VICTOR RESTIS and ENTERPRISES SHIPPING AND TRADING S.A., Plaintiffs, v. AMERICAN COALITION AGAINST NUCLEAR IRAN, INC. a/k/a UNITED AGAINST NUCLEAR IRAN, MARK D. WALLACE, DAVID IBSEN, NATHAN CARLETON, DANIEL ROTH, MARTIN HOUSE, MATAN SHAMIR, MOLLY LUKASH, LARA PHAM, and DOES 1-10, Defendants.	No. 1:13-cv-05032 (ER)(KNF)
UNITED STATES OF AMERICA, Intervenor.	

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL INTERVENOR TO PROVIDE ADDITIONAL INFORMATION RELATING TO THE ASSERTION OF THE STATES SECRETS PRIVILEGE AND OPPOSING DISMISSAL OF THE CASE

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This is an extraordinary case. Never before has the government sought dismissal of a suit between private parties on state secrets grounds without providing the parties and the public *any* information about the government's interest in the case. *Amici curiae* respectfully submit this brief to address the proper scope of the state secrets privilege, which is an evidentiary rule and can only be a basis for dismissal in the narrowest of circumstances. They also address the courts' role in evaluating government invocations of the privilege, and the unique danger posed here by the government's unprecedented secrecy.

In accordance with state secrets doctrine, *Amici* urge the Court to proceed by undertaking a searching examination of whether the government has properly asserted the privilege in this matter—including by requiring meaningful adversarial testing of the government's claim of privilege and by reviewing the evidence *in camera*. If the Court determines that the government has properly invoked the privilege, it must then consider whether it is certain that privileged evidence is essential to the litigation and whether any special procedures might nonetheless permit the litigation to proceed. Separately, in light of the important public interests threatened by excessive secrecy, the Court should consider whether this case is so unlike every other state secrets case in history as to justify keeping from the public any understanding of why the Executive has sought to deny an individual access to a federal forum.

I. THE STATE SECRETS PRIVILEGE IS A NARROW EVIDENTIARY RULE, NOT A JUSTICIABLITY DOCTRINE.

The state secrets privilege is a "common law evidentiary rule" which, when properly invoked, "allows the government to withhold information from discovery when disclosure would be inimical to national security." *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546 (2d Cir. 1991). "[T]he privilege is not to be lightly invoked," *id.* at 547, and must be narrowly

construed so as not to "shield any material not strictly necessary to prevent injury to national security." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983).

The Supreme Court set out the proper scope of the privilege in *United States v. Reynolds*, 345 U.S. 1 (1953). In that case, widows of victims killed in a military plane crash in Georgia sued for damages. In response to a discovery request for the accident report, the government asserted the state secrets privilege, arguing that the report contained information about secret military equipment aboard the aircraft during the fatal flight. *Id.* at 3. Where, the Court explained, "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged," the privilege operated to bar such disclosure. *Id.* at 10. The Court in *Reynolds* upheld the claim of privilege over the accident report but did *not* dismiss the suit. Rather, it remanded the case for further proceedings, so that the plaintiffs could pursue alternative sources of non-privileged evidence to prove their claim. *Id.* at 11–12.

The Supreme Court has never departed from its holding that the state secrets privilege is a rule of evidence, not justiciability. The privilege is not to be confused with the so-called *Totten* doctrine, which involves the non-justiciability of disputes over sensitive governmental contracts. *See Totten v. United States*, 92 U.S. 105 (1875) (barring judicial review of claims arising out of an alleged contract to perform espionage activities). In fact, the Court has taken pains in two recent cases to distinguish the "evidentiary state secrets privilege" of *Reynolds* from the narrow non-justiciability rule set forth in *Totten*. *See Tenet v. Doe*, 544 U.S. 1, 8 (2005); *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1905 (2011). In *Tenet*, the Court explained that secret government contract claims based on secret evidence were subject to a "unique and categorical . . . bar—a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry."

544 U.S at 12. By contrast, the Court explained, *Reynolds* involved "the balancing of the state secrets evidentiary privilege" and did not mandate dismissal. *Id.* at 9. And just three years ago, the Court in *General Dynamics* reinforced the distinction between the state secrets privilege and the *Totten* contract doctrine. Like *Totten* and *Tenet*, *General Dynamics* involved a contract dispute with the government, this time over the development of stealth aircraft for the Navy. The Court held that the *Totten* rule barred adjudication of the dispute, but again distinguished that result from the more limited holding of *Reynolds*: "*Reynolds* was about the admission of evidence." 131 S. Ct. at 1906. By contrast, the basis for permitting threshold dismissals in government contracting cases involving secret evidence is the "common-law authority to fashion contractual remedies in Government-contracting disputes." *Id.* Thus, this Court should take care not to confuse the *Totten* doctrine for the state secrets privilege. The privilege applies only to exclude discrete and specific evidence—it is not a sweeping justification for dismissing a suit outright.[1]

II. DISMISSAL OF AN ACTION IS ONLY EVER APPROPRIATE AFTER SEARCHING REVIEW AND AS A LAST RESORT.

Dismissal of a suit on the basis of the state secrets privilege is a "drastic" result, appropriate solely when the removal of privileged evidence renders it impossible for the plaintiff to put forth a prima facie case, or for the defendant to assert a valid defense. See *Zuckerbraun*, 935 F.2d at 547; *see also Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1242 (4th Cir. 1985)

[1] The government also casts the state secrets privilege as "a manifestation of the President's Article II powers to conduct foreign affairs and provide for the national defense." Dkt. No. 258 at 8. The Supreme Court has never adopted this controversial view of the privilege's origin. And as the Second Circuit has made clear, the state secrets privilege sounds in the common law, and is therefore a privilege the limits of which can, and should, be carefully set by the courts. *See Zuckerbraun*, 935 F.2d at 546. This is in accord with Article III, which explicitly places adjudication of legal controversies involving diplomacy and foreign affairs within the authority of the federal courts. *See* U.S. Const. Art. III, Sec. 2.

