No. 20-827

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ZAYN AL-ABIDIN MUHAMMAD HUSAYN,
A.K.A. ABU ZUBAYDAH, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION FOR RESPONDENTS ABU ZUBAYDAH AND JOSEPH MARGULIES

JOSEPH MARGULIES
jm347@cornell.edu
243 Myron Taylor Hall
Cornell University
School of Law
Ithaca, NY 14850
(607) 255-6477

DAVID F. KLEIN
Counsel of Record
david.klein@pillsburylaw.com
JOHN PATRICK CHAMBERLAIN
john.chamberlain@pillsburylaw.com
PILLSBURY WINTHROP SHAW
PITTMAN LLP
1200 Seventeenth Street, NW
Washington, DC 20036
(202) 663-8000

Attorneys for Respondents Abu Zubaydah and Joseph Margulies

QUESTION PRESENTED

Where the district court found that some information sought by Respondents' subpoenas is neither classified nor covered by the state secrets privilege, but dismissed the case without attempting to separate privileged from nonprivileged information, could the court of appeals remand with instructions to make the attempt?

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A. Abu Zubaydah's Capture and Detention

Respondent Zayn al-Abidin Muhammad Husayn ("Abu Zubaydah") is a stateless Palestinian currently imprisoned at the U.S. detention facility in Guantánamo Bay, Cuba. Respondent Joseph Margulies is one of his attorneys. Abu Zubaydah was captured in Pakistan in March 2002 by U.S. and Pakistani agents, and has been imprisoned ever since, without charges, as an alleged "enemy combatant."

For several years after his capture, Abu Zubaydah was held in various CIA "black sites" in foreign countries, where he was subjected to a relentless regime of "enhanced interrogations." On 83 different occasions in a single month of 2002, he was strapped to an inclined board with his head lower than his feet while CIA contractors poured water up his nose and down his throat, bringing him within sight of death. He was handcuffed and repeatedly slammed into walls, and suspended naked from hooks in the ceiling for hours at a time. He was forced to remain awake for eleven consecutive days, and doused again and again with cold water when he collapsed into sleep. He was forced into a tall, narrow box the size of a coffin, and crammed into another box that would nearly fit under a chair, where he was left for hours. He was subjected to a particularly grotesque humiliation described by the CIA as "rectal rehydration." *See generally* Senate Select Committee on Intelligence, Committee Study of the Central

Intelligence Agency's Detention and Interrogation Program, Executive Summary at 40-47, 118, 488 of 499, S. Rep. No. 288, 113th Cong., 2d Sess. 11 (2014) (hereafter "SSCI Report").[1]

In ostensible justification of this torture, the CIA initially took the position that Abu Zubaydah had been, *inter alia*, the "third or fourth man" in al Qaeda, and that he was "involved in every major terrorist operation carried out by al Qaeda," including as "one of the planners of the September 11 attacks." SSCI Report at 410 of 499. The CIA also maintained that Abu Zubaydah had some unique ability to resist interrogations and that he had authored the al Qaeda manual on resistance techniques. *Id.* But a 2014 report of the Senate Select Committee on Intelligence determined that all these allegations were either false or unsupported by any CIA record. *Id.* at 410-11. The CIA eventually concluded, for instance, that Abu Zubaydah had been telling the truth when he protested that he was not a member of al Qaeda. *Id.* Moreover, "CIA records [did] not support" the assertion that Abu Zubaydah helped plan the September 11 attacks or any other "major terrorist operation," or that he had any expertise in resisting

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[1] Abu Zubaydah's torture has been described in a number of official, unclassified documents. The most comprehensive account appears in the SSCI Report. For a first-person description of the torture, *see*, *e.g.*, Carol Rosenberg, "What the CIA's Torture Program Looked Like to the Tortured," *New York Times*, Dec. 4, 2019, https://www.nytimes.com/2019/12/04/us/politics/cia-torture-drawings.html; Mark Denbeaux, "How America Tortures," Seton Hall Center for Policy and Research (2019).

interrogations. *Id.* at 410. And the most inflammatory allegation—that he had been a senior officer in al Qaeda—had been based on "single-source reporting that was recanted." *Id.* The Government's contrary statement in its Petition—that Abu Zubaydah "was an associate and longtime terrorist ally of Osama bin Laden" (Pet. 2)—is categorically false.[2]

From December 2002 until September 2003, the CIA detained Abu Zubaydah at a black site in Stare Kiejkuty, Poland. Court of Appeals Excerpts of Record ("C.A. E.R.") at 558, Judgment in *Husayn (Abu Zubaydah) v. Poland*, No. 7511/13, European Court of Human Rights ("ECHR Judgment") at ¶ 419. The former president of Poland, who was in office at the time of Abu Zubaydah's captivity there, confirmed that a CIA black site operated in his country. Pet. App. 59a, 79a. The SSCI Report refers to the Polish site by the alias, "Detention Site Blue." C.A. E.R. 97-98.

