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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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 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*.

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STATEMENT REGARING AUTHORITY TO FILE WITHOUT LEAVE

Pursuant to Circuit Rule 29-2(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 Rule 29-2(e)(2).

STATEMENT OF INTEREST

Amici curiae, the American Civil Liberties Union, American Civil Liberties Union Foundation of Southern California, Center for Constitutional Rights, Human Rights First and Human Rights Watch,[1] 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.[2]

Amici curiae are gravely concerned by the lower court's decision authorizing the extradition of an individual without evaluating whether the evidence supporting the extradition request was procured by torture. Extradition under these circumstances contravenes Article 15 of the United Nations' Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT" or the "Convention Against Torture"), customary international law, and fundamental U.S. constitutional principles all of which affirm the illegitimacy of evidence obtained by torture.

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[1] *Amici curiae* 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 preparing or submitting this brief.

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

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 by torture. Nonetheless, the extradition court below (the "Extradition Court"), *see In the Matter of the Extradition of Munoz Santos*, No. 06-05092 (C.D. Cal. Jun. 13, 2011), held that torture-tainted evidence may be admitted in a judicial proceeding in support of a government's extradition request, without inquiring into whether the evidence was in fact obtained by torture. Specifically, the court refused to consider evidence explaining that the only inculpatory statements in support of the government's extradition request was obtained by torture—signaling that torture-tainted evidence can be, like any other form of proof, competent evidence in a probable cause determination. The decision misapprehended the significance of the anti-torture norm and ignored international legal obligations requiring inquiry into and exclusion of such evidence.

In ratifying the Convention Against Torture in 1994, the United States joined a global commitment to eliminate torture and other forms of cruel, inhuman or degrading treatment. U.S. ratification made CAT "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, reflecting a widely accepted customary international law norm, establishes an "exclusionary rule," which prohibits state

parties from considering evidence procured by torture or other ill-treatment in judicial or any other proceedings. This international prohibition echoes long-established U.S. constitutional law principles recognizing that statements obtained through torture are fundamentally unreliable and incompetent as evidence, and that such evidence must be rejected to protect both the dignity of the individual and the legitimacy of the court in a constitutional system.

Contrary to the Extradition Court's operating assumption, evidence procured by torture is not just another form of attestation to be weighed in a probable cause calculus. The prohibition against torture represents a "legal archetype," a principle that is "vividly emblematic of our determination to sever the link between law and brutality." Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House,* 105 Colum. L. Rev. 1681, 1726-27 (2005). Among nations, "the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind." *Filartiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). Thus, 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, including the Extradition Court, have an independent obligation to police—and reject—its use.

The Extradition Court's decision risks judicial sanction of the use of torture, inviting foreign governments to employ torture instead of working with the United

States and all nations to end it.

ARGUMENT

I. THE COURT SHOULD CONSIDER THE ARGUMENTS RAISED BY AMICI.

In its opposition to Mr. Munoz Santos' (hereinafter "Munoz") Petition for Rehearing, the government observes that *Amici*'s arguments were not raised below and cites authority that holds that "generally" and "in ordinary circumstances" such arguments should be deemed waived. Appellee's Opp'n to Pet. for Reh'g at 21 n.7, *Munoz Santos v. Thomas*, No. 12-56506 (9th Cir. 2015), ECF No. 63. The government's argument (which does not address the merits of *Amici*'s analysis) should not preclude this Court's consideration of *Amici*'s arguments, given their significance and relevance to the development of an important body of law.

