No. 22-190

IN THE

Supreme Court of the United States

WIKIMEDIA FOUNDATION,

Petitioner,

v.

NATIONAL SECURITY AGENCY / CENTRAL SECURITY SERVICE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF FORMER FEDERAL JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

Statutes

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTERESTS OF *AMICI CURIAE*[1]

Amici are former Article III judges whose experiences on the bench convince them that the judicial role in reviewing the state secrets privilege is vital to the rule of law, and that courts are competent to evaluate executive assertions of the privilege.

Amici seek to participate in this case out of concern that the decision below would prevent the Judiciary from performing its critical constitutional role checking executive power. History teaches that judges are well-equipped to evaluate assertions of privilege in a national-security context with an appropriate level of deference, and that limiting review of privilege claims can lead to costly mistakes. *Amici* respectfully submit that they can lend the Court a unique perspective on the Judiciary's responsibility to carefully review the Executive's claim that a case cannot be litigated because it implicates state secrets.

SUMMARY OF ARGUMENT

The Judiciary guards against governmental overreach in our constitutional system, and judicial review of executive action is essential to preserving the rule of law. Since the founding, judges have evaluated executive claims that the presence of state secrets in a case precludes its litigation. Examples of this his-

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[1] Counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission. Sup. Ct. R. 37.6. All parties received timely notice of, and consented to, the filing of this brief. Sup. Ct. R. 37.2(a).

torical judicial function can be traced back to the treason trial of Aaron Burr in 1807. Two centuries of experience confirm the Judiciary's important role in reviewing assertions of the state secrets privilege.

While judges must be sensitive to the Executive's special insight in matters of national security, their deference is not absolute. When courts consider, with appropriate deference, whether the Executive's bid for secrecy is credible and justified, the answer is often yes. But the existence of careful judicial review guards against the potential for abuse that would result if the Judiciary had no meaningful role at all. History teaches that blind judicial deference to claimed national security prerogatives can compromise fundamental constitutional protections. We know now of instances when executive claims of security risks have withered in the light of day. Absent the prospect of judicial review, governmental actors have an inherent incentive to claim the privilege where it does not belong.

Courts have developed a variety of tools to evaluate whether cases may be litigated without impairing national security interests. They may conduct *in camera* review in appropriate cases, for example. The rule espoused below—that the Judiciary should stay its hand once the government asserts that its potential defenses could implicate state secrets—ignores that judges have long performed a critical role scrutinizing privilege claims.

This curtailment of the judicial branch comes at a real cost: the state secrets privilege, when validly asserted, can extinguish even meritorious claims. In a society bound by the rule of law it must be deployed

carefully, not cavalierly. Safeguarding the rule of law is a quintessential judicial function, and it should be preserved here. Particular judgments on particular facts will not always be easy. National security and civil liberties can be fitful bedfellows at times. But judges have a proven ability to perform their limited review conscientiously, ensuring that it is always the Nation's interests—and not its government's errors—that are kept safe.

This Court should grant the petition.

ARGUMENT

I. THE JUDICIARY HAS HISTORICALLY PROVIDED A CRITICAL CHECK ON EXECUTIVE ACTION, EVEN WHERE NATIONAL SECURITY IS IMPLICATED

The Judiciary enforces the rule of law in our system of checks and balances, including when the Executive claims that litigation would impinge national security interests. This Court reaffirmed the judicial role in reviewing state secrets claims as recently as last Term. The decision below departs from longstanding constitutional tradition: As the dissent explains, allowing the executive branch to evade judicial review "based on nothing more than boilerplate claims of privilege" and "hypotheticals as defenses" "marks a dramatic departure" from this Court's precedents. *Wikimedia Found. v. Nat'l Sec. Agency*, 14 F.4th 276, 306-08 (4th Cir. 2021) (Motz., J., concurring in part and dissenting in part). This Court should intervene to restore the Judiciary's critical check on executive action.

