No. 20-827

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ZAYN AL-ABIDIN MUHAMMAD HUSAYN,
A.K.A. ABU ZUBAYDAH, ET AL.,
Respondents.

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

BRIEF ON THE MERITS FOR RESPONDENTS ABU ZUBAYDAH AND JOSEPH MARGULIES

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STATEMENT

This case arises from the CIA's attempt to gather intelligence through the use of torture.[1] The CIA undertook this effort after the attacks of September 11, 2001, with the cooperation of a number of foreign states who allowed the CIA to establish then-secret "black sites" on their territory. *See generally* S. Rep. No. 288, 113th Cong., 2d Sess. (2014), Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, Executive Summary (hereafter "SSCI Report").

Respondent Zayn-al Abidin Muhammad Husayn ("Abu Zubaydah") was the first prisoner detained and tortured in such a site. He is a stateless Palestinian whom the CIA mistakenly believed was a high-ranking member of al-Qa'ida. *Id.* at 410-411. He was captured in Pakistan in March 2002, and held at a number of black sites from late March 2002 until September 2006, when he was transferred from CIA to DOD custody and moved to the U.S. prison at Guantánamo Bay, where he remains.

The locations of many black sites are now widely known. The two former CIA contractors who devised and implemented the torture program (Respondents James Mitchell and John "Bruce" Jessen) have twice testified under oath about what they saw, heard, and

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[1] President's News Conference, Aug. 1, 2014, https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/press-conference-president ("[W]e did some things that were wrong. … [W]e tortured some folks. We did some things that were contrary to our values.").

did at various black sites, including what they did to Abu Zubaydah and some of what they observed at the black site at issue in this litigation. It is undisputed that this testimony contains no state secrets. In addition, the European Court of Human Rights ("ECHR") found "beyond a reasonable doubt" that Abu Zubaydah was initially detained by the CIA at a black site in Thailand before being transferred to a black site in Poland on December 5, 2002.[2]

Polish prosecutors are investigating the complicity of Polish nationals in Abu Zubaydah's detention and torture. In this case, Abu Zubaydah seeks nonprivileged discovery from Mitchell and Jessen for use in that investigation, as permitted by 28 U.S.C. Section 1782 ("§1782").

The narrow question before this Court is whether the district court may order Mitchell and Jessen to testify (as they have done twice before) about *nonprivileged* information; or if, instead, the Government may prohibit disclosure of even nonprivileged information by invoking the state secrets doctrine.

A. Abu Zubaydah's Torture

When Abu Zubaydah was arrested, the CIA had no detention facilities. Yet it did not want to transfer him to military custody, because he "would have to be

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[2] Statement § C, *infra*. The SSCI Report uses code names for the sites and confirms that in December 2002, Abu Zubaydah was transferred from "Detention Site Green" to "Detention Site Blue." SSCI Report at 67. Detention Site Blue is the site at issue in this litigation.

declared to the International Committee of the Red Cross." SSCI Report at 22. The Agency rejected the option of holding him at the U.S. military base in Guantánamo because of the "general lack of secrecy and the possible loss of control to US military and/or FBI." *Id.* (internal quotation marks omitted). Ultimately, the Agency decided to hold him at a black site, in part because of the "lack of U.S. court jurisdiction." *Id.* In late March 2002, Abu Zubaydah arrived at "Detention Site Green" (*id.* at 23), which is now known to have been located in Thailand (C.A.E.R. 552, ¶404). The CIA dispatched Respondent Mitchell to the site shortly thereafter; Respondent Jessen followed later that summer. SSCI Report at 26, 40.[3]

Initially, Abu Zubaydah was questioned by FBI agents who spoke Arabic and had long experience investigating al-Qa'ida. *Id.* at 24-25. Abu Zubaydah promptly informed the agents that he intended to cooperate, and "provided background information on his activities." *Id.* When his medical condition deteriorated from gunshot wounds he suffered when captured, he was transferred to a hospital, where he was intubated, but continued to provide information "using an Arabic alphabet chart." *Id.* When the breathing tube was removed, he "provided additional

[3] The SSCI Report refers to Mitchell and Jessen as "Swigert" and "Dunbar," respectively. *Compare* C.A.E.R. 767 (CIA cable identifying Mitchell and Jessen as Abu Zubaydah's interrogators) *with* SSCI Report at 40 (referring to the same interrogators as "Swigert" and "Dunbar").

intelligence and reiterated his intention to cooperate." *Id.*

But CIA officials thought Abu Zubaydah was holding back. They believed, wrongly, that he was the "third or fourth man" in al-Qa'ida, and had been "involved in every major terrorist operation carried out by al-Qa'ida," including as "one of the planners of the September 11 attacks." *Id.* at 410. They also believed he had a heightened ability to resist interrogations and had authored an al-Qa'ida manual on resistance techniques. *Id*.

None of these allegations has support in any CIA record (*id.* at 410-11), and the CIA itself concluded that the most basic of them was false: Abu Zubaydah "was not a member of al-Qa'ida," let alone a high ranking member. *Id.* at 410. There is also no evidence he had a role in the September 11 attacks, that he has an unnatural ability to resist interrogations, or that he authored an al-Qa'ida interrogation manual. *Id.* at 410-11.

Nonetheless, convinced that Abu Zubaydah was withholding critical intelligence, the Agency decided to subject him to "novel interrogation methods." *Id*. at 32. In July 2002, Respondent Mitchell "provided a list of 12 [interrogation] techniques for possible use by the CIA." *Id.*[4] The interrogation team warned that the

[4] The techniques were: "(1) the attention grasp, (2) walling, (3) facial hold, (4) facial slap, (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) waterboard, (10) use of diapers, (11) use of insects, and (12) mock burial." SSCI Report at 32. All but the last two were approved and implemented. For a more detailed description of these techniques, see C.A.E.R. 767-69 (declassified CIA cable).

proposed methods might kill Abu Zubaydah. *Id.* at 34-35. Additionally, "in light of the planned psychological pressure techniques to be implemented," the team sought "reasonable assurances that [Abu Zubaydah] will remain in isolation and incommunicado for the remainder of his life." *Id.* at 35 (brackets in original). CIA Headquarters confirmed that "the interrogation process takes precedence over preventative medical procedures" and provided these assurances. *Id.*[5]

On August 3, 2002, the CIA instructed Mitchell and Jessen to begin. *Id.* at 40. For twenty consecutive days, they tortured Abu Zubaydah. *Id.* Eighty-three times, they strapped him to a board with his head lower than his feet while they poured water up his nose and down his throat. *Id.* at 231, n.1316. Just when he thought he would drown, they raised the board, allowing him a moment to vomit and gasp before they repeated the torture. *See, e.g.*, C.A.E.R. 783.[6] During one session, Abu Zubaydah became "unresponsive, with bubbles rising through his open, full mouth." SSCI Report at 495.

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[5] The CIA has made good on this promise: Abu Zubaydah, now 50 years old, has been held for nearly 20 years without charges, and without meaningful communication with the outside world.

[6] "Subject began crying, and at 1716 hours, the first water treatment of this session was applied. [REDACTED] Subject (and board) was elevated as necessary in order to clear his air passage. Subject continued to whimper. The interrogators [Mitchell and Jessen] told subject that they had been patient … that it was time to say the truth …. Subject responded that if he knew … he would have told them. … The interrogators stopped subject's denials and applied the water treatment …. Subject continued crying and whimpering."

Abu Zubaydah was also handcuffed and repeatedly slapped and slammed into walls, forced into a tall, narrow box the size of a coffin, and crammed into another box that would nearly fit under a chair, where he was left for hours.[7] At least once, he was subjected to "rectal rehydration." *Id.* at 488.[8] The objective of this torture was to "induce complete helplessness" and "reach the stage where we have broken any will or ability of subject to resist," so the CIA could "confidently assess" that he was not holding back information. C.A.E.R. 759.

In this they succeeded. By the sixth day of his torture, Abu Zubaydah was sobbing, whimpering, twitching, and hyperventilating. C.A.E.R. 780-83. He was so broken that he complied with orders at the snap of a finger. SSCI Report at 43. At that point, Mitchell and Jessen believed Abu Zubaydah had no more information to give and recommended that the torture stop, but the CIA disagreed.[9] The torture

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[7] SSCI Report at 42 ("Abu Zubaydah spent a total of 266 hours … in the large (coffin size) confinement box and 29 hours in a small confinement box, which had a width of 21 inches, a depth of 2.5 feet, and a height of 2.5 feet.").

[8] Abu Zubaydah's torture is described in graphic detail in declassified CIA cables, some of which were produced in discovery in the *Salim* litigation (described *infra*) and are in the record here. C.A.E.R. 742-800. Those cables describe, *inter alia*, the government-approved torture techniques (*id*. 766-69) and their use on Abu Zubaydah (*id*. 773-77, 780-85).