As a threshold matter, there is no jurisdictional bar to hearing new arguments and the Court has discretion to consider *Amici*'s position. *Mercury Interactive Corp. Sec. Litig. v. Mercury Interactive Corp*., 618 F.3d 988, 992 (9th Cir. 2010). This Court has acted on such discretion when considering new arguments raising structural constitutional considerations relating to, for example, federalism or separation of powers. *See Swan v. Peterson*, 6 F.3d 1373, 1383 (9th Cir. 1993). Similarly, where a treaty provision, such as Article 15 of CAT, speaks directly *to obligations of the judiciary*, this Court should not ignore government

conduct that puts the United States in breach of its international commitments. As the Seventh Circuit explained:

> The plaintiffs ask us to close our eyes to the treaty because Quasar failed to mention it to the district judge. Ordinarily we will not consider a point that was not raised in the district court, but we *can* do so . . . and, for the sake of international comity, amity, and commerce, we should do so when we are asked to consider the bearing of a major treaty with a major power and principal ally of the United States.

Fortino v. Quasar Co., 950 F.2d 389, 391 (7th Cir. 1991) (emphasis added); *see also Stone v. San Francisco*, 968 F.2d 850, 855-56 (9th Cir. 1992) (citing *Fortino*'s "comity" principle favorably).

Amici respectfully submit that this Court should consider the important treaty-based and customary international law arguments presented here to ensure U.S. compliance with its binding international law obligations.

II. THE EXTRADITION OF MR. MUNOZ, BASED ON EVIDENCE PROCURED BY TORTURE, WOULD VIOLATE BINDING OBLIGATIONS UNDER CAT AND CUSTOMARY INTERNATIONAL LAW.

As a treaty ratified by the U.S. Senate in 1994, CAT imposes legal obligations on the United States. U.S. Const. art. VI, cl. 2 ("Treaties made, or which shall be made, under the Authority of the United States, shall be supreme Law of the Land."). CAT's overall objective is the eradication of torture and other forms of cruel, inhuman or degrading treatment. Integral to CAT's objectives, Article 15 incorporates an "exclusionary rule," which requires U.S. courts—

including extradition courts—to carefully scrutinize evidence produced in any proceeding and to exclude it if there is a real risk that it was procured by torture or other ill-treatment.

Article 15 is not merely hortatory or aspirational. It is a binding international law norm, akin to constitutional or statutory authority, which U.S. courts should enforce in proceedings over which they have jurisdiction—even absent any implementing legislation that might separately create a private right of action. *See infra* Section I(B). The principles embodied in Article 15 are so widely accepted among nations, that they have the status of customary international law—a body of common law that U.S. courts likewise must consider when enforcing domestic law. *See infra* Section I(C).

A. Article 15 of CAT and Customary International Law Require the Exclusion of Torture-Tainted Statements from Extradition Proceedings.

Article 15 of CAT 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).

The Committee Against Torture, the United Nations' body of experts that monitor and enforce state parties' compliance with CAT, recognizes this "exclusionary rule" as key to ensuring CAT's overarching goal of prohibiting and

preventing torture. *See* Committee Against Torture, *Ms. P.E. v. France*, Comm. No. 193/2001, ¶ 6.3, U.N. Doc. CAT/C/29/D/193/2001 (2002) ("the generality of the provisions of article 15 derive from the absolute nature of the prohibition of torture"). Article 15 applies to exclude reliance on any statement, including those made by third parties, that was procured by torture or cruel, inhuman and degrading treatment. Committee Against Torture, *Ktiti v. Morocco*, Comm. No. 419/2010, ¶ 8.8, U.N. Doc. CAT/C/46/D/419/2010 (2011); U.N. Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, ¶ 6, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008). In these instances, the rule is animated by three fundamental concerns: (1) excluding such statements removes the incentive to use these practices; (2) such statements are inherently unreliable; and (3) they undermine the right to a fair trial. *See A. & Ors. v. Sec'y of State for the Home Dept.*, [2005] UKHL 71 ¶ 39 (Lord Bingham of Cornhill) (quoting 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)). Given its provenance, the exclusionary rule, like the prohibition of torture, is not subject to any limitations or exceptions. *See, supra*, U.N. Committee Against Torture, *General Comment No. 2*, at ¶ 6.

