UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VICTOR RESTIS, *et al.*, Plaintiffs, v. AMERICAN COALITION AGAINST NUCLEAR IRAN, INC. *et al.*, Defendant.
UNITED STATES OF AMERICA, Intervenor.

ECF CASE

No. 13 Civ. 5032 (ER) (KNF)

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL THE UNITED STATES AND DEFENDANTS TO PROVIDE ADDITIONAL INFORMATION RELATING TO THE ASSERTION OF THE STATE SECRETS PRIVILEGE AND OPPOSING DISMISSAL OF THE CASE

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PRELIMINARY STATEMENT

On September 12, 2014, the Government filed a motion to intervene, asserted the state secrets privilege, and moved to dismiss this action. Its submission included a publicly filed brief addressing the Government's assertion of the state secrets privilege, without revealing the information that privilege was asserted to protect. In addition, the Government provided submissions to the Court *ex parte* and *in camera* to allow the Court to assess the Government's privilege assertion and motion to dismiss. In response, plaintiffs have filed a motion to compel disclosure on the public record of a range of additional information concerning the privileged information at issue and its applicability to this case. Plaintiffs also seek an order directing the United States to grant their counsel access to the privileged information at issue, including the *ex parte* submission to the Court. Plaintiffs also oppose dismissal based on the Government's privilege assertion. Plaintiffs' motion should be denied, and the Court should proceed to decide the Government's assertion of privilege, and whether dismissal is required.

As set forth further below, plaintiffs' portrayal of the state secrets doctrine is incomplete, inaccurate, and misleading; it relies heavily on cases arising outside the state secrets doctrine and misreads the applicable law in key respects.[1] Contrary to plaintiffs' position, longstanding legal principles applicable in state secrets cases make clear that there is no threshold requirement for public disclosure concerning a state secrets privilege assertion. The law, instead, contemplates a public disclosure of the nature of the privilege only to the extent (if any) that is practicable under the circumstances without risking disclosure of the information to be protected. Here, the scope and specific nature of the Government's interest in privileged information as it relates to this case is properly protected, and the specific disclosures demanded by plaintiffs would put that

[1] Notably, plaintiffs err in repeatedly relying on a Fourth Circuit panel decision that was reversed *en banc*. *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (*en banc* order dismissing case on state secrets grounds). *See* Br. 14, 15, 18.

very information at issue at risk of disclosure. Also contrary to plaintiffs' presentation, the clear weight of authority in the state secrets doctrine *rejects* access to states secrets information by private counsel.

The Government acknowledges that the issues it has placed before the Court are significant and that the circumstances presented here are rare (though not unprecedented, as plaintiffs and *amici* assert). Nonetheless, the law, properly construed and applied to the particular circumstances here, firmly supports several conclusions: that no further information can safely be disclosed on the public record; that the privilege assertion is well founded and should be upheld; that the Court cannot and should not grant access to that information to plaintiffs' counsel; and that the need to prevent a significant risk of harm to national security requires dismissal here. The Government recognizes that dismissal is a drastic remedy and does not seek it lightly. Existing law establishes that whether a case should be dismissed on state secrets grounds depends on the relationship between the privileged information and the litigation, and here the Court should find that the inherent risk of disclosure in further proceedings necessitates dismissal. The Government stands ready to address the issues with the Court, *ex parte* as necessary, to explain further the basis for its position. In the meantime, the Court should not accept plaintiffs' flawed presentation of the law nor grant the relief sought through their motion to compel.

ARGUMENT

POINT I

THE LAW DOES NOT SUPPORT PLAINTIFFS' DEMAND FOR DISCLOSURE OF MORE INFORMATION CONCERNING THE PRIVILEGE ASSERTION

In their motion, plaintiffs ask this Court to compel the Government to publicly disclose myriad additional details about the nature of the information over which the Government has asserted the state secrets privilege. Plaintiffs (and *amici*) contend that what the Government has done here is unprecedented and that the Government is required to publicly disclose more information. *See* Memorandum of Law in Support of Plaintiffs' Motion to Compel the United States and Defendants to Provide Additional Information Relating to the Assertion of the State Secrets Privilege and Opposing Dismissal of This Case ("Br.") at 1, 6-7; Brief of *Amici Curiae* in Support of Motion to Compel Intervenor to Provide Additional Information Relating to the Assertion of the State Secrets Privilege and Opposing Dismissal of the Case ("Amicus Br.") at 1. As explained below, however, while the circumstances presented here are rare, the governing law does not require a level of public disclosure that, as a practical matter, would risk revealing the very privileged information at issue.

A. The Law Governing State Secrets Privilege Assertions Does Not Support Compelling the Public Disclosures Plaintiffs Seek

As an initial matter, plaintiffs (and *amici*) inaccurately claim that the manner in which the Government has asserted the state secrets privilege in this case is "unprecedented," "unlike every other state secrets case," and a "legal unicorn," and further assert incorrectly that the Government is required to file a public declaration asserting the privilege. *See* Br. 1; Letter from Abbe David Lowell to the Hon. Edgardo Ramos dated Oct. 2, 2014, at 1. On the contrary, the Government's practice in state secrets cases varies depending on the context and circumstances

the case presents, and the circumstances here, while rare, fall within the spectrum of prior precedent.[2]

In *United States v. Reynolds*, the Supreme Court recognized that, in state secrets cases, the circumstances of the individual case dictate how much information the Government can disclose: "The Court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing disclosure of the very thing the privilege is designed to protect." 345 U.S. 1, 8 (1953). The *Reynolds* Court's observation is borne out in the body of state secrets cases. Just as "there is considerable variety in the situations in which a state secrets privilege may be fairly asserted," *Ellsberg v. Mitchell*, 709 F.2d 51, 63 (D.C. Cir. 1983), the amount of information the Government can publicly reveal regarding the state secrets it is protecting varies from case to case.

Relying on *Ellsberg,* plaintiffs assert that "the District of Columbia Circuit specifically required such public disclosure" in state secrets cases. Br. 6. But the *Ellsberg* court explained that it was *not* "adopting a strict rule" regarding the amount of public disclosure required in state

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[2] Aside from misapprehending the law (as discussed further below), plaintiffs assert that "[c]ourts have denied state secrets privilege claims, at least in part, dozens of times in a range of civil and criminal cases, including many outright denials." Br. 4 (citing Ex. D (Georgetown Law State Secrets Archive, available at http://apps.law.georgetown.edu/state-secrets-archive/)). This assertion is incorrect and the exhibit on which it relies is inaccurate. Plaintiffs' Exhibit D is derived from a database maintained online by Georgetown University Law Center ("GULC") of cases purportedly involving the disposition of state secrets matters in litigation. But plaintiffs have submitted only a portion of the database based apparently on their own use of the options available online to show cases where a purported state secrets privilege assertion was "denied" or "upheld in part and denied in part." In other words, plaintiffs' report from the database omits all cases where the privilege was upheld – cases that also are included in the GULC database. In addition, the cases where plaintiffs claim the privilege was denied in whole or part include several criminal cases, where the privilege is inapplicable as expressly held by *Reynolds*, and numerous cases where the Government *did not assert* the privilege. The Government has prepared a summation of Exhibit D's flaws. *See* Exhibit A hereto. Ultimately, plaintiffs do not cite a single case in which a state secrets assertion actually made by the Government in civil litigation was finally rejected by courts reviewing the matter, and in which the privileged information at issue was ultimately ordered to be disclosed.

secrets cases and further explained that such a rule would be inappropriate for two reasons. 709 F.2d at 63. First, it could "force 'disclosure of the very thing the state secrets privilege is designed to protect.'" *Id.* (quoting *Reynolds*, 345 U.S. at 8). Second, because "there is considerable variety in the situations in which a state secrets privilege may be fairly asserted," courts should be permitted to address the issue of public disclosure on a case-by-case basis. *Id.* After explaining why a rigid approach was inappropriate, *Ellsberg* reaffirmed that the amount of information the Government should be required to put on the public record in state secrets cases depends on the circumstances of the individual case. *Id.* at 64 ("We wish to make clear the limitations of our ruling: The government's public statement need be no more (and no less) specific than is practicable under the circumstances."). Thus, far from requiring the Government to publicly disclose more information, *Ellsberg* is consistent with the Government's efforts in this case (and others) to publicly disclose as much information as possible without risking disclosure of the very privileged information it seeks to protect.

