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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PROFESSOR LAURA K. DONOHUE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Laura K. Donohue is a Professor of Law at Georgetown Law and Director of Georgetown's Center on National Security. She holds her Ph.D. in History from the University of Cambridge and her J.D. with Distinction from Stanford University. Professor Donohue has written extensively on national security, foreign intelligence, constitutional law, and legal history. Her scholarship includes notable writings on the state-secrets privilege. She served on the Board of the American Bar Association's Standing Committee on Law and National Security and is a Senior Scholar at Georgetown Law's Center for the Constitution. In 2015, the U.S. Foreign Intelligence Surveillance Court (FISC) appointed her as one of five amici curiae under the USA FREEDOM Act.

Professor Donohue served as an amicus in *FBI v. Fazaga*, 142 S. Ct. 1051 (2022). She has a substantial interest in this case because it presents important questions related to history and the proper application of the state-secrets privilege.

SUMMARY OF ARGUMENT

Left unaddressed, the issues in this case will not go away. Public information about programmatic surveillance—much of which has been disclosed by the Government—means that plaintiffs can now regularly make a prima facie case of constitutional injury

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person other than the amicus and her counsel made a financial contribution to the preparation or submission of this brief. All parties have consented to its filing.

sufficient to show standing, without resort to classified information. In response, the Government has increasingly relied on a novel interpretation of the state-secrets privilege to prevent litigation from moving forward.

This approach, which extends to a broad range of constitutional challenges, is deeply problematic. For centuries, the privilege has acted as an evidentiary rule. But, as here, the Government seeks to use it as an immunity from suit by conflating the *Totten v United States*, 92 U.S. 105 (1876), rule for secret government contracts with the *United States v. Reynolds*, 345 U.S. 1 (1953), privilege centering on withholding particular documents in the course of litigation.

This metastasis is especially alarming because the Government frequently makes overbroad claims in the state-secrets realm and similar national security contexts.

This Court, cognizant of the significant constitutional rights at issue, can safeguard the important role that state secrets plays in protecting U.S. national security, while ensuring that the Government continues to be held accountable to the People. Taking this case would underscore the Court's commitment to the rule of law.

ARGUMENT

I. The Government increasingly is turning to the state-secrets privilege to obtain immunity from suits that allege serious constitutional and statutory violations.

The issues raised by this case are as significant as they are recurring. Programmatic surveillance impacts Americans' First, Fourth, and Fifth Amendment

rights. In the past, because of the classified nature of foreign intelligence collection, plaintiffs were unable to demonstrate particularized injury. Following the Government's responses to recent disclosures by its former employees and contractors, however, plaintiffs in many cases now can establish prima facie standing using information already in the public domain. *See, e.g.*, *Klayman v. Obama*, 957 F. Supp. 2d 1, 9 (D.D.C. 2013), *rev'd*, 800 F.3d 559 (D.C. Cir. 2015); *Smith v. Obama*, 24 F. Supp. 3d 1005, 1007 n.2 (D. Idaho 2014), *rev'd in part as moot*, 816 F.3d 1239 (9th Cir. 2016); *ACLU v. Clapper*, 959 F. Supp. 2d 724, 738 (S.D.N.Y. 2013), *rev'd on other grounds*, 785 F.3d 787, 801 (2d Cir. 2015); *In re FBI*, No. BR 14-01, 2014 U.S. Dist. LEXIS 157865, at *8–9 (FISC Mar. 20, 2014); *Schuchardt v. Obama*, 839 F.3d 336 (3d Cir. 2016).

The Government has responded to the current environment by asserting the state-secrets privilege early in litigation to secure dismissal before reaching the merits. *See, e.g.*, *FBI v. Fazaga*, 142 S. Ct. 1051, 1058–59 (2022); *Twitter, Inc. v. Barr*, 445 F. Supp. 3d 295, 301 (N.D. Cal. 2020), *appeal filed*, No. 20-16174 (9th Cir. June 16, 2020); *Jewel v. NSA*, No. 4:08-cv-04373-JSW, 2015 U.S. Dist. LEXIS 16200, at *7 (N.D. Cal. Feb. 10, 2015); *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1195 (9th Cir. 2007).