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[2] At no point in the Petition or the proceedings below has the Government cited any evidence to support its statement. Instead, the Government relies on *dicta* from a judicial opinion in 2013, in a case in which Abu Zubaydah was not a party and did not have the opportunity to dispute the Government's allegations. *Ali v. Obama*, 736 F.3d 542, 546 (D.C. Cir. 2013). That case was decided before the public release of the SSCI Report, which debunked the CIA's claims.

B. Polish Investigation and Proceedings Before the European Court of Human Rights

In 2010, Mr. Margulies and other attorneys for Abu Zubaydah filed an application in Poland (analogous to a criminal complaint) seeking to hold Polish officials accountable for their complicity in Abu Zubaydah's unlawful detention and torture on Polish soil. They sought "injured-party" status in the ensuing investigation. C.A. E.R. 443 (ECHR Judgment ¶ 142). The investigation produced no material progress for several years (*id.* at 577, ¶ 482), prompting Abu Zubaydah's attorneys to file an application to the European Court of Human Rights, where they alleged he was the victim of crimes in Poland and that Poland had breached its duty to investigate them (*id.* at 395-96, ¶¶ 1-3).

In July 2014, the court ruled in Abu Zubaydah's favor, finding "beyond a reasonable doubt" that Abu Zubaydah had been detained *incommunicado* in a detention facility in Poland from December 2002 to September 2003. *Id.* at 556, ¶ 419. The court reached this conclusion "on the basis of unrebutted facts and in the light of all the relevant documentary material in its possession"—including declassified CIA reports—"and the coherent, clear and categorical expert evidence explaining in detail the chronology of the events occurring in [Abu Zubaydah's] case." *Id.* at 556, ¶ 415.

Among other evidence, the court heard that a plane that had been "conclusively identified as the rendition aircraft used for transportation of [CIA

detainees] at the material time" landed in Syzmany, Poland on December 5, 2002, with eight passengers and four crew, and departed less than an hour later with no passengers and four crew. *Id.* at 553-56, ¶¶ 406-414. This was followed by "five further landings of the N379P (the 'Guantánamo express'), the most notorious CIA rendition plane," and culminated with the landing of another CIA rendition plane on September 22, 2003—"the date indicated by the applicant for his transfer from Poland, confirmed by the experts as the date of his transfer out of Poland and identified by them as the date on which the black site [] in Poland had been closed." *Id.* at 556, ¶ 414. "[N]o other CIA-associated aircraft" was recorded in Syzmony after that date. *Id.*

The Polish Government "offered no explanation" for these events, from which the court concluded that there was no legitimate explanation—drawing, as any court would, reasonable "inferences from the evidence before it and from the [Polish] Government's conduct." *Id.* ¶¶ 414-415.

In addition to concluding that Abu Zubaydah had been detained at a Polish black site, the ECHR found that he had been subjected to enhanced interrogation techniques while imprisoned there. *Id.* at 556-57, ¶¶ 416-18. Although the court acknowledged evidence that the CIA had stopped waterboarding him prior to December 2002, "this left open the application of other EITs on [Abu Zubaydah] throughout his undisclosed detention." *Id.* ¶ 417. Additionally, the court found "abundant and coherent circumstantial evidence" leading to the "inevitab[le]" conclusion that "Poland knew of the nature and purposes of the CIA's

activities on its territory at the material time," and that "Poland cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory." *Id.* at 567, ¶ 444. In this regard, the court cited a 2012 interview with Aleksander Kwaśniewski, the president of Poland from 2000 to 2005, who responded to questions about an alleged Polish black site as follows:

> Of course, everything took place with my knowledge. The President and the Prime Minister agreed to the intelligence co-operation with the Americans, because this was what was required by national interest. After attacks on the World Trade Center we considered it necessary on account of exceptional circumstances.
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> * * *
>
> The decision to cooperate with the CIA carried a risk that the Americans would use inadmissible methods. But if a CIA agent brutally treated a prisoner in the Warsaw Marriott Hotel, would you charge the management of that hotel for the actions of that agent? We did not have knowledge of any torture.

Id. at 472, ¶ 234.

The ECHR also held that the Polish Government's investigation into the crimes committed against Abu Zubaydah had been deficient. *Id.* at 581, ¶ 493. In doing so, the court "t[ook] note of the fact that the investigation may involve national-security issues," but concluded that "this does not mean that reliance

on confidentiality or secrecy gives the investigating authorities complete discretion in refusing disclosure of material to the victim or the public." *Id.* at 580, ¶ 488.

