No. 20-828

IN THE

Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL.,

Petitioners,

v.

YASSIR FAZAGA, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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September 28, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

Constitutional Provisions and Legislative Materials

Books, Articles, and Other Authorities

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and therefore has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

According to Yassir Fazaga and the other plaintiffs in this case, the FBI used an informant to gather information about them and make surreptitious recordings of their private conversations—all because of their religion. In response to their lawsuit alleging violations of the Constitution and the Foreign Intelligence Surveillance Act (FISA), the government tried to invoke the state secrets privilege to have the case dismissed, but the court below held that the privilege was displaced here by FISA procedures allowing judges to review materials concerning electronic surveillance *in camera* to determine the lawfulness of the surveillance. Disagreeing with that conclusion, the government attempts to buttress its statutory arguments by

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[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

invoking constitutional principles that it says should control the Act's interpretation. This effort to tilt the interpretive scales in the government's favor should be rejected.

According to the government, the state secrets privilege "is rooted in the Executive's Art[icle] II duties to protect the national security and conduct foreign affairs." Pet. Br. 3. Because of that "constitutional foundation," the government says, this Court should not interpret FISA here in the same way that statutes are normally construed—instead, it should adopt a presumption against displacement of the state secrets privilege by requiring a "clear statement . . . that Congress intended to bring about such a startling change in the Executive's authority to protect national-security information." *Id.* at 3, 47. In other words, according to the government, "any ambiguity should be construed in favor of retaining the privilege." *Id.* at 19.

The government's position rests on a misleading account of the state secrets privilege that is at odds with the history of the privilege and this Court's precedents. In reality, the judiciary has never grounded the state secrets privilege in the Constitution; rather, it developed the privilege as a matter of federal common law, using its power to devise evidentiary rules based on its own perceptions of sound public policy. Indeed, far from representing a construction of the president's inherent Article II authority over military and foreign affairs, the key aspects of the state secrets privilege were drawn from twentieth-century case law in the United Kingdom, which this Court imported nearly wholesale into federal common law when it established the contours of the privilege in *United States v. Reynolds*, 345 U.S. 1 (1953). None of this Court's decisions resolving state secrets questions has ever

relied on the separation of powers or inherent executive authority under the Constitution.

In addition to distorting the legal basis for the state secrets privilege, the government also exaggerates its historical pedigree. For most of the nineteenth century, there was no American case law recognizing any privilege from disclosing state secrets in judicial proceedings. *See* Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 Geo. Wash. L. Rev. 1249, 1273-77 (2007). While the government claims that episodes in the early Republic indicate a recognition of the executive's power to withhold sensitive information from disclosure, those incidents—each of which is deeply ambiguous—at best represent early expressions of a general concept of executive privilege, rooted in concerns over confidentiality in government communications. These episodes have little if any bearing on the state secrets privilege and provide no evidence of a constitutional foundation for that doctrine.

Rather than stemming from principles widely accepted in the early Republic, the concept of an evidentiary privilege protecting state secrets from disclosure in court proceedings was a later innovation that developed slowly in American jurisprudence. And far from reflecting constitutional imperatives, the privilege was justified, at every step of its development, exclusively by the courts' common law authority to shape evidentiary rules in service of public policy.

The idea of a state secrets privilege entered American legal thought through the works of nineteenth-century treatise writers, who drew on diverse strands of English precedent in an effort to "rationalize and systematize the body of common law evidentiary rules." *Id.* at 1270. When this Court first endorsed a bar against the judicial enforcement of espionage

agreements in *Totten v. United States*, 92 U.S. 105 (1875), it similarly relied on analogies to common law privileges shielding "confidential" information from disclosure, as well as on general notions of "public policy," *id.* at 107, without referencing constitutional considerations of any kind. *See Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 485 (2011) (describing *Totten* as a use of "our common-law authority to fashion contractual remedies").

Notwithstanding *Totten*, which involved a "unique and categorical" rule barring certain types of suits entirely, *Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005), it was not until the early twentieth century that "[t]he core of a distinctive 'state secrets' privilege, focused on security-related matters, . . . beg[a]n to emerge," Chesney, *supra*, at 1281. Over the first half of that century, a number of lower court decisions recognized an evidentiary privilege against the public disclosure of government materials on the ground that their release would harm the public interest. Throughout this period, the emerging state secrets privilege continued to be understood as a common law evidentiary doctrine, not a matter of constitutional law, supported by citations to treatises, pragmatic arguments from necessity, and vague invocations of "public policy." *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353, 355 (E.D. Pa. 1912).

Before *Reynolds*, state secrets jurisprudence remained "limited and vague, and failed to set forth a standardized doctrine by which privilege claims ought to be evaluated." Sudha Setty, *Litigating Secrets: Comparative Perspectives on the State Secrets Privilege*, 75 Brook. L. Rev. 201, 232 (2009). When this Court eventually fleshed out the contours of the state secrets privilege and outlined a process to use in administering it, this Court acknowledged that judicial

experience with the privilege had been "limited in this country." *Reynolds*, 345 U.S. at 7. To fill the gap, this Court turned to contemporary developments in the United Kingdom, largely adopting the substantive and procedural standards for the privilege that had been recently prescribed by the House of Lords in *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624 (H.L.).