Article 15 applies broadly to exclude any statement (or other evidence) produced in "any proceedings" of a criminal, civil or administrative nature, including extradition proceedings. U.N. Committee Against Torture, *Ms. G.K. v. Switzerland*, Comm. No. 219/2002, ¶ 6.10, U.N. Doc. CAT/C/30/D/219/2002 (2003). If, during these proceedings, an individual alleges that a statement was, even in part, "obtained as a result of torture, the State party ha[s] the obligation to ascertain the veracity of such allegations." *Ms. P.E. v. France*, *supra*, at ¶ 6.3; *Ktiti v. Morocco*, *supra*, at ¶ 8.8; *A. & Ors.*, UKHL 71 ¶ 56 ("If [the U.K. Special Immigration Appeals Commission] is unable to conclude that there is not a real risk that the evidence has been obtained by torture, it should refuse to admit the evidence.").

Article 15's exclusionary rule is also an established norm of customary international law. Customary international law arises from general and consistent state practice that is accepted as law which may be ascertained "by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing the law." *See Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699, 714-15 (9th Cir. 1992) (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820). The exclusionary rule's status as custom is evidenced by its inclusion in CAT, a treaty today ratified by 158 states, and other widely ratified human rights treaties,

including the International Covenant on Civil and Political Rights, arts. 7, 14, 999 U.N.T.S. 171 (1976) ("ICCPR"); the African [Banjul] Charter on Human and Peoples' Rights, arts. 5, 7, 21 I.L.M. 58 (1982) ("ACHPR"); the American Convention on Human Rights, arts. 5, 8(3), 1144 U.N.T.S. 123 (1978) ("ACHR"); and the Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 3, 6, 213 U.N.T.S 222 (1953) ("ECHR").

An exclusionary rule is guaranteed by these treaties as an integral component of the protections from torture, cruel, inhuman or degrading treatment and the fair trial rights that each expressly guarantee.[3] Recognition of an exclusionary rule in numerous resolutions adopted by U.N. member states and other international instruments and the rule's incorporation in laws and practices of

[3] *See, e.g.*, ICCPR: Human Rights Committee, General Comment No. 20, *Article 7, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶ 12, U.N. Doc. HRI/GEN/1/Rev.1 (1994); Human Rights Committee, General Comment No. 32, *Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, ¶ 41, U.N. Doc. CCPR/C/GC/32 (2007); ACHPR: African Comm'n on Human and Peoples' Rights, *Egyptian Initiative for Personal Rights and Interights v. Arab Republic of Egypt*, ¶¶ 104-41, Comm. No. 334/06 (2011); ACHR: Inter-Am. Comm'n H.R., *Manriquez v. Mexico*, Case 11.509, ¶¶ 2-4, Report No. 2/99, OEA/Ser.L/V/11.102 (1999); ECHR: Eur. Ct. H. R., *Othman (Abu Qatada) v. United Kingdom*, ¶ 264, App. No. 8139/09 (2012) ("[N]o legal system based upon the rule of law can countenance the admission of evidence—however reliable—which has been obtained by such a barbaric practice as torture. . . . Torture evidence is excluded to protect the integrity of the trial process and, ultimately the rule of law itself.").

states worldwide provide further confirmation of the rule's customary status.[4] *See, e.g.*, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Office of the High Commissioner for Human Rights, ¶¶ 17-37, U.N. Doc. A/HRC/25/60 (Apr. 4, 2014) (by Juan E. Mendez).

