Nos. 09-1298 & 09-1302

In the Supreme Court of the United States

GENERAL DYNAMICS CORP.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

THE BOEING CO.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to The Court Of Appeals For The Federal Circuit

BRIEF OF THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The Constitution Project is an independent nonprofit organization that seeks bipartisan solutions to pressing constitutional issues. The Project brings together policy experts, legal scholars, and former government officials and judges from across the political spectrum to formulate, issue, and promote recommendations for policy reform. The Project's Liberty and Security Committee works to ensure that we protect civil liberties as well as national security.

In May 2007, members of the Liberty and Security Committee issued a report entitled *Reforming the State Secrets Privilege* (May 31, 2007).[2] More recently, the Constitution Project issued a report outlining specific recommendations for the Obama Administration and Congress regarding pressing national security issues (*Liberty and Security: Recommendations for the Next Administration and Congress* (Nov. 18, 2008)), as well as a report about over-classification within the Executive Branch (*Reining In Excessive Secrecy: Recommendations*

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The docket in this case reflects the parties' blanket consent to the submission of *amicus* briefs.

[2] HTTP addresses for this and other material we cite are included in the table of authorities.

For Reform Of The Classification And Controlled Unclassified Information Systems (July 16, 2009)).

The first two of these reports examine the state secrets privilege formulated by this Court in *United States* v. *Reynolds*, 345 U.S. 1 (1953). They express concern at how the privilege has been expanded in recent years and recommend reforms to restore the independent role of the courts in evaluating privilege claims. The Government has invoked the privilege more frequently and in more kinds of cases than ever before. And the lower courts—including the Federal Circuit in this case—have broadened the privilege so that, rather than simply protecting particular pieces of sensitive evidence from public disclosure, it now operates to shield the Government from accountability for violations of the Constitution, laws, and treaties of the United States. The bipartisan group of professionals who have endorsed the Constitution Project's efforts believes that, as a result, a thorough reexamination of the privilege by all three branches of government is in order. This case affords an opportunity for this Court to begin that important work.

SUMMARY OF ARGUMENT

This case is the Court's first meaningful encounter with the state secrets privilege since it first created the privilege in *Reynolds* more than a half century ago. Much has changed in that time. We have learned that *Reynolds* itself was built on a false foundation—the supposedly secret military evidence at issue there was in fact nothing more than evidence of the Government's negligence. And, in the absence of additional guidance from this Court, the Executive Branch and the lower courts have gradual-

ly expanded the privilege from a limited evidentiary doctrine to a powerful litigation weapon that allows the Government to eradicate entire claims and defenses. This expansion threatens the separation of powers and has pernicious consequences for the rule of law. Indeed, in recent years, both Congress and the President have begun to recognize the dangers that the privilege poses and have proposed reform. But Congress has yet to enact any corrective legislation, and the Executive's new guidance is extremely limited. Thus, far from obviating action by this Court, those efforts only underscore the pressing need for the Court to narrow the state secrets privilege and restore it to its proper sphere. The privilege is judge-made law, after all, and the Court is the institution best suited to fix these problems.

This case presents the Court with an opportunity to rethink the privilege for a new era, one in which government secrecy has increased, the privilege has become far more prominent, and the courts have more experience handling confidential materials. The Court should hold, first, that the courts must actually examine the evidence at issue *in camera* before ruling on a privilege claim. The failure to take this simple step in *Reynolds* allowed the Government to perpetrate a fraud that has haunted the privilege for over a half century. Second, the Court should make clear that the privilege does not give license to dismiss entire cases, claims, or defenses at the outset of litigation. Federal courts have various tools to let litigation proceed even where the privilege is invoked, and they must use those options if at all possible, rather than allowing privilege invocations to terminate the adjudication more-or-less automatically. At a minimum, the Court must reject the result endorsed by the Federal Circuit here, that the privi-

lege can be used to block a litigant from defending itself against a Government claim. The state secrets privilege, like other evidentiary privileges, cannot be invoked simultaneously as shield and sword.

By confining the privilege in these ways, the Court will enable the Government to protect its secrets without unduly trammeling citizens' rights to pursue their claims or improperly immunizing the Executive against meaningful judicial review.

ARGUMENT

I. The Court Should Clarify *Reynolds* And Give Guidance To The Lower Courts About How To Apply The State Secrets Privilege.

In the more than 50 years since this Court last confronted the state secrets privilege, the privilege has gone from a relatively obscure doctrine to a centerpiece of the Executive Branch's litigation strategy in an increasingly wide and important range of cases. Without additional guidance from this Court, lower courts have tended to defer to the Government's claims of privilege, threatening to tilt the scale too much in favor of secrecy at the expense of justice and judicial independence.

A. The history and evolution of the privilege illustrates the need for reform.

This Court created the modern state secrets privilege when it decided *United States* v. *Reynolds* in 1953. Although the Court tried to balance national security concerns with adherence to the rule of law, *Reynolds* was built on what by all appearances was a brazen act of deception—or at the very least, a misguided and unchecked effort to avoid embarrassment. The abuse that the Court unwittingly sanc-

tioned in *Reynolds* illustrates the dangers of too much deference to the Executive. Those dangers have been compounded in more recent years by the Government's increasing willingness to assert the privilege and by the increasing unwillingness of lower courts to provide a real check on those assertions.

1. Abuse of the privilege has been a problem from the very start.

Decided at the height of the Cold War, *Reynolds* was the first case in which the Court recognized a formal evidentiary privilege based on the protection of military or state secrets. Only decades later, however, was it revealed that in fighting for the privilege in *Reynolds*, the Government was not protecting national security, but was trying to cover up its own negligence. That cover-up taints *Reynolds*'s legacy—and that of the privilege it endorsed.