("[D]enial of the forum provided under the Constitution for the resolution of disputes, U.S. Const. art. III, § 2, is a drastic remedy that has rarely been invoked."). Courts subject governmental requests for dismissal based on claims of privilege to searching scrutiny because of the grave separation of powers concerns raised when the Executive acts to bar litigation. In these circumstances, the reviewing court must carefully determine for itself whether litigation may go forward in light of the judiciary's constitutional "duty ... to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).[2] "Only when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal [on state secrets grounds] warranted." *Fitzgerald*, 776 F.2d at 1244.

The Court should therefore undertake the following steps to determine whether dismissal is required here: (A) require the government to provide, to security-cleared counsel at a minimum, some basis for its invocation of the state secrets privilege; (B) examine *in camera* the evidence the government seeks to withhold to determine if it is properly subject to the privilege; (C) evaluate, after non-privileged discovery, whether any privileged evidence is essential to plaintiff's prima facie case or a valid defense; and (D) if privileged evidence is essential, determine whether dismissal may nonetheless be avoided by use of specialized procedures.

[2] The "judicial Power" conferred by Article III belongs to the courts alone; it may not be ceded to or exercised by any other branch. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58–59 (1982). It has long been held that neither the Legislature nor the Executive may "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *United States v. Klein*, 80 U.S. 128, 146 (1871). To "defer to a blanket assertion of secrecy" would "abdicate" a court's "constitutional duty to adjudicate the disputes that come before it." *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 995 (N.D. Cal. 2006), *remanded in light of intervening legislation*, 539 F.3d 1157 (9th Cir. 2008).

A. The Court Should Require Disclosure By The Government To Cleared Counsel To Preserve Meaningful Adversarial Process.

Meaningful participation by counsel is essential to the determination of whether the state secrets privilege has been validly invoked. The government's refusal here to provide a public declaration supporting its assertion of the state secrets privilege is unprecedented in the annals of state secrets litigation: even in cases involving extraordinarily sensitive subject matter such as governmental torture, surveillance, intelligence, and secret weapons systems, litigants have had some basis for understanding the governmental interest in the litigation. Here, by contrast, the parties lack even the broadest contours of government's alleged justification for the draconian result it seeks: denying a forum for a lawsuit between two private parties.

In the ordinary case, the government files both classified and unclassified declarations describing the scope of its privilege assertion, its basis for believing that evidence within the scope of the privilege assertion truly is secret, and the potential harm to national security that could result from public disclosure of the evidence. *See, e.g.*, *Zuckerbraun*, 935 F.2d at 548–53 (Declaration of H. Lawrence Garrett, III, Secretary of the Navy). As the D.C. Circuit has explained, such disclosure is critical to allowing a robust adversarial process that can "assist the judge in assessing the risk of harm posed by dissemination of the information in question. This kind of focused debate is of particular aid to the judge when fulfilling his duty to disentangle privileged from non-privileged materials—to ensure that no more is shielded than is necessary to avoid the anticipated injuries." *Ellsberg*, 709 F.2d at 63.[3] Thus, for example, in *In re Nat'l Sec.*

[3] The *Ellsberg* court emphasized the need for a proper adversarial process: "[C]onsiderable time and resources might have been saved by adherence to the principle that *in camera* proceedings should be preceded by as full as possible a public debate over the basis and scope of a privilege claim. Had they been afforded an opportunity to contest a detailed justification for the government's claim, the plaintiffs most likely would have been able to demonstrate, at trial,

Agency Telecommunications Records Litig., 564 F. Supp. 2d 1109, 1119 (N.D. Cal. 2008), the plaintiffs were able to successfully demonstrate that a specific federal law had preempted the state secrets doctrine—but only with the benefit of a public declaration describing the general types of secrets the government sought to withhold. Here, by contrast, the government has deprived the parties of any opportunity to participate meaningfully in determining whether state secrets are essential to their claims. *See Al Bakri v. Obama*, 660 F. Supp. 2d 1, 2 (D.D.C. 2009) ("Counsel cannot realistically be expected to assist a court in conducting meaningful review if he does not have access to material facts.").

It is hard to see why, unlike in every other state secrets case in history, meaningful public disclosure to the parties is not possible in this case. *Amici* believe that the government should be required to file a public version of its declaration. *See Section* III. However, if this case is so unique that no further public disclosure is possible, the Court should respond to the unprecedented circumstances the government has created by requiring the government to disclose to security-cleared counsel for the parties the following information: the scope of the privilege assertion; the basis for believing that evidence within the scope of the privilege assertion truly is secret; and the potential harm to national security that could result from public disclosure of the evidence.[4]

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rather than on appeal, the conceded absence of any basis for the refusal to disclose the names of the Attorneys General who authorized the taps." 709 F.2d at 63.

[4] Due process and fundamental principles of fairness in adjudication also support disclosure to security-cleared counsel. Secret evidence severely infringes plaintiffs' due process rights. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 264 (1987) (meaningful notice requires both "notice of the . . . allegations" and "notice of the substance of the relevant supporting evidence."); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985) (due process requires "an explanation of the . . . evidence"). When there is no disclosure at all by the government of the basis of its privilege assertion, the due process guarantee of an opportunity to be heard in opposition becomes entirely meaningless: "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and

Such an order would be perfectly in keeping with this Court's power and obligation to control the procedures by which the common-law state secrets privilege is asserted in this case in order to ensure due process and fundamental fairness.[5] "[T]he common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996); *accord Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130, 1133 (2d Cir. 1977).