[9] C.A.E.R. 130-31, Mitchell's Testimony ("[W]e ended up in a video conference with Jose Rodriguez [of the CIA] and a bunch of folks, and prior to that, Bruce and I had said, We're not going to continue doing this, and what they said was, Well, you guys have lost your spine. I think the word that was actually used is

therefore continued another two weeks, "on a near 24-hour-per-day basis," until the CIA concluded that Abu Zubaydah had been telling the truth all along "and that he did not possess any new terrorist threat information." *Id.* at 40, 45.

B. Mitchell's and Jessen's Prior Disclosures

Mitchell and Jessen have twice provided detailed, sworn testimony regarding their experiences and observations at black sites generally, including their interactions with Abu Zubaydah and some of their observations of the site at issue in this proceeding, without revealing information the Government deems privileged.

In 2017, for instance, Mitchell and Jessen gave deposition testimony in *Salim v. Mitchell*, No. 2:15-cv-286-JLQ (E.D. Wash. 2015), which was brought on behalf of former CIA detainees interrogated at black sites (one of whom, Gul Rahman, died of hypothermia while in custody—*see* SSCI Report at 54-55). Multiple Government attorneys attended the depositions to "protect against the unauthorized disclosure of classified, protected or privileged Government information." C.A.E.R. 107-08.

In *Salim*, Mitchell testified without Government objection about Abu Zubaydah's interrogation at the first black site. He recounted visiting a hospital in

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that, You guys are p******, there was going to be another attack in America and the blood of dead civilians are going to be on your hands."); SSCI Report at 42-43.

April 2002 where "Abu Zubaydah was dying"; the "aggressive phase" of Abu Zubaydah's interrogation; how he asked the CIA to discontinue Abu Zubaydah's torture after a few days, but the Agency refused; and how he conceived the idea of waterboarding detainees. *Id.* at 119, 124-25, 128, 130-31, 134-35. Jessen testified about, *inter alia*, the timing of his visit to "Detention Site Cobalt," and the conditions of confinement he observed there. *Id.* at 109-112. The Government did not assert the state secrets privilege over any of this information.

More recently, in January 2020 Mitchell and Jessen testified again in Military Commission hearings at Guantánamo. Mitchell testified over the course of eight days, generating more than 2,000 pages of testimony.[10] He described, *inter alia*, how Abu Zubaydah was kept awake for 126 consecutive hours[11] before being moved into the "isolation phase" of his interrogation,[12] and how he waterboarded Abu Zubaydah.[13] Mitchell also testified about what he saw, heard, and did at the black site at issue in this

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[10] *United States v. Khalid Shaikh Mohammad, et al.*, transcripts available at https://www.mc.mil/. Mitchell and Jessen testified from January 21, 2020 to January 31, 2020.

[11] Jan. 21, 2020 Tr. (https://tinyurl.com/6cuy92vm) at 30348:10-349:7.

[12] *Id.* at 30350:8-11, 30353:11-355:9.

[13] Jan. 22 a.m. Tr. (https://tinyurl.com/er797abs) at 30441:22-443:11; 30469:11-17.

litigation.[14] He testified, for instance, about Abu Zubaydah's mistreatment there[15]; unauthorized interrogation techniques that were used[16]; the condition of the cells[17]; and (in detail) the interrogation techniques that were implemented against detainee Khalid Sheikh Mohammed.[18]

Respondent Jessen testified at Guantánamo on January 31, 2020. He discussed, *inter alia*, a July 2002 meeting in which he was "asked to join the interrogation team of Abu Zubaydah"[19]; how Abu Zubaydah was then "still healing physically from some really severe injuries"[20]; how he and Mitchell provided a list of proposed interrogation techniques to the CIA[21]; the "proportion of time that those techniques were used compared to the proportion of time [the detainees] were in detention"[22]; and his

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[14] The Commission Hearings used code numbers for the black sites instead of the color code names used in the SSCI Report. "Location Number 4" took the place of "Detention Site Blue." *See* Jan. 27 Tr. Part 4 of 5 (https://tinyurl.com/nkfzajpb) at 31371:18-22.

[15] Jan. 22 p.m. Tr. (https://tinyurl.com/2d9tuu4a) at 30562:4-30574:23.

[16] *Id.* at 30576:5-579:3.

[17] Jan. 27 p.m. Tr. Part 3 of 5 (https://tinyurl.com/nfpmc4wz) at 31280:3-283:22.

[18] Jan. 27 Tr. Part 4 of 5 at 31371:18-395:4.

[19] Jan. 31 Tr. (https://tinyurl.com/4bzwktxe) at 32450:19-453:4.

[20] *Id.* at 32461:19-462:17.

[21] *Id.* at 32463:14-32465:17.

[22] *Id.* at 32467:10-13.

perception that Abu Zubaydah "disliked" being waterboarded "very much."[23]

Mitchell and Jessen also testified about their observations at "Detention Site Cobalt." Mitchell described detainees "in various stages of clothing, chained in what looked … like horse stalls"[24] while Jessen testified about the timing of his visit[25]; the layout of the site; the small, windowless cells; the loud music that was played; and the smell of the facility.[26] Jessen also described an "indigenous guard force" that had administrative duties at Cobalt[27]; the interrogation there of detainee Gul Rahman[28] (who later died of hypothermia); and how he and Mitchell discussed improper conditions at the site after Mitchell arrived, including the need for heaters.[29] And both Mitchell and Jessen were shown photographs and permitted to testify whether they depicted Detention Site Cobalt.[30]

In addition, Mitchell authored a book detailing his experiences as an interrogator, which includes a disclaimer above the copyright notice stating that

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[23] *Id.* at 32478:20-23.

[24] Jan. 22 a.m. Tr. at 30502:13-503:1.

[25] Jan. 31 Tr. at 32485:16-486:5. Jessen's testimony confirms that "Location Number 2" is the same as Detention Site Cobalt. *Id.* at 32488:17-489:7.

[26] *Id.* at 32492:15-495:5.

[27] *Id.* at 32510:17-20.

[28] *Id.* at 32517:8-519:1.

[29] *Id.* at 32522:4-524:9.

[30] Jan. 22 p.m. Tr. at 30527:19-30529:23; Jan. 31 Tr. at 32496:3-497:16.

"[a]ll statements of fact … are those of the author and do not reflect the official positions or views of the Central Intelligence Agency." It also states the book was published after CIA classification review.[31]

C. Polish Investigation and Proceedings Before the European Court of Human Rights

In 2010, based on abundant evidence that Abu Zubaydah had been detained in Poland, Respondent Joseph Margulies and other attorneys for Abu Zubaydah filed an application in Poland seeking to hold Polish nationals accountable for their complicity in Abu Zubaydah's unlawful detention and torture on Polish soil. They secured "injured-party" status for Abu Zubaydah in the ensuing investigation. C.A.E.R. 443, Judgment in *Husayn (Abu Zubaydah) v. Poland*, No. 7511/13, European Court of Human Rights ("ECHR Judgment") at ¶142. According to the Polish government, this meant "there existed a sufficient level of credibility," based on the evidence offered, "that an offence had been committed to the detriment of [Abu Zubaydah] in Poland." C.A.E.R. 543, ¶374.

The investigation produced no material progress for several years (*id.* at 577, ¶482), prompting Abu Zubaydah's attorneys to file an application to the ECHR,[32] where they alleged he was a victim of crimes

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[31] James E. Mitchell, *Enhanced Interrogation: Inside the Minds and Motives of the Islamic Terrorists Trying to Destroy America* (2016).

[32] The ECHR's rulings are "[a]uthoritative in all countries that are members of the Council of Europe," and this Court has cited

in Poland and that Poland had breached its duty to investigate them (*id.* at 395-96, ¶¶1-3).

In July 2014, the court ruled in Abu Zubaydah's favor, finding "beyond a reasonable doubt" that he had been held *incommunicado* in a detention facility in Poland from December 2002 to September 2003. *Id.* at 558, ¶419. Additionally, the court found "abundant and coherent circumstantial evidence" leading to the "inevitab[le]" conclusion that "Poland knew of the nature and purposes of the CIA's activities on its territory at the material time," and that "Poland cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory." *Id.* at 567, ¶444. The court cited, *inter alia*, a 2012 interview with Aleksander Kwaśniewski, the President of Poland from 1995 to 2005, who addressed allegations of a Polish black site as follows:

> Of course, everything took place with my knowledge. The President and the Prime Minister agreed to the intelligence co-operation with the Americans, because this was what was required by national interest.
> * * *
> The decision to cooperate with the CIA carried a risk that the Americans would use

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the ECHR as persuasive authority on at least one occasion. *Lawrence v. Texas*, 539 U.S. 558, 573 (2003). The United States has "commend[ed] the Council of Europe for its efforts to get its members to … abid[e] by judgements handed down by the European Court of Human Rights." Stmt. of Ambassador Gilmore, Dec. 10, 2020 (https://tinyurl.com/szuyj7yc).