In adherence to this authority, and in the normal course, the Government often is able to file public declarations in support of its assertion of the state secrets privilege that provide some information regarding the nature of the privileged information. Typically, such cases involve publicly known circumstances (such as a military accident), or activities and programs that the Government has publicly acknowledged. For example, in *Zuckerbraun v. General Dynamics*, the Government intervened in a wrongful death action brought against defense contractors who had designed, manufactured, and tested the weapons systems on the U.S.S. Stark. 935 F.3d 545, 546 (2d Cir. 1991). There, where the tragic accident at issue was of course public knowledge, and the existence of the weapons systems involved was not classified, the Government was able to submit detailed public declarations explaining why classified technical data about the weapons system's design, performance, and functional characteristics were properly protected by the state

secrets privilege. *Id.* at 546. Likewise, in many of the cases that plaintiffs and *amici* cite, the Government is the defendant, and the particular matter at issue concerns a publicly acknowledged connection, role, or activity by the Government. *See, e.g.*, *Doe v. CIA*, 576 F.3d 95, 99 (2d Cir. 2009) (Government filed public declaration asserting the state secrets privilege in suit by acknowledged former covert CIA employee); *Sterling v. Tenet*, 416 F.3d 338, 345-46 (4th Cir. 2005) (same); *Molerio v. FBI*, 749 F.2d 815, 821 (D.C. Cir. 1984) (Government filed public declaration asserting the state secrets privilege in suit by individual whose application for an FBI position was not secret but where the reasons for denying employment were properly protected); *Fazaga v. FBI*, 884 F. Supp. 2d 1022, 1033 (C.D. Cal. 2012) (Government filed public declaration asserting state secrets privilege in suit concerning an acknowledged FBI counterterrorism investigation), *appeal docketed*, No. 13-55017 (9th Cir. Jan. 3, 2013); *Nejad v. United States*, 724 F. Supp. 753, 755 (C.D. Cal. 1989) (Government filed public declaration asserting the state secrets privilege to protect operational details of weapons system involved in accidental downing of an Iranian passenger plane).

Moreover, in cases where an alleged governmental role or activity may not be publicly confirmed, the mere fact that allegations in a complaint are directed at alleged governmental action may allow for a public assertion of privilege that encompasses general categories of information that would be needed to address the allegations. *See, e.g.*, *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073-75 (9th Cir. 2010) (*en banc*) (in response to public allegations that defendant assisted CIA in extraordinary renditions, CIA could file public declaration asserting the state secrets privilege even where alleged program was not confirmed); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899, 910 (N.D. Ill. 2006) (in response to public allegations that defendant disclosed telephone records to the Government, the United States could file public declaration asserting state secrets privilege neither confirming nor denying the

allegations); *Hepting v. AT&T Corp*., 439 F. Supp. 2d 974, 994-95 (N.D. Cal. 2006) (same); *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1202-03 (9th Cir. 2007) (public declaration asserting the state secrets privilege submitted in response to allegation that plaintiffs were subjected to surveillance under publicly acknowledged surveillance program); *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978) (same); *Black v. United States*, 62 F.3d 1115, 1117 (8th Cir. 1995) (CIA Director filed public declaration asserting the state secrets privilege neither confirming nor denying allegations regarding alleged covert CIA programs); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 53-54 (D.D.C. 2010) (same). But the fact that the Government often is able to provide, and does provide, some public information concerning the information as to which it asserts privilege does not in itself establish a rule that it is invariably required to do so, let alone create a required threshold level of disclosure needed to permit adversarial adjudication over the privilege assertion itself.

Thus, in some state secrets cases, the Government is able to file a public declaration identifying the agency that is asserting the privilege but is not able to publicly describe the privileged information it is protecting to any meaningful extent. For example, in *Doe v. CIA*, the Government filed a public declaration from CIA Director Porter Goss asserting the state secrets privilege. 576 F.3d at 99. However, "Goss's public declaration did not describe the classified information at issue because, he said, he had 'determined that the bases for [the] assertion of the state secrets privilege cannot be filed on the public court record, or in any sealed filing accessible to the plaintiffs or their attorneys, without revealing the very information that [the Government sought] to protect.'" *Id.* (quoting the Goss Declaration). Similarly, in *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010), the CIA Director asserted the state secrets privilege in response to allegations concerning the use of lethal force overseas, but was able to say little in a public declaration in response to the allegations or about the nature of any information being protected.

See Exhibit B hereto. These cases illustrate that public declarations do not always describe the nature of a privilege assertion with more specificity than the Government has been able to provide in this case.

Similarly, there also have been cases, like this one, where specific details concerning the Government's interest in a private lawsuit could not be described on the public record and the particular circumstances required that declarations in support of the Government's assertion of the state secrets privilege be submitted *ex parte* and *in camera* to protect certain information that was at risk of disclosure in the case. For example, in *Terex Corp., et al., v. Fuisz et al.*, No. 92-0941 (D.D.C.), the Government filed a Statement of Interest in a defamation action between private parties and filed a public brief asserting the state secrets privilege. *See* Declaration of Anthony J. Coppolino (attached as Exhibit C). There, as here, the Government submitted its supporting declaration *ex parte* and *in camera* and did not publicly disclose which agency asserted the privilege. *Id.*[3]

In addition, although extremely rare, there also have been matters in which the Government's state secrets assertion has been entirely under seal. By definition, of course, sealed matters cannot be found on the public record. In publicly acknowledging that it is asserting the state secrets privilege in this case and submitting a public brief in support of its assertion, the Government has disclosed more information about its state secrets privilege assertion here than has occurred in prior sealed matters.[4]

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[3] The Government does not fault plaintiffs and *amici* for not being aware of the *Terex* case, as there appear to be no public decisions from that matter on Westlaw. This example indicates that legal databases may not identify cases that did not generate a publicly available decision.

[4] The Government can provide the Court with additional information *ex parte* and *in camera* regarding certain sealed cases that involved a state secrets privilege assertion.

In sum, there is no "one-size-fits-all" requirement as to whether and to what extent a state secrets privilege assertion must include a public declaration or some threshold level of public information concerning the privilege. Whether and to what extent public discussion of a privilege assertion is possible depends on the circumstances of the particular case. Here, the Government has placed as much information on the public record as it judged was possible without risking disclosure of the very information over which privilege has been asserted. The fact that there have been previous cases where the Government has been able to publicly disclose more information does not establish a rule of law that inflexibly requires any particular level of public disclosure. Just as the *Reynolds* Court envisioned, the amount of public disclosure that is possible must turn on the particular circumstances of each case. Because state secrets cases have varied based on their own circumstances, public disclosure in these cases has fallen along a wide spectrum. This case falls within that historical spectrum.

B. Disclosure of the Information Plaintiffs Seek Would Risk Disclosure of the Privileged Information Itself

Aside from its misunderstanding of prior precedent, plaintiffs' motion also is flawed to the extent that it seeks to compel the disclosure of specific information about the nature and scope of the Government's privilege assertion that would reveal details about the privileged information itself – including what it may or may not pertain to and how that information is relevant to this case. Plaintiffs' contention that due process considerations require such public disclosures to permit a more adversarial litigation of the privilege itself finds no support in the law. To the contrary, as outlined above, the Court must determine whether the circumstances are appropriate for the claim of privilege without forcing disclosure of the very thing it is designed to protect and, as other courts have repeatedly held, that determination may be made through *ex parte*, *in camera* review.

To begin with, plaintiffs' proposed order seeks to compel details such as which agency is asserting the privilege; the nature of any privileged information defendants may possess; how deeming this material to be privileged would protect national security; whether the privileged information involves a foreign entity or person, and if so, how a relationship with that foreign entity or person would be properly protected by the state secrets privilege; and how the privileged information would bear upon plaintiffs' ability to support a *prima facie* case or on defendants' ability to either challenge a particular element of plaintiffs' cause of action or assert an affirmative defense. *See* Proposed Order (dkt. item 291-1). Likewise, in their brief, plaintiffs contend that the Government should disclose whether the privileged information concerns a military, intelligence, or diplomatic secret – arguing that if it concerns diplomatic secrets a different analysis of law supposedly applies. *See* Br. at 10. Plaintiffs also demand to know if defendants maintain any classified information in their files; if so, how they obtained it, and how it might be relevant to the allegations in this case and to presenting a valid defense. *See id*. at 20.