Critically, *Reynolds* derived none of its new standards from the separation of powers or the president's Article II authority. Indeed, this Court expressly disclaimed any reliance on constitutional principles when fashioning these standards—despite the government's urging of an "inherent executive power" under the Constitution to withhold materials from the judiciary. *See* 345 U.S. at 6 & n.9. Instead, *Reynolds* "decided a purely evidentiary dispute by applying evidentiary rules." *Gen. Dynamics*, 563 U.S. at 485. As in prior decisions concerning the state secrets privilege, this Court exercised its authority under federal common law to recognize evidentiary privileges based on general assessments of good public policy.

Reynolds remains "the only instance in which [this] Court has articulated a standard for the state secrets privilege." Setty, *supra*, at 208; *cf. Tenet*, 544 U.S. at 8-9 (applying the *Totten* bar while distinguishing it from the *Reynolds* privilege); *Gen. Dynamics*, 563 U.S. at 485-87 (same). To be sure, passages in *United States v. Nixon*, 418 U.S. 683 (1974), a case that did not concern state secrets, may suggest that Article II calls for *some* type of evidentiary privilege enabling the president to safeguard military and diplomatic secrets from public disclosure. "Plainly, however," whatever "core" of the state secrets privilege might be constitutionally compelled "does not account for the full scope of the privilege as it has come to be understood." Chesney, *supra*, at 1309. None of the

specific components of the privilege articulated in *Reynolds* has ever been linked to constitutional imperatives—including the rules concerning *in camera* review of allegedly privileged material.

In light of this history, the government is wildly off base to portray the state secrets privilege as "firmly rooted in the Constitution," with its common law origins relegated to an afterthought. Pet. Br. 42. Far from being the product of constitutional analysis, the standards governing the state secrets privilege were patterned on foreign sources in the course of exercising the courts' authority to craft evidentiary rules under federal common law, without any consideration of Article II or the separation of powers.

There is no warrant, therefore, for placing an interpretive thumb on the scale in the government's favor here by imposing an unusual requirement that Congress be "unmistakably clear" in displacing the state secrets privilege. Pet. Br. 16 (quoting Pet. App. 110a (Bumatay, J., dissenting from the denial of rehearing *en banc*)). Instead, this case should be resolved just like any other statutory dispute in which a party argues that Congress has supplanted federal common law. Under that standard, for the reasons explained by Respondents, the decision below should be affirmed.

ARGUMENT

I. The State Secrets Privilege Is Not a Product of Constitutional Analysis but of Federal Common Law.

In the government's telling, the state secrets privilege is "inherent in the constitutional design" and has been "acknowledged since our Nation's founding." Pet. Br. 46 (quoting Pet. App. 134a (Bumatay, J., dissenting from denial of rehearing *en banc*)). In reality, the

standards governing the privilege "emerged during the mid-twentieth century," Chesney, *supra*, at 1271, and were fashioned as a matter of federal common law without reference to the Constitution. Constitutional reasoning concerning executive authority and the separation of powers has played no role at any point in the long development of the state secrets privilege.

A. Nineteenth-century precursors to the state secrets privilege invoked English common law and general notions of public policy.

Although the government cites episodes from the early Republic to claim that the state secrets privilege has been "acknowledged since our Nation's founding," Pet. Br. 46 (quoting Pet. App. 134a), those episodes have no clear relationship to the privilege. *See infra* Part II. Until the late nineteenth century, there was no American case law recognizing any "privilege against court-ordered disclosure of state and military secrets." *Gen. Dynamics*, 563 U.S. at 484.

Instead, the concept of such a privilege entered American legal thought in the mid–nineteenth century, thanks to "treatise writers actively seeking to rationalize and systematize the body of common law evidentiary rules." Chesney, *supra*, at 1270. Given "the absence of on-point case law in the United States," these authors "relied extensively on English precedent." *Id.* at 1273. They did not root their discussions in the American separation of powers or the president's constitutional authority. Rather, citing English decisions and general notions of public policy, these authors combined "disparate threads" under "the umbrella concept of a multifaceted 'public interest' privilege, some aspects of which were referred to under the subheading of 'state secrets.'" *Id.* at 1270-71.

For example, Thomas Starkie's English treatise on evidence—subsequently published and widely influential in America—discussed the exclusion of evidence "on grounds of public policy," including in situations where "disclosure might be prejudicial to the community." 1 Thomas Starkie, *A Practical Treatise on the Law of Evidence* 69, 71 (7th Am. ed. 1842). This discussion integrated "three distinct lines of English precedent" involving protections for criminal informers, for the deliberative process, and for information kept secret "on security grounds." Chesney, *supra*, at 1274; *see, e.g.*, Starkie, *supra*, at 71-72 (citing *Rex v. Watson*, 2 Starkie's C. 148 (K.B. 1817), where, for public safety, "an officer from the Tower of London could not be examined as to the accuracy of a plan of the Tower").

Simon Greenleaf's treatise, "arguably the first successful volume of this nature to be written from an explicitly American perspective," Chesney, *supra*, at 1276, likewise discussed evidence "excluded from motives of public policy," including "*secrets of State* . . . the disclosure of which would be prejudicial to the public interest," 1 Simon Greenleaf, *A Treatise on the Law of Evidence* 327 (7th ed. 1854). Greenleaf's "secrets of state" category encompassed a diverse range of situations not tied to military or foreign affairs, was based primarily on English precedent, and referenced no American constitutional law principles. *See id.* at 329.

While treatises propagated the idea of evidentiary privileges tied to public safety, it was not until 1875, in *Totten*, that this Court first established "a Government privilege against court-ordered disclosure of state and military secrets." *Gen. Dynamics*, 563 U.S. at 484. *Totten* "preclude[d] judicial review" entirely in cases "where success depends upon the existence of [a] secret espionage relationship with the Government," *Tenet*, 544 U.S. at 8, essentially concluding that "some

claims against the government are simply not justiciable based on the nature of the claim being made and the need for government secrecy," Setty, *supra*, at 233. While *Totten*'s "unique and categorical" bar to suit is distinct from the more limited evidentiary privilege recognized in later cases, *Tenet*, 544 U.S. at 6 n.4, it was "a significant extension of the still-evolving concept of a state secrets privilege," Chesney, *supra*, at 1278; *see Gen. Dynamics*, 563 U.S. at 485-86 (describing *Totten* as part of "our state-secrets jurisprudence").

Totten "at no point described its holding in separation of powers or other constitutional terms." Chesney, *supra*, at 1278. "Rather, the Court simply spoke in terms of the detrimental 'public policy' ramifications of permitting lawsuits regarding unacknowledged espionage contracts to proceed," *id.* at 1278-79, reasoning that secrecy was an implied term of such contracts, precluding "any action for their enforcement," *Totten*, 92 U.S. at 107; *cf. Gen. Dynamics*, 563 U.S. at 490 ("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." (citation omitted)).

Given the secret matters involved, *Totten* compared the enforcement of espionage contracts to other types of suits that could not be pursued because they would "lead to the disclosure of matters which the law itself regards as confidential." *Totten*, 92 U.S. at 107 (citing suits that "would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician"). As with those other examples of common law evidentiary privileges, suits to enforce espionage agreements were prohibited for the simple reason that exposing the relevant facts would be to the "serious detriment of the public." *Id.* "'[P]ublic policy,'" this

Court held, "forbids the maintenance of any [such] suit." *Gen. Dynamics*, 563 U.S. at 486 (quoting *Totten*, 92 U.S. at 107). *Totten* thus "followed the British example . . . in recognizing a public-policy justification in American law for precluding public disclosure of information on security-related grounds." Chesney, *supra*, at 1278.

In short, *Totten* was an exercise of the judiciary's "common-law authority to fashion contractual remedies in Government-contracting disputes." *Gen. Dynamics*, 563 U.S. at 485; *see id.* at 488 (explaining that courts may refuse, "on grounds of public policy," to aid an "unenforceable promise"). *Totten*'s "public policy" rationale arose from that common law framework, not from any reference to Article II or the separation of powers. And that rationale persists today. *See id.* at 487 ("refusal to enforce promises contrary to public policy . . . is not unknown to the common law, and the traditional course is to leave the parties where they stood"); *id.* at 491 ("what we promulgate today is . . . a common-law opinion").

B. When a privilege concerning state secrets began to emerge in the twentieth century, it was based on federal common law authority to shape evidentiary rules in service of public policy.

"By the late nineteenth century, treatise writers in the United States had begun to refer expressly to a 'state secrets' privilege." Chesney, *supra*, at 1280. But they were still using that term "much as the early writers had referred to a 'public interest' privilege: namely, as an umbrella concept integrating cases like *Totten* . . . with precedents concerning the informer's privilege, the deliberative-process privilege, and the government-communications privilege." *Id.* Only "in the

early twentieth century" did the "[t]he core of a distinctive 'state secrets' privilege, focused on security-related matters, . . . begin to emerge." *Id.* at 1281. The nature of the privilege remained nebulous throughout this period, with little articulation of its standards or procedures. But the nascent doctrine was firmly understood as a common law evidentiary principle—not a matter of constitutional law—justified by citations to treatises, pragmatic arguments from necessity, and vague invocations of public policy.

Over the first half of the twentieth century, in "fairly conclusory fashion and without extended analysis, a handful of lower courts considered what was in substance a state secrets privilege, typically described as a 'military or national security privilege.'" Anthony John Trenga, *What Judges Say and Do in Deciding National Security Cases: The Example of the State Secrets Privilege*, 9 Harv. Nat'l Sec. J. 1, 12 (2018). In the absence of any comprehensive standards or "unifying doctrine," Setty, *supra*, at 234, these decisions rested on vague invocations of "public policy," supported by citations to treatises, English precedent, and *Totten*. *See Firth Sterling*, 199 F. at 355 (citing those sources for "the rule of public policy forbidding the disclosure of military secrets"); *Robinson v. United States*, 50 Ct. Cl. 159, 167 (1915) ("The Government is not required to answer questions or supply papers which on the grounds of public policy it is entitled to resist."); *Pollen v. United States*, 85 Ct. Cl. 673, 679 (1937) (relying on treatises and the "many English cases" protecting "military secrets, the disclosure of which . . . would be detrimental to the National defense").

