No.

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.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred when it rejected the United States' assertion of the state-secrets privilege based on the court's own assessment of potential harms to the national security, and required discovery to proceed further under 28 U.S.C. 1782(a) against former Central Intelligence Agency (CIA) contractors on matters concerning alleged clandestine CIA activities.

PARTIES TO THE PROCEEDING

Petitioner is the United States of America, which was the intervenor in the district court.

Respondents Zayn Al-Abidin Muhammad Husayn (a.k.a. Abu Zubaydah) and his attorney Joseph Margulies were petitioners in the district court. Respondents James Elmer Mitchell and John Jessen were respondents in the district court.

RELATED PROCEEDINGS

United States District Court (E.D. Wash.):

Husayn v. *Mitchell*, No. 17-cv-171 (Feb. 21, 2018)

United States Court of Appeals (9th Cir.):

Husayn v. *Mitchell*, No. 18-35218 (Sept. 18, 2019)

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The Acting Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 938 F.3d 1123. Opinions regarding the denial of rehearing en banc (Pet. App. 73a-85a, 86a-109a) are reported at 965 F.3d 775. An order of the district court (Pet. App. 35a-60a) is not published in the Federal Supplement but is available at 2018 WL 11150135. A separate order of the district court (Pet. App. 61a-71a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2019. A petition for rehearing was denied on July 20, 2020 (Pet. App. 72a-109a). On March 19,

2020, the Court extended the time within which to file a petition for a writ of certiorari due on or after that date to 150 days from the date of, as relevant here, the order denying rehearing. Under that order, the deadline for filing a petition for a writ of certiorari is December 17, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. 1782 is set out in the appendix to the petition (Pet. App. 161a-162a).

STATEMENT

On September 17, 2001, in the wake of al Qaida's 9/11 terrorist attacks on the United States, the President authorized the Central Intelligence Agency (CIA) to undertake covert operations "to capture and detain persons who posed a continuing, serious threat of violence or death to U.S. persons and interests or who were planning terrorist activities." Pet. App. 140a; see S. Rep. No. 288, 113th Cong., 2d Sess. 11 (2014) (*SSCI Report*); cf. 50 U.S.C. 3093(a) and (e). Based on that authority, the CIA developed the former detention and interrogation program (the CIA Program), the focus of which was to collect intelligence from senior al Qaida members and other terrorists thought to have knowledge of active terrorist plots against Americans. Pet. App. 140a-141a.

Respondent Zayn Husayn, also known as Abu Zubaydah, was an associate and longtime terrorist ally of Osama bin Laden. *Ali* v. *Obama*, 736 F.3d 542, 546 (D.C. Cir. 2013), cert. denied, 574 U.S. 848 (2014). Although Abu Zubaydah is now detained at the United States Naval Station at Guantanamo Bay, Cuba, he initially was captured in Pakistan and detained in CIA detention facilities abroad. *SSCI Report* 21, 23, 67; see Pet. App. 2a.

In this case, Abu Zubaydah and his attorney (respondent Joseph Margulies) seek to compel discovery under 28 U.S.C. 1782(a) from two former CIA contractors (James Mitchell and Bruce Jessen) who worked on the CIA Program. Pet. App. 123a, 126a. As relevant here, Abu Zubaydah and Margulies (collectively, respondents) seek evidence from the former CIA contractors for use in criminal proceedings in Poland that would confirm or deny whether "the CIA operated a detention facility in Poland in the early 2000s"; the alleged "use of interrogation techniques and conditions of confinement" in "that detention facility"; and the "details" of Abu Zubaydah's alleged treatment "there." *Id.* at 21a; see *id.* at 115a-116a, 120a.

As discussed below, the 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, which included the use of enhanced interrogation techniques (EITs). The United States, however, determined that certain categories of information—including the identities of its foreign intelligence partners and the location of former CIA detention facilities in their countries—could not be declassified without risking undue harm to the national security. The United States has protected that information even as news outlets and other sources outside the government have commented and speculated on the same topic. A divided Ninth Circuit panel rejected the government's assertion of the state-secrets privilege to protect that information, Pet. App. 126a, 130a-134a, and required that discovery proceed under Section 1782(a). *Id.* at 21a-23a. Twelve judges dissented from the denial of rehearing en banc, *id.* at 86a-109a, concluding that the panel's decision rests on

"grave legal errors" and "poses a serious risk to our national security," *id.* at 86a.

1. a. In 2010, Abu Zubaydah filed a criminal complaint in Poland "seeking to hold Polish officials accountable for their [purported] complicity in his [alleged] unlawful detention and torture," which, he claims, occurred in Poland. Pet. App. 6a. The Government of Poland requested information from the United States pursuant to the mutual legal assistance treaty (MLAT) between the two countries, which the United States denied, citing reasons of national security. *Id.* at 87a (Bress, J., dissenting from denial of rehearing en banc). The investigation was closed without a prosecution. *Id.* at 6a.

In 2013, Abu Zubaydah filed an application with the European Court of Human Rights (ECHR) alleging, *inter alia*, that Poland violated "international and Polish domestic law" by failing to conduct a full and proper investigation into his criminal complaint. Pet. App. 114a; C.A. E.R. 597.

b. While that ECHR case was pending, the Senate Select Committee on Intelligence (SSCI) completed its 2009-2014 "comprehensive review" of the former CIA Program, which examined CIA records comprising more than "six million pages of material." *SSCI Report* 8-9 & n.2. The Committee's full 6700-page classified report is not public. See *id.* at 8-9. But the Committee's Findings and Conclusions (*id.* at x-xxviii), its detailed 499-page Executive Summary (*id.* at 1-499), and the separate views of its members have been published—after declassification by the Executive Branch—as Senate Report 113-288 (2014). See *id.* at ii, 9-10 & n.6.

That Senate report provides a detailed and critical public accounting of government actions involving the

former CIA Program. See *SSCI Report* 1-499; cf. Memorandum from John O. Brennan, Director, CIA, *CIA Comments on the SSCI Report on the Rendition, Detention, and Interrogation Program* (June 27, 2013), https://go.usa.gov/xAxWm. But in doing so, the SSCI took care to redact even from the classified versions of its reports "the names of countries that hosted CIA detention sites"—"as well as information directly or indirectly identifying such countries"—in order to safeguard that classified information. *SSCI Report* 10.