The very public disclosures plaintiffs seek to compel would risk disclosure of details about the privileged information itself. For example, in the circumstances of a case such as this, different inferences might be drawn about the nature of the privileged information from the mere identity of the agency asserting privilege. Other details, such as whether a foreign entity is at issue and why disclosure could harm national security, likewise could provide valuable insights into what the privileged information may be. Any response to plaintiffs' demands for more information – regardless of whether it would confirm or deny precise details of what is at issue in the privilege assertion – would inherently risk disclosure of what the privilege concerns. But in a case where the very nature of the Government's interest in the underlying lawsuit is itself properly protected, such a course is neither required nor appropriate.

The authority on which plaintiffs rely simply does not hold that due process considerations require the kind of public disclosures they seek in order to adjudicate the question of privilege in an adversarial fashion. *Reynolds* itself does not hold or provide that due process considerations require public disclosures in order to litigate the question of privilege. Rather, as noted, *Reynolds* and its progeny make clear that the process for adjudicating a state secrets privilege assertion should not itself reveal privileged information, and hence may entail decidedly non-adversarial measures such as *ex parte* review. *Reynolds*, 345 U.S. at 532; *see Doe*, 576 F.3d at 103 ("The [*Reynolds*] Court thus strongly suggested that if the district court is not satisfied by the claim of privilege, it may examine the evidence in question, so long as the review is *ex parte* and *in camera*."). Indeed, courts upholding state secrets privilege assertions and dismissing claims on that basis have done so precisely because adversarial proceedings would risk disclosure of the privileged information. *See, e.g.*, *Fitzgerald v. Penthouse Int'l*, 776 F.2d 1236, 1243 (4th Cir. 1985) ("[T]he parties would have every incentive to probe dangerously close to the state secrets themselves."); *accord Farnsworth Cannon*, 635 F.2d at 281. If this action is allowed to proceed, plaintiffs will have every incentive to probe dangerously close to the edge of (if not beyond) what may be at issue in the privilege assertion. Under the applicable law, demands for adversarial probing are grounds for denying – not granting – disclosures that would risk revealing the privileged information at issue. Indeed, as the Second Circuit made clear in upholding *ex parte* review of a state secrets assertion:

> Unarguably, then, the plaintiffs have no right of access to material that the government contends contains state secrets prior to the district court's adjudication of that contention. *The plaintiffs do not create such a right by asserting that they seek access to enable them to argue that the alleged state secrets are not really state secrets.*

Doe, 576 F.3d at 106 (emphasis added).[5] *See also Jabara v. Kelly*, 75 F.R.D. 475, 486-87 (D. Mich. 1977) ("In the case of claims of military or state secrets' privilege, however, the superiority of well-informed advocacy becomes less justifiable in view of the substantial risk of unauthorized disclosure of privileged information.").

Plaintiffs' reliance on *Reynolds* to claim a due process right to additional public disclosures in order to litigate the claim of privilege is particularly misguided. In their motion, plaintiffs claim that, "[i]n *Reynolds*, the Supreme Court explained there is a sliding scale *as to how much public disclosure is appropriate* depending on the circumstances of a case." Br. 7 (emphasis added). Plaintiffs mischaracterize the nature and purpose of the sliding scale that the *Reynolds* Court described. The scale measures how much information the Government must disclose *to the court* in order to support the privilege assertion itself – not how much information about the privilege must be disclosed on the public record in order to permit adversarial proceedings over the question of privilege itself. In describing the sliding scale, *Reynolds* explained that "[i]n each case, the showing of necessity which is made will determine how far *the court* should probe in satisfying *itself* that the occasion for invoking the privilege is appropriate." 345 U.S. at 11 (emphases added). Thus, under *Reynolds*, the greater the parties' need for the privileged material, the deeper the court should probe into assuring that the state secrets privilege has been properly invoked. But *Reynolds* does not require a quantum of public disclosure in order to litigate the question of privilege.

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[5] *See also Al-Haramain Islamic Found., Inc. v. Bush,* 507 F.3d 1190, 1203 (9th Cir. 2007) ("The process of *in camera* review ineluctably places the court in a role that runs contrary to our fundamental principle of a transparent judicial system. It also places on the court a special burden to assure itself that an appropriate balance is struck between protecting national security matters and preserving an open court system. That said, we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.").

The *Ellsberg* decision likewise recognized that the sliding scale from *Reynolds* measures how much information the Government should be required to disclose to the court to justify protecting information from disclosure, not whether more information should be made public to litigate the claim of privilege. In describing the sliding scale, *Ellsberg* explained that "[w]hether (and in what spirit) the *trial judge* in a particular case should examine the materials sought to be withheld depends upon two critical considerations." 709 F.2d at 58 (emphasis added). "First, the more compelling a litigant's showing of need for the information in question, the deeper 'the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate.'" *Id.* at 58-59 (quoting *Reynolds*, 345 U.S. at 11). "Second, the more plausible and substantial the government's allegations of danger to national security, in the context of all the circumstances surrounding the case, the more deferential should be the judge's inquiry into the foundations and scope of the claim." *Id.* at 59. In sum, neither *Reynolds* nor *Ellsberg* supports plaintiffs' argument that the Government should be required to submit additional information about state secrets on the public record.[6]

Accordingly, the Court should not compel the disclosures plaintiffs seek, because no law requires or supports that result, and doing so would effectively compromise the privilege assertion itself. Rather, the Court first should consider the assertion of privilege, and decide

[6] Other cases plaintiffs cite in support of their argument that the Government should be forced to disclose state secrets are not state secrets cases and are inapposite here. *See, e.g.*, *United States v. Abuhamra*, 389 F.3d 309 (2d Cir. 2004) (*ex parte* information at issue concerned application for bail pending sentencing, not state secrets privilege); *ACLU v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013) (declining to review redacted classified judicial opinions in dismissing challenge to NSA's collection of telephone meta data). Two cases cited by plaintiffs actually undercut their argument. In *Schiller v. City of New York*, the court rejected the NYPD's attempt to submit unclassified documents *ex parte* but specifically distinguished case law permitting *ex parte* submissions of classified information. No. 04-cv-7922, 2008 WL 1777848, at*3-*5 (S.D.N.Y. Apr. 14, 2008). Similarly, in *Abourezk v. Reagan*, then Circuit Judge Ginsburg observed that courts can properly rely on *ex parte* submissions in state secrets cases. 785 F.2d 1043, 1060-61 (D.C. Cir. 1986).

whether the Government has established that the information at issue should be properly excluded from the case. Once the Court is satisfied that there is a "reasonable danger" that state secrets will be revealed, *Reynolds*, 345 U.S. at 10, any further disclosure demanded by plaintiffs would be a "fishing expedition" that the Court should not countenance because it amounts to "playing with fire" on national security matters. *Sterling*, 416 F.3d at 344. If the Court has particular questions about whether certain information is properly privileged, the Government stands ready to address the matter, including through an *ex parte* process as appropriate. But in no event should the Court disclose or direct disclosure of additional information without providing an opportunity for the Government to engage further with the Court or, if necessary, to seek further review.[7]

POINT II

THE LAW DOES NOT SUPPORT THE DISCLOSURE OF STATE SECRETS INFORMATION TO PLAINTIFFS' COUNSEL

Plaintiffs also contend, in the alternative, that the Court should require the Government to grant plaintiffs' counsel access to the information subject to the state secrets privilege assertion, including the *ex parte* filings submitted to the Court, in order to permit a more adversarial process in litigation over the privilege assertion. Br. 11. Plaintiffs' premise that "the use of cleared counsel in civil cases involving classified information or state secrets is not uncommon," *id.*, is incorrect and based on cases that have no bearing in the present context. Plaintiffs' contemplated extension of the narrow circumstances where access is granted would represent a change in the law, as *amici* acknowledge. *See* Amicus Br. 7 & n.5 (urging the Court to take a

[7] An order directing the disclosure of privileged information would be subject to appellate review. *See, e.g.*, *In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008) ("Secrecy is a one-way street: Once information is published [or disclosed], it cannot be made secret again," and thus an order of disclosure is "effectively unreviewable on appeal from a final judgment.").