The Government is following the same strategy in numerous suits that raise equally troubling claims about whether the Government is acting outside its constitutional and statutory limits. *See, e.g.*, *Kareem v. Haspel*, 412 F. Supp. 3d 52, 55 (D.D.C. 2019) (placement on "kill list" without due process), *vacated by* 986 F.3d 859 (D.C. Cir.), *cert. denied*, 142 S. Ct. 486 (2021); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (similar); *Mohamed v. Holder*, No. 1:11-cv-50

(AJT/MSN), 2015 U.S. Dist. LEXIS 92997, at *12 (E.D. Va. July 16, 2015) (placement on "no fly" list without due process); *Mohamed v. Jeppesen Dataplan*, 614 F.3d 1070, 1076 (9th Cir. 2010) (en banc) (forced disappearance and torture); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 539 (E.D. Va. 2006) (due process violation in connection with kidnap and extraordinary rendition), *aff'd sub nom. El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

A. Prior to the recent disclosures, unlawful surveillance cases were often dismissed based on lack of standing.

Surveillance programs risk violating American's constitutional rights by: (1) chilling their freedoms of speech, religion, and association; (2) collecting private communications without probable cause or a warrant; and (3) violating the right against self-incrimination.

Until 2013, however, suits in opposition to surveillance programs often fell on the shoals of standing because individuals could not demonstrate an injury in fact without recourse to classified information. Thus, in *Halkin v. Helms*, the D.C. Circuit determined that "appellants' inability to adduce proof of actual acquisition of their communications" prevented them from stating a cognizable claim. 690 F.2d 977, 998 (D.C. Cir. 1982). Absent a concrete injury, the constitutionality of interception could not be challenged.

The revelation that a surveillance program was underway similarly proved insufficient to demonstrate standing. Following media reports that the NSA had "monitored the international calls and international e-mail messages of hundreds, perhaps thousands of people inside the United States without warrants," *Jewel v. NSA*, MDL Docket No. C 06-1791

VRW, 2010 U.S. Dist. LEXIS 5110, at *2–3 (N.D. Cal. Jan. 21, 2010), concluded that residential telephone customers lacked standing because neither the plaintiffs nor their purported class representatives had alleged an injury sufficiently particular. In a parallel action, the Sixth Circuit concluded plaintiffs in regular communication with individuals overseas lacked standing. *ACLU v. NSA*, 493 F.3d 644, 656–57 (6th Cir. 2007).

Despite these setbacks, the revelations, and their questionable legality, spurred Congress to enact statutory language, clarifying that the Government had the authority, under certain circumstances, to engage in programmatic collection. *See* FISA Amendments Act of 2008, Pub. L. No. 110-261, § 101(a)(2), 122 Stat. 2436, 2438–48 (adding FISA Section 702 to empower the Attorney General in conjunction with the Director of National Intelligence to place non-U.S. persons reasonably believed to be outside the United States under surveillance).

The presence of the statutory provisions still failed to satisfy standing. This Court, accordingly, dismissed the case of organizations in contact with likely targets of overseas surveillance under FISA Section 702 because their "theory of *future* injury is too speculative to satisfy the well-established requirement that the threatened injury must be 'certainly impending.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013). Nor could those groups make their injury more concrete by expending resources to protect confidentiality before being surveilled because the "hypothetical future harm" was "not certainly impending." *Id.*

B. The Government's response to the disclosures has made it easier for litigants to demonstrate standing.

In 2013, newspapers began publishing articles based on documents provided by former defense contractor Edward Snowden, revealing that the Government was secretly collecting massive amounts of information on U.S. citizens. *See, e.g.*, Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, The Guardian, June 6, 2013; Charlie Savage, *NSA Said to Search Contents of Messages To and From America*, N.Y. Times, Aug. 8, 2013. Immediate public outcry followed.

The Government joined the public discourse, in the process providing a prima facie case for potential litigants, including Wikimedia, to bring suit. It immediately issued a series of statements to clarify the scope of government surveillance. *See, e.g.*, Press Release, Joint Statement: NSA and Office of the Director of National Intelligence (Aug. 22, 2013); Press Release, Facts on the Collection of Intelligence Pursuant to Section 702 of the Foreign Intelligence Surveillance Act (June 8, 2013).

President Obama then directed the Director of National Intelligence (DNI) to declassify and make public as much information as possible about government programs conducted under FISA—which the DNI subsequently did. *See, e.g.*, Press Release, DNI Announces the Declassification of the Existence of Collection Activities Authorized by President George W. Bush Shortly After the Attacks of September 11, 2001 (Dec. 21, 2013); Press Release, DNI Clapper Directs

Annual Release of Information Related to Orders Issued Under National Security Authorities (Aug. 30, 2013).

