No. 20-827

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ZAYN AL-ABIDIN MUHAMMAD HUSAYN,
AKA ABU ZUBAYDAH, ET AL.

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals erred when it rejected the United States' assertion of the state-secrets privilege based on the court's own assessment of potential harms to the national security, and required discovery to proceed further under 28 U.S.C. 1782(a) against former Central Intelligence Agency (CIA) contractors on matters concerning alleged clandestine CIA activities.

PARTIES TO THE PROCEEDING

Petitioner is the United States of America, which was the intervenor in the district court.

Respondents Zayn al-Abidin Muhammad Husayn (a.k.a. Abu Zubaydah) and his attorney Joseph Margulies were petitioners in the district court. Respondents James Elmer Mitchell and John Jessen were respondents in the district court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 938 F.3d 1123. Opinions regarding the denial of rehearing en banc (Pet. App. 73a-85a, 86a-109a) are reported at 965 F.3d 775. An order of the district court (Pet. App. 35a-60a) is not published in the Federal Supplement but is available at 2018 WL 11150135. A prior order of the district court (Pet. App. 61a-71a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2019. A petition for rehearing was denied on July 20, 2020 (Pet. App. 72a-109a). The petition for a writ of certiorari was filed on December 17, 2020, and granted on April 26, 2021. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

Pertinent provisions are reprinted in the appendix to this brief (App., *infra*, 1a-4a).

STATEMENT

On September 17, 2001, in the wake of al Qaida's 9/11 terrorist attacks on the United States, the President authorized the Central Intelligence Agency (CIA) to undertake covert operations "to capture and detain persons who posed a continuing, serious threat of violence or death to U.S. persons and interests or who were planning terrorist activities." Pet. App. 140a; see S. Rep. No. 288, 113th Cong., 2d Sess. 11 (2014) (*SSCI Report*); cf. 50 U.S.C. 3093(a) and (e). Under that authority, the CIA developed the former detention and interrogation program (the CIA Program) to collect intelligence from senior al Qaida members and other terrorists believed to have knowledge of active terrorist plots against Americans. Pet. App. 140a-141a.

Respondent Zayn Husayn, also known as Abu Zubaydah, was an associate and longtime terrorist ally of Osama bin Laden. *Ali* v. *Obama*, 736 F.3d 542, 546 (D.C. Cir. 2013) (Kavanaugh, J.), cert. denied, 574 U.S. 848 (2014); see Cert. Reply Br. 4 n.* (discussing evaluations of Abu Zubaydah in the *SSCI Report* and the factual return in his habeas case). Although Abu Zubaydah is now detained at the United States Naval Station at Guantanamo Bay, Cuba, he initially was captured in Pakistan and detained in CIA detention facilities abroad. *SSCI Report* 21, 23, 67; see Pet. App. 2a.

In this case, Abu Zubaydah and his attorney (respondent Joseph Margulies) seek to compel discovery under 28 U.S.C. 1782(a) from two former CIA contractors (James Mitchell and Bruce Jessen) who worked on the CIA Program. Pet. App. 110a, 123a, 126a. As relevant

here, Abu Zubaydah and Margulies (collectively, respondