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.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF RESPONDENTS ZAYN AL-ABIDIN MUHAMMAD HUSAYN, AKA ABU ZUBAYDAH, AND JOSEPH MARGULIES

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INTEREST OF AMICUS[1]

The Electronic Frontier Foundation is a non-profit, member-supported organization working to protect civil liberties and preserve privacy rights in the digital world. Founded in 1990, EFF is based in San Francisco, California, and has over 38,000 dues-paying members.

EFF has litigated state secrets privilege issues extensively. It has a strong interest in ensuring that the state secrets privilege remains within the limits established by the Court and is not expanded to shield from judicial scrutiny government abuses and illegal conduct. EFF has served as counsel in lawsuits with state secrets issues. *Jewel v. National Security Agency*, No. 19-16066, 2021 WL 3630222 (9th Cir. Aug. 17, 2021); *Hepting v. AT&T*, 439 F.Supp.2d 974 (N.D. Cal. 2006). EFF has served as amicus on state secrets issues in this Court, *General Dynamics Corp. v. U.S.*, 563 U.S. 478 (2011), and in the lower courts, *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc); *In re National Security Agency Telecommunications Records Litigation*, 564 F.Supp.2d 1109 (N.D. Cal. 2008).

[1] No party or party's counsel authored this brief in whole or in part, or contributed money to fund the preparation or submission of this brief. No person other than the amicus, its members, and its counsel contributed money to fund the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This brief explains why the government's arguments in this case are inconsistent with the Court's previous state secrets decisions. This case is governed by the state secrets evidentiary privilege, which does not exclude nonprivileged evidence. Both courts below held that the private parties from whom discovery is sought have at least some testimony that is nonprivileged, because it relates to publicly known facts and because it would not be an official confirmation by the Government. The court of appeals permitted discovery only of this nonprivileged information, while finding that other information was privileged.

The state secrets evidentiary privilege is a common-law evidentiary privilege that, when the Government establishes its prerequisites, permits the Government to withhold from judicial proceedings evidence whose disclosure would harm national security. The Court recognized the state secrets evidentiary privilege in *U.S. v. Reynolds*, 345 U.S. 1 (1953), and most recently addressed it in *General Dynamics Corp. v. U.S.*, 563 U.S. 478 (2011).

Reynolds sets out a balancing approach for courts to use in determining whether the state secrets evidentiary privilege applies. Courts independently balance the Government's showing of potential harm from the production of the evidence against the requesting party's need for the evidence. Where a court finds that the Government has sustained its burden of showing the privilege applies, "[t]he privileged information is

excluded and the trial goes on without it." *General Dynamics*, 563 U.S. at 485.

As the Court unanimously made clear in *General Dynamics*, the state secrets evidentiary privilege is distinct from the special rule that government contract disputes are nonjusticiable if "too many of the relevant facts remain obscured by the state-secrets privilege to enable a reliable judgment." *General Dynamics*, 563 U.S. at 492. The Court explained that the government-contract nonjusticiability rule springs not from "our power to determine the procedural rules of evidence, but our common-law authority to fashion contractual remedies in government-contracting disputes." *Id*. at 485. Because this is not a government-contract dispute, the nonjusticiability rule does not apply.

The court of appeals' judgment should be affirmed. At issue is application of the state secrets evidentiary privilege in the context of 28 U.S.C. § 1782's procedure for the discovery of evidence for use in foreign proceedings. That question was narrowly and appropriately answered by the court of appeals, which simply directed the district court to permit discovery to proceed to the extent that it did not impinge on state secrets, and no further. Witnesses Mitchell and Jessen possess relevant information that the Government has permitted them to publicly testify about in other proceedings, and they should be permitted to do so here—including about matters that are no longer secret because of widespread public disclosures. Their testimony will not be an official confirmation of anything because they are not government agents.

The Government's state secrets arguments are unavailing. It argues its privilege assertions should be subject to the "utmost deference" and that any "facially plausible" assertion of potential harm requires a court to sustain the privilege—standards inconsistent with *Reynolds* and its requirement of independent judicial review.

The Government's section 1782 arguments also fail. The district court did not abuse its discretion in concluding the *Intel* factors support discovery. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004). The U.S.-Polish legal assistance treaty does not bar Abu Zubaydah from obtaining evidence using section 1782. And the Government failed to show it would be burdensome to participate in Mitchell's and Jessen's depositions.

ARGUMENT

I. The Three Tracks Of State Secrets Doctrine

When state secrets evidence is present in a case, there are three potential tracks.

- In the ordinary case, if the Government sustains its burden of establishing the privilege, the evidence is excluded and the case proceeds without it.
- In the special case of government contract disputes, if too much evidence is excluded to permit a reliable judgment, the

lawsuit may be dismissed as a matter of contract law.

- Finally, because these are both common-law rules, Congress may override them with statutes establishing alternative procedures for handling state secrets in litigation.

As described below, this case proceeds on the first track.

A. The State Secrets Evidentiary Privilege

"We have recognized the sometimes-compelling necessity of governmental secrecy by acknowledging a Government privilege against court-ordered disclosure of state and military secrets." *General Dynamics*, 563 U.S. at 484. *Reynolds* "held that documents that would disclose state secrets enjoyed such a privilege; the state-secrets privilege, we said, had a 'well established' pedigree 'in the law of evidence.'" *General Dynamics*, 563 U.S. at 484 (quoting *Reynolds*, 345 U.S. at 6-7).