As custom, the rule forms part of U.S. federal common law, which "must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *Sosa v. Alvarez-Machain*, 542 U.S. 697, 730 (2004) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)) (internal quotations omitted). *See United States v. Matta-Ballesteros*, 71 F.3d 754, 764 (9th Cir. 1995) ("We conclude that the right to be free from official torture is fundamental and universal,

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[4] *See, e.g.*, General Assembly, *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *Res.*, 3452 (XXX), art. 12 (Dec. 9, 1975); United Nations Economic and Social Council, *Report of the Sub-Commission on the Promotion and Protection of Human Rights*, at 12 (Oct. 17, 2005); *A. & Ors.*, *supra*, ¶¶ 37, 38 & ¶ 52 (examining state practice and holding that the exclusionary rule forms part of the common law). *See generally* Evan Ezray, Note, *The Admissibility of Foreign Coerced Confessions in United States Courts: A Comparative Analysis*, 52 COLUM. J. TRANSNAT'L L. 851, 876-95 (2014) (analyzing state laws and practices and international laws that incorporate an exclusionary rule). Indeed, given this widespread acceptance of the rule and its importance in ensuring the effective prohibition and prevention of torture—a *jus cogens* norm of customary international law, *Siderman de Blake*, 965 F 2d. at 718—the exclusionary rule has likewise arguably attained the status of a *jus cogens* norm of customary international law.

a right deserving of the highest status under international law . . . .") (quoting *Siderman de Blake*, 965 F.2d at 717).

B. Article 15 is Judicially Enforceable in Extradition Proceedings.

After signing CAT in 1988, the U.S. Senate ratified the treaty subject to the declaration that "the provisions of Articles 1 through 16 of the Convention are not self-executing." U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Cong. Rec. S17486-01, Part III(1) (daily ed., Oct. 27, 1990). This term has taken a range of connotations in U.S. courts.[5] The Senate's intent in declaring these provisions "non-self-executing" was merely to signal that they would not automatically create private rights of action in U.S. courts, not to bar their enforcement by the judiciary altogether. *See* U.S. DEP'T OF STATE, INITIAL REPORT TO THE COMMITTEE AGAINST TORTURE UNDER ARTICLE 19 ¶ 56 (Oct. 15, 1999) (the "Initial U.S. Report on CAT") ("In United States practice, provisions of a treaty may be denominated 'non-self-executing,' in which case they may not be

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[5] *See* Carlos Vasquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 626 (2008) (identifying four versions of "non-self-execution" adopted by the courts, and explaining that subject to narrow exceptions, under the Supremacy Clause, treaties are judicially enforceable in the same manner as statutes and the Constitution); *id.* at 601 (explaining that the Supreme Court's dicta in *Medellin v. Texas*, 552 U.S. 491, 505 n. 2 (2008), employing a restrictive version of the "self-execution" definition, "raises more questions than it answers").

invoked or relied upon as a cause of action by private parties in litigation."). *See also* David Sloss, *Ex Parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103, 1111-23 (2000) (explaining that this narrow conception of non-self-execution is consistent with the Supremacy Clause of the Constitution).

In this case, this Court need not itself evaluate whether Article 15 is a self-executing treaty provision under Ninth Circuit standards,[6] because even if Article 15 is not self-executing absent implementing legislation and even if it does not establish a private right of action for the violation of its terms, it should nonetheless be judicially enforceable in extradition proceedings because it is invoked defensively.

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[6] To determine whether a treaty provision is self-executing, the Ninth Circuit has adopted a contextual analysis, examining:

> the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self– or non–self–execution.

White v. Paulsen, 997 F. Supp. 1380, 1386 (E.D. Wash. 1998) (quoting *People of Saipan v. United States Dep't of Interior*, 502 F.2d 90, 97 (9th Cir. 1974)). Other courts have examined a range of other factors such as the circumstances surrounding the treaty's ratification, the nature of the obligations imposed by the treaty, and, generally, whether it is capable of judicial enforcement. *See generally*, Carlos Manuel Vasquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 628-65 (collecting and analyzing cases).

Like a statute or the Constitution, a treaty is "the supreme Law of the Land," U.S. Const. art VI, cl. 2, binding on all branches of the U.S. government. This was the Executive Branch's understanding in urging CAT's ratification by the Senate. *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) ("[I]f you adopt this treaty [CAT], it is not just international law. The standard becomes part of our law."). And, reflects basic constitutional principles. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 203 (2d ed. 1996) ("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."); *see also 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."). Article 15 unquestionably forms part of federal law.