A significant portion of the public SSCI report concerns Abu Zubaydah, who was the first detainee in the former CIA Program. *SSCI Report* xii-xiv, xviii, xx, 17-49, 204-210, 405-413, 437-439. The report explains that shortly after his March 2002 capture in Pakistan, Abu Zubaydah was moved to "Country [redacted] where he was held at the first CIA detention site," which the report labels as Detention Site Green. *Id.* at 21, 23. The report states that after Abu Zubaydah's initial interrogation sessions, *id.* at 24-25, 29, 45 n.215, he was subjected at Detention Site Green to the CIA's EITs beginning on August 4, 2002. *Id.* at 42; see *id.* at 40. The report recounts that Abu Zubaydah, *inter alia*, experienced at least 83 applications of the waterboard technique; spent over 11 days in a coffin-size confinement box and 29 hours confined in an extremely small enclosure; and was subjected to "walling, attention grasps, slapping, facial holds, stress positions," "white noise and sleep deprivation." *Id.* at 42, 118 n.698 (citation omitted). The SSCI determined that "[t]he CIA continued to use its enhanced interrogation techniques against Abu Zubaydah until August 30, 2002," *id.* at 42 n.190, and that "CIA records indicate that the use of the CIA's

enhanced interrogation techniques [against Abu Zubaydah] ceased on [that date]," *id.* at 231 n.1316.[1]

The SSCI report states that four months later, in December 2002, Detention Site Green "was closed" and Abu Zubaydah was transferred to a second detention site, labeled Detention Site Blue. *SSCI Report* 67; see *id.* at 24. Abu Zubaydah alleges that he was detained "[f]rom December 2002 until September 2003" at that second detention site, which he alleges was in Poland. Pet. App. 113a-114a (citation omitted).

c. Poland did not cooperate with the ECHR's inquiry into Abu Zubaydah's 2013 application to that court. Poland declined to "address in detail the Court's questions" about the allegations, was unwilling to provide answers based on the assumption that Abu Zubaydah "had been transferred to and from Poland and had legally or illegally been detained on its territory," and represented that it was "not prepared to affirm or negate the facts" that he alleged. C.A. E.R. 542; see *id.* at 398-401.

The ECHR observed that Poland's former President and its former Prime Minister who were in office when Abu Zubaydah alleges he was held in Poland had "denied the existence of any CIA prisons in Poland" and that other Polish prime ministers and ministers of foreign affairs had made similar denials. C.A. E.R. 447, 488. The court further observed that Poland's President "had refused to relieve [its former President] from

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[1] A report by the CIA's Office of the Inspector General (OIG) explains that CIA officers "reported back to Headquarters that the EITs were no longer needed on Abu Zubaydah." OIG, CIA, *Special Review: Counterterrorism Detention and Interrogation Activities (September 2001-October 2003)*, at 85 (May 7, 2004), https://go.usa.gov/xAqp2.

his secrecy duty," precluding him from providing information to investigators. *Id.* at 446.

d. In 2015, the ECHR issued a final judgment in favor of Abu Zubaydah. C.A. E.R. 383-607. The court acknowledged that it lacked "any form of direct account of the [alleged] events" and relied "to a great extent" on "circumstantial" materials due to the absence of other evidence, which it viewed as resulting from restrictions on Abu Zubaydah's ability to communicate from detention and "the extreme secrecy surrounding the US rendition operations," which were "compounded" by "the Polish Government's failure to cooperate with the Court in its examination of the case." *Id.* at 550-551. The court decided that Poland's "fail[ure] to disclose crucial documents to enable the Court to establish the facts or otherwise provide a satisfactory and convincing explanation of how the events in question occurred" would give rise to "strong [adverse] inferences" against Poland. *Id.* at 549-550; see *id.* at 556, 577. The court labeled its fact-finding method as "proof 'beyond reasonable doubt'" but emphasized that, in doing so, it did not follow "the national legal systems that use that standard." *Id.* at 549.

Under its standard and based in large part on adverse inferences, the ECHR determined that Abu Zubaydah was detained at a CIA facility in Poland from December 2002 to September 2003. C.A. E.R. 556-558; see *id.* at 562-563, 567. The court recognized that the evidence before it provided "very sparse information" about Abu Zubaydah's treatment during that time period, but the court "f[ound] it inconceivable" that the CIA did not employ EITs (other than waterboarding) against him "during [his] detention in Poland" because he had been the CIA's first high-value detainee "for whom the EITs were specifically designed." *Id.* at 556-

557. The court concluded that Poland had violated Abu Zubaydah's rights both by being complicit in his purported detention and torture in Poland, *id.* at 589, and by failing to conduct an "effective investigation" into his complaint, *id.* at 598-599.

e. In light of the ECHR's judgment, the Krakow regional prosecutor's office reopened an investigation into Abu Zubaydah's criminal complaint. Pet. App. 6a; C.A. E.R. 72. Polish authorities again requested that the United States provide evidence under the MLAT. Pet. App. 6a. The United States denied the request. *Ibid.* An attorney in the regional prosecutor's office thereafter "invited [Abu Zubaydah's Polish counsel] to submit evidence" to aid the investigation. C.A. E.R. 73.

2. a. Abu Zubaydah and his American attorney then initiated this proceeding in federal district court by applying for an *ex parte* order under 28 U.S.C. 1782(a) to obtain discovery from the two former CIA contractors (Mitchell and Jessen) who they alleged were "co-architect[s] of the CIA's enhanced interrogation program" and had information "regarding the identities of Polish officials complicit in the establishment and operation of the black site [in Poland] and the nature of their activities." Pet. App. 115a-116a; see *id.* at 110a-122a. The United States submitted a statement of interest opposing discovery under Section 1782. *Id.* at 8a, 62a.