The President also constituted a Review Board to examine what policies needed to be implemented. *See Liberty and Security in a Changing World: Report and Recommendations of The President's Review Group on Intelligence and Communications Technologies* (Dec. 12, 2013). The Privacy and Civil Liberties Oversight Board provided further reports containing declassified details on foreign-intelligence collection. *See, e.g.*, Privacy and Civil Liberties Oversight Board, *Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court* (Jan. 23, 2014).

With information flooding the public discourse, a profusion of lawsuits followed. Unlike before, however, plaintiffs now had enough information to establish a prima face standing case—***without*** relying on secret information. *See supra* at 3.

Standing met, the Government turned to state secrets to head off litigation. The present case provides an example par excellence: In 2017, the Fourth Circuit cited government disclosures to conclude that Wikimedia's allegations about government surveillance were not merely speculative. *See Wikimedia Found. v. NSA*, 857 F.3d 193, 201–02, 211 (4th Cir. 2017) (citing government disclosures); *see also Wikimedia Found. v. NSA*, 14 F.4th 276, 289–94 (4th Cir. 2021) (finding standing). Deprived of its Rule 12(b)(1) motion, the Government resorted to a state-secrets immunity defense, which the Fourth Circuit subsequently allowed. *See Wikimedia Found.*, 14 F.4th at

302–04 (dismissing even though Wikimedia made a prima facie case).

That decision warrants review because it is part of a trend in lower-court cases ahistorically transforming the state-secrets privilege from an evidentiary rule into immunity from constitutional challenge.

II. The state-secrets doctrine advanced by the Government and accepted by the Fourth Circuit's lacks historical grounding.

The shift that has occurred lacks historical grounding: The state-secrets privilege traditionally provides for the exclusion of evidence—not immunity from suit. Getting this history right—which the Fourth Circuit did not do here—is crucial to allowing the privilege its proper scope while still protecting bedrock constitutional rights.

A. Going back to English common law, the state-secrets privilege has been about excluding evidence—not dismissing cases

1. "[T]he law of evidence in this country" is "founded upon the ancient common law of England, the decisions of its courts show what is our own law upon the subject where it has not been changed by statute or usage." *United States v. Reid*, 53 U.S. 361, 366 (1851), *overruled by Rosen v. United States*, 245 U.S. 467 (1918). Thus, history starts with the "English experience," as Chief Justice Vinson understood in *Reynolds*. 345 U.S. at 7 & n.15.[2]

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[2] Even if the state secrets privilege were constitutional, English common law at the founding would still be the starting point. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*,

English decisions show that the common law treated state secrets as a matter of excluding evidence, not as any bar to continuing a suit.

Rex v. Watson (1817) 2 Stark. 116, 148–49 (KB), for instance, held that a criminal defendant could not elicit testimony describing whether a drawing of the Tower of London found at his lodgings "was a correct plan." Such testimony might confirm sensitive details of the layout of the building. The court nevertheless allowed a witness to testify that the document "was a plan of a part of the interior of the Tower" and that similar documents could be purchased. It was only the *accuracy* of the drawings that was considered a state secret.

Home v. Bentinck (1820) 2 Brod. & B. 130, likewise involved an evidentiary ruling resulting in the narrow exclusion of minutes from a military court of enquiry containing sensitive information. The *Home* court looked to *Wyatt v. Gore* (1816) Holt N.P.C. 299, which had similarly excluded certain evidence. In that case, Upper Canada's surveyor-general sued the Lieutenant Governor for libel. The plaintiff sought testimony from the attorney-general about communications from the Lieutenant Governor to the attorney-general. The court directed the attorney-general not to testify about certain matters, even as it allowed others. The plaintiff ultimately prevailed and was awarded £300 in damages. *Id.* at 305.

Cooke v. Maxwell (1817) 2 Stark. 183, 183, 185–86, adopted a similar approach: The plaintiff alleged that

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142 S. Ct. 2111, 2139 (2022) (quoting *Ex Parte Grossman*, 267 U.S. 87, 108–09 (1925)).

he was unlawfully arrested by the defendant, the governor of Sierra Leone. The court held that the governor's instructions to a military officer could not "on principles of public policy be read in evidence," but nevertheless allowed the plaintiff to prove "that what was done was done by the order of the defendant." *Id.* at 186. The result was a "[v]erdict for the plaintiff." *Id.* at 187. Numerous other cases followed suit.