Reynolds involved a suit against the federal Government by the widows of three civilian engineers killed in the crash of an Air Force B-29 aircraft. The plaintiffs claimed that the crash was caused by government negligence and sought discovery of the Air Force's official accident investigation report, which they believed would corroborate that claim. The Government declined to produce the report, asserting that its disclosure would jeopardize national security. The Air Force claimed that the B-29 was on a secret mission to test classified electronic equipment. The district court was skeptical and ordered that the documents be made available for *in camera* review. When the Government refused, the district court found in favor of the plaintiffs, and the court of appeals affirmed. *Reynolds*, 345 U.S. at 3-6.

The Government pressed on, and ultimately persuaded this Court to sustain its privilege claim. The Court began by observing that "[j]udicial experience with the privilege which protects military and state secrets has been limited in this country." *Id.* at 7. The Court then described a "formula of compromise." *Id.* at 9. On the one hand, judges are the ultimate arbiters of "whether the circumstances are appropriate for the claim of privilege" and "[j]udicial control over the evidence * * * cannot be abdicated to the caprice of executive officers." *Id.* at 8-10. On the other hand, the Court was not willing to "go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case." *Id.* at 10. The Court suggested that "[i]t may be possible to satisfy the court, from all the circumstances of the case, that 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." *Ibid.*

Applying this framework, *Reynolds* held that the Government should not have been ordered to produce the accident report. The Court concluded that the plaintiffs' need for the secret documents "was greatly minimized by an available alternative, which might have given respondents the evidence to make out their case without forcing a showdown on the claim of privilege." *Id.* at 11; see also *ibid.* ("it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets"). The Court remanded to allow the plaintiffs to try to make their case without the privileged documents. *Id.* at 12.

Notably, the Court issued its ruling without ever actually reviewing the documents that the Air Force had claimed as privileged. The Court instead took the Government at its word that the report was highly sensitive and referred to "the secret electronic equipment which was the primary concern of the mission." *Id*. at 10.

Thus it was that for more than 50 years the Government's account of the sensitivity of the accident report went unquestioned. But in 1996, the Air Force at last declassified that report and, in 2000, the daughter of one of the civilians killed in the crash discovered the document on the Internet. See *Reforming the State Secrets Privilege* at 10-11; Louis Fisher, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE 166 (2006). It was immediately obvious that the report, which the Government had so steadfastly insisted contained classified intelligence information, included nothing of the sort. The report did not mention the B-29's secret mission or any secret equipment on board. *Id.* at 167–169. Instead, it revealed that the crash was the result of the Air Force's negligence—just as the plaintiffs had claimed all along. See *Herring* v. *United States*, 2004 WL 2040272, at *8 (E.D. Pa. Sept. 10, 2004), aff'd, 424 F.3d 384 (3d Cir. 2005).

It is difficult to avoid the conclusion that the Government fought so hard to avoid disclosing the report—and misled several courts about its contents—*not* to protect national security, but simply to avoid embarrassment (and liability). But even if the impetus for secrecy in *Reynolds* was not malevolent but simply stemmed from natural bureaucratic incentives, the point is that the courts easily can—and

should—serve as a critical check on the Executive's penchant for secrecy. Had this Court or the lower courts actually inspected the challenged evidence, the Government's ruse would have been exposed and justice could have been done. Instead, *Reynolds*'s remarkable after-history confirms that, absent meaningful judicial oversight, the state secrets privilege offers the Executive a convenient tool for using dubious claims of national security to avoid scrutiny of its actions. The shadow of *Reynolds* haunts the privilege to this day.

2. The potential for abuse of the privilege is equally serious today.

Unfortunately, the unwarranted secrecy illustrated by *Reynolds* does not represent an isolated incident. Government secrecy is a growth business, see, *e.g.*, *Reining In Excessive Secrecy* at 1-3; Dana Priest & William Arkin, *Top Secret America: A hidden world, growing beyond control*, WASH. POST, July 19, 2010, at 1, and the opportunities for improper classification and misuse of the state secrets privilege are greater than ever.

Senior executive branch officials themselves have estimated that somewhere between 50 and 90 percent of documents classified for national security purposes should never have been so classified.[3] The

[3] See *Emerging Threats: Overclassification and Pseudo-classification: Hearing Before the Subcommittee on National Security, Emergency Threats and International Relations of the H. Committee on Government Reform*, 109th Cong. 115 (Mar. 2, 2005) at 120-121, 125 (prepared statement of Thomas Blanton, Executive Director, National Security Archive) (citing Carol Haave, Deputy Undersecretary of Defense for Counterintelligence and Security in the George W. Bush administration, for the 50% estimate, and Rodney McDaniel, executive secretary of

bureaucratic tendency to overclassify has only increased in recent years, which have seen the promulgation of secret laws[4] and even secret legal theories.[5] Classification is only increasing. According to the Information Security Oversight Office, the Government made 9 million new classification decisions in 2001, 11 million in 2002, 14 million in 2003, 15 million in 2004, 14 million in 2005, 20 million new classification decisions in 2006, and a breathtaking 54 million decisions in 2009. Declassification, on the other hand, has remained stagnant.[6]

This is perhaps not surprising. There are bureaucratic incentives to over-classification, among

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the National Security Council under President Reagan, for the 90% estimate). See also *id*. at 121 ("It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but with governmental embarrassment of one sort or another.") (emphasis omitted) (quoting Erwin Griswold, Editorial, *Secrets Not Worth Keeping: The Courts and Classified Information*, Wash. Post, Feb. 15, 1989, at A25).