Courts universally understood the emerging state secrets privilege to be a common law evidentiary doctrine. *See O'Neill v. United States*, 79 F. Supp. 827, 829 (E.D. Pa. 1948) (citing "the general policy of the

common law, prohibiting disclosure of state secrets the publication of which might . . . harm the government in its diplomatic relations, military operations or measures for national security"); *Firth Sterling*, 199 F. at 355 (stating that "at common law" the court "might, upon grounds of public policy, strike out evidence of this nature"). Constitutional principles were not invoked.

Indeed, when decisions of this era elaborated on the theoretical justification for the privilege, they described it as a matter of practical necessity emanating from a right of self-preservation intrinsic to all governments. *See, e.g.*, *Pollen*, 85 Ct. Cl. at 681 (the privilege is "predicated upon the principle of the public good and the right of the Sovereign to maintain an efficient National defense," which "transcends the individual interests of a private citizen"). The reasoning was pragmatic, not constitutional, and no emphasis was placed on executive branch authority vis-à-vis the other branches. *See, e.g.*, *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583, 584 (E.D.N.Y. 1939) (citing "the inherent right of self-preservation for purposes of national defense" as "a paramount government right").

Because courts were fashioning a common law doctrine rather than discerning the executive branch's constitutional authority, they felt free to look to contemporary developments in foreign law for inspiration. In *Bank Line v. United States*, 163 F.2d 133 (2d Cir. 1947), for instance, the court of appeals recommended that the district court "consider the views of the English House of Lords recently expressed . . . in *Duncan v. Cammell, Laird & Co.*, (1942) A.C. 624, when discussing the nature of the privilege to withhold production of official documents on grounds of public interest." *Bank Line*, 163 F.2d at 139.

Moreover, even when the government raised constitutional arguments in support of nondisclosure, it did not base these arguments on the president's military or foreign affairs powers under Article II. Rather, the government simply claimed a broad executive privilege to withhold information *of any kind* from the other branches. *See O'Neill*, 79 F. Supp. at 830 (describing the attorney general's argument that under the separation of powers he was "free to refuse disclosure of *any evidence* in his possession, *regardless of its character*, for *any reason which may seem to him sufficient*" (emphasis added)); *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 469 (1951) (describing the attorney general's assertion of "a determinative power as to whether or on what conditions . . . he may refuse to produce government papers under his charge"); 25 Op. Att'y Gen. 326, 331 (1905) (advising a department head that he could decline to furnish records of his department "whenever in your judgment the production of such papers . . . might prove prejudicial for any reason to the Government or to the public interest").

Significantly, too, courts that recognized a state secrets privilege in this era saw no tension between that privilege and a judge's *in camera* review of the materials alleged to be privileged. *See Cresmer v. United States*, 9 F.R.D. 203, 204 (E.D.N.Y. 1949) ("[T]o make sure that the report in question contained no military or service secrets which would be detrimental to the interests of the armed forces of the United States or to the National security, I requested counsel to produce the report for my examination.").

C. The standards governing the state secrets privilege were borrowed, as a matter of federal common law, from contemporary developments in the United Kingdom.

In *United States v. Reynolds*, 345 U.S. 1 (1953), this Court confirmed the existence of a state secrets privilege in the common law of evidence and for the first time established standards to govern the administration of the privilege. Those standards were imported nearly wholesale from contemporary case law in the United Kingdom. This Court borrowed those standards as an exercise of federal common law authority without suggesting that any of them have any relationship to the separation of powers or the president's Article II authority.

Reynolds was a dispute "about the admission of evidence," *Gen. Dynamics*, 563 U.S. at 485, under the Federal Rules of Civil Procedure. Those rules authorized discovery only of materials "not privileged," which this Court construed as referring "to 'privileges' as that term is understood in the law of evidence." *Reynolds*, 345 U.S. at 6. "At the time, Congress had not yet approved the Federal Rules of Evidence, and therefore the only 'law of evidence' to apply in federal court was an amalgam of common law, local practice and statutory provisions with indefinite contours." *In re NSA Telecommunications Recs. Litig.*, 564 F. Supp. 2d 1109, 1123 (N.D. Cal. 2008). Citing treatises and some of the limited American precedent available, this Court confirmed that a privilege against revealing military and state secrets was "well established in the law of evidence." *Reynolds*, 345 U.S. at 6-7.

Beyond merely recognizing the existence of such a privilege, *Reynolds* fleshed out its contours and "adopted for the first time a methodology" for

administering it. Trenga, *supra*, at 13. That guidance was sorely needed because, as this Court observed, "[j]udicial experience with the privilege" had "been limited in this country." *Reynolds*, 345 U.S. at 7.

