No. 22-190

IN THE

Supreme Court of the United States

WIKIMEDIA FOUNDATION,

Petitioner,

—v.—

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

Respondents.

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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate-disclosure statement included in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

Wikimedia challenges the lawfulness of Upstream surveillance, a program that has operated for more than twenty years and whose workings have been described in detail in declassified court opinions, government reports, and NSA disclosures to the public. The panel majority held that these official disclosures and Wikimedia's expert declarations satisfied Wikimedia's standing burden at summary judgment. Nearly two dozen technologists, relying on the same official disclosures, endorsed the conclusion that Wikimedia's communications are subject to Upstream surveillance, and rejected the government's speculation about how this surveillance might avoid all of Wikimedia's trillions of communications as an implausible "thought exercise."

Nonetheless, the court of appeals dismissed the suit because the government claimed it *could in theory* have secret evidence that would refute Wikimedia's showing of injury. At no point in this case has any court assessed whether such evidence exists, let alone whether it would defeat Wikimedia's standing. Yet Judge Diaz relied on the mere possibility of a secret defense to dismiss Wikimedia's suit on state secrets grounds, applying Fourth Circuit precedent that conflicts with decisions of this Court and of the D.C. and Ninth Circuits. But for Judge Diaz's state secrets opinion, Wikimedia's lawsuit would have proceeded to the merits based on the extensive public evidence. This Court should grant certiorari to resolve the important and recurring question of whether and when the government may rely on the state secrets privilege not just to protect privileged evidence, but to obtain dismissal of suits challenging executive branch

conduct where plaintiffs are able to proceed based entirely on public evidence.

ARGUMENT

I. The decision below squarely presents state secrets questions warranting this court's review.

A. Judge Diaz's state secrets opinion applied settled Fourth Circuit law, was decisive to the result, and reflects a clear circuit split.

The government makes much of the divided opinions in this case, but it cannot camouflage two central facts about the Fourth Circuit's ruling: (1) the panel majority held that Wikimedia had presented enough public evidence of its standing to proceed; and (2) the case would not have been dismissed but for Judge Diaz's state secrets holding, which applied well-established Fourth Circuit law that conflicts with this Court's precedents and those of other courts of appeals.

Judge Rushing did not join the portion of Judge Diaz's majority opinion that addresses dismissal under the state secrets privilege, App. 68a, but that fact does not diminish the propriety or necessity of this Court's review.

Judge Diaz's state secrets opinion was dispositive and applied longstanding circuit precedent. App. 52-58a (applying *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *Abilt v. CIA*, 848 F.3d 305, 312-14 (4th Cir. 2017)); Pet. 24-31. The issue is not whether Judge Diaz's opinion is itself binding, but whether the outcome in this case rests on precedent that conflicts

with that of this Court and other circuits. If *United States v. Reynolds*, 345 U.S. 1 (1953), does not authorize state secrets dismissals in this context, or if courts must review the privileged evidence when the government seeks dismissal based on secret evidence, Wikimedia's case should have been remanded for further proceedings—not dismissed.

The government objects that Judge Diaz's opinion does not constitute a "decision" entered by the court of appeals. Opp. 16. But the Court would be reviewing the decision below, and Judge Diaz's opinion was essential to the decision. And because he applied circuit precedent that conflicts with decisions of this Court and other circuits, the case falls squarely within this Court's certiorari jurisdiction.

B. Wikimedia has standing, as the panel majority correctly held.

As the panel majority found, App. 24-35a, Wikimedia put forward sufficient factual evidence of its standing to overcome summary judgment. That evidence included extensive official disclosures and expert testimony, which together show that some of Wikimedia's trillions of Internet communications are subject to Upstream surveillance.

Wikimedia's burden at summary judgment was to present specific facts showing a genuine issue as to its standing. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). Wikimedia satisfied this burden by providing evidence on which a factfinder could rely to find it more probable than not that some of Wikimedia's communications were being copied and reviewed in

the course of Upstream surveillance.[1] It did so in two ways.