General Dynamics reaffirmed that the state secrets privilege is a common-law evidentiary rule that the Court formulated by exercising "our power to determine the procedural rules of evidence." *General Dynamics*, 563 U.S. at 485. "*Reynolds* was about the admission of evidence. It decided a purely evidentiary dispute by applying evidentiary rules: The privileged information is excluded and the trial goes on without it." *Id*. That is what occurred in *Reynolds* itself on remand.

Reynolds emphasized the necessity for judicial control over the scope and application of the state secrets privilege. It analogized to the similar need for judicial control over the privilege against self-incrimination, where "a complete abandonment of judicial control would lead to intolerable abuses." *Reynolds*, 345 U.S. at 8. It found likewise that in applying the state secrets privilege, "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Id*. at 9-10.

1. The *Reynolds* Procedure

Reynolds lays out a careful procedure for applying the state secrets privilege. It begins with "a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Reynolds*, 345 U.S. at 7-8. Next, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. The latter requirement is the only one that presents real difficulty." *Id*. at 8.

Reynolds requires a balancing process, in which the degree of Government justification required to sustain the privilege turns on the requesting party's need for the secret evidence. *Tenet v. Doe*, 544 U.S. 1, 9 (2005) (*Reynolds* "set out a balancing approach for courts to apply in resolving Government claims of privilege."). The court weighs the strength of the Government's

showing of "reasonable danger" to national security from disclosure of the evidence against the necessity of the evidence to the requesting party. *Reynolds*, 345 U.S. at 10-11. *In camera* review of the evidence is not "automatically require[d]." *Id*. at 10. "In each case, the showing of necessity which is made [by the party seeking the evidence] will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." *Id*. at 11.

In *Reynolds*, the Court concluded that the plaintiffs' need for the assertedly privileged evidence was not great and thus there was no need to probe deeply into whether the Government's justification was sufficient to overcome the plaintiffs' need. *Reynolds* was a suit by the widows of civilians killed in an Air Force plane crash while testing experimental equipment. The Government, invoking the state secrets privilege, refused to produce the accident report and the statements of the surviving crew members but offered to make the crew members available for deposition, an offer the plaintiffs refused. Deposing the crew members would have likely made it "possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets." *Reynolds*, 345 U.S. at 11.

> [N]ecessity was greatly minimized by [this] available alternative, which might have given respondents the evidence to make out their case without forcing a showdown on the claim of privilege. By their failure to pursue that alternative, respondents have posed the

> privilege question for decision with the formal claim of privilege set against a dubious showing of necessity.

Reynolds, 345 U.S. at 11.

In *Reynolds*, the formal claim of privilege and the publicly known circumstances were sufficient without more to prevail against the plaintiffs' "dubious showing of necessity." *Reynolds*, 345 U.S. at 11. It fell into the class of cases in which "[i]t *may* be possible to satisfy the court, from all the circumstances of the case," that the evidence is privileged. *Id*. at 10 (emphasis added). Only "when this is the case," i.e., when the public circumstances alone are sufficient to sustain the privilege, is it also the case that "the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." *Id*.

By contrast, in the class of cases "where there is a strong showing of necessity, the claim of privilege should not be lightly accepted," and the court may probe further "in satisfying itself that the occasion for invoking the privilege is appropriate." *Reynolds*, 345 U.S. at 11. While not "automatically required," in such cases the court may review the evidence *in camera* to assess whether it is privileged and, if so, to determine the scope of the privilege. *Id*. at 10.

Thus, *Reynolds* holds that the greater the necessity of the evidence to the party seeking it, the more the Government needs to substantiate its claim of potential harm.

Reynolds' holding that courts may probe to the extent necessary to establish the appropriateness of the privilege claim, including *in camera* review, is also true of other similar privileges. *See U.S. v. Zolin*, 491 U.S. 554, 570-73 (1989) (citing *Reynolds*; holding that a court can review *in camera* communications assertedly privileged under the attorney-client privilege where there is a reasonable basis to believe that the communications may not be privileged); *U.S. v. Nixon*, 418 U.S. 683, 713-15 & n.21 (1974) (citing *Reynolds*; approving *in camera* inspection of evidence in balancing Article II executive-privilege claim against the interest in "the fair administration of justice"). *Reynolds* analogized the state secrets privilege to the self-incrimination privilege, and there, too, a court may conduct *in camera* proceedings to determine whether the privilege applies. *U.S. v. Drollinger*, 80 F.3d 389, 393 (9th Cir. 1996); *U.S. v. Argomaniz*, 925 F.2d 1349, 1355 (11th Cir. 1991).

2. The Government's Arguments Conflict With The *Reynolds* Evidentiary Privilege

The Government agrees that *Reynolds* is a balancing test in which the Government's burden of justification, and the depth of the court's inquiry, varies with the necessity of the evidence to the requesting party. Gov't Brief 39-40.

