No. 20-827

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ZAYN AL-ABIDIN MUHAMMAD HUSAYN,
AKA ABU ZUBAYDAH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The divided Ninth Circuit panel in this state-secrets case held that discovery may proceed against former Central Intelligence Agency (CIA) contractors who worked on the CIA's former detention and interrogation program (CIA Program), where the classified information obtained in discovery would be used exclusively in a foreign proceeding probing CIA intelligence activity that allegedly occurred in Poland. The court did so by substituting its own assessment of national-security risks for the considered judgment of the CIA Director. The 12 judges who dissented from the denial of rehearing en banc correctly determined that the panel's decision rests on "grave legal errors" and "poses a serious risk to our national security." Pet. App. 86a. Those errors and risk amply warrant this Court's review.

The Ninth Circuit's decision reflects a fundamentally misguided approach to national-security litigation that

poses significant risks to the Nation's intelligence capabilities. As the petition describes, the court of appeals departed from what previously had been highly deferential review of the Executive Branch's predictive judgments about national-security harms in a manner that, as the dissenting judges explained, led it to give no "apparent deference to the CIA Director's declarations." Pet. 32-33 (quoting Pet. App. 97a); see Pet. 17-19. The court then further departed from precedent by adopting a view never previously accepted by courts: that compelled disclosures by former CIA contractors would not harm the national security because such contractors are "private parties" and, as a result, compelling them to disclose information they obtained while engaged in clandestine activities for the CIA would not require the United States itself to confirm or deny anything. Pet. 20-23, 33. The court went on to deem classified information about the alleged identity of the CIA's intelligence partners to be "public knowledge" based on public speculation, unofficial statements by former foreign officials, and the judgment of a foreign tribunal that deemed Poland's refusal to confirm or deny alleged intelligence cooperation as warranting an adverse inference that Poland did host a CIA facility. Pet. 23-28, 33-34.

The court of appeals' errors would be significant enough in a case in which a federal court must adjudicate domestic rights to which the requested discovery relates. But they are substantially more grave here, where the classified information sought in discovery would be used exclusively in a foreign proceeding considering wholly foreign legal obligations outside the supervisory power of the federal judiciary, and where the

very purpose of that proceeding is to investigate alleged clandestine activities of the CIA abroad. Pet. 29-32, 34.

Respondents' arguments that review by this Court is unwarranted in the face of these manifold errors by the court of appeals are without merit. Indeed, those arguments underscore the need for this Court's review.

1. a. Respondents' leading contention (Br. in Opp. (Br.) 16-19) is that this Court should defer review because the decision below is interlocutory and the panel's decision might not lead to the disclosure of "privileged information" on remand. That contention lacks merit for at least two reasons.

First, respondents disregard that the Ninth Circuit has *already* determined that what the CIA Director explained was "the central issue that underlies this entire matter"—whether "the CIA conducted detention and interrogation operations in Poland," Pet. 9 (citation omitted)—was *not* privileged. The court held that whether "the CIA operated a detention facility *in Poland*," information about interrogation techniques and conditions "in *that* [purported] detention facility," and pertinent details about Abu Zubaydah's alleged "treatment *there*" are "basically public knowledge," not state secrets, and thus unprivileged. Pet. App. 17a, 21a (emphases added). Respondents' discovery requests are predicated on their singular allegation about Poland's involvement, which the United States can neither confirm nor deny without risking significant harm to the national security.

Second, respondents identify no scenario under which the government could on remand protect from discovery such purported "public knowledge" about Poland's alleged role. As the petition explains (Pet. 3-6), the United States has already declassified significant details

about Abu Zubaydah's treatment in CIA detention, including information reflected in public Senate Report No. 288, 113th Cong., 2d Sess. (2014) (*SSCI Report*). And respondents acknowledge that they seek discovery of "the details of Abu Zubaydah's [purported] torture *in Poland*, the nature of his medical treatment, and the conditions of his confinement." Br. 9-10 (emphasis added). Given the Ninth Circuit's holding that Poland's alleged connection to Abu Zubaydah's detention is public knowledge and unprivileged, and in light of the government's prior declassification of information about his treatment in CIA detention, the intersection of those two sets of information would not be protected by the state-secrets privilege on remand. While certain information concerning, for instance, "the identities and roles of foreign individuals" might be protected, Pet. App. 20a, such protection would not under the Ninth Circuit's decision be a basis to avoid discovery into the more basic and central issue whether or not Poland hosted a clandestine CIA facility at which Abu Zubaydah was detained. That issue permeates the entire case.*