Section 1782(a) provides that a district court "may" order "a person [who] resides or is found" in its district "to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." 28 U.S.C. 1782(a). Under Section 1782(a), however, "[a] person may not be compelled to give his testimony or statement

or to produce a document or other thing in violation of any legally applicable privilege." *Ibid.*

The district court granted the Section 1782 application and granted leave to subpoena Mitchell and Jessen. Pet. App. 61a-71a. The court viewed discovery as warranted under the factors identified in *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), even though it had yet to decide if discovery would be "unduly intrusive or burdensome" and notwithstanding the denial of Poland's MLAT requests. Pet. App. 65a-68a. The court added that a motion to quash the subpoenas could be filed later. *Id.* at 70a-71a.

b. The United States moved to intervene and quash the resulting subpoenas based, *inter alia*, on its formal invocation of the state-secrets privilege, which it supported with the declaration of then-CIA Director Michael Pompeo (Pet. App. 123a-160a). See *id.* at 9a.

Director Pompeo explained that he asserted the privilege to prevent compelled discovery from the former CIA contractors on "the central issue that underlies this entire matter," *i.e.*, whether "the CIA conducted detention and interrogation operations in Poland" with any "assistance of the Polish Government." Pet. App. 126a, 128a. Among other things, the Director stated that it is "critical" to national security to protect the "location of detention facilities" and "the identity of foreign partners who stepped forward in the aftermath of the 9/11 attacks," because those partners "must be able to trust our ability to honor our pledge to keep any clandestine cooperation with the CIA a secret," even after "time passes, media leaks occur, or the political and public opinion winds change." *Id.* at 136a. The CIA's ability to "convince foreign intelligence services to work with us," he explained, depends on "mutual trust" and

our partners' confidence that their role will be protected even if new "officials come to power" who may "want to publicly atone or exact revenge for the alleged misdeeds of their predecessors." *Id.* at 135a-136a. The Director stated that breaching "th[at] trust" would jeopardize foreign cooperation "vital to our world-wide efforts to collect intelligence and thwart terrorist attacks" needed "to keep our country and our citizens safe." *Id.* at 130a-131a. That risk, he explained, extends beyond just the particular country whose role might be revealed to "other foreign intelligence or security services" that would recognize the United States' failure to protect the confidentiality of "our coordinated clandestine activities." *Id.* at 132a.

Director Pompeo explained that the foregoing holds true even where, as here, "[t]here has been much public speculation about which countries and services assisted the [former CIA Program]" and even though "the media, nongovernmental organizations, and former Polish government officials" may have "publicly alleged that the CIA operated a detention facility in Poland." Pet. App. 133a-134a. The Director stated that the locations of former CIA facilities and the identities of our foreign partners remain classified; the government had "steadfastly refused to confirm or deny the accuracy of [public] speculation" on those matters; the absence of official confirmation "leaves an important element of doubt about the veracity of [any publicly available] information"; and compelling the former CIA contractors to confirm or deny the allegations would significantly harm national security. *Id.* at 126a, 133a-135a.

c. The district court granted the government's motion to intervene and quash the subpoenas. Pet. App. 35a-60a. As relevant here, the court concluded that the

state-secrets privilege protects "operational details concerning the specifics of cooperation with a foreign government, including the roles and identities of foreign individuals." *Id.* at 55a-56a. The court, however, viewed differently more general information concerning Poland's alleged involvement in clandestine activity. While recognizing that the government has never "acknowledged Poland's cooperation or assistance with the [CIA] Program," *id.* at 51a, it viewed the government's privilege assertion with the "skeptical eye" required by Ninth Circuit precedent, *id.* at 47a (citation omitted), and determined that "merely acknowledging, or denying, the fact the CIA was involved with a facility in Poland [would not] pose[] an exceptionally grave risk to national security." *Id.* at 52a; see *id.* at 59a. The court stated that "the former President of Poland, Kwasniewski," had "acknowledged the cooperation with CIA"; the ECHR "found by proof beyond a reasonable doubt the CIA operated a facility in Poland"; and "[t]he fact has also been fairly widely reported in media." *Id.* at 52a-53a.

The district court nevertheless terminated discovery because "compelling Mitchell and Jessen to address the mere fact of whether they were part of CIA operations conducted in Poland, or whether they interrogated Zubaydah in Poland, would not seem to aid the Polish investigation" for which they sought discovery. Pet. App. 53a. The court stated that "Polish investigators already have a ECHR Opinion," and what respondents ultimately sought was "more detail as to what occurred and who was involved." *Ibid.*; see *id.* at 56a-57a.

3. A divided panel of the court of appeals reversed and remanded. Pet. App. 1a-34a.

a. The panel majority "reject[ed] the government's blanket assertion of [the] state secrets privilege" because it concluded that certain information "is not—at least in broad strokes—a state secret, namely: [1] the fact that the CIA operated a detention facility in Poland in the early 2000s; [2] information about the use of interrogation techniques and conditions of confinement in that detention facility; and [3] details of Abu Zubaydah's treatment there," Pet. App. 20a-21a. See *id.* at 14a-21a. The court stated that "[t]hese facts have been in the public eye for some years now," *id.* at 21a, noting that "[j]ournalists, non-governmental organizations, and Polish government officials ha[d] widely reported that one of [the CIA's detention] sites was in Poland" and the ECHR had "found 'beyond reasonable doubt' that Abu Zubaydah was detained in Poland" and that his treatment "by the CIA during his detention in Poland" amounted to "torture," *id.* at 4a-6a.

Notwithstanding the CIA Director's contrary declaration, the panel majority decided "that disclosure of [those] basic facts would not 'cause grave damage to national security.'" Pet. App. 18a (citation omitted). The majority stated that "to be a 'state secret,' a fact must first be a 'secret.'" *Ibid.* It further discounted the national-security risks of compelled discovery because Mitchell and Jessen are now "private parties," not "agents of the government," such that their production of evidence would not mean that the United States itself had "confirm[ed] or den[ied] anything." *Ibid.* And the majority noted that "*current* Polish authorities, specifically, prosecutors," had indirectly requested the information, which in the court's view diminished the risk of "breaching trust with the cooperating country." *Id.* at 19a.

