Nos. 09-1298, 09-1302

IN THE
Supreme Court of the United States

GENERAL DYNAMICS CORPORATION,
Petitioner,
v.
UNITED STATES,
Respondent.

THE BOEING COMPANY, SUCCESSOR TO
MCDONNELL DOUGLAS CORPORATION,
Petitioner,
v.
UNITED STATES,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

STATUTES AND REGULATIONS

EXECUTIVE ORDERS

SCHOLARLY AUTHORITY

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the Chamber) submits this brief as *amicus curiae* in support of petitioners General Dynamics Corporation and The Boeing Company.[1]

The Chamber is the world's largest business federation. The Chamber represents more than 300,000 direct members and indirectly represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community. This is such a case.

Many members of the Chamber do business with the federal government. The Chamber also represents businesses in industries, such as defense and aerospace, transportation, information technology, and telecommunications, which long have served the nation by entering contracts to provide the federal government with goods and services that are vital to the nation's security. Such contracts often relate to defense or national security programs that are highly classified. For this reason, the question

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Counsel of record for all parties have consented to the filing of this brief in letters on file with the Clerk's office.

presented in this case—whether the Government may prevail in its contract claim against a contractor because its assertion of the state secrets privilege completely deprives the contractor of its facially valid defense to that claim—is of particular concern to the Chamber and its members.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns whether the federal government may protect classified information by invoking the state secrets privilege *and* allow that privilege to serve as the basis for the Government to prevail on its own contract claim against defense contractors. While honoring the invocation of the privilege is quite proper, allowing the federal government to gain financially from the privilege at the expense of the Government's contractor is unconscionable. Sustaining a government claim worth billions of dollars after the Government's invocation of the privilege has eliminated the contractor's defense does serious violence to basic due process principles that have uniformly and appropriately guided judicial resolution of how the state secrets doctrine affects pending claims. In addition, significant commercial uncertainty would arise in the defense procurement process if the Government were permitted not only to define private parties' contract rights by establishing the government contracting system and negotiating individual defense contracts, but also to nullify certain of those rights on an ad hoc basis as particular contract disputes arise.

In this case, the Federal Circuit held that the invocation of the state secrets privilege protected the Government's classified information and permitted the Government to prevail in its multi-billion-dollar

claim against two government contractors selected by the Navy to design and build an aircraft using highly classified stealth technology. Under the Federal Circuit's approach, invoking the privilege eliminated the contractors' key defense against the Government's claim that the contractors' delay placed them in contractual default. That defense was that the Government failed to share its "superior knowledge" and critical information that was necessary to prevent them from pursuing a "ruinous course of action."[2] App. 202a. Because the contractors were stripped of their ability to argue on this basis that the Government's actions should be deemed a termination of the contract for convenience, rather than based on the contractors' default, the Federal Circuit ruled in favor of the Government on its default termination claim. As a result, the Government is demanding that the contractors return approximately $2.9 billion in progress payments and interest (see General Dynamics Br. at 21), and the contractors will not be reimbursed for the $1.2 billion in unreimbursed costs (now more with interest) the Court of Federal Claims found they spent performing the contract before it was terminated by the Government (see Boeing Br. at 17).

The court of appeals' decision causes great uncertainty for businesses that enter contracts with the Government that relate to classified matters affecting national security, homeland security, and intelligence matters. Under the Federal Circuit's rule, these businesses have little assurance that their contractual rights and defenses will be judicially enforced where the Government may assert that

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[2] Citations to the Petition Appendix are to the Appendix to the Petition for Writ of Certiorari filed by General Dynamics in No 09-1298.

relevant evidence is protected by the state secrets privilege. Contractors have little basis to assess or contract around the risk of the Government invoking the privilege. The court's decision "expand[s] the Government's opportunities for contractual abrogation, with the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements," *United States* v. *Winstar Corp.*, 518 U.S. 839, 884 (1996) (plurality opinion), the very result this Court has sought to avoid in cases where the Government has breached its contractual obligations and attempted to walk away cost-free. If the Federal Circuit's decision stands, the defense contracting process would shift from one grounded in rule of law principles toward a less workable, one-sided deal that gives the United States so much leverage that contractors may be unwilling to enter into such arrangements. Cf. *id.* at 913 (Breyer, J., concurring) (where Government can breach contract with impunity, private businesses might "quite rightly, be unwilling to undertake the risk of government contracting").