Thus, the absence of domestic legislation implementing Article 15 should be immaterial in these proceedings because Mr. Munoz does not seek to rely on a new private right of action under Article 15. Instead, Article 15 acts as a *defense* in the existing extradition proceeding—where jurisdiction has been conferred and authority already exists for the court to provide a remedy. In such circumstances,

the court should consider the treaty provision as a rule of decision—its substantive provisions impose obligations on the United States that should not be ignored. *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"); *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) (defensive enforcement of treaty provisions); 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).

Accordingly, U.S. courts have recognized the obligation to apply substantive provisions of a treaty as substantive rules of decision to resolve a case or controversy already properly before the court. *See*, *e.g.*, *El Al Israel Air Lines, Ltd v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999) (dismissing state law damages claim because it conflicted with conditions for liability set by Warsaw Convention, without regard to self-executing status of the Convention); *Brzak v. United Nations*, 597 F. 3d 107, 112-14 (2d Cir. 2010) (dismissing federal law sex discrimination claims and state law torts brought against United Nations officials based on immunity defense in U.S.-ratified Convention on Privileges and Immunities of the United Nations).

Treaty provisions are likewise enforceable as a defense to a criminal prosecution brought by the state or in habeas corpus proceedings, where the governing statute already provides a right of action to challenge the legality of a petitioner's detention, *see, e.g.*, 18 U.S.C. § 2241, or as a defense in criminal proceedings. In *United States v. Rauscher*, on direct appeal of a criminal conviction, the Supreme Court stressed that "courts are bound to take judicial notice of [treaties], and to enforce in any appropriate proceeding the rights of persons growing out of [them]" and should consider a treaty a "rule of decision for the case before [it]." 119 U.S. 407, 419 (1886). *See also Benitez v. Garcia*, 449 F.3d 971, 972 (9th Cir. 2006) (granting habeas relief where prison sentence was in violation of non-self-executing provisions of a Venezuelan extradition).[7]

Likewise, in *Hamdan v. Rumsfeld*, 548 U.S. 557, 633-34 (2006), the Court did not decide whether the Geneva Conventions were self-executing, but nevertheless considered the habeas petitioner's invocation of Common Article 3 of the Geneva Conventions and concluded that it imposed substantive limitations on the Executive's construction of military commissions. *See also In re Yamashita*, 327 U.S. 1, 23-34 (1946) (considering on direct appeal a claim that military

[7] The opinion was superseded by *Benitez v. Garcia*, 495 F.3d 640, 641 (9th Cir. 2007), which denied the petition because the Court came to a different understanding of the substantive requirements of the treaty operation, not because the Court questioned the relevance of treaty provisions to adjudicate the legality of a sentence in habeas.

commission lacked authority under 1929 Geneva Convention, without caveats about absence of treaty-based remedy).

The same principle applies here. The Extradition Court already has jurisdiction over the government's request to extradite Mr. Munoz, 18 U.S.C. § 3184, and has the authority to deny or grant that request for relief. As such, the extradition court should consider the substantive legal limitations imposed by Article 15 in adjudicating the legality of the government's extradition request. *See* Vasquez, *Treaties as Law of the Land*, 122 HARV. L. REV. at 612 ("the Supremacy Clause, by declaring treaties to be domestic law, transforms the obligations of the United States under a treaty into the obligations of all domestic law-applying officials whose conduct would be attributable to the United States under international law. . ."). Under our constitutional system, the judicial branch thus bears a constitutional obligation to "ensure that any statement which is established to have been made as a result of torture", CAT, art. 15, is excluded from extradition proceedings.

C. At a Minimum, the Extradition Statute Should Be Interpreted to Avoid Conflict with U.S. Obligations Under Article 15 and Customary International Law.