In confirming the existence of a state secrets privilege and defining its scope, this Court did not draw on Article II, the separation of powers, or any other constitutional principles concerning executive authority. *Reynolds* was explicit on this point: The government asserted a "power to suppress documents" based on "an inherent executive power which is protected in the constitutional system of separation of power." *Id.* at 6 n.9. But this Court disclaimed any reliance on constitutional considerations, finding it "unnecessary to pass upon" these "broad propositions." *Id.* at 6. Instead, *Reynolds* "decided a purely evidentiary dispute by applying evidentiary rules." *Gen. Dynamics*, 563 U.S. at 485.[2]

Having expressly "declined to address the constitutional question" raised by the government, *Reynolds* simply "interpreted and applied federal common law." *In re NSA*, 564 F. Supp. 2d at 1123. But with "little domestic doctrine to rely upon," Setty, *supra*, at 226-27, this Court sketched the outlines of the state secrets privilege by turning to foreign law—specifically, contemporary standards in the United Kingdom. "English experience has been more extensive," this Court explained, and "the principles which control the application of the privilege emerge quite clearly from the available precedents." *Reynolds*, 345 U.S. at 7; *see* William G. Weaver & Robert M. Pallitto, *State Secrets and*

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[2] *Reynolds* did draw on constitutional principles, but not concerning Article II or the separation of powers. *See* 345 U.S. at 8 (analogizing to the privilege against self-incrimination secured by the Fifth Amendment).

Executive Power, 120 Pol. Sci. Q. 85, 97 (2005) (while American decisions had begun to distinguish the state secrets privilege from various forms of executive privilege, "case law in the United States proved too thin a resource to fully explain this distinction, and so [this] Court turned to the law of the United Kingdom and the development of the doctrine of 'crown privilege'").

Significantly, among the principles that *Reynolds* borrowed from abroad was a cautious stance toward *in camera* judicial review of materials alleged to be privileged—an attitude not previously found in American state secrets jurisprudence. Two English decisions, "one in the 1860s and the other in the 1940s," were "decisive" in entrenching this principle in England, "laying the groundwork for the parameters of the U.S. state secrets privilege as laid out in *Reynolds*." Setty, *supra*, at 228.

First, *Beatson v. Skene* held that when the head of a department "states that in his opinion the production of the document would be injurious to the public service, . . . the Judge ought not to compel the production of it." 157 Eng. Rep. 1415, 1421-22 (Exch. Div. 1860). Notably, "[t]he court in *Beatson* reasoned that a contrary approach ordinarily would not be possible because, it believed, a judicial inspection 'cannot take place in private' and thus necessarily would entail public exposure of the matter in issue." Chesney, *supra*, at 1280 (quoting *Beatson*, 157 Eng. Rep. at 1421).

That principle was fortified in *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624 (H.L.), in which the House of Lords essentially ruled that "if a government officer offers a good faith affidavit as to the need for nondisclosure," it should be accepted "at face value." Setty, *supra*, at 228-29. "Those who are responsible for the national security must be the sole judges of what the national security requires," *Duncan* stated,

and so the "approved practice" was "to treat a Ministerial objection taken in proper form as conclusive," and "the Court should not ask to see the documents." *Duncan*, A.C. 624 (quotation marks omitted). While the decision to exclude documents remained "the decision of the Judge," a validly taken objection to production, "on the ground that this would be injurious to the public interest," was "conclusive." *Id.*

This Court largely "adopted the framework" of *Duncan* when setting forth the parameters of the state secrets privilege in *Reynolds*. Weaver & Pallitto, *supra*, at 98; *see Reynolds*, 345 U.S. at 7-8 & nn.15, 20-22. This Court made an important change, however, regarding the one aspect of the privilege that it said "presents real difficulty," namely, the rule that a court determining whether the privilege applies should "do so without forcing a disclosure of the very thing the privilege is designed to protect." *Reynolds*, 345 U.S. at 8; *see id.* at 8 n.22 (citing *Duncan* for this principle). Under *Reynolds*, an official's assertion of the state secrets privilege is not "conclusive." *Duncan*, A.C. 624. Instead, drawing on judicial experience with the privilege against self-incrimination, this Court fashioned a "like formula of compromise," permitting courts to require a "disclosure to the judge before the claim of privilege will be accepted," including, if necessary, a "complete disclosure." *Reynolds*, 345 U.S. at 9-10.

In sum, like *Totten* before it, *Reynolds* was a common law decision decided on common law principles, and it derived none of its rules from the president's Article II responsibilities. Exercising the traditional authority to carve out evidentiary privileges under federal common law based on general assessments of sound public policy, this Court patterned the scope of the privilege on the model provided by contemporary law in the United Kingdom.