A. The Judiciary Has Historically Served As A Check On Unlawful Executive Action

No one "in this country is so high" that they are "above the law." *United States v. Lee*, 106 U.S. 196, 220 (1882). A society that secures the rule of law makes a simple yet powerful promise: "All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it." *Id.* No person is "immune from some form of legal constraint." Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. Chi. L. Rev. 455, 457 (2003); *see* Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. Cal. L. Rev. 1307, 1313 (2001) (rule of men, in contrast, "connotes unrestrained and potentially arbitrary personal rule"); Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 Colum. L. Rev. 1, 9 (1997) (the supremacy of legal authority, even over government officials, is essential to the rule of law).

The Judiciary has anchored the rule of law from this country's beginnings. Among the list of grievances expressed in the Declaration of Independence was the King's control of judges, who were "dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence para. 11 (U.S. 1776). The American revolutionaries regarded "an independent judiciary, free of executive oppression" "as essential to a free society." Thomas I. Vanaskie, *The Independence and Responsibility of the Federal Judiciary*, 46 Vill. L. Rev. 745, 748-49 (2001).

The Founders trusted the Judiciary to uphold the rule of law by serving as a check on the other

branches. John Adams counseled that the judicial power "ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both." John Adams, On Government, in The Works of John Adams 181, 198 (C. Adams ed., 4th ed. 1851-56) (quoted in Charles Gardner Geyh, *The Origins and History of Federal Judicial Independence*, in A.B.A. Comm'n on Separation of Powers and Judicial Independence, An Independent Judiciary app. A at 67, 69 (1997)). Alexander Hamilton considered it essential that "the Judiciary remain[] truly distinct from both the legislature and the executive." The Federalist No. 78, p. 466 (C. Rossiter ed. 1961) (A. Hamilton). As Hamilton reminded, "there is no liberty if the power of judging be not separated from the legislative and Executive powers." *Id.* (quoting 1 Montesquieu, Spirit of Laws 181).

Our constitutional system of checks and balances forswears unquestioning deference to the Executive, even in the sphere of national security. Though the Executive's national security judgments may be "delicate, complex, and involve large amounts of prophecy," *Trump v. Hawaii*, 138 S. Ct. 2392, 2421-22 (2018) (quotation omitted), "concerns of national security and foreign relations do not warrant abdication of the judicial role," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010). "[N]ational-security concerns" are neither "a talisman used to ward off inconvenient claims" nor a "label used to cover a multitude of sins." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017) (quotation omitted); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) ("No penance would ever expiate the sin against

free government of holding that a President can escape control of executive powers by law through assuming his military role.").

Uncritical deference in the national security context can lead to devastating mistakes, as in *Korematsu v. United States*, 323 U.S. 214 (1944). There, although the Court recognized that "legal restrictions which curtail the civil rights of a single racial group are immediately suspect," it nevertheless deferred to the government's claim that a military order that removed and incarcerated all Japanese Americans living on the West Coast was justified by military necessity. *Id.* at 216, 218-19. Based on a submission by Lieutenant General John L. DeWitt (the "DeWitt Report"), the Court accepted that "there were disloyal [Japanese Americans], whose number and strength could not be precisely and quickly ascertained" and that "the need for action was great, and time was short." *Id.* at 218, 223-24.

While the Court declined to probe the government's justifications, several Justices were skeptical of that unquestioning deference. Justice Murphy, for instance, acknowledged that "[t]he scope of … discretion" granted to the executive branch in this context "must, as a matter of necessity and common sense, be wide," but concluded that "like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled." *Id.* at 234 (Murphy, J., dissenting). In his view, the DeWitt Report fell short of this modest

standard; it amounted to "a plea of military necessity that has neither substance nor support." *Id.*

Justice Jackson likewise questioned the Court's acquiescence to the Executive's claim. "How does the Court know that these orders have a reasonable basis in necessity?," he asked *Id.* at 245 (Jackson, J., dissenting). The Court's deference, in Justice Jackson's view, amounted to an acceptance of "General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable" with "no real evidence before it." *Id.*

The dissenters' skepticism was prescient. Decades after *Korematsu*, a congressional commission and newly discovered government records revealed not only that intelligence contradicted the claim that the internment of Japanese Americans was justified by military necessity, but also that the government knew as much when it offered that justification. *See Korematsu v. United States*, 584 F. Supp. 1406, 1416-17 (N.D. Cal. 1984).