This Court can restore certainty to the contracting process without calling into question the Government's legitimate ability to invoke the state secrets privilege and shield classified information from disclosure in this or any other case. In the Chamber's view, the Government is fully empowered to protect sensitive information, such as the stealth aircraft technology at issue in this case. Here, the state secrets privilege was properly invoked because a sufficiently senior official determined that disclosure reasonably could be expected to "'severely

jeopardize national security.'"[3] App. 375a (quoting declaration of Secretary Donley). The proper invocation of the privilege should not, however, allow a court to enter judgment for the Government on its default termination claim if the privilege prevents the contractors from defending against the Government's assertion that they were in default. The Government's claim instead should be resolved by applying the most basic principles of fundamental fairness and due process, with the effect of accommodating the nation's security interests and restoring contractual certainty. Lower courts correctly dismiss claims brought against the Government, government contractors, or others when the Government's invocation of the state secrets privilege deprives the plaintiff of evidence needed to establish *prima facie* case—or deprives the defendant of evidence needed to present a defense. Dismissal of claims in the latter case is a logical and proper implication of basic due process principles: courts cannot order relief against a party that is precluded from defending itself. *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 466 (2000). This Court should apply those principles here.

These principles should especially support dismissal of the Government's claim against a defense contractor. The Government, acting in its sovereign capacity, has already protected its interests by enacting the Contract Disputes Act and promulgating the Federal Acquisition Regulation, which establishes the contract dispute process and gives the Government unique rights, such as the right to terminate a contract for its own convenience.

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[3] The Chamber's knowledge of the facts of this case is limited to those set forth in the lower court opinions reprinted in the Petition Appendices.

The Government, acting in its propriety capacity, further protects its interests by negotiating the terms of particular contracts. The Government, acting as a litigant advancing a contract claim in federal court, should not be permitted in addition to use its authority to protect state secrets to eliminate a contractor's *prima facie* defense, thereby securing to the United States an enormous financial windfall and imposing on the contractor an equally enormous out-of-pocket loss. Due process precludes that outcome, where the Government blatantly attempts to shift "the costs of meeting its legitimate public responsibilities to private parties." *Winstar*, 518 U.S. at 896.

ARGUMENT

I. ELIMINATING DEFENSES AGAINST A GOVERNMENT CLAIM BASED ON THE STATE SECRETS DOCTRINE WOULD CREATE COMMERCIAL UNCERTAINTY, IMPAIRING THE PROVISION OF GOODS AND SERVICES NEEDED FOR THE NATIONAL DEFENSE.

The Federal Circuit held that the Government's invocation of the state secrets privilege eliminates a contractors' "superior knowledge" defense in a government contract dispute and that as a result the Government prevails in its contract claim. The court rejected the traditional approach that protects classified information and bars the prosecution of any claim where the invocation deprives a party of a defense to the claim. By enabling the invocation of the privilege to defeat a contractual right held against the Government, the Federal Circuit's rule creates considerable uncertainty surrounding the enforceability of government contracts that directly

or indirectly involve classified matters. That result, in turn, threatens to undermine and make less efficient the government contract system the United States has long used to procure the goods and services that are critical to the nation's security—with the inevitable result that costs will increase or fewer services will be provided. In sum, allowing the state secrets doctrine to be used as it has in this case is both bad government contracting practice and hopelessly inconsistent with any notion of due process.

A. The United States Has Always Relied On Contractors To Provide Goods And Services For The National Defense, Including Those Needed For Classified Programs.

The United States has always relied on the innovation and efficiency of the private sector to provide goods and services for the national defense. This practice is quite unlike that of most former and current Communist nations, which rely instead on instrumentalities of the government, or many European nations, which rely on companies substantially owned by the government. In 1775, the Continental Congress established a procurement system and appointed a quartermaster general and a commissary general to procure clothing, weapons, transportation and engineering services for the Continental Army.[4] As the threats facing the nation and the needs of the military changed over the next two centuries, the Government continued its reliance

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[4] *See* Moshe Schwartz, Congressional Research Service, *Defense Acquisitions: How DOD Acquires Weapon Systems and Recent Efforts to Reform the Process* 1-2 (July 10, 2009), *available at* http://www.fas.org/sgp/crs/natsec/rl34026.pdf.

on private enterprise. During World War II, for example, "Congress sought to do everything possible to retain and encourage individual initiative in the world-wide race for the largest and quickest production of the best equipment and supplies." *Lichter* v. *United States*, 334 U.S. 742, 768 (1948).

The private sector continues to be vital to homeland security and national defense today because "the vast majority of critical [defense industrial base] assets reside in the private sector."[5] Thousands of suppliers now contract with the Department of Defense to provide the weapons, equipment, and raw materials to achieve national security objectives.[6] In 2009, the Department of Defense purchased more than $380 billion in goods and services from the nation's top 100 defense contractors.[7] And in fiscal year 2010, outlays on national defense were estimated to represent almost 20 percent of total federal outlays and almost five percent of gross domestic product.[8]

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[5] U.S. Dep't of Homeland Security, *National Infrastructure Protection Plan, Defense Industrial Base Sector* 2, *available at* http://www.dhs.gov/xlibrary/assets/nipp_snapshot_defenseindustrialbase.pdf.