Even if this Court does not consider Article 15 directly enforceable as a substantive limitation on the Extradition Court's consideration of the torture-tainted evidence, it should nevertheless construe the statute governing certification

of extraditability, 18 U.S.C. § 3184, so as to ensure that it does not conflict with the United States' treaty obligations under Article 15 or customary international law. 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. (2 Cranch) 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 the United States).

Thus, in *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) the Supreme Court interpreted the 2001 congressional Authorization for the Use of Military Force ("AUMF") expressly in accordance with "longstanding law of war principles"—a form of customary international law—so as to authorize detention of alleged combatants for some purposes authorized by international law (preventing a return to the battlefield) but not for others prescribed by it (punishment or interrogation).

Similarly, in *Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009), this Court recognized its obligation under "the general rule of the *Charming Betsy* canon" to interpret a provision of the Immigration and Naturalization Act defining "terrorist activity" "in such a way so as to avoid any conflict with the [United Nations

Protocol Relating to the Status of Refugees]," acceded to by the U.S., although it ultimately disagreed that there was any substantive conflict between the statute and the treaty (citing *Charming Betsy*, 6 U.S. (2 Cranch) at 118).

Here, the conflict is plain. Under the extradition statute, 18 U.S.C. § 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. *See also 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, May 4, 1978, T.I.A.S. No. 9656, 31 U.S.T. 5059, requires that such evidence be sufficient for "the apprehension and commitment for trial of the person sought."

The Extradition Court's failure to interpret its statutory obligations in light of the exclusionary rule codified in Article 15 of CAT and customary international law and to review the credibility of all the evidence adduced in support of extradition, conflicts with the United States' obligations under CAT and customary international law and renders unlawful the certification of extraditability.

III. THE PANEL'S DECISION CONFLICTS WITH LONG-ESTABLISHED U.S. LAW PROHIBITING THE ADMISSION OF STATEMENTS OBTAINED BY TORTURE.

The Extradition Court viewed witnesses Rosas and Hurtado's recantations of their prior inculpatory statements on the grounds that they had been procured by torture to be mere "contradictory evidence" which would not obviate the threshold probable cause determination established from the initial statements. *Matter of Extradition of Munoz Santos*, No. 06-05092, slip op. at 27-29 (C.D. Cal. Jun. 13, 2011).

The Extradition Court's treatment of the torture procured statements and the retraction as mere "he-said, she-said" forms of evidence reflects a deeply insufficient appreciation of the singularly distinctive features of torture-tainted evidence and U.S. law prohibiting its consideration. On a moral and constitutional dimension, the prohibition on torture is not to be subject to the vicissitudes of utilitarian balancing tests or the totality of any particular circumstance; the legal ban is absolute. And, as an evidentiary matter, statements coerced by torture—no less than superstition or hunch—lack elementary indicia of reliability, such that they cannot be considered "competent" evidence under the extradition statute. For either reason, no court can countenance a legal judgment that depends on evidence obtained by torture.

A. The Constitution Prohibits Consideration of Torture-Tainted Evidence.

Torture, in its reliance on brutality and disregard for human dignity, represents a microcosm of the system that our constitutional order—with its commitment to reason and due process—is designed to reject. In imposing prohibitions on torture in the Fifth Amendment's privilege against self-incrimination and the Eighth Amendment's prohibition on cruel and unusual punishment, the Framers of the Constitution sought to set America apart from the perceived barbarism of old Europe.[8]

The Supreme Court has recognized that the constitutional transgression from torture extends beyond mere punishment, such that evidence of torture must be excluded from judicial proceedings as a matter of due process. *See Brown v. Mississippi*, 297 U.S. 278, 281-82, 286 (1936) ("[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). The Court observed that the prohibition reflects more broadly a commitment to the rule of law. In contrast to authoritarian states, which employ "unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them

[8] EDWARD PETERS, TORTURE 74-75 (1985) (describing the development and use of torture throughout Europe's history until the modern movement toward abolition); *see also* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 193 (1999) (Framers viewed privilege against self-incrimination as safeguard against torture).

