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13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE EASTERN DISTRICT OF WASHINGTON**

15
16 In Re Application of ZAYN AL-
17 ABIDIN MUHAMMAD HUSAYN
18 (Abu Zubaydah) and JOSEPH
19 MARGULIES,

20 Petitioners

Misc. Case No. _____

**EX PARTE APPLICATION FOR
DISCOVERY ORDER PURSUANT
TO 28 U.S.C. § 1782 IN AID OF
FOREIGN PROCEEDING**

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23 Petitioners Zayn Al-Abidin Muhammad Husayn (“Abu Zubaydah”) and
24 Joseph Margulies, by their counsel, hereby apply to the Court for an order
25 under 28 U.S.C. § 1782(a) granting them leave to issue subpoenas to James
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28 APPLICATION FOR DISCOVERY
UNDER 28 U.S.C. § 1782

1 Elmer Mitchell and John “Bruce” Jessen to produce documents and give
2 testimony for use in an ongoing criminal investigation in Kraków, Poland.¹
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4 This Application is supported by the memorandum of points and
5 authorities below, as well as the Declaration of Joseph Margulies (“Margulies
6 Decl.”). A proposed discovery order and subpoenas have been
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8 contemporaneously filed as attachments to this Application.

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I. Overview of 28 U.S.C. § 1782**

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12 Section 1782 authorizes a federal district court to order discovery of
13 documents and testimony for use in a foreign proceeding from any person who
14 resides or is found in the court’s district:
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16 The district court of the district in which a person resides or is found
17 may order him to give his testimony or statement or to produce a
18 document or other thing for use in a proceeding in a foreign or
19 international tribunal, including criminal investigations conducted
20 before formal accusation. The order may be made ... upon the

21 ¹ Although Section 1782 applications are properly made *ex parte*, Petitioners
22 have provided advance notice of this Application to counsel for Messrs. Jessen
23 and Mitchell and will provide a courtesy copy of the Application and
24 accompanying materials after filing.
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1 application of any interested person and may direct that the testimony
2 or statement be given, or the document or other thing be produced,
3 before a person appointed by the court.

4 28 U.S.C. § 1782(a).

5 A successful application must meet three requirements: (1) the person(s)
6 from whom discovery is sought must reside or be “found” in the district of the
7 court issuing the discovery order; (2) the applicant must be a foreign tribunal
8 or “interested person”; and (3) the discovery must be sought “for use in a
9 proceeding in a foreign or international tribunal.” *Govan Brown & Assocs. Ltd.*
10 *v. Does 1 & 2*, No. C 10-02704 PVT, 2010 WL 3076295, *2 (N.D. Cal. Aug.
11 6, 2010). Because all three requirements are met here, this Application should
12 be granted.
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16 **II. Factual Background**

17 **A. Abu Zubaydah’s Detention**

18 Abu Zubaydah is a stateless Palestinian currently held in Guantánamo
19 Bay, Cuba. Margulies Decl. ¶ 5. Joseph Margulies is his counsel. *Id.* ¶¶ 1-3.
20 Abu Zubaydah was captured in Pakistan in March 2002 by U.S. and Pakistani
21 agents and is now being held as an “enemy combatant.” *Id.* ¶ 5. The U.S.
22 Government initially alleged that Abu Zubaydah was the “third or fourth man”
23 in al Qaeda and had a role in every major al Qaeda terrorist operation,
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1 including as a planner of the attacks on September 11, 2001. *Id.*; Margulies
2 Decl. Ex. A. However, a Senate Select Intelligence Committee report
3 subsequently revealed that these allegations were unfounded, based on a
4 review of contemporaneous CIA records. Margulies Decl. ¶ 5; Executive
5 Summary of the Senate Select Committee on Intelligence – Study of the CIA’s
6 Detention and Interrogation Program, at 410-411. (“Senate Select Committee
7 Report”) (relevant excerpts appended to Margulies Decl. as Ex. B).