The Government, however, attempts to rewrite the careful balancing test of *Reynolds* with a rule of automatic "utmost deference" by the judiciary to any state

secrets privilege claim. Gov't Brief 24. But it cannot muster any support from the Court's state secrets jurisprudence for that extreme proposition. Instead, it stitches together short phrases from cases dealing with other doctrines: executive privilege; the executive's power to control the dissemination of government information within the executive branch by granting or denying security clearances to individual employees; the scope of statutory duties under the Freedom of Information Act to publicly disclose information; a pattern-and-practice challenge to Ohio National Guard training arising out of the Kent State shootings; enforcement of government-employee non-disclosure agreements; and rational-basis review of the exclusion of foreign nationals giving "appropriate weight" to "the Executive's evaluation of the underlying facts" (*Trump v. Hawaii*, 138 S. Ct. 2392, 2420-22 (2018)). *Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (security clearance); *CIA v. Sims*, 471 U.S. 159, 170 (1985) (FOIA); *Snepp v. U.S.*, 444 U.S. 507, 507-08 (1980) (non-disclosure agreement); *Nixon*, 418 U.S. at 710 (executive privilege); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (Ohio National Guard training); *Military Audit Project v. Casey*, 656 F.2d 724, 745 (1981) (FOIA).

Those are quite different legal doctrines operating in different factual contexts from the state secrets privilege, and the phrases the Government cites from those cases do not control here. Instead, the rule of *Reynolds* is that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."

Reynolds, 345 U.S. at 9-10. Mere invocation of an inherently subjective label like "utmost deference" cannot substitute for the careful, fact-intensive scrutiny that *Reynolds* requires. Under *Reynolds*, courts are not rubber stamps.

The appropriate deference to the Government is already incorporated in *Reynolds*' substantive standard. The *Reynolds* standard defers to the Government's assessment of potential harm because the Government need only show there is a "reasonable danger" of harm from disclosure of the evidence. That is significant deference. Absent *Reynolds*' deferential standard of proof, the higher preponderance-of-proof standard would apply and the Government would have to show it was more likely than not that harm would result from disclosure of the evidence.[2] Fed. R. Evid. 104(a); *Bourjaily v. U.S.*, 483 U.S. 171, 175 (1987). (As Respondents note, the separate question of whether the Government has shown a fact is truly secret is subject to Rule 104(a)'s preponderance standard, because it is a judicial inquiry that requires no special national security expertise. Respondents' Brief 34, 43.)

General Dynamics forecloses the Government's additional argument that the state secrets evidentiary

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[2] The Government reads too much into the court of appeals' shorthand use of the word "skeptical" to describe what *Reynolds* requires: independent judicial scrutiny to determine whether the Government's claim of potential harm from disclosure is factually supported and outweighs the necessity shown by the party seeking the evidence. Gov't Brief 19, 25, 35. Independent scrutiny is fully consistent with the deferential "reasonable danger" standard of proof.

privilege is a constitutional rule. Instead, *Reynolds* is a common-law "evidentiary rule[]" that is the product of the Court's "power to determine the procedural rules of evidence." *General Dynamics*, 563 U.S. at 485. Earlier, *Reynolds* likewise refused to embrace the Government's assertion that the state secrets evidentiary privilege was a constitutional rule. *Reynolds*, 345 U.S. at 6 & n.9. There is no basis for doing so here, either. The *Nixon* dicta the Government relies on to renew its suggestion to constitutionalize *Reynolds* (Gov't Brief 22, 24) does not claim that the state secrets evidentiary privilege is a constitutional rule. 418 U.S. at 710-11.

3. The *Reynolds* Privilege Only Excludes Evidence

The *Reynolds* privilege is an evidentiary privilege, not a nonjusticiability rule. As Justice Scalia writing for a unanimous court explained, if the Government shows the privilege applies, "[t]he privileged information is excluded and the trial goes on without it." *General Dynamics*, 563 U.S. at 485.

Although the state secrets privilege is not a rule of nonjusticiability, it can put the plaintiff out of court if the exclusion of state-secrets evidence leaves the plaintiff with insufficient nonprivileged evidence to prove her claims. Of course, the exclusion of evidence under any evidentiary privilege or other rule of evidence can have that consequence. "But the Court [in *Reynolds*] did not order judgment in favor of the Government." *General Dynamics*, 563 U.S. at 485.

Instead, *Reynolds* remanded for further proceedings for the plaintiffs to attempt "to adduce the essential facts as to causation without resort to material touching on military secrets." *Reynolds*, 345 U.S. at 11-12. On remand, "the parties conducted limited discovery [and] settled their claims for approximately seventy-five percent of the original judgment." *Herring v. U.S.*, No. 03-CV-5500-LDD, 2004 WL 2040272, at *2 (E.D. Pa. Sept. 10, 2004).

B. The State Secrets Nonjusticiability Bar In Government Contract Cases

Distinct from the *Reynolds* state secrets evidentiary privilege is the rule that government contract disputes are nonjusticiable if their merits cannot be resolved without secret evidence. In creating this rule, the Court has "exercise[d] . . . our common-law authority to fashion contractual remedies in Government-contracting disputes. And our state-secrets jurisprudence bearing upon that authority is not *Reynolds*, but two cases dealing with alleged contracts to spy." *General Dynamics*, 563 U.S. at 485-86 (citation omitted). Those two spy contract cases—*Totten v. U.S.*, 92 U.S. 105 (1876), and *Tenet v. Doe*, 544 U.S. 1—held "public policy forbids suits based on covert espionage agreements." *General Dynamics*, 563 U.S. at 486 (quotation marks and brackets omitted). From them, *General Dynamics* derived the general rule of contract law that government contract claims whose fair resolution requires secret evidence are nonjusticiable. *Id*. at 486-92.

The Court applied the government-contract nonjusticiability rule to the government-contract claims at issue in *General Dynamics*, explaining the rule's basis in contract law. *General Dynamics*, 563 U.S. at 486-91.

> As in *Totten*, our refusal to enforce this contract captures what the *ex ante* expectations of the parties were or reasonably ought to have been. Both parties "must have understood" that state secrets would prevent courts from resolving many possible disputes. . . . Both parties—the Government no less than petitioners—must have assumed the risk that state secrets would prevent the adjudication of claims of inadequate performance.

Id. at 490-91 (citations omitted).

General Dynamics reaffirmed the Court's longstanding distinction between the *Reynolds* evidentiary privilege and the *Totten/Tenet* nonjusticiability rule barring adjudication of government contract claims that turn on secret evidence. The Court made clear that the *Reynolds* state secrets privilege is a common-law evidentiary rule, while the *Totten/Tenet* government-contract justiciability bar is a common-law contract rule. *General Dynamics*, 563 U.S. at 484-88.

In maintaining a clear boundary between the *Reynolds* evidentiary privilege and the *Totten/Tenet* government-contract justiciability bar, the Court firmly rejected the Government's attempt to conflate these two distinct state-secrets doctrines. In its brief in *General Dynamics*, the Government attempted to broaden the state secrets justiciability bar beyond

government contract disputes by incorporating it into the *Reynolds* evidentiary privilege. Brief for the United States at 24-27, *General Dynamics Corp. v. U.S.*, 563 U.S. 478 (2011) (Nos. 09-1298 and 09-1302). The Court decisively blocked that attempt, noting that "*Reynolds* has less to do with these cases than the parties believe" and reiterating that "*Reynolds* decided a purely evidentiary dispute by applying evidentiary rules," not by imposing a justiciability bar or "order[ing] judgment in favor of the Government."[3] *General Dynamics*, 563 U.S. at 485.

The Court should continue to maintain the distinction between the two state-secret doctrines, which have different origins and serve different purposes.

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[3] The Ninth Circuit's en banc decision in *Mohamed v. Jeppesen Dataplan, Inc.*, which the court of appeals panel below was compelled to follow, erroneously imports the *Totten/Tenet* government-contract justiciability bar into the *Reynolds* state secrets evidentiary privilege. 614 F.3d 1070, 1083 (9th Cir. 2010) ("In some instances" "the *Reynolds* privilege converges with the *Totten* bar."). This Court's subsequent decision in *General Dynamics* demonstrates the error of the Ninth Circuit's approach, and explains the reasons why the justiciability bar is uniquely a creature of contract law and is limited to attempts to litigate government contract disputes.

Moreover, there is no basis for a justiciability bar in section 1782 proceedings because those proceedings are only for the production of evidence. Once all nonprivileged evidence has been produced, a determination that all the remaining evidence sought is privileged terminates the action, not because it is nonjusticiable but because it is fully adjudicated.

C. Congress Has The Power To Modify Or Displace The State Secrets Privilege

Congress can by statute modify or displace the state secrets privilege. "Congress, of course, has plenary authority over the promulgation of evidentiary rules for the federal courts." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 31 (1976). Federal Rule of Evidence 501 provides "[t]he common law . . . governs a claim of privilege unless any of the following provides otherwise: . . . a federal statute."

For example, 50 U.S.C. § 1806(f) is a statute that "provides otherwise" for the admission, under special protective procedures, of evidence relating to unlawful electronic surveillance that the state secrets privilege might otherwise exclude. Congress expressly provided that section 1806(f) applies "notwithstanding any other law," displacing the "other law" of the state secrets privilege. Section 1806(f) directs courts, rather than excluding evidence whose disclosure would harm national security, to use the evidence to decide the lawfulness of the surveillance. Thus, it is plainly contrary to the state secrets privilege's exclusion of national security evidence. Section 1806(f)'s displacement of the state secrets privilege is pending before the Court in *FBI v. Fazaga*, No. 20-828.

II. Evidence, Facts, and Official Acknowledgments

The starting point of the *Reynolds* balancing test is that the item of evidence in question is truly secret.

If the item of evidence is not secret, any state secret privilege claim regarding it fails at the threshold before the balancing test is applied. There is nothing to balance because there is no potential harm from the production of a document or testimony that has previously been publicly disclosed.

Similarly, there are situations where a particular item of evidence has not yet been publicly disclosed, but the fact to which it relates is publicly known. In analyzing the application of the state secrets evidentiary privilege in such circumstances, basic distinctions between evidence, facts, and official acknowledgments are important to keep in mind.

The state secrets privilege excludes evidence, not facts. Parties remain free to prove a fact using nonprivileged evidence, and courts are free to find facts using nonprivileged evidence.

Evidence and facts are distinct. Evidence is testimony, statements, or things that tend to prove or disprove a fact. Fed. R. Evid. 401. Evidence is secret if it is not publicly known. Evidence is a state secret only if, in addition to being secret, its disclosure poses a reasonable danger to national security. *Reynolds*, 345 U.S. at 10.

The state secrets privilege is a "Government privilege against court-ordered disclosure of state and military secrets." *General Dynamics*, 563 U.S. at 484. It excludes those Government-derived items of evidence that are privileged. But it does not exclude nonprivileged evidence relating to the same facts, just as the

self-incrimination privilege excludes only testimony by the defendant, not other evidence going to prove the same facts. And the state secrets privilege does not restrict the discovery or admission of evidence from non-Government sources.

Whether the Government has officially acknowledged a fact is distinct both from the fact itself and from the evidence proving the fact.

A once-secret fact can become public, either through an official acknowledgment or by the accumulation of public information outside the Government's control. Here, for example, the Government has acknowledged many facts and disclosed much information about the harrowing methods of torture it has used on Abu Zubaydah during his captivity, including facts about the participation of Mitchell and Jessen. Additional facts have come to light from non-Government sources.

The Government may continue refusing to confirm or deny a fact that becomes public through the accumulation of public information. The Government's refusal to acknowledge a public fact, however, does not render the fact itself or evidence relating to the public fact a state secret, and the privilege does not apply. (But if Government evidence relating to the public fact also contains different information relating to facts that are still secret and whose disclosure would harm national security, those portions may remain privileged.)

Moreover, the Government's production of nonprivileged evidence relating to a public fact is not an acknowledgment or confirmation or admission by the Government of the truth of the fact. And the production of evidence by third parties who are not Government employees or agents is by definition not a Government confirmation that the fact is true.

The state secrets privilege, because it does not exclude nonprivileged evidence, does not prevent courts from using nonprivileged evidence to reach conclusions about facts, even facts the Government refuses to confirm or deny or that it contends are state secrets.

Fact-finding by a court based on nonprivileged evidence is not a disclosure of a state secret. A judicial decision finding a fact to be true also is not a Government acknowledgment or admission or confirmation that the fact is true. Like any judicial finding, it is only a factfinder's evaluation, based on the nonprivileged evidence the parties have put before it, that more likely than not the fact is true.

III. The Court Should Continue Its Practice Of Deciding State Secrets Issues Narrowly

In the common-law tradition, the Court has trod carefully in the state secrets field and narrowly crafted its decisions.

In *Reynolds*, the Court noted "[w]e have had broad propositions pressed upon us for decision. . . . which we find it unnecessary to pass upon, there being a

narrower ground for decision." *Reynolds*, 345 U.S. at 6. The Court should exercise a similar prudence here.

Similarly, in *General Dynamics*, the Court limited its ruling to apply "only where it precludes a valid defense in government-contracting disputes, and only where both sides have enough evidence to survive summary judgment but too many of the relevant facts remain obscured by the state-secrets privilege to enable a reliable judgment." 563 U.S. at 492. The Court left for another day the applicability of the government-contract justiciability bar in circumstances "where relevant factors significantly different from those before us here counsel a different outcome." *Id*. at 491.

A case-specific ruling is appropriate here. This case presents the application of the state secrets evidentiary privilege where previous litigation has already demonstrated that the private parties from whom discovery is sought have at least some nonprivileged testimony on the subject that can safely be disclosed. In answering that question, the Court need not issue broad pronouncements about how the privilege might apply in other circumstances.

IV. This Case Is Easily Resolved By Applying The Court's Established State Secrets Jurisprudence

This Court's settled case law provides a clear roadmap for resolving this appeal, and demonstrates that the court of appeals' decision is correct. The Government does not challenge the district court's factual

finding that the very subject matter of this proceeding is not a state secret. Pet. App. 10a n.12, 42a. Nor is this a government contract dispute falling within the *General Dynamics/Totten/Tenet* justiciability bar. Accordingly, *Reynolds* governs.

While conceding *Reynolds* governs, the Government contends that in section 1782 cases it should not have to meet *Reynolds*' "reasonable danger" standard but only the much laxer standard of showing "a facially plausible risk to the national security." Gov't Brief 40. The Court should reject that contention. Because the only evidence "'shipped overseas,'" *id*., in a section 1782 proceeding is *nonprivileged* evidence, it creates no heightened national security concerns and there is no need to water down *Reynolds*.

A. Because Mitchell And Jessen Indisputably Possess Nonprivileged Information, *Reynolds* Directs That The Discoverable Nonprivileged Information Should Be Separated From The Privileged Information

Mitchell and Jessen indisputably possess nonprivileged, public information about the incarceration and abuse of Abu Zubaydah. They have given public testimony about it in deposition and in the Guantanamo military commissions. Mitchell wrote a book about it. James Mitchell & Bill Harlow, *Enhanced Interrogation* (2016).

The court of appeals' holding was simple and restrained. Adhering to the step-by-step approach laid out in *Reynolds*, it first "agree[d] with the district court that much, although not all, of the information requested by Petitioners is covered by the state secrets privilege" and thereby excluded from discovery. Pet. App. 20a. It did not "reject[] the United States' assertion of the state-secrets privilege," as the Question Presented contends. Pet. at I.

It required only that, as the next step, discovery proceed with respect to matters that are not secret, disentangled from any secret evidence by the procedures the district court previously used with great success in the related case of *Salim v. Mitchell*, involving testimony by these same witnesses regarding the same subject matter. Pet. App. 22a-27a; *Salim v. Mitchell*, No. 15-CV-286-JLQ (E.D. Wash. filed Oct. 13, 2015).

In *Salim*, the Government consented to and the district court successfully implemented testimony by Mitchell and Jessen concerning the torture of Abu Zubaydah and the torture program they designed and implemented at CIA black sites—the same subject matter as the discovery here. *Salim* shows that discovery without impinging on state secrets is workable here.