The Court also has the benefit of decades of noncriminal litigation in the federal courts since *Reynolds*, in which classified information has been disclosed to security-cleared counsel without any resulting harm to national security. For example, in *Loral*, a state secrets case, the Second Circuit explained that "[t]he Department of Defense has cleared, or can and will clear, for access to the material the judge and magistrate assigned to the case, the lawyers and any supporting personnel whose access to the material is necessary." *Loral* at 1132. This is in keeping with courts' broad practice of using security-cleared counsel in noncriminal cases to ensure effective litigation of a wide variety of sensitive topics. *See, e.g.*, *Al Bakri*, 660 F. Supp. 2d at 2 (ordering disclosure of facts concerning detainees at Bagram Airbase in Afghanistan to security-cleared counsel); *Ibrahim v. Dep't of Homeland Sec.*, C 06-00545 WHA, 2013 WL 1703367 (N.D. Cal. Apr. 19, 2013) (ordering disclosure of documents pertaining to the no-fly list

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to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one." *Morgan v. United States*, 304 U.S. 1, 18 (1938).

[5] Because it is a common-law evidentiary privilege, the continued evolution and development of the state secrets privilege rests with the courts. *See* Fed. R. Evid. 501; *see also* H.R. Rep. No. 93-650 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7082 (explaining that Rule 501 encompasses the "secrets of state" privilege); S. Rep. No. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7047, 7058 (same) In enacting Rule 501, Congress intended that "privileges shall continue to be developed by the courts of the United States." H.R. Rep. No. 93-650 (1973), reprinted in 1974 U.S.C.C.A.N. 7075, 7082; *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 31 (1976) ("Congress, of course, has plenary authority over the promulgation of evidentiary rules for the federal courts."). Congress itself drafted Rule 501, unlike most provisions of the Federal Rules of Evidence, which were drafted by the advisory committee on the Federal Rules of Evidence.

to Sensitive Security Information-cleared counsel); *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 660 (N.D. Ohio 2010) (ordering that counsel for charity contesting freezing of its assets "obtain an adequate security clearance to view the necessary documents, and will then view these documents in camera, under protective order, and without disclosing the contents to [plaintiff]").[6]

Courts' long and successful experience with disclosure of classified information to security-cleared counsel confirms that it is a viable option. It is also a necessary one here, in light of the government's unprecedented refusal to make any public disclosure whatsoever of the basis for its assertion of the state secrets privilege. *See also* 26 WRIGHT & GRAHAM, FEDERAL PRACTICE & PROCEDURE § 5671 (2d ed. 1992) at 734 ("many of [the countervailing arguments against in camera proceedings] would be resolved or weakened if courts did not automatically assume that every in camera hearing had to be ex parte as well").

The government most likely will reply to this proposal by quoting *Reynolds*'s admonition that courts should evaluate a privilege claim "without forcing a disclosure of the very thing the privilege is designed to protect." *Reynolds*, 345 U.S. at 8. But disclosure to security-cleared counsel under secure conditions is not the equivalent of a general public disclosure. *See Al Haramain Islamic Found. v. U.S. Dep't of Treasury*, 686 F.3d 965, 983 (9th Cir. 2011) (disclosing information to a "lawyer for the designated entity who has the appropriate security clearance also does not implicate national security when viewing the classified material because,

[6] In recent years, the federal courts have applied their expertise and experience handling classified information in habeas cases brought by Guantanamo detainees. Those courts have developed workable procedures designed to allow reasonable access to classified evidence, while protecting the government's secrecy interest. *See* The Constitution Project & Human Rights First, Habeas Works: Federal Courts' Proven Capacity to Handle Guantanamo Cases - A Report from Former Federal Judges, at 17 (June 2010) (describing procedures that seek "to strike a careful balance between protecting classified information and ensuring that petitioners have enough information to challenge their detention").

by definition, he or she has the appropriate security clearance"). And the degree of disclosure to security-cleared counsel can be tailored to the necessities of the case. Typically, for example, the government's state secrets privilege declarations do not disclose in detail the assertedly privileged evidence itself but instead describe the general categories of evidence over which the government claims the privilege and the harms it asserts would result from public disclosure. *See, e.g., Zuckerbraun*, 935 F.2d at 548–53. At a minimum, similar disclosures to security-cleared counsel are required here.

B. The Court Must Undertake A Particularly Searching Inquiry Of The Government's Assertion Of Privilege, Including *In Camera* Review.

The Supreme Court has emphasized that the courts, not the government, determine the validity of assertions of the state secrets privilege. *See Reynolds*, 345 U.S. at 8 ("The court itself must determine whether the circumstances are appropriate for the claim of privilege."). Under *Reynolds*, a state secrets privilege assertion is sustainable only if it is supported by a credible showing that there is a "'reasonable danger'" that disclosure of any of the evidence within the scope of the privilege assertion will harm national security. *Reynolds*, 345 U.S. at 10; *see also Zuckerbraun*, 935 F.2d at 546-47 ("A court before which the privilege is asserted must assess the validity of the claim of privilege, satisfying itself that there is a reasonable danger that disclosure of the particular facts in litigation will jeopardize national security."). As courts have repeatedly emphasized, the proper standard of deference cannot render the judicial role irrelevant or allow for unilateral termination of unwanted litigation by the Executive Branch. *See In re United States*, 872 F.2d at 475 ("[A] court must not merely unthinkingly ratify the Executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role."). "Were the rule otherwise, the Executive Branch could immediately ensure that the 'state secrets privilege' was successfully invoked simply by classifying information, and the Executive's actions would be

beyond the purview of the judicial branch."[7] *Horn v. Huddle*, 647 F. Supp. 2d 55, 62-63 (D.D.C. 2009), *vacated due to settlement*, 699 F. Supp. 2d 236 (D.D.C. 2010).