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* Respondents mistakenly assert, based solely on their reading of the *SSCI Report*, that it is "categorically false" that Abu Zubaydah was "an associate and longtime terrorist ally of Osama bin Laden." Br. 2-3 (citation omitted). The *SSCI Report* does not contradict that description. The report does state that the CIA was incorrect in its early view that Abu Zubaydah was one of al Qaida's top three or four leaders and that CIA records did not support a determination that he was involved in planning "every major [al Qaida] terrorist operation." *SSCI Report* 410-411. But it also discusses intelligence that Abu Zubaydah was a terrorist facilitator who, *inter alia*, facilitated a terrorist training camp, *id.* at 21 & n.60, and that his interrogation resulted in 766 disseminated sole-source intelligence reports based on his "information on 'al-Qa'ida activities, plans, capabilities, and

Allowing discovery to proceed on remand would therefore pose the very national-security risks that the government has sought certiorari to prevent. "The possibility that [the] suit may proceed and [a clandestine intelligence] relationship may be revealed" under the Ninth Circuit's decision rejecting the state-secrets privilege "is unacceptable: 'Even a small chance that some court will order disclosure of [an intelligence partner's] identity could well impair intelligence gathering and cause [the CIA's] sources to 'close up like a clam.'" *Tenet* v. *Doe*, 544 U.S. 1, 11 (2005) (citation omitted); see Pet. 9-10.

b. Respondents relatedly argue (Br. 24-26; see Br. 8-9, 28) that the government's attempt to preserve secrecy is unwarranted because the government "did not appeal" the district court's conclusion that information about Poland's alleged role was unprivileged and because, in the *Salim* litigation, "the same witnesses have provided extensive public disclosures * * * on the same topics," Br. 26. Both contentions are incorrect.

The government intervened as a party in this case in order to move to quash respondents' subpoenas. Pet. 9. Although respondents correctly note (*e.g.*, Br. 12, 24) that the government did not appeal the district court's resulting order, the government had no occasion to appeal from that order *granting* its motion. See Pet. App. 35a, 60a. And while the government did not agree with

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relationships,'" "leadership structure," "decision-making processes, training, and tactics," *id.* at 46 & n.220. The government's factual return in Abu Zubaydah's pending habeas action provides ample evidence—including from his own six-volume diary—demonstrating his terrorist activities and connection with al Qaida and bin Laden. See Doc. 474-1, at 24-67, *Husayn* v. *Mattis*, No. 1:08-cv-1360 (D.D.C. Mar. 29, 2017); see, *e.g.*, *id.* at 24, 33, 35, 44-46 & nn.12-13 (discussing Osama bin Laden).

some aspects of the district court's reasoning, it could as appellee defend the order quashing the subpoenas on "any ground appearing in the record." *Rivero* v. *City & Cnty. of S.F.*, 316 F.3d 857, 862 (9th Cir. 2002); accord *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 273 (2009) (stating that this principle applies to grounds "rejected" by the lower court).