First, Wikimedia presented evidence that the NSA was temporarily copying and reviewing *every* communication transiting the international Internet circuits the agency monitors, and that Wikimedia's communications transited all such circuits. As Wikimedia's expert, Scott Bradner, explained, reviewing the entire stream of traffic transiting international Internet circuits is the only way to implement the Upstream surveillance system described by the government in its public disclosures. JA.7: 3883-85, 3892-95.[2]

A 2011 opinion from the FISC explained that the government "readily concedes" it "will acquire" communications transiting international Internet links being monitored by the NSA if those communications contain a targeted selector. [*Redacted*], 2011 WL 10945618, at *15 (FISC Oct. 3, 2011). As Bradner described and as the panel majority acknowledged, the NSA's concession to the FISC would only be true if the NSA were copying and reviewing *all* communications on international Internet links, including Wikimedia's communications. App. 32-35a; JA.7: 3893-95.

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[1] Standing is evaluated as of the filing of the operative complaint—here, 2015. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 570 n.5 (1992). A plaintiff seeking prospective relief may show either an ongoing injury or "substantial risk" of harm. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013)).

[2] "JA" citations are to the joint appendix filed in the court of appeals, No. 20-1191, on July 1, 2020.

The government contends that the FISC opinion did not state that the NSA "acquires" all communications transiting international Internet links. Opp. 20. But this is beside the point. As the panel majority recognized, Petitioner's standing does not require a showing that the NSA "acquires" (*i.e.*, retains) Wikimedia's communications; it is sufficient that the NSA temporarily *copies and searches* them, in order to identify the subset associated with its thousands of targets. App. 31-32a ("The government doesn't dispute that Wikimedia may prove [standing] by showing . . . copying[.]").[3]

Second, Wikimedia presented independent evidence that the NSA was copying and reviewing some of Wikimedia's trillions of communications. JA.7: 3891, 3899-3918. The NSA cannot know in advance whether any given Internet packet crossing a circuit is part of a transaction containing the selectors it is searching for. JA.7: 3899-3900, 3903-04. An inherent part of the difficulty is that the NSA is not seeking the communications of a single individual, but instead those of thousands of individuals around the globe. JA.2: 1042; JA.7: 3906. Thus, the NSA has no practical choice but to broadly copy and review the communications transiting a circuit—including, as Bradner explained, at least some of Wikimedia's communications. JA.7: 3891, 3899-3900.

The government simply ignores the evidence corroborating Wikimedia's expert testimony. The PCLOB observed, for example, that Upstream

[3] The government also argues that the 2011 FISC Opinion is not evidence but legal opinion. Opp. 20-21. This ignores the obvious: the statement in question was a recitation of *fact*, not of legal principle. App. 32-35a.

technology allows the government "to examine the contents of *all* transmissions passing through collection devices and acquire those, for instance, that contain a tasked selector anywhere within them." JA.4: 2561 (emphasis added); *see also* JA.4: 2449, 2562 (NSA seeks to "comprehensively" identify communications that contain selectors). The leading treatise on national security investigations, coauthored by David Kris, former Assistant Attorney General for National Security, similarly explains that the "NSA's machines scan the contents of *all* of the communications passing through the collection point, and the presence of the selector or other signature that justifies the collection is not known until after the scanning is complete." David Kris & J. Douglas Wilson, Nat'l Security Investigations & Prosecutions 2d § 17.5 (2015) (emphasis in original).

In the face of this record, the government speculated that the NSA might, in theory, filter out *every one* of Wikimedia's trillions of communications. But it proffered no evidence that this is in fact the case. App. 65-66a. Instead, it enlisted an outside expert with "no knowledge" of the NSA's practices to dispute Wikimedia's expert analysis. JA.1: 743. But the panel majority properly rejected this entirely ungrounded hypothetical as insufficient to refute Wikimedia's showing. App. 35a; *see* Technologists' Amicus Br., *Wikimedia Found. v. NSA*, No. 20-1191, 2020 WL 3958568 at *2-3 (4th Cir. July 8, 2020) (brief on behalf of 22 technologists endorsing Wikimedia's showing and explaining why the government's hypothetical "lacks a basis in both Internet technology and engineering").