"flexible" approach and engage in a "continued evolution and development" of state secrets law). This demand for access to the national security information being protected in this case runs counter to the broad weight of authority under the state secrets doctrine rejecting that very proposition. The circumstances on which plaintiffs rely to claim a right of access here are plainly distinguishable, and the authority they claim supports such access under the state secrets doctrine is inapposite. Moreover, the law also is clear that the decision whether to grant access to classified information lies within the discretion of the Executive Branch based on a need to know information in furtherance of a governmental function. Plaintiffs' desire to pursue private litigation does not fall within the ambit of circumstances where the Government is required to grant such access.

A. The Law Underlying the State Secrets Privilege Doctrine Is Well Settled Against Granting Private Counsel Access to State Secrets

The weight of authority under the state secrets doctrine rejects the notion that plaintiffs should be granted access to the privileged information in this case. The Second Circuit, D.C. Circuit, and Fourth Circuit have expressly rejected this very demand.

In *Doe*, the Second Circuit upheld the district court's denial of access to information over which the Government had asserted the state secrets privilege – even in circumstances where the plaintiff in that case previously had access to some of the privileged information while working as a covert employee for the CIA. 576 F.3d at 106. The Second Circuit examined the Supreme Court's decision in *Reynolds* and determined that plaintiffs in state secrets cases do not have a right to access privileged materials. *Id.* ("Even if they already know some of it, permitting the plaintiffs, through counsel, to use the information to oppose the assertion of privilege may present a danger of '[i]nadvertent disclosure' – through a leak, for example, or through a failure or mis-use of the secure media that plaintiffs' counsel seeks to use, or even through over-

disclosure to the district court *in camera* – which is precisely 'the sort of risk that *Reynolds* attempts to avoid.'" (quoting *Sterling*, 416 F.3d at 348)).

Similarly, the D.C. Circuit rejected access by counsel to information subject to a state secrets privilege assertion in *Ellsberg*. 709 F.2d at 61 ("It is well settled that a trial judge called upon to assess the legitimacy of a state secrets privilege claim should not permit the requester's counsel to participate in an *in camera* examination of putatively privileged material."). Like the Second Circuit, the court in *Ellsberg* explained: "The rationale for this rule is that our nation's security is too important to be entrusted to the good faith and circumspection of a litigant's lawyer (whose sense of obligation to his client is likely to strain his fidelity to his pledge of secrecy) or to the coercive power of a protective order." *Ellsberg*, 709 F.2d at 61; *see also Halkin*, 598 F.2d at 7 ("However helpful to the court the informed advocacy of the plaintiffs' counsel may be, we must be especially careful not to order any dissemination of information asserted to be privileged state secrets.").

Likewise, the Fourth Circuit also rejected the very argument that plaintiffs make here in *El-Masri v. United States*, 479 F.3d 296, 311 (4th Cir. 2009). There, the plaintiff argued that the district court "should have employed some procedure under which state secrets would have been revealed to him, his counsel, and the court, but withheld from the public." *Id.* The court, however, rejected that argument as "expressly foreclosed by *Reynolds*, the Supreme Court decision that controls this entire field of inquiry. . . . El-Masri's assertion that the district court erred in not compelling the disclosure of state secrets to him and his lawyers is thus without merit." *Id.*; *see also Sterling*, 416 F.3d at 348 (denying private counsel access to classified information in state secrets case); *Tilden v. Tenet*, 140 F. Supp. 2d 623, 626 (E.D. Va. 2000)

("[C]ourts have routinely denied attorneys' requests to participate in *in camera* reviews even when the attorneys have security clearances.").[8]

In sum, the foregoing authority makes plain that a compelled disclosure of information subject to the state secrets privilege in civil cases, even to counsel who has been granted access to classified information in the past, would abrogate the privilege assertion itself and risk harm to national security. The need to protect national security information is of such importance that efforts to protect it must sometimes impinge on traditional adversarial procedures. Accordingly, the baseline rule of law is that private counsel may not be granted access to national security information when the state secrets privilege is asserted.

B. The Authority on Which Plaintiffs Rely to Demand Access to Classified Information Is Plainly Inapposite Here

Plaintiffs attempt to support their demand for access to the privileged information at issue here through reliance on plainly distinguishable circumstances and inapposite authority. The cases counsel cite fall into a few distinct categories presenting circumstances not present here, namely, criminal cases, Guantanamo Bay habeas litigation, and cases involving government contractors. Plaintiffs also rely on miscellaneous cases that did not ultimately involve any access to national security information by private counsel.

Criminal Cases: Procedures applicable to the use of classified information in criminal cases are statutorily mandated, and simply do not apply here. *See* Classified Information

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[8] The Ninth Circuit also has read *Reynolds* to require *ex parte*, *in camera* review of state secrets privilege assertions – not an embrace of protective order procedures. *See Mohamed*, 614 F.3d at 1077 n.3 (concluding privileged information was at risk of disclosure "no matter what protective procedures the district court might employ. Adversarial litigation, including pretrial discovery of documents and witnesses and the presentation of documents and testimony at trial, is inherently complex and unpredictable."); *see also Al-Haramain*, 507 F.3d at 1202-03 (concluding that, despite accidental disclosure of a document subject to the state secrets privilege, "*Reynolds* requires an *in camera* [and *ex parte*] review of the [document containing the information in question] in these circumstances").

Procedures Act, 18 U.S.C. app. 3 ("CIPA"). By its plain terms, CIPA is inapplicable in civil cases. *See* CIPA, Pub. L. No. 96-456, 94 Stat. 2025 (1980) ("An act to provide certain pretrial, trial and appellate procedures for criminal cases involving classified information."); *see also id.* § 3 ("Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any *criminal case* in a district court of the United States." (emphasis added)). As the Supreme Court observed in *Reynolds* itself, there are critical differences between civil litigation and criminal prosecutions. In the latter, the Government makes an affirmative decision whether to bring charges, including in cases where classified national security information may be implicated, and seeks to deprive a person of his most basic liberty interest: freedom from incarceration. As *Reynolds* explains, in that setting:

> [T]he Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. Such rationale has no application in a civil forum where the Government is not the moving party . . . .

Reynolds, 345 U.S. at 12. Thus, on its face, *Reynolds* indicates that the procedures applicable to a state secrets privilege assertion differ from those applicable in a criminal setting. In a criminal case, the Government may choose to withdraw evidence, dismiss charges, or dismiss an indictment rather than disclose classified information. But the opportunity to unilaterally end the dispute in which classified information is at issue obviously does not apply in a civil case where the Government is a defendant, let alone one in which it is a third party to a discovery dispute between private parties, as here. [9]

[9] Even in the criminal context, CIPA itself contains numerous provisions recognizing the Government's ability to protect classified information. For example, if the court authorizes

Plaintiffs' efforts to analogize to criminal cases are therefore incorrect and ill-reasoned. In *Abuhamra*, the Second Circuit relied on its extensive analysis of a criminal defendant's liberty and due process interests to require the Government to make some public disclosure. 389 F.3d at 318-19, 322-23. But *Abuhamra* – a criminal case that did not involve national security information, *see id*. at 324 – provides no basis to conclude that the Second Circuit imposed a public disclosure requirement in state secrets cases. *Cf.* Br. 5 (incorrectly suggesting that *Abuhamra* is applicable to cases such as *Zuckerbraun* and *Doe*).[10]

Accordingly, it is of no relevance that private counsel may have received access to classified information in representing defendants in criminal cases, because the law applicable to those circumstances does not apply to an assertion of the state secrets privilege in a civil setting. The application of CIPA to this action would be an impermissible construction of that statute,

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disclosure of classified information, the Government may move to substitute non-classified information in its place, and may submit an affidavit from the Attorney General, explaining why disclosure will damage national security, which the court must review *ex parte* and *in camera* at the Government's request. *See* 18 U.S.C. app. 3 § 6(c). If a court orders disclosure of classified information, the Government may either bring an interlocutory appeal or cause the court to dismiss the indictment. S*ee id.* §§ 7(a), 6(e).

