than 30 people being prosecuted for at least 10 murders. *Stakeknife inquiry could lead to more than 30 people facing*

criminal proceedings, Irish News (Feb. 1, 2020), https://tinyurl.com/sdl4pel. As more information has been gathered and revealed, the investigation into Agent Stakeknife by Operation Kenova has continued to expand, and *amicus* Eugene Oliver has been informed that the investigation covers the death of his father.

Another example of state-sponsored mass murder is what has now become commonly known as the "Glenanne Series" or "Glenanne Gang." A paramilitary gang operated in the area of Mid-Ulster during the period 1971-1978 and was responsible for approximately 120 deaths. Chris Kilpatrick, *Glenanne gang: Notorious squad 'fuelled by collusion'*, Belfast Telegraph, (Feb. 2, 2015), https://tinyurl.com/udqszjo. This "gang" was made up mostly of security force personnel to include members of the Royal Ulster Constabulary (then the police force in Northern Ireland) or the Ulster Defence Regiment (a British Army unit). *Id.* The Glenanne Gang was involved in the murder of *amicus* Eugene Reavey's three brothers on 4 January 1976. *Id.* The same gang was also responsible for the attempted murder of *amicus* Stephen Travers, and the killing of three of his friends and bandmates, when the bus that he and members of his band were travelling on exploded. *Id.* Eugene Reavey and Stephen Travers have both initiated civil proceedings seeking to hold the state to account for this violence. For Stephen Travers' case, some discovery has been provided and a further discovery request is pending. Eugene Reavey and Stephen Travers were also involved in the related

proceedings initiated by Edward Barnard, in which he sought to compel an investigation into the state activities and practices which formed the Glenanne Series. The High Court and the Court of Appeal both ruled that there must be an independent investigation into the activities. *Re Barnard (Edward)* [2017] NIQB 104; *Re Barnard (Edward)* [2019] NICA 38. The Barnard review is now underway and an independent police investigator has been appointed to examine the circumstances of the Glenanne Series and to produce a report addressing the allegations of systemic state collusion. *Terms of reference agreed for Glenanne Series review*, Kenova, https://tinyurl.com/sxndlkl.

The ongoing procedures in which *amici* are involved demonstrate that, in the absence of adequate controls, illegal state-sponsored violence against a nation's own citizens, even civilians, can become a reality. For decades, claims that national security required secrecy forestalled attempts to shed light on unlawful government conduct during the Troubles. Those claims increasingly ring hollow now that courts have begun to force the facts to be revealed, and started the process of securing accountability.

II. Accountability Through Judicial Review Is Critical To Preventing Such Unnecessary, Unlawful Deaths.

A. Judicial Review Is an Essential Means of Securing Accountability for—and Deterring—Unlawful State-Sponsored Violence.

For *amici*, recourse to the courts has been instrumental in the ongoing attempts to secure justice and accountability for the victims of arbitrary and unlawful state-sponsored violence. Although there is now increasing judicial accountability in Northern Ireland for past illegality, the lack of judicial accountability at the time of the killings undoubtedly fostered an environment where citizens were unnecessarily, and unlawfully, killed at the hands or urging of their government. The Court has an opportunity to set conditions within the United States to stop that from happening.

As Appellant convincingly argues (Br. 21-25), context matters greatly when the government claims state secrets privilege, and the privilege must yield when the government is seeking to deprive a litigant of information material to the defense of his life against an alleged unconstitutional killing. *Cf. United States v. Reynolds*, 345 U.S. 1, 12 (1953) ("[S[ince the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."); *In re Sealed Case* , 494 F.3d 139, 143 (D.C. Cir. 2007) ("[E]videntiary matters," like state secrets privilege, "cannot modify litigants' substantive rights as to either constitutional or statutory matters.").

Permitting the privilege to operate as a bar against constitutional claims seeking to prevent targeted extrajudicial executions would vitiate the only truly effective means of policing state-sponsored violence: judicial review.

First, proper oversight of the use of lethal violence by the state is vital to ensure accountability for those state agents responsible for it. It is fundamental that, in a democratic society constrained by the rule of law, decisions of such profound importance must be subject to rigorous and effective accountability mechanisms. Moreover, controls of that kind are necessary to maintain public confidence in the adherence of the state to the rule of law.