The result was that "English courts applying the old crown privilege sometimes afforded litigants the chance to prove their cases independently without the benefit of privileged proof." *United States v. Zubaydah*, 142 S. Ct. 959, 996 (2022) (Gorsuch, J., dissenting) (citing *H.M.S. Bellerophon* (1875) 44 LJR 5, 5–9).

2. From Aaron Burr's 1807 trial through *Reynolds*, early U.S. decisions also revolved around the exclusion of evidence, not dismissal of the litigation.[3] The only apparent exception is *Totten* (and its progeny), in which the Court identified a special rule relating to secret government contracts.

In *United States v. Burr*, 25 F. Cas. 187 (1807), Chief Justice Marshall allowed the defense to subpoena President Jefferson for a letter he received from alleged co-conspirator General James Wilkinson, governor of the Louisiana Territory. *Id.* at 190–91. While the president was "subject to the general rules which apply to others," he might nonetheless have "sufficient motives for declining to produce a particular paper." *Id.* at 191–92.

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[3] *Reynolds* highlights many of these cases. *See* 345 U.S. at 7 nn.11, 18.

For many years following *Burr*, courts understood the state-secrets privilege to present an evidentiary issue. *Cf. Reynolds*, 345 U.S. at 9 (explaining that the state-secrets framework "received authoritative expression in this country as early as the *Burr* trial"). In *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353, 353–56 (E.D. Pa. 1912), the court ordered drawings relating to armor-piercing projectiles to be expunged from the record. In *Pollen v. United States*, 85 Ct. Cl. 673 (1937), and *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583 (E.D.N.Y. 1939), British inventors claimed that the Government and Ford, respectively, were violating their patents. In the first suit, the court of claims applied the state-secrets privilege to bar certain testimony, but underscored that it was merely "passing upon a rule of evidence" and was "not refusing . . . to permit the petitioners to establish their case." *Pollen*, 85 Ct. Cl. at 680. In the second suit, the court refused to order Ford "to produce and permit plaintiffs to inspect drawings showing the construction of range keepers or other apparatus." *Pollen*, 26 F. Supp. at 583. The privilege did not end the litigation. The court went on to explain that plaintiff's complaint was too bare to justify an injunction.

The *Reynolds* decision adhered to common law and cemented the privilege as an evidentiary rule. Civilian observers had died in a plane crash while "testing secret electronic equipment." In their widows' Federal Tort Claims Act suit, Plaintiffs requested official accident report and statements of surviving crewmembers. 345 U.S. at 2–4. The government invoked the military-secrets privilege. The district court rejected that invocation and entered judgment for the Plaintiffs as a Rule 37 sanction.

Even though the trial court terminated the case because of the incorrect assertion of the privilege, this Court issued a purely evidentiary ruling, analogizing the state-secrets privilege to the privilege against self-incrimination: "[C]ompromise" would be needed to balance the sanctity of the assertion of the privilege and "[j]udicial control over the evidence in a case." *See id.* at 8–10. Concluding that the Government had successfully asserted the privilege, the Court emphasized that there was "nothing to suggest that the electronic equipment . . . had any causal connection with the accident," so that the plaintiffs would be unable "to adduce the essential facts as to causation without resort to material touching upon military secrets." *Id.* at 11.

3. Following *Reynolds*, courts continued to treat the state-secrets doctrine as an evidentiary privilege, permitting litigation to proceed where sufficient evidence remained for the plaintiff to make out a prima facie case.

In *Republic of China v. National Union Fire Insurance Co. of Pittsburgh, Pennsylvania*, 142 F. Supp. 551 (D. Md. 1956), for example, the court upheld the United States's assertion of state-secrets, while permitting it to continue to seek recovery on marine and war-risk insurance policies. The Government withheld information regarding certain communications with the British government. *Id.* at 556. The court held that the Government's refusal "to supply th[at] information" did not "bar its recovery." *Id.* at 557.