[10] In addition, it should be noted that the Second Circuit has held that CIPA represents the application of the state secrets privilege in the criminal context. *See United States v. Aref*, 533 F.3d 72, 78-79 (2d Cir. 2008) (explaining that CIPA "presupposes" a governmental privilege against the disclosure of classified information and that the "most likely source" for that protection is the common-law state secrets privilege); *see also United States v. Stewart*, 590 F.3d 93, 130 (2d Cir. 2009) (citing *Aref*). The Government strongly disagrees with this conclusion, which at least two other circuits have expressly declined to adopt. *See United States v. Rosen*, 557 F.3d 192, 198 (4th Cir. 2009); *United States v. El-Mezain*, 664 F.3d 467, 521 (5th Cir. 2011). In any event, the fact that the invocation of CIPA protections now also requires an invocation of the "state secrets privilege" in the Second Circuit does not mean or imply that CIPA applies to civil litigation involving the state secrets privilege.

distorting both its language and legislative rationale and ignoring the distinction between criminal and civil litigation.[11]

Guantanamo Habeas Cases: Plaintiffs also err in relying on the Guantanamo *habeas* cases as a purported analog to their request for access to the state secrets at issue in this case. *Cf.* Br. 13; Amicus Br. 6-8 & n.6. The Guantanamo cases involve detainees' liberty interests in being free from custodial detention, and, in that unique and sensitive circumstance arising from Executive-imposed detentions, the Government chose to provide qualified, security-cleared *habeas* counsel with access to classified information the Government was willing to disclose to counsel, and sought and obtained a protective order regulating counsel's access to sensitive and

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[11] Plaintiffs' reliance on *Latif v. Holder*, 686 F.3d 1122 (9th Cir. 2012), and *Halliwell v. A-T Solutions*, No. 13 Civ. 2014, 2014 WL 4472724 (S.D. Cal. Sept. 10, 2014), for the proposition that CIPA provides a basis for counsel to have access here, *see* Br. 12, is likewise misplaced. Any assumption reflected in either case that CIPA can be applied in a civil setting is manifestly incorrect. The Ninth Circuit in *Latif* did not directly hold as much, but merely suggested that the district court could exercise its "sound judgment" in handling discovery that might involve sensitive intelligence information; nowhere did the Ninth Circuit specifically reference how CIPA should apply. *See* 686 F.3d at 1130. That case remains on remand, and the district court has not yet attempted to apply CIPA to require clearance of counsel over the Government's objection, but instead suggested that an unclassified summary would suffice (an option that is not workable here). *See, e.g.*, *Latif v. Holder*, No. 10 Civ. 750, 2014 WL 2871346, at *25 (D. Or. June 24, 2014) ("[The Government] *may choose* to provide Plaintiffs with unclassified summaries of the reasons for their respective placement on the No-Fly List or disclose the classified reasons to properly-cleared counsel." (emphasis added)). Likewise, neither *Halliwell*'s statement that "courts and the government follow similar procedures [to CIPA] in civil cases," 2014 WL 4472724, at *4, nor the sources cited in *Halliwell* for that proposition, *see* Robert Timothy Reagan, *Keeping Government Secrets* 9 (2d ed. 2013); 28 C.F.R. § 17.17(c), suggest that the court was looking to CIPA to determine whether to order the Government to clear counsel, which it did not do in any event. Similarly, to the extent that the district court in *Horn v. Huddle* purported to order the "implementation of pretrial CIPA-like procedures," 636 F. Supp. 2d 10 (D.D.C. 2009) (cited at Br. 13), that decision was also in error and, in any event, was vacated pursuant to a settlement. 699 F. Supp. 2d 236, 238-39 (D.D.C. 2010). Moreover, before the settlement, the Government had appealed the district court's order in *Horn* and the D.C. Circuit had granted a stay of the district court's order pending appeal, and set a schedule for expedited briefing. *See* Case No. 09-5311, Document #1205471 (D.C. Cir.). Both the underlying district court case and the appeal were dismissed as a result of the settlement. *See* Case No. 09-5311, Document #1241679 (D.C. Cir.); *Horn*, 699 F. Supp. at 238-39.

classified information, as well as counsel's access to the secure Guantanamo Bay facility. *See In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-0442, 2009 WL 50155 (D.D.C. Jan. 9, 2009); *In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004). There is no parallel in this case, and critically, as noted, the Government agreed to the appropriate disclosure of classified information, subject to detailed constraints, given the unique circumstances of the litigation. Moreover, nothing in the Guantánamo protective order requires the Government to disclose classified information, and nothing in the order entitles petitioners or their counsel access to information filed *ex parte* or *in camera*. *See In re Guantanamo Bay Detainee Litig.*, 2009 WL 50155, at *12 (§ 48(b)). Finally, as in criminal cases, the Government typically can avoid the disclosure of classified information in the Guantanamo cases, where it may determine to withdraw allegations or release a detainee.

Government Contractor Cases: Cases involving government contractors who worked on classified defense contracts also do not provide a proper basis for granting access here. *Cf.* Br. 12, 15 (citing *Halliwell*, 2014 WL 4472724; *Loral Corp. v. McDonnell Douglas Corp.*, 558 F.2d 1130 (2d Cir. 1977); *N.S.N. Int'l Industry v. E.I. DuPont*, 140 F.R.D. 275 (S.D.N.Y. 1991); Amicus Br. 7, 20-21 (citing *Loral*).

As a general matter, the fact that government contractors and their counsel have been granted access to classified information is unsurprising since the very purpose of some contracts is to create classified government projects for which contractors must receive clearances for access to classified information. Plaintiffs and their counsel are in no similar position here.

Moreover, past access to sensitive information does not entitle a government contractor or their counsel to such access (even to the same information) in the future, including in litigation. The law remains that the Government may assert the state secrets privilege to prevent even previously cleared counsel from access to or use of classified information in litigation. *See,*

e.g., *Gen. Dynamics Corp. v. United States*, 131 S. Ct. 1900, 1904 (2011) (noting that court had terminated certain discovery upon state secrets assertion).[12]

Thus, in one of the cases cited by plaintiffs, *N.S.N.*, the court upheld an assertion of the state secrets privilege to exclude certain evidence from the case despite the fact that certain counsel for the defendant defense contractor had been granted security clearances for access to classified information. 140 F.R.D. at 279. The court noted that neither cleared counsel had reviewed all of the privileged information at issue, but found in any event that the privilege would not have been waived if they had, since it was "wholly proper" that counsel for the contractor had clearances because they "were agents of the corporation that created the privileged material." *Id.* at 279-80 (finding a waiver to be "absurd" in these circumstances).

Likewise, in *Loral*, a dispute between a prime and sub-contractor involved in producing classified Air Force equipment, the sole issue on appeal was whether an order striking a jury trial should be upheld because of the need to protect classified information essential to the claims. 558 F.2d at 1131. Citing *Reynolds*, the court agreed with the Government that a jury trial was "inappropriate" in the circumstances. *Id.* at 1132. The decision notes that the Department of Defense had provided access to the relevant materials for the court, magistrate, and lawyers – but does not reflect that the court required the Government to do so. *See id.*

Miscellaneous Cases: Plaintiffs and *amici* also cite various other cases that purportedly support their right to access the privileged information, but none of them do so – indeed, most do not involve the state secrets privilege at all. Cases involving proceedings brought by the

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[12] As noted above, the same outcome holds true in cases where government employees had access to classified information as part of their official duties and their counsel had received a limited security clearance to represent the employee. *See, e.g.*, *Doe v. CIA*, 576 F.3d at 106; *see also, e.g.*, *Tilden v. Tenet*, 140 F. Supp. 2d at 626-27 (the court denied counsel for a CIA employee access to the Government's *ex parte* filings, even though counsel had a security clearance, and, after *in camera* review, granted dismissal based on the Government's assertion of the state secrets privilege).