Contrary to the government's claims, the facts essential to Wikimedia's standing are not state

secrets. They rest squarely on official disclosures—in the FISC's opinions, in the PCLOB report, and by the NSA itself. As Wikimedia's expert explained, the government has disclosed more than enough information about Upstream surveillance to conclude that some of Wikimedia's trillions of communications are being searched. JA.2: 927; JA.7: 3883. That is more than sufficient to show standing at summary judgment, as the panel majority correctly found.

II. This case presents important and recurring questions about the government's use of the state secrets privilege to obtain dismissal of lawsuits challenging executive branch actions.

Wikimedia's petition presents two questions of extraordinary importance: first, whether the executive branch can invoke the state secrets privilege to have suits dismissed in their entirety when the plaintiff can make its case without privileged evidence; and second, if such dismissals are ever permitted, must a court review the evidence to determine whether it supports a meritorious defense. The Fourth Circuit precedent Judge Diaz relied on conflicts with this Court's precedent and wrongly insulates ongoing constitutional violations from judicial review.

A. This Court's decisions do not permit state secrets dismissals under *Reynolds*.

The government argues that state secrets dismissals are permitted even when the plaintiff can make its case without secret evidence. Opp. 22-30. But this conflates the evidentiary privilege applied in

Reynolds, which allows litigation to proceed while excluding secret information, with the much narrower justiciability bar applied in *Totten* and *Tenet*, which permits dismissal of claims relating to secret government contracts. *Totten v. United States*, 92 U.S. 105 (1875); *Tenet v. Doe*, 544 U.S. 1 (2005). The misperception that these two doctrines are interchangeable pervades circuit case law and was decisive below. *See* App. 54-58a; Pet. 24-25. Each of the government's arguments for the conflation of *Reynolds* and *Totten* fails.

First, the government claims that *General Dynamics Corp. v. United States*, 563 U.S. 478 (2011), "did not purport to limit the principle animating *Totten* and *Tenet* to government contract cases." Opp. 24. But the authority that *General Dynamics* cited for *Totten*/*Tenet* dismissals derived explicitly from the Court's power "to fashion contractual remedies in Government-contracting disputes." 563 U.S. at 485-91. As the Court explained, when a person enters into a secret contract with the government, they "assume[] the risk that state secrets [will] prevent the adjudication of claims of inadequate performance." *Id.* at 490-91. These contract-law principles have no application here.

Second, the government's contention that *Tenet* expanded *Totten* beyond contract claims is a red herring, because *Tenet* clearly restricted the doctrine to claims (of any kind) arising out of a secret espionage relationship. Opp. 24-25. The Court in *Tenet* distinguished *Reynolds*' evidentiary rule and described *Totten*'s justiciability doctrine as barring all claims "where success depends upon the existence of [plaintiffs'] secret espionage relationship with the

Government." *Tenet*, 544 U.S. at 8. That is obviously not this case.

Third, the government repeatedly and misleadingly cites *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981), as a state secrets case. It was not. It merely interpreted a statute that permitted the government to withhold environmental impact studies relating to a putative nuclear weapons storage facility. *Compare* Opp. 25-26, *with Weinberger*, 454 U.S. at 142-46. The Court held that, as a result, plaintiffs could not establish whether the Navy had in fact completed such a study. *Id.* at 146-47. *Weinberger* mentioned *Totten* as a "similar situation," but only by way of analogy. *Id.* The Court did not extend *Totten*; it simply applied the statute.

The fact is that this Court has *never* allowed dismissal on state secrets grounds in a case not involving a secret government contract.[4]

B. Even if dismissals are permitted in rare circumstances, the court must review the secret evidence ex parte and in camera before dismissing based on claims that the government would have a secret defense.

Even if the Court were to hold that state secrets dismissals are sometimes permitted where a plaintiff can make its case on the public record, the lower courts are in conflict about what the government must

[4] *FBI v. Fazaga*, 142 S. Ct. 1051, 1062 (2022), acknowledged that dismissal may be appropriate in spy-contracting cases, but did not reach the questions presented here.

show to obtain dismissal. Pet. 25-33. That division is squarely presented by this case and warrants this Court's review.