[4] Steven Aftergood, *The Secrets of Flight: Why Transportation Security Administration Guards Don't Have To Tell You What They Won't Tell You*, www.slate.com, Nov. 18, 2004, (describing fact that certain federal regulations governing airport security have been classified as "sensitive security information" and therefore may not be disclosed); see also Harold Relyea, *The Coming of Secret Law*, 5 GOV'T INFO. Q. 97 (1988).

[5] Editorial, *Injustice, in Secret*, WASH. POST, Feb. 21, 2005, at A26 (describing how the Justice Department urged dismissal of *United States* v. *Abu Ali*, 395 F. Supp. 2d 338 (E.D. Va. 2005), on the basis of a secret argument, claiming that the "legal argument itself cannot be made public without disclosing the classified information that underlies it").

[6] See INFORMATION SECURITY OVERSIGHT OFFICE, REPORT TO THE PRESIDENT 2009, at 10 (2010).

them that secrecy is a tried and true strategy to evade accountability and, sometimes, the law. See *Reining In Excessive Secrecy* at 1 ("excessive secrecy and over-classification remove vast amounts of information from public scrutiny, shielding misconduct and impeding oversight"). That appears to be reflected in the sheer volume (and increasing number) of state secrets privilege claims in recent years. By all measures, the Government's use of the privilege has increased dramatically. In a 2007 article, Professor Robert Chesney reviewed all the published cases since *Reynolds* in which the Executive invoked the state secrets privilege. Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007). The numbers showed a striking uptick in the use of the privilege since the 1970s. While the privilege was asserted only twice between 1961 and 1970 and 14 times between 1971 and 1980, it was asserted 23 times between 1981 and 1990, 26 times between 1991 and 2000, and 20 times between 2001 and 2006. *Id.* at 1315; see also, *e.g.*, Amanda Frost, *The State Secrets Privilege and Separation of Powers,* 75 FORDHAM L. REV. 1931, 1939 (2007).

3. In the absence of additional guidance from this Court, lower courts have shown increasing willingness to avoid meaningful scrutiny of privilege claims.

With ever more information subject to classification and with the state secrets privilege a more important part of the Government's litigation arsenal, the need for judicial vigilance against abuse of the privilege is greater than ever. But because this Court has not revisited the privilege in any meaningful way since *Reynolds*, the lower courts have struggled with

how to apply the *Reynolds* framework in an ever-widening variety of cases, including those alleging racial discrimination,[7] retaliation against whistleblowers,[8] misconduct by the CIA,[9] and extraordinary rendition.[10] The results are unsettling.

The government's invocations of the privilege have been largely successful. Of the 89 opinions that Professor Chesney catalogued, the courts issued rulings on the merits in 78 cases. In 69 of those cases, the court sustained the privilege claim in whole or in part, and in 9 cases, it denied the claim or found the information was no longer secret (i.e., time had passed and the information was no longer classified). See Chesney, 75 Geo. Wash. L. Rev. at 1315-32.

Particularly significant is the fact that the Executive Branch has increasingly used the privilege not just to wall off certain evidence from discovery, but to try to dismiss entire cases or claims.[11] Professor Chesney found that the Executive invoked the

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[7] *Sterling* v. *Tenet*, 416 F.3d 338 (4th Cir. 2005).

[8] *Edmonds* v. *U.S. Dep't of Justice*, 323 F. Supp. 2d 65, 67 (D.D.C. 2004), aff'd, 161 F. App'x 6 (D.C. Cir. 2005).

[9] *Black* v. *United States*, 62 F.3d 1115, 1118-19 (8th Cir. 1995).

[10] *Mohamed* v. *Jeppesen Dataplan, Inc.,* 614 F.3d 1070 (9th Cir. 2010) (en banc); *El-Masri* v. *United States*, 479 F.3d 296 (4th Cir. 2007);

[11] See, *e.g., Sterling*, 416 F.3d at 341, 347-349; *Trulock* v. *Lee*, 66 F. App'x 472, 473 (4th Cir. 2003) (per curiam); *Black*, 62 F.3d at 1116-1117, 1120; *Bowles* v. *United States*, 950 F.2d 154, 155 (4th Cir. 1991); *In re Under Seal*, 945 F.2d 1285, 1286-1288 (4th Cir. 1991); *Zuckerbraun* v. *Gen. Dynamics Corp*., 935 F.2d 544, 545 (2d Cir. 1991); *Weston* v. *Lockheed Missiles & Space* Co., 881 F.2d 814, 815-816 (9th Cir. 1989); *Fitzgerald* v. *Penthouse Int'l, Ltd*., 776 F.2d 1236, 1243 (4th Cir. 1985); *Edmonds*, 323 F. Supp. 2d at 65.

privilege to seek outright dismissal in five cases between 1971 and 1980, out of 14 cases during that period in which the Executive asserted the privilege at all (36% of invocations); 9 of 23 cases between 1981 and 1990 (39%); 13 of 26 cases between 1991 and 2000 (50%); and 15 of 20 cases between 2001 and 2006 (75%). Chesney, 75 GEO. WASH. L. REV. 1249 (App.); see also Frost, 75 FORDHAM L. REV. at 1939 ("the Bush Administration * * * has sought dismissal [based on the state secrets privilege] in ninety-two percent more cases per year than in the previous decade"). This new expansive use of the privilege continues today, and contrasts with cases in prior decades in which the privilege was applied narrowly to block only specific information requested in discovery, with the litigation otherwise being allowed to proceed.[12]

In this case, for example, the Federal Circuit applied the privilege to strip petitioners of their right to present a "superior knowledge" defense to the Government's default termination claim. As a result, petitioners were precluded from mounting a meaningful defense against a Government claim that, if successful, carried a forfeiture penalty of over $5 billion. The court of appeals expressly rejected the argument that the Executive could not affirmatively invoke the privilege to deprive a private litigant of an otherwise valid defense against a Government claim. The court