Second, only *independent* oversight can secure accountability for the use of lethal violence by the state. To be effective, any mechanism for determining the legality of the state's use of force must: (i) be sufficiently independent from the state entities responsible for decision-making concerning the use of lethal force; (ii) have sufficient power to gather (and, if necessary, to compel) the relevant evidence in order to form a complete picture of the use of force; and (iii) have some element of public accountability and transparency (even if public disclosures are carefully circumscribed as necessary to protect legitimate secrets). In *amici*'s experience, only mechanisms sharing these hallmarks have led to any accountability for the use of lethal force by the state in Northern Ireland. Although this has taken various forms—civil claims for damages brought against relevant state agencies, public law

challenges to particular decision-making in the investigation and review processes seeking injunctive or declaratory relief, and coronial inquest proceedings—all of them have been judicial or adjudicative in nature. Judicial procedures also assure the possibility of an effective remedy, including orders to prevent further illegality.

In short, the position of *amici curiae* is that proceedings of a judicial character are necessary to ensure accountability in circumstances of the allegedly unlawful use of lethal violence by the state.

Third, the experience of *amici curiae* suggests that these judicial proceedings must be ones that the victims of state violence and their families can invoke directly. Relying on government entities to initiate independent review—*i.e.*, through criminal prosecutions for state agents who use unlawful lethal force—will not work. The government is highly unlikely to police itself, and it is near nigh impossible for private citizens to force criminal prosecutions—even in legal systems that allow claims challenging failures to prosecute, such as in the United Kingdom. *See R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756 ("only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator"). Such a claim would be exceedingly difficult to bring in the United States. *Cf. Heckler v. Chaney*, 470 U.S. 821, 834 (1985) (describing "a general presumption of unreviewability of decisions not to enforce"),

A number of bereaved families who have lost family members to state violence during the Troubles have sought to challenge inaction by prosecutors in bringing such cases to trial. By way of example, the father of a man killed as a result of Agent Stakeknife sought to challenge the ongoing failure of the Public Prosecution Service to prosecute Stakeknife for perjury. *Re Mulhern* [2018] NIQB 33. And, in the case of *Re McGuigan* [2019] NICA 46, the Police Service for Northern Ireland refused to investigate allegations of torture in which government ministers were implicated. There, the Court declared that it was unlawful not to investigate allegations of torture, concluding that although it is "appropriate" that "civil servants should protect the political reputation of their Ministers," "there is a real danger that the rule of law is undermined if that extends to protecting Ministers from investigation in respect of criminal offences possibly committed by them." *Id.* § 117. As a result, a criminal investigation into the ministers who ordered or acquiesced in this treatment during the Troubles is now underway.

Even when criminal investigations have been ordered by the courts, however—again, something unlikely to occur under United States law—the prosecution of state agents responsible for lethal violence in the Troubles is a vexed matter. Because of decades of government concealment, the facts have often become clear only years after the relevant incident. The passage of time affects the availability of evidence, the memory of witnesses, and the identification of the

defendant—such that, in many cases, defendants have been able to successfully argue that a fair trial is no longer possible. Moreover, the higher standard of proof in criminal proceedings may result in acquittals of particular individuals even when it is beyond doubt that the government as a whole encouraged or facilitated violence. An example of this is *amicus* Michael O'Hare's case, where the soldier charged with the unlawful killing of his twelve-year-old sister, Majella O'Hare, was acquitted as a result of the evidence failing to meet the criminal standard of proof.

For these reasons, civil claims by victims of unlawful state violence are critical to ensuring accountability. In commencing a civil action, bereaved families are not dependent upon the decision-making processes of prosecutors. The lower standard of proof in civil proceedings can also facilitate a broader, and more thorough, investigation of the factual circumstances surrounding the death. And, most importantly, civil claims offer greater opportunity to prevent illegality before it happens. Courts have the power to prevent loss of life rather than merely punish past unlawful killings. They should not throw that power away on account of an evidentiary privilege.