The panel majority then determined that, even though other information was "covered by the state secrets privilege," Pet. App. 20a, the district court had erred in quashing the subpoenas. See *id.* at 21a-27a. The majority noted that dismissal can be warranted on state-secrets grounds when associated claims or defenses are to be litigated in the U.S. court considering the privilege assertion, but it viewed differently this proceeding, which it termed a "pure discovery matter" seeking information for use in another forum. *Id.* at 22a-23a. The majority stated that dismissal nevertheless might be warranted here if discovery targeting nonprivileged information would present an "'unacceptable risk of disclosing state secrets'" because the "'privileged'" and "'nonprivileged information'" are "'inseparable,'" but it concluded that it "is not impossible to separate secret information," *id.* at 22a (citation omitted), and deemed it premature to conclude that discovery cannot proceed, *id.* at 25a-27a.

b. Judge Gould dissented. Pet. App. 29a-34a. He concluded that the "majority jeopardizes critical national security concerns"; stated that he was "not in a position as an Article III judge to make a conclusion that it is agreed that Abu Zubaydah was detained and tortured in Poland," even though "much media comment" and "some reasoning of the [ECHR]" "suggest[] that conclusion"; and explained that he would "defer to the view of then-CIA Director and now Secretary of State Michael Pompeo that the disclosure of secret information in this proceeding 'reasonably could be expected'" to significantly harm national security. *Id.* at 29a-30a. He further explained that, even assuming that some information involving purported CIA activity in

Poland would not be protected, dismissal was still warranted because "walking close to the line of actual state secrets may result in someone overstepping that line" and because "the entire premise of the proceeding" here is to obtain information about the "details about the CIA's involvement" for "Polish prosecutorial efforts." *Id.* at 30a-31a. Judge Gould emphasized that respondents sought information exclusively for use in "a foreign tribunal in Poland," where it will be beyond "the supervision of the United States court system" to mitigate the risks to "this country's national security." *Id.* at 33a-34a.

4. The court of appeals denied rehearing en banc. Pet. App. 72a-73a. Judge Paez, joined by Judges Fletcher and Berzon, concurred in that disposition. *Id.* at 73a-85a. Judge Bress, writing for 12 judges, dissented. *Id.* at 86a-109a.

The 12 dissenting judges concluded that the panel majority's decision in this "important case" rests on "grave legal errors, conflicts with governing precedent, and poses a serious risk to our national security" by "treat[ing] information that is core state secrets material as fair game in discovery." Pet. App. 86a, 93a. In rejecting the government's privilege assertion, the judges explained, the panel majority erroneously failed to give "any apparent deference" to "the CIA Director on matters uniquely within his national security expertise." *Id.* at 93a, 96a-98a. The judges explained that the decision "mark[ed] an even further departure from precedent" by deeming classified information "'basically public knowledge,'" *id.* at 98a (citation omitted), even though this Court has held that "'[t]he privilege belongs to the Government'" and cannot be "'waived by

a private party,'" *ibid.* (quoting *United States* v. *Reynolds*, 345 U.S. 1, 7 (1953)) (brackets in original).

The dissenting judges further explained that although Director Pompeo "directly" and persuasively "addressed the public disclosure issue," the panel majority failed to recognize that the "concerns animating the state secrets privilege remain" even where "some information is in the public domain." Pet. App. 100a-101a. The judges found the panel majority's reliance on the ECHR's findings to be "especially troubling," because those findings rested on "negative inferences" resulting from Poland's refusal to confirm or deny the allegations. *Id.* at 101a n.1. "It cannot be the law that foreign partners would destroy the U.S. state secrets privilege by trying to protect it." *Ibid.*

The dissenting judges further concluded that the panel majority was wrong to view the state-secrets privilege as diminished because "discovery is directed to a government contractor." Pet. App. 102a. They explained that the privilege fully applies in this context, adding that the panel's "contrary rule would enable an end-run around the privilege, as litigants could simply subpoena current or former contractors to avoid the privilege's strictures." *Ibid.*

Finally, the dissenting judges concluded that, "even if some of the requested discovery" were not privileged, the panel majority's decision would still be "deeply problematic" because its "critical errors" allow discovery of information where "exposing the classified 'mosaic' is the *entire point* of the Polish criminal proceeding" and thus unacceptably risk revealing the information that even the panel majority "concedes" is a state secret. Pet. App. 103a-104a. The judges observed

that "[t]his would all be troubling enough if the resulting discovery were being used in domestic litigation," yet here any discovery obtained will be transferred overseas to a foreign proceeding "dedicated to investigating our country's counterintelligence operations abroad," where its use cannot be safeguarded by the district court. *Id.* at 107a.

REASONS FOR GRANTING THE PETITION

In this proceeding to obtain classified information from former CIA contractors for use in a foreign court, a divided panel of the Ninth Circuit rejected the government's assertion of the state-secrets privilege and overruled the considered judgment of the CIA Director regarding the risk of harm to the national security. The court then allowed discovery to proceed despite the risk that it would reveal more detailed information that the court itself determined was covered by the state-secrets privilege. That decision is seriously flawed and poses significant risks to the national security and therefore presents exceptionally important questions warranting this Court's review. It also conflicts with decisions of other courts of appeals. Review is necessary before further proceedings can produce the very harms that the state-secrets privilege is designed to prevent.

I. THE COURT OF APPEALS' DECISION IS FUNDAMENTALLY ERRONEOUS

The court of appeals' decision is significantly flawed. The court failed to afford the required deference to the judgment of the CIA Director on national-security matters squarely within his expertise, substituting instead its own assessment of the national-security risks. In doing so, the court then determined that the risks to na-

tional security resulting from the discovery of information about clandestine CIA activity is tolerable because that discovery targeted only former CIA contractors. It further deemed that matters within the realm of purported "public knowledge" cannot be a state secret. And the court disregarded the proper balance under *United States* v. *Reynolds*, 345 U.S. 1 (1953), when evaluating the government's privilege in this context, where a federal court acts purely as a forum for the acquisition of information destined for a foreign proceeding. At the very least, such discovery would in any event be improper under 28 U.S.C. 1782(a).

A. The Ninth Circuit Substituted Its Own Assessment Of National-Security Risks For The CIA Director's Considered Judgment

The Ninth Circuit's multiple errors in this case derive largely from one source: the court's failure to afford deference to the judgment of the CIA Director regarding the risk of harm to the national security. That approach led the court further into error by relying on its own predictive judgment about possible national-security harms, rather than accepting the judgment of the Executive Branch official charged with that responsibility.