[6] Gov't Accountability Office, *DOD Assessments of Supplier-Base Availability for Future Defense Needs; Briefing to the Senate Committee on Banking and Housing, Urban Affairs, Subcommittee on Security and International Trade and Finance* 2 (Oct. 27, 2009), *available at* http://www.gao.gov/new.items/d10317r.pdf.

[7] Gov't Executive, *Top 100 Defense Contractors* (Aug. 15, 2010), *available at* http://www.govexec.com/story_page_pf.cfm?articleid=43388&printerfriendlyvers=1.

[8] U.S. Dep't of Commerce, *Statistical Abstract of the United States: 2010*, tbl.491, at 326, *available at* http://www.census.gov/prod/2009pubs/10statab/defense.pdf.

As this case and earlier cases illustrate, the application of the state secrets privilege often arises in the context of—and has the potential to affect—the development and manufacture of the most advanced, and thus most classified, technologies used by the military. *United States* v. *Reynolds*, 345 U.S. 1 (1953) (testing of secret electronic equipment aboard a B-29 aircraft); *Crater Corp.* v. *Lucent Techs., Inc.*, 423 F.3d 1260 (Fed. Cir. 2005) (development and manufacture of underwater coupling device for fiber optics); *Bareford* v. *Gen. Dynamics, Corp.*, 973 F.3d 1138 (5th Cir. 1992) (design and manufacture of Navy's Phalanx anti-missile system); *Bentzlin* v. *Hughes Aircraft Co.*, 833 F. Supp. 1486 (C.D. Cal. 1993) (manufacture of air-to-ground missile used by the Air Force during Operation Desert Storm); *Nejad* v. *United States*, 724 F. Supp. 753 (C.D. Cal. 1989) (design and manufacture of Navy's AEGIS ship-based air defense system). Cases concerning the state secrets doctrine have also addressed support allegedly provided by companies to intelligence agencies. *E.g. Mohamed* v. *Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir., 2010) (en banc) (alleged provision of counter-terrorism-related transport service to intelligence agency); *Hepting* v. *AT&T Corp.,* 439 F. Supp. 2d 974 (N.D. Cal. 2006) (alleged telecommunications support to National Security Agency). Thus, the defense and intelligence communities and the nation in general have been well served by government contractors.

B. The Federal Circuit's Rule Would Undermine the Contractual Certainty That Underpins The Defense Sector's Ability To Provide Goods And Services To The Government.

As Justice Brandeis recognized, "[p]unctilious fulfillment of contractual obligations is essential" to the government's ability to enter contracts. *Lynch* v. *United States,* 292 U.S. 571, 580 (1935). Since the Government first waived sovereign immunity for contract claims in 1855, the assurance that private companies can enforce their contracts with the Government has been viewed as "indispensable to the efficient operation of government, for without it, qualified private contractors might not undertake government projects …." Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 Vand. L. Rev. 1529, 1565 (1992).

Today, the Federal Acquisition Regulations govern the award, performance and termination of government contracts through rules intended to ensure that the private sector can "deliver on a timely basis the best value product or service to the [Government], while maintaining the public's trust and fulfilling public policy objectives." 48 C.F.R. § 1.102(a). If a government contractor believes the Government has not complied with its contractual obligations, it may file a claim with the contracting officer. 41 U.S.C. § 605(a). Likewise, if the Government believes that a contractor is in breach of its obligations, the contracting officer may find that the contractor is in default and terminate the contract. *Id.*; see also *Malone* v. *United States*, 849 F.2d 1441, 1443 (Fed. Cir. 1988). The contracting officer's decision "shall be final and conclusive and not subject to review by any forum, tribunal, or

Government agency, unless an appeal or suit is timely commenced," 41 U.S.C. § 605(b), by the contractor filing an appeal to the agency board of contract appeals, *id.* § 606, or a lawsuit in the Court of Federal Claims, *id.* § 609(a).

One effect of the contracting officer's decision to terminate the contract for default is that the Government is "not liable for the contractor's costs on undelivered work and is entitled to the repayment of advance and progress payments, if any, applicable to that work." 48 C.F.R. § 49.402-2(a). A default termination can also harm the contractor's ability to obtain future government contracts, or even result in the contractor's debarment from future government contracts. See *Malone*, 849 F.2d at 1445; *Bannum, Inc.* v. *United States*, 91 Fed. Cl. 160, 171-72 (2009).

This scheme has two remarkable qualities. First, a termination for default obviously carries with it extraordinarily negative consequences for the government contractor. It not only deprives the contractor of the potential profit in the contract, but also requires disgorgement of monies received for services actually rendered on the Government's behalf and threatens the contractor's ability to receive future government contracts. Thus, the termination for default can be described as the "death penalty" in government contracting.