In *Clift v. United States*, 597 F.2d 826, 827 (2d Cir. 1979), Eugene Clift sued the government for patent damages regarding his "cryptographic device," which was subject to a secrecy order. Although the Second

Circuit held that the NSA Director had sufficiently asserted the military-secrets privilege, it further held that the district court had "acted too precipitately in dismissing the complaint." *Id.* Judge Friendly added that the case might be stayed until the systems at issue were no longer secret: "In time the cryptographic systems now considered so secret may be as obsolete as the giant computer that broke the German code in World War II." *Id.* at 830.

In *Farnsworth Cannon, Inc. v. Grimes*, an en banc Fourth Circuit rejected defendant's contention that plaintiff's case must be dismissed because "secret information, if available, would be central to plaintiff's case":

> The unavailability of the evidence is a neutral consideration, and, whenever it falls upon a party, that party must accept the unhappy consequences. If the assertion of the privilege leaves plaintiff without sufficient evidence to satisfy a burden of persuasion, plaintiff will lose. If plaintiff's case might be established without the privileged information, dismissal is not appropriate. The same standards apply to defendants.

635 F.2d 268, 270–72 (4th Cir. 1980) (en banc) (per curiam) (citation omitted) (citing numerous cases).

Many courts maintained the general rule derived from common law and *Reynolds*: "When the state secrets privilege is successfully invoked, '[t]he effect . . .

is well established: "[T]he result is simply that the evidence is unavailable, as though a witness had died, and the case will proceed accordingly, with no consequences save those resulting from the loss of the evidence."'" *In re Sealed Case*, 494 F.3d 139, 144–45 (D.C. Cir. 2007) (quoting *Ellsberg v. Mitchell*, 709 F.2d 51, 64 & n.56 (D.C. Cir. 1983)).

B. The *Totten* cases differ materially from general state-secrets cases.

Despite this extensive history, some recent lower court cases (especially in the Fourth Circuit) have mistakenly relied on *Totten* (or *Reynolds*' brief mention of *Totten*) for the proposition that state-secrets privilege can result in the dismissal of cases. But as this Court and numerous authorities have explained, *Totten* is a special case because the subject-matter itself was a secret government contract: "[T]he opinion turned primarily 'on the breach of contract which the Court found occurred by the very bringing of the action.'" Raoul Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. Rev. 1288, 1298 (1965) (quoting *Halpern v. United States*, 258 F.2d 36, 44 (2d Cir. 1958)).

In *Totten*, the plaintiff sought to recover under an alleged contract to spy on the Confederacy. The Court affirmed the dismissal of the plaintiff's case because the contract would have contained an implied covenant of secrecy and thus "[t]he publicity produced by a[breach] action would itself be a breach of a contract of that kind, and thus defeat a recovery," *Totten*, 92 U.S. at 107.

In a footnote, *Reynolds* said of *Totten*: "[T]he very subject matter of the action, a contract to perform espionage, was a matter of state secret. The action was

dismissed on the pleadings without ever reaching the question of evidence, since it was so obvious that the action should never prevail over the privilege." *Reynolds*, 345 U.S. at 11 n.26.

In *Wikimedia*, the Fourth Circuit misunderstood this footnote to require dismissal whenever the case's factual nexus possibly touches on state secrets—not just when the action revolves around a government contract.

Recently, the Court has emphasized that *Totten*'s reasoning was specific to the government-contracts context. In *Tenet v. Doe*, 544 U.S. 1, 3 (2005), the Court expressly re-affirmed "the longstanding rule, announced more than a century ago in *Totten*, prohibiting suits against the Government based on covert espionage agreements." While *Reynolds* "looked to *Totten*," *Tenet* explained that "*Totten*'s broader holding [was] that lawsuits premised on alleged espionage agreements are altogether forbidden." *Id.* at 9; *see also id.* at 8 (rejecting the argument "that *Totten* has been recast simply as an early expression of the [*Reynolds*] evidentiary 'state secrets' privilege, rather than a categorical bar to their claims").

In *General Dynamics Corp. v. United States*, 563 U.S. 478, 481 (2011), the Government terminated petitioners' contract to research and develop a stealth aircraft. Petitioners claimed that their alleged contractual default was excused by the Government's "failure to share its 'superior knowledge' about how to design and manufacture stealth aircraft." The Government resisted production of materials relevant to Petitioners' "superior knowledge" defense under the state-secrets privilege.