This Court has long "recognized the sometimes-compelling necessity of governmental secrecy by acknowledging a Government privilege against court-ordered disclosure of state and military secrets." *General Dynamics Corp.* v. *United States*, 563 U.S. 478, 484 (2011). That state-secrets privilege is deeply rooted in both "the law of evidence," *Reynolds*, 345 U.S. at 6-7, and the Executive's "Art[icle] II duties" to protect "military or diplomatic secrets," *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). Even if a litigant makes a "strong

showing of necessity" for discovery or use of the information, the privilege applies whenever "there is a reasonable danger that compulsion of the evidence will expose military [or other] matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10-11. Where the privilege applies, it is absolute: "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake." *Id.* at 11.

This Court has also made clear that the Executive Branch's assertion of the state-secrets privilege as part of its "Art[icle] II duties" is entitled to a "high degree of deference," *Nixon*, 418 U.S. at 710-711, emphasizing that the responsible Executive officials possess "the necessary expertise" to make a "[p]redictive judgment" about risks to the national security, *Department of the Navy* v. *Egan*, 484 U.S. 518, 529 (1988) (citing *CIA* v. *Sims*, 471 U.S. 159, 170 (1985)). Courts therefore provide "'the utmost deference'" to the Executive's assessment of potential harms in the national-security context, *id.* at 529-530 (quoting *Nixon*, 418 U.S. at 710), reflecting not only the central role of the Executive in that sphere but also a recognition that "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973); see *Center for Nat'l Sec. Studies* v. *U.S. Dep't of Justice*, 331 F.3d 918, 928 (D.C. Cir. 2003) ("[T]he judiciary is in an extremely poor position to second-guess the executive's judgment in [the] area of national security."), cert. denied, 540 U.S. 1104 (2004).

With respect to the CIA Director in particular, this Court has explained that "it is the responsibility of the Director * * * , not that of the judiciary, to weigh

the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." *Sims*, 471 U.S. at 180. It therefore follows that the "decisions of the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference." *Id.* at 179; accord, *e.g.*, *Linder* v. *Department of Def.*, 133 F.3d 17, 25 (D.C. Cir. 1998).

Notwithstanding those principles, as the 12 dissenting judges below explained, the panel majority failed to afford "any apparent deference" to "the CIA Director on matters uniquely within his national security expertise." Pet. App. 93a, 97a (Bress, J., dissenting from denial of rehearing en banc). The court instead viewed its precedent as demanding that it review the Director's state-secrets assertion using "a skeptical eye." *Id.* at 15a, 17a n.14. Although such language by itself might have been understood to reflect the view that "[a]ppropriate judicial oversight" can require "'very careful'" review of a privilege assertion while still providing "'utmost deference'" to Executive Branch judgments, *Abilt* v. *CIA*, 848 F.3d 305, 312 (4th Cir. 2017) (citations omitted); see *id.* at 314, the majority stated that it understood its own "skeptical eye" review to be "contradictory" to the court's prior acknowledgment of "'the need to defer to the Executive on matters of foreign policy and national security,'" Pet. App. 14a-15a (citations omitted). The Ninth Circuit's flawed approach is a serious departure from the "great deference" warranted in this context, *Sims*, 471 U.S. at 179, and erroneously invites courts to substitute their own views for those of the officials vested with authority to protect the Nation.

B. The Disclosure Of Classified Information By CIA Contractors Risks Significant Harm To National Security

The Ninth Circuit then "further depart[ed] from precedent" in undertaking its own assessment of risks to the national security. Pet. App. 98a (Bress, J., dissenting). The court deemed that requiring Mitchell and Jessen to confirm or deny Poland's alleged clandestine connection to a CIA detention facility would not be problematic because the former CIA contractors are "private parties" such that "the United States [would not] confirm[] or deny[] anything." *Id.* at 18a. That holding "would enable an end-around the privilege" and threaten significant harm to the national security in this case and future cases. *Id.* at 102a (Bress, J., dissenting).

The fact that respondents subpoenaed "private parties" does not mean that the public disclosure of classified information that the contractors obtained while working for the CIA would not harm national security. Director Pompeo explained that Mitchell and Jessen are "former contractors employed by the CIA to assist in the interrogation of detainees," and their response to respondents' subpoenas would "either confirm[] or deny[] the existence or nonexistence of a clandestine CIA detention facility in Poland" and whether the Polish government "clandestinely assisted the CIA." Pet. App. 123a, 126a, 130a. Such a response reasonably would be expected to cause significant damage to national security. *Id.* at 126a. The Ninth Circuit's focus on the contractors' relationship to the government as a matter of employment or "agen[cy]" law, *id.* at 18a, was misplaced. What matters is that, as former CIA contractors with first-hand knowledge of CIA activities under the former CIA Program, the compelled disclosure of such information would be a "breach of the trust" on

which the CIA's clandestine relationships with its foreign partners are based, which would undermine the CIA's ongoing ability to maintain such cooperation. *Id.* at 131a.

This Court has long recognized that "the appearance of confidentiality" is "essential to the effective operation of our foreign intelligence service," because the "continued availability" of assistance from "intelligence services of friendly nations" "depends upon the CIA's ability to guarantee the security of information that might compromise them." *Snepp* v. *United States*, 444 U.S. 507, 509 n.3, 512 (1980) (per curiam). The Ninth Circuit here significantly "underestimated the importance of providing" our intelligence partners "with an assurance of confidentiality that is as absolute as possible." *Sims*, 471 U.S. at 175. "[F]orced disclosure of the identities" of those partners would pose substantial risks for "the Agency's ability to carry out its mission," for if our intelligence partners "come to think that the Agency will be unable to maintain the confidentiality of its relationship to them," they may "well refuse to supply information" critical to the national security. *Ibid.* "Even a small chance that some court will order [such] disclosure" risks "impair[ing] intelligence gathering" and "caus[ing] sources to 'close up like a clam.'" *Ibid.*; accord *Tenet* v. *Doe*, 544 U.S. 1, 11 (2005).