Second, even though a claim that the contractor is in default of a contract is a *Government* claim for which the Government bears the burden of proof, *Malone*, 849 F.2d at 1443, the statutory scheme does not require the Government to bring suit to establish the contractor's liability. See also Pet. Opp. at 14-15 (conceding that "default termination has been deemed a 'government claim' . . . for which the government bears the burden of proof under the

CDA"). Instead, the statutory scheme provides that the contracting officer's default termination decision is final and unreviewable in any forum unless it is challenged by the *contractor* in the Court of Federal Claims or the relevant agency board of contract appeals. 41 U.S.C. § 605(b); *Seaboard Lumber Co.* v. *United States*, 903 F.2d 1560, 1562 (Fed. Cir. 1990).

The Government's claim in this case was initially adjudicated through just this process. The contracting officer granted the Government's claim that the contractors were in default and terminated the contract. App. 8a. A few weeks later, the Navy sent the contractors a letter demanding the return of approximately $1.35 billion in unliquidated progress payments under the contract. *Id.* Had the contractors not filed suit challenging the default termination, that determination would have become final and unreviewable. That determination did not become final, however, because the contractors filed suit, claiming that they were not in default because, among other reasons, the Government breached its duty to disclose its "superior knowledge" and the "critical information" necessary to prevent them from "unknowingly pursuing a ruinous course of action." App. 202a. Specifically, the Government had extensive knowledge concerning stealth technology that the contractors lacked. With that technology, it is alleged, the contractors would have fulfilled all of their contractual obligations in timely fashion. But without that technology, Boeing and General Dynamics were left to flounder in search of sophisticated solutions to extremely complicated technical problems. This is the classic situation where the party who fails to comply with the contract is found not to be in breach of contract. See, *e.g.*, *Fla. Engineered Constr. Prods. Corp.* v. *United* States, 41

Fed. Cl. 534, 542 (1998) (contractor may raise Government's failure to share superior knowledge as a complete defense to Government's default termination claim). After the Government invoked the state secrets privilege to preclude discovery of evidence necessary to litigate the contractors' superior knowledge defense, the trial court concluded that the defense "could not be tried because the resulting threat to national security would not permit it." App. 243a-244a.

At this point, however, the courts below abandoned the traditional approach to implementing the state secrets privilege and created the rule that so threatens contract rights and the commercial certainty that the government contracting process depends upon for success. Instead of dismissing the Government's default termination claim because the state secrets privilege deprived the contractors of the superior knowledge defense, see *infra* pp. 18-21 (outlining traditional approach), the Court of Federal Claims dismissed only the contractors' superior knowledge defense (App. 246a) and entered judgment for the Government on its default termination claim (App. 177a). That is, the court allowed the Government to prevail based on the Government's own actions that eliminated the contractors' defense.

In affirming this decision, the Federal Circuit granted the Government a wholly one-sided and purely discretionary means of avoiding its contractual commitments in cases involving sensitive classified information. The natural and inevitable result of this contractual uncertainty is to undermine the defense sector's ability and willingness to enter such contracts, which "produce[s] the untoward result of compromising the Government's practical capacity to make contracts[.]" *Winstar*, 518 U.S. at 884. And,

where contractors are willing to enter contracts despite the increased commercial uncertainty, they must address that increased risk as any other commercial party would—through increased charges or reduced service provision. But this Court has routinely rejected Government efforts to achieve short-term gains by trying to short-change contractors, recognizing that the long-term consequences to the public interest would be much worse if the Government were to prevail in a particular dispute on a theory that would broadly harm the contracting community. *Id.;* see also *id.* at 913 (Breyer, J., concurring) (rules promoting contractual certainty "ensure[] that the government is able to obtain needed goods and services from parties who might otherwise, quite rightly, be unwilling to undertake the risk of government contracting"); *id.* at 921 (Scalia, J., concurring) (contract should not be read to make the Government's performance discretionary). To be sure, the amount of money involved in this dispute is not insignificant, but it will pale in comparison to the ultimate costs the United States will incur in the event that all government contractors must turn a jaundiced eye to every agreement they are asked to enter into that implicates government secrets.

II. THE STATE SECRETS PRIVILEGE CAN AND SHOULD BE IMPLEMENTED TO PROTECT BOTH THE GOVERNMENT'S MILITARY AND INTELLIGENCE SECRETS AND THE CONTRACTUAL RIGHTS OF DEFENSE CONTRACTORS.