In accordance with the court's judgment, Poland renewed its investigation, which remains pending.[3] Abu Zubaydah, as victim, has procedural rights in the investigation, including the right to submit evidence through his attorneys. C.A. E.R. 72-74. Under that authority, Polish prosecutors asked counsel for Abu Zubaydah to submit evidence in aid of the investigation. *Id.* However, Abu Zubaydah cannot offer his own testimony, as the victim of a crime normally would, because the U.S. Government forbids it, having decided nineteen years ago that he "should remain incommunicado for the remainder of his life" to prevent facts about the "psychological pressure techniques" (torture) inflicted on him from coming to light.[4]

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[3] Abu Zubaydah's Polish counsel have informed Respondents that Polish prosecutorial authorities recently discontinued a portion of their investigation relating to the Polish security agency, and Abu Zubaydah's Polish counsel is appealing that decision. The balance of the investigation remains in progress. As a victim of crimes, Abu Zubaydah retains a right under Polish law to appeal to a court from the prosecutor's determination to discontinue a portion of the investigation.

[4] SSCI Report at 35 of 499 ("[I]n light of the planned psychological pressure techniques to be implemented, we need to get reasonable assurances that [Abu Zubaydah] will remain in isolation and incommunicado for the remainder of his life."); *id.* ("[Abu Zubadyah] will never be placed in a situation where he has any significant contact with others and/or has the opportunity to be released … all major players are in

C. Proceedings in the District Court

Unable to appear before Polish authorities to give testimony in their investigation, on May 5, 2017, Abu Zubaydah and his counsel filed in the district court an application for discovery ("the Application") pursuant to 28 U.S.C. § 1782 ("Section 1782"). Pet. App. 110a. Section 1782 authorizes a federal district court of the district in which a person resides or is found to order discovery of documents and testimony for use in a foreign proceeding, "including criminal investigations conducted before formal accusation." 28 U.S.C. § 1782(a).

The Application sought leave to serve subpoenas for documents and oral testimony on two private U.S. citizens: James Elmer Mitchell and John "Bruce" Jessen. Mitchell and Jessen are former CIA contractors who have pleaded in unrelated litigation before the same district judge (*Salim v. Mitchell*) that they visited CIA black sites at the relevant time and have personal knowledge about Abu Zubaydah's detention and interrogation at the sites. Pet. App. 4a-5a, n.4 (citing *Salim v. Mitchell*, No. 2:15-cv-286-JLQ, Answer to Compl. and Affirmative Defenses (E.D. Wash. June 16, 2016). In *Salim*, the Government permitted Mitchell and Jessen to provide wide-ranging deposition testimony about their experiences at CIA black sites, without objecting that their testimony might divulge classified information or otherwise endanger national security. Pet. App. 26a-

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concurrence that [Abu Zubaydah] should remain incommunicado for the remainder of his life.").

27a, 81a; *see also* C.A. E.R. 106-49 (excerpts of testimony). Where a specific detention site was under discussion, the site's declassified code name was used (e.g., "Detention Site Cobalt") rather than its actual name. The Government also permitted Mitchell and Jessen to testify about interrogations at black sites in open military commission proceedings at Guantánamo Bay.[5] In addition, Mitchell has written a book, published by Random House, about his experiences as a CIA interrogator, which describes, *inter alia*, how detainees at the black sites were tortured and fed.[6]

Importantly, Respondents' discovery application did not seek mere confirmation that a CIA black site existed in Poland; that fact has been abundantly established in the proceedings before the European Court of Human Rights and is well known to the Polish investigators. Indeed, Polish authorities are pursuing their investigation precisely because they know there was a black site in Poland. Instead, Respondents sought other, non-privileged information that could aid Polish prosecutors in establishing whether a crime was committed under Polish law, such as the details of Abu Zubaydah's torture in Poland, the nature of his medical

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[5] *United States v. Khalid Shaikh Mohammad, et al.*, transcripts of proceedings available at https://www.mc.mil/. Mitchell and Jessen testified from January 21, 2020 to January 31, 2020.

[6] James Elmer Mitchell, ENHANCED INTERROGATIONS: INSIDE THE MINDS AND MOTIVES OF THE ISLAMIC TERRORISTS TRYING TO DESTROY AMERICA (Penguin Random House, 2016).

treatment, and the conditions of his confinement.[7] The Government has already declassified this information. *See* Pet. 3 ("[T]he United States has declassified a significant amount of information regarding the former CIA Program, including the details of Abu Zubaydah's treatment while in CIA custody.").

Respondents provided notice of the Application to Mitchell and Jessen, who did not oppose it. Pet. App. 61a. The Government, however, appeared in the case and filed a Statement of Interest, in which it opposed the Application. The Government did not invoke the state-secrets privilege at that time. *Id.* 68a. The district court, after weighing the discretionary factors set forth in this Court's Section 1782 jurisprudence,[8]

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[7] *See* C.A. E.R. at 23, Tr. of Hearing on Mot. to Quash ("We're not here because we're seeking to have a Polish prosecutor … find again what [] is already res judicata for purposes of Abu Zubaydah's claims in Poland … [W]e are here in order to understand the story around it … what sort of treatment was Mr. Zubaydah subjected to, what was the feeding regimen, how was he held, what medical care was he given, and of course, yes, we want to know if locals were involved in that and to what extent.")