The "critical feature of the state secrets inquiry . . . is whether the showing of harm that might reasonably be seen to flow from disclosure is adequate in a given case to trigger the absolute right to withhold the information sought." *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982). The scope of the privilege and the asserted harm must be coextensive: To adequately support the claim of privilege, the asserted harm must be reasonably likely to occur if any of the evidence within the scope of the privilege is disclosed; otherwise, the privilege assertion is overbroad. Thus, the broader and less specific the identification of the evidence subject to the claim of privilege, the greater the showing necessary to demonstrate that disclosure of any of the evidence falling within the scope of the assertion is reasonably likely to harm national security.

In *Reynolds*, the Court recognized that misuse of the state secrets privilege might lead to "intolerable abuses," and admonished that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Id.* at 9-10. The greater the necessity for the allegedly privileged information in presenting the case, the more a "court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." *Id.* at 11. In *Reynolds* itself, the Court found *in camera* review of an incident report unnecessary because a substitute appeared to be readily available: witnesses were able to testify about the incident, so the proper

[7] Classification provides a very poor proxy for determining whether information is properly subject to the privilege. Deputy Secretary of Defense for Counterintelligence and Security Carol A. Haave conceded that approximately 50 percent of classification decisions are over-classifications. *Subcommittee on National Security, Emerging Threats and International Relations of the House Committee on Gov't Reform Hearing*, 108th Cong. (2004) (testimony of Carol A. Haave), http://www.fas.org/sgp/congress/2004/082404transcript.pdf. Then-CIA Director Porter Goss told the 9/11 Commission, "we overclassify very badly. There's a lot of gratuitous classification going on, and there are a variety of reasons for them." *9/11 Commission Hearing* (testimony of Porter Goss) (2003).

course was to remand for further non-privileged discovery. *See id.* As the passage of time has shown, the government's account of the contents of the withheld report was less than accurate, a fact that an *in camera* examination would have revealed.[8]

Where, as here, the government instead asserts that state secrets are absolutely necessary to the litigation and that no substitute could allow the case to proceed, *in camera* review of the evidence is almost always required.[9] *See Nat'l Lawyers Guild v. Attorney Gen.*, 96 F.R.D. 390, 401 (S.D.N.Y. 1982) ("Where, however, there is a strong showing of need by the non-governmental party, *in camera* review is appropriate.") (citing *Reynolds* at 10–11)). As the Seventh Circuit has explained:

> a party's showing of need often compels the district court to conduct an *in camera* review of documents allegedly covered by the privilege in order to determine whether the records are properly classified "secret" by the Government. Any other rule would permit the Government to classify documents just to avoid their production even though there is need for their production and no true need for secrecy.

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[8] In *Reynolds*, the government misrepresented the secret accident report, asserting that it contained information about secret military equipment aboard the aircraft that crashed. 345 U.S. at 3-4. In 1996, the accident report was declassified. It contained no "details of any secret project the plane was involved in," but "[i]nstead.... a horror story of incompetence, bungling, and tragic error." Garry Wills, *Why the Government Can Legally Lie*, 56 N.Y. REV. OF BOOKS 32, 33 (2009); s*ee also* Louis Fisher, In the Name of National Security: Unchecked Presidential Power and the *Reynolds* Case 166-69 (2006) (documenting that the government knew that the information withheld in *Reynolds* posed no threat to national security); *Herring v. United States*, 2004 WL 2040272, at *5 (E.D. Pa. Sept.10, 2004), *aff'd*, 424 F.3d 384 (3d Cir. 2005) (finding no deliberate fraud upon the court in *Reynolds*, but noting "the apparent dearth of sensitive information in the accident investigation report and witness statements"). Nor have the intervening decades eliminated the inclination and incentive for the government to play fast and loose with the privilege. *See, e.g.*, *Horn*, 647 F. Supp. 2d at 58, 58 n.3 (finding that "the government has already committed fraud on this Court and the Court of Appeals regarding what information is covered by the state secrets privilege in this case," and the government's "action . . . can only be construed as an attempt to dishonestly gain dismissal").

[9] The Second Circuit has recognized an exception to *in camera* review only on a single occasion: when it was "self-evident" that documents were subject to the state secrets privilege as they concerned the secret technical capabilities and tactics of the nation's "most technically advanced and heavily relied upon" warships. *See Zuckerbraun*, 935 F.2d at 547.

Am. Civil Liberties Union v. Brown, 619 F.2d 1170, 1173 (7th Cir. 1980); *accord Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) ("[W]e read *Reynolds* as requiring an in camera review of the Sealed Document in these circumstances . . . because of [the plaintiff's] admittedly substantial need for the document to establish its case."); *Ellsberg*, 709 F.2d at 59 n. 37. And, indeed, *in camera* review can reveal problems with the government's assertion of privilege that are impossible to discern by simply taking agency affidavits at their word. *See, e.g.*, *Brown* ("Significantly, our preliminary in camera examination of the material causes us to conclude that the existence of state or military secrets therein is sufficiently dubious that the formal claim of privilege may not prevail if . . . the material is needed by plaintiffs."); *Virtual Def. & Dev. Int'l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 9, 24 (D.D.C. 2001) (conducting *in camera* review and "determin[ing] that the United States Department of State had inappropriately withheld" evidence).