This case presents no occasion to balance the nation's security against the rights of litigants, or to reconsider the entirely appropriate rule that courts should defer to the determination by sufficiently

senior Executive Branch officials that sensitive national security information should be protected from disclosure in litigation. Instead, resolving this case requires only the application of established principles already developed in cases determining the litigation consequences of the Government's invocation of the state secrets privilege. Those principles require dismissal of a claim when information subject to the state secrets privilege is necessary to a private party's ability to litigate either the claim or especially a defense to a claim before the court. Any other result would be inconsistent with due process principles.[9] Here, those principles require dismissal of a claim whereby the Government seeks to have a court find the contractors liable on a contract claim on which it seeks payment of billions of dollars by parties who cannot defend themselves due solely to the Government's invocation of the privilege.

A. The State Secrets Privilege Should Reflect And Protect the Government's Authority To Control Access To Classified Information.

This case appropriately focuses on the litigation consequences of the Government's invocation of the state secrets privilege, rather than on the conditions or processes that may give rise to the assertion of the privilege. Defense contractors often handle the most sensitive national security information on the Government's behalf and appreciate that only senior government officials have the full scope of

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[9] The Court could resolve this case based on the Due Process Clause or avoid the constitutional issue by implementing the privilege to require the dismissal of the Government's default termination claim.

information and expertise needed to assess the potential harm that release of information may pose to the nation's security. Courts appropriately defer to the Government's invocation of the privilege, and accordingly protect sensitive national security information. See *infra* pp. 16-18. In contrast, courts cannot defer to the Government's preferences regarding the judicial actions required once that information is protected from disclosure.

For reasons "too obvious to call for enlarged discussion," *CIA* v. *Sims*, 471 U.S. 159, 170 (1985), the "protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it." *Dep't of Navy* v. *Egan*, 484 U.S. 518, 529 (1988). Businesses that enter contracts with the Government therefore understand that the relevant federal agency decides whether information relating to the contract should be classified. See Exec. Order 13526, 75 Fed. Reg. 707 (Dec. 29, 2009). If classified information is released to a government contractor, the contractor also understands that the information must "be safeguarded in a manner equivalent to its protection within the executive branch of Government." Exec. Order 12829, 58 Fed. Reg. 3479 (Jan. 6, 1993).

Government contracts involving classified information contain a "Security Requirements" clause restricting the disclosure of classified information, 42 C.F.R. § 4.404, and employees of government contractors must certify that they will abide by the restrictions on the release of classified information. See Information Security Oversight Office, *Classified Information Nondisclosure Agreement Briefing Booklet, available at* http://www.archives.gov/isoo/training/standard-form-312.html. Sanctions associat-

ed with contractors' disclosure of classified information are severe. The Government "may move to terminate the contract or to seek monetary damages from the contractor, based on the terms of the contract" and may also criminally prosecute individuals or organizations. *Id.* at Question 20.

The Government also appropriately controls disclosure of, and access to, classified information in litigation. The common law has long recognized a privilege for the government to withhold information in the interest of national security. See *Reynolds*, 345 U.S. at 7 (discussing English cases); *United States* v. *Burr*, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (No. 14692D) (Marshall, C.J.) (suggesting that a letter from a general might be privileged if it "contains any matter the disclosure of which would endanger the public safety").

In *Reynolds,* this Court established an appropriate framework for the Government's invocation of the state secrets privilege. To ensure that a suitably knowledgeable and accountable Executive Branch official makes the national security assessment, the privilege must be asserted by the "head of the department which has control over the matter, after actual personal consideration by that officer." *Reynolds,* 345 U.S. at 8. To ensure that the Executive Branch articulates the basis for its conclusions and sets forth the degree of potential harm to the nation's security, the "court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect." *Id.* If the court is satisfied, "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," the Government may not be compelled to produce the evidence. *Id.* at 10-11.

The *Reynolds* framework is an entirely reasonable means to protect the national security while fostering the accountability of the Executive Branch, and it functioned in just that manner in this case. The contracting parties most familiar with information related to that withheld at the Government's request do not challenge the propriety of the Government's decision to invoke the state secrets privilege. Nor could a court or private party reasonably suggest that the general subject matter of the privileged material—details of the stealth technology protecting the Nation's most advanced aircraft—does not deserve protection from public disclosure Cf. *id.* at 10. The litigants do not call for greater judicial scrutiny of the Government's determination, or fault the lower courts' treatment of the invocation of the privilege or the related information itself. Instead, they rightly focus on whether their defense can be nullified, and the Government awarded a financial windfall, as a result of the Court's honoring the Executive Branch's assessment of the national security consequences of disclosing the privileged information.

B. A Claim Raised In Litigation Must Be Dismissed If The State Secrets Privilege Precludes Litigation Of Either The Plaintiff's Claim Or The Defendant's Defense.