II. The Government Mischaracterizes the Origins and Foundation of the Privilege.

A. Ambiguous episodes in the early Republic have no clear connection to the state secrets privilege.

Despite the history recounted above, the government insists that "[t]he Executive's power and duty . . . to protect state secrets" has been "recognized since the earliest years of the Republic," Pet. Br. 2, and attempts to trace a direct line between certain episodes in the early Republic and the privilege later established in *Reynolds*. That effort is unavailing. Early judicial decisions did not recognize a state secrets privilege or any predecessor to it. The government's evidence consists of ambiguous *dicta* and an incident involving a *congressional* request for documents—none of which has any clear relationship to the state secrets privilege, much less supplies evidence of a constitutional foundation for that privilege.

The "early pronouncements" cited by the government and the dissent below "dealt with a series of evidentiary questions that were quite distinct from one another and which did not necessarily concern matters of a diplomatic or military nature." Chesney, *supra*, at 1270. Focused on the confidentiality of communications among government officials, not on presidential authority under Article II, these discussions are, at best, nascent expressions of a "general notion of executive privilege" that fail to clarify its "nature or extent." Setty, *supra*, at 232; *see* Weaver & Pallitto, *supra*, at 96 ("until recently, courts did not undertake to disentangle executive privilege from the power to withhold military and state secrets from judicial proceedings").

The government points primarily to statements made by Chief Justice Marshall while presiding over Aaron Burr's treason trial, in which the defense sought a letter discussing Burr that a U.S. general had sent to President Jefferson. *See United States v. Burr*, 25 F. Cas. 187, 190 (C.C.D. Va. 1807). According to the government, Marshall acknowledged a need for judicial deference to "the President's judgment that, in response to a trial subpoena, the public interest required that certain documents 'be kept secret.'" Pet. Br. 3 (quoting *Burr*, 25 F. Cas. at 192). But the government mischaracterizes Marshall's statements.

Contrary to the government's intimation, Jefferson "did not attempt to withhold any documents from production to the court." Setty, *supra*, at 232-33. Rather, prosecutor George Hay "said he had that letter, and would produce it," but that "some matters" discussed in the letter *"ought not to be made public*." *Burr*, 25 F. Cas. at 190 (emphasis added); *see id.* (objecting to "public inspection" of these passages). Notably, Hay "was willing to put them in the hands of the clerk confidentially" to "copy all those parts which had relation to the cause," and suggested that "if there should be any difference of opinion as to what were confidential passages, *the court should decide*." *Id.* (emphasis added).

Marshall approved a subpoena *duces tecum* for the letter, and Hay produced it, "excepting such parts" as were, in his view, "not material" to the defense or the issues involved. *Id.* The government "was not resisting production on the ground that disclosure of the document would endanger the public safety," Chesney, *supra*, at 1272 (quotation marks omitted), but rather because portions of the letter were "confidential," *Burr*, 25 F. Cas. at 190. And crucially, Hay had no objection to allowing the court to view the entire letter to

confirm that the passages in question were not material: "The accuracy of this opinion *I am willing to refer to the judgment of the court, by submitting the original letter to its inspection*." *Id.* (emphasis added). Thus, "the Government was perfectly willing to leave it to the court to determine whether portions of the letter were in fact privileged. It insisted only that the portions so adjudged should be withheld from the defendant." Raoul Berger & Abe Krash, *Government Immunity from Discovery*, 59 Yale L.J. 1451, 1458 (1950).

This was the context for Marshall's statement relied on here by the government: "Had the president, when he transmitted [the letter], subjected it to certain restrictions, and stated that in his judgment the public interest required certain parts of it to be kept secret, and had accordingly made a reservation of them, all proper respect would have been paid to it," Marshall observed, "but he has made no such reservation." *Burr*, 25 F. Cas. at 192. Marshall did not elaborate on what "proper respect" would have entailed, and his focus, like the prosecutor's, was on *public* disclosure:

> In regard to the secrecy of these parts which it is stated *are improper to give out to the world*, the court will take any order that may be necessary. *I do not think that the accused ought to be prohibited from seeing the letter*; but, if it should be thought proper, I will order that *no copy of it be taken for public exhibition* . . . . After the accused has seen it, it will yet be a question whether it shall go to the jury or not.

Id. (emphasis added). The government "produce[d] the letter under the restrictions suggested by the court," *id.* at 192-93, and ultimately the evidentiary dispute "became moot, sparing Marshall the need to take a

firm stand with respect to privilege issues," Chesney, *supra*, at 1272-73.

In short, *Burr* does not evince any understanding in the early Republic that executive branch officials could withhold materials from review by the courts on national security grounds, much less suggest a constitutional pedigree for the modern state secrets privilege. The government's objections in *Burr* did not clearly relate to military or diplomatic secrets, and constitutional principles were not invoked. Most importantly, no one raised any objection to judicial review of the allegedly immaterial passages in the disputed letter—not the prosecutor, not Jefferson, and not Marshall. To the extent that *Burr* sheds any light on the present controversy, therefore, it supports the position of Respondents, not the government: the assumption shared by all was that court review would remain available even if particular information could not be disclosed publicly.