Accordingly, when plaintiffs face deprivation of their day in court, courts regularly review evidence *in camera* to ensure that such a result is absolutely necessary; unilateral executive assurances are simply insufficient.[10] *See Kerr v. U.S. Dist. Court*, 426 U.S. 394, 405-406 (1976) ("[T]his Court has long held the view that *in camera* review is a highly appropriate and useful means of dealing with claims of governmental privilege." (citing *Reynolds*, 345 U.S. 1)). The prospect of searching review provides a disincentive for the Government to assert the privilege where it is not warranted, counteracting the natural bureaucratic incentive to use secrecy as a deterrent to accountability. Meaningful review is also necessary for the judicial process to embody the democratic values of transparency and legitimacy, assuring litigants that

[10] This is not to say that judges must themselves always look at each individual document; judges may, of course, rely on magistrates or sampling techniques in appropriate cases—procedures that are well within judges' inherent powers.

their right to obtain evidence in the judicial process has not been delegated to "the caprice of executive officers." *Reynolds*, 345 U.S. at 9-10.

Nor can there be any question that courts are entirely competent to perform an independent assessment of materials the Executive has deemed secret. In the decades since *Reynolds*, federal courts have frequently been called upon to assess whether litigants or members of the public may have access to classified information under a variety of statutes, including the Classified Information Procedures Act (CIPA), the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1805, and the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(B) & (b)(1), 18 U.S.C. App. 3. In all these contexts, district courts are required to make judgments regarding the disclosure and handling of national security information, and *in camera* review of classified materials is a standard procedure. None of these statutes has ever been seriously questioned on grounds of institutional competence. To the contrary, the Supreme Court has rejected the suggestion that national security matters are "too subtle [or] complex for judicial evaluation." *United States v. United States Dist. Ct. (Keith)*, 407 U.S. 297, 320 (1972).

For over 30 years, "courts have effectively applied" CIPA, which has "provide[d] Federal courts with clear statutory guidance on handling secret evidence." S. Rep. No. 110-442, at 9 (2008) (Conf. Rep.). CIPA empowers federal judges to craft special procedures to determine whether and to what extent classified information may be used in criminal trials, including procedures requiring disclosure to defendants. *See generally United States v. Pappas*, 94 F.3d 795, 799 (2d Cir. 1996). FISA further empowers all federal district courts—not just the FISA court—to review highly sensitive information *in camera* and *ex parte* to determine whether the surveillance was authorized and conducted in accordance with the statute. The statute entrusts

courts with deciding whether disclosures to the parties are necessary to assist in making this determination. *See* 50 U.S.C. § 1806(f).

Congress's guidance has also made clear that the judiciary has a vital role in policing claims of secrecy in the context of FOIA, and that the Executive's choice to classify information is the beginning—not the end—of the Court's inquiry. Overriding a presidential veto, Congress granted judges explicit authority to conduct *in camera* review of records despite the government's assertion of national security. The purpose of this provision was to safeguard against arbitrary, capricious, and myopic use of the awesome power of the classification stamp by the government bureaucracy. *See* S. Rep. No. 93-854 (1974), as reprinted in *FOIA SourceBook*, at 183. When it amended FOIA in 1974, Congress "stressed the need for an objective, independent judicial determination, and insisted that judges could be trusted to approach the national security determinations with common sense, and without jeopardy to national security." *Ray v. Turner*, 587 F.2d 1187, 1194 (D.C. Cir. 1978).

There have been no credible claims that judicial review in such cases has compromised national security or resulted in the mishandling of classified information. To the contrary, federal courts have consistently shown their competence in adjudicating cases that implicate national security. As former Judge Patricia Wald explained in testimony before Congress, courts "deal with national security information on a regular basis and can be entrusted with its evaluation on the relatively modest decisional threshold of whether its disclosure is 'reasonably likely' to pose a national security risk." Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability, Hearing before the S. Comm. on the Judiciary, 110th Cong. (Jan. 29, 2008) (prepared statement of Patricia Wald). Former federal judge, FBI Director and CIA Director William Webster made a similar observation in his statement to Congress: "I can

confirm 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." *Id.* (prepared statement of William Webster).

C. The Court Must Determine Whether It Is Certain At This Stage That Any State Secrets Are Actually Essential To The Litigation.

Even where a court has determined that a privilege invocation is valid, state secrets doctrine is clear that the result is not the automatic dismissal of a litigant's claims. "[T]he effect of the government's successful invocation of the state secrets privilege '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 evidence.'" *Ellsberg*, 709 F.2d at 64; *accord General Dynamics*, 131 S.Ct. at 1906 ("The privileged information is excluded and the trial goes on without it."). As with any evidentiary privilege, the state secrets privilege excludes only evidence from a particular, privileged source, and does not prevent proof of contested facts with evidence from a non-privileged source. Dismissal is never appropriate unless it is absolutely certain that the "court would be unable to 'disentangle" the sensitive from the nonsensitive information as the case unfolds," *In re U.S.*, 872 F.2d at 479 (citing *Ellsberg*, 709 F.2d at 57).

Without knowing what particular evidence the parties actually might need, and may be available, to prove their claims and defenses, courts cannot comply with *Reynolds*'s requirement that they determine whether it is possible for the parties to prove their cases in some other way. Accordingly, courts order non-privileged discovery prior to evaluating whether, under the state secrets doctrine, dismissal is warranted. *See, e.g.*, *Clift v. United States*, 597 F.2d 826, 830 (2d

Cir. 1979) (remanding for further proceedings where plaintiff has "not conceded that without the requested documents he would be unable to proceed").[11]

