No. 12-56506

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE LUIS MUNOZ SANTOS,

Petitioner-Appellant,

v.

LINDA R. THOMAS, Warden,

Respondent-Appellee.

On Appeal from the United States District Court
for the Central District of California

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, CENTER FOR CONSTITUTIONAL RIGHTS, HUMAN RIGHTS FIRST AND HUMAN RIGHTS WATCH AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR REHEARING

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STATEMENT REGARDING AUTHORITY TO FILE WITHOUT LEAVE

Pursuant to Federal Rule of Appellate Procedure 29(a), *amici curiae* hereby inform the Court that all parties have consented to the filing of this brief. As agreed by the parties, *amici curiae* maintain that their brief is timely filed within the period permitted under Circuit Rules 26-2, 29-2 and Federal Rule of Appellate Procedure 26(c).[1]

[1] In preparation for filing the brief, *amici curiae* explained their interpretation of the application of the three-day period provided under Federal Rule of Appellate Procedure 26(c) to the Clerk. On May 26, 2015, a different potential interpretation was suggested by the Clerk's office to other counsel of *amici curiae*, but the brief could not be completed for filing until May 27, 2015. *Amici curiae*, however, maintain that the brief is timely filed.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), *amici curiae* the American Civil Liberties Union, American Civil Liberties Union of Southern California, Center for Constitutional Rights, Human Rights First and Human Rights Watch state that they all are non-profit corporations; that none of *amici curiae* has any parent corporations; and that no publicly held company owns any stock in any of *amici curiae.*

STATEMENT OF INTEREST

Amici curiae, the American Civil Liberties Union, American Civil Liberties Union of Southern California, Center for Constitutional Rights, Human Rights First and Human Rights Watch,[2] are civil rights and human rights organizations that engage in litigation, education and advocacy to promote respect for and adherence to international human rights law and principles—including the prohibition on the infliction of torture or its use in legal proceedings—by all nations, including the United States.[3]

Amici curiae are gravely concerned by the Panel's decision affirming a probable cause determination in support of the extradition of a Mexican citizen that was based on evidence procured by torture. The Panel's holding violates Article 15 of the United Nations' Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture" or "CAT") and is inconsistent with elementary and U.S. constitutional principles recognizing

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[2] *Amici curiae* submit this brief in accordance with Federal Rule Appellate Procedure 29 and Circuit Rule 29-2, and certify that no party's counsel authored this brief in whole or in part, and that no party, party's counsel, or other person or entity contributed money that was intended to fund the preparation or submission of this brief.

[3] A fuller description of *amici curiae*'s interests is included in Appendix A to this brief.

the illegitimacy of evidence obtained by torture. If left standing, the holding represents a judicial imprimatur to an internationally condemned practice.

INTRODUCTION AND SUMMARY OF ARGUMENT

There are few rules as clear, well-established or important—under U.S. and international law—as the prohibition against the use of evidence obtained under torture. Nonetheless, a panel of this Court held that evidence obtained under torture may be admitted and considered by U.S. courts in support of a government's extradition request.

The United States ratified the Convention Against Torture in 1994, joining 158 countries in a global commitment to eliminate state torture and all of its manifestations. That commitment is not merely symbolic. By ratifying CAT, the United States made its provisions "the supreme Law of the Land," binding all branches of the government, including the judiciary. U.S. Const. art. VI, cl. 2. Article 15 of CAT specifically prohibits state parties from considering evidence procured by torture in judicial proceedings, and thus required the extradition court below, *see* Case No. CV 06-05092 MMM (AJW) (the "Extradition Court"), to ascertain whether the evidence before it was a product of torture—as it

undisputedly was[4]—and reject that evidence in evaluating whether probable cause supported the extradition.

These international law prohibitions echo long-established U.S. constitutional law principles recognizing that statements obtained through torture are fundamentally unreliable and incompetent as evidence. Moreover, as the Supreme Court unanimously pronounced in *Brown v. Mississippi*, "[i]t would be difficult to conceive of methods more revolting to the sense of justice" than to admit confessions coerced by "whipping" or other forms of torture. 297 U.S. 278, 281-82, 286 (1936). Because the "common law has regarded torture and its fruits with abhorrence for 500 years," *A(FC) v. Secretary of State*, [2005] UKHL 71 [51] (appeal taken from Eng.) (per Lord Bingham), U.S. courts have an independent obligation to police—and reject—their use.