> inadmissible methods. But if a CIA agent brutally treated a prisoner in the Warsaw Marriott Hotel, would you charge the management of that hotel for the actions of that agent? We did not have knowledge of any torture.

Id. at 472, ¶234.

The ECHR also found that the Polish Government's investigation into the crimes committed against Abu Zubaydah had been deficient. *Id.* at 581, ¶493. Poland then renewed its investigation, which remains pending.[33] The Polish Government repeatedly sought evidence from the United States under a Mutual Legal Assistance Treaty ("MLAT"), including requests for Abu Zubaydah's testimony, but was rebuffed. C.A.E.R. 632-33.

The Polish prosecutor has invited Abu Zubaydah to submit evidence in the investigation, which is Abu Zubaydah's right under Polish law. *Id.* at 72-74. But Abu Zubaydah cannot offer his own testimony, as the survivor of a crime normally would, because the U.S. Government summarily decided nineteen years ago that he "should remain incommunicado for the remainder of his life." SSCI Report at 35; *see also* C.A.E.R. 425, ¶80 ("A request for release of an

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[33] Abu Zubaydah's Polish counsel have informed Respondents that Polish prosecutorial authorities recently discontinued part of their investigation relating to the Polish security agency. Abu Zubaydah's Polish counsel is appealing that decision as permitted under Polish law. The balance of the investigation continues.

affidavit from Abu Zubaydah had been pending before the US authorities for more than two years but, as was routinely the case, this request would involve the need for litigation in a US court.").

D. Proceedings in the District Court

Because Mitchell and Jessen demonstrably possess relevant, nonprivileged information about what transpired at black sites, Abu Zubaydah and Mr. Margulies filed an application for discovery ("the Application") pursuant to §1782, seeking leave to serve subpoenas for documents and oral testimony on Mitchell and Jessen. Pet.App. 110a. Section 1782 authorizes a federal district court to order such discovery for use in foreign proceedings, "including criminal investigations conducted before formal accusation." 28 U.S.C. § 1782(a).

Importantly, the Application did not seek confirmation that a CIA black site existed in Poland; that fact is well known to Polish investigators. Respondents sought other, nonprivileged information that could aid in establishing whether a crime was committed under Polish law, such as the details of Abu Zubaydah's torture in Poland, his medical treatment, and the conditions of his confinement.[34] The Government has declassified this information (Br. at 3; Pet.App. 142a-43a), and Mitchell and Jessen

[34] *See* C.A.E.R. 171, Opp'n to Mot. to Quash ("Petitioners do not require Respondents Mitchell and Jessen to confirm what Polish prosecutorial authorities already believe to be true, and Petitioners can gain valuable information from execution of the subpoenas without encroaching on these matters.").

have been permitted to testify about these categories of information in the past (Stmt. § B, *supra*).

Mitchell and Jessen did not oppose the Application. Pet.App. 61a. The Government, however, filed a Statement of Interest, which conceded that the "minimum statutory elements" of §1782 were met (Pet.App. 65a), but argued that the Application should be denied under the discretionary factors this Court articulated in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).[35] The Statement of Interest did not invoke the state secrets privilege. Instead, it "raised unspecified hypothetical concerns regarding privilege and classification of documents." Pet.App. 70a. The district court therefore "exercised its discretion and determined the *Intel* factors favor granting the Application." *Id.* The Government did not appeal that order.[36]

After the subpoenas were served, however, the Government moved to quash, arguing that the state secrets privilege required that they be quashed in their entirety. In support, the Government submitted a public declaration[37] by then-CIA Director Michael Pompeo, in which he argued that "[w]hether or not [a Polish] facility existed and whether or not the Polish Government provided assistance to the CIA remain classified facts that cannot be disclosed without significant harm to the national security." Pet.App.

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[35] The *Intel* factors are discussed at pp. 50-55, *infra*.

[36] "[A]n order pursuant to §1782 is final and appealable." *In re Premises Located at 840 140th Ave. NE, Bellevue, Wash.*, 634 F.3d 557, 566 (9th Cir. 2011).

[37] The Government did not submit a classified declaration.

129a. Pompeo acknowledged that "media, nongovernmental organizations, and former Polish government officials have publicly alleged that the CIA operated a detention facility in Poland," but attested that "[t]hese allegations do not constitute an official acknowledgment by the CIA." *Id.* 134a. Pompeo did not assert that discovery of nonprivileged information like that disclosed in *Salim* would be harmful.

Respondents opposed the motion, noting that it was "unnecessary for [Mitchell and Jessen] to confirm or deny that a secret CIA site existed in Poland, or that the Polish Government was complicit in its operation," since it would "advance the Polish investigation if [Respondents] are allowed to seek information about what transpired in and around the interrogations, and under what conditions." C.A.E.R. 157.

The district court granted the Government's motion and quashed the subpoenas. In assessing the state-secrets claim, the court applied the three-part test articulated by the Ninth Circuit in *Mohamed v. Jeppesen Dataplan Inc.*, 614 F.3d 1070 (2010), which itself is a restatement of the principles established by this Court in *United States v. Reynolds*, 345 U.S. 1 (1953). The district court first determined that the Government had satisfied the procedural requirements for invoking the privilege. Pet.App. 45a-47a.

The district court then addressed the factual predicate of the privilege claim. The court "[did] not find convincing the [Government's] claim that merely acknowledging, or denying, the fact the CIA was

involved with a facility in Poland poses an exceptionally grave risk to national security." *Id.* 52a. The court found that the presence of a CIA black site in Poland was a fact that the ECHR had found "beyond a reasonable doubt"; that Poland's President Kwaśniewski confirmed the site's existence; that the site was the subject of multiple governmental investigations in Poland and Europe; and that its existence had been widely reported in the media. *Id.* 52a-53a. The district court also acknowledged that "in *Salim*, Mitchell and Jessen were both deposed at length" about their experiences as CIA interrogators. *Id.* 54a.

However, the court determined that some of the information sought by Respondents would be privileged, including "operational details concerning the specifics of cooperation with a foreign government," and "the roles and identities of foreign individuals." *Id.* 55a-56a. Having made this determination, the court turned to the "three circumstances when the *Reynolds* privilege justifies terminating the case": (1) where the plaintiff cannot make its case without the privileged information; (2) where the defendant is deprived of evidence vital to its defense; or (3) where "litigating the case on the merits would present an unacceptable risk of disclosing state secrets because the privileged and nonprivileged evidence is 'inseparable.'" *Id.* 56a. The court determined that the first two circumstances were absent, since the action was a pure discovery matter without a plaintiff or defendant. *Id.*

But rather than determining whether the privileged and nonprivileged information were

"inseparable," the court opined that the nonprivileged information at issue "would not seem of much, if any, assistance to a Polish investigation." *Id.* 59a. The court then quashed the subpoenas. *Id.* 60a.

E. Proceedings in the Ninth Circuit

Respondents appealed, arguing that under *Reynolds*, the district court should have attempted to disentangle privileged from nonprivileged matter before it considered dismissing the Application. The court of appeals therefore considered a "narrow but important question: whether the district court erred in quashing the subpoenas after concluding that not all the discovery sought was subject to the state secrets privilege." *Id.* 2a-3a.

The court answered that question in the affirmative and remanded for further proceedings. The court "agree[d] with the district court that much, although not all, of the information requested" was privileged, including information "about the identities and roles of foreign individuals involved with the detention facility." Pet.App. 20a. But "in light of the record," the court also "agree[d] with the district court that disclosure of certain basic facts would not cause grave harm to national security" (*id.* 18a), including "that the CIA operated a detention facility in Poland in the early 2000s; information about the use of interrogation techniques and conditions of confinement in that detention facility; and details of Abu Zubaydah's treatment there" (*id.* 20a-21a). The court reasoned that "in order to be a 'state secret,' a fact must first be a 'secret.'" *Id.* 18a. Invoking the

privilege over matters of public notoriety would "not protect the disclosure of secret information, but rather prevent[] the discussion of already disclosed information in a particular case." *Id.* 19a.

The court accepted *arguendo* the Government's assertion that "the absence of official confirmation from the CIA is the key to preserving an important element of doubt about the veracity" of publicly available information regarding the CIA's activities. *Id.* 17a. But the Government had "fail[ed] to explain why discovery here could amount to such an 'official confirmation,'" since, "[a]s the district court found, neither Mitchell nor Jessen [who were private contractors] are agents of the government," and "[t]he government has not contested—and we will not disturb—that finding." *Id.* 17a-18a.[38]

The court then held that the district court erred in dismissing the action without first attempting to separate privileged from nonprivileged matter. *Id.* 21a-23a. "Mitchell and Jessen have already provided nonprivileged information similar to the information sought here in the *Salim* lawsuit … illustrating the viability of this disentanglement." *Id.* 26a. The court therefore remanded with instructions to attempt to separate protected from unprotected information, and directed the district court to dismiss if separation

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[38] The district court made this ruling in rejecting the Government's alternative argument that this proceeding is an "action against the United States or its agents" within the jurisdiction-stripping provisions of 28 U.S.C. § 2241(e)(2). Pet.App. 38a-41a. The Government has abandoned that argument.

proved impossible. *Id.* 27a-28a. Judge Gould dissented. *Id.* 29a-43a.