The wisdom of this traditional practice is manifest. Attempting to discern the "impact of the government's assertion of the state secrets privilege" before the plaintiff's claims have developed and the relevancy of privileged material has been determined "is akin to putting the cart before the horse." *Crater Corp. v. Lucent Tech.*, 423 F.3d 1260, 1268 (Fed. Cir. 2005). As *Reynolds* makes clear, plaintiffs should be free to attempt to establish their claims "without resort to material touching upon military secrets." 345 U.S. at 11. At a minimum, this means that courts should not consider the state secrets privilege as a ground for dismissal until all non-privileged discovery has been exhausted and it is determined whether plaintiff's case can be made without privileged evidence. *See Spock v. United States*, 464 F. Supp. 510, 520 (S.D.N.Y. 1978) ("In this case, the Government seeks to foreclose the plaintiff at the pleading stage. Such a result would be unfair and not in keeping with the basic constitutional tenets of this country."). In many cases, needless dismissals can thus be avoided. *See, e.g.*, *In re Sealed Case*, 494 F.3d 139, 148 (D.C. Cir. 2007) ("[E]ven after evidence relating to covert operatives, organizational structure and functions, and intelligence-gathering sources, methods, and capabilities is stricken from the proceedings under the state secrets privilege, Horn has alleged sufficient facts to survive a motion to dismiss under Rule 12(b)(6)."). Courts have followed this practice for decades, demonstrating the practical difference between an evidentiary privilege and a justiciability doctrine.[12]

[11] The Second Circuit has affirmed dismissal under *Reynolds* prior to discovery only once: when the *entirety* of the relevant facts of the disputed consisted of "self-evident" state secrets: the secret capabilities and tactics of the most advanced U.S. warships. *Zuckerbraun*, 935 F.2d at 547.
[12] *See, e.g.*, *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003) (dismissing defense contractor suit only after discovery and determination that the claims could

Premature dismissal not only interferes with evaluation of whether a plaintiff can establish her claims without privileged information, but also threatens the Court's ability to determine whether any asserted state secrets will interfere with an actual and valid, rather than hypothetical, defense. As the Second Circuit has explained, dismissal on state secrets grounds is not permissible when the privilege may interfere with *possible* defenses, but only when it precludes the assertion of a valid defense. *See Zuckerbraun*, 935 F.2d at 547 (dismissal may be warranted only "if the court determines that the privilege so hampers the defendant in establishing a valid defense that the trier is likely to reach an erroneous conclusion"). That is, unless the state secrets privilege results in the elimination of a "meritorious and not merely plausible" defense, a case may not be dismissed on this ground. *In re Sealed Case*, 494 F.3d 139, 149 (D.C. Cir. 2007).[13] Were it otherwise, "then virtually every case in which the United States

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not be proved through non-privileged evidence); *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 334-35 (4th Cir. 2001) (upholding claim of privilege but rejecting premature dismissal of trade secret misappropriation suit and remanding for further discovery); *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1364 (Fed. Cir. 2001) (reversing premature dismissal of contract suit on basis of the privilege so that plaintiff could engage in further discovery to support claim with non-privileged evidence); *In re U.S.*, 872 F.2d at 477 (rejecting premature and categorical invocation of the privilege to dismiss a Federal Tort Claims Act case); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 400-02 (D.C. Cir.1984) (remanded for further proceedings without privileged material); *Ellsberg*, 709 F.2d at 64 n.55 (reversing dismissal of a constitutional tort action and remanding where the district court "did not even consider whether the plaintiffs were capable of making out a prima facie case without the privileged information."); *Heine v. Raus*, 399 F.2d 785, 791 (4th Cir. 1968) (upholding claim of privilege in a defamation suit, but remanding for further discovery of non-privileged evidence); *Hepting*, 439 F. Supp. 2d at 994 ("It would be premature to decide these issues at the present time. In drawing this conclusion, the court is following the approach of the courts in *Halkin v. Helms* and *Ellsberg v. Mitchell*; these courts did not dismiss those cases at the outset but allowed them to proceed to discovery sufficiently to assess the state secrets privilege in light of the facts.").

[13] The District of Columbia Circuit has elaborated on the standard for determining a valid defense: "A 'valid defense' . . . is meritorious and not merely plausible and would require judgment for the defendant. 'Meritorious,' in turn, means 'meriting a legal victory.'" *In re Sealed Case*, 494 F.3d at 149 (citations omitted, emphasis added). To determine whether the proposed defense is meritorious and requires judgment for the defendant, the district court must examine the privileged evidence and determine whether it proves the existence of the defense: "If the

successfully invokes the state secrets privilege would need to be dismissed." *Id.* at 150-51. As the District of Columbia Circuit explained,

> Such a practice "would mean abandoning the practice of deciding cases on the basis of evidence—the unprivileged evidence and privileged-but-dispositive evidence—in favor of a system of conjecture. . . . [I]t would be manifestly unfair to a plaintiff to impose a presumption that the defendant has a valid defense that is obscured by the privilege. There is no support for such a presumption among the other evidentiary privileges because a presumption would invariably shift the burdens of proof, something the courts may not do under the auspices of privilege.
>
> *Id.*

It is unclear whether the government has even attempted to meet its burden before this Court and make the showing necessary to satisfy the valid-defense exception. There is no indication that it has submitted to the court any privileged evidence (as opposed to declarations asserting that evidence exists that is privileged). It has not publicly identified any affirmative defense that is valid, or even one that is merely plausible. It has not attempted to rebut the plaintiff's' allegations. And it is far from clear that the valid defense doctrine even *applies* outside of government contract cases.[14]

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defendant proffers a valid defense that the district court verifies upon its review of state secrets evidence, then the case must be dismissed." *Id.* at 153.