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[12] See, *e.g., Northrop Corp.* v. *McDonnell Douglas Corp.*, 751 F.2d 395 (D.C. Cir. 1984); *Ellsberg* v. *Mitchell*, 709 F.2d 51, 59-60 (D.C. Cir. 1983); *Halpern* v. *United States*, 258 F.2d 36, 44 (2d Cir. 1958); *Am. Tel. & Tel. Co.* v. *United States*, 4 Cl. Ct. 157, 159, 162 (Cl. Ct. 1983); *In re "Agent Orange" Prod. Liab. Litig.*, 101 F.R.D. 97, 98 (E.D.N.Y. 1984); *O'Keefe* v. *Boeing Co.*, 38 F.R.D. 329, 336 (S.D.N.Y. 1965).

thus allowed the Government to maintain its litigation claim and block any discovery of evidence that might have undermined the validity of that claim. Pet. App. 207a-210a.

Even more broadly, in two prominent recent cases challenging extraordinary rendition, courts relied on the privilege to dismiss the plaintiffs' claims before any discovery was taken. In *El-Masri* v. *United States*, 479 F.3d 296 (4th Cir. 2007), the plaintiff alleged that he was mistakenly held in U.S. custody for months while he was beaten, drugged, interrogated, and placed in solitary confinement at a CIA "black site" in Afghanistan. The Government asserted the privilege, and the Fourth Circuit upheld the dismissal of the case at the pleadings stage. It did so without even giving the plaintiff an opportunity to try to prove his case using alternative, unclassified sources of evidence. *Id.* at 313; see also, *e.g.*, Steven D. Schwinn, *The State Secrets Privilege in the Post-9/11 Era*, 30 PACE L. REV. 778 (2010).

The Ninth Circuit accepted a similarly aggressive expansion of the privilege in *Mohamed* v. *Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (en banc). There, a bare 6-5 majority applied the privilege to affirm dismissal of a suit at the pleadings stage alleging that private contractors knowingly participated in an illegal CIA rendition program. The en banc court rejected the panel's ruling that the privilege applies only "to prevent discovery of the evidence itself" and "cannot be invoked to prevent a litigant from persuading a jury of the truth or falsity of an allegation by reference to non-privileged evidence." *Mohamed* v. *Jeppesen Dataplan Inc.,* 563 F.3d 992, 1005 (9th Cir. 2009), rev'd 614 F.3d 1070. Whereas the panel and the en banc dissent would

have required the district court to make an independent assessment of whether the privilege should apply to the evidence—and given the plaintiffs a chance to prove their case without evidence that was properly deemed privileged—the en banc majority dismissed the litigation entirely. *Jeppesen*, 614 F.3d at 1093; see also *id.* at 1095 (Hawkins, J., dissenting).

All of this suggests a disturbing evolution of the state secrets privilege from a limited rule of evidence to what is often an absolute bar to litigation and from a narrow protection for truly confidential materials to a powerful thumb on the scale that the Executive is free to deploy without serious judicial oversight. These developments are not consistent with, much less compelled by, *Reynolds*, which expressly instructed the lower courts to try to find ways other than the privileged evidence for the plaintiffs to present their claims. See 345 U.S. at 11. Given its proven potential to erode accountability and deprive righteous litigants of their day in court, the Court should use this case to reevaluate the *Reynolds* framework and to confine the privilege to its appropriate sphere.

B. Improper application of the privilege undermines separation of powers.

Serious constitutional concerns are also raised by this pattern of increasingly expansive claims of state secrets privilege and increasing judicial deference to such claims. An overly broad application of the privilege undermines the role of the courts in our constitutional system and erodes the separation of powers.

"Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton* v. *City of New York*, 524 U.S. 417,

450 (1998) (Kennedy, J., concurring). As Madison explained, "the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." THE FEDERALIST No. 51, at 321-22 (C. Rossiter ed. 1961); see also THE FEDERALIST No. 47, at 301 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, * * * may justly be pronounced the very definition of tyranny.").

One critical aspect of our system of divided government is that the federal courts have a responsibility to adjudicate the cases that come before them. See, *e.g., Colorado River Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976) (describing "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"). "Article III establishes a 'judicial department' with the 'province and duty * * * to say what the law is' in particular cases and controversies." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) ((quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). 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); *Morrison* v. *Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). An unduly expansive state secrets privilege subverts these constitutional values.

One problem occurs when courts rubber stamp privilege claims without undertaking their own examination of the evidence at issue. There is, to be sure, a legitimate place for the protection of secret

information. The President has constitutional authority "to classify and control access to information bearing on national security" and to withhold it "from unauthorized persons in the course of executive business." *Dep't of Navy* v. *Egan*, 484 U.S. 518, 527 (1988). But the Executive cannot simply dictate that certain evidence is categorically excluded from the judicial process. Determinations about what evidence is admissible in a given case necessarily affect the outcome of litigation, and the Judiciary thus has a constitutional duty to bring its own judgment to bear when a coordinate branch seeks to withhold evidence from a legal proceeding. 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 (1872).

To discharge their duty, judges must be able to review the evidence subject to a claim of privilege and determine for themselves the merits of that claim. While the courts should give respectful consideration to the President's views, they must have the final say. For a court to declare that evidence is privileged, without any independent examination and merely on the Executive's say-so, abdicates that responsibility and improperly cedes control over this critical aspect of judicial procedure.