The Government unsuccessfully sought rehearing *en banc*. Concurring in the denial of rehearing, Judge Paez, who authored the panel majority's opinion, emphasized that the court's mandate "does not require the government to disclose information, and it certainly does not require the disclosure of state secrets." Pet.App. 73a. Indeed, it "does not compel the government to confirm or even acknowledge any alleged malfeasance abroad," and "critically, it does not direct the district court to compel discovery on remand if the court determines that nonprivileged materials cannot be disentangled from privileged materials." *Id.* "Instead, the majority opinion stands solely for the narrow and well-settled proposition that before a court dismisses a case on state secrets grounds, it must follow the three-step framework set forth in *Reynolds*," which includes an inquiry to determine "whether there is any feasible way to segregate the nonprivileged information from the privileged information." *Id.* 73a-74a. Judge Bress, joined by eleven other judges, dissented. *Id.* 86a-109a.

The Government petitioned for certiorari, and this Court granted review.

SUMMARY OF ARGUMENT

The state secrets privilege, as applicable here, is an evidentiary rule that excludes privileged evidence from discovery. It does not exclude nonprivileged evidence. As such, *Reynolds* and its progeny have carefully defined the contours of the privilege to

ensure there is no greater infringement on the interests of justice than national security demands. This requires courts to scrutinize the Government's privilege assertions and to permit discovery of nonprivileged information. In conducting this analysis, courts properly defer to the Executive's assessment that the disclosure of *secret* information will harm national security. But there is no special executive branch knowledge, and therefore no reason for deference, on the factual question of whether information is secret; or on the judicial question of how the matter should proceed when a discovery request seeks both privileged and nonprivileged information.

The court of appeals correctly applied these principles. It critically examined the Government's privilege claim and upheld most of it, deferring to the judgment of former-CIA Director Pompeo on the question of whether disclosure of actual secrets—like the identities of Polish nationals—would harm national security. But the court recognized that a subset of information was not privileged, including Abu Zubaydah's conditions of confinement and the details of his interrogation, as well as the publicly known, repeatedly confirmed historical fact that a CIA black site existed in Poland. And although the Government argues that "official confirmation" of this historical fact would work unique harms, the court of appeals properly held that "official confirmation" is not at issue here, because the witnesses are not agents of the Government and cannot speak on its behalf. Under settled law, the court of appeals was

correct to reverse and remand to the district court for further proceedings.

The Government incorrectly portrays that decision as a failure of deference. Yet the Government offers no workable principle to limit the degree of deference it demands. To the contrary, the Government's argument would produce absolute deference, which would impermissibly transfer judicial control over the evidence in particular cases from Article III judges to Article II officers. This Court has consistently warned of the dangers inherent in such an approach. The Court should affirm the court of appeals and leave in place a rule that has served the Nation for nearly seventy years.

The Government's alternative argument—that the district court "would have" abused its discretion under §1782 by permitting discovery to proceed—was neither presented nor fairly included in the Petition and should be rejected for that reason alone. It also mischaracterizes the procedural posture by ignoring that the district court undertook a §1782 discretionary analysis only when *granting* the discovery Application, not when quashing the subpoenas. In its order granting the Application, the district court assessed the discretionary factors under *Intel* and found they weighed in favor of discovery, rejecting the Government's contrary arguments. The Government now ignores all of this, effectively asking this Court to review *de novo* whether discovery was properly granted under §1782, without reference to the actual arguments presented to the district court and the court's treatment of those arguments.

ARGUMENT

I. The Court of Appeals Correctly Reversed the District Court's Dismissal of the Application, Which Seeks Discovery of Nonprivileged Information.

The Government may invoke the state secrets privilege if the release of information will imperil national security. Like any evidentiary privilege, however, the reach of the state secrets privilege extends no wider than necessary to achieve its purpose, lest the privilege become a blank check for the Government to withhold embarrassing or criminal information.

For this reason, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege," to ensure that "[j]udicial control over the evidence in a case [is not] abdicated to the caprice of executive officers." *Reynolds*, 345 U.S. at 8-10. Anything less would encourage "intolerable abuses" by conveying to the Executive that courts will defer even to dubious assertions of the privilege. *Id.* at 8.

As the court of appeals recognized, *Reynolds* proceeded in three steps. Pet.App. 13a. It ascertained whether procedural requirements for invoking the privilege had been satisfied; made an independent determination whether the information was privileged; and, having found privilege, allowed proceedings to continue without the privileged matter. *Reynolds*, 345 U.S. at 8-12. In determining

"how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate," *Reynolds* stressed that "[w]here there is a strong showing of necessity, the claim of privilege should not be lightly accepted." *Id.* at 11-12.

For nearly seventy years, lower courts have applied *Reynolds* faithfully to strike "an appropriate balance … between protecting national security matters and preserving an open court system." *Abilt v. CIA*, 848 F.3d 305, 311 (4th Cir. 2017) (quoting *Al–Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007)). They accomplish this by "critically [] examin[ing]" the Government's privilege assertions, to "ensure that the state secrets privilege is asserted no more frequently and sweepingly than necessary." *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983). Accordingly, and consistent with *Reynolds*, "the privilege may not be used to shield any material not strictly necessary to prevent injury to national security." *Id.* at 57.[39] "Any other rule would permit the Government to [assert privilege over] documents just to avoid their production even though there is need for their production and no true need for secrecy." *ACLU v. Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980).[40] Therefore, in cases (like this one) where only

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[39] *Accord Abilt*, 848 F.3d at 312; *Mohamed*, 614 F.3d at 1082; *Crater Corp. v. Lucent Techs., Inc.*, 423 F.3d 1260, 1265 (Fed. Cir. 2005); *In re Grand Jury Subpoena*, 218 F. Supp. 2d 544, 552 (S.D.N.Y. 2002).

[40] Earlier case law is similar. *Reynolds* itself cited decisions in which litigation continued notwithstanding the assertion of state secrets privileges. 345 U.S. at 7, n.11 (citing*, inter alia, Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353 (E.D.

some of the information at issue is privileged, courts have required that "whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter." *Mohamed*, 614 F.3d at 1082 (quoting *Ellsberg*, 709 F.2d at 57). Some lower courts, including the Ninth Circuit, recognize a narrow exception to this rule in cases (unlike this one) where nonprivileged evidence is "inseparable" from privileged matter. *Mohamed,* 614 F.3d at 1083-84.[41]

The court of appeals correctly applied these principles. Pet.App. 11a-27a. It specifically "acknowedg[ed] the need to defer to the Executive on matters of foreign policy and national security" (*id.* 14a), and "agree[d] with the district court that much, although not all, of the information requested by Petitioners is covered by the state secrets privilege," including information regarding the "identities and roles of foreign individuals involved with the detention facility, operational details about the facility, and any contracts made with Polish government officials or private persons residing in

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Pa. 1912) (in patent dispute, ordering military secrets expunged from record but case continued); *Bank Line Ltd. v. United States*, 68 F. Supp. 587 (S.D.N.Y. 1946) (declining to vacate court's prior order that military crash report be produced, where "no reasons of national security [were] involved"), *aff'd* 163 F.2d 133 (2d Cir. 1947); *Cresmer v. United States*, 9 F.R.D. 203 (E.D.N.Y. 1949) (rejecting privilege claim after in camera review showed naval crash report contained no state secrets)).

[41] As discussed in the next section, prior testimony by Mitchell and Jessen demonstrates that privileged and nonprivileged matter can be readily segregated here.

Poland." *Id.* 20a. The court deferred to the CIA Director's assessment of whether disclosure of these matters would be harmful. *Id.*

But the court properly declined to defer to three of the Government's arguments: that discovery could not proceed as to nonprivileged information; that the historical and widely-known fact of a Polish black site is a state secret; and that confirmation of this historical fact by Mitchell and Jessen would amount to "official confirmation" by the Government. *Id.* 17a-27a. These arguments do not derive from any specialized executive-branch knowledge regarding national security. They are legal arguments, and deferring to them would have ceded to the Executive the court's "duty … 'to say what the law is' with respect to the claim of privilege." *United States v. Nixon*, 418 U.S. 683, 705 (1974) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

A. As They Have Done Twice Before, Mitchell and Jessen Can Testify to What They Saw, Did, and Heard at Black Sites, Without Mentioning Their Locations.