[14] Ordinarily, when privileged evidence is excluded, both sides are deprived of its use, and the chips fall where they may—a rule favoring neither plaintiff nor defendant. Each party faces the possibility of losing the case even though the privileged evidence, if admissible, would enable that party to prevail. A "valid defense" exception transforms the *Reynolds* evidentiary privilege into a *Totten* justiciability bar. Indeed, in *General Dynamics*, the Court grounded the "valid defense" exception on the ability of the parties to a government contract to allocate the risk that they will be unable to prove a contract breach because of the state secrets privilege. 131 S.Ct. at 1909. It identified "our common-law authority to fashion contractual remedies in Government-contracting disputes" as the basis for permitting dismissals based on a valid defense in government contracting cases. *General Dynamics*, 131 S. Ct. at 1906. Refusing to enforce government contracts in those circumstances "captures what the *ex ante* expectations of the parties were or reasonably ought to have been. . . . Both parties . . . must have assumed the risk that state secrets would prevent the adjudication of [their] claims . . . ." *Id.* at 1909. This reasoning has no application to cases not based on government contract. In non-contract cases, it is the *Reynolds* evidentiary privilege that controls.

Before dismissal may be ordered, the Court must determine whether secret evidence is *absolutely essential* either for the plaintiff to prove his claims or for defendants validly to defend against them. As the Government acknowledges, "it does not appear that there has been any meaningful party discovery." Dkt. #258 at 6. Therefore, such a determination is virtually certain to be premature at this stage. The proper manner in which to assess the effect of the privilege on the evidence available to plaintiff and defendants is to permit the case to proceed to controlled discovery. There will be no shortage of opportunities for the government to protect its legitimate interests with respect to specific privileged evidence.

D. Even If Privileged Evidence Is Essential, The Court Must Consider Whether Any Alternative To Dismissal Would Avoid The Draconian Result Of Denying Plaintiff Access To The Courts.

Courts must make every effort to allow claims to proceed even where privileged material is essential; dismissal is available only as a last resort. "Because evidentiary privileges by their very nature hinder the ascertainment of the truth, and may even torpedo it entirely, their exercise 'should in every instance be limited to their narrowest purpose.'" *In re U.S.*, 872 F.2d at 478-79 (quotation marks omitted); *see also In re Sealed Case*, 494 F.3d at 51 ("[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."). Courts therefore use "creativity and care" to devise "procedures which would protect the privilege and yet allow the merits of the controversy to be decided in some form." *Fitzgerald*, 776 F.2d at 1238 n.3. Dismissal must not be resorted to unless "no amount of effort and care on the part of the court and the parties will safeguard privileged material," *Id.* at 1244.

The Second Circuit has for decades encouraged judicial creativity in crafting procedures to respond to the challenges posed by legitimate assertions of state secrets. As the court

explained in *Loral*, judges "are faced with the problem of resolving private civil disputes and at the same time preserving the confidentiality of developments by or for governmental defense agencies." 558 F.2d at 1133. Rather than "long-term postponement or complete denial of the forum to the litigants," the Second Circuit required instead the use of specialized judicial procedures to address the challenge of sensitive litigation. *Id.* The court explained that this creativity is entirely in keeping with the judicial role: "Courts of equity have the power and duty to adapt measures to accommodate the needs of the litigants with those of the nation, where possible." *Id.*[15] Such measures are required in light of the narrow justification for the state secrets privilege. In *Halpern v. United States*, the Second Circuit explained that "the scope of the privilege of the United States with respect to state secrets . . . 'is limited by its underlying purpose.'" 258 F.2d 36, 44 (2d Cir. 1958) (quoting *Roviaro v. United States*, 1957, 353 U.S. 53, 60). Accordingly, the court held that "the privilege relating to state secrets is inapplicable when disclosure to court personnel in an *in camera* proceeding will not make the information public or endanger the national security." *Id.*

In *Loral*, the Second Circuit was persuaded that a jury trial was inappropriate because a "large amount of material properly classified confidential and secret must be submitted to the trier of fact in the case." 558 F.2d at 1132. The Court found that use of security-cleared counsel and a special master would best allow the parties to resolve their dispute in spite of the state secrets present in the case. *See id.* (noting that "Congress has provided professional, experienced officers in the magistrates available to serve as special masters and encouraged the 'district

[15] *See generally Hanna v. Plumer*, 380 U.S. 460, 472-73 (1965) (noting that, subject to congressional limitations but "completely aside from the powers Congress expressly conferred in" the Federal Rules of Civil Procedure, "the administration of legal proceedings [is] an area in which federal courts have traditionally exerted strong inherent power"); Amy Coney Barrett, *Procedural Common Law*, 94 Va. L. Rev. 813, 842-78 (2008) (discussing federal courts' "inherent authority over procedure").

courts to continue innovative experimentations in the use of this judicial officer.'" (quoting 4 S.Rep. No. 94-625, 94th Cong., 2d Sess. (1976), at 10)). In *Halpern*, the Court was able to instead make use of an *in camera* trial. *See* 258 F.2d at 44; *see also Clift v. United States*, 597 F.2d 826, 829 (2d Cir. 1979) (noting that the district court could craft creative procedures, such as recruiting security-cleared court personnel, to conduct *in camera* trial). And in long-running litigation brought by a plaintiff who alleged that CIA agents had dropped LSD into his drink while he sat in a Paris café, the Government was allowed to preserve the privilege by producing redacted documents so that the case could proceed through discovery, summary judgment, and trial. *See Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998).

Other courts have also developed a variety of innovative "procedures which will protect the privilege and yet allow the merits of the controversy to be decided in some form." *Fitzgerald*, 776 F.2d at 1238 n.3. These courts have utilized a number of additional tools to safeguard sensitive information in cases involving state secrets, including protective orders, seals, bench trials, and specialized discovery procedures. *See In re U. S.*, 872 F. 2d. at 478 (bench trial); *In re Under Seal*, 945 F.2d 1285, 1287 (4th Cir. 1991) (protective orders as well as depositions in secure facilities); *Horn*, 647 F. Supp. 2d at 58, 58 n.3 (making use of procedures analogous to CIPA to protect state secrets); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 323 F. Supp. 2d 82 (D.D.C. 2004) (prohibiting certain deposition questions and permitting the government "to have a representative present at any deposition" of deponent "to monitor compliance with this Order and to otherwise ensure that state secrets are not revealed"); *United States v. Lockheed Martin Corp.*, 1998 WL 306755 (D.D.C. 1998) (protective order); *Air-Sea Forwarders, Inc. v. United States*, 39 Fed. Cl. 434, 436-37 (Fed. Cl. 1997) (protective order).