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); *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).

More recently, courts have continued to stress that freedom from torture is not encompassed only through an assertion of an individual right, but that its exclusion is necessary to preserve the legitimacy of the court itself as a democratic institution. *See United States v. Anderson*, 772 F.3d 969, 975 (2d Cir. 2014) ("torture [is] so beyond the pale of civilized society that no court could countenance it"); *United States v. Tavares*, 705 F.3d 4, 23 (1st Cir. 2013) ("It is unthinkable that a statement obtained by torture or by other conduct belonging only in a police state should be admitted at the government's behest in order to bolster its case.") (quoting *La France v. Bohlinger*, 499 F.2d 29, 34 (1st Cir. Mass. 1974)); *see, e.g.*, *United States v. Abu Ali*, 395 F. Supp. 2d 338, 380 (E.D. Va. 2005) ("[T]orture, and evidence obtained thereby, have no place in the American system of justice . . . .").

Courts have accordingly applied this categorical prohibition to extradition proceedings. *See, e.g., In re Extradition of Mainero*, 990 F. Supp. 1208, 1226

(S.D. Cal. 1997) ("The thought of testimony coerced by torture is certainly abhorrent and inconsistent with tenets of our society. As a society, we cannot suspend that concept by virtue of the interest of a foreign nation in [] extradition . . . ."); *In re Extradition of Singh*, 170 F. Supp. 2d 982, 1029 (E.D. Cal. 2001) ("Probable cause cannot be based on evidence procured by torture, which is incompetent if obtained by unlawful means.").[9]

As the Petition recounts, the only evidence in support of extradition was testimony from witnesses Rosas and Hurtado. Yet, each 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. Appellant's Pet. For Reh'g at 3, *Munoz Santos v. Thomas*, No. 12-56506 (9th Cir. 2015, ECF. No. 15 (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

[9] Significantly, this is why the government's arguments about the Rule of Non-Inquiry are beside the point. Appellee's Opp'n to Pet. for Reh'g at 12-17, *Munoz Santos v. Thomas*, No. 12-56506 (9th Cir. 2015), ECF No. 63. The extradition in this case is unlawful not because of any arguments about the comparative adequacy of the Mexican judicial system to fairly investigate and adjudicate the allegations of torture upon Mr. Munoz's extradition to Mexico. Even if Mr. Munoz were to concede that the Mexican judicial system was equal or superior to this country's (a question that is not before this Court), the extradition would still be unlawful because *United States courts* cannot consider evidence obtained by torture at the threshold, when it undertakes its duty to assess the sufficiency of the evidence.

was later observed in court with physical injuries consistent with the beating he described.[10] *Id.* at 4 (citing ER 108). Under *Brown* and its progeny, as well as elementary principles of justice and due process, no court should base its judicial pronouncement on evidence of this kind.

B. Torture-Procured Evidence is So Compromised and Unreliable, It Should Have Been Excluded as Incompetent Under the Extradition Statute.

Evidence obtained by torture is not only morally and legally proscribed but, as courts routinely recognize, it so unreliable and compromised that it is considered incompetent evidence as a matter of law. *See, e.g.*, *Crowe v. Cnty. of San Diego*, 608 F.3d 406, 433 (9th Cir. 2010) ("[C]oerced confessions are legally insufficient and unreliable and thus cannot factor into the probable cause analysis."); *see also Yusupov v. AG of the United States*, 650 F.3d 968, 982-83 (3d Cir. 2011) ("Testimony procured by coercion is notoriously unreliable and unspeakably inhumane.") (quoting *Boumediene v. Bush*, 476 F.3d 981, 1006 (D.C. Cir. 2007)); *In re Extradition of Singh*, 170 F. Supp. 2d at 1029. The recantation of testimony