Thus, contrary to the Panel's assumption, evidence procured by torture is not just another form of attestation to be weighed in a probable cause calculus. The Panel's ruling contravenes the prescriptions of CAT and clearly established U.S. law by erroneously carving out an exception to the absolute anti-torture prohibitions set forth therein. The decision represents a judicial sanction of the use

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[4] The Mexican government has not disputed that the witnesses' statements were obtained under torture. *See* Appellant's Petition for Panel Rehearing and/or Rehearing *En Banc* (the "Petition") at 4 (Dkt. No. 53).

of torture in U.S. extradition proceedings, inviting foreign governments to employ torture instead of ending it.

ARGUMENT

I. THE PANEL'S RULING CONTRAVENES FEDERAL LAW AND INVOLVES A MATTER OF EXCEPTIONAL IMPORTANCE.

The Panel's ruling contravenes the United States' obligations under Article 15 of CAT and therefore presents an exceptionally important matter requiring rehearing: whether a U.S. court may admit and rely exclusively on evidence obtained by torture in a legal proceeding. In this case, the Panel affirmed the Extradition Court's finding that probable cause existed for the extradition of Appellant Jose Luis Munoz Santos ("Appellant") based entirely on the statements of two alleged co-conspirators, Jesus Hurtado and Fausto Rosas, who thereafter recanted their statements, testifying that those statements had been obtained by means of physical torture by the Mexican police. (*See* Exhibit A to Petition at 12-15.)

Although Mexico did not dispute the allegations of torture (*see* Petition at 4), the Extradition Court effectively accepted the evidence as sufficient to support a probable cause finding, reasoning that the recantations of the confession constituted mere contradictory evidence that could be discarded in assessing probable cause. (*See* Appellant's Excerpts of Record ("ER") at 59-64.) In

affirming the Extradition Court's decision, the Panel overlooked the United States' obligations under CAT and more than a century of U.S. constitutional and evidentiary law holding that evidence obtained under torture is inherently unreliable and never admissible. Because the Panel's decision is contrary to established federal law and presents an issue of exceptional importance, the Court should grant rehearing. *See* Fed. R. App. P. 35(a).

A. The Panel's Decision Violates Article 15 of CAT, Which Requires the Extradition Court to Exclude Statements Obtained by Torture.

Signed by President Reagan in 1988, CAT was ratified by the U.S. Senate in 1994. Adopted today by 158 nations, CAT represents the international community's universal condemnation of the practice of torture, and obligates all state parties to enforce its interdependent provisions to ensure the treaty's efficacy. Article 15 of CAT contains an "exclusionary rule" that requires courts—including extradition courts—to scrutinize questionable evidence and exclude it if the evidence was procured by torture. Because the statements supporting extradition in this case were procured by torture, the Extradition Court was obligated under Article 15 to exclude these statements in evaluating whether probable cause supported Appellant's extradition under 18 U.S.C. § 3184.

1. The "Exclusionary Rule" Established by Article 15 Is Necessary to Effectuate CAT.

"Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world," CAT requires, through a variety of interdependent provisions, that all state parties, including the United States, prohibit and punish torture, and eliminate incentives and means to torture. Preamble to CAT, 1465 U.N.T.S. 85 (Dec. 10, 1984). Critical to the architecture of CAT, Article 15 provides:

> Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence *in any proceedings*, except against a person accused of torture as evidence that the statement was made.

Id., art. 15 (emphasis added).

This "exclusionary rule" is broadly recognized as an integral part of CAT's overarching prohibition on torture. *See, e.g.*, U.N. Secretariat, *Compilation of General Comments Adopted by the Human Rights Committee*, U.N. Doc. HRI/GEN/1/Rev.7, General cmt. No. 20, ¶ 12 (Mar. 10, 1992); Committee Against Torture, *P.E. v. France*, U.N. Doc. CAT/C/29/D/193/2001, ¶ 6.3 (Dec. 19, 2002). One authoritative treatise on CAT explains that the rule is based on two inter-related considerations: (1) that statements made under torture are inherently unreliable, and (2) that prohibiting the use of such statements removes the incentive to torture. *See* J. Herman Burgers and H. Danelius, *The United Nations*

Convention Against Torture: A Handbook on the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 148 (Martinus Nijhoff 1988). The rule applies to "any proceedings," CAT art. 15, which, according to the U.N. committee tasked with monitoring and enforcing compliance with the treaty, necessarily includes a state party's extradition proceedings. Committee Against Torture, *Ktiti v. Morocco*, U.N. Doc. CAT/C/46/D/419/2010, ¶ 8.8 (July 5, 2011); *see also P.E. v. France*, U.N. Doc. CAT/C/29/D/193/2001 at ¶ 6.3 (the "generality of the provisions of article 15 derive from the absolute nature of the prohibition of torture"). Thus, where an individual alleges that statements supporting an extradition request were, even in part, "obtained as a result of torture, the State party ha[s] the obligation to ascertain the veracity of such allegations." *P.E. v. France*, U.N. Doc. CAT/C/29/D/193/2001 at ¶ 6.3.

