Nos. 09-1298, 09-1302

In The
Supreme Court of the United States

GENERAL DYNAMICS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

THE BOEING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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The National Defense Industrial Association (NDIA) respectfully submits this brief as amicus curiae in support of petitioners.[1]

INTEREST OF AMICUS CURIAE

The NDIA is a non-partisan, nonprofit organization with a membership that includes over 1,700 companies and 80,000 individuals. NDIA's members provide a wide variety of goods and services to the government and include some of the Nation's largest defense and homeland security contractors. Among other things, NDIA's members perform, and may be asked in the future to perform, large-scale research and development contracts with the government similar to the one awarded to petitioners here to design, manufacture, and test the "A-12 Avenger" aircraft.

[1] Pursuant to Rule 37.3(a), blanket letters consenting to the filing of this brief by the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

The issue in this case raises matters of substantial interest to NDIA's members, because it affects the manner in which the government can subsequently justify in court its termination of a government contract, and in particular a billion dollar fixed-price research and development contract. The Federal Circuit's ruling permits the government to expose NDIA members to the severe consequences of default termination—due to waning political or economic support for a project—while simultaneously preventing the contractor from mounting a defense against that termination due to the government's invocation of the state-secrets privilege. Such a result severely undermines NDIA's members' abilities and incentives to bid on and undertake future government contracts.

SUMMARY OF ARGUMENT

The United States depends on private contractors to provide assistance and materials for all facets of government operations. This is particularly true with respect to national defense, where NDIA's members provide the United States with cutting-edge technology to defend the nation from enemies all over the world. The ruling below, if not reversed by this Court, significantly undermines a contractor's incentive to enter into costly research and development contracts, and, at a minimum, increases the costs that the government, and ultimately the taxpayers, must pay to acquire new defense technologies.

A. The state-secrets holding in this case will have a profound effect on government contractors, including NDIA's members. The government possesses extraordinary power to terminate its contracts. Under the Federal Acquisition Regulation, the government can simply walk away from any contract by terminating it for convenience, with virtually no consequences to the government. The government also can, as it did in this case, terminate a contract for default, which imposes severe consequences and penalties on the contractor. But in any litigation over the propriety of such a default termination, the government must prove de novo its default claim against the contractor.

By permitting the government to use the state-secrets privilege to foreclose a contractor's defense against a default termination, the Federal Circuit

shifts the balance of power too far in favor of the government and injects new uncertainty in the contracting process. Many government contracts require the contractor either to use or to develop classified information. After the ruling below, the mere existence of this top-secret information provides the government with a potential basis to invoke the privilege whenever the contractor seeks to raise a valid defense to the government's claim of default.

B. The Federal Circuit's decision will have substantial negative effects on the government-contracting industry. The Department of Defense invests hundreds of billions of dollars in government contracts and relies on those contracts to provide a wide array of services. But uncertainty and fundamental unfairness will result from the unchecked authority bestowed on the government by the Federal Circuit's decision. As such, the decision either will discourage contractors from engaging in particularly risky or difficult-to-achieve contracts with the government or will cause such engagements to become more costly to taxpayers.

More specifically, and more importantly, the Federal Circuit's decision will discourage major research and development projects. These projects are the foundation of significant advances to our Nation's defense, yet they often require flexibility as contractors are asked to work in uncharted territory. It is commonplace for these contracts to experience cost and schedule overruns. The government often waives those overruns based on its own recognition,

and its superior knowledge due to access to classified information, that the contract goal was not attainable in the time or under the terms originally contemplated. Under the ruling below, that common reality is now a basis for a default termination even where the government has waived certain contract requirements. And the government will be able to use the state-secrets privilege to insulate that termination from meaningful review in any subsequent judicial proceeding. Such a result will discourage contractors from entering into these contracts in the future.

ARGUMENT

THE FEDERAL CIRCUIT'S STATE-SECRETS RULING IS WRONG AND CONFERS VIRTUALLY UNCONSTRAINED POWER ON THE GOVERNMENT WHEN DEFENDING ITS DEFAULT TERMINATIONS OF CONTRACTS INVOLVING CLASSIFIED INFORMATION

In *United States v. Reynolds*, this Court held that the state-secrets privilege permits the United States to prevent the disclosure of information if "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." 345 U.S. 1, 10 (1953). The Court explained that the government could refuse, by invoking the state-secrets privilege, to produce certain documents sought by a private plaintiff in a Federal Tort Claims Act suit. *Id*. at 6-7.