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10 For several years after his capture, Abu Zubaydah was imprisoned in
11 various CIA “black sites” in foreign countries, where he was subjected to so-
12 called “enhanced interrogation techniques” – torture – including
13 waterboarding, starvation, and other serious abuses. Margulies Decl. ¶¶ 7-24;
14 *see generally* Senate Select Committee Report (describing the interrogations of
15 Abu Zubaydah and others). Such acts of torture would be illegal on U.S. soil.²

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19 ² The U.S. Supreme Court and other federal courts have long cited the use of
20 force amounting to torture, or other forms of ill treatment in custody or during
21 interrogations, as violating rights under the Fourth, Fifth, Eighth and
22 Fourteenth Amendments to the Constitution. Some of the practices the federal
23 courts have condemned include whipping, slapping, depriving a victim of food
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2 or sleep, keeping him naked or in a small cell for prolonged periods, holding a
3 gun to his head, or threatening him with mob violence. *See, e.g., Hope v.*
4 *Pelzer*, 536 U.S. 730, 731, 741 (2002) (exposing prisoner to the heat of the sun
5 and use of stress positions were cruel and unusual punishment); *DeShaney v.*
6 *Winnebago*, 489 U.S. 189, 199-200 (1989) (failure to provide food and
7 clothing violated Eighth Amendment and Due Process Clause); *Ashcraft v.*
8 *Tennessee*, 322 U.S. 143, 156 (1944) (sleep deprivation violated prisoner's due
9 process rights); *Chambers v. Florida*, 309 U.S. 227 (1940) (holding prisoner
10 incommunicado for five days of continuous questioning violated due process
11 rights); *Brown v. Mississippi*, 297 U.S. 278, 282, 286 (1936) (whipping suspect
12 to coerce confession violated due process); *Moore v. Dempsey*, 261 U.S. 86, 91
13 (1923) (threatening prisoner with mob violence violated due process); *Bram v.*
14 *United States*, 108 U.S. 532, 565 (1897) (forcing suspect to strip before
15 interrogation contributed to violation of Fifth Amendment due process rights);
16 *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996) (keeping cell constantly
17 illuminated interfered with prisoner's sleep and violated Eighth Amendment);
18 *Gray v. Spillman*, 925 F.2d 90, 93 (4th Cir. 1991) (beating and threatening
19 prisoner violated Fifth and Fourteenth Amendments); *Burton v. Livingston*, 791

1 However, the executive branch has maintained that these black sites operated
2 beyond the protections of U.S. law. Regardless of their domestic legal status,
3 the sites existed with the knowing complicity of the sovereign nations in which
4 they were located. Margulies Decl. ¶ 6. Without the complicity of foreign
5 states, the CIA's black sites could not have existed and the torture performed
6 there would not have happened.
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9 From December 2002 until September 2003, Abu Zubaydah was
10 imprisoned in a black site in Stare Kiejkuty, Poland. *Id.* ¶ 7. The Senate Select
11 Committee Report refers to this site by the alias "Detention Site Blue." *Id.*
12 ¶ 11. In 2010, attorneys for Abu Zubaydah filed a criminal complaint in Poland
13 seeking to hold Polish officials accountable for their complicity in Abu
14 Zubaydah's unlawful detention and torture. *Id.* ¶ 31. However, the case closed
15 without any prosecutions or convictions. *Id.*
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18 In 2013, attorneys for Abu Zubaydah – including Petitioner Joseph
19 Margulies and his Polish co-counsel, Bartłomiej Jankowski – filed an
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22 F.2d 97, 99, 100-01 (8th Cir. 1986) (pointing loaded pistol at prisoner violated
23 his substantive due process rights); *Ware v. Reed*, 709 F.2d 345, 351 (5th Cir.
24 1983) (custodial use of force against prisoner violated his constitutional rights).
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1 application against the Republic of Poland before the European Court of
2 Human Rights, alleging that Poland had failed to conduct a full and proper
3 investigation into violations of international and Polish domestic law. *Id.* ¶ 32.
4 The court agreed that Poland’s actions violated the European Convention for
5 the Protection of Human Rights and Fundamental Freedoms, and that the
6 investigation was inadequate; as a result, Poland reopened the criminal
7 investigation of Polish official complicity in the operation of the black site. *Id.*
8 ¶ 33; *Abu Zubaydah v. Poland*, No. 7511/13 (2014) (Ex. C to Margulies Decl.).
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12 The Polish criminal investigation is charged with examining whether
13 Polish officials violated domestic law by opening, operating, and conspiring
14 with the United States to detain and mistreat prisoners, including Abu
15 Zubaydah. Abu Zubaydah has the right to submit evidence in aid of the
16 investigation through his attorneys, and the Polish prosecutor has invited
17 counsel for Abu Zubaydah to do so. *Id.* ¶ 35.
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20 Because Abu Zubaydah continues to be held *incommunicado* at the U.S.
21 Naval Base at Guantánamo Bay, Cuba, he is unable to give direct testimony in
22 the Polish criminal investigation or any other public proceeding, making it
23 even more critical to obtain evidence from other sources. Margulies Decl. ¶ 36.
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1 **B. Respondents Mitchell and Jessen**