With the benefit of hindsight, *Korematsu* "stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees." *Id.* at 1420; *see Printz v. United States*, 521 U.S. 898, 933 (1997) (quoting *New York v. United States*, 505 U.S. 144, 187 (1992) (the Constitution "protects us from our own best intentions" by "divid[ing] power … among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.")). Executive actors promise to support and de-

fend the Constitution—but some of our deepest national disappointments have occurred when the Judiciary failed to hold the Executive accountable to that promise.

B. This Court Has Repeatedly Reaffirmed The Judiciary's Constitutional Role In Evaluating Secrecy Claims

Ever since Aaron Burr's trial for treason, this Court has repeatedly upheld the Judiciary's authority to scrutinize executive efforts to curtail litigation on state secrets grounds.

1. Chief Justice John Marshall presided over Burr's trial and twice asserted the court's role in reviewing the Executive's state secrets claim. First, when President Thomas Jefferson opposed Burr's request for the production of correspondence between the President and Burr's co-conspirator because the letter "might contain state secrets, which could not be divulged without endangering the national safety," *United States v. Burr*, 25 F. Cas. 30, 31 (C.C.D. Va. 1807), Chief Justice Marshall declined to quash the subpoena. Although "disclosure" of the letter might "endanger the public safety," Marshall emphasized that the potentially dangerous information was not yet "before the court" and would have its "due consideration on the return of the subpoena." *Id.* at 37.

Second, when Burr later renewed his request for the letter, and the prosecution insisted that certain parts should be withheld as public secrets, Marshall again emphasized the Judiciary's role in reviewing those assertions. *See United States v. Burr*, 25 F. Cas. 187, 190 (C.C.D. Va. 1807). If the President sought to

withhold a paper, Marshall explained, he would need to "state the particular reasons" for doing so." *Id.* at 192. The Court would then weigh those reasons against "the affidavit of the accused" before deciding whether to compel disclosure. *Id.* In other words, "the ultimate decision remained with the court." *Nixon v. Sirica*, 487 F.2d 700, 710 (D.C. Cir. 1973).

2. This Court reaffirmed the importance of judicial review of a claimed need for secrecy to protect national security in *United States v. Reynolds*, 345 U.S. 1 (1953). After three civilian observers were killed in the crash of a B-29 bomber testing secret military equipment, the observers' widows sued the government. The plaintiffs sought as part of discovery the accident investigation report, but the government refused to produce the report—even to the Court—asserting it could not do so without "seriously hampering national security." *Id.* at 5.

The Court rejected the government's argument "that the executive department heads have power to withhold any documents in their custody from judicial review if they deem it to be in the public interest." *Id.* at 6. The Court cautioned that even in cases implicating national security, "[j]udicial control over the evidence in the case cannot be abdicated to the caprice of executive officers." *Id.* at 9-10. Rather, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege." *Id.* at 8. Ultimately, it is "the court," not the Executive, that must be "satisfied that military secrets are at stake." *Id.* at 11. Any other rule would amount to an impermissible "abandonment of judicial control" and "lead to intolerable abuses." *Id.* at 8.