B. International Human Rights Standards Require Effective Judicial Controls on Lethal State Violence.

Judicial review is not only an essential method for keeping state-sponsored violence within proper bounds, it is also required by international human rights law. *Amici* recognise that under American law, "non-self-executing" treaties "constitute

international law commitments" but do "not by themselves function as binding federal law." *Medellin v. Texas*, 552 U.S. 491, 504 (2008). And that the Senate's ratification of the International Covenant on Civil and Political Rights declared that the Covenant's substantive provisions are not self-executing. 138 Cong. Rec. 8071 (1992). Nonetheless, an evidentiary privilege should not be interpreted to violate the United States' obligations under international law if there is a reasonable contrary interpretation—as there plainly is here. *Cf. Macleod v. United States,* 229 U.S. 416, 434 (1913) (holding a statute "should be construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations"). And applying the state secrets privilege to cut off any review of a citizen's claim that the government has targeted him for extrajudicial killing without due process—or even notice of the basis for the government's belief that execution is warranted—flatly contradicts fundamental principles of international human rights law.

The right to life enshrines a basic and fundamental value of a democratic society. It guarantees freedom from arbitrary and unlawful lethal violence by the state. This substantive prohibition upon arbitrary killing would be rendered toothless however, if, in practice, there existed no procedural obligation to adjudicate challenges to the lawfulness of the use of lethal force by state authorities. For that reason—and buttressing the United States Constitution's own promise of due

process that Appellant's brief well explains—international human rights law imposes upon the United States a procedural obligation to provide for the effective investigation of the use of lethal (or potentially lethal) violence by the state.

First, it cannot be doubted that the United States owes an international law obligation to safeguard the right to life.

The right to life is protected by all major international human rights treaties. It is enshrined in, *inter alia*, Article 3 of the Universal Declaration of Human Rights (1948), Article 2 of the European Convention on Human Rights (1953) ("ECHR"), Article 6 of the International Covenant on Civil and Political Rights (1966), Article 4 of the American Convention on Human Rights (1969), Article 4 of the African Charter on Human and Peoples' Rights (1981); and Article 5 of the Arab Charter on Human Rights (2004). The right to life is regarded as a *jus cogens* norm of customary international law, and is protected in all major legal systems.

The minimum substantive protection of the right to life is an obligation, on the part of the state, to refrain from the arbitrary and unlawful use of lethal force. This protection has been particularly important for victims of unlawful state violence in Northern Ireland. The European Court of Human Rights has consistently found that killing by, or with the involvement of, state agents engages the protection of Article 2(1) of the ECHR, for which the state must be called to account. *McCann v.*

United Kingdom (1996) 21 EHRR 97; *Finucane v. United Kingdom* (2003) 37 EHRR 29.

Second, the duty to safeguard the right to life requires the state to provide a legal and administrative framework that will ensure that any use of lethal force complies with the law. *Makaratzis v Greece* (2005) 41 EHRR 49. In particular, the European Court of Human Rights held in *Makaratzis* that:

> Unregulated and arbitrary action by state officials is incompatible with effective respect for human rights. This means that, as well as being authorised under national law, policing operations must be sufficiently regulated by it, within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force.

Id. ¶ 48. A system of law governing the use of force demands an effective system of judicial review. *Makaratzis* is a judgment applying the ECHR and that the ECHR does not apply to the United States. However, as discussed below, the standards imposed by the ECHR have been widely followed outside of Europe and reflect an international consensus.

Third, any legal and administrative framework that aims to effectively control the use of lethal force must provide for investigations into the use of lethal force by state agents.

This procedural obligation has been particularly significant in ensuring accountability for the unlawful use of lethal force by the state in Northern Ireland.

In *Re McCaughey* [2012] 1 AC 725, the United Kingdom Supreme Court (Lord Phillips of Worth Matravers) described those obligations in the following terms:

> [A]rticle 2 by implication gave rise not merely to a substantive obligation on the state not to kill people but, where there was an issue as to whether the state had broken this obligation, a procedural obligation on the state to carry out an effective investigation into the circumstances of the deaths.

Id. § 2. This obligation extends to cases where the government puts a person at risk even if they have not lost their life, as Appellant has alleged here. *See Makaratzis* 41 EHRR 49 at ¶¶ 1-2.

Although described as procedural, the duty to investigate has fundamental substantive effects. The European Court of Human Rights has made clear that the substantive prohibition on arbitrary killing by agents of the state would be rendered ineffective without a procedural obligation to adjudicate the lawfulness of the use of lethal force by state authorities. *McCann* 21 EHRR 97 at §161. It also promotes public confidence in the adherence of the state to the rule of law. *Brecknell v. United Kingdom* (2008) 46 EHRR 42 at §65.