The Government previously described its satisfaction with the witness examination procedures used in *Salim* and the success of the procedures in preventing the disclosure of any secret matters while permitting Mitchell and Jessen to testify extensively:

> The witnesses [Mitchell, Jessen, and three former CIA employees] were generally able to respond to a broad array of questions posed to them about their Government service on the basis of unclassified and non-privileged information. *See*, *e.g.*, Excerpts from Deposition of James Mitchell (attached as Exhibit 1. In some instances, attorneys for the United States asserted objections to questions that would tend to call for the witnesses to reveal classified or privileged Government information. *See id*. In many such instances, Government attorneys and agency representatives provided guidance and clarification to the witnesses, off the record, regarding the classification or privileged nature of the witnesses' proposed answers to certain questions, so as to permit the witness to answer the questions without reference to such information. *See id*. Only in rare instances were witnesses unable to answer questions because of an objection from the Government based on a question calling for the disclosure of classified or privileged information. *See id*.

United States' Unopposed Motion For Procedures Governing Trial Testimony Of Former Government Officials And Contractors, at 4, *Salim v. Mitchell*, No. 15-CV-286-JLQ (E.D. Wash. Aug. 2, 2017), ECF No. 229.

In its request to have the same procedures apply to trial testimony by Mitchell and Jessen, the Government affirmed, "This procedure will be sufficient to protect the Government's significant national security interests while at the same time allowing the

testimony of these witnesses to proceed without undue interruption or delay." *Id.* at 6.

The excerpts of Mitchell's testimony attached to the Government's motion in *Salim* include testimony about Abu Zubaydah. *Id*., Ex. 1 at 284-90. The transcript shows that the process worked—the examination proceeded carefully and cooperatively, secrets were protected, and nonprivileged facts were established on the record.[4]

Accordingly, there is no need to speculate whether these witnesses possess relevant information that is either already publicly known or may safely be disclosed without impinging on secrets. As the prior depositions of these witnesses in *Salim* with the Government's participation and consent demonstrate, it is feasible for them to be questioned on their personal knowledge with the Government making specific state-secrets objections to specific questions.

The process in *Salim* the Government endorsed and participated in—deposition examination to establish the nonprivileged facts they know while protecting secret facts from disclosure—is, of course, exactly the procedure that the Court held in *Reynolds* was a

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[4] This same witness examination procedure was also used successfully to the Government's satisfaction in *Salim* to question John Rizzo, former CIA acting general counsel; Jose Rodriguez, former CIA National Clandestine Service director; and Charles Morgan, former CIA employee and Department of Defense contractor. United States' Unopposed Motion For Procedures Governing Trial Testimony Of Former Government Officials And Contractors, *supra*, at 3-4.

proper balancing of the need to protect state secrets with the duty to produce nonprivileged evidence. *Reynolds*, 345 U.S. at 11, 5 (Plaintiffs were given a "reasonable opportunity" to "adduce the essential facts as to causation without resort to material touching upon military secrets" when the Government "offered to make the surviving crew members available for examination" "as to all matters except those of a 'classified nature.' ").

The *Reynolds*-sanctioned process the Government endorsed and participated in in *Salim* is also exactly—and the totality of—what the court of appeals held should occur as the next step in this proceeding. All the court of appeals directed was that the district court should proceed to the next step of determining whether the privileged evidence could be disentangled from the nonprivileged evidence. "Our holding is a limited one: if, upon reviewing disputed discovery and meaningfully engaging the panoply of tools at its disposal, the district court determines that it is not possible to disentangle the privileged from the nonprivileged, it may again conclude that dismissal is appropriate. . . ." Pet. App. 27a-28a. This limited and correct holding should be affirmed.

B. The Court Of Appeals Correctly Determined That Some Of The Matters Claimed By The Government Are Not Privileged

The final remaining state secrets question is the boundary between the privileged and nonprivileged

information. The Government does not challenge the district court's and the court of appeals' conclusion that to be a state secret a fact must first be a secret, and must continue to be a secret at the time the privilege claim is decided. Pet. App. 42a.

The court of appeals made two related findings: first, that given widespread public disclosures certain matters were no longer secret and thus were outside the scope of the state secrets privilege; and, second, that discovery from Mitchell and Jessen limited to these subjects would not amount to an official confirmation of anything. Both are correct.

1. Nonprivileged Matters

The first finding:

> [W]e also agree with the district court that a subset of information is not—at least in broad strokes—a state secret, namely: the fact that the CIA operated a detention facility in Poland in the early 2000s; information about the use of interrogation techniques and conditions of confinement in that detention facility; and details of Abu Zubaydah's treatment there. These facts have been in the public eye for some years now, and we find no reason to believe that Mitchell and Jessen testifying about these facts 'will expose . . . matters which, in the interest of national security, should not be divulged.' *Reynolds*, 345 U.S. at 10. We therefore reject the government's

> blanket assertion of state secrets privilege over everything in Petitioners' discovery request.[5]

Pet. App. 20a-21a.

The court of appeals' finding that these matters were no longer secret is well supported by the wealth of disclosures amply documented in Respondents' Brief regarding the CIA's interrogation program, Mitchell's and Jessen's design of and participation in the program and in Abu Zubaydah's torture, and the location of a CIA black site in Poland. Pet. App. 4a-7a; Respondents' Brief 1-14, 30-34.

Nevertheless, the district court concluded this nonprivileged discovery from Mitchell and Jessen should be denied because, it speculated, that discovery might not be of much use in the Polish proceeding.