This Court and lower courts have, in fact, already set forth the principles that govern the litigation consequences that follow once a court declines to permit or order release of information subject to a properly supported invocation of the state secrets

privilege. In broad terms, those principles focus on whether a party's claim can be fully litigated (and judicial relief thereafter ordered) in the absence of the information subject to the privilege. Claims that have no evidentiary support in the absence of the withheld information are dismissed, and claims subject to defenses that cannot be asserted in the absence of the withheld information are dismissed as well. See *infra* pp. 19-21. Those simple principles reflect a proper understanding of the role of the courts, which especially cannot order relief against a party that has been stripped of the ability to defend itself in court. Due process principles require no less and should require dismissal of the Government's claim in this case.

As this Court recognized in *Reynolds*, 345 U.S. at 11, in many cases it will be possible for the plaintiff to establish a *prima facie* case without the information protected by the state secrets privilege. In some cases, however, withholding the privileged information will deprive the plaintiff of the evidence needed to establish a case. *E.g.*, *El-Masri* v. *United States*, 479 F.3d 296, 309 (4th Cir. 2007) (dismissing plaintiff's lawsuit against CIA officials because "El-Masri would need to rely on witnesses whose identities, and evidence the very existence of which, must remain confidential in the interest of national security"); *Bareford*, 973 F.2d at 1142 (dismissing plaintiffs' tort suit against the manufacturer of the Phalanx anti-missile system because their "claim of manufacturing and design defects requires proof of what the Phalanx system was intended to do and the ways in which it fails to accomplish these goals," all information subject to the state secrets privilege). In that situation, the claim must be dismissed because there is simply no way to establish a right to recovery

without disclosing information that must, in the interest of national security, remain secret. Dismissal of a claim is unquestionably a "harsh sanction. But the results are harsh in either direction and the state secrets doctrine finds the greater public good – ultimately the less harsh remedy – to be dismissal." *Id.* at 1144; see also, *e.g.*, *Fitzgerald* v. *Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1238 n.3 (4th Cir. 1985) ("When the state secrets privilege is validly asserted, the result is unfairness to individual litigants—through the loss of important evidence or dismissal of a case—in order to protect a greater public value").

In other cases more directly relevant to this case, the plaintiff may be able to establish a *prima facie* case without information protected by the state secrets privilege, but the defendant—usually the Government or a contractor that acted pursuant to a contract in a classified program—needs privileged information to establish a defense to the claim. In this situation, dismissal is even more clearly the appropriate remedy, although the justification is slightly different. *E.g., Tenenbaum* v. *Simonini*, 372 F.3d 776 (6th Cir. 2004); *Kasza* v. *Browner*, 133 F.3d 1159 (9th Cir. 1998); *Molerio* v. *FBI*, 749 F.2d 815 (D.C. Cir. 1984) (Scalia, J.). "The fundamental requisite of due process of law is the opportunity to be heard." *Mullane* v. *Cent. Hanover Bank & Trust, Co.* 339 U.S. 306, 314 (1950) (internal quotation marks omitted). In the context of civil litigation, this principle means that courts must provide the defendant with "an adequate opportunity to defend against the imposition of liability." *Nelson*, 529 at 466. If the invocation of the state secrets privilege has the practical effect of depriving the defendant of the ability to raise a defense, the courts cannot,

consistent with the due process that they are charged to provide, allow the plaintiff to continue to litigate the claim. Indeed, it would be a "mockery of justice" for the court to impose liability erroneously because the evidence needed to establish the defense to the claim is protected by the state secrets privilege. *Molerio*, 749 F.2d at 825. This result is also entirely consistent with this Court's unanimous approach to barring litigation of matters in the intelligence context that inherently involve classified information. See *Tenet* v. *Doe*, 544 U.S. 1 (2005).

The Government has acknowledged the validity of these rules on many occasions and has invoked them to have courts dismiss claims brought by third parties against the United States or its contractors when the court cannot determine the defendant's liability without information protected by the state secrets privilege. See, *e.g.*, *Mohammed*, 614 F.3d at 1087 (agreeing with Government that plaintiffs' claims against a government contractor should be dismissed because "there is no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets"); *El-Masri*, 479 F.3d at 310 (dismissing plaintiffs' claims against the United States because ""virtually any conceivable response to [plaintiffs'] allegations would disclose privileged information"); *Zuckerbraun* v. *Gen. Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991) (dismissing plaintiffs' claims against defense contractors where the "factual questions concerning the liability of the defendants" cannot be resolved without information that "is in its entirety classified and subject to the claim of privilege"). In these cases, the Government appropriately uses the state secrets privilege as a shield to protect against the imposition of liability on a claim the Government or its

contractors cannot fully defend without disclosing classified information that, in the interest of national security, must remain secret.