Government against designated terrorist organizations are inapposite. *See, e.g.*, *Al Haramain Islamic Found. Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 983 (9th Cir. 2012); *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 660 (N.D. Ohio 2010).[13] No such grant of access to classified information has been compelled by a court in any of these cases, and no such access occurred. Indeed, Congress has, by statute, specifically *authorized* the *ex parte* submission of classified information in support of such terrorist designation on the merits. 50 U.S.C. § 1702(c).[14]

Likewise, cases involving alleged designations on a "No-Fly" list have not involved granting access to private counsel to classified information subject to the state secrets privilege. As noted above, no such access has been granted in *Latif v. Holder*, 2014 WL 2871346, at *9-*10. And in *Ibrahim v. Department of Homeland Security* – a case cited by *amici*, *see* Amicus Br. 7-8 – the district court upheld the Government's state secrets privilege assertion and excluded that information from the case without granting access to plaintiffs' counsel. No. C 06-

[13] In their brief, plaintiffs claim that, in *KindHearts*, the court ordered counsel for a charity that was contesting the freezing of its assets to obtain a security clearance and view necessary documents. Br. 8. A closer look at the decision, however, shows that the court only "propose[d]" counsel access as one of multiple options, subject to further briefing by the parties. *KindHearts*, 710 F. Supp. 2d at 660. The case ultimately settled, and nothing indicates that private counsel was ever given access to classified information.

[14] In *Al Haramain*, the Ninth Circuit considered a challenge to the Government's designation of Al Haramain as an organization that supports Al-Qaeda based on a record that included classified information filed *ex parte* and *in camera*. *See* 686 F.3d at 985. Here, defendants have not and are not relying on the classified information to present a record to the Court that would result in a decision on the merits. Moreover, the court in *Al Haramain* declined to grant plaintiff's counsel access to the classified information in the administrative record supporting the Al Haramain designation, which was upheld by both the district and appellate courts. *Id.* at 983-84.

00545, 2013 WL 4549941, at *2, *5 (N.D. Cal. Aug. 23, 2013). Other non-state secrets cases cited by plaintiffs likewise are inapposite.[15]

As for the cases actually involving the state secrets privilege, none of them support granting security clearances for access by plaintiffs' counsel here to the privileged information. First, as noted, plaintiffs rely heavily on a case that was reversed *en banc*. (Br. 14, 15, 18). *See Farnsworth Cannon,* 635 F.2d at 281. In *Farnsworth,* a tortious-interference-with-contract case between private parties, a panel of the Fourth Circuit suggested that counsel would have a "need to know" in further proceedings, and thus should be cleared by the Executive, a conclusion it drew from the Government's acknowledgment "that just resolution of cases sometimes creates a limited 'need to know' in judicial personnel." 635 F.2d at 276 (panel op.) ("If it is necessary for this case to go to trial, then counsel for plaintiff, as an officer of the court, would have a comparable need to know."). While plaintiffs rely on this passage from the *Farnsworth* panel opinion to argue for access to the sensitive information at issue here, *see* Br. 14, they fail to note that the panel opinion was subsequently reversed by an *en banc* court, which ordered dismissal of the case. *Id.* at 281 (*en banc*). The *en banc* court's dismissal was based on the fact that the Executive would not agree to disclose the contents of an *ex parte* affidavit to plaintiff's counsel,

[15] *In re Nat'l Sec. Letter* is not a state secrets case and undermines plaintiffs' arguments in this case. 930 F. Supp. 2d 1064 (N.D. Cal. 2013), *appeal docketed*, No. 13-16732 (9th Cir. Aug. 28, 2013). In that case, the district court rejected a challenge to a statutory provision providing for *ex parte* and *in camera* review of government submissions regarding National Security Letters. In reaching its decision, the court observed that, "in the context of intelligence gathering activities and national security, the use of *ex parte* and in camera submissions to review classified information may be the only way for a court to carry out its duty." *Id.* at 1079. *In re September 11 Litig.*, 236 F.R.D. 164 (S.D.N.Y. 2006) (Hellerstein, J.), is similarly distinguishable. In that case, the Government did not assert the state secrets privilege nor grant private parties or their counsel access to classified national security information. *Id.* at 167. Similarly, the Supreme Court's decision in *Webster v. Doe*, 486 U.S. 592 (1988), held only that a constitutional challenge to the denial of a security clearance by the CIA was subject to judicial review. The Court specifically cited *Reynolds* as providing the district court with authority to protect national security information on remand. *See id.* at 604.

and that, as a result, further proceedings would risk disclosure of the sensitive information as counsel would inevitably probe "as close to the core secrets as the trial judge would permit," a situation that itself would "inevitably be revealing." *Id.* at 281 (*en banc*). A key basis for the reversal of the panel opinion thus was the *en banc* court's rejection of the notion that a court could order disclosure to counsel over the objection of the Executive Branch. *Farnsworth* therefore stands for exactly the opposite of the relief sought here by plaintiffs.

Plaintiffs also rely on *Horn v. Huddle*, 647 F. Supp. 2d 66 (D.D.C. 2009), in support of their purported right to access privileged information. But, as noted, that case relied incorrectly on applying CIPA proceedings, clearances were never implemented, and the relevant opinions and orders were vacated. *See* n.11, *supra*.[16] Plaintiffs also rely on *In re National Security Agency Telecommunications Records Litigation*, 595 F. Supp. 2d 1077 (N.D. Cal. 2009), but fail to note extensive subsequent litigation there in which the Government vigorously and successfully opposed any access by plaintiffs to the privileged information. No such access was ultimately compelled; a resulting final judgment of liability against the Government, based in part on its refusal to rebut plaintiffs' claims with privileged information pursuant to a protective order, was reversed by the Ninth Circuit on other grounds, and the case dismissed. *See also In re Nat'l Sec. Agency Telecomms. Records Litig. (Al-Haramain Islamic Found. v. Obama)*, 700 F. Supp. 2d 1182, 1191-92 (N.D. Cal. 2010) (describing Government's refusal to grant security clearances), *rev'd sub nom. Al-Haramain Islamic Found. Inc. v. Obama*, 705 F.3d 845 (9th Cir.

[16] Moreover, *Horn* also involved a circumstance where the plaintiff was a government employee who previously had access to classified information, and what the district court contemplated was that the parties would have access to classified information that they previously were authorized to have access to in connection with their official duties. *See Horn*, 636 F. Supp. 2d at 18-19, *vacated*, 699 F. Supp. 2d 236. Even if *Horn* was correctly decided, that scenario of course would not apply here.

2012) (reversing and vacating judgment against United States for lack of waiver of sovereign immunity).

Finally, plaintiffs also incorrectly cite the holding in *Halpern v. United States*, 258 F.2d 36 (2d Cir. 1958), for the proposition that *in camera* trials are appropriate in state secrets cases. *See* Br. 15, Amicus Br. 20. *Halpern* involved the question of whether the Invention Secrecy Act, 35 U.S.C. § 183 *et seq*., allowed a patent challenge to proceed notwithstanding the need to protect state secrets as to the use of the invention made by the Government. 258 F.2d at 44. The court held that the statute "must be viewed as waiving the [state secrets] privilege" but that this "waiver" was dependent on the availability of adequate methods to protect the "overriding interest of national security" during a trial. *Id.* at 43. The court also noted that the plaintiff wanted to use secret information already known to him because he was the inventor. *Id.* at 44. That is not the situation here and, in any event, the holding of *Halpern* has been substantially limited.

In *Clift v. United States*, the Second Circuit expressly declined to follow *Halpern* in another case involving the same statute where the state secrets privilege was asserted. 597 F.2d 826, 829 (2d Cir. 1979). *Clift* specifically rejected the notion of *in camera* discovery, and deferred the case to see if future developments might make relevant information available to litigate the case. *See* 597 F.2d at 829; *see also American Tel. & Tel. Co. v. United States*, 4 Cl. Ct. 157, 160 (1983) (following *Clift* and declining to follow *Halpern*, because, *inter alia*, plaintiffs were seeking to obtain secret information which they did not possess). A decade later, the information at issue in *Clift* was still subject to the state secrets privilege and, on remand, the district court upheld the state secrets assertion and dismissed the case. *See Clift v. United States*, 808 F. Supp. 101, 109-11 (D. Conn. 1991). Thus, *Halpern* is no authority at all for the proposition that this case may proceed through an *in camera* trial with cleared counsel.