It blinks reality to believe, as the panel majority apparently did, that the CIA's foreign intelligence partners would not be deterred from cooperating if their clandestine relationships with the CIA were revealed by former CIA contractors. A contractor, like a government employee, must generally enter into a nondisclosure agreement *before* obtaining access to classified information and can then be subject to sanctions for the

unauthorized disclosure of that information. Exec. Order No. 13,526, §§ 4.1(a)(2), 5.5(b)(1), 3 C.F.R. 298, 314, 321 (2009 Comp.) (50 U.S.C. 3161 note). That is precisely because, as an insider, his unauthorized disclosure of the national-security information with which he has been entrusted can cause significant damage to the national security. Cf. *Standard Form 312: Classified Information Nondisclosure Agreement* ¶ 3 (rev. 2013) (obligation to "never divulge" classified information without authorization), https://go.usa.gov/xAc5E; cf. also *Snepp*, 444 U.S. at 507-508 (enforcing nondisclosure agreement against former CIA officer); *United States* v. *Marchetti*, 466 F.2d 1309, 1312 & n.1, 1315-1318 (4th Cir.) (same), cert. denied, 409 U.S. 1063 (1972).

For the same reasons, the state-secrets privilege has long applied when information is sought from private contractors performing services on the government's behalf. This Court in *Reynolds* "looked to *Totten* [v. *United States*, 92 U.S. 105 (1876)]"—a case involving purported spies providing services under an "alleged espionage agreement[]"—when it described "the 'well established' state secrets privilege." *Tenet*, 544 U.S. at 9 (citing *Reynolds*, 345 U.S. at 7 & n.11). And *Reynolds* further illustrated that established privilege by citing state-secrets decisions rejecting efforts to obtain documents directly from private contractors that produced them for the federal government. 345 U.S. at 6-7 & n.11; see *Pollen* v. *Ford Instrument Co.*, 26 F. Supp. 583 (E.D.N.Y. 1939) (denying discovery request for contractor's drawings of range-sighting devices for guns); *Firth Sterling Steel Co.* v. *Bethlehem Steel Co.*, 199 F. 353 (E.D. Pa. 1912) (denying enforcement of subpoena for contractor's drawings of munitions). The rule could

not be otherwise. The government utilizes contractors in numerous national-security contexts to, *inter alia*, produce military weapons systems and reconnaissance platforms and to provide clandestine intelligence services. For that reason, the Ninth Circuit's decision threatens to cause significant problems for the government's ability to protect national-security information.

C. Purported "Public Knowledge," In The Absence Of Official Government Disclosure, Does Not Bar Information From Protection Of The State-Secrets Privilege

The panel majority erred yet further in relying on its own assessment that confirming or denying "basic facts" about the alleged location of a CIA detention facility in Poland and any assistance provided by Poland "would not 'cause grave damage to national security'" because, in its view, "a fact must first be a 'secret'" to be "a 'state secret,'" and no secrecy exists here because those facts are "basically public knowledge" that "have been in the public eye for some years." Pet. App. 17a-18a, 21a (citation omitted). That ruling misunderstands the governing principles.

1. The state-secrets privilege "belongs to the Government" and cannot be "waived by a private party." *Reynolds*, 345 U.S. at 7. Public statements by non-U.S.-government entities and persons about a purported CIA detention facility in Poland do not undermine the government's ability to invoke the privilege to prevent its *own* employees and contractors with first-hand knowledge based on their work for the government from being compelled by a court to confirm or deny that information. See Pet. App. 98a-99a (Bress, J., dissenting).

Courts have repeatedly recognized that "in the arena of intelligence and foreign relations," there can be "a

critical difference between official and unofficial disclosures." *Fitzgibbon* v. *CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). "It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so." *Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362, 1370 (4th Cir.), cert. denied, 421 U.S. 908, and 421 U.S. 992 (1975). "Rumors and speculations circulate" and can "get into print," and "others may [then] republish [that] previously published material," but such reports are properly understood "as being of uncertain reliability" and insufficient for courts to displace the Executive Branch's expert judgment that "damage [to] the national security" could reasonably be expected from disclosing classified information possessed by those with first-hand knowledge of the Nation's intelligence activities. *Id.* at 1368, 1370; accord *ACLU* v. *United States Dep't of Def.*, 628 F.3d 612, 621-622 (D.C. Cir. 2011); *Stein* v. *Department of Justice*, 662 F.2d 1245, 1259 (7th Cir. 1981) (concluding that information remains "properly classified" notwithstanding public speculation, "even if the speculation may be accurate"); see, *e.g.*, *Frugone* v. *CIA*, 169 F.3d 772, 774-755 (D.C. Cir. 1999) (citing cases). Such determinations based on expert assessments of the potential for harm to national security are therefore "generally unaffected" by whether the information is asserted to have entered "the realm of public knowledge." *Halpern* v. *FBI*, 181 F.3d 279, 294 (2d Cir. 1999).

The D.C. Circuit's influential decision in *Military Audit Project* v. *Casey*, 656 F.2d 724 (1981), illustrates the proper analysis in such contexts. The court there confronted "widely publicized" media reports that the

CIA had contracted with Howard Hughes to build a specialized vessel—the *Glomar Explorer*—to recover a sunken Soviet nuclear-missile submarine from the three-mile-deep ocean northwest of Hawaii. *Id.* at 728 & n.1. The media had reported that the vessel had secretly recovered a portion of the submarine and that further recovery had been planned before the press learned of the project as the result of a "mysterious burglary" by armed men who broke into a Hughes safe. *Id.* at 728-729. The CIA Director and other government officials reportedly attempted to convince major news outlets to suppress the story, and those efforts were themselves reported when the media broke the news. *Id.* at 729. The government later acknowledged its ownership of the vessel and declassified certain portions of its contractual agreement with Hughes, but it declined to declassify further information, notwithstanding the "great deal of speculation in the press concerning the nature of the [vessel's] mission." *Id.* at 732.

The D.C. Circuit concluded that information pertaining to the purpose of the *Glomar Explorer* project remained properly classified even in the face of the widespread reporting, giving "substantial weight" to the government's affidavits, which explained that confirming or denying the public speculation would cause serious harm to the national security. *Military Audit Project*, 656 F.2d at 738 (citation and emphasis omitted); see *id.* at 741-745. While "the *reported* purpose of the *Glomar Explorer*'s mission may well [have been] notorious," the court accepted that its "*actual* purpose may well still [have been] a secret, or, at the very least, unresolved doubt may still remain," and that eliminating "lingering doubts" through confirmation or denial risked harm to the national security. *Id.* at 744-745.