[8] *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004), sets forth four factors for a district court to consider in evaluating a Section 1782 application: (1) Whether "the person from whom discovery is sought is a participant in the foreign proceeding"; (2) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance"; (3) whether the request "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the

granted the application. *Id*. 70a. The Government did not appeal the district court's order.[9] After the subpoenas were served, the Government moved to quash, arguing (as relevant here) that the state secrets privilege required that they be quashed in their entirety.

The district court granted the Government's motion and quashed the subpoenas *in toto*. In assessing the state-secrets claim, the court applied the three-part test articulated by the Ninth Circuit in *Mohamed v. Jeppesen Dataplan Inc.*, 614 F.3d 1070 (2010), which itself is a restatement of the principles set down by this Court in *United States v. Reynolds*, 345 U.S. 1 (1953). The district court first determined, as required by *Mohamed* and *Reynolds*, that the Government had satisfied the procedural requirements for invoking the privilege. Pet. App. 45a-47a.

Next, the district court addressed the merits of the Government's privilege claim. The court stated that it "[did] not find convincing the [Government's] claim that merely acknowledging, or denying, the fact the CIA was involved with a facility in Poland poses an exceptionally grave risk to national security." *Id.* 52a. The court noted that the presence of a CIA black site in Poland was a fact that the European Court of Human Rights had found "beyond a reasonable

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United States"; and (4) whether the request is "unduly intrusive or burdensome."

[9] "[A]n order pursuant to § 1782 is final and appealable." *In re Premises Located at 840 140th Ave. NE, Bellevue, Wash.*, 634 F.3d 557, 566 (9th Cir. 2011).

doubt"; that Poland's president at the time confirmed the site's existence; that the black site was the subject of multiple governmental investigations in Poland and Europe; and that the existence of the Polish black site had been widely reported in the media. *Id.* 52a-53a. The Government did not appeal this or any other aspect of the district court's holding. The district court also acknowledged that "in *Salim*, Mitchell and Jessen were both deposed at length" about their experiences as CIA interrogators. *Id.* 54a. On the other hand, the court agreed with the Government that some information known by Mitchell and Jessen would be privileged, including "operational details concerning the specifics of cooperation with a foreign government," and "the roles and identities of foreign individuals." *Id*. 55a-56a.

Having sustained only part of the privilege claim, the court observed that "there are three circumstances when the *Reynolds* privilege justifies terminating the case": (1) where the plaintiff cannot make its case without the privileged information; (2) where the defendant is deprived of evidence vital to its defense; or (3) where "litigating the case on the merits would present an unacceptable risk of disclosing state secrets because the privileged an nonprivileged evidence is 'inseparable.'" *Id.* 56a. The court determined that the first two circumstances were not present, since the action was a pure discovery matter and there was no plaintiff or defendant. *Id.*

However, the Court held that the third circumstance *was* present, because, in the court's view, "[m]eaningful discovery cannot proceed in this

matter without disclosing information the Government contends is subject to the state secrets privilege." *Id.* 57a. The court reached this conclusion without considering whether it would be possible to separate privileged from non-privileged material. Instead, it held that the non-privileged information at issue "would not seem of much, if any, assistance to Polish investigators." *Id.* 59a. On that basis, the district court dismissed the application. *Id.* 60a.

D. Proceedings in the Ninth Circuit

Respondents timely appealed the district court's ruling, arguing that under *Reynolds*, the district court should have attempted to disentangle privileged from non-privileged matter before dismissing the case entirely. The Government did not cross-appeal, leaving unchallenged both the district court's discretionary order granting the Application under Section 1782, and the district court's holding that the subpoenas sought at least some information that was not a state secret. The court of appeals was therefore presented with a "narrow but important question: whether the district court erred in quashing the subpoenas after concluding that not all the discovery sought was subject to the state secrets privilege." *Id.* 2a-3a.

The court of appeals answered that question in the affirmative and remanded for further proceedings. The panel majority agreed with the district court that some of the information sought by Respondents was not covered by the state secrets privilege, including "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." *Id.* 20a-21a. The majority reasoned that "in order to be a 'state secret,' a fact must first be a 'secret.'" *Id.* 18a. The Government's invocation of privilege over matters of public notoriety would "not protect the disclosure of secret information, but rather prevent[] the discussion of already disclosed information in a particular case." *Id.* 19a.

In reaching its conclusion, the panel majority accepted *arguendo* the Government's assertion that "the absence of official confirmation from the CIA is the key to preserving an important element of doubt about the veracity" of publicly available information regarding the CIA's activities. *Id.* 17a. But the majority found that the Government had "fail[ed] to explain why discovery here could amount to such an 'official confirmation,'" since, "[a]s the district court found, neither Mitchell nor Jessen [who were both private contractors] are agents of the Government," and "[t]he Government has not contested—and we will not disturb—that finding." *Id.* 17a-18a.