C. The Executive Branch Retains the Discretion to Grant Security Clearances for Governmental Functions

In addition to being contrary to the principles established in state secrets case law, an order directing the Government to disclose classified information to plaintiffs' counsel would conflict with clear law that the authority to determine who may have access to classified information "is committed by law to the appropriate agency of the Executive Branch," which enjoys exclusive responsibility for the protection and control of national security information. *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988); *see also Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990) ("The decision to grant or revoke a security clearance is committed to the discretion of the President by law."); *CIA v. Sims*, 471 U.S. 159, 180 (1985) ("[I]t is the responsibility of [the Executive], not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether [to disclose sensitive information]."). The grant of access to classified information requires the Executive Branch to make two determinations: first, a favorable determination that an individual is trustworthy for access to classified information and, second, a separate determination "within the executive branch" that an individual has a demonstrated "need-to-know" classified information – that is, the individual "requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function." Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009) at §§ 4.1(a)(3), 6.1(dd). Both determinations are crucial to the protection of sensitive information – in other words, a prior determination of trustworthiness does not by itself provide adequate protection. *See Gen. Dynamics Corp.*, 131 S. Ct. at 1904 (noting that disclosure of sensitive information to a limited number of cleared lawyers nevertheless led to several unauthorized disclosures of military secrets); *Al Haramain*, 686 F.3d at 983 (explaining that the Government

"might have a legitimate interest in shielding the materials even from someone with the appropriate security clearance").[17]

Moreover, the Executive's determination about which persons may access classified information, and under what circumstances, is "'sensitive and inherently discretionary.'" *Dorfmont*, 913 F.2d at 1401 (quoting *Egan*, 484 U.S. at 527). As the Supreme Court has recognized, "[p]redictive judgments" about the possible "compromise [of] sensitive information" involve the determination of "what constitutes an acceptable margin of error in assessing the potential risk" and thus "must be made by those with the necessary experience in protecting classified information." *Id.* at 528-29.

Here, the Executive Branch has not granted plaintiffs' counsel access to the information at issue in the state secrets privilege assertion. Moreover, it cannot reasonably be said that granting access in this case (or any other brought to vindicate a private litigant's interests) would serve a *governmental* function. Plaintiffs' interest here is in vindicating a private defamation claim, and granting access by private counsel in these circumstances would transform access determinations from a discretionary judgment by the Executive to one that arises from a private litigant's decision to file a civil action that (intentionally or not) puts national security information at issue. Put another way, under plaintiffs' apparent theory, whenever the Government judges that it must act to protect national security information in civil actions that risk improper disclosures, the Government may become obligated to grant access to private

[17] Thus, private counsel that possess a "security clearance" for one matter (such as through CIPA in particular criminal matters, *see* Br. 11) are not thereby entitled, by virtue of any prior grant of access, to gain access to any other classified information for which the Executive Branch has not separately and specifically concluded that they have a need to know for a governmental function. More specifically, a finding of "trustworthiness" in granting prior access in one case does not entitle a person to access any and all classified information in another area. *See* Exec. Order No. 13,526, at §§ 4.1(a)(3), 6.1(dd). At most, a prior clearance may resolve the first inquiry for access, but not the need to know determination. *See id.* (These principles apply as well to lawyers for the Government who hold security clearances.)

counsel who initiated the motion to compel. Such a scenario, multiplied by the numerous civil cases that are brought against the Government as defendant, along with third party matters that implicate national security information, would continually compound the risk of harmful disclosures (intentional or inadvertent); indeed, such a rule would incentivize and lead to new types of fishing expeditions in which litigants seek to force disclosures by filing suit.[18] Such an outcome is plainly not the law. Rather, courts have made clear that private interests do not outweigh the need to protect the overall public interest in protecting national security. *Kasza v. Browner*, 133 F.3d 1159, 1167 (9th Cir. 1998); *El-Masri*, 479 F.3d at 313.

For all the foregoing reasons, the Court should not order the Government to disclose state secrets to plaintiffs' counsel.

POINT III

THE COURT SHOULD GRANT THE GOVERNMENT'S MOTION TO DISMISS

Plaintiffs' filing also specifically sets forth its opposition to the Government's motion to dismiss, arguing that dismissal is an extraordinary remedy and the equities do not favor dismissal in this case. Br. 16. Plaintiffs' arguments are, again, inconsistent with the body of cases that have applied the state secrets privilege.

After a court determines that the state secrets privilege should be upheld, it must then "assess whether it is feasible for the litigation to proceed without the protected evidence and, if so, how." *Mohamed*, 614 F.3d at 1082; *see El-Masri*, 479 F.3d at 304. Although the Government seeks dismissal on state secrets grounds only when it is absolutely necessary to protect the privileged information, there have been cases where dismissal was required to protect

[18] *Cf. Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1149 n.4 (2013) (recognizing that requiring the Government to submit information about individuals it targeted for surveillance *in camera* "would allow a terrorist (or his attorney) to determine whether he is currently under U.S. surveillance simply by filing a lawsuit challenging the Government's surveillance program").

state secrets. *See, e.g.*, *Doe*, 576 F.3d at 97-98 (affirming dismissal based on state secrets privilege); *Zuckerbraun*, 935 F.2d at 545 (same); *Mohamed*, 614 F.3d at 1093 (same); *Black*, 62 F.3d at 1118-19 (same); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1140 (5th Cir. 1992) (same); *Halkin v. Helms*, 690 F.2d 977, 981 (D.C. Cir. 1982) (same).

Courts have recognized three circumstances in which the state secrets privilege requires dismissal of a case. Dismissal is required if (1) the plaintiff cannot prove the *prima facie* elements of its claims without the privileged evidence, (2) the defendant cannot present a valid defense without the privileged evidence, or (3) the privileged information is so at risk of disclosure that any attempt to proceed will risk harm to national security. *See Mohamed*, 614 F.3d at 1082-83; *El-Masri*, 479 F.3d at 306; *Zuckerbraun*, 935 F.2d at 547. Plaintiffs (and *amici*) ignore the critical third ground for dismissal – the inherent risk that further proceedings will lead to disclosures that harm national security.

Even assuming, *arguendo*, plaintiffs can establish a *prima facie* case without the privileged evidence (which seems doubtful absent full discovery), the separate questions would remain as to whether defendants could present a valid defense without the excluded privileged information or whether any attempt to proceed further would nonetheless inherently risk disclosures that would harm national security. *See Mohamed*, 614 F.3d at 1083 (even if the claims and defenses might theoretically be established without privileged evidence, "it may be impossible to proceed with the litigation because—privileged evidence being inseparable from nonprivileged information that will be necessary to the claims or defenses—litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets."). This last inquiry is a central reason why dismissal is required here.[19]

[19] Plaintiffs and *amici* devote a portion of their briefs to arguing that, on the issue of whether exclusion of the privileged material would preclude defendants from raising a valid defense, "the

In opposing dismissal, plaintiffs cite the Fourth Circuit's decision in *Fitzgerald* for the proposition that courts "should use 'creativity and care' to craft procedures that 'will protect the privilege and yet allow the merits of the controversy to be decided in some form.'" Br. 16 (quoting *Fitzgerald*, 776 F.2d at 1238 n.3). But whether that approach is possible depends on the circumstances of the particular case, and indeed such circumstances were not present in *Fitzgerald*. In that case, the Fourth Circuit ultimately affirmed the district court's decision dismissing the case "[b]ecause there was simply no way this particular case could be tried without compromising sensitive military secrets." *Fitzgerald*, 776 F.2d at 1243. The Fourth Circuit likewise reaffirmed in *Sterling* that courts should not attempt to devise special procedures for allowing state secrets cases to proceed if such procedures would place state secrets at risk of disclosure:

Court must be convinced that the Defendants would win this case before dismissing the case on this basis." Br. 19-21; Amicus Br. 17-18 & n.3. That argument is based on the D.C. Circuit's opinion in *In re Sealed Case* (*Horn*), 494 F.3d 139 (D.C. Cir. 2007). As an initial matter, the Court need not reach the issue of whether privileged material is needed for defendants to present a valid defense where the risk of further proceedings alone would warrant dismissal. But to the extent *In re Sealed Case* can be read to require courts to reach the merits of a defendant's possible defenses before it can determine whether dismissal is appropriate under a valid defense theory, its reasoning is flawed and contradicts Supreme Court precedent. To begin with, the effect of an assertion of the state secrets privilege is to "exclude[]" the privileged information from the case. *Gen. Dynamics*, 131 S. Ct. at 1906. Permitting further litigation on the merits is inconsistent with such exclusion. *In re Sealed Case* also is in tension with *Reynolds* to the extent that it would require courts routinely to examine privileged materials *in camera* (to weigh the merits of a defense) despite the Supreme Court's directive to the contrary. *See* 345 U.S. at 10. There also may be circumstances where reaching a merits determination, to decide dismissal under the privilege, would itself tend to reveal properly privileged information (such as whether a classified activity even occurred). In any event, no other authority adopts this view, and the proper approach is that dismissal is required where the exclusion of privileged evidence hinders the presentation of a valid defense. *See Zuckerbraun*, 935 F.2d at 537 ("[I]f the court determines that the privilege so hampers the defendant in establishing a valid defense that the trier is likely to reach an erroneous conclusion, then dismissal is also proper."); *Tenenbaum v. Simonini*, 372 F.3d 776 (6th Cir. 2004) ("Defendants cannot defend their conduct . . . without revealing the privileged information."); *Sterling*, 416 F.3d at 347 (assessing that the presentation of a defense would inherently reveal privileged information). *Cf. Gen. Dynamics*, 131 S. Ct. at 1907 (declining to award relief to either side where "liability depends upon the validity of a *plausible* . . . defense" (emphasis added)).

> Such procedures, whatever they might be, still entail considerable risk. Inadvertent disclosure during the course of a trial—or even in camera—is precisely the sort of risk that *Reynolds* attempts to avoid. At best, special accommodations give rise to added opportunity for leaked information. At worst, that information would become public, placing covert agents and intelligence sources alike at grave personal risk.

416 F.3d at 348.

Plaintiffs also quote the superseded panel decision in *Farnsworth Cannon* for the proposition that, when the Government properly asserts the state secrets privilege in a suit between private parties, the privileged material should simply be removed from the case and litigation should continue. Br. 18. That approach may be appropriate in cases where the privileged material is tangential to and thus clearly segregable from litigation of the parties' claims and valid defenses.[20] Notably, the Fourth Circuit in *Farnsworth Cannon* did not ultimately find that mere exclusion was sufficient where privileged information would inherently be at risk of disclosure in further proceedings. Rather, the *en banc* opinion upheld the district court's dismissal of the case based on the Government's assertion of the state secrets privilege. 635 F.2d 281. The court explained that counsel for the parties had not seen the Government's declaration and was unaware of the scope of the privileged information. *Id.* It then observed that "[p]laintiff and his lawyers would have every incentive to probe as close to the core secrets as the trial judge would permit" and that "such probing in open court would inevitably be

[20] Plaintiffs and *amici* cite several cases where, unlike here, the privileged information was tangential to the parties' claims and defenses and was clearly segregable. *See, e.g.*, *Crater Corp. v. Lucent Tech.*, 255 F.3d 1361, 1370-71 (Fed. Cir. 2001) (in patent infringement action between private parties, the court upheld the state secrets privilege and allowed the case to proceed because the privileged evidence was not needed to decide the claims); *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1364-65 (Fed. Cir. 2001) (in contract dispute, the court upheld the Government's assertion of the state secrets privilege and allowed discovery from non-governmental witnesses to proceed); *DTM Research L.L.C. v. AT&T Corp*., 245 F.3d 327, 333-34 (4th Cir. 2001) (in dispute involving alleged misappropriation of trade secrets between private companies, the court quashed third party subpoenas served on the Government on state secrets grounds and allowed case to proceed without privileged evidence).

revealing." *Id.* Accordingly, the court reasoned that allowing the plaintiff to continue litigating its claims "would so threaten disclosure of state secrets that the overriding interest of the United States and the preservation of its state secrets precludes any further attempt to pursue this litigation." *Id.*; *accord Mohammed*, 614 F.3d at 1083; *El-Masri*, 479 F.3d at 308. Thus, while *amici* note that a court should look to whether privileged and non-privileged information in the case can be "disentangle[d]," Amicus Br. 15, that is a fact specific inquiry that turns on whether the privileged information can *safely* be disentangled and excluded without risk that it will be revealed in further proceedings or needed for a fair adjudication of the claims.

The Government cannot publicly reveal the scope or nature of the privileged information at issue here. Whatever impact exclusion of this information would have on the parties' ability to establish their claims or valid defenses, the Government believes that further proceedings would inevitably risk the disclosure of state secrets if this case were to proceed. In general terms, this risk turns on the nature of the question presented in this action and the proof required by the parties to establish or refute the claim, as well as on the risks associated with the normal give and take of adversarial questioning and probing. Here, the parties could not be aware of the boundaries separating privileged and unprivileged information, and plaintiffs and their counsel would have every incentive to probe without limitation and in a manner that would implicate, or at least tread close to, the privileged information, which would inevitably be revealing.

Finally, plaintiffs argue that the equities do not favor dismissal of this case. Br. 19. But a court must determine whether dismissal is required in state secrets cases based on what is necessary to protect the privileged information. If further proceedings would reasonably risk harm to national security, the public interest weighs in favor of dismissal.[21] The Government

[21] *See Fitzgerald*, 776 F.2d at 1238 n.3 ("When the state secrets privilege is validly asserted, the result is unfairness to individual litigants—through the loss of important evidence or dismissal of

acknowledges plaintiffs' concern that dismissal of this action may be perceived as providing defendants with a "license to defame" in the future. Br. 24. The Government again affirms that it has asserted privilege and sought dismissal in this case to protect its own national security interests, not to defend or obtain relief for defendants. The Government takes no position on the merits of the parties' claims and defenses. Plaintiffs also speculate that the Government would necessarily need to assert the state secrets privilege and seek dismissal in future litigation between the parties. Future disputes could well be unrelated to the Government's particular interests at issue here, and may not involve the present underlying circumstances.

Nonetheless, the issue before the Court is whether continued litigation of the pending matter would place state secrets at risk of disclosure. As the Government has set forth in its submissions, that is the case here, and dismissal is therefore necessary. Government counsel stands ready to address this issue further with the Court *ex parte* as necessary.

POINT IV

IF THE COURT DETERMINES THAT THE STATE SECRETS PRIVILEGE REQUIRES DISMISSAL OF THIS CASE, INJUNCTIVE RELIEF IS NOT AN AVAILABLE REMEDY

In its October 9, 2014 Opinion and Order, the Court directed the parties to address whether, if it determines that the Government has properly asserted the state secrets privilege, the Court can still grant plaintiffs injunctive relief. It appears this issue may be moot, as plaintiffs do not seek injunctive relief as to defendants' future statements. *See* Br. 24 n.11. The Government also notes that dismissal under the state secrets doctrine is not a disposition on the merits that would permit injunctive relief as if liability were found. *See, e.g.*, *Mohamed*, 614 F.3d at 1083

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a case—in order to protect a greater public value."); *El-Masri*, 479 F.3d at 313 (explaining that a party whose claim is dismissed based on the state secrets privilege "suffers this reversal not through any fault of his own, but because his personal interest in pursuing his civil claim is subordinated to the collective interest in national security"); *see also Kasza*, 133 F.3d at 1167 (public interest favors protecting national security).

(recognizing that state secrets assertion may require dismissal where "litigating the case to a judgment on the merits would present an unacceptable risk" of disclosure); *Al-Haramain*, 507 F.3d at 1201 (noting that an assertion of the state secrets privilege may "preclude the case from proceeding to the merits"); *El-Masri*, 479 F.3d at 312-13 & n.6 (recognizing that state secrets assertion precluded adjudication on the merits). We must add, however, that the law would not permit as part of the "future remedy" plaintiffs seek (*see* Br. 23) any type of restriction on the Government's ability to assert privilege in future, as yet unknown circumstances.

CONCLUSION

For the reasons stated above, the Court should deny plaintiffs' motion and proceed to consider the Government's assertion of the state secrets privilege and related motion to dismiss the complaint.

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November 19, 2014

Respectfully submitted,

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