The Government dedicates most of its brief to arguing that the historical fact of a Polish black site is a state secret. Br. at 21-42. But Respondents have argued from the outset that they do not require confirmation of what Polish prosecutorial authorities already know. C.A.E.R. 157 (Opp'n to Mot. to Quash). Respondents seek other, nonprivileged information: *e.g.*, whether Mitchell and Jessen were at the same

black site as Abu Zubaydah at any point between December 5, 2002 and September 22, 2003 (when Abu Zubaydah was detained in Poland); whether they interacted with Abu Zubaydah during that period; what interrogation techniques were applied to Abu Zubaydah then; and Abu Zubaydah's conditions of confinement, feeding regime, and medical treatment during that time.

The Government does not claim any of these topics are privileged. Br. at 3 ("[T]he United States has declassified a significant amount of information regarding the former CIA program, including the details of Abu Zubaydah's treatment while in CIA custody, which included the use of enhanced interrogation techniques."); C.A.E.R. 234-35 (Pompeo Decl. from *Salim*) ("[T]he enhanced interrogation techniques employed with respect to specific detainees in the program, and their conditions of confinement, are no longer classified."). Thus, contrary to the Government's repeated implication, the information Respondents seek is not all "classified." Br. at 18, 19, 26.

The Government has twice permitted Mitchell and Jessen to testify about these categories of unclassified information—a material fact the Government altogether omits from its brief. This prior testimony included some of what they observed at the site at issue here and what they did to Abu Zubaydah elsewhere. *See* Stmt. § B.[42] The parties in these prior

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[42] In this prior testimony, Mitchell and Jessen were not questioned regarding what happened to Abu Zubaydah at the Polish black site (a.k.a. "Detention Site Blue"). Thus, the

cases—following the lead of the SSCI Report—used code names to disguise the locations of black sites. *Id.* As they have before, Mitchell and Jessen can testify here without saying where they were at the time.

For instance, in *Salim*, Mitchell was permitted to testify about: interrogation methods used on Abu Zubaydah, including sleep deprivation and "dietary manipulation"; nurses sneaking food to Abu Zubaydah; how Abu Zubaydah was "rendered to Detention Site Green" in March 2002; how he whimpered, wept, and vomited during his torture; and how the CIA ordered Mitchell to continue waterboarding Abu Zubaydah even after Mitchell wanted to stop. C.A.E.R. 114-49. There could be no harm to national security from Respondents seeking comparable details of Abu Zubaydah's treatment at "Detention Site Blue" without identifying any geographic location.

Similarly, Jessen testified in *Salim* about the timing of his visit to "Detention Site Cobalt" and his observations of the conditions there, including as relevant to the death of Gul Rahman. *See generally id.* 106-12. There is no reason Jessen cannot provide similar testimony here.

More recently, Mitchell and Jessen provided lengthy testimony at hearings in Guantánamo, including limited testimony about what occurred at "Detention Site Blue." Stmt. § B, *supra*.

An analogy demonstrates the utility of such discovery to Polish prosecutors. "Detention Site

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testimony Respondents seek here would provide new information.

Cobalt" is publicly known to have been in Afghanistan, although the CIA has never officially confirmed this fact. C.A.E.R. 151-54. If an Afghan prosecutor were investigating Gul Rahman's death in CIA custody, Jessen's testimony about conditions at Cobalt would be valuable evidence, if the prosecutor knew independently that Cobalt was in Afghanistan. Similarly, because Polish prosecutors already know Abu Zubaydah was in Poland from December 2002 to September 2003, any testimony about what happened to him during that period would be probative, even if the witnesses do not independently confirm the locations of the events they testify about. This is precisely the kind of testimony that Mitchell and Jessen have been permitted to provide on two prior occasions. What was not privileged before cannot be privileged now.

The Government says nothing to this argument, falling back on the contention that Respondents seek exclusively privileged information. They do not. Therefore, under *Reynolds*, the district court should have attempted to segregate privileged from nonprivileged matter before dismissing the Application entirely. Its failure to do so was error, as the court of appeals correctly held.

B. The Historical Fact of a Polish Black Site Is Not a State Secret.

The court of appeals properly held that "to be a 'state secret,' a fact must first be a 'secret.'" Pet.App. 18a; *see also* Charles Alan Wright & Arthur R. Miller, 26 Fed. Prac. & Proc. Evid. § 5665 (1st ed.) ("[T]he

secrecy required for the privilege can be destroyed without regard to who made or authorized the disclosure.").[43] And here, the fact that the CIA operated a black site in Poland is no secret. Thus, even if Mitchell and Jessen were to utter the words, "and it happened in Poland," that would not disclose a state secret. It would merely repeat what has already been definitely established.

The ECHR Judgment sets out copious evidence of the Polish black site, including declassified CIA reports, flight records, Polish governmental records, eyewitness testimony, and "coherent, clear and categorical expert evidence explaining in detail the chronology of the events occurring in [Abu Zubaydah's] case." C.A.E.R. 556, ¶415. The recitation of this evidence spans over a hundred pages. *Id.* 406-

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[43] *Accord Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1197-98 (9th Cir. 2007) (existence of Terrorist Surveillance Program was no longer state secret following official statements by President, Attorney General, and other officials), *superseded on other grounds*, 705 F.3d 845 (9th Cir. 2012): *Spock v. United States*, 464 F. Supp. 510, 518-20 (S.D.N.Y. 1978) (sustaining privilege, but refusing to dismiss case, where purportedly secret information had been reported in the press and other facts at issue were concededly not secret); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 994 (N.D. Cal. 2006) ("[T]he very subject matter of this action is hardly a secret. … [P]ublic disclosures by the government and AT&T indicate that AT&T is assisting the government to implement some kind of surveillance program."); *cf. Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475 (1974) ("The subject of a trade secret must be secret, and must not be of public knowledge."); *Olaplex, Inc. v. L'Oreal USA, Inc.*, 2021 WL 1811722, at *5 (Fed. Cir. May 6, 2021) ("Whether a trade secret exists is generally a question of fact.").

529. And although the Government now criticizes the ECHR's findings, it was the Government that placed the ECHR Judgment into the record below (*id.* 380)—inviting, if not compelling, the lower courts to take notice of its content.

The lower courts were thus presented with substantial evidence, including the ECHR's detailed findings reciting all of the voluminous evidence before it. *See, e.g.*, Pet.App. 53a (district court cites passages of ECHR Judgment). They learned, for example, that a plane that was "conclusively identified as the rendition aircraft used for transportation of [CIA detainees] at the material time" landed in Szymany, Poland on December 5, 2002, with eight passengers and four crew, and departed less than an hour later with no passengers and four crew—a fact officially confirmed by the Polish Border Guard. C.A.E.R. 553-56, ¶¶406-414.[44] Its flight path was traced back to Bangkok, the site of Abu Zubaydah's initial detention and torture. *Id.* at 552-54, ¶¶403-04, 408. This landing was followed by "five further landings of the N379P (the 'Guantánamo express'), the most notorious CIA rendition plane," and culminated with the landing of another CIA rendition plane on

[44] The court noted "abundant evidence identifying [the aircraft at issue] as rendition planes used by the CIA for the transportation of detainees," including "flight plan messages by Eurocontrol and information provided by the Polish Border Guard and the Polish Air Navigation Services Agency [], which was released and subsequently analyzed in depth in the course of the international inquiries concerning the CIA secret detentions and renditions." ¶407 (citing evidence at ¶¶95-96, 252, 265, 281-86, 310 & 312).

September 22, 2003—"the date indicated by [Abu Zubaydah] for his transfer from Poland, confirmed by the experts as the date of his transfer out of Poland and identified by them as the date on which the black site [] in Poland had been closed." *Id.* at 556, ¶414. "[N]o other CIA-associated aircraft" was recorded in Szymany after that date. *Id.*

The ECHR also heard testimony from Swiss Senator Dick Marty, who prepared several investigative reports commissioned by the Council of Europe about the black sites (the "Marty Reports"). The 2007 Marty Report reported "clear and detailed confirmation from our own sources, in both the American intelligence services and the countries concerned, that [Poland and Romania] did host secret detention centres under a special CIA programme." *Id.* at 476-77, ¶246. The report described eyewitness accounts of how, when rendition aircraft arrived in Szymany, "[a] 'landing team' comprising American officials waited at the edge of the runway, in two or three vans with their engines often running." *Id.* at 482-83, ¶254. The aircraft would taxi to the far end of the runway, out of sight of the control tower, where the vans would meet it. *Id.* After a brief pause, the vans would quickly leave the airport through the front security gate, without stopping, while the guards "turned [their] eyes away." *Id.*; *see also id.* at 505-09, ¶¶287-296 (citing Szymany airport manager's eyewitness testimony corroborating these details).