The court accepted the government's predictive judgment of harm, even though the French edition of a book by the former CIA Director (which the "CIA did not clear" before its publication), a Senate committee's publication (which appeared to adopt "'speculation from non-governmental sources'"), and a government scientific memorandum (by an "agency not connected in any way with the Glomar Explorer project" that apparently relied on news accounts) all described the vessel's mission as reported in the press. *Id.* at 742-744 (citation omitted). Because the government's affidavits supplied "an understandable and plausible basis" for the information's ongoing classification based on harms to the national security, the court properly deferred to that Executive Branch judgment. *Id.* at 745.[2]

2. The panel majority's application of its contrary approach further highlights the error of its "skeptical" review that displaces deference to considered Executive Branch expertise. The majority deemed the actual facts of whether a CIA detention site was in Poland and whether Abu Zubaydah was detained and mistreated there to be "no secret[s] at all" based on its assessment of what was already in the "public eye," Pet. App. 20a-21a, namely, the ECHR's 2015 findings "'beyond reasonable doubt'" and "widely reported" information in the press, including reports of statements by former

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[2] Many years later, the Executive Branch declassified the *Glomar Explorer*'s mission, which was, as had been reported, a "recovery operation against the[] lost [Soviet] submarine." Author Redacted, *Project Azorian: The Story of the Hughes Glomar Explorer* 46, 49 (Fall 1978) (emphasis omitted) (publicly released 2010), https://go.usa.gov/xAxKz; see *id.* at 1 (noting that "[t]he widespread publicity has contained much fact and extensive error").

Polish officials, *id.* at 4a-6a. Each illustrates the major shortcomings in the court's approach.

The ECHR deemed its findings as "beyond reasonable doubt" if, in its view, they were "supported" by the evidence and "inferences" drawn from the parties' submissions. C.A. E.R. 549. The ECHR therefore decided the case as if the alleged facts were "no[t] contest[ed]," and based its findings on strong adverse inferences it chose to draw against Poland, because Poland declined in its submissions to confirm or deny the allegations, refused to disclose "documents to enable the Court to establish the facts," and otherwise "fail[ed] to cooperate with the Court." *Id.* at 542, 548-550; see *id.* at 556; pp. 7-8, *supra*. As the 12 dissenting judges in this case concluded, "[i]t cannot be the law that foreign partners" that "refuse[] to confirm allegations to protect U.S. state secrets" will convert "the allegations [into] 'public knowledge'" and thereby "destroy the U.S. state secrets privilege by trying to protect it." *Id.* at 101a n.1.

The ECHR judgment in fact supports the Director's explanation that "public speculation" about a CIA facility in Poland leaves "an important element of doubt about the veracity of the information." Pet. App. 133a, 135a. The ECHR acknowledged that it lacked "*any* form of direct account of the [alleged] events" and ultimately credited Abu Zubaydah's allegations (in light of adverse inferences) based on circumstantial "threads of information gleaned" from public sources. C.A. E.R. 550-551 (emphasis added); see *id.* at 549, 556, 577. Moreover, Abu Zubaydah's central allegation of "unlawful detention and torture" in Poland after his purported transfer there in December 2002, Pet. App. 114a, is itself undermined by the public SSCI report, which found after a comprehensive review of CIA records that

the CIA discontinued its use of EITs on Abu Zubaydah months *before* December 2002. See pp. 5-6 & n.1, *supra*.[3]

The ECHR's judgment likewise reflects that a former Polish President and multiple Polish Prime and Foreign Ministers had denied the existence of any CIA detention facility in Poland. See p. 6, *supra*. The distrct court noted that the media has since reported that, in 2014, Poland's former President acknowledged certain Polish intelligence cooperation with the CIA while denying knowledge of "torture." See Pet. App. 52a. But such statements by a former official of a foreign government do not undermine the CIA Director's determination that the national security would be harmed if United States courts were to compel former CIA contractors to confirm or deny any clandestine cooperation. Such a result would signal that the CIA is "unable or unwilling to keep its clandestine liaison relationships secret," significantly risking its ability to secure ongoing and future cooperation from foreign intelligence partners. *Id.* at 131a-132a. As the CIA Director's declaration makes clear, that cooperation depends on those partners' confidence in "our ability to honor our pledge to keep any clandestine cooperation with the CIA a secret," even after "time passes, media leaks occur, or the political and public opinion winds change in those foreign countries." *Id.* at 135a-136a.

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[3] Although the ECHR's judgment did not become final until after the December 2014 printing of the SSCI Report, the ECHR adopted its judgment beforehand and therefore apparently did not consider that report. See C.A. E.R. 383, 395, 425.

D. Discovery Requests For Information Destined For Foreign Proceedings Warrant Enhanced Deference To The Executive

The Ninth Circuit's errors are particularly significant because under *Reynolds*' particular "balancing approach" that "courts [must] apply in resolving Government claims of privilege," *Tenet*, 544 U.S. at 9, the nature of the discovery request here warranted an especially high degree of deference to the CIA Director's assessment of harm. Indeed, quite aside from the state-secrets privilege, the district court's decision quashing respondents' subpoenas could properly be affirmed, and the court of appeals' decision reversed, on the ground that discovery should have been denied under 28 U.S.C. 1782(a).

Reynolds' "formula of compromise" for evaluating privilege assertions was based on the Court's understanding that while "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers," that proposition must be balanced against the practical recognition that "a complete disclosure to the judge"—which could "jeopardize the secrecy which the [state-secrets] privilege is meant to protect"—should not be automatically required "before the claim of privilege will be accepted." 345 U.S. at 9-10. *Reynolds* therefore determined that "how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate" is determined by "the showing of necessity" made by the party seeking the information. *Id.* at 11. A "strong showing of necessity" calls for the court to be satisfied, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military [or

other] matters which, in the interest of national security, should not be divulged." *Id.* at 10-11. But "where necessity is dubious," a lesser showing is "sufficient" to "cut off further demand." *Id.* at 11.

Reynolds struck that balance between adjudicatory authority and the need to maintain secrecy in a wholly domestic setting, where the plaintiffs had brought a wrongful-death action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* See *Reynolds*, 345 U.S. at 2-3. The "showing of necessity" in *Reynolds* was therefore that the information sought would be necessary as evidence of the "causation" element of the tort claim before the Court. *Id.* at 11.