The dissent below cites *Marbury v. Madison*, 5 U.S. 137 (1803), to similar ends, pointing to a trial colloquy in that case as evidence that "the Judiciary has long recognized an executive privilege over sensitive information." Pet. App. 116a (Bumatay, J., dissenting from the denial of rehearing *en banc*). But that exchange has nothing to do with state secrets.

At trial in *Marbury*, the attorney general claimed "that he was not bound . . . to answer, as to *any facts which came officially to his knowledge* while acting as secretary of state." 5 U.S. at 143; *id.* at 144 ("He did not think himself bound to disclose his official transactions while acting as secretary of state."). Although Chief Justice Marshall had "no doubt he ought to answer" the questions put to him, because "[t]here was nothing confidential required to be disclosed," Marshall also suggested that "if he thought that any thing

was communicated to him in confidence he was not bound to disclose it." *Id.* at 144.

"The *Marbury* dicta raised more questions than it answered." Chesney, *supra*, at 1272. "Did the Court mean to suggest that confidential communications to executive branch officials are privileged," and if so, "was the basis for protection rooted in the common law of evidence, in constitutional considerations associated with the independence of the executive branch, or both?" *Id.* "Or was the point to suggest that courts lack the capacity to subject a cabinet official to judicial process . . . ?" *Id.*

There is no way of knowing. And regardless, the exchange did not involve any claim of authority to withhold state secrets from the judiciary on the basis of the president's Article II authority over military and foreign affairs. Instead, this episode and the one in *Burr* are "best thought of" as pertaining to the "deliberative process privilege," *id.* at 1274, or simply to an early conception of executive privilege more generally, *see* Trenga, *supra*, at 11 n.21. Neither case is clearly related to the modern state secrets privilege, much less suggests that the privilege is grounded in the Constitution.[3]

With no other judicial sources of even arguable relevance, the government cites President Washington's response to a *legislative* request for documents concerning the disastrous St. Clair expedition. Pet. Br. 2; *see Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2029-

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[3] Notably, Greenleaf's mid-nineteenth-century treatise cited *Burr* and *Marbury* only in regard to protecting the confidentiality of communications among government officials, a privilege enjoyed by state as well as federal officers. *See* Greenleaf, *supra*, at 329. The American editor of Starkie's treatise cited those opinions (only) for the same point. *See* Starkie, *supra*, at 71 n.1.

30 (2020). But this episode has even less to do with the state secrets privilege than the discussions in *Marbury* and *Burr*.

Upon receiving this congressional request, Washington's cabinet concluded—relying primarily on precedents from the English House of Commons—that presidents could withhold documents from Congress "the disclosure of which would injure the public." 1 *The Writings of Thomas Jefferson* 304 (Andrew Lipscomb ed., 1903). But despite affirming, in theory, this right to withhold documents from Congress, the cabinet "agreed in this case, that there was not a paper which might not be properly produced." *Id.* at 305; *see* 20 Op. O.L.C. 253, 270 (1996) ("[T]he cabinet further advised President Washington that the documents in question could all be disclosed consistently with the public interest.").

This episode did not concern privileges from disclosure in judicial proceedings, much less the question of when judges can or should compel disclosure of contested materials *in camera*. Moreover, there is no record of the basis for the position taken by Washington's cabinet, beyond the vague public-interest rationale quoted above. And although Congress, upon learning of the administration's position, issued a new request asking only for papers "of a public nature," 20 Op. O.L.C. at 270, the import of that change was also "ambiguous," *id.* at 270 n.54 (quoting Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power* 82-83 (1976)).

In short, the St. Clair incident—flush with ambiguity and fundamentally involving the interplay between the political branches, *see Mazars*, 140 S. Ct. at 2031—offers paltry support for the notion that the state secrets privilege is "a longstanding feature of our

legal system" with "a firm foundation in the Constitution." Pet. Br. 42, 45 (quotation marks omitted).

B. Any relationship between Article II and the state secrets privilege remains undefined.

Since *Reynolds*, this Court has hinted that Article II may call for *some* version of a state secrets privilege, given the president's responsibilities in military and diplomatic affairs. But none of the features of the privilege that actually exists has ever been linked to any constitutional imperatives.

Reynolds is still "the only instance in which [this] Court has articulated a standard for the state secrets privilege." Setty, *supra*, at 208. Comments made in *United States v. Nixon*, 418 U.S. 683 (1974), however, may provide "indirect support" for the idea that a privilege against disclosing military and state secrets implicates presidential authority under the Constitution. Chesney, *supra*, at 1294. In rejecting President Nixon's broad and undifferentiated claim of executive privilege, this Court implied that it might have accorded greater protection to his "interest in confidentiality" in his "Presidential communications" if they had concerned "military or diplomatic secrets." *Nixon*, 418 U.S. at 706, 711. More generally, this Court stated that "to the extent" that an interest in confidentiality "relates to the effective discharge of a President's powers, it is constitutionally based." *Id.* at 711. At the same time, however, this Court endorsed *in camera* judicial review of subpoenaed presidential materials to excise any portions that might be privileged under *Reynolds*. *See id.* at 715 n.21.