Salim, in turn, involved no disclosures materially similar to those sought here. The three plaintiffs in *Salim* sued Mitchell and Jessen under the Alien Tort Statute, 28 U.S.C. 1350, seeking damages for injuries allegedly caused by the CIA contractors through their work on the former CIA Program. *Salim* v. *Mitchell*, 268 F. Supp. 3d 1132, 1135-1136, 1138, 1141 (E.D. Wash. 2017). Those damages claims focused on *the treatment* of former CIA detainees and did not depend on *the locations* at which they were purportedly harmed. For that reason, discovery was able to proceed against the former contractors without exposing information about the "aspects of the [former] interrogation program [that] remain classified," including "'information pertaining to the location of program facilities * * * and the names of the countries [that] may have assisted the U.S. Government in facilitating program-related activities.'" *Salim* v. *Mitchell*, No. 15-cv-286, 2016 WL 5843383, at *4 (E.D. Wash. Oct. 4, 2016) (citation omitted). Respondents themselves acknowledge that, in *Salim*, each former CIA detention site was referred to by the "code name" used by the public *SSCI Report*, Br. 9, 25-26, and respondents identify no instance in which Mitchell and Jessen—or the government—has publicly disclosed whether any such site was in Poland or other particular countries. Even the *SSCI Report*, which was particularly critical of the CIA Program, took great care to

protect that highly classified information to avoid damage to the national security. Pet. 5.

2. Respondents provide only a limited defense of the Ninth Circuit's actual decision, further underscoring the need for certiorari. Br. 19-23, 27-29.

a. Respondents first assert (Br. 19-23) that the Ninth Circuit "applied the same standard" that it previously did in state secrets cases. But respondents ignore the significant difference between prior decisions and this one. As the petition explains (Pet. 19, 32-33), the panel here modified what previously had been highly deferential review of Executive Branch assessments of national-security harms, seizing upon the word "skeptical" in a prior Ninth Circuit ruling and determining that such "skeptical" review was itself "*contradictory*" to precedent reflecting "the need to defer to the Executive," Pet. App. 14a-15a (emphasis added). The panel majority made no other reference to "deference" in its opinion and, instead, deemed its "essential obligation" to be review with "a skeptical eye." *Id.* at 17a n.14. Tellingly, the majority failed even to acknowledge the CIA Director's explanation of why compelling former CIA contractors to confirm or deny Poland's alleged connection to a CIA detention facility would jeopardize the national security *notwithstanding* the existence of substantial public speculation on the matter. Cf. Pet. 9-10 (discussing explanation). Instead, as the 12 judges dissenting from the denial of rehearing en banc explained, the court gave no "apparent deference to the CIA Director's declarations" and thus reached a result creating substantial "national security risks." Pet. App. 93a, 97a. Had the Ninth Circuit accorded the Director's judgment the "utmost deference" provided by other

courts of appeals, Pet. 33; see Pet. 18-19, the outcome would have been different.

b. Respondents dedicate one paragraph to the Ninth Circuit's holding that no national-security harm would result from compelling disclosures from CIA contractors, simply reiterating (Br. 27) the panel's view that those "third-party" contractors "cannot officially confirm anything." But respondents offer no answer to the government's explanation (Pet. 20-23, 33) that the state-secrets privilege has long protected against disclosures by government contractors and that the rule, for obvious reasons, could not be otherwise. Indeed, respondents appear to embrace the panel's position—which, as the dissenting judges explained, "no [other] court" has adopted—thereby "enabl[ing] an end-run around the privilege," with "untold risks for our national security." Pet. App. 102a-103a.

c. Finally, respondents assert (Br. 27-28) that the existence of a covert CIA facility in Poland "is already a matter of public record" and that "the CIA's cooperation with Poland is no secret at all." But in the world of clandestine intelligence operations, where tradecraft is deployed to cloak the true nature of activities and misdirect attention, things may be uncertain notwithstanding suppositions based on incomplete and circumstantial information. See *Military Audit Project* v. *Casey*, 656 F.2d 724, 744 (D.C. Cir. 1981); see also Pet. 23-24 (discussing additional authority). Thus, as the petition explains (Pet. 23-26), public speculation in the absence of official government confirmation is insufficient to displace the Executive Branch's expert, informed judgment that the disclosure of classified information by those with first-hand knowledge of the Nation's intelligence activities would harm the national security.