That reasoning proved prophetic. Years after the government claimed that producing the accident report would "seriously hamper[] national security," *id.* at 5, it emerged that the report contained no classified or sensitive national-security information at all, and showed only "that the crash and resulting deaths were caused by ordinary negligence." Shayana Kadidal, *The State Secrets Privilege and Executive Misconduct*, Jurist F. (May 30, 2006); *see* Garry Wills, *Why the Government Can Legally Lie*, 56 N.Y. Rev. of Books 32, 33 (2009) (the report contained no "details of any secret project," but instead "a horror story of incompetence, bungling, and tragic error"). The government had asserted the privilege not to preserve state secrets, but "to avoid liability and embarrassment." William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 Pol. Sci. Q. 85, 99 (2005).

3. Twenty years after *Reynolds*, the Court again reaffirmed that it is the Judiciary's prerogative to evaluate state secrets claims, even where national security is at stake. In *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam), the government sought to enjoin the publication of the Pentagon Papers—a detailed Department of Defense history of the United States' involvement in Vietnam—by arguing that their publication would be detrimental to national security. The government offered testimony from representatives of the Department of State, Department of Defense, and the Joint Chiefs of Staff, but failed to present "cogent reasons" "as to why these documents … would vitally affect the security of the Nation." *United States v. N.Y. Times Co.*, 328 F.

Supp. 324, 330 (S.D.N.Y. 1971). This Court thus concluded that the government had failed to carry its "heavy burden of showing justification" for the need for secrecy, and permitted publication. *N.Y. Times Co.*, 403 U.S. at 714 (quotation omitted).

Years later, former Solicitor General Erwin Griswold commented: "I have never seen any trace of a threat to the national security from the publication [of the Pentagon Papers]. Indeed, I have never seen it even suggested that there was such an actual threat." Hon. Robert D. Sack, Hon. John D. Bates, Douglas Letter, & Ben Wizner, *The Philip D. Reed Lecture Series: The State Secrets Privilege and Access to Justice: What Is The Proper Balance?*, 80 Fordham L. Rev. 1, 9 (2011). Griswold explained, "[i]t quickly becomes apparent to any person who has considerable experience with classified material" that "there is a massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another." Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, Wash. Post (Feb. 15, 1989). The Papers were fully declassified in 2011. Press Release, National Archives, National Archives and Presidential Libraries Release Pentagon Papers (June 8, 2011), https://www.archives.gov/press/press-releases/2011/nr11-138.html.

4. In recent years, courts have accepted that the principles embodied in *Reynolds* and *New York Times Company* require them to probe government claims that the state secrets privilege precludes a valid defense, by using "appropriately tailored *in camera* re-

view" to determine whether "resort to privileged material" is in fact necessary for the government to pursue a "meritorious and not merely plausible" defense. *In re Sealed Case*, 494 F.3d 139, 149-51 (D.C. Cir. 2007) (reversing district court dismissal based on "possible defenses"); *see, e.g.*, *Molerio v. F.B.I.*, 749 F.2d 815, 825 (D.C. Cir. 1984) (granting dismissal only after reviewing evidence in camera); *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004) (same). The alternative, "allowing the mere prospect of a privileged defense to thwart a citizen's efforts to vindicate his or her constitutional rights," would "run afoul of the Supreme Court's caution against precluding review of constitutional claims." *In re Sealed Case*, 494 F.3d at 151 (citation omitted).

Last Term, this Court affirmed the Judiciary's continuing role in adjudicating disputes over the application of the state secrets privilege. Citing *Reynolds*, this Court reiterated that "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege," and that judicial control over evidence "cannot be abdicated to the caprice of executive officers." *United States v. Zubaydah*, 142 S. Ct. 959, 967 (2022) (quoting *Reynolds*, 345 U.S. at 8-10). This Court outlined the flexible standard governing these evidentiary assessments, where a litigant's "necessity" for the ostensibly privileged information "will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." *Id.* (quoting *Reynolds*, 345 U.S. at 11). The decision below improperly abandons genuine review of the evidence in precisely the scenario where the stakes are highest—when the government

seeks dismissal of claims that would otherwise merit litigation.