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[5] The Government divides the court of appeals' finding of what is public, quoted above, into three parts, but its arguments seem to address only the first one. Gov't Brief 14-15 ("The panel majority 'reject[ed] the government's blanket assertion of [the] state secrets privilege' based on its view that certain information 'is not—at least in broad strokes—a state secret, namely: [1] the fact that the CIA operated a detention facility in Poland in the early 2000s; [2] information about the use of interrogation techniques and conditions of confinement in that detention facility; and [3] details of Abu Zubaydah's treatment there.' "). The descriptions in the Government's brief of what is privileged, however, focus only on the Polish connection: "whether or not a CIA detention facility was located in Poland with any relevant assistance from Polish authorities" (Gov't Brief 18); "whether the CIA operated a clandestine detention facility in Poland and whether Poland's security services provided assistance" (Gov't Brief 21-22).

"[C]ompelling Mitchell and Jessen to address the mere fact of whether they were part of CIA operations conducted in Poland, or whether they interrogated Zubaydah in Poland, would not seem to aid the Polish investigation." Pet. App. 53a.

The district court's speculation about how useful the nonprivileged evidence might be in the foreign proceeding was an improper basis for denying discovery. Section 1782 does not permit a court to deny discovery based on its own assessment of how useful the discovery might be in the foreign proceeding.

> [D]iscovery sought pursuant to § 1782 need not be necessary for the party to prevail in the foreign proceeding in order to satisfy the statute's "for use" requirement. The plain meaning of the phrase "for use in a proceeding" indicates something that will be employed with some advantage or serve some use in the proceeding—not necessarily something without which the applicant could not prevail. *See* Oxford English Dictionary, vol. XIX at 354 (2d ed.1989) (defining "use" as "to employ . . . in some function or capacity, esp. for an advantageous end"); Webster's Tenth New Collegiate Dictionary 1301 (1998) (defining "use" as "the act or practice of employing something"). Notably, § 1782 makes no mention of necessity, and in several other contexts we and the Supreme Court have declined to read into the statute requirements that are not rooted in its text.

> Moreover, a necessity requirement would be "unwise[,] as well as in tension with the aims of section 1782." It would entail a painstaking analysis not only of the evidence already available to the applicant, but also of the amount of evidence required to prevail in the foreign proceeding. Such an inquiry would therefore "require interpretation and analysis of foreign law[,] and . . . 'comparisons of that order can be fraught with danger.' " We have previously rejected similarly "speculative forays into legal territories unfamiliar to federal judges," because "[s]uch a costly, time-consuming, and inherently unreliable method of deciding section 1782 requests cannot possibly promote the 'twin aims' of the statute." . . . We have no reason to believe that Congress intended § 1782 to provide such parsimonious assistance, permitting discovery only when the applicant demonstrates she cannot do without it. Under § 1782, an applicant may seek discovery of any materials that can be made use of in the foreign proceeding to increase her chances of success.

Mees v. Buiter, 793 F.3d 291, 298-99 (2d Cir. 2015) (footnotes and some citations omitted); *see also In re Bayer AG*, 146 F.3d 188, 192 (3d Cir. 1998) ("[I]t 'would contradict the express purpose of section 1782' if the American court were required to predict the actions of another country's tribunal.").[6]

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[6] Thus, necessity is a factor in determining whether evidence of secret facts is privileged under the *Reynolds* balancing test, but

2. Mitchell's And Jessen's Testimony Is Not An Official Statement Or Acknowledgment By The Government

The court of appeals' second finding—that discovery from Mitchell and Jessen would not amount to an official confirmation—is equally correct. Pet. App. 17a-18a & n.15.

As explained in section II above, there is a distinction between (1) an official acknowledgment issued by the Government and (2) other evidence that reasonable minds would find to be sufficient evidence of a fact even in the absence of official acknowledgment. This case does not present an attempt by a litigant to compel an official acknowledgment from the Government. Abu Zubaydah seeks no evidence from the Government and the Government is an intervenor, not a respondent in this proceeding.

The district court found both in this proceeding and previously in *Salim* that Mitchell and Jessen are not and were not agents of the Government. Pet. App. 39a-41a. The Government does not challenge this finding. Pet. App. 18a. Because Mitchell and Jessen are not Government agents, nothing they say can amount to an official acknowledgment. *See* Fed. R. Evid. 801(d)(2)(C), 801(d)(2)(D) (discussing when an agent's statements are attributable to the principal).

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is not a factor in determining whether nonprivileged evidence should be produced under section 1782.

The Government says that contractors "generally" enter into nondisclosure agreements with the Government, but does not contend that Mitchell and Jessen did, and none appears in the record. Gov't Brief 28. So there is no evidence of any duty owed by Mitchell or Jessen to the Government. Indeed, Mitchell monetized his secret knowledge of the Government's torture program by writing a book about it. James Mitchell & Bill Harlow, *Enhanced Interrogation* (2016).

In any event, Mitchell's and Jessen's testimony will be limited to matters the court of appeals found were not privileged. Their evidence is discoverable because it is not privileged, not because they are private parties. Even if they were Government agents and their testimony an official acknowledgment, it would be official acknowledgment of nonprivileged information and thus outside the scope of the state secrets privilege.