The nature of the investigation required to discharge the procedural obligation to control the use of lethal force will depend upon the circumstances of the particular case. At a basic level, the investigation must be capable of leading to the identification and punishment of those responsible for any potentially unlawful acts. *A.M. v. Secretary of State for the Home Department* [2009] EWCA Civ 219 at §32. It must involve a sufficient degree of public scrutiny so as to secure accountability

in practice as well as in theory, to maintain public confidence in the authorities' adherence to the rule of law, and to prevent any appearance of collusion in or tolerance of unlawful acts. *Al-Skeini v. United Kingdom* (2011) 53 EHRR 18; *Anguelova v. Bulgaria* (2004) 38 EHRR 31 at §140.

Fourth, this procedural obligation is not unique to the ECHR. A number of decisions concerning the scope of other human rights treaties agree that an effective procedural mechanism for the investigation of lethal state violence is an essential component of the right to life. *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, Inter-Am. Ct. Human Rights (5 July 2006) at §66; *General Comment No. 3 on the Right to Life*, African Comm'n on Human and Peoples' Rights (Nov. 2015) at §§ 2, 15; *General Comment No. 31*: *The Nature of the General Legal Obligation Imposed on States Parties to the International Covenant on Civil and Political Rights,* UN Human Rights Committee (Mar. 2004) at §§15, 18.

The obligation to provide an effective investigative and accountability mechanism is also reflected in a number of international legal instruments. Article 9 of the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions requires "a thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions." ECOSOC Res 1989/65. The Principles contain detailed requirements for investigative procedures; particularly relevant here, Article 10 specifies that the

"investigative authority shall have the power to obtain all the information necessary to the inquiry." *Id*.

The United Nations Office of the High Commissioner for Human Rights' Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016) is similar. Article 9(c) of the Minnesota Protocol provides that the "duty to investigate is an essential part of upholding the right to life" and "promotes accountability and remedy where the substantive right may have been violated." In particular, Article 27 requires that the "investigative mechanism charged with conducting the investigation must be adequately empowered to do so."

These authorities demonstrate that as a matter of international law, all states owe an obligation not simply to refrain from unlawful killing, but to put in place robust and effective mechanisms to investigate (and, if necessary, punish) the use of lethal violence by the state. As a matter of logic and precedent, this obligation extends to attempted lethal acts as well as completed ones. Proper investigation of attempted, and allegedly unlawful, killings is a necessary incident of the right to life. The United States' obligation to provide robust mechanisms to review the use of lethal force by the state is thus a powerful factor in favour of allowing Appellant's civil claim to proceed.

C. Courts Are Well Suited to Fashion Procedures that Protect Security While Furthering Effective Judicial Review of State-Sponsored Lethal Violence.

As Appellant describes at length (Br. 26-32), American courts have proven themselves able, time and again, to develop procedures that allow a case to proceed while protecting information from disclosure when necessary. *Amici* agree that protecting national security is, of course, a legitimate aim—and, in certain circumstances, a cogent reason to refuse disclosure in civil proceedings of particular classes of information. However, the experience of *amici* in Northern Ireland is that such interests are capable of being accommodated in a manner which nonetheless allows claims to progress, using procedures analogous to those described by Appellant.

First, the United Kingdom has a system of public interest immunity, which operates analogously (albeit not identically) to the state secrets privilege in the United States. The essence of public interest immunity is the common law rule that documentary evidence may be withheld on the basis that disclosure would be injurious to the public interest. *Conway v. Rimmer* [1968] AC 910. A critical difference between this immunity and the state secrets privilege, however, is the court's more active role in determining the appropriate balance between the public interest against disclosure, and the public interest in furthering justice by not withholding documentary evidence. *Id.* at 880. The relevant balance must be struck

by the court, not the government agency asserting the privilege (although, of course, the court gives due weight to the concerns expressed). *Id*. And, as here, courts have options for protecting information short of granting immunity from disclosure. Where a claim for the immunity fails, it is open to a court in the United Kingdom to order disclosure by way of a "confidentiality ring," *i.e.*, to only a limited circle of individuals, or on other terms crafted for a specific case. *R (Serdar Mohammed) v. Secretary of State for Defence* [2012] EWHC 3454 (Admin).