General Dynamics explained the fundamental difference between the *Reynolds* and *Totten* lines of cases: "*Reynolds* was about the admission of evidence. It decided a purely evidentiary dispute by applying evidentiary rules: The privileged information is excluded, and the trial goes on without it." *Gen. Dynamics Corp.*, 563 U.S. at 485. The narrow *Totten* line applied where the Court was "called upon to exercise . . . not our power to determine the procedural rules of evidence, but our common-law authority to fashion contractual remedies in Government-contracting disputes." *Gen. Dynamics Corp.*, 563 U.S. at 485. Therefore, the Court "le[ft] the parties where they [we]re," "[a]s in *Totten*." *Id.* at 490.

Like *General Dynamics*, other cases have relied on *Totten* to justify dismissal of suits brought over secret government contracts. *See Spock v. United States*, 464 F. Supp. 510, 520 & n.11 (S.D.N.Y. 1978). Just last year, Justice Gorsuch summed up the matter well:

> [T]his Court has held that some contract disputes between spies and the government may be dismissed at their outset. . . . Still, none of that displaces the general rule that the privilege protects only against the production of certain evidence—not the inconvenience of lawsuits. If a way exists for a court to discharge its statutory duty to entertain a case without the government's privileged proof, that way must be found.

Zubaydah, 142 S. Ct. at 996 (Gorsuch, J., dissenting). Thus, in normal state-secrets cases, "the trial simply 'goes on' without the government's privileged proof." *Id.* at 995 (quoting *Gen. Dynamics Corp.*, 563 U.S. at 485).

C. The Fourth Circuit's holding is contrary to history and to *Reynolds*.

In the decision below, the Fourth Circuit held that the state-secrets privilege required the dismissal of the case—even though the panel recognized that the plaintiff made out a prima facie case without resort to secret evidence—by relying on circuit precedents that mistakenly conflate *Totten* and *Reynolds*. *See* 14 F.4th at 303.

The Fourth Circuit has held that dismissal is proper where state secrets has been invoked under three conditions: "(1) 'the plaintiff cannot prove the prima facie elements of his or her claim without privileged evidence'; (2) 'even if the plaintiff can prove a prima facie case without resort to privileged information, . . . the defendants could not properly defend themselves without using privileged evidence'; and (3) 'further litigation would present an unjustifiable risk of disclosure.'" *Wikimedia Found.*, 14 F.4th at 303 (quoting *Abilt v. CIA*, 848 F.3d 305, 313–14 (4th Cir. 2017)). The first condition is the historical state-secrets privilege; the latter two are a mirage.

In support of the second condition, the *Wikimedia* court quoted *Abilt v. CIA*, 848 F.3d 305, 314 (4th Cir. 2017), which in turn relied on *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007). *Abilt* was a *Totten* case: The plaintiff alleged that he was discriminated against and wrongfully fired as a CIA "covert employee" because of his narcolepsy.

The state-secrets rule adopted in *El-Masri* was dicta. Khaled El-Masri contended that defendants violated his constitutional rights and the Alien Tort Statute by unlawfully detaining, interrogating, and torturing him. His case was dismissed because he could not "establish a prima facie case" using only "admissible evidence." 479 F.3d at 309.

Nevertheless, *El-Masri* asserted, without citation, that cases can be dismissed under the *Reynolds* privilege a case where the "main avenues of defenses available . . . would require disclosure of" state secrets," the Court in *El-Masri* did not provide any citation. *Id.* at 309. This ipse dixit is contrary to the privilege's evidentiary nature and *General Dynamics*' recognition that *Totten* and *Reynolds* apply to different facts.

El-Masri also asserted that dismissal is proper where military secrets are "central to the subject matter." *El-Masri*, 479 F.3d at 308. But *El-Masri* relied on *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005), *Tenet v. Doe*, 544 U.S. 1, 9 (2005), and *Totten*—all covert-employment cases—as well as the footnote in *Reynolds* that summarizes *Totten*.

Again, *Reynolds* recognized that the privilege was evidentiary, like the privilege against self-incrimination. When a party uses it simultaneously as a "sword and shield," courts may dismiss a claim or case. *Gen. Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1213 (8th Cir. 1973); *cf. Roviaro v. United States*, 353 U.S. 53, 60–61 (1957) (court may dismiss prosecution if the government's assertion of privilege about its confidential informants is fundamentally unfair). But in other circumstances, invocation of the state-secrets privilege just means the case proceeds without the evidence.