2 Respondent Mitchell is a former CIA contractor and was one of the
3 architects of the CIA enhanced interrogation program. Margulies Decl. ¶ 12.
4 Mitchell was the chief psychologist at the U.S. Air Force Survival, Evasion,
5 Resistance and Escape training program at Fairchild Air Force Base,
6 Washington. *Id.* From 2001 to 2005, Mitchell worked as an independent
7 contractor for the CIA. *Id.* From 2005 to 2009 Mitchell was CEO of a company
8 he co-founded with Jessen, called Mitchell, Jessen & Associates, with
9 headquarters and offices in Spokane, Washington. Margulies Decl. ¶ 12. Mr.
10 Mitchell resides at 20727 Lake Vienna Dr. in Land O’Lakes, Florida.
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12 Respondent Jessen is also a former CIA contractor and, together with
13 Mitchell, a co-architect of the CIA’s enhanced interrogation program.
14 Margulies Decl. ¶ 13. In July 2002, the CIA contracted with Jessen on
15 Mitchell’s recommendation. Margulies Decl. ¶ 14. From 2005 to 2009, Jessen
16 was president of Mitchell, Jessen & Associates. *Id.* Jessen currently resides at
17 8719 South Palouse Highway in Spokane, Washington.
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19 By their own admission as defendants in other legal proceedings,
20 Respondents subjected Abu Zubaydah to waterboarding and other so-called
21 “enhanced interrogation techniques.” Margulies Decl. ¶ 15; *Salim v. Mitchell*,
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1 No. 2:15-CV-286-JLQ (E.D. Wash., June 21, 2016), Def.'s Am. Answer and
2 Affirm. Defs. ¶¶ 47-53 (Ex. E to Margulies Decl.). And according to the Senate
3 Select Committee on Intelligence's report on the CIA's detention and
4 interrogation program, Mitchell and Jessen visited the Polish black site at least
5 twice. Margulies Decl. ¶ 27, Ex. B at 17-18. Accordingly, Petitioners expect
6 Respondents to have relevant documents and personal knowledge regarding the
7 identities of Polish officials complicit in the establishment and operation of the
8 black site and the nature of their activities. Margulies Decl. ¶ 37.

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12 Specifically, Respondents are in a position to describe or produce
13 evidence relating to the following: the crimes committed against Abu
14 Zubaydah on Polish soil; the identities of all perpetrators of those crimes; the
15 presence of Polish officials at the facility in general, and during the
16 commission of the various crimes; agreements between Polish and U.S.
17 officials; the identities of other witnesses to the crimes against Abu Zubaydah;
18 contracts or other agreements between the two governments regarding
19 interrogations of Abu Zubaydah and other victims of crimes in Poland;
20 knowledge or documentation of the day-to-day operations of the black site,
21 including the provision of daily necessities such as food, water, medicine, etc.;
22 interaction with the community surrounding the black site; flight arrival and
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1 departure operations; upkeep and provision of the black site grounds; and any
2 interaction those working on the black site may have had with the local
3 population. Respondents' production of documents and testimony would aid
4 the Polish prosecutors in their understanding of Polish civilian and
5 governmental complicity in the operation of Detention Site Blue.
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8 **III. ARGUMENT**