But where, as here, the district court has no claim for relief before it for adjudication and where the discovery "will be shipped overseas," "totally out of control of a domestic court," Pet. App. 108a (Bress, J., dissenting), the balance tilts decidedly against such discovery. Nothing in *Reynolds* suggests that in a case like this—where the coercive power of this Nation's courts is invoked to export sensitive evidence about the Nation's intelligence activities for exclusive use in a *foreign* proceeding the very purpose of which is to explore purported clandestine CIA operations and relationships—a proper evaluation of the government's objection to the discovery and formal claim of privilege requires anything more than a facially plausible risk to national security.

The Section 1782(a) process that respondents have invoked reinforces that understanding. Congress specifically determined in 28 U.S.C. 1782(a) that discovery for use in a foreign proceeding must not violate "any legally applicable privilege," *ibid.*, and that, even when a court possesses authority to order discovery, it retains

discretion to "'refuse to'" do so, *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 260-261, 264 (2004) (citation omitted). Given the "character of the [Polish] proceedings" and the United States' own rejection of direct requests from Polish authorities for the information under the governing MLAT, respondents' subpoenas to the CIA contractors are "unduly intrusive" and a transparent "attempt to circumvent" the "policies of * * * the United States" in this sensitive area that warrants foreclosing such discovery. *Id.* at 264-265. Thus, even independent of the state-secrets privilege, the district court would have erred under Section 1782(a) by allowing discovery in this case to proceed.

The panel majority essentially treated as irrelevant "the fact that the information sought here is ultimately destined for a foreign tribunal." Pet. App. 21a n.17. It instead directed discovery to proceed further even though it agreed that information concerning the "identities and roles of foreign individuals involved with the [purported CIA] detention facility" in Poland and related operational details are properly "covered by the state secrets privilege." *Id.* at 20a. It determined that the only "potentially applicable" ground to quash respondents' subpoenas in this "pure discovery matter" was if privileged evidence is "'inseparable'" from nonprivileged information. *Id.* at 22a-23a (citation omitted). The majority stated that it is "not impossible to separate" them and, in light of respondents' suggestion that the Polish prosecutor already has a "'good idea'" of "'who his targets are,'" the majority determined that Mitchell's and Jessen's compelled production of what it regarded as nonprivileged evidence could "provide context to Polish prosecutors or corroborate prosecutors'

independent investigations." *Id.* at 22a, 25a. That approach is exactly backwards.

More, not less, deference to national-security interests is warranted in this "pure discovery matter" for a foreign proceeding. Even in contexts involving claims for relief before U.S. courts, "[c]ourts are not required to play with fire and chance further disclosure—inadvertent, mistaken, or even intentional—that would defeat the very purpose for which the privilege exists." *Sterling* v. *Tenet*, 416 F.3d 338, 344 (4th Cir. 2005), cert. denied, 546 U.S. 1093 (2006). Yet the panel majority did exactly that by authorizing discovery of "context[ual]" information for the express purpose of "corroborat[ing]" matters that are state secrets of the United States in a proceeding the very focus of which is alleged Polish participation in clandestine CIA activities. Pet. App. 25a.

II. THIS COURT'S REVIEW IS WARRANTED

The court of appeals' divided decision imposes a significantly flawed legal "framework [that] poses untold risks for our national security, both in this case and in the future cases that must try to comply with [its] decision." Pet. App. 103a (Bress, J., dissenting from denial of rehearing en banc). The decision therefore presents exceptionally important questions that warrant this Court's review. It also conflicts with decisions of other courts of appeals that apply proper deference to the Executive Branch's predictive assessments of harm to the national security.

The panel majority's reconceptualization of its "skeptical" review of Executive Branch state-secrets-privilege assertions significantly alters the standard governing the proper disposition of such matters, lead-

ing it to give no "apparent deference to the CIA Director's declarations." Pet. App. 97a (Bress, J., dissenting). That approach starkly conflicts with the standard applied in other courts of appeals, which recognize that, "[i]n assessing the risk" to national security, "a court is obliged to accord the 'utmost deference' to the responsibilities of the [E]xecutive [B]ranch." *El-Masri* v. *United States*, 479 F.3d 296, 305 (4th Cir.), cert. denied, 552 U.S. 947 (2007) (citation omitted); accord, *e.g.*, *Black* v. *United States*, 62 F.3d 1115, 1119 (8th Cir. 1995), cert. denied, 514 U.S. 1154 (1996); *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991).

That lack of deference underlies the majority's minimizing of the harm to national security because the disclosure of classified information would be by government contractors, even though they obtained that information only by virtue of their work for the CIA. That holding is a particularly dangerous judicial innovation given the significant numbers of government contractors with access to classified information. Indeed, "no [other] court" has adopted such a striking proposition, which "would enable an end-run around the [state-secrets] privilege" by permitting courts to compel "current or former contractors" to disclose national-security information. Pet. App. 102a (Bress, J., dissenting).

The majority's treatment of purported "public knowledge" about classified matters that the government has never officially confirmed or denied also significantly departs from the longstanding legal framework developed by other courts of appeals, which recognize the government's continuing authority to protect such information. See pp. 23-26, *supra*. Respondents' case, for

instance, cannot be squared with *Military Audit Project*, *supra*, where the D.C. Circuit properly deferred to the Executive Branch's prediction of harm notwithstanding widely publicized media reports about the *Glomar Explorer*'s mission and the publication of a book describing that mission by the former CIA Director who had supervised the project. See pp. 25-26, *supra*. The D.C. Circuit correctly upheld the Executive's classification decision because the government had provided an "understandable and plausible basis" for its assessment of risk to the national security. *Military Audit Project*, 656 F.2d at 745.

The majority's errors are particularly damaging because its decision allows discovery of information destined for a foreign proceeding that is itself probing alleged clandestine operations of, and relationships with, the CIA. Pet. App. 107a (Bress, J., dissenting). As 12 dissenting judges below explained, the majority's deeply flawed analytical framework is "antithetical to the core principles on which the [state-secrets] privilege is founded," and its "grave legal errors" now pose "serious risk[s] to our national security"—"risks we should not tolerate and that a fair application of the state secrets privilege should protect against." *Id.* at 86a, 101a, 109a.

This Court's review is needed to restore the principles protecting the government's ability to safeguard classified information and the national security.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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