"Dismissal of a suit [on the basis of state secrets], and the consequent denial of a forum without giving the plaintiff her day in court . . . is indeed draconian." *In re U.S.*, 872 F.2d at 477. As decades of precedent make clear, courts have an abundance of tools at their disposal to accommodate the government's legitimate security needs without undertaking the radical step of barring a plaintiff from the courts' protection.

III. THE UNPRECEDENTED OPACITY OF THE PUBLIC DISCLOSURES IN THIS CASE HARMS THE PUBLIC INTEREST.

Beyond damaging the adversarial process, the government's unprecedented secrecy here also harms the public interest. Excessive and unchecked secrecy erodes public confidence in the legitimacy of government.[16] This concern is confirmed by the history of Executive misuse of classification and the state secrets privilege. *See* notes 7–8, *supra*. Concerns over excessive secrecy are exacerbated by the uniquely opaque public disclosures in this case, which deprive the public of any understanding of why the Executive has sought the extreme result of denying an individual his day in court. Moreover, unlike previous cases involving private litigants in which the government has intervened to assert the state secrets privilege, there is no known contractual relationship between the government and one of the parties, or any other apparent reason why state secrets would be implicated in the litigation. When combined with the unprecedented lack of public explanation, the predictable result is rampant public speculation about unlawful government activity or secret foreign intelligence involvement in shaping U.S. public opinion, eroding public trust in government. *See, e.g.*, Matt Apuzzo, Holder Says Private Suit Risks State

[16] *See, e.g.*, *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 520 n.242 (S.D.N.Y. 2004) ("The recognition that excessive secrecy may damage democratic values is widespread."), *aff'd in part*, *Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006); Report of the Commission on Protecting and Reducing Government Secrecy, S. Doc. No. 105-2, at XXI (1997) ("Excessive secrecy has significant consequences for the national interest when, as a result, policymakers are not fully informed, government is not held accountable for its actions, and the public cannot engage in informed debate.").

Secrets, N.Y. TIMES, Sept. 14, 2014 at A13, *available at* http://nyti.ms/1wEAXSQ. ("If United Against Nuclear Iran possesses American classified information, it is not clear how the group obtained it. Government intelligence agencies are prohibited from secretly trying to influence [U.S.] public opinion."); Emily Flitter, U.S. Judge to Decide State Secrets Procedure in Iran Case, REUTERS, Oct. 8, 2014, *available at* http://reut.rs/1tDMOjX ("There has been virtually no indication of what the information in question may be. UANI, which is funded in part by the American mining tycoon Thomas Kaplan, whose family has ties to Israel, includes several former intelligence chiefs on its advisory board, including the former head of Israel's Mossad, Meir Dagan.").

Once again, the example of other courts demonstrates the tools available to the judiciary to protect the public's right of access to judicial proceedings and guard against excessive secrecy. This Court can and should adopt the procedure used recently by the Northern District of California, requiring the government to submit to the public docket unclassified or redacted versions of its classified state secrets privilege declarations. *See Jewel v. NSA*, No. 08-CV-4373, ECF No. 164 at 8-9, 17, 22-25; ECF Nos. 172, 209, 219-228. The experience in that district has been that when the government is put to the task of reviewing its classified declarations line by line, it turns out that not every sentence is in fact secret and much of the declarations can be publicly disclosed. *See, e.g., id.* ECF No. 220, *available at* http://bit.ly/1FWvI6l, (Redacted Declaration of James R. Clapper).

This Court should carefully weigh whether this case is so extraordinary in the history of the state secrets privilege as to justify keeping the public entirely in the dark as to the government's interest in dismissal.

CONCLUSION

For the foregoing reasons, the Court should deny the government's motion to dismiss and order further disclosure and discovery before considering any renewed assertion of the state secrets privilege.

Respectfully submitted,

/s/ Dror Ladin

Dror Ladin
Hugh Handeyside
Hina Shamsi
Ben Wizner
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 284-7303 (tel)
(212) 549-2654 (fax)
dladin@aclu.org
hhandeyside@aclu.org
hshamsi@aclu.org
bwizner@aclu.org

Richard R. Wiebe
LAW OFFICE OF RICHARD R. WIEBE
One California Street, Suite 900
San Francisco, CA 94111
(415) 433-3200 (tel)
(415) 433-6382 (fax)
wiebe@pacbell.net

Cindy Cohn
Andrew Crocker
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
(415) 436-9333 (tel)
(415) 436-9993 (fax)
cindy@eff.org

Shayana Kadidal
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th floor
New York, NY 10012
(212) 614-6438
kadidal@ccrjustice.org

Michael Price
Elizabeth Goitein
BRENNAN CENTER FOR JUSTICE
161 6th Ave., 12th Floor
New York, NY 10012
(646) 292-8335
michael.price@nyu.edu

Sean Vitka
SUNLIGHT FOUNDATION
1818 N Street NW Suite 300
Washington, DC 20036
(202) 742-1520
svitka@sunlightfoundation.com

Rita Siemion
THE CONSTITUTION PROJECT
1200 18th Street, NW Suite 1000
Washington DC, 20036
(202) 580-6928
rsiemion@constitutionproject.org

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