The government first contends that the threshold state secrets issue in this case "does not pertain to a government 'defense,'" and instead concerns Wikimedia's standing. Opp. 27-28. But that is incorrect. The majority below held that Wikimedia made a prima facie showing of standing based on public evidence. Judge Diaz held that "any valid defense" would implicate privileged materials, and that further litigation of this "central" issue would present an "unjustifiable risk of disclosure." App. 56-57a. But the "so central" test is inappropriate where, as here, only the government's case, not the plaintiff's, would implicate privileged information. Pet. 30. Instead, the valid-defense test applies, so that claims of secrecy are not misused to evade court review where the plaintiff could make its case on the public evidence.[5]

Second, the government argues that any ex parte and in camera review would be at odds with the state secrets privilege. Opp. 28-29. But the privilege has never been an absolute bar to in camera judicial review of secret evidence. *Reynolds* itself authorizes courts to review the purportedly privileged evidence in certain circumstances. 345 U.S. at 9. In this very case, as in virtually every modern state secrets case, the government submitted classified declarations to

[5] The government errs in arguing that Wikimedia focuses "only" on the valid-defense rule. Opp. 27. The Petition plainly encompasses a challenge to the "so central" ground cited by Judge Diaz, because it rested on the same purportedly secret defense. Pet. i, 30-31.

support its assertion of privilege. Moreover, the sensitive evidence here is no different from the type of information that Article III judges review in camera and ex parte when considering FISA applications and motions to suppress evidence obtained under FISA. There is no reason to believe courts cannot reliably do here what they do in these other settings.

Third, the government objects that a court should not assess the merits of the government's secret defense. Opp. 28-29. It is true that the *Reynolds* privilege, properly applied, should result only in the exclusion of evidence—not a disposition of the merits. Pet. 20-25. But if it is ever permissible to grant outright dismissal based on a purportedly secret defense, court review and evaluation of the evidence is the only way to maintain "[j]udicial control over the evidence in a case," which "cannot be abdicated to the caprice of executive officers." *Reynolds*, 345 U.S. at 9-10; *see In re Sealed Case*, 494 F.3d 139, 149-50 (D.C. Cir. 2007).

Fourth, there is no basis to believe that merely establishing Wikimedia's standing would require the disclosure of state secrets. The Fourth Circuit has already held that Wikimedia presented enough public evidence of its standing to proceed—and the government does not argue that its holding revealed state secrets.

To rule in Wikimedia's favor on standing, the district court need only find that, as of 2015, it was more probable than not that some of Wikimedia's trillions of communications were being copied and

reviewed.[6] Given the government's own disclosures about Upstream surveillance, that finding would not reveal any secrets. The record is clear that (1) the government systematically monitors at least one international circuit in the United States, and (2) Wikimedia sends voluminous Internet traffic over *every* international circuit in the United States. App. 106a. As Judge Motz recognized, the details of the government's surveillance—*e.g.*, the identities of its targets, the specific geographic locations where Upstream is conducted, and the participating companies—are irrelevant and would not be disclosed by a ruling on standing. App. 65a.

The government claims that Wikimedia's "whole object" is to "inquire into . . . state secrets." Opp. 29. But because of the government's official disclosures about Upstream surveillance, Wikimedia can establish its standing *without* inquiring into state secrets. The fact that certain details of a surveillance program are secret cannot preclude a court's review of the public record, or its power and duty to reach a conclusion—based on government disclosures—about the likelihood of a plaintiff's injury.[7]

Finally, the government's invocation of the privilege in suits where it is not a party is fully consistent with Petitioner's position. Opp. 30. In these suits, the traditional *Reynolds* rule should apply: the privileged evidence is excluded, whether it supports a

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[6] Indeed, it would be enough for the court to find it more probable than not that Wikimedia faced a substantial risk of surveillance. *See* Part I.B, *supra*.

[7] If the district court were to find the government's defense valid, it could issue a redacted opinion that does not reveal to Wikimedia or to the public the specific basis for its holding.

claim or a defense, and the litigation goes on without it. *See Gen. Dynamics*, 563 U.S. at 485. Petitioner has no objection to that approach; indeed, that is the approach it urges here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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