C. The Government May Not Use the State Secrets Privilege As A Sword To Further Its Claims Against Defense Contractors.

The principles of fundamental fairness that determine the litigation consequences of the state secrets privilege, outlined above, directly require that the Government's termination of contracts for default should be converted into a termination for convenience when invocation of the privilege eliminates the contractors' ability to defend the assertion of "default." The Government is entitled to no special treatment in this respect. Indeed, the Government's ability to manage its litigation risks related to the government contracting process, its ability to control when the privilege is invoked, and the contractual obligations it owes to defense contractors all decidedly favor refusing to allow the United States to assert that the termination of the contracts was for default.

Like a private contracting party, the Government protects its interests by negotiating favorable contract terms. But unlike a private party, the Government also protects its interests by establishing the laws and regulations that govern the resolution of disputes that arise under government contracts. The Government has protected its interests in just this fashion by enacting rules that give it unique rights—such as the right to terminate a contract for its own convenience—that private companies do not share. This case is extraordinary because the Government seeks yet another way to advance its contractual interests: by asking the courts to allow the Government to use the state secrets privilege not

simply as a shield to protect military secrets, but also as a sword to prevail on the Government's own contract claim by precluding litigation of a private party's contractual defense to that claim. In granting that request, the Federal Circuit sanctioned an unprecedented application of the state secrets privilege that deprives the contractors of due process.

The Federal Circuit's decision is inconsistent with the courts' longstanding refusal to allow litigants to use a privilege as both a sword and a shield. See, *e.g.*, *United States* v. *Rylander*, 460 U.S. 752, 761 (1983) (Fifth Amendment privilege against self-incrimination); *Bittaker* v. *Woodford*, 331 F.3d 715 (9th Cir. 2003) (attorney-client privilege). Only this rule is consistent with the requirement that litigants in our judicial system be afforded "an adequate opportunity to defend against the imposition of liability." *Nelson*, 529 U.S. at 466. For this reason, courts do not permit a party to advance a claim while refusing to disclose information that could provide its adversary with a defense to that claim: a litigant "should not be required to defend against a party who refuses to reveal the very information which might absolve [him] of all liability." *Wehling* v. *CBS*, 608 F.2d 1084, 1088 (5th Cir. 1979).

This reasoning applies equally to governments and private litigants. As this Court has recognized, allowing a government to promote its "litigation interests" by freely asserting both a claim and immunity in the same case "could generate seriously unfair results." *Lapides* v. *Bd. Of Regents*, 535 U.S. 613, 619 (2002). Consequently, a state government may not advance its claim, or deflect counterclaims, by invoking state sovereign immunity, including that recognized by the Eleventh Amendment. *Id.* For example, when a state files a bankruptcy claim, "it

waives any immunity which it otherwise might have had respecting the adjudication of the claim." *Gardner* v. *New Jersey*, 329 U.S. 565, 574 (1947). Likewise, a foreign government may not pursue a claim and assert foreign sovereign immunity as a defense to that claim (or as to counterclaims). See 28 U.S.C. § 1607; *Cabiri* v. *Gov't of Ghana*, 165 F.3d 193 (2d Cir. 1999); see also 28 U.S.C. § 1605(a)(1). And, when the United States commences a civil action against a private party, the "defendant may, without statutory authority," assert a counterclaim to recoup "an amount equal to [the Government's] principal claim." *United States* v. *U.S. Fid. & Guar. Co.*, 309 U.S. 506, 511 (1940).

This principle of fundamental fairness extends to the Government's privileges related to classified information and the national security. Although the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3 §§ 1-16, provides a measure of protection to classified information in the course of prosecutions, the Government may not use its provisions to secure a material litigation advantage. The Government is required instead to abandon the claim where litigation of the claim or a related defense depends on information the Government chooses not to disclose. See *id.* § 6(e)(2) (dismissal of claim or count, or finding against Government). Similarly, outside the context of CIPA, the Government must choose between pursuing a prosecution and invoking executive privilege to protect classified information or other government secrets material to a defense against the Government's case. See *United States* v. *Smith*, 780 F.2d 1102, 1107-08 (4th Cir. 1985) (en banc); see also *Roviaro* v. *United States*, 353 U.S. 53, 60 (1957).

The court of appeals reasoned that a different result is warranted here because, it believed, the contractors "are not at jeopardy from an attack on them by the government," but rather "are the plaintiffs in this purely civil matter, suing the sovereign on the limited terms to which it has consented." App. 208a. Therefore, the "Fifth Amendment does not require that they be able to present all defenses[.]" *Id.* at 208a-209a. That ruling fundamentally misconceives the nature of the Government's claim, the unique scheme the Government has established to resolve government contract disputes, and the due process implications of stripping the contractors of their defense.