Thus, there is no merit to the Government's contention that discovery from Mitchell and Jessen would amount to an official confirmation *of state secrets* and is therefore privileged.[7]

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[7] Mitchell's and Jessen's testimony on any nonprivileged matters is not a "waiver" by them of the Government's privilege, both because it is nonprivileged and because they are not the Government's agents. A private party cannot waive the Government's privilege, but a private party is free to testify to any facts within their personal knowledge. 28 U.S.C. § 1782(b). Indeed, in the case cited by *Reynolds* on this point, the Government refused on state secrets grounds to produce plans for destroyers but permitted the shipbuilder to produce those plans, illustrating the

V. The Government's Section 1782 Arguments Lack Merit

After considering the section 1782 arguments made in the Government's Statement of Interest (C.A. E.R. 645), the district court granted the application for discovery and found that the *Intel* factors guiding its discretion under section 1782 weigh in favor of discovery. Pet. App. 70a ("The court has exercised its discretion and determined the *Intel* factors favor granting the Application for Discovery."); *Intel*, 542 U.S. at 264-65. In its subsequent motion to quash the subpoenas, the Government never took up the district court's invitation to renew its burdensomeness objection. C.A. E.R. 80, 181.

There is no merit to the Government's arguments that the district court abused its discretion in finding the *Intel* factors favor discovery. The arguments also do not appear to have been preserved below or to be within the scope of the Question Presented. Respondents' Brief 47-49.

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distinction between official acknowledgment and unofficial disclosure. *In re Grove*, 180 F. 62, 67 (3d Cir. 1910).

The Government is incorrect in suggesting that the court of appeals found that public disclosures had "waived" the privilege. Gov't Brief 30. The court of appeals found that as to certain matters there was no secret, not that there was a secret that the Government had waived its right to assert the privilege over.

A. The MLAT Argument Fails

The district court did not abuse its discretion in rejecting the argument that the Government's refusal of assistance to Poland under the U.S.-Poland Mutual Legal Assistance Treaty[8] (MLAT) barred Abu Zubaydah from seeking evidence from Mitchell and Jessen. "This argument is fallacious." Pet. App. 66a. Mitchell and Jessen are not the United States and not agents of the United States, and Abu Zubaydah is not Poland.

Equally meritless is the further argument that it offends either Polish or United States policies to permit discovery of nonprivileged evidence from Mitchell and Jessen. Poland's policy is that it wants this evidence; its Central Authority under the MLAT, the Polish Minister of Justice-Attorney General, has repeatedly requested it.[9] *See* MLAT art. 2(2); Gov't Brief 4, 8, App. 3a.

United States policy includes not just the MLAT but also section 1782, which authorizes Abu Zubaydah to seek discovery. The plain text of section 1782 does not prohibit an interested party from seeking evidence for use in a foreign government proceeding even if the

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[8] Treaty Between the United States of America and the Republic of Poland on Mutual Legal Assistance in Criminal Matters, U.S.-Pol., July 10, 1996, T.I.A.S. No. 99-917.1.

[9] In *Intel*, the Court held that even though the tribunal in question (the European Commission) did not want the evidence the section 1782 applicant sought to present to it, that was not a categorical bar to discovery. *Intel*, 542 U.S. at 265-66. Here, Poland wants the evidence.

foreign government could seek the same evidence under a treaty. And the MLAT expressly authorizes the production of evidence by other means, such as section 1782, that are "consistent with their laws." MLAT, art. 17.

The other relevant United States policy, the state secrets privilege, is not offended by the discovery of nonprivileged evidence.

B. The Burdensomeness Argument Fails

The Government's argument that discovery would be burdensome fails in light of its admission that the Mitchell and Jessen depositions in *Salim* proceeded with ease and efficiency. It has certainly been far more burdensome and consumed far more time and effort for the Government to fight the subpoenas to this Court than to participate in two depositions limited to nonprivileged matters.

C. A Rejected Privilege Claim Is Not A Discretionary Factor Weighing Against Discovery Under Section 1782

The tenor of the Government's section 1782 argument suggests it seeks an improper double-counting of its privilege claim under section 1782. It implies that the state secrets privilege should be taken into account not only in a court's privilege determination but again in making its discretionary determination whether to grant discovery.

This suggestion fails on multiple grounds. First, it is contrary to the statutory text. Congress provided that privilege claims should be addressed separately from the district court's consideration of its discretion: "A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege." § 1782(a); *Intel*, 542 U.S. at 260 ("We note at the outset, and count it significant, that § 1782(a) expressly shields privileged material"). Section 1782's grant of discretion to compel discovery thus extends only to nonprivileged matters, and any excluded privileged matters are beside the point in deciding whether to grant discovery.

Second, Mitchell and Jessen are called upon only to give nonprivileged testimony. The state secrets privilege and its policies have been satisfied by the lower courts' rulings on the scope of the privilege and the procedure to be followed for limiting discovery to evidence outside the privilege. The state secrets privilege should not be reintroduced back into the case under the guise of the *Intel* discretionary factors.

CONCLUSION

The court of appeals' judgment upholding in part and rejecting in part the Government's state secret's privilege assertion should be affirmed.

That the Government occasionally loses or partially loses a state secrets privilege claim comes as no

surprise. What would be a surprise is if the Government never lost a state secrets privilege claim. That would be a sign the lower courts are not doing their job. Some assertions of the privilege are much more weakly supported than others, and some are too weak to establish the privilege. That is especially true when, as here, the Government attempts to extend the privilege to cloak facts that are well established in the public record and beyond reasonable dispute. In the case of such public facts, the Government need not officially acknowledge them, but it cannot suppress litigation concerning them or discovery of nonprivileged evidence relating to them.

Respectfully submitted,

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