An even more serious separation-of-powers problem occurs when the state secrets privilege is used to secure the outright dismissal of entire claims—or, as in this case, the rejection of entire defenses. Applying the privilege in that way lets the Executive dictate not just the evidence that can be used, but the more basic question whether a litigant can maintain its claims and defenses at all. That effectively gives ex-

ecutive officers the power to prescribe the outcome of individual cases—an affront to Article III's guarantee of an independent judiciary, and an ironic one given the federal courts' historical role in protecting individuals against government abuse.

In short, an overly broad application of the privilege circumscribes the independence of the courts within their constitutional sphere, allowing the Executive to foreclose judicial remedies for those who have suffered legal wrongs. *Hepting* v. *AT&T Corp.*, 439 F. Supp. 2d 974, 995 (N.D. Cal. 2006) (to "defer to a blanket assertion of secrecy" would "abdicate" the court's "constitutional duty to adjudicate the disputes that come before it"). In consequence, "the privilege becomes a shield behind which the government may insulate unlawful behavior from scrutiny and redress by citizens." *Halkin* v. *Helms*, 598 F.2d 1, 13-14 (D.C. Cir. 1978) (Bazelon, J., dissenting).

C. Both Congress and the President have begun to recognize the need for reform of the state secrets privilege.

In recent years, both Congress and the Executive have begun to acknowledge that the state secrets privilege needs reform. Congress has proposed (but not yet enacted) a legislative overhaul of the procedures governing the privilege, while the Obama Administration has issued a new set of guidelines that the Executive Branch is supposed to follow before asserting the privilege. These efforts are encouraging, as they indicate the widespread recognition that the privilege has strayed from its foundations and become destabilizing to our constitutional system. But they certainly do not obviate the need for this Court to do its part to keep this judge-made doctrine confined to its proper sphere. To the contrary, these li-

mited reform efforts only underscore why the Court should use this occasion to begin refashioning the state secrets privilege for the 21st century.

1. Recent legislative efforts provide a blueprint for reforming the privilege.

In 2008 and 2009, bills to reform the state secrets privilege were introduced in both the House and Senate.[13] The bills included a number of significant procedural and substantive features that offer a model this Court might follow in adjusting the *Reynolds* framework.

The Senate bill would expressly bar use of the privilege as grounds for dismissing a case. S. 417 § 4055. It also would require courts to actually review each "specific item of evidence" for which the Government invoked the privilege to determine whether the privilege claim is valid. *Id.* § 4054(e)(1). Before the court could accept a privilege claim, it would have to find that the evidence "contains a state secret" and that there is "no possible means of effectively segregating it from other evidence." *Ibid.* If the court finds the evidence privileged, it would have to determine whether "it is possible to craft a non-privileged substitute * * * that provides a substantially equivalent opportunity to litigate the claim or defense." *Id.* § 4054(f). Where the United States is the defendant and refuses to provide a non-privileged substitute, the court would be instructed to "resolve the disputed issue of fact or law to which the evi-

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[13] See State Secrets Protection Act, S. 2533, 110th Cong. (2008); State Secret Protection Act of 2008, H.R. 5607, 110th Cong. (2008); State Secrets Protection Act, S. 417, 111th Cong. (2009); State Secret Protection Act of 2009, H.R. 984, 111th Cong. (2009).

dence pertains in the non-government party's favor." *Id*. § 4054(g).

The progress of this legislation[14] signals a recognition by many in Congress that meaningful reform of the state secrets privilege is warranted in the absence of action from this Court. The *Reynolds* framework, established over a half century ago, had not been updated to account for the Executive's more aggressive invocations of the privilege or the federal courts' increased experience in dealing with classified materials (discussed in greater detail below, *infra* pp. 25-27). The legislation was intended to fill that void. Its goal was to restore a proper balance between the legitimate needs of secrecy and the rights of litigants, especially those seeking to hold the Government accountable when it engages in misconduct.[15]

While these bills present a compelling framework for reforming the privilege, they have not been enacted and their prospects are uncertain. In any event, the possibility of legislative action should not be a deterrent to meaningful reevaluation of the privilege by this Court. The state secrets privilege is judge-made law, and the Court is the institution best

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[14] The Senate Judiciary Committee reported favorably on S. 2533 in 2008, and the House Judiciary Committee reported favorably on H.R. 984 in 2009.

[15] See Constitution Project Letter to Senate Judiciary Committee Urging Adoption of S. 417, the State Secrets Protection Act, Without Amendments, at 1 (June 3, 2009) ("It would restore checks and balances by restoring the role of our independent courts in evaluating state secrets claims."); see also Constitution Project Statement in Support of the State Secret Protection Act (H.R. 984) Submitted to the House Judiciary Subcommittee on the Constitution (June 4, 2009).

positioned to correct its misapplication. But the salutary principles articulated in the proposed legislation can and should guide the Court as it takes up the privilege in this case (and in future cases).

2. The recent Attorney General guidelines only confirm the need for this Court to reexamine the Reynolds *framework.*

Reflecting similar concerns that the state secrets privilege has been abused and unduly expanded, the Attorney General recently issued a new set of guidelines to regulate the Executive Branch's use of the privilege. See Memorandum from Eric Holder, Attorney Gen., to Heads of Executive Dep'ts and Agencies and Heads of Dep't Components (Sept. 23, 2009). While an important first step (and a welcome acknowledgment from the Executive of some of the problems with the privilege), these Guidelines only reinforce the need for this Court to impose similar, but legally binding, constraints—and to further clarify the critical role of courts in evaluating privilege claims.