II. JUDGES CAN REVIEW EXECUTIVE ASSERTIONS OF THE STATE SECRETS PRIVILEGE WITHOUT JEOPARDIZING NATIONAL SECURITY

When judges test Executive assertions of privilege, they employ special procedures to assess the Executive's claim while protecting sensitive information from disclosure. The fact of judicial review ensures that meritorious claims may be adjudicated, when consistent with national security considerations. And the *prospect* of judicial review protects against abuse of the privilege by the Executive. A rule that allows the government to quash litigation merely by asserting it may have defenses involving sensitive information invites Executive overreach, and error. The Court should grant review to clarify that judges retain a meaningful role in evaluating claims of privilege, and that they should not, as a rule, blindly defer to the government's assertion that litigating a case would disclose state secrets.

A. Structural Factors Reinforce That Judicial Review In This Context Is Important And Necessary

1. The state secrets privilege is "not to be lightly invoked." *Reynolds*, 345 U.S. at 7. Absent the potential for probing judicial review, however, the Executive has the incentive and ability to claim the privilege where it does not actually apply.

a. The risk of overreach is serious even if the Executive acts in good faith. Because of "inescapable human nature," the "branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises." *Hamdi v. Rumsfeld*, 542 U.S. 507, 545 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). Just as "[t]hose who work for the House of Representatives or the Senate might well be expected to aggrandize the powers of Congress," we should expect "[g]enerous interpretations of the president's prerogatives" when national security is ostensibly at risk. Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 Geo. Wash. L. Rev. 693, 696-97 (2005).

If the government's claim that its defenses depend on state secrets will invariably be insulated from review, the government can be expected to invoke the privilege extravagantly: when the Executive knows "that assertion of the privilege is tantamount to conclusive on the Judiciary, and that federal judges rarely order documents for inspection, then there is great incentive on the part of the Executive branch to misuse the privilege." Weaver & Pallitto, *supra*, at 101; *see id.* at 102 ("It is hardly surprising that such an effective tool would tempt presidents to use it with increasing frequency and in a variety of circumstances."). Courts already defer heavily to the Executive in this context; further circumscribing the judicial role would increase the possibility of abuse.

b. An over-inclusive conception of the state secrets privilege provides "a convenient vehicle through which an executive official can conceal misdeeds, prevent liability, or simply avoid public embarrassment." Michael H. Page, *Judging Without the Facts: A Schematic for Reviewing State Secrets Privilege Claims*, 93 Cornell L. Rev. 1243, 1273 (2008). Beyond *Reynolds* and the Pentagon Papers, *see supra* section I.B at 9-11, lower court decisions shed light on the potential for abuse. In *Edmonds v. U.S. Department of Justice*, 323 F. Supp. 2d 65, 72 (D.D.C. 2004), *aff'd* 161 F. App'x 6 (D.C. Cir. 2005), for example, an FBI translator blew the whistle on alleged incompetence in the translation department. *Id.* at 72. The government successfully argued that the state secrets privilege barred her suit for wrongful termination, *id.* at 81, but the invocation "seem[ed] to be directed more at avoiding embarrassment and the publication of unsavory details about the FBI than at protecting the national security," Weaver & Pallitto, *supra*, at 106, such as the government's enlistment of unqualified translators at Guantanamo Bay, *see* Kadidal, *supra*.

c. The government itself has acknowledged the impulse to overextend claims of confidentiality. A report issued in 1997 by the Commission on Protecting and Reducing Government Secrecy concluded that "the classification system … is used too often to deny the public an understanding of the policymaking process, rather than for the necessary protection of intelligence activities." *Report of the Commission on Protecting and Reducing Government Secrecy,* S. Rep. No. 105-2 at xxi, 105th Cong., 1st sess. (1997). In one particularly ironic example, "a memo from one member

of the Joint Chiefs of Staff to another member claiming that too many documents were being classified, was itself classified." Weaver & Pallitto, *supra*, at 87.