2. Article 15 Is Binding and Enforceable in U.S. Extradition Proceedings.

After signing CAT in 1988, the Reagan administration transmitted a series of reservations, understandings and declarations to the Senate for its advice and consideration, including a declaration that Articles 1 through 16 would not be self-executing, thereby requiring Congress to pass implementing legislation before litigants could *affirmatively* invoke CAT in private actions. S. Treaty Doc. No. 100-20, at 2 (1988). *See also* U.S. Dep't of State, *Initial Report to the Committee*

Against Torture Under Article 19, U.N. Doc. CAT/C/28/Add.5 ¶ 56 (Oct. 15, 1999) ("In United States practice, provisions of a treaty may be denominated 'non-self-executing,' in which case they may not be invoked or relied upon as a cause of action by private parties in litigation.").

The administration's analysis, however, underscored two key points. First, existing domestic law prohibitions against considering involuntary evidence were already "stricter than is provided for under the Convention."[5] S. Treaty Doc. No. 100-20, at 14-15. Indeed, as described below, *see infra* section I.B, constitutional law has categorically forbidden evidence obtained by torture from being admitted in U.S. legal proceedings since long before the United States signed and ratified CAT.

Second, U.S. officials responsible for reviewing the treaty understood that CAT—including Article 15—would be enforceable even as to non-self-executing provisions not covered by implementing legislation. *See Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations*, 101st Cong. 2, at 42 (1990) (testimony of Abraham Sofaer, State Department Legal Advisor) ("If you

[5] In its reporting to the United Nations Committee Against Torture, the U.S. government has consistently maintained this position. *See, e.g.*, *Initial U.S. Report on CAT*, ¶ 287 ("Current United States law contains stringent rules regarding the exclusion of coerced statements and the inadmissibility of illegally obtained evidence in criminal trials. These rules are stricter than article 15 of the Convention requires.").

adopt this treaty, it is not just international law. The standard becomes part of our law."). This point is consistent with basic constitutional principles. Under the Constitution, a ratified treaty "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. "Whether a treaty is self-executing or not, it is legally binding on the United States. Whether it is self-executing or not, it is supreme law of the land." Louis Henkin, *Foreign Affairs and the United States Constitution* 203 (2d ed. 1996).

Thus, even if Article 15 is not "self-executing" and therefore does not affirmatively confer a private right of action, as a ratified treaty provision it nevertheless must be enforced by courts when invoked *defensively* in court proceedings, such as habeas proceedings, 18 U.S.C. § 2241, or extradition proceedings, 18 U.S.C. § 3184, where jurisdiction is independently conferred on the court. *See* Carlos Manuel Vasquez, *Treaty-Based Rights and Remedies of Individuals*, 92 Colum. L. Rev. 1082, 1143 (1992) ("[A] treaty that does not itself confer a right of action . . . is not for that reason unenforceable in the courts. A right of action is not necessary if the treaty is being invoked as a defense").[6] The

[6] *See also* Oona Hathaway, et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 Yale J. Int'l L., 51, 83-87 (2012); David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 Yale J. Int'l L. 129, 134 (1999); *(cont'd)*

Supreme Court recently confirmed this elementary principle of law. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2005) ("To say that the Supremacy Clause does not confer a right of action is not to diminish the significant role that courts play in assuring the supremacy of federal law. For once a case or controversy properly comes before the court, judges are bound by federal law.").

3. The Extradition Statute Should Be Interpreted to Avoid Conflict with U.S. Obligations Under Article 15 of CAT.

Moreover, the Extradition Court should have construed the statute governing certification of extraditability, 18 U.S.C. § 3184, so as to ensure that it did not conflict with the United States' treaty obligations under Article 15. It is hornbook law that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804); *see also* Restatement (Third) of Foreign Relations Law § 114 (1987) ("[A] United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984) (refusing to interpret statute in a way that would render a treaty unenforceable in

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(cont'd from previous page)

Thomas Michael McDonnell, *Defensively Invoking Treaties in American Courts*, 37 Wm. & Mary L. Rev. 1401, 1451 (1996).

the United States); *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009) (holding that treaty at issue did not have the force of law in U.S. courts but that it could serve as a "useful guide" in interpreting other provisions of law so as to avoid a violation of the law of nations) (citing *Charming Betsy*, 6 U.S. at 118).