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[10] This testimony is supported by numerous credible reports of pervasive and widespread instances of torture by the Mexican police force. A 2006 report by the U.S. State Department (covering the period during which the inculpatory statements in this case were uttered), found that officials in Mexico "continued to use torture with near impunity in large part because confessions were the primary evidence in many criminal convictions . . . ." U.S. DEP'T OF STATE, 2006 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: MEXICO, § 1.C (2007), *available at* http://www.state.gov/j/drl/rls/hrrpt/2006/78898.htm.

by the two tortured witnesses should have negated the probable cause associated with their original statements. *See Republic of France v. Moghadam*, 617 F. Supp. 777, 783 (N.D. Cal. 1985) (admitting recantation evidence that "negates the only evidence of probable cause").

As a result of an unfortunate reality, the experience with torture inflicted by U.S. officials demonstrates its unreliability (in addition to its immorality). The Executive Summary of the Senate Select Committee on Intelligence Study of the Central Intelligence Agency's ("CIA") Detention and Interrogation Program ("SSCI Report") demonstrates that torture is worse than ineffective: it produces false information. Some CIA detainees gave false or misleading information in an effort to make their torture stop. SSCI Report at 108-09, http://www.intelligence.senate.gov/sites/default/files/press/executive-summary_0.pdf (last visited Nov. 12, 2015). Former U.S. government interrogators have publicly stated that torture does not produce reliable information.[11] The U.S. Army Field Manual confirms this assessment, noting that torture is "a poor technique that yields unreliable results . . . and can induce the

[11] *See, e.g.*, Donald Canestraro, *Experienced Interrogator: Torture Doesn't Work*, THE HILL (Dec. 13, 2014), http://thehill.com/blogs/congress-blog/homeland-security/226866-experienced-interrogator-torture-doesn't-work; STATEMENT OF NATIONAL SECURITY, INTELLIGENCE, AND INTERROGATION PROFESSIONALS (Oct. 1, 2014), http://www.humanrightsfirst.org/sites/default/files/Torture-Statement-09-30-14.pdf.

source to say whatever he thinks the interrogator wants to hear." DEP'T OF THE ARMY, FIELD MANUAL 34-52 INTELLIGENCE INTERROGATION, at 1-8 (1992).

Cognitive and social 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."). The neurobiology of stress responses under interrogations can interfere with memory and brain functions, leading individuals under interrogation to produce false information they do not even know is false. *See generally* SHANE O'MARA, WHY TORTURE DOESN'T WORK: THE NEUROSCIENCE OF INTERROGATION (2015). False confessions are highly correlated with more coercive interrogation techniques. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, Amer. Psychology-Law Society (July 15, 2009), http://web.williams.edu/Psychology/Faculty/Kassin/files/White%20Paper%20online%20%2809%29.pdf.

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Regrettably, the U.S.-conducted abuses in the so-called "war on terror," documented in part in the SSCI Report, have destroyed lives and severely damaged the United States' international credibility as an anti-torture leader. This is in part

why *Amici* believe this case to be so significant. It represents an important opportunity to commit to this country's non-derogable international and domestic legal obligations to denounce torture and its fruits in absolute terms—despite the strongly asserted law enforcement interests of the Mexican and American governments.

The courts often must lead the way in adherence to law. Judicial acceptance of evidence based on torture not only violates the United States' international legal obligations but also risks legitimizing—and perpetuating—the practice. 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), supra*, ¶ 113 (per Lord Hope) (quoting Holdsworth).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment, vacate the certification of extradition and remand for further proceedings consistent with U.S. domestic and international legal obligations.

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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

I certify that, pursuant to Circuit Rule 29-2(c)3, the foregoing brief of *amici curiae* is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less.

DATED: November 12, 2015

Respectfully submitted,

s/ Jennifer Pasquarella
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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2015, I caused to be electronically filed the foregoing documents with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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