The new Guidelines address the circumstances under which the Executive will assert the state secrets privilege in litigation. They tighten the standards for privilege assertions, including requiring multiple levels of internal review before the claim may be invoked, and provide for increased public reporting of privilege claims. *Ibid.* In an effort to prevent the kind of abuse that occurred in *Reynolds*, the Guidelines expressly provide that the Department of Justice will not invoke the privilege for an improper purpose. *Id.* at 2. The Guidelines provide the following standard for when to assert the privilege:

> The Department will defend an assertion of the state secrets privilege ("privilege") in litigation when a government department or agency seeking to assert the privilege makes a sufficient showing that assertion of the privilege is necessary to protect information the unauthorized disclosure of which reasonably could be expected to cause significant harm to the national defense or foreign relations ("national security") of the United States.

Id. at 1.

While these Guidelines are a step in the right direction, they represent a very small first step. Although the Guidelines establish a standard for when the privilege will be invoked, they do not address what happens once the Government does assert the privilege. They say nothing about whether the Justice Department will consent to having courts independently review evidence that is claimed to be privileged. Nor do the Guidelines require Executive Branch officials to explain whether alternatives to the allegedly privileged material are available or require the Government to provide (unprivileged) substitute evidence. Most troubling, even under the new policy the Executive continues to assert that the privilege may be used to scuttle cases at the pleading stage, before the opposing party has a chance to prove its case using non-privileged evidence.

These are crucial issues. Judges are hard-pressed to determine whether a privilege assertion is justified if they cannot actually examine the evidence at issue. But the Guidelines do nothing to ensure that the Executive Branch will facilitate that process. Similarly, the use of the privilege to foreclose entire cases or claims, with no meaningful consideration of

alternative modes of proof, is perhaps the most ominous expansion of the privilege that has occurred since *Reynolds*. The fact that the Guidelines preserve the Executive's claim that the privilege may be used to completely foreclose litigation without discovery or any independent judicial review demonstrates that they are insufficient to restore the privilege to its proper scope and role.

Finally, the Guidelines are neither legally binding nor judicially enforceable. The President or the Attorney General is free to depart from them without consequence, and a new administration could revoke them at will. Thus, while such internal self-regulation by the Executive is not insignificant, it is no substitute for clear instruction from this Court about how the privilege may appropriately be used.

In short, the Guidelines only reinforce the importance of the Court using this case to look afresh at the state secrets privilege. By reflecting on the judicial experience of the past half-century, along with the recent reforms proposed by the other branches, the Court has an opportunity to create a new framework for the privilege, one adapted to the needs of the present age. It is to the contours of this refined conception of the privilege that we now turn.

II. The Court Should Make Clear That The State Secrets Privilege Is A Narrow Evidentiary Privilege That Requires Independent Evaluation By The Courts And Leaves Room For Litigants To Pursue Their Claims Or Defenses By Alternative Means.

In refining the state secrets privilege, the Court should focus on two guiding principles. The first is independent judicial examination of the evidence at

issue. See *Reforming the State Secrets Privilege* at i-ii. *Reynolds* itself illustrates the dangers that follow from abdicating this responsibility. The Court should revisit the privilege in light of what we have learned about the Government's deception in *Reynolds* itself—as well as about the bureaucratic incentives for over-classification more generally—and make clear that judges must inspect the evidence claimed to be privileged before allowing the Executive to withhold it from the judicial process. Courts are fully competent to make those determinations without threatening national security, and they have a variety of procedural tools at their disposal to help them do so.

The second guiding principle is that the privilege is a narrow rule of evidence, not a justiciability doctrine or an affirmative litigation weapon to be wielded by the Government. Consequently, the result of a valid privilege invocation should not be the automatic dismissal of a litigant's claims or defenses. The courts must instead craft appropriate procedures to allow litigation to proceed whenever possible without compromising privileged information, and judges must make an independent assessment of whether there is enough non-privileged evidence for the litigation to proceed. See *Reforming the State Secrets Privilege* at 12-13. These principles are particularly powerful in a case like this, where the Executive seeks to deprive a private party of a defense against a Government claim. The Court should make clear that the privilege simply cannot be used in that way.

A. Judges should always review the evidence before ruling on a privilege claim.

It seems intuitive to say that before ruling on a state secrets privilege claim, the court should actual-

ly examine the evidence that the Government claims is privileged. And, indeed, in many state secrets privilege cases, courts do just that.[16] But the question of *in camera* inspection has been clouded by *Reynolds*'s suggestion that this procedure is not always required—that in certain circumstances, judges may rule on privilege claims without even seeing the documents at issue. 345 U.S. at 10.

The time has come for the Court to revisit that aspect of *Reynolds* and make clear that judicial evaluation of the evidence is a prerequisite for a successful invocation of the state secrets privilege. "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." *ACLU* v. *Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980).[17] *Reynolds* itself illustrates that. As discussed above, the Court's willingness to uphold the privilege claim without conducting even a cursory examination of the allegedly privileged material allowed the Government to use the privilege to avoid embarrassment and conceal illegality, rather than to protect national security. The deception that oc-

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[16] See, *e.g., Linder* v. *Department of Defense*, 133 F.3d 17, 21 (D.C. Cir. 1998) ("In addition to reviewing the McNair declaration *in camera*, the district court examined the withheld documents."); *ACLU* v. *Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980); *Heine* v. *Raus*, 399 F.2d 785, 788 (4th Cir. 1968).

[17] 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—tools that are specifically authorized in the pending legislation (see, *e.g.*, S. 417 § 4054(d)(2); H.R. 984 § 6(b)), but which are in any event already well within judges' inherent powers.

curred in *Reynolds* could have been readily prevented by *in camera* review.

The promise of meaningful judicial review is the most effective way to ensure that the privilege is used appropriately, rather than as a cover for negligence or malfeasance. It 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. And, where a privilege claim is valid, putting the Government to its proof, rather than merely taking it at its word, makes the entire process more transparent and legitimate. It helps ensure litigants that the courts are respecting their interests even where the Government invokes national security, and that 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.