Under § 3184, a fugitive cannot be surrendered to a foreign government unless there is "evidence sufficient to sustain the [underlying] charge," which requires "competent evidence" to support probable cause. *Mainero v. Gregg*, 164 F.3d 1199 (9th Cir. 1998) (citation omitted), *superseded by statute on other grounds*, Pub. L. No. 105-277, § 2242. Further, article 11(1)(a) of the United States-Mexico Extradition Treaty, T.I.A.S. No. 9656, 31 U.S.T. 5059, requires that such evidence be "sufficient for the arrest and commitment for trial of the person sought."

Thus, to avoid a conflict between § 3184 and the United States' international obligations under Article 15, the Extradition Court was obligated to ensure that statements proffered as "evidence" under the statute were reliable and not procured by torture. The court's failure to interpret its statutory obligations in light of Article 15, and to review the credibility of all the evidence adduced in support of extradition, conflicts with the United States' obligations under CAT and renders unlawful the certification of Appellant's extradition.

B. The Panel's Decision Conflicts with Long-Established U.S. Law Prohibiting the Admission of Statements Obtained by Torture.

The Panel's decision holds that an extradition court can, and perhaps should, ignore evidence that statements supporting extradition were obtained by torture when that evidence of torture conflicts with the content of the original statements. This conclusion is not only contrary to international law, it conflicts with elementary due process principles mandating that no tribunal should countenance evidence procured by torture.

Due process requires that statements made under physical coercion or torture be excluded in any proceeding. In *Brown v. Mississippi*, the Court equated defendants' confessions obtained by torture with "perjured . . . testimony," explaining that "[t]he constitution recognized the evils that lay behind these practices, and prohibited them in this country."[7] 297 U.S. at 287 (citation omitted). *See also Chambers v. Florida*, 309 U.S. 227, 236 (1940) (recognizing "hatred and abhorrence of illegal confinement, torture, and extortion of confessions" as the impetus for the adoption of the constitutional due process guarantee); *Williams v.*

[7] During this era, the Supreme Court cited torture as a key characteristic distinguishing authoritarian regimes from democratic societies. In contrast to totalitarian states, which employ "unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture," the Court vowed that "[s]o long as the Constitution remains the basic law of our Republic, America will not have that kind of government." *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944).

United States, 341 U.S. 97, 98-99, 101-02 (1951) ("when officers wring confessions from the accused by force and violence, they violate some of the most fundamental, basic, and well-established constitutional rights").

In short, "[a] constitutional right is traduced the moment torture or its close equivalents are brought to bear." *Chavez v. Martinez*, 538 U.S. 760, 789 (2003) (Kennedy, J., concurring in part). "[T]orture [is] so beyond the pale of civilized society that no court could countenance it." *United States v. Anderson*, 772 F.3d 969, 975 (2d Cir. 2014).

As the Petition recounts, Rosas and Hurtado testified that their initial inculpatory statements were beaten out of them. Rosas was bound, tied to a chair and struck until he signed a statement implicating Appellant. (Petition at 3 (citing ER 110-11, 169-70).) Hurtado was bound, sprayed with water and stomped on; police even threatened to harm his daughter. (*Id.* at 4 (citing ER 196).) Hurtado was later observed in court with physical injuries consistent with the beating he described. (*Id.* at 4 (citing ER 108).) Under *Brown* and its progeny, as well as elementary principles of justice and due process, the Extradition Court was required to consider the undisputed evidence of torture and exclude the torture-procured statements.

Finally, evidence obtained by torture is not only prohibited on legal and moral grounds, but is widely understood to be incompetent and unreliable. For

example, the U.S. Army Field Manual instructs that torture is "a poor technique, as it yields unreliable results . . . and can induce the source to say whatever he thinks the interrogator wants to hear." Dep't of the Army, *Field Manual 34-52 Intelligence Interrogation*, ch. 1-8 (1992). Political scientists have likewise concluded that testimony obtained by torture yields little to no probative value, let alone "sufficient evidence" to reach even non-judicial conclusions. *See, e.g.*, Darius Rejali, *Torture and Democracy* 500 (2007) ("Torture induces numerous false positives and buries interrogators in useless information."). Accordingly, even if it were not normatively prohibited, such torture-tainted "evidence" would not, as an evidentiary matter, be "sufficient to sustain the [underlying] charge." 18 U.S.C. § 3184.