B. Courts Have The Institutional Competence To Evaluate Claims Of Privilege Without Compromising National Security

Courts are fully equipped to evaluate executive assertions of the need for secrecy while minimizing the risk that information will be improperly disclosed. Depending on the nature of the case, its procedural posture, and the particular concerns that are implicated, courts have a variety of tools to protect against the improper or inadvertent disclosure of sensitive information. Their record of success is strong: "in our history, it is hard to find even a single case in which judicial protection of freedom seriously damaged national security." Sunstein, *supra*, at 702.

1. To begin, courts can review information supporting the Executive's claim of secrecy *in camera* and *ex parte*. *See, e.g.*, *Ellsberg v. Mitchell*, 709 F.2d 51, 59 n.37 (D.C. Cir. 1983) ("When a litigant must lose if the claim is upheld and the government's assertions are dubious in view of the nature of the information requested and the circumstances surrounding the case, careful *in camera* examination of the material is not only appropriate, but obligatory." (internal citations omitted)); *see also Mohamed v. Jeppesen Dataplan*, 614 F.3d 1070 (9th Cir. 2010) (en banc court reviewed *in camera*, *ex parte* the documents at issue); *El-Masri v. United States*, 479 F.3d 296, 305 (4th Cir. 2007) ("In some situations, a court may conduct an *in camera* examination of the actual information sought to be protected, in order to ascertain that the criteria

set forth in *Reynolds* are fulfilled."). *In camera* and *ex parte* review of the privilege claim preserves the constitutional role of judges as a check on the Executive, while preventing potentially damaging disclosures of sensitive information to the opponent or public.

Congress trusts these procedures to protect sensitive national security information. The Foreign Intelligence Surveillance Act (FISA), for example, governs the use of information obtained through electronic surveillance. *See* 50 U.S.C. § 1806.[2] Under Congress's scheme, whenever the government intends to "use or disclose" information obtained through electronic surveillance against the subject of that surveillance, and the subject objects, the Attorney General can file an affidavit attesting that disclosure of the information "would harm the national security of the United States." *Id.* § 1806(f). FISA then provides that a "United States district court ... review[s] *in camera* and *ex parte*" the surveillance application, the order authorizing the surveillance, and any other relevant materials, and determines based on those materials whether the surveillance "was lawfully authorized and conducted." *Id.*

Congress likewise established mechanisms for *in camera* and *ex parte* review in both the Classified Information Procedures Act (CIPA) and the Freedom of Information Act (FOIA). CIPA authorizes the court

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[2] FISA "does not displace the state secrets privilege," as the Court held last Term. *FBI v. Fazaga*, 142 S. Ct. 1051, 1060 (2022). But the practices that have been developed in the FISA context reinforce how courts may utilize *ex parte* and *in camera* review to assess documents that may implicate sensitive information.

alone to inspect classified material where the Attorney General claims that broader disclosure of that material will damage national security. *See* 18 U.S.C. app. 3 § 4; *see also id.* § 6(c)(2). And FOIA contains a national security exemption, which permits an agency to withhold documents that are classified as "secret for "national defense or foreign policy" reasons." 5 U.S.C. § 552(b)(1). When a requestor challenges an agency's decision to withhold documents, the court may review the agency records *in camera* to determine de novo whether the exemption applies. *Id.* § 552(a)(4)(B).

2. Courts can also enter protective orders and establish security procedures that allow for sharing of sensitive information with opposing counsel while ensuring against any broader disclosure. Congress has codified these security procedures, too, in statutes such as FISA, which explicitly empowers courts to disclose information to the non-governmental party under such procedures where "necessary to make an accurate determination of the legality of the surveillance," 50 U.S.C. § 1806(f), and CIPA, which likewise permits disclosure of classified information to defendants and defense counsel where due process requires, *see* 18 U.S.C. app. 3 § 3.