Having determined that the subpoenas sought a mix of privileged and non-privileged matter, the majority held, consistent with precedent, that the district court erred in dismissing the action without first attempting to separate one from the other. *Id.* 21a-23a (citing *Mohamed*, 614 F.3d at 1082). The majority observed that "Mitchell and Jessen have already provided nonprivileged information similar to the information sought here in the *Salim* lawsuit

before the district court, illustrating the viability of this disentanglement." Pet. App. 26a. The court remanded to the district court with instructions to employ "the panoply of tools at its disposal" to separate protected from unprotected information, and directed the court to dismiss if this separation proved impossible. *Id.* 27a-28a. Judge Gould dissented from the majority opinion.

The Government sought rehearing *en banc*, contending that the panel majority had "ordered" Mitchell and Jessen to "disclose classified information," even though the court of appeals did not order discovery. Dkt. Entry 50-1, No. 18-35218. The court of appeals denied rehearing. In an opinion concurring in that denial, Judge Paez (who authored the panel majority's opinion) emphasized that the majority opinion "does not require the government to disclose information, and it certainly does not require the disclosure of state secrets." Pet. App. 73a (Paez, J., concurring). Indeed, as Judge Paez observed, the majority opinion "does not compel the government to confirm or even acknowledge any alleged malfeasance abroad," and certainly "does not direct the district court to compel discovery on remand if the court determines that non-privileged materials cannot be disentangled from privileged materials." *Id*. "Instead, the majority opinion stands solely for the narrow and well-settled proposition that before a court dismisses a case on state secrets grounds, it must follow the three-step framework set forth in *Reynolds*," which includes an inquiry to determine "whether there is any feasible way to segregate the nonprivileged information [at issue] from the privileged

information." *Id.* 73a-74a. Judge Bress, joined by 11 other judges, dissented from the denial of rehearing. *Id.* 86a-109a.

REASONS FOR DENYING THE PETITION

I. The Government's State-Secrets Concerns Are Speculative and Premature.

This case comes before the Court in an interlocutory posture. The court of appeals remanded to the district court with instructions to determine whether privileged and non-privileged information could be separated. That is the whole of the lower court's holding. The court of appeals did not order disclosure of anything, let alone privileged information.

The Government's "Question Presented" is therefore not presented at all. The court of appeals did not "require[] discovery to proceed … against former CIA contractors," as asserted. Pet. at (I). Instead, the court of appeals instructed the district court to determine whether wheat could be separated from chaff. District courts routinely make such determinations. *E.g.*, *Rahman v. Chertoff*, No. 05 C 3761, 2008 WL 4534407, at *11 (N.D. Ill. Apr. 16, 2008) (sustaining in part and rejecting in part the Government's state secrets claim, and permitting proceedings to continue without the privileged evidence); *Mitchell v. United States*, Dkt. Entry 91, No. 2:16-mc-00036-JLQ (E.D. Wash. May 31, 2017) (unreported order) (in subpoena enforcement action

brought by Mitchell and Jessen, sustaining in part and rejecting in part the Government's assertion of, *inter alia*, the state secrets privilege, and compelling discovery of non-privileged matter); *Jabara v. Kelley*, 75 F.R.D. 475 (E.D. Mich. 1977) (on motion to compel responses to interrogatories, sustaining state secrets privilege, but segregating privileged from non-privileged matter and compelling release of the latter).

The district court in this case pointedly *did not* hold that separation was impossible. The court of appeals concluded that the district court erred when it failed to attempt that separation, and directed the lower court to dismiss the case if separation proves impossible. Thus, the Government's stern warnings of harm to national security are both speculative and premature. At this juncture, the case presents nothing more than the possibility of an eventual discovery dispute.

Although the Government makes passing reference to an alleged Circuit split, the petition cites no division of authority among the federal circuit courts on any legal issue. Rather, the Government argues that the case is of exceptional importance because, at some point in the indefinite future, after further proceedings on remand, the district court might order the disclosure of sensitive information. What discovery might ultimately be ordered is unknown, leaving the Court and the parties to shadowbox against the specter of some future judicial action.

It is for this very reason that the Court disfavors review of interlocutory orders, especially where (as

here) further proceedings in the district court could moot the issues raised in the petition. "[M]any orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters." *Am. Const. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893). "[T]herefore, this court should not issue a writ of certiorari … on appeal from an interlocutory order," absent a compelling reason to do so. *Id.*; *accord Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944 (2012) (Alito, J., concurring); *Wrotten v. New York*, 560 U.S. 959 (2010) (Sotomayor, J., concurring) (denial of review was warranted "[i]n light of the procedural difficulties that arise from the interlocutory posture"); *Bhd. of Locomotive Firemen & Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court.").