In upholding the invocation of the state-secrets privilege, however, the Court observed that "the

Government [wa]s not the moving party" in the litigation. 345 U.S. at 12. The Court thus distinguished the situation there from the "unconscionable" circumstance where, as here, the government *pursues* a claim "and then invoke[s] its governmental privileges to deprive the accused of anything which might be material to his defense." *Ibid.* As a moving party, this Court observed, the government "can invoke its evidentiary privileges only at the price of" relinquishing its claim. *Ibid.* Thus, this Court has recognized that the government must relinquish its claim against an accused if the government withholds documents, even due to "vital national interests," that are necessary for the accused's defense. *Jencks v. United States*, 353 U.S. 657, 670-672 (1957); *see also Roviaro v. United States*, 353 U.S. 53, 60-61 (1957) (recognizing that governmental privileges "must give way" where the disclosure "is relevant and helpful to the defense of an accused").

As petitioners demonstrate, when the government has invoked the state-secrets privilege to defeat a defense to liability, permitting the government to prevail in court on its claim is inconsistent not only with *Reynolds* but with fundamental notions of Due Process. NDIA and its members do not dispute that issues of national security can, and should, require the government to restrict access to classified information. And they recognize that the government's unilateral decision to invoke the state-secrets privilege often must go unchallenged, as even in camera review of the classified information can

threaten national security. But the price for the government's invocation of this privilege should not be borne by the party against whom it is asserted. Rather, the government must forfeit its claim against the contractor. Otherwise the judicial system will be distorted, as contractors will be deprived of the ability to defend themselves against the government's claim. And, as discussed below, because the government is not subject to contract-breach damages, the price the government must pay is small.

A. Because The Government Possesses Significant Power To Terminate Contracts For Default, The Court Should Not Permit The Government To Invoke The State-Secrets Privilege Without Consequence

1. As the present case demonstrates, the government possesses extraordinary power to terminate its procurement contracts. The Federal Acquisition Regulation, which governs every federal procurement contract, allows the government to terminate a contract at any time, for almost any reason, for its own convenience. 48 C.F.R. § 49.101(a). There are virtually no consequences to the government for a termination for convenience. The government simply walks away from the deal and must only reimburse the contractor for costs reasonably incurred and (in some cases) a reasonable profit on those costs. *Maxima Corp. v. United States*, 847 F.2d 1549, 1552 (Fed. Cir. 1988).

In certain circumstances, when the contractor fails to meet its contractual obligations, the government

can terminate a contract for "default." 48 C.F.R. § 49.101(a). The consequences to the contractor of a default termination are severe. *DeVito v. United States*, 413 F.2d 1147, 1153 (Ct. Cl. 1969). The contractor is denied payment for out-of-pocket costs that have not already been reimbursed, and the contractor may be required to pay back all progress payments it has received for work that has not yet been accepted by the government. 48 C.F.R. § 49.402-2(a). A default termination also can result in the contractor being barred from public contracting, or being prejudiced in the award of new contracts. *Id*. § 9.406-2(b)(1).

After the fact, contractors can contest a default termination in court and require the government to prove de novo the grounds for default. And if the government fails to demonstrate that a default termination was justified, the termination for default will be set aside. But rather than awarding contract-breach damages to the contractor, the termination is converted into one for the government's convenience. *Darwin Constr. Co. v. United States*, 811 F.2d 593, 597 (Fed. Cir. 1987). Thus, the only downside to the government in terminating a contract for default is really no downside at all. In its worst case scenario, the government simply walks away in a termination for convenience.

2. The ruling below further stacks the deck against contractors, and it injects new uncertainty into the contracting process. This result will have significant negative implications on future defense procurement.

Many government contracts, and particularly those in the defense industry where NDIA's members have expertise, require contractors to use and develop classified technology. In many of these contracts, the mere existence of this classified information could provide the government with the basis to invoke the state-secrets privilege whenever the contractor seeks to raise a valid defense to a government claim of default. This result is aggravated by the fact that, under the ruling below, the government is permitted to articulate a post-hoc justification for its decision to terminate the contract for default. GD Pet. App. 269a; Boeing Pet. App. 95a. Thus, the government can terminate a contract due to waning political support for a program, GD Pet. App. 411a; Boeing Pet. App. 442a ("In the end, the contract was not terminated because of contract default. It was terminated because the Office of the Secretary of Defense withdrew support and funding."), and then justify the termination after the fact on grounds that are entirely unrelated to the government's motivation. Indeed, because the Federal Circuit requires only some "nexus between the government's decision to terminate for default and the contractor's performance" for a default termination to be sustained, GD Pet. App. 269a; Boeing Pet. App. 95a, the government can intentionally articulate a basis for default during the course of litigation that implicates classified information and the state-secrets privilege.