Thus, the ECHR's findings were not "based on … adverse inferences," as the Government contends, nor do they comprise "public speculation" that leaves open an "element of doubt." Br. at 30, 35, 36. They are the

refined product of a core judicial function. And the Government's criticism of the ECHR's standard of proof, *id*. at 35-36, is a distraction.[45] By any standard of proof, the overwhelming evidence establishes that a CIA black site existed in Poland.

The site's existence was separately confirmed by Aleksander Kwaśniewski, Poland's President from 1995 to 2005. In 2012, he reversed prior denials and acknowledged that he personally authorized the black site: "Of course, everything took place with my knowledge. The President and the Prime Minister agreed to the intelligence co-operation with the Americans, because this was what was required by national interest." C.A.E.R. 472, ¶234. In 2014, Kwaśniewski again confirmed the site's existence, adding that "Poland took steps to end the activity at this site and the activity was stopped at some point."[46]

The Polish Government further confirmed the site's existence when it represented to the ECHR that its investigation "involved many and various offences, some of them so serious that they were not subject to the statute of limitation," and stated that "as of September 2012 the prosecution had already taken evidence from 62 persons. The case file comprised 43 volumes of documentary evidence." C.A.E.R. 572, ¶¶461-62.

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[45] The ECHR explained what it meant when it made its findings "beyond a reasonable doubt," and did not imply that its standard was less demanding than other courts'. C.A.E.R. 549, ¶394.

[46] *Poland's secret CIA prisons: Kwasniewski admits he knew*, BBC NEWS (Dec. 10, 2014), https://tinyurl.com/3yhus2v2.

Given this ample foundation, both the district court and the court of appeals found as a matter of fact that a black site existed in Poland, and that its existence was widely known.[47] The district court found the Polish site was "the subject of governmental investigations in Poland and Europe going back to 2005 and 2007," "acknowledged" by the former President of Poland, and "fairly widely reported in media." Pet.App. 52a-53a. The court of appeals agreed, "in light of the record," that "certain basic facts" had been well-established and widely reported, including "that the CIA detained Abu Zubaydah in Poland." Pet.App. 18a-19a; *see also id*. 20a-21a ("[W]e also agree with the district court that a subset of information is not … a state secret," including "that the CIA operated a detention facility in Poland in the early 2000s.").

Absent clear error, these factual findings cannot be disturbed, *Bourjaily*, 483 U.S. at 181, especially when they represent the concurrent findings of two lower courts. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) (the Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error") (citation omitted); *Glossip v. Gross*, 576 U.S. 863, 882 (2015) ("[T]his Court will not lightly overturn the concurrent findings of the two lower

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[47] Under Federal Rule of Evidence 104(a), "[t]he court must decide any preliminary question about whether … a privilege exists." That factual determination is reviewed for clear error. *Bourjaily v. United States*, 483 U.S. 171, 181 (1987).

courts.") (internal quotation marks and citation omitted).

The Government does not confront these findings. Instead, it argues they can be brushed aside because, in the "world of clandestine operations," spies leave false trails to mislead their adversaries. Br. at 32. The implication is that the many courts and investigators who found a site in Poland may have been duped; that the CIA seeded, years in advance, the evidence that courts and investigators later uncovered; that the former Polish president was complicit in this duplicity when he admitted the existence of a Polish black site; and that Polish prosecutors spent years compiling "43 volumes of documentary evidence" (C.A.E.R. 572) regarding a site that never existed. Setting aside that the Government did not present this argument to either court below, it offers no plausible reason for creating such a fiction.

To support its argument, the Government cites *Military Audit Project v. Casey*, 656 F.2d 724 (D.C. Cir. 1981) (Br. at 32)—a *sui generis* FOIA case that provides no guidance here. "[M]uch of the discussion in [*Casey*] concerned … the possibility that the CIA might have invented a 'fallback cover story' for the [Glomar Explorer] project."[48] *Johnson v. CIA*, 2018 WL 833940, at *4 (S.D.N.Y. Jan. 30, 2018). But here, "there is no 'fallback cover story' that the CIA is trying to protect." *Id.* Domestic and international courts have found as a matter of fact that there was a black

[48] The Government later admitted that the implausible fiction of secrecy it asked the *Casey* court to subscribe to was just that. Br. at 34, n.5.

site in Poland; the Polish government is under court order to investigate its nationals' conduct there; and the notion that all this is happening as part of a CIA exercise in misdirection is too fantastic to be credited.[49]

By insisting that the Polish black site is a "secret," the Government asks this Court "to give [its] imprimatur to a fiction of deniability that no reasonable person would regard as plausible." *ACLU v. CIA*, 710 F.3d 422, 431 (D.C. Cir. 2013). But "[t]here comes a point where this Court should not be ignorant as judges of what [they] know as men" and women. *Watts v. Indiana,* 338 U.S. 49, 52 (1949) (opinion of Frankfurter, J.). To sustain the Government's privilege assertion would not protect "secret" information or benefit the public interest. At best, it would create perverse incentives for future misconduct; at worst, it would give the Executive unfettered power to impose its own version of history on the courts.

C. Mitchell and Jessen Cannot "Officially Confirm or Deny" Anything.

The Government argues there is "a critical difference between official and unofficial disclosures."

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[49] Moreover, *Casey* is distinguishable because there the Government had already "compl[ied] with the [discovery] requests to the maximum extent consistent with national security by releasing, for example, over two thousand pages of documents." *Casey*, 656 F.2d at 745. *Casey* thus exemplifies the course the court of appeals directed the district court to follow on remand here.

Br. at 30 (quoting *Fitzgibbon* v. *CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)). Director Pompeo's declaration similarly contends that "the concept of official acknowledgement is important to the protection of the CIA's intelligence mission," and while "the CIA obviously cannot control" what others say or do, "the CIA cannot officially acknowledge allegations that would confirm or deny the existence of a classified intelligence relationship with a foreign government." Pet.App. 134a-35a.

The court of appeals did not question this principle, but properly rejected its application, for two reasons. First, the CIA is not being asked to testify—two private individuals are—and the Government has "fail[ed] to explain why discovery here could amount to … 'official confirmation.'" *Id.* 17a. The district court found that "neither Mitchell nor Jessen are agents of the government" (*id.* 18a) and the Government does not contest that finding on appeal. *See supra* at 19, n.38. "As private parties, Mitchell's and Jessen's disclosures are not equivalent to the United States confirming or denying anything." Pet.App. 18a. Their testimony would merely provide *unofficial* confirmation of what is already public knowledge. *See Casey*, 656 F.2d at 743-44 (accepting Government's argument that admissions of former CIA Director with firsthand knowledge of Glomar Explorer Project were "'not an official governmental pronouncement' because [the former director] was not an agency official at the time [his] book was published"); *Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 891 F.2d 414, 421 (2d Cir. 1989) (statements by retired admiral

"cannot effect an official disclosure of information since he is no longer an active naval officer").

The Government urges that it must be able to assure foreign counterparts that it will keep secrets not only through its agents, but through its contractors as well. This stands to reason when there are non-public facts to conceal. But here, the Government's expressed concern is not to protect undisclosed information, but to avoid *attribution to itself*. Mitchell and Jessen have no power to effect that.[50]

Second, the harm the Government warns of does not follow logically from the testimony sought. As the district court recognized, "given the notoriety" of public disclosures about the Polish black site, "there must logically come a point at which they have become so widely and credibly recognized as true that confirmation or denial cannot exacerbate the harm already done." Pet.App. 49a (quoting Opp'n to Mot. to Quash). This is precisely why the district court "d[id] not find convincing the claim that merely acknowledging, or denying, the fact the CIA was involved with a facility in Poland poses an

[50] The CIA evidently recognized this when it allowed Mitchell's book, *Enhanced Interrogation*, to be published after passing classification review, under a disclaimer that its statements of fact "are those of the author and do not reflect the official positions or views of the Central Intelligence Agency." *Supra* at 11.

exceptionally grave risk to national security." Pet.App. 52a.[51]

Deference to the Government's plausible explanations may be appropriate, but if judicial review is to have meaning, courts must be allowed to doubt explanations that make no sense.

D. Under *Reynolds*, Abu Zubaydah's Strong Showing of Necessity Required More Careful Judicial Review.

Following the lead of *United States v. Burr*, the Court in *Reynolds* recognized that a privilege claim is weakest when the need for the information is greatest. *Reynolds*, 345 U.S. at 11 ("Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted …."); *United States v. Burr*, 25 F. Cas. 30, 37 (C.C.D. Va. 1807) (evidence would be suppressed unless "immediately and essentially applicable to the point" at issue).[52] In *Reynolds*, necessity was "greatly minimized" because the plaintiffs could obtain the evidence they sought by other means. *Id.*

This case presents the opposite situation. Abu Zubaydah seeks evidence of crimes committed against him. He has no other means by which to gather this

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[51] The court of appeals did not address this conclusion of the district court, because it found official confirmation was not at issue. Pet.App. 17a, n.15.