The Court's denial of review in *Mount Soledad* is instructive. There, the Ninth Circuit had held that a war memorial on federal land, in the form of a large white cross, "convey[ed] the message of government endorsement of religion that violates the Establishment Clause." 567 U.S. at 944 (Alito, J., concurring). But critically, the court of appeals "remanded the case to the District Court to fashion an appropriate remedy, and, in doing so, … emphasized that its decision 'd[id] not mean that the Memorial could not be modified to pass constitutional muster [or] that no cross can be part of [the Memorial].'" *Id.* (quoting 629 F.3d at 1125) (brackets Justice Alito's). Thus, because it was "unclear precisely what action

the Federal Government w[ould] be required to take," the case was not ripe for review. *Id.*

Here, the Ninth Circuit has remanded for further proceedings, and no action has yet been required of the putative witnesses or the Government. As in *Mount Soledad*, the decision by the court of appeals explicitly confirms the district court's discretion to fashion an appropriate remedy, including dismissal. Pet. App. 27a-28a ("[O]ur holding is a limited one: if, upon reviewing disputed discovery, … the district court determines that it is not possible to disentangle the privileged from non-privileged, it may again conclude that dismissal is appropriate."). The proceedings on remand may well moot the concerns raised in the Government's petition.

Given the interlocutory posture of the case and the speculative nature of the Government's arguments, the Court's resources are better directed elsewhere and the Government's petition should be denied.

II. The Lower Court Correctly Applied Settled Precedent, and the Petition Presents Nothing More Than a Call for Error Review.

The petition should be denied for an additional reason: the court of appeals applied a correct and well-settled legal standard. Pet. App. 13a. Indeed, it applied the same standard as it did ten years earlier in *Mohamed v. Jeppesen Dataplan Inc.*, which in turn followed *United States v. Reynolds*, the seminal state secrets decision:

> Based on *Reynolds*, we [have] identified three steps for analyzing claims of the state secrets privilege:
>
> > First, we must ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied. Second, we must make an independent determination whether the information is privileged. Finally, the ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim.

Pet. App. 13a (quoting *Mohamed*, 614 F.3d at 1080). When opposing certiorari in *Mohamed*, the Government itself described this analysis as "correctly appl[ying] established legal principles," and "not [in] conflict with any decision of this Court or any other court of appeals." *Mohamed v. Jeppesen Dataplan Inc.*, No. 10-778, United States' Opp'n to Pet. for Cert. at 10-11 (S. Ct. 2010). The Government thus overreaches when it argues that the court of appeals in this case took a "flawed approach" that is a "serious departure" from precedent (Pet. 19a) and "conflicts with decisions of other courts of appeals" (*id.* 16a). The court took the same approach that the Government previously assured this Court was correct.

And the Government had it right in *Mohamed*: Each step in the court of appeals' analysis follows *Reynolds*. *See Reynolds*, 345 U.S. at 7-8 ("There must be 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.");

id. at 8 ("The court itself must determine whether the circumstances are appropriate for the claim of privilege."); *id.* at 12 (remanding to determine whether proceedings could continue after sustaining the privilege claim). That three-step analysis is also applied in other circuits. *E.g.*, *El-Masri v. United States*, 479 F.3d 296, 304 (4th Cir. 2007) ("A court faced with a state secrets privilege question is obliged to resolve the matter by use of a three-part analysis.")

The Government also criticizes the court of appeals for engaging in a "skeptical" review of the privilege claim, which the Government calls a "serious departure" from precedent (Pet. at 19) that "displaces deference to the Executive" (*id.* at 26) and "significantly alters the standard governing the proper disposition of such matters" (*id.* at 32). Yet in *Mohamed*, the Government argued it was entirely proper for the court of appeals to conduct a "careful *and skeptical* examination" of the privilege claim, which the Government characterized as a "careful and independent approach." No. 10-778, United States' Opp'n to Pet. for Cert. at 22-23 (emphasis added). The Government assured the Court that its review was not needed, because "[t]he lower courts, like the court of appeals in this case, *properly scrutinize [the Government's privilege] assertions through independent review*." *Id.* at 24 (emphasis added).

In any case, and notwithstanding the Government's breathless hyperbole, there was nothing novel in the court of appeals' decision or reasoning here. The court expressly recognized the "need to defer to the Executive on matters of foreign

policy and national security." Pet. App. 14a. Indeed, the court credited many of the Government's arguments and upheld its privilege claim as to several categories of information. *Id.* 20a. But the court also recognized, as required by precedent, that "the state secrets doctrine does not represent a surrender of judicial control over access to the court." *Id.* 14a (quoting *Mohamed*, 614 F.3d at 1082); *accord Reynolds*, 345 U.S. at 8-10 ("[C]omplete abandonment of judicial control would lead to intolerable abuses," and, therefore, "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."); *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"); *cf. Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 389 (2004) ("Executive privilege is an extraordinary assertion of power not to be lightly invoked.") (internal quotation marks omitted); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) ("[A] state of war is not a blank check for the [Executive] ….").