Accordingly, if left standing, the Federal Circuit's ruling will place NDIA's members in a fundamentally

untenable and unfair situation with respect to many of their contracts: if the government were to terminate those contracts on an allegation of default, the government could preclude the contractor from raising valid defenses while still subjecting the contractor to the government's forfeiture claim. This troubling result is unnecessary, as the government suffers very little prejudice if its invocation of the privilege results in a termination for convenience. That consequence is hardly the equivalent of letting a potential criminal go free, a result that is accepted when the government invokes the state-secrets privilege against someone it criminally has accused. *See, e.g.*, *Jencks*, 353 U.S. at 671-672. Indeed, here, the government's invocation of the state-secrets privilege means that it would not even have to pay all of the usual termination-for-convenience costs to the contractors. *See* Boeing Br. 17-20; GD Br. 13-14, 58-61. Moreover, where the government decides it needs to invoke its state-secrets privilege, a termination for convenience of the government is the appropriate result.

Further, because courts defer to the government when reviewing an invocation of the state-secrets privilege (lest that scrutiny result in the disclosure of the very information the privilege is designed to protect), the government's assertion of the privilege is almost never successfully contested (if it is even contested at all). *See, e.g., El-Masri v. United States*, 479 F.3d 296, 305-306 (4th Cir. 2007). As this Court has explained, the propriety of the invocation often is immune even from in camera review. *Reynolds*,

345 U.S. at 10. Thus, the government has every opportunity and motive to assert the privilege, even where it might be unnecessary or inappropriate to do so.

Reynolds itself provides a potential example of just such a case. Fifty years after that decision, access to previously classified reports raise serious questions as to the legitimacy, or at least the necessity, of the government's privilege claim. *See Herring v. United States*, No. 03-cv-5500, 2004 WL 2040272 (E.D. Pa. Sept. 10, 2004), aff'd, 424 F.3d 384 (3d Cir. 2005). When it was finally disclosed, the report discussed nothing about secret military equipment on board the aircraft that crashed. Erin M. Stilp, Note, The Military & State-Secrets Privilege: The Quietly Expanding Power, 55 Cath. U. L. Rev. 831, 843-845 (2005). Instead, it discussed the military's negligence in the crash. *Ibid.*

B. The State-Secrets Privilege, As Applied Below, Will Hinder The Nation's Ability To Develop Cutting-Edge Defense Technology

1. As NDIA's members can attest, the relationship between our government and its contractors depends on principles of trust and fairness, because the government possesses unique power to terminate its contracts. Just as the government invests significant taxpayer resources into contracts with its contractors, contractors—including many of the Nation's most important businesses—invest billions of dollars of their own funds into research and development to meet contractual obligations.

The uncertainty and fundamental unfairness that result from the Federal Circuit's decision will discourage contractors from engaging in risky or difficult-to-achieve contracts with the government. At a minimum, the Federal Circuit's ruling, if left standing, will cause such engagements to become more costly to taxpayers. Businesses will be required to account for the possibility that the government might terminate a contract for default—even when the termination is motivated by politics or shifting priorities rather than by contractor fault—and then prevent meaningful litigation into the very propriety of that default termination by invoking the state-secrets privilege.

This unbridled authority granted to the government by the Federal Circuit places at risk current government contracts worth hundreds of billions of dollars. And it will deter contractors from entertaining certain high-risk contracts with the government in the future. Under the Federal Circuit's ruling, NDIA's members and other contractors risk arbitrary default terminations that can be insulated from judicial review due to the government's invocation of the state-secrets privilege.

Indeed, the risks are anything but inchoate. In this case, the government knew that petitioners could not fulfill the contract without access to prior classified information on stealth technology. GD Pet. App. 64a n.16; Boeing Pet. App. 137a n.16. Tellingly, the government received a much higher and more realistic bid from contractors who, unlike petitioners,

previously had worked on very similar classified technology. JA 45, 244-246, 1188-1190. And the government recognized, even before awarding the contract to petitioners, that petitioners lacked the knowledge to appreciate the risks of, and to perform under, this contract. But the government did not share the needed information with petitioners, either before contract award or in a timely or sufficient extent during contract performance. Meanwhile, petitioners spent hundreds of millions of dollars every month from their own coffers to perform. Now, the Federal Circuit has allowed the government to impose a multi-billion dollar forfeiture on the contractors while invoking the state-secrets privilege to deprive the contractors of this defense to that claim.

If this result is allowed to stand, an observation made by the Chief Judge of the United States Court of Federal Claims in another case will be apt. There, after recognizing that "the dollars at stake" were "so large" that they caused the government to act in an unjust way, the Chief Judge observed that "one is almost tempted to wonder if insanity is indeed a prerequisite for contracting with the Government." *California Fed. Bank v. United States*, 39 Fed. Cl. 753, 754, 767 (1997). But NDIA's members are not "insane." Thus, unless the ruling below is reversed, the outcome will influence future contracting decisions when contractors decide whether to enter into new contracts and on what terms.

2. Nor should there be any doubt as to the significance of the ruling on government procurement.

As staggering as the multi-billion dollar forfeiture here is, it represents only a small fraction of the Department of Defense's overall annual investment in government contracts.