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The Convention Against Torture and parallel principles of U.S. constitutional law prohibit and denounce torture and its fruits in absolute terms. Acceptance of evidence based on torture not only violates the United States' obligations under international law, but also risks legitimizing the practice as a matter of law. For once torture is sanctioned by law, "it spreads like an infectious disease, hardening and brutalising those who have become accustomed to its use." *A(FC)*, ¶ 113 (per Lord Hope) (quoting Holdsworth).

CONCLUSION

For the foregoing reasons, the Court should grant rehearing, and remand this case for further proceedings.

Respectfully submitted,

/s/ Allen L. Lanstra

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APPENDIX “A”

The **American Civil Liberties Union (ACLU)** is a nationwide, non-profit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embedded in the Constitution. The ACLU of Southern California is one of its state affiliates. Founded more than 90 years ago, the ACLU has participated in numerous cases before this Court involving the scope and application of constitutional and human rights, both as direct counsel and as amicus curiae.

The ACLU established the Human Rights Program in 2004 to protect and promote human rights and to hold the U.S. government accountable to universal human rights laws and principles. In pursuit of these objectives, the Human Rights Program has appeared in numerous cases nationwide, in which the proper interpretation of treaty-based rights and customary international law has been at issue. This case is of significant interest to the ACLU and the ACLU of Southern California as it concerns the proper application of the U.N. Convention Against Torture, a treaty ratified by the United States, in U.S. courts and specifically the enforceability of Article 15's exclusionary rule in U.S. extradition proceedings. The outcome of this case has potentially far-reaching legal consequences and the proper resolution of the issues raised is, therefore, a matter of critical importance to the ACLU, the ACLU of Southern California, and their members.

The **Center for Constitutional Rights (CCR)** is a nonprofit legal and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international human rights law. Since its founding in 1966 out of the civil rights movement, CCR has brought numerous cases challenging the state use of torture and seeking accountability domestically and internationally against individuals and corporations who engage in torture, including in cases under the Alien Tort Statute, 28 U.S.C. § 1350, *see Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), *Doe v. Unocal Corp*., 395 F.3d 932 (9th Cir. 2002), cases challenging the practice of "extraordinary rendition," *see Arar v. Aschroft*, 585 F.3d 559 (2d Cir. 2009) (en banc), cases seeking redress for torture and abuse in Abu Ghraib, *Al Shimari v. CACI Premier Tech., Inc*., 758 F.3d 516 (4th Cir. 214) and cases seeking access to habeas corpus for individuals detained in Guantanamo Bay, *see Rasul v. Bush*, 542 U.S. 466 (2004).

Human Rights First ("HRF") is a non-profit, nonpartisan international human rights organization based in Washington, D.C. and New York. HRF believes that respect for human rights and the rule of law help ensure the dignity to which everyone is entitled and will stem intolerance, tyranny, and violence.

HRF strongly advocated for the SSCI's investigation of the CIA's use of torture and cruel, inhuman, and degrading treatment of individuals after the 9/11 attacks, and the release of the executive summary, findings, and conclusions of the resulting report. HRF works to ensure that the U.S. keeps its promise to absolutely ban torture in its name, and to comply with the international human rights obligations it has ratified in the ICCPR, CAT, and relevant International Humanitarian Law.

Human Rights Watch, a non-profit organization, is the largest U.S.-based international human rights organization. It was established in 1978 to investigate and report on violations of fundamental human rights and now operates in some 90 countries worldwide. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others in order to end abusive practices.

Human Rights Watch has documented torture in many countries, and has advocated globally and consistently for respect of the Convention against Torture, including the prohibition on refoulement to torture and the use of evidence produced by torture. Its US Program has monitored US compliance with the Convention against Torture extensively for years, producing research on torture in the United States in many contexts, including in prison conditions, immigration detention, torture by the military, and torture by the Central Intelligence Agency. We have advocated for holding those responsible for torture in the United States to account, and for the exclusionary rule barring evidence produced by torture to be respected by military commissions at Guantanamo Bay. Failure to apply the exclusionary rule in US extradition proceedings would be a very troubling development. Therefore the issues raised by this case are of great importance to Human Rights Watch.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 12-56506

I certify that, pursuant to Federal Rule Appellate Procedure 29(d) and Circuit Rule 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less.

Respectfully submitted,

May 27, 2015

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that the Brief of the American Civil Liberties Union, American Civil Liberties Union of Southern California, Center for Constitutional Rights, Human Rights First and Human Rights Watch as *amici curiae* in Support of Appellant's Petition for Panel Rehearing and/or Rehearing *En Banc* was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 27, 2015.

May 27, 2015

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