The Government cannot have it both ways: If the Government is content to endorse "skeptical" review when it prevails, then it must accept the same standard in all cases.[10] The Government was correct

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[10] The Government does not aid its case by citing this Court's dictum, in *United States v. Nixon*, that courts should provide "utmost deference" to the executive in matters of national security. Pet. 18, 33. *Nixon* did not involve the state-secrets privilege. More importantly, the Court in *Nixon* "reaffirmed" the principle that—"[n]otwithstanding the deference each branch must accord the others"—"it is the province and duty of this Court to 'say what the law is' with respect to the claim of

the first time when it assured the Court that the legal standards applied in *Mohamed* (and again in this case) are "not [in] conflict with any decision of this Court or any other court of appeals."

The Government's shifting positions demonstrate that its true quarrel is not with the well-settled legal principles applied by the court of appeals, but with the result of their application in this particular case. But "[a] petition for certiorari is rarely granted when the asserted error consists of … the misapplication of a properly stated rule of law." S. Ct. R. 10. The essence of a legal test is that its outcome will vary depending on the particular facts of a case. That the test was resolved here partially in Respondents' favor is hardly an indication that the test is wrong. On the contrary, it shows the test is working, and that the judicial review promised in *Reynolds* is meaningful. Stated simply, the fact that the Government's state secrets argument failed to persuade the court of appeals is not grounds for the Court's review.

The Government also argues that any discovery from Mitchell and Jessen in this matter risks harm to national security, and that the court of appeals disregarded the importance of "official confirmation" in the context of state secrets. According to the Government, these concerns are heightened where

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privilege." 418 U.S. 683, 705 (1974) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). The Court then went on to *reject* the executive's privilege claim, over the president's objections that disclosure would be detrimental to the public interest.

discovery is destined for use in a foreign proceeding. These arguments, however, are mistaken.

1. To begin with, the court of appeals emphatically did not order the disclosure of classified or privileged information. Indeed, it did not order the disclosure of anything. The district court had already held that the subpoenas reached information that was not privileged, a ruling the Government did not appeal. The court of appeals merely applied settled law to this holding and remanded for further proceedings with an important caveat: the district court may yet dismiss the action if it determines that the non-privileged information is inextricably intertwined with privileged matter.

To be sure, the court of appeals expressed confidence that the two *could* be separated, largely because "Mitchell and Jessen have already provided nonprivileged information similar to that sought here in the *Salim* lawsuit" (Pet. App. 26a)—a material fact that the Government inexplicably fails to disclose in its petition. "Excerpts of those depositions were included in the record and reflect how depositions could proceed in this case, such as with the use of code names and pseudonyms, where appropriate." *Id.*; *see also* C.A. E.R. 106-149 (excerpts of testimony). And given that "eight U.S. government attorneys or experts were present" at those depositions "to ensure that nothing confidential or privileged would be disclosed" (Pet. App. 26a, n.23), the court of appeals sensibly concluded that there are likely to be non-

privileged facts that Mitchell and Jessen could provide in this litigation as well.[11]

For instance, in the *Salim* litigation, Jessen testified—without objection from the Government—about the specific timing and duration of his visit to another black site, "Detention Site Cobalt," and the things he observed there. C.A. E.R. 109-112. Likewise, Mitchell testified about the many "coercive techniques" used on Abu Zubaydah at "Detention Site Green," including waterboarding, and the effect they had on him. *Id.* 114-49. He also testified about Abu Zubaydah's physical condition during interrogation; the medical treatment he received; and the "dietary manipulation" he endured. *Id.* In addition, Mitchell

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[11] The Government speculates about a risk arising from the use of evidence "out of control of a domestic court." Pet. 30. That speculation is unfounded. Discovery in this case will occur entirely under the control of the district court and nothing will be made available to prosecutors abroad unless the district court first determines it is non-privileged. This presents no more risk than the publication of the non-privileged deposition transcripts from *Salim*, or the publication of Mitchell's and Jessen's non-privileged testimony at Guantánamo, all of which is publicly available online and therefore "out of the control of a domestic court," in the sense that anyone—including Polish prosecutors—can obtain and use it. There is nothing perilous in this—on the contrary, it is salutary—and there is no reason to expand the state secrets cloak to cover cases where *non-privileged* information can be separated from privileged information. And, while the Government places great weight on Section 1782's requirement that discovery "not violate any legally applicable privilege" (Pet. 30), the court of appeals' order explicitly precludes discovery, not only of privileged information, but also of non-privileged matter that is inseparable from privileged information.

testified that he visited Detention Site Cobalt on a single occasion, "[s]ometime about November the 12th, 2002," where he observed detainee Abd al-Rahim al Nashiri. *Id.* at 146-47. As the Government freely permitted this testimony about Detention Sites Green and Cobalt, it "blinks reality" (to borrow the Government's phrase) for the Government to argue that national security will be imperiled if the same two witnesses give similar testimony—or, indeed, *any* testimony—about "Detention Site Blue."