Moreover, *Reynolds*'s suggestion that courts should sometimes accede to the Executive's privilege assertions without verifying for themselves that the evidence is actually privileged was based on a false premise. The Court was concerned that disclosure of the evidence at issue *even to a judge alone* might itself destroy the privilege and jeopardize national security. The Court evidently was worried that the federal courts lacked the resources and experience to protect classified information. *Reynolds*, 345 U.S. at 10. But these concerns have proven unfounded, and the passage of time has rendered this aspect of *Reynolds* anachronistic.

Since *Reynolds*, federal courts have frequently been called upon to assess claims regarding access to classified information under a variety of statutes, in-

cluding the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B) & (b)(1), the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1805, and the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3. See also *Reforming the State Secrets Privilege* at 5. In these contexts, the courts are required to handle 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, this 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).

These developments have provided the federal judiciary with considerable experience dealing with classified information, and the courts have developed a number of tools for conducting *in camera* review of such materials. For example, a court may impose a protective order to limit disclosure of the information[18]; limit the hearing to attorneys with appropriate security clearances[19]; or, in some cases, conduct the entire hearing ex parte.[20] In addition, special

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[18] Such orders are common under CIPA. See, *e.g., United States* v. *Bin Laden*, 58 F. Supp. 2d 113, 116 (S.D.N.Y. 1999); *United States* v. *Rezaq*, 899 F. Supp. 697, 708 (D.D.C. 1995) (protective order provided "more than adequate procedural protections against public disclosure of classified information"); *United States* v. *Musa*, 833 F. Supp. 752, 758-61 (E.D. Mo. 1993);

[19] This procedure has been successfully used in some CIPA cases. See, *e.g., In re Terrorist Bombings of U.S. Embassies in East Africa*, 549 F.3d 146 (2d Cir. 2008); *United States* v. *Rezaq*, 156 F.R.D. 514 (D.D.C.1994).

[20] See, *e.g., United States* v. *Dumeisi*, 424 F.3d 566, 577 (7th Cir. 2005); *United States* v. *Gurolla*, 333 F.3d 944, 951 (9th Cir.

masters with the necessary security clearances can help courts evaluate information potentially harmful to national security.[21]

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.'"[22] 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."[23]

2003); *United States* v. *Yunis*, 867 F.2d 617, 620 (D.C. Cir. 1989).

[21] See, *e.g., In re "Agent Orange" Prod. Liab. Litig.*, 97 F.R.D. 427, 429 (E.D.N.Y. 1983) (special master appointed to review classified documents relevant to a class action brought by Vietnam War veterans); *In re United States Dep't of Defense*, 848 F.2d 232, 234 (D.C. Cir. 1988).

[22] Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability, Hearing before the S. Comm. on the Judiciary, 110th Cong. (Feb. 13, 2008) (prepared statement of Patricia Wald).

[23] *Ibid*. (prepared statement of William Webster).

In short, given what we now know about the tendency of the Executive to over-classify information and about the courts' competence to review classified information, there is no justification for any conception of the state secrets privilege that excludes *in camera* review of the evidence at issue.

B. A successful claim of privilege should not terminate a case or otherwise render claims non-justiciable.

The Court should also make clear that the state secrets privilege is a narrow rule of evidence—not a justiciability doctrine or a vehicle for scuttling a litigant's entire claim or defense.

That understanding of the privilege flows from *Reynolds* itself. *Reynolds* involved a concrete dispute over a concrete document. The Court ruled that the plaintiffs could not obtain and use that document, but in no way suggested that plaintiffs were barred from pursuing their claims using other evidence. To the contrary, the Court held that plaintiffs should have an opportunity to "adduce the essential facts * * * without resort to material touching upon military secrets" and remanded to allow them to do just that. *Reynolds*, 345 U.S. at 11. Thus, while the privilege formulated in *Reynolds* protects classified *evidence*, it does not and should not preclude litigants from pursuing their claims or defenses through other means. The *Reynolds* privilege, that is, is not an immunity doctrine or a rule about whether certain kinds of claims can be adjudicated in the first place.

By contrast, this Court has recognized that certain types of cases—"lawsuits premised on alleged espionage agreements"—are "altogether forbidden." *Tenet* v. *Doe*, 544 U.S. 1, 9 (2005). First formulated in

Totten v. *United States*, 92 U.S. 105 (1875), that rule is very narrow; it applies only in the "the distinct class of cases that depend upon clandestine spy relationships." *Tenet*, 544 U.S. at 10. The limit on *Totten*'s scope flows from its premise. The rule rests on the idea that prohibiting litigation over the substance of a clandestine employment relationship is an implied condition of the contract. *Id*. at 107 ("The secrecy which such contracts impose precludes any action for their enforcement."). Given *Totten*'s grounding in contract law, it does not extend to other cases where the party opposing the Government has not consented (even impliedly) to a bar on his right to pursue his claims.

Thus, in *Tenet* the Court expressly distinguished the "categorical *Totten* bar" from the "balancing of the state secrets evidentiary privilege." 544 U.S. at 10. The Court held that "the state secrets privilege and the more frequent use of *in camera* judicial proceedings simply cannot provide the absolute protection we found necessary in enunciating the *Totten* rule." *Id.* at 11. *Tenet* therefore confirms that the state secrets privilege is not to be conflated with the *Totten* bar. The two are distinct in scope and in operation. The privilege is a narrow evidentiary doctrine, not a categorical bar on certain kinds of litigation.