9 Congress enacted Section 1782 to "facilitate the conduct of litigation in
10 foreign tribunals, improve international cooperation in litigation, and put the
11 United States into the leadership position among world nations in this respect."
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13 *In re Application Pursuant to 28 U.S.C. § 1782 for an Order Permitting Bayer*
14 *AG to Take Discovery (In re Bayer AG)*, 146 F.3d 188, 191-92 (3d Cir. 1998).
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16 Liberal application of Section 1782 in appropriate cases furthers the statute's
17 twin aims of "provid[ing] efficient means of assistance to participants in
18 international litigation in our federal courts and encourag[ing] foreign countries
19 by example to provide similar means of assistance to our courts." *Schmitz v.*
20 *Bernstein, Liebhard & Lifshitz*, 376 F.3d 79, 84 (2d Cir. 2004).
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23 This Application presents a paradigmatic case for judicial assistance.
24 Other attempts by Polish investigators to obtain similar discovery have been
25 thwarted. Margulies Decl. ¶ 39. The need for discovery is particularly acute
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1 because Abu Zubaydah, who remains *incommunicado*, cannot offer direct
2 testimony on his own behalf. And, as explained below, the three threshold
3 requirements for granting a Section 1782 application are readily met.
4

5 **A. Respondent Jessen resides in this district and Respondent**
6 **Mitchell is “found” in this district.**

7 Mr. Jessen resides in Spokane, Washington, and is therefore subject to
8 this Court’s authority under Section 1782.
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10 Mr. Mitchell is “found” in this district and is therefore also subject to
11 this Court’s authority under Section 1782. Mr. Mitchell has served as the CEO
12 of a company headquartered in this district. Margulies Decl. ¶ 12. He is also a
13 defendant in ongoing civil litigation in this district and is already subject to this
14 Court’s power to compel discovery from him in that matter. Additionally,
15 although Mr. Mitchell contested the court’s subject matter jurisdiction in that
16 litigation, he did not contest that the court had personal jurisdiction over him.
17 *Id.*, Ex. G (Def.’s Mot. to Dismiss). Because the requirement that a litigant be
18 “found” in a district should not be more restrictive than the requirement of
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1 personal jurisdiction,³ Mitchell is properly “found” in this district for purposes
2 of Section 1782.
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6 ³ While the Ninth Circuit does not appear to have addressed whether a litigant
7 is “found in” a federal court district for purposes of Section 1782 in
8 circumstances like Mr. Mitchell’s, the Second Circuit has analogized the
9 “found in” requirement to the requirement of personal jurisdiction, remarking
10 that “the question of what it means to be found in a particular locale is already
11 the subject of well-settled case law on territorial jurisdiction.” *In re Edelman*,
12 295 F.3d 171, 179 (2d Cir. 2002). Given that Section 1782 “is simply a
13 discovery mechanism and does not subject a person to liability,” the court
14 determined that the requirements for subjecting an individual to a Section 1782
15 order were not more stringent than those required to subject to an individual to
16 civil suit. *Id.*; *cf. First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 20
17 (2d Cir. 1998) (emphasis in original) (“[A] person who is subjected to *liability*
18 by service of process far from home may have better cause to complain of an
19 outrage to fair play than one similarly situated who is merely called upon to
20 supply documents or testimony.”).

1 **B. Petitioners are “interested persons” under the statute.**

2 The Supreme Court has held that the term “interested person” in the
3 statute is broad, encompassing any individual who “possesses a reasonable
4 interest in obtaining judicial assistance.” *Intel Corp. v. Advanced Micro*
5 *Devices, Inc.*, 542 U.S. 241, 256-57 (2004) (citation and alteration omitted).
6 This includes a complainant before a foreign commission who “has the right to
7 submit information ... and may proceed to court if the Commission
8 discontinues the investigation or dismisses the Complaint.” *Id.*

9 Here, Abu Zubaydah is the complaining victim in a criminal
10 investigation. He has significant procedural rights in that investigation,
11 including the right to submit evidence. Margulies Decl. ¶ 35. In short,
12 Petitioners are precisely the types of interested persons contemplated in the
13 statute and in the Supreme Court’s *Intel* opinion.