3. Finally, courts can manage sensitive material in other ways, as by appointing special masters, or finding substitute information that will allow the case to proceed without the allegedly privileged information. *In re U.S. Department of Defense*, 848 F.2d 232 (D.C. Cir. 1988), for example, demonstrates how courts can use special masters where sensitive na-

tional security information is involved. There, the Department of Defense invoked FOIA's national-security exemption to withhold 14,000 pages of documents related to attempts to rescue United States hostages in Iran. *Id.* at 234. Neither the district court's clerks nor opposing counsel were cleared to access the classified information implicated, so the court appointed a special master with an appropriate clearance to develop a representative sample of the documents at issue and "summariz[e] to the Court the arguments that each party has made, or could make with respect to the exemptions claimed." *Id.* This process, the court explained, would "preserve[] and indeed enhance[]" the court's Article III role while ensuring appropriate levels of control over sensitive documents. *Id.* The D.C. Circuit affirmed this approach, explaining that the appointment was particularly appropriate given the lack of "impartial expert witnesses or other features of the adversary process ... to assist [the court] in making his decision about disclosure" of the documents. *Id.* at 236. The district court's decision, the D.C. Circuit said, "show[ed] commendable sensitivity to the importance of confining the number of persons privy to the documents in question." *Id.* at 238.

Reynolds likewise confirms that courts can evaluate whether there are routes for the case to proceed. This Court emphasized that there was "nothing to suggest that the electronic equipment" being tested "had any causal connection" with the crash of the military aircraft. *Reynolds*, 345 U.S. at 11. Thus, it should have been possible for the plaintiffs "to adduce the essential facts as to causation without resort to

material touching upon military secrets." *Id.* Indeed, the government had offered the plaintiffs a "reasonable opportunity to do just that," by "formally offer[ing] to make the surviving crew members available for examination." *Id.* The plaintiffs could have accepted that offer and proceeded with their case absent classified information. *See id.*; *see also In re Sealed Case*, 494 F.3d at 141 (plaintiff could establish a prima facie *Bivens* claim without privileged information).

Where witnesses are not available, as in *Reynolds*, courts can work with the government to "disentangle sensitive information from non-sensitive information" or craft a non-privileged substitute version of the evidence. *In re Sealed Case*, 494 F.3d at 153; *see also Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability Before the S. Comm. On the Judiciary*, 110th Cong. At 215 (2008) (statement of William H. Webster Submitted to the Senate Judiciary Committee). CIPA expressly contemplates such procedures in the criminal context, by authorizing the government to move to introduce a "summary of the specific classified information" or "a statement admitting relevant facts that the specific classified information would tend to prove." 18 U.S.C. app. 3 § 6(c)(1). Similar procedures are available in civil cases if the court determines that a particular document implicates a state secret. *See, e.g.*, *In re Sealed Case*, 494 F.3d at 154 ("[N]othing in this opinion forecloses a determination by the district court that some of the protective measures in CIPA ..., which applies in criminal cases, would be appropriate."); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 539

(E.D. Va. 2006) ("[S]pecial procedures, such as clearing defense counsel for access to classified information and the application of [CIPA] could be, and indeed have been, used effectively in appropriate circumstances in other cases.").

4. A rule that forecloses meaningful review of privilege claims not only misapprehends the competency of the judicial branch but also creates its own risk of harm. Meritorious claims against the government can be dismissed at an early stage, even if their litigation would not actually entail the disclosure of state secrets. *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 908 (N.D. Ill. 2006) (noting the operation of the privilege can be "fatal to the underlying case … rendering a plaintiff unable to establish a *prima facie* case and without a remedy for the violation of her rights" (citation omitted)). And without sufficient oversight, the Executive may improperly claim protection from suit in a variety of legal contexts—including cases involving claims of religious discrimination, *see Tenenbaum*, 372 F.3d at 777 (affirming dismissal "[b]ecause the state secrets doctrine … deprives Defendants of a valid defense to the [plaintiffs'] claims"); racial discrimination, *see Sterling v. Tenet*, 416 F.3d 338, 345 (4th Cir. 2005) (holding that "materials necessary for pressing [plaintiff's] Title VII claim or defending against it are likely to result in inappropriate disclosure of state secrets"); wrongful termination, *see Edmonds*, 323 F. Supp. 2d at 79 (holding that plaintiff was "unable to prove the prima facie elements of each of her claims without the disclosure of privileged information"); warrantless wiretapping, *see Terkel*, 441