[52] *See also, e.g.*, *Ellsberg*, 709 F.2d 51 at 58-59 (acknowledging the role of necessity in assessing privilege claim); *Doe v. CIA*, 576 F.3d 95, 104 (2d. Cir. 2009) (same); *Brown*, 619 F.2d at 1173 (same).

evidence, nor does the Government contend otherwise. He cannot testify, as any survivor of a crime would, because the Government summarily decided nearly twenty years ago that he would remain *incommunicado* for the rest of his life to keep him from publicly disclosing his torture. SSCI Report at 35. His attorneys cannot communicate information on his behalf without CIA pre-clearance. *See* C.A.E.R. 669 (Margulies Decl.). Poland's repeated requests for his testimony have been rejected. *Id.* 632-33. Thus, he seeks an alternative avenue by presenting evidence from witnesses who undisputedly have first-hand knowledge of those crimes—whom the Government twice before *freely permitted* to testify regarding his treatment at black sites. A greater showing of necessity can scarcely be imagined.

E. There Is No Heightened Risk from Transmitting Nonprivileged Information Abroad.

As the court of appeals recognized, the fact that evidence is destined for Poland has no bearing on whether it is privileged:

> A state secret … is a state secret in any forum, domestic or foreign. The crux of the question is whether "there is a reasonable danger that compulsion of the evidence will expose … matters which, in the interest of national security, should not be divulged."

Pet.App. 21a n.17 (quoting *Reynolds*, 345 U.S. at 10). The Government is therefore mistaken in contending that its privilege assertions are entitled to "enhanced

deference" in this setting. Br. at 39. The intended use of evidence is irrelevant to whether it is privileged.

Nor is there any heightened risk arising from transmitting nonprivileged evidence overseas, "out of control of a domestic court." *Id*. Court proceedings are presumptively public. The deposition transcripts of Mitchell and Jessen in *Salim* were promptly published by the U.S. media. Mitchell's and Jessen's testimony at Guantánamo was in open court. The Government itself published transcripts of that testimony online. All this nonprivileged information is now "out of the control of a domestic court." Anyone in the world can access and use it as they deem fit. At any rate, as an *added* control here, any testimony will be subject to the supervision of a domestic court before anything is sent abroad. There is nothing perilous in this, and no reason to expand the state secrets doctrine in cases where nonprivileged information will be transmitted to prosecutors abroad.

II. There Is No Basis for Replacing the *Reynolds* Doctrine with a Standard of Blind Deference, as the Government Seems to Suggest.

The Government portrays the court of appeals' decision as a failure of deference due the Executive. But what the Government seeks is to convert a longstanding standard of measured deference into practical immunity from judicial review. This would be a drastic departure from precedent and would upend the balance of powers set out in the Constitution.

This Court has always insisted on more. Since the days of John Marshall, the Justices of this Court have recognized that where the Executive asserts that "disclosure of [evidence] would endanger the public safety," the proper course is for the court to look behind the privilege claim and suppress only that "which it would be imprudent to disclose." *Burr*, 25 F. Cas. at 37. In *Burr*, the Chief Justice acknowledged that the President might withhold information to protect public safety, but required him to "state the particular reasons" for doing so; then the court, paying "all proper respect" to those reasons, would decide whether to compel disclosure. *United States v. Burr*, 25 F.Cas. 187, 192 (No. 14694) (C.C.D. Va. 1807); *see also Trump v. Vance*, 140 S.Ct. 2412, 2422 (2020) ("Marshall also rejected the prosecution's argument that the President was immune from a subpoena *duces tecum* because executive papers might contain state secrets.").

Almost a century-and-a-half later, the Court, citing *Burr*, reaffirmed that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Reynolds*, 345 U.S. at 9-10. Accordingly, the "court itself must determine whether the circumstances are appropriate for the claim of privilege," and uphold the privilege only "if the court is ultimately satisfied that military secrets are at stake." *Id*. at 8, 11.

To be "satisfied that military secrets are at stake," such that interests in justice must give way, courts must afford review that is meaningful. In doing so, courts properly accord deference to the Executive on whether harm to national security will result from the

disclosure of secret information—for this is an area in which courts are ill-suited to second-guess the Executive's assertions. The court of appeals gave such deference here. Pet.App. 20a. But there is no reason for deference on the antecedent question of whether a secret actually exists, or on the subsequent question of how the case should proceed when the court finds that some, but not all, of the information at issue is privileged. The Judiciary is as well situated as the Executive to determine, based on evidence, whether a fact is secret. And determining how the case should proceed is a core judicial function, abdication of which would violate separation of powers principles enshrined in our Constitution.

This Court's jurisprudence underscores these principles. Even in cases involving the military authority entrusted to the Executive, the Court has rejected arguments that executive action should entirely escape judicial oversight. As far back as *Ex parte Milligan*, the Court rejected the proposition that civilian courts had no role in reviewing the Executive's commitment of a prisoner to trial by a military commission. 71 U.S. 2 (1866). The Court observed that even in time of war, when "the passions of men are aroused and the restraints of law are weakened, if not discarded[,] these safeguards need, and should receive, the watchful care of those entrusted with the guardianship of the Constitution and the laws." *Id.* at 124. And, in *Hamdi v. Rumsfeld*, the Court again rejected the contention that courts' limited institutional capabilities in military matters required judicial acquiescence. 542 U.S. 507, 527-32 (2004) (plurality opinion). The Government argued

that "courts should review [the Executive's] determination that a citizen is an enemy combatant under a very deferential 'some evidence' standard." *Id.* at 527. Rejecting that argument, the Court stressed, "[w]hatever power the United States Constitution envisions for the Executive ... in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Id.* at 536.[53]

History teaches that Executive power, left unchecked, will "lead to intolerable abuses." *Reynolds*, 345 U.S. at 8.[54] This very case arises from the Executive's attempt to evade judicial oversight: the Government established foreign black sites to evade "U.S. court jurisdiction" and public scrutiny. SSCI Report at 22. This led to conduct the Founders would have recognized as an abuse of power,[55] which

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[53] *Accord Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (complete deference "would permit a striking anomaly in our system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is'") (quoting *Marbury*, 1 Cranch at 177); *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1862 (2017) ("[N]ational-security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'") (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985)).

[54] *Accord* THE FEDERALIST No. 51 (Madison) ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. … [B]ut experience has taught mankind the necessity of auxiliary precautions.").

[55] THE FEDERALIST No. 84 (Hamilton) ("To bereave a man of life … without accusation or trial, would be so gross and notorious an act of despotism as must convey the alarm of tyranny throughout the whole nation; but confinement of the person, by

improper assertions of the state secrets privilege can only compound. The courts' role, as gatekeeper of the evidence, is to ensure that the privilege sweeps no more broadly than national security requires. Thus, in both *Reynolds* and *Burr*, the courts found the proper course would be to exclude state secrets from evidence but allow proceedings to go forward.

Here, the court of appeals applied a three-part test derived directly from *Reynolds* and the Ninth Circuit's prior decision in *Mohamed*, fulfilling its duty to provide meaningful judicial review. Pet.App. 13a. When the Government opposed certiorari in *Mohamed*, it described this test as "correctly appl[ying] established legal principles," and "not [in] conflict with any decision of this Court or any other court of appeals." *Mohamed v. Jeppesen Dataplan Inc.*, No. 10-778, United States' Opp'n to Pet. for Cert. at 10-11. The Government praised the court of appeals' "detailed and searching judicial review under *Reynolds* … which included the court's careful and *skeptical* examination" of the privilege claim. *Id.* at 22 (emphasis added, internal quotation marks and alterations omitted); *see also id.* (endorsing statement that "an appropriate dose of 'skepticism' [is] warranted where 'serious government wrongdoing' is alleged"). The Government acknowledged that these "legal principles recognized in *Reynolds* date back to the earliest days of the Republic … and they have been repeatedly affirmed in decisions since that

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secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.").

time." *Id.* at 24. Those are precisely the principles the court of appeals applied in this case.

Thus, when the Government, contradicting its prior statements to the Court, criticizes the panel majority's "skeptical" review (Br. at 25, 35), its true complaint is not with the level of deference given, but with the fact that its privilege claims were questioned at all. The Government offers no principle to limit the degree of deference it demands. Br. at 22 ("utmost deference"); at 25 ("great deference"); at 39 ("enhanced deference"); at 42 ("more, not less deference"). Instead, the Government would eviscerate *Reynolds* and shield its privilege assertions from any review. This demotes the judiciary's role to mere ceremony. Even in cases, like this one, where discovery of nonprivileged information is demonstrably feasible, the Government would demand judicial acquiescence—not only in assessing whether the privilege applies (the second step of the Ninth Circuit's analysis), but also in determining how the matter should proceed (the third step).