For instance, in *United States v. Haugen*, 58 F. Supp. 436 (E.D. Wash. 1944), the government's prosecution foundered when the government improperly tried to use oral testimony to describe a critical document, which it declined to publish because it was a national secret. That result—not *Wikimedia*'s—is how the evidentiary *Reynolds* state-secrets privilege works. *See, e.g.*, *United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950) (Hand, J.) (dicta) ("This privilege will often impose a grievous hardship, for it may deprive parties to civil actions, or even to criminal prosecutions of power to assert their rights or to defend themselves. That is a consequence of any evidentiary privilege."); *Farnsworth Cannon*, 635 F.2d at 271–72 ("The unavailability of the evidence is a neutral consideration . . . ."); *Spock*, 464 F. Supp. at 519 (allowing case to go forward after invocation of state-secrets privilege because the privilege is just evidentiary).

III. The distorted "privilege" is especially dangerous in light of the Government's overbroad national security claims.

While the radical transformation of the state-secrets privilege from an evidentiary rule to a broad-based immunity alone deserves review by this Court, placing the state-secrets privilege in its proper historical scope is all the more important given the exuberance with which the Government asserts national-security privileges. If not curbed, such assertions may lead courts to dismiss meritorious constitutional claims that could be adjudicated without any risk to national security.

A. The Government has shown in state-secrets and analogous contexts that it asserts the privilege where none exists.

In recent years, the United States has over-zealously invoked the state-secrets privilege. In 2016, United States district court judge Anthony John Trenga interviewed 31 federal judges about how they handle state-secrets cases. He observed the tendency of "more experienced judges" to "probe deeper" into an assertion of state-secrets privilege, noting that "[s]everal talked about how the scope of a privilege claim narrows substantially once a judge 'pushes back.'" Anthony John Trenga, *What Judges Say and Do in Deciding National Security Cases: The Example of the State Secrets Privilege*, 9 Harv. Nat'l Sec. J. 1, 49 (2018). Judge Trenga added:

> Several other judges . . . , some with a background in law enforcement, saw . . . the initial assertion of privilege claims broader than the government can ultimately defend and attributed this conduct, in various articulations, to an attempt, for the most part, to avoid "the hard analysis" and the sometimes tedious and difficult task of separating protected information from non-protected information until a judge reacts adversely.

Id. at 51. The judges' experience with state secrets is corroborated by numerous examples of the Government's over-assertion of the national-security risks at stake.

When a visaholder, for instance, argued that her inclusion on the federal No Fly List violated her constitutional rights, the Government initially invoked an evidentiary state-secrets privilege, but then "completely reversed" itself: It argued for summary judgment in its favor on states secrets grounds and, after denial, essentially moved for reconsideration of that motion. *Ibrahim v. Dep't of Homeland Sec.*, 62 F. Supp. 3d 909, 914 (N.D. Cal. 2014). At trial, however, the Government conceded that the plaintiff had *never* actually been a threat: An FBI agent had misunderstood the form that he used to put her on the list. *Id.* at 915–16. In another No Fly List case, the Government moved for summary judgment on state secrets, but, after *in camera* review, the court "conclude[d] that there is no information protected from disclosure under the state secrets privilege that is necessary" for the litigation to proceed. *Mohamed v. Holder*, No. 1:11-cv-50 (AJT/MSN), 2015 U.S. Dist. LEXIS 92997, at *4–5 (E.D. Va. July 16, 2015).

The Government has made similarly overbroad claims regarding classified materials before the FISC. Following the government-contractor disclosures in 2013, for instance, the ACLU, supported by media organizations and bipartisan legislators, filed a motion requesting that the FISC make its opinions regarding certain surveillance available. The court held that the ACLU had standing and ordered the Government to identify opinions not incorporated in parallel FOIA litigation, so the court could determine whether to de-

classify them. *See In re Orders of This Court Interpreting Section 215 of the Patriot Act*, No. Misc. 13-02, 2014 U.S. Dist. LEXIS 156464, at *2–5 (FISC Aug. 7, 2014). In response, the Government identified just one opinion and claimed that it would have to be withheld in full. When the FISC noted that the Government had provided "no explanation," the Government changed its position and allowed that parts of the opinion could be published. *Id.* at *6–8. After the court (and its staff) pressed, the Government further admitted that the release of "certain additional information" would be fine. *Id.* at *9.