The fact that this case arises in the civil, rather than the criminal, context is not relevant, for even in civil cases, a litigant must be given an "adequate opportunity to defend against the imposition of liability." *Nelson*, 529 U.S. at 466. As previously noted, *supra* at p. 11, the effect of a termination for default is not only to deprive a contractor of profits it would have made on the contract, but also to require the contractor to repay the monies it received for services performed on the Government's behalf and perhaps to reduce or eliminate the contractor's ability to receive additional government contracts in the future. Thus, while the Government does not seek to deprive the contractors of liberty in this case, it most certainly seeks, through its default termination claim, to require them to pay billions of dollars to the Government.

The Federal Circuit's analysis thus rests on the empty formalism of labeling the contractors as "plaintiffs" and disregards the due process principles associated with when a court may grant relief to a party on its claim or compel payment by a losing

party. And, even the court's labeling is mistaken. As previously discussed, *supra* at pp. 10-12, the contractors are styled as plaintiffs in this case only because the Government gave itself (acting through the contracting officer) the power to determine when its contractors are in breach of contract, and made that determination final and legally binding unless challenged by the contractors. See 41 U.S.C. § 605 (Contract Disputes Act). That is, the defense contractors nominally are "plaintiffs" only because the Government structured the defense contracting process to relieve itself of the normal obligation of having to sue the contractors to assert its breach of contract claim. Thus, only by elevating form over substance can the Federal Circuit hold that the posture of this litigation supports permitting the Government to use the state secrets privilege to deprive the contractors of their right to present an adequate defense—that the Government itself caused the breach of contract.

The Government's reversal of the normal litigation process is consistent with due process only because it still affords the contractors an opportunity to dispute and defend against the Government's breach of contract claim by filing a lawsuit to obtain a judicial hearing. See *Lichter*, 334 U.S. at 789-92 (upholding similar scheme under the Renegotiation Act that enabled the Government to recover "excessive profits" on military goods and services during World War II unless the contractor challenged the Government's determination in the Tax Court). Nor does any consideration related to sovereign immunity require a different result. While the United States has the sovereign authority to require a contractor to initiate a lawsuit to avoid being held liable on a government contract claim, sovereign immunity cannot erase a

contractual right—and trigger judicial enforcement against a private party—once the Government has already entered the contract. The Government's claim against its contractors is hardly analogous to the claim of a third party who, like the plaintiffs in *Reynolds*, has no contractual relationship with the Government and may sue the Government in tort only because the Government has waived sovereign immunity. In the former situation, the Government is advancing its own contract claim, which in this case could require the contractors to pay the Government more than $2.8 billion in contract payments and interest, in addition to forfeiting $1.2 billion (plus interest) in unrefunded costs incurred performing the contract. In the latter situation, "the Government is not the moving party, but is a defendant only on terms to which it has consented." *Reynolds*, 345 U.S. at 12.

Although the Fifth Amendment hardly requires the Government to answer in damages for every violation of law, it does require that when the Government seeks judicial relief against a private party and proposes to extract from it billions of dollars, that party must be afforded an "adequate opportunity to defend against the imposition of liability." *Nelson*, 529 U.S. at 466; see also, *e.g.*, *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (due process requires that "'there be an opportunity to present every available defense'") (quoting *Am. Surety Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)). The Federal Circuit's rule denies government contractors this opportunity to defend against government contract claims when, as in this case, the Government's invocation of the state secrets privilege precludes litigation of the contractors' defense.

The Federal Circuit's rule is particularly flawed in the context of this case because the Government can terminate the contract for convenience, which is a substantial but not one-sided remedy. See, *e.g.*, Krent, *supra*, at 1565-66 (when the Government terminates a contract for convenience, it may "escape the full consequences of a breach" because the contractor may not obtain specific performance and its recovery is generally limited to costs incurred, profit on work done, and the cost of preparing the termination settlement proposal). Thus, even leaving due process principles to one side, the Government's interests can be fully protected without depriving contractors of their defenses to government claims and thereby shifting to government contractors the entire cost of protecting classified information.[10] Cf. *Winstar*, 518 U.S. at 896 (balancing the Government's "need for freedom to legislate with its obligation to honor its contracts" by refusing to give the Government relief from its contractual commitments in "instances in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties"). Accordingly,

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[10] The Government's suggestion that contractors might "raise a superior-knowledge claim simply to induce the government to invoke the state-secrets privilege" (Pet. Opp. at 18) is wholly unfounded. When litigating against parties that already hold security clearances and have been trusted to handle extremely sensitive information, the Government would rarely need to invoke the privilege. And, in the usual case even following invocation of the privilege (as in the initial phases of this case), the parties' claims can be litigated through the courts' traditional methods of protecting classified information and proceeding based on otherwise available evidence. *See Reynolds*, 345 U.S. at 11. In addition, defense contractors are often highly dependent on the Government's continued willingness to do business with them, which creates very considerable incentives against litigating in bad faith.

simple justice—reflected both in sound government contracting policy and due process—requires that the termination for cause be converted to a termination for convenience.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully Submitted,

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