In 2008, the Department of Defense dedicated more than $200 billion in *services* contracts alone. *See* GAO, Report No. 10-39, *Defense Acquisitions: Further Actions Needed to Address Weaknesses in DOD's Management of Professional and Management Support Contracts*, at "Highlights" (Nov. 2009). And for weapons defense programs, like those at issue in this case, the Department of Defense has planned to invest nearly $900 billion over the next 5 years – the highest level in two decades. *See* GAO, Report No. 08-467SP, *Defense Acquisitions: Assessment of Selected Weapons Programs* 1 (Mar. 2008). These staggering investments by the government undermine any argument that the ruling below can be limited to the facts of this particular case. The hundreds of billions of dollars invested in numerous contracts—many of which involve significant research and development like the contract at issue here—virtually guarantee that these issues will arise again.

Indeed, the ruling below will discourage contractors from entering new contracts, which will ultimately harm the government, as it will be unable "to obtain needed goods and services" that contractors provide. *United States v. Winstar Corp.*, 518 U.S. 839, 913 (1996) (Breyer, J., concurring). This will occur at a time when the government can ill afford any such reduction, as contracted services extend far

beyond weapons defense programs. Contractors are increasingly relied on "to perform core agency missions." GAO, Report No. 08-572T, *Defense Management: DOD Needs to Reexamine Its Extensive Reliance on Contractors and Continue to Improve Management and Oversight*, at "Highlights" (Mar. 2008). Contractors are used in various roles for a number of operations, such as those in Iraq and Afghanistan. *See* GAO, Report No. 10-492, *Warfighter Support: DOD Needs to Improve Its Planning for Using Contractors to Support Future Military Operations*, at "Highlights" (Mar. 2010). As of November 2009, there were about 218,000 contractor employees operating in Iraq and Afghanistan—a number that "at times exceed[ed] the number of military personnel in each country." *Ibid.* And the Department of Defense expects to continue this heavy reliance on contractors in the future. *Ibid.*

3. Perhaps even more significant is the *type* of contract the Federal Circuit's decision discourages. Absent reversal, the ruling below will significantly discourage contractor investment into major research and development projects, which often have formed the backbone of the Nation's cutting-edge innovation, and which often are entered to counter a military threat.

When the goal is an uncharted innovation, it is difficult to establish a clear timeline for progress or completion. It is commonplace for government contracts to take longer than originally planned and to require more funding than originally expected.

See, e.g., GAO, Report No. 09-326SP, *Defense Acquisitions: Assessments of Selected Weapon Programs* 10-11 (Mar. 2009) ("Only 28 percent of DoD's major defense acquisition programs currently estimate that they will deliver on time or ahead of schedule, while just under one-half report they will have a delay of 1 year or more in delivery of an initial operational capability"); *id*. at 6 ("For DoD's 2008 programs, * * * the average delay in delivering initial capabilities is now 22 months"); GAO, Report No. 09-648T, *Space Acquisitions: Government and Industry Partners Face Substantial Challenges in Developing New DOD Space Systems*, at "Highlights" (Apr. 2009) (noting problems that "had driven up costs and schedules"); GAO Report No. 08-467SP, *Defense Acquisitions, supra*, at 8 ("DOD has already missed fielding dates for many programs and many others are behind schedule.").

Indeed, as this case makes clear, the government, which possesses significant classified information on prior projects unavailable to the contractor, often recognizes that a contract may not be capable of being fulfilled under the original timeline or specification. G.D. Pet. App. 57a; Boeing Pet. App. 129a-130a. Thus, the government frequently waives or excuses deadlines or requirements when the contract goal is more difficult to attain than initially contemplated, because the contract sets "optimistic requirements for weapon programs that require new and unproven technologies." GAO Report No. 08-467SP, *Defense Acquisitions*, *supra*, at 24.

Notwithstanding this acknowledgement by the government, the government frequently cancels contracts because it has reallocated funding or other priorities. GAO Report No. 09-648T, *Space Acquisitions*, *supra*, at 1 (noting that DOD has canceled programs "that were expected to require investments of tens of billions of dollars"). Contractors understand such terminations for convenience are a matter of government prerogative, but before the ruling below they did not view such shifting priorities as a potential basis for a default termination. And they did not expect that a defense against such a default termination could be totally defeated by the government's invocation of the state-secrets privilege. Unless the ruling below is reversed, NDIA's members can ill afford to make those assumptions, and undertaking future fixed-price development contracts may be "too great a risk" in most circumstances. Ralph C. Nash, *Fixed-Price Research & Development Contracts: A Risk Too High*, 23 Nash & Cibinic Rep. ¶ 39 (Aug. 2009).

CONCLUSION

For the reasons above and in petitioners' briefs, the judgment of the Federal Circuit should be reversed.

Respectfully submitted,

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