14 **C. The requested discovery is for use in a criminal**
15 **investigation before a foreign tribunal.**

16 “Proceedings” qualifying for issuance of a discovery order under
17 Section 1782 specifically include “criminal investigations conducted before
18 formal accusation.” 28 U.S.C. § 1782(a). Adjudicatory proceedings need not
19 be imminent or pending “for an applicant to invoke § 1782(a) successfully.”
20 *Intel*, 542 U.S. at 253. Indeed, as the legislative history shows, “[T]he [district]

1 court[s] have discretion to grant assistance when proceedings are pending
2 before investigation magistrates in foreign countries.” S. Rep. No. 1580, at 7,
3 U.S. Code Cong. & Admin. News 1964, pp. 3782, 9788.
4

5 The discovery requested in this Application falls squarely within the
6 statute’s purview. It is sought in furtherance of an ongoing criminal
7 investigation by prosecutorial authorities in Kraków, Poland. The scope of that
8 investigation extends to all Polish officials who were in any way involved in
9 facilitating or permitting the existence and operation of the CIA black site in
10 Poland. Margulies Decl. ¶ 34.
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13 The requested discovery, which is related to Respondents’ interactions
14 with Polish officials and knowledge of Polish official actions, will be shared
15 with Polish prosecutors “for use” in that criminal investigation. Margulies
16 Decl. ¶ 38. Official government reports and Respondents’ own admissions
17 illustrate their central role in the implementation and oversight of that same
18 torture program, which was conducted on Polish soil. Margulies Decl. ¶¶ 12-
19 15. The information in Respondents’ possession would be not only relevant,
20 but essential to the progress of the Polish investigation.
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24 Other efforts to obtain evidence regarding official conduct towards Abu
25 Zubaydah have been substantially impeded. The U.S. government has rejected
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1 multiple mutual legal assistance requests lodged by the Polish government
2 under the 2006 U.S.-Poland Mutual Legal Assistance Agreement, and signaled
3 that it would ignore further requests relating to the same subject matter.
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5 Margulies Decl. ¶ 39.

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7 **D. The Application should be granted in the exercise of the Court's**
8 **discretion.**

9 Where, as here, Section 1782's threshold requirements are met, the
10 decision whether to grant the application rests within the district court's
11 discretion. The Supreme Court has articulated several factors for a court to
12 consider in determining whether to grant an application, including (1) whether
13 the person from whom discovery is sought is a participant in the foreign
14 proceeding; (2) the nature of the foreign tribunal and proceedings, and the
15 receptivity of the foreign government, court, or agency to the assistance of the
16 U.S. federal courts; (3) whether the application conceals an attempt to
17 circumvent foreign proof-gathering restrictions or other public policies; and (4)
18 whether the discovery would be unduly intrusive or burdensome. *Intel*, 542
19 U.S. at 264-66. All of these factors weigh in favor of granting this Application.
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22 First, Respondents are not participants in the underlying foreign
23 proceeding, and Polish authorities have no independent means of securing their
24 cooperation.
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1 Second, the Polish Prosecutor’s office has invited counsel for Abu
2 Zubaydah to submit evidence, negating any concern that the Polish government
3 is unreceptive to the Court’s assistance. Margulies Decl. ¶ 35.

5 Third, the Application does not seek to circumvent proof-gathering
6 restrictions, but rather to fill a gap in foreign discovery devices – a goal firmly
7 in line with the statute’s overarching purpose of “providing efficient means of
8 assistance to participants in international litigation in our federal courts.”
9 *Application of Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992).

11 Finally, the discovery sought is restricted to Respondents’ oral testimony
12 and documents within their personal possession, and is not unduly intrusive or
13 burdensome. This is especially so in light of the potential benefit to Petitioners
14 and the Polish prosecutorial authorities from the requested discovery. The
15 Polish investigation represents a government’s historic effort to ensure its
16 sovereign accountability, and the accountability of individuals purporting to act
17 on its behalf, for gross violations of international humanitarian law. Moreover,
18 notwithstanding their own role in the events under investigation, Respondents
19 are not and cannot be charged in those proceedings. The relatively *de minimis*
20 burden on Respondents’ resources and time is an insufficient basis for
21 declining to aid the investigation’s critical truth-seeking mission.
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CONCLUSION

WHEREFORE, Petitioners respectfully request the Court grant
Petitioners leave to serve Respondents Mitchell and Jessen with the subpoenas
attached to this Application.

Respectfully submitted,

Dated: May 22, 2017

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