The Government makes similarly overbroad claims of privilege to try to prevent FISA-related materials from being released under the Freedom of Information Act (FOIA). FOIA contains five enumerated exemptions that operate like the state-secrets privilege. *See* 5 U.S.C. § 552(b)(1) (materials authorized by Executive Order to be kept secret in the interest of national defense or foreign policy and properly classified under such order); 5 U.S.C. § 552(b)(3) (exempting material specified by statute, including, in the national security context, material specified under the National Security Act of 1947 as amended); 5 U.S.C. § 552(b)(5) (inter-agency or intra-agency memoranda or letters); 5 U.S.C. § 552(b)(6) (personnel files); 5 U.S.C. § 552(b)(7) (records or information compiled for law enforcement purposes).

Assertions of these exemptions by the Government frequently do not survive judicial scrutiny. In 2011, for example, the government produced just three documents in response to the ACLU's FOIA request for records about certain surveillance. *ACLU v. FBI*, 59 F. Supp. 3d 584, 586 (S.D.N.Y. 2014). After the ACLU filed suit and the court ordered rolling productions,

"the Government released over 1,000 pages of [additional] material." *Id.* at 587–88. The court pointed to the Government's assertions that "strain[ed] credulity" and were "incorrect," adding: "These inconsistencies shake this Court's confidence in the Government's submissions." *Id.* at 591–92. Because the court had so "little faith in the Government's segregability determinations," it required the Government to submit documents for i*n camera* review. *Id.* at 592.

Pari passu, in January 2015, the *New York Times* made a FOIA request to the NSA for more information about the agency's bulk phone records and Internet metadata collection. After the NSA failed to respond, the newspaper filed suit. Despite repeated invocation of national security exceptions, the Government ultimately releases hundreds of pages—apparently with no detrimental impact on U.S. national security. *See N.Y. Times v. NSA*, 205 F. Supp. 3d 374, 376–77 (S.D.N.Y. 2016).

There are numerous such FOIA cases. *See, e.g.*, *ACLU v. U.S. Dep't of Justice*, 210 F. Supp. 3d 467, 471 (S.D.N.Y. 2016) (following a court order, DOJ located approximately 80 new responsive documents it previously failed to identify).

B. The Government's new state-secrets assertions further depart from previous practice by barring entire categories of information instead of particular documents.

The particularity historically required by state-secrets privilege has been buried by the Government's novel and expansive effort to use the privilege. For instance, in *Mitchell v. United States*, No. 16-MC-0036-JLQ (E.D. Wash. May 31, 2017), ECF No. 91, the

court upheld the Government's assertion of privilege over seven broad categories, ranging from "information identifying individuals involved with the" CIA interrogation program to "information concerning the CIA's internal structure and administration," categories for which a significant amount of information was already in the public domain, *see, e.g.*, *Mohamed v. Jeppesen Dataplan*, 614 F.3d 1070, 1087 (9th Cir. 2010) (en banc) (acknowledging the extensive public record).

In *Twitter v. Barr*, the Government asserted the state-secrets privilege over four topic areas, including, among others, "Information Regarding How Adversaries May Seek to Exploit Information Reflecting the Government's Use of National Security Legal Process." Mem. at 15, No. 4:14-cv-04480-YGR (N.D. Cal. Mar. 15, 2019), ECF No. 281.

Similarly, in *Wikimedia*, the Government has asserted the state-secrets privilege over seven expansive categories:

(1) "Entities subject to Upstream surveillance activities";

(2) "Operational details of the Upstream collection process";

(3) "Location(s) on the Internet backbone at which Upstream surveillance is conducted";

(4) "Categories of Internet-based communications subject to Upstream surveillance activities";

(5) "the scope and scale on which Upstream surveillance is or has been conducted";

(6) "NSA decryption capabilities"; and

(7) "Additional categories of classified information contained in opinions and orders issued by, and in submissions made to, the FISC."

Defs.' Mem. at 7–8, No. 1:15-cv-00662-TSE (D. Md. Apr. 28, 2018), ECF No. 138.

This categorical approach sweeps up significant amounts of non-privileged information ***already released by the Government***—hardly the exception historically applied to particular documents. By acting in this manner, the Government is, indeed, "avoid[ing] "the hard analysis" and the sometimes tedious and difficult task of separating protected information from non-protected information. Trenga, *supra*, at 49.

CONCLUSION

The state-secrets privilege protects national security. The Government's distortion of the doctrine, however, undermines the right of the People to hold the Government accountable. Rule of law is at stake. The petition should be granted.

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