F. Supp. 2d at 918 (dismissing where "the state secrets privilege covers any disclosures that affirm or deny the activities alleged in the complaint"); and torture and unlawful detention, *see El-Masri*, 479 F.3d at 309 (upholding dismissal because prima facie case "could be made only with evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations").

Because the privilege may necessitate the dismissal of even meritorious claims, it "often trumps what we ordinarily consider to be due process of law." *Jeppesen Dataplan,* 614 F.3d at 1093-94 (Hawkins, J., dissenting). But that trade-off is unacceptable when the privilege is not actually necessary to guard state secrets. Permitting the government unfettered use of the privilege to avoid scrutiny of constitutional violations would erode constitutional guarantees whose very purpose is to check governmental overreach. The judicial branch is—constitutionally and historically—the proper check on the improper exercise of executive power.

5. The Fourth Circuit's holding that the government may obtain dismissal based on the mere possibility that state secrets *might* afford a defense disregards these judicial tools and undermines the Judiciary's constitutional role in reviewing executive action. First, as Petitioner explains, the Fourth Circuit's approach "conflicts with the decisions of the D.C., Ninth, Sixth, and Second Circuits," which "require the government to establish, through ex parte, in camera review, that the secret evidence would provide a 'valid' or 'legally meritorious defense'—not merely to hypothesize in the abstract about a defense that might

or might not have a factual and legal basis, as the Fourth Circuit permitted here." Pet. 26; *see id.* at 27-28 (collecting cases). Second, as Judge Motz explains in her dissent, dispensing with the Judiciary's long-wearing tools for reviewing sensitive evidence "turns *Reynolds* on its ear." *Wikimedia Found.*, 14 F.4th at 308 (Motz, J., concurring in part and dissenting in part). "[P]articularly when constitutional rights are at stake," *Reynolds* and its progeny counsel that courts should not "lightly accept[]" the government's claims; rather, courts should "scrutinize" the "claim of privilege" to determine whether the privileged material even exists, and if so, whether that material "is in fact necessary for the Government to pursue a meritorious and not merely plausible defense." *Id.* at 307-8 (quotation omitted). Allowing the government to obtain a state secrets privilege dismissal without any judicial examination of the allegedly privileged evidence amounts to an impermissible "abandonment of judicial control." *Reynolds*, 345 U.S. at 8.

* * *

William H. Webster, a former Director of the FBI, Director of the CIA, and federal judge, told Congress that "judges can and should be trusted with sensitive information" and that they "are fully competent to perform an independent review of executive branch assertions of the state secrets privilege." *Examining the State Secrets Privilege*, *supra*, at 214 (statement of William H. Webster Submitted to the Senate Judiciary Committee). Indeed, "[i]t is judges, more so than executive branch officials, who are best qualified to balance the risks of disclosing evidence with the in-

terests of justice." *Id.* at 215. The decision below denies the Judiciary this critical constitutional function. The Court should grant review.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX: *AMICI CURIAE*

The Honorable Mark W. Bennett
United States District Judge for the Northern District of Iowa from 1994 to 2019

The Honorable Nancy Gertner
United States District Judge for the District of Massachusetts from 1994 to 2011

The Honorable Thomas I. Vanaskie
United States District Judge for the Middle District of Pennsylvania from 1994 to 2010
United States Circuit Judge for the Third Circuit Court of Appeals from 2010 to 2018