The Court should not rewrite the law, as the Government's argument would require. It should reaffirm the principles crystallized in *Reynolds* and applied consistently by the lower courts. That the privilege analysis was resolved against the Government this time is not a reason to abandon two hundred years of jurisprudence. It simply confirms that the judicial review demanded by *Reynolds* is meaningful.

III. The Government's Abuse-of-Discretion Argument Is Not Properly Before this Court and, In Any Event, Is Without Merit.

Finally, the Government argues that the Court may affirm the district court based on reasons "independent" of the state secrets privilege. Br. at 42. It suggests the district court "would have" abused its discretion if it had granted Respondents' application to issue subpoenas pursuant to §1782, under the four factors set forth in *Intel*, 542 U.S. at 264. Br. at 42-43. This argument was not presented in the petition or the motion to quash. It is therefore not properly before the Court.

The Government's argument also mischaracterizes the district court proceedings. The Government overlooks the fact that the district court *granted* the Application after resolving the *Intel* factors *against* the Government. Afterwards, the district court entered a separate order, holding that the state secrets privilege "necessitate[d]" dismissal of the Application. Pet.App. 60a. This was an error of law concerning state secrets, not a discretionary act concerning *Intel*. It was therefore properly reviewed *de novo* by the court of appeals.

In any event, the district court did not abuse its discretion in resolving the *Intel* factors against the Government. For this additional reason, the Government's abuse-of-discretion argument should be rejected.

A. The Government's New Argument Was Not Raised in Its Petition for Writ of Certiorari or in the District Court.

The Government's abuse-of-discretion argument is not "fairly included" in the question presented or the petition. S. Ct. R. 14.1. Neither the question presented nor anything else in the Government's petition makes mention of an "abuse of discretion" under *Intel*. Instead, the question presented in the petition asks how the state secrets privilege should apply. Pet. iii-iv.

The district court considered the *Intel* factors only when granting the Application, an order the Government did not appeal. After the subpoenas issued, the Government moved to quash them "because the subpoenas seek privileged information protected from disclosure by the state secrets privilege." C.A.E.R. 182. But the Government's motion to quash did not mention *Intel*, the *Intel* factors, or the district court's discretion under §1782. C.A.E.R. 181-207. Rather, the Government argued that "the state secrets privilege bars the discovery sought by Abu Zubaydah." *Id.* at 187.

Attempting to excuse its failure to preserve this argument, the Government asserts that it "had no occasion to appeal the district court's initial order" because the district court had "deemed it 'premature' to complete its *Intel* analysis" and made its discovery order subject to further proceedings on any motion to quash. Br. at 48. But that misses the point. When the Government did move to quash, it did not ask the district court to revisit the *Intel* factors. Thus, the

Government's alternative argument is not properly before this Court.

B. The Government's Abuse-of-Discretion Argument Mischaracterizes the District Court Proceedings.

The Government argues that the district court "ultimately refused to issue an order" compelling discovery under §1782. Br. at 42. This is simply incorrect. The district court *granted* the Application and issued an order permitting Respondents to serve the subpoenas. The Government then brought a separate motion, unrelated to the *Intel* factors and §1782, that sought to quash the subpoenas based on the state secrets privilege.

The court of appeals properly rejected the Government's argument that the district court's dispositive order could be "affirmed as an exercise of discretion to deny section 1782 discovery requests":

> [T]he district court exercised its discretion to *grant* the section 1782 application after applying the Intel factors. That order is not on appeal. Moreover, the order that was appealed was not a discretionary one. The district court concluded that it was required by the state secrets privilege to quash the subpoenas.

Pet.App. 11a, n.13 (emphasis in original). The district court's ruling on the state secrets privilege was an erroneous conclusion of law under *Reynolds*, and therefore a reversible error. *Id.* 3a. There is no abuse-of-discretion issue presented by that ruling.

C. In Any Event, There Was No Abuse of Discretion by the District Court.

The Government's abuse-of-discretion argument also fails on its merits. It ignores what the district court actually decided in its *Intel* analysis (Pet.App. 61a-71a), instead inviting this Court to undertake the analysis *de novo*. This turns the standard of review on its head, and is improper—especially because examining what the district court actually decided demonstrates there was no abuse of discretion.

The district court resolved the first *Intel* factor—whether "the person from whom discovery is sought is a participant in the foreign proceeding"—in Respondents' favor. Pet.App. 66a. The Government now concedes that this factor cuts in favor of discovery. Br. at 43. Therefore, the district court's finding on this factor was not an abuse of discretion.

As to the second factor—the receptivity of the foreign government to U.S. judicial assistance (*Intel*, 542 U.S. at 264)—the district court rejected the Government's argument, which "focuse[d] solely on the [MLAT] process and [was] not convincing." Pet.App. 67a. The court noted that "[t]he fact the Polish government has sought information through the treaty process, and been denied by the United States Government further demonstrates the Polish government would be receptive to receiving the information. The second factor [therefore] weigh[s] in favor of granting the Application." *Id.*

Without acknowledging this finding, the Government raises a new argument that it did not present to either court below. The Government

asserts this factor weighs against discovery because in 2011, Poland's then-president refused to relieve Poland's former president of his "secrecy duty" regarding the black site. Br. at 44. In fact, Poland's former president confirmed a Polish black site the next year, in 2012. What happened in 2011 is beside the point. But in any case, the district court cannot be said to have abused its discretion by failing to accept arguments the Government *did not make*.

The district court found that the third *Intel* factor—whether the application is an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States—"cuts both ways":

> There is nothing in the materials filed with the court to indicate the Application seeks to circumvent Poland's proof-gathering restrictions or policies of Poland. Rather, Zubaydah, as the Government concedes, has been invited to participate in the foreign proceeding. … Further, the Polish government's repeated treaty requests indicate granting the Application would not offend the policies of Poland, but rather, would be welcome.

Pet.App. 67a.

The Government argues that the Application is an attempt to "evade limitations in … the bilateral MLAT with Poland" (Br. at 44), but the Government ignores that the district court rejected the contention that the MLAT displaced Respondents' rights under §1782—and rightly so. The U.S.-Poland MLAT does

not deprive private individuals of their right to seek discovery under §1782. It is a treaty governing mutual requests for assistance by the contracting governments. By its terms, the MLAT is "intended solely for mutual legal assistance between [Poland and the U.S.]," and does not "give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence." U.S.-Poland MLAT, art. 1(4), July 10, 1996, S. Treaty Doc. No. 105-12, 1996 WL 905552.

Abu Zubaydah is not the Polish government. He is not acting on behalf of the Polish government. He is an individual seeking discovery in furtherance of his personal right under Polish law to submit evidence regarding crimes committed against him. He cannot provide his own testimony because the United States is holding him *incommunicado* indefinitely and without charges, a perverse state of affairs that is unprecedented in our history.

Like all private individuals, Abu Zubaydah may seek discovery under §1782, even if the foreign state could also seek the same information through an MLAT request. *See Weber v. Finker*, 554 F.3d 1379, 1383-84 (11th Cir. 2009) (U.S.-Switzerland MLAT did not displace §1782 rights of individual seeking information for use in Swiss proceeding); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("When [a treaty and a statute] relate to the same subject, the courts will always endeavor to construe them so as to give effect to both ...."). Thus, the third *Intel* factor does not preclude discovery—at most, it "cuts both ways," as the district court found.

As to the final *Intel* factor—whether discovery is unduly intrusive or burdensome—the court noted that Mitchell and Jessen (not the Government) were the targets of the discovery requests, and they had previously argued before the same judge that discovery in this area "was not unduly burdensome." Pet.App. 69a. Additionally, the Government did not assert the state secrets privilege, instead raising "unspecified hypothetical concerns regarding privilege and classification." *Id.* 70a. Therefore, the district court found determination of this factor "premature." *Id.* 68a. But it concluded that issuance of the subpoenas was warranted by the weight of the *Intel* factors: "The court has exercised its discretion and determined the *Intel* factors favor granting the Application for Discovery." *Id.* 70a. That ruling, which the Government did not appeal, offers no alternative grounds for reversing the court of appeals' decision.

The Government's argument is a paradox. It contends this Court should reverse the court of appeals and affirm the district court's judgment under an abuse of discretion standard. Yet the Government ignores and contradicts what the district court actually held in exercising its discretion—inviting this Court to undertake *de novo* review, without regard to what the district court actually decided or the arguments the parties presented. If, as the Government apparently believes, the district court's *Intel* analysis was incomplete or premature, the proper remedy would be what the court of appeals actually ordered: to remand for further proceedings,

not to undertake that analysis for the first time in this Court, based on arguments not presented below.[56]

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[56] *See Ansonia v. Bd. of Educ. v. Philbrook,* 479 U.S. 60, 71 (1986) (judgment of court of appeals remanding case to district court should be affirmed so that district court may make necessary factual findings).

CONCLUSION

The Court should affirm the Ninth Circuit's decision and remand the case for further proceedings consistent therewith.

Respectfully submitted,

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