The court of appeals had reason for healthy skepticism of that argument. Nonetheless, the court took much narrower action than the Government asserts. Faced with a record in which non-privileged material was concededly at issue, the court of appeals properly held that, under this Court's state-secrets precedent, the district court could not dismiss the matter entirely without first determining whether discovery of non-privileged information could feasibly proceed. And, it properly cautioned the district court to limit any discovery it ultimately allows to non-privileged information. The argument for any broader secrecy is meritless, given that the same witnesses have provided extensive public disclosures, in multiple other contexts, on the same topics that are at issue here. If the federal courts were required to defer to such arguments, then judicial review of the privilege would become an empty ritual. The district court on remand will apply the familiar tools of civil litigation to determine whether discovery of non-privileged information can proceed. Undertaking that threshold analysis cannot be said to threaten national security.

2. After carefully reviewing the declaration of then-CIA Director Pompeo in support of the privilege claim, the court of appeals noted that "much of the concern animating the assertion of the state secrets claim is that harm might result from the government's disclosure of certain information—in particular, confirming or denying the location of a CIA black site—rather than a concern that harm might result from the spread of the information *per se*." Pet. App. 16a. The privilege claim thus rested on the notion that "the absence of official confirmation from the CIA is the key to preserving an 'important element of doubt about the veracity of the information.'" *Id.* 17a. The court of appeals properly found that risk absent, because the subpoenas were not addressed to the Government, but to third-party witnesses who undisputedly are not the Government's agents[12] and therefore cannot officially confirm anything. Pet. App. 20a-21a.

The Government also fails to make a persuasive argument that official confirmation would result in appreciable harm, given that the information at issue (the existence of a CIA black site in Poland) is already a matter of public record, and the CIA's cooperation with Poland is no secret at all. And if, as the Government acknowledges, "the Government of Poland requested information from the United

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[12] The district court made this ruling in response to the Government's argument that this proceeding constitutes an "action against the United States or its agents" for purposes of the jurisdiction-stripping provisions of the Military Commissions Act, 28 U.S.C. 2241(e)(2). Pet. App. 38a-41a. The Government has since abandoned that argument.

States" to aid its investigation (Pet. 4, 8), it strains credulity to argue that Poland will retaliate against the U.S. or withhold its cooperation if Respondents are permitted to discover the very evidence and provide the very assistance that the Polish Government itself has repeatedly requested.

The D.C. Circuit's decision in *Military Audit Project v. Casey*, 656 F.2d 724, 727 (1981), is inapposite. *Casey* was a FOIA case, involving discovery requests directed to the Government itself. Here, the district court expressly found this was not an action against the United States or its agents, and the Government did not appeal that ruling. Pet. App. 39a-40a. Additionally, the state secrets privilege was not at issue in *Casey*—the case turned on a statutory exception to FOIA requirements, not an evidentiary privilege.

Most importantly, the Government in *Casey* had already "compl[ied] with the [discovery] requests to the maximum extent consistent with national security by releasing, for example, over two thousand pages of documents." *Casey*, 656 F.2d at 745. This case presents the opposite situation: the Government has intervened to oppose *all* discovery against these two non-governmental witnesses, even though the same witnesses have provided testimony on the same topics in other contexts, including in *Salim*. The cases are simply not comparable. *Casey* does not stand for the proposition that a court may quash discovery as to both privileged and non-privileged matter, as the district court did here, without first determining whether discovery of non-privileged matter may feasibly proceed.

Finally, as Judge Paez acknowledged when concurring in the denial of rehearing, "the government can still argue on remand" that Mitchell and Jessen should not be required to disclose "any information … that would amount to an official confirmation." Pet. App. 80a. Thus, there is no occasion for the Court to intervene on this issue at this time.

III. This Case Is Not the Proper Vehicle for Reexamining the Law.

This case arises from a factual and procedural context that is atypical of cases involving the states-secrets privilege. It is a pure discovery matter in aid of a foreign proceeding under Section 1782, not a civil action in which the parties are attempting to establish the elements of a cause of action or a defense. Unlike a more typical case, it does not risk the uncontrolled disclosure of classified information in an open trial, because the district court will control what information will be made available to the foreign prosecutors and what will be withheld. Moreover, the district court's rulings on these fact-specific questions lie entirely in the future, and the Government's arguments therefore rely on a heavy dose of speculation. For these reasons, this case presents a particularly poor vehicle for altering, clarifying, or extending the Court's state-secrets precedents.

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CONCLUSION

For the foregoing reasons, Respondents respectfully request the Court deny the petition for a writ of certiorari.

Respectfully submitted,

DAVID F. KLEIN
Counsel of Record
david.klein@pillsburylaw.com
JOHN PATRICK CHAMBERLAIN
john.chamberlain@pillsburylaw.com
PILLSBURY WINTHROP SHAW
PITTMAN LLP
1200 Seventeenth Street, NW
Washington, DC 20036
(202) 663-8000

JOSEPH MARGULIES
jm347@cornell.edu
243 Myron Taylor Hall
Cornell University School of Law
Ithaca, NY 14850
(607) 255-6477

Attorneys for Respondents Abu Zubaydah and Joseph Margulies

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