Second, in some circumstances, proceedings are conducted by way of "closed material procedure." In a closed material procedure, a security-cleared legal representative is appointed to represent the interests of a party in closed proceedings. This legal representative is referred to as a special advocate. A special advocate may not disclose "closed" material to the party whom they represent, but may make submissions in closed proceedings on the basis of such material in order to advance that party's case (as set out by their appointed legal representatives in "open proceedings"). Typically, although not always, a court hearing a case using a closed material procedures will deliver two judgments: a public "open" judgment, which is based on public material or material which, in the course of proceedings, is found to not be sensitive; and a "closed" judgment, which is not made public (even to the parties' "open" representatives), and sets out the court's reasoning based on the closed material.

Closed material procedures are available in a range of different proceedings. In particular, since the passage of the Justice and Security Act 2013, they are available in most civil proceedings. The 2013 Act was specifically enacted to ensure that the security services could be held to account in legal proceedings. Kenneth Clarke MP, the minister responsible for enactment, told Parliament that the 2013 Act was needed because:

> … it has become well nigh impossible for British judges to untangle, and adjudicate on, claims and counter-claims of alleged British involvement in the mistreatment of detainees.

House of Commons (Hansard), 18 December 2012, Vol. 555, Col. 715. In *amici*'s view, the use of closed material procedures is an imperfect solution, because it runs contrary to the fundamental principles of open justice and the right of parties themselves to know the case against them and the evidence upon which it is based. *Al Rawi v. Security Service* [2012] 1 AC 531. Nevertheless, it is a far sight better than no accountability at all and it allows a case to proceed where, in other circumstances, it may have become untriable due to the application of public interest immunity. *Cf. Carnduff v. Rock* [2001] EWCA Civ 680.

Such closed proceedings allow a judge to review sensitive material to determine whether actions of the state are lawful without putting national security at risk. As Appellant describes, analogous procedures are available to American courts, and Appellant's counsel already has or could obtain the requisite security clearance

(Appellant's Br. 19 n.1). In such circumstances, there is no reason why the asserted need to protect information from disclosure should stop any judicial review at all from going forward.

* * * * *

There is a powerful overriding public interest in courts having the capacity to hold the state to account for its arguably unlawful use of lethal force. Where that interest is in tension with the public interest in refusing disclosure on national security grounds, simple procedures can easily facilitate claims proceeding to trial, while protecting the necessary information. The alternative—that claims concerning unlawful state violence are dismissed altogether through the application of the state secrets privilege—is profoundly concerning. *Amici* know, through painful experience, that the absence of effective, independent checks on government violence can lead to unnecessary, unlawful civilian deaths at the hands of state actors. It is imperative that assertions of state secrets not become an impenetrable shield for state-sponsored lawlessness.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

/s/ Hyland Hunt

Hugh Southey QC
Tim James-Matthews
MATRIX CHAMBERS
Griffin Building, Gray's Inn
London WC1R 5LN

Darragh Mackin
PHOENIX LAW
92 High St.
Belfast BT1 2BG

Hyland Hunt
Ruthanne M. Deutsch
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW
Suite 900
Washington, DC 20001
(202) 868-6915
hhunt@deutschhunt.com

Counsel for Amici Curiae

March 17, 2020

CERTIFICATE REGARDING SEPARATE BRIEF

Pursuant to D.C. Circuit Rule 29(d), I certify that a separate amicus brief is necessary because of the unique perspective offered by *amici* as victims of state-sponsored violence and participants in ongoing judicial accountability proceedings in the United Kingdom.

/s/ Hyland Hunt
Hyland Hunt

March 17, 2020

CERTIFICATE OF COMPLIANCE

This amicus curiae brief is in 14-point Times New Roman proportional font and contains 5,448 words as counted by Microsoft word, excluding the items that may be excluded. The brief thus complies with the type-face, style, and volume limitations set forth in Rule 29(a)(5) and 32(a)(5)–(7)(B) of the Federal Rules of Appellate Procedure.

/s/ Hyland Hunt
Hyland Hunt

March 17, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on March 17, 2020, I served the foregoing amicus curiae brief upon all counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system.

/s/ Hyland Hunt
Hyland Hunt