Respondents largely have no answer, except to note (Br. 28) that *Military Audit Project*'s decision about the classified mission of the *Glomar Explorer* arose in the context of a "statutory exception to [Freedom of Information Act] requirements, not an evidentiary privilege." But the "sole issue" in that FOIA case was whether, notwithstanding substantial speculation in public sources, the compelled disclosure of information about the mission "'reasonably could be expected to cause serious damage to the national security.'" *Military Audit Project*, 656 F.2d at 738 (citation omitted); see *id.* at 736-738. That question directly tracks the state-secrets inquiry, which asks—even after a litigant has made a "strong showing of necessity" for the discovery or use of information—whether "there is a reasonable danger that compulsion of the evidence will expose military [or other] matters which, in the interest of national security, should not be divulged." *United States* v. *Reynolds*, 345 U.S. 1, 10-11 (1953). And given the "utmost deference" owed to the government's assessment of national-security harm in this context, Pet. 18-19, 33, the teachings of *Military Audit Project* apply to this case with particular force.

Respondents incorrectly attempt to distinguish this case from *Military Audit Project* on the ground that the government in the latter case had provided information about the *Glomar Explorer* to the extent "consistent with national security." Br. 28 (citation omitted). The government's opposition to discovery here, however, reflects that discovery cannot proceed on remand without confirming or denying whether or not Poland hosted a CIA detention facility—the very information that the government asserted the state-secrets privilege to protect. Unlike *Salim*, where the plaintiffs

sought information on the treatment of former CIA detainees irrespective of the location(s) of their detention (which remained protected), respondents' discovery is unavoidably based on their contention that alleged CIA activity occurred in a particular location: Poland.

Respondents argue (Br. 27-28) that no claim of harm to national security is credible because Polish prosecutors have sought information about alleged CIA activity for their investigation. But respondents, like the Ninth Circuit, ignore the CIA Director's explanation that even after "time passes, media leaks occur, or the political and public opinion winds change," it remains "critical" to protect "the location of detention facilities" and "the identity of [the CIA's] foreign partners" because the CIA's ability to "convince foreign intelligence services to work with us" depends on "mutual trust" and our partners' enduring confidence that their role will be protected even if new "officials come to power" who may "want to publicly atone or exact revenge for the alleged misdeeds of their predecessors." Pet. App. 135a-136a; see Pet. 9-10, 21. Polish prosecutors, of course, can always attempt to obtain information about alleged actions on Polish soil from within their own government. And the fact that they have sought such information from United States sources only underscores the Director's explanation of why foreign intelligence cooperation must be protected. Compelled disclosure of that information by a federal court risks not only the future cooperation of a foreign partner's intelligence and security services whose role might thereby be confirmed, but also that of "*other* foreign intelligence or security services" that would recognize the United States' failure to protect the confidentiality of "our coordinated clandestine activities." Pet. App. 132a (emphasis added).

d. Respondents largely avoid the government's arguments (Pet. 29-32) that their discovery of information destined solely for a foreign proceeding warrants heighted deference to the Executive Branch's assessment of national-security harm. Respondents instead contend (Br. 29) that this "pure discovery matter in aid of a foreign proceeding" is "atypical" among state secrets cases and that this Court's review is unwarranted for that reason. But the extraordinary nature of respondents' attempt to obtain evidence about alleged CIA clandestine intelligence activity in Poland for export to a foreign proceeding investigating that very subject only highlights the extent of the Ninth Circuit's error.

The balance that this Court has struck in the state-secrets privilege is a balance between a domestic court's authority to adjudicate obligations under the laws of the United States and the Nation's need for secrecy, as here, in national-security contexts. Pet. 29-30. If no domestic rights are at issue and information is sought solely for use in foreign proceedings, that balance tips decidedly against allowing federal courts to extract information for foreign purposes where doing so would create any plausible risk to the national security of the United States. Nothing in 28 U.S.C. 1782(a) reflects any intent by Congress to facilitate proceedings before foreign tribunals at the cost of this Nation's core interests in protecting its own national security. Pet. 30-31. This Court should determine whether the Ninth Circuit should have deferred to the CIA Director's considered judgment regarding harm to the national security before Section 1782 may be used in this case to extract classified information about alleged clandestine CIA activities abroad solely for use in a foreign proceeding.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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