"*Nixon* was not, of course, a state secrets privilege case," and its allusion to the possibility of a different result if military or diplomatic matters had been

involved was *dicta*. Chesney, *supra*, at 1294. Still, this Court's comments may suggest that some form of a state secrets privilege could be constitutionally compelled—at least with respect to "confidential conversations between a President and his close advisors." *Nixon*, 418 U.S. at 703. "Plainly, however," any such constitutional core "does not account for the full scope of the privilege as it has come to be understood." Chesney, *supra*, at 1309. As discussed, the substantive and procedural standards that actually comprise the privilege did not result from an analysis of the Constitution. Rather, they were imported from abroad and adopted in common law fashion without any consideration of Article II or the separation of powers.

To assert that the state secrets privilege performs "a function of constitutional significance," therefore, Pet. Br. 45 (quoting *El-Masri v. United States*, 479 F.3d 296, 304 (4th Cir. 2007)), is not so much wrong as it is misleading in its artful construction. The ability to conceal information concerning national security may indeed make it easier for the executive branch to pursue the goals it has set in the realms of military or foreign affairs. In that sense, any state secrets privilege adopted by the courts, whatever its scope or rationale, would have "constitutional significance." *Id.* But it is a leap to jump from that observation to the conclusion that the state secrets privilege as we know it—fashioned in *Reynolds* as a matter of federal common law—has "a firm foundation in the Constitution." *Id.* (quoting *El-Masri*, 479 F.3d at 304). The history of the privilege belies that assertion.

III. Because the Question Here Implicates the Powers of All Three Branches of Government, the Analysis Should Not Be Slanted in Favor of the Executive.

Tipping the interpretive scales in the executive branch's favor is inappropriate here for an additional reason: the state secrets privilege affects the constitutional powers of all three branches of government.

"The Constitution gives Congress near-plenary power to decide which kinds of Article III cases and controversies federal courts shall hear," and the dismissal of lawsuits as a result of the state secrets privilege therefore "intrudes not just on the power of courts and the rights of individuals, but on the jurisdiction-conferring authority of the legislature as well." Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 Fordham L. Rev. 1931, 1932 (2007); *see In re United States*, 872 F.2d 472, 477 (D.C. Cir. 1989) ("[D]enial of the forum provided under the Constitution for the resolution of disputes, U.S. Const. art. III, § 2, is a drastic remedy . . . .").

Further, when the executive branch uses the state secrets privilege "to obtain dismissals of suits alleging government misconduct or unconstitutional behavior," it "raises special concerns relating to democratic accountability and the rule of law." Chesney, *supra*, at 1308. While the judiciary has no "roving writ to ferret out and strike down executive excess," *El-Masri*, 479 F.3d at 312, the Framers intended that in resolving "Cases" and "Controversies," U.S. Const. art. III, § 2, cl. 1, and "decid[ing] on the rights of individuals," *Marbury*, 5 U.S. at 170, the federal courts would rein in unlawful abuses by the executive branch, preserving the rights secured by federal law "from all violation from every quarter," *Cohens v. Virginia*, 19 U.S. 264, 388 (1821); *see* 1 Annals of Cong. 457 (1789) (Joseph

Gales ed., 1834) (James Madison) ("independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive"); *The Federalist No. 78*, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Without this, all the reservations of particular rights or privileges would amount to nothing.").

Critically, too, "power over national security information does not rest solely with the president." *In re NSA*, 564 F. Supp. 2d at 1120-21. Instead, "decisions as to foreign policy . . . . are wholly confided by our Constitution to the political *departments* of the government, *Executive and Legislative*." *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (emphasis added). So too for decisions concerning military policy. *See Martin v. Mott*, 25 U.S. 19, 28-29 (1827). Indeed, Congress, not the president, is the "final arbiter of military and diplomatic policy." James Zagel, *The State Secrets Privilege*, 50 Minn. L. Rev. 875, 896 (1966); *see id.* at 896 n.82 ("The presidential powers over treaties and the armed forces are subject either to outright congressional veto or to implied veto by virtue of Congress' control over appointments and appropriations.").

In line with this constitutional structure, Congress has empowered the judiciary "to hear cases in which executive power is challenged" by giving it "broad federal question jurisdiction, and by enacting specific statutory limits on executive power in the area of national security, such as in the Foreign Intelligence Surveillance Act." Frost, *supra*, at 1954-55. When the state secrets privilege restricts the breadth of that jurisdiction and the effectiveness of those limits, it affects the constitutional roles of Congress and the federal courts.

Thus, when the question is whether a statute enacted by the legislature permits the judiciary to adjudicate allegations that the executive has violated the law, the answer implicates the constitutional powers of all three branches of government. Skewing that statutory analysis in favor of the executive is unwarranted.

* * *

In sum, there is no justification for distorting the normal approach to statutory interpretation here by demanding a showing "that Congress was unmistakably clear," Pet. Br. 16 (quoting Pet. App. 110a), when it displaced the state secrets privilege in FISA. This Court should do what it normally does: interpret the statute to discern its meaning.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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September 28, 2021 * Counsel of Record