Nevertheless, as described above, lower courts have increasingly allowed the privilege to be used not simply to wall off particular evidence from discovery, but to block entire claims from even getting past the pleading stage. See, *e.g.*, *Jeppesen*, 614 F.3d 1070; *El-Masri*, 479 F.3d 296. In other cases, such as this one, the privilege has been used to strike entire claims and defenses that private litigants would otherwise have been able to pursue in litigation against

the Government. See Pet. App. 207a-210a; n.11, *supra*.

This expanded use of the privilege allows the Government to pull the plug on litigation even though the opposing party may be able to prove its claim or defense through alternative means. In consequence, the state secrets privilege is effectively being transformed into a broad justiciability doctrine, akin to the *Totten* bar. The Government is being allowed to use the privilege not to protect certain evidence, but to stop litigation in its tracks. This expansion of the state secrets privilege—one not sanctioned by any of this Court's decisions—poses serious dangers to our constitutional democracy. It lets the Executive effectively prescribe rules of decision in particular cases and thereby immunizes a wide swath of Government conduct from judicial review. The Court should make clear that this application of the privilege is impermissible.

Instead, under the proper conception of the privilege, a court's acceptance of a privilege claim after independently reviewing the evidence would be the first step in the analysis, not the last. Rather than dismissing the case outright, the court would be required whenever possible to craft appropriate procedures to allow the case to proceed without compromising the properly privileged information. In doing so, courts would not be writing on a blank slate. Since *Reynolds*, courts have developed various procedural innovations to allow litigation to proceed even when a case implicates state secrets. Using "creativity and care," these courts have employed "procedures which will protect the privilege and yet allow the merits of the controversy to be decided in

some form." *Fitzgerald* v. *Penthouse Int'l. Ltd.*, 776 F.2d 1236, 1238 n.3 (4th Cir. 1985).

One option is for the district court to order the Government to provide a non-privileged substitute for evidence covered by the privilege in situations where the court concludes that such a substitute would be feasible. That procedure has been used with considerable success under CIPA, which requires the Government to "provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." 18 U.S.C. App. 3 § 6(c)(l); see, *e.g., United States* v. *Rezaq*, 134 F.3d 1121, 1143 (D.C. Cir. 1998). A substitute can take various forms, including a non-classified summary of the privileged information,[24] a redacted version of the evidence,[25] a statement by the Government admitting to the facts that the privileged evidence would tend to prove,[26] or any other substitute that the court deems fair to both parties. The goal of all these options is to put the opposing party in as close as possible to the same position as if it had access to the classified material.

Another procedural device for keeping the privilege confined to its proper sphere is to ensure that sensitive material is "disentangled from non-sensitive information to allow for the release of the latter." *Ellsberg* v. *Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983). Courts have sometimes used special masters to help in the task of supervising discovery to

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[24] *E.g.*, *Attorney General* v. *Irish People, Inc.*, 684 F.2d 928, 954 (D.C. Cir. 1982) (per curiam).

[25] *E.g.*, *United States* v. *Kampiles*, 609 F.2d 1233 (7th Cir. 1979); *United States* v. *Libby*, 429 F. Supp. 2d 1 (D.D.C. 2006).

[26] *E.g.*, *United States* v. *North*, 713 F. Supp. 1442 (D.D.C. 1989).

ensure that only truly privileged information is being withheld.[27] But, however the courts do it, the state secrets privilege should not automatically preclude a private litigant's right to pursue its claims and defenses on the merits. That does not mean that those litigants will necessarily prevail, but they should not be prematurely deprived of the opportunity to adjudicate merely because they cannot have access to certain evidence. For example, 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. Although the privilege was sustained, the case proceeded through discovery, summary judgment, and trial. Ultimately, after a three-week trial, defendants prevailed on the merits. *Kronisch* v. *United States*, 150 F.3d 112 (2d Cir. 1998).

C. The privilege cannot be used to strip private litigants of their defenses against the Government's claims.

Finally, and particularly relevant here, the Court should make clear that the Government cannot use the privilege offensively, to strip a private litigant of a defense or otherwise prevent it from effectively defending against a Government claim. In this case, the Federal Circuit applied the privilege not just to limit petitioners in the evidence they could use, but to preclude them from even advancing one of their

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[27] *E.g.*, *Loral Corp.* v. *McDonnell Douglas Corp.*, 558 F.2d 1130, 1132 (2d Cir. 1977) (special master used where a "large amount of material properly classified confidential and secret must be submitted to the trier of fact in the case"); *Hepting*, 439 F. Supp. 2d at 1010.

central defenses. Pet. App. 207a-210a. This is a particularly pernicious application of the privilege.

It is inconsistent with the very notion of an evidentiary privilege to allow the Government at once to deploy it to protect evidence and to preclude its litigation adversaries from defending against its claims. It is black-letter law that a party cannot make affirmative claims that rest on privileged evidence while relying on the privilege to prevent the opposing party from offering defenses to those claims. See, *e.g., Tenenbaum* v. *Simonini*, 372 F.3d 776, 777 (6th Cir. 2004); *Kasza* v. *Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998). It should be no different with the state secrets privilege. Where its affirmative claims implicate privileged material, the Government may protect its secrets only at the expense of its litigation position. See *Reforming the State Secrets Privilege* at 12. As the petitioners show in their briefs, any other approach further distorts the privilege and violates due process. Boeing Br. at 27; General Dynamics Br. at 27.

Simply put, the Government should not be allowed to pursue a claim when the state secrets privilege precludes its adversary from offering evidence to defend against that claim. Just as the Government cannot bring a prosecution in which it "invoke[s] its governmental privileges," *Reynolds*, 345 U.S. at 12, in a civil case like this the Government cannot assert an affirmative claim while at the same time invoking the privilege so as to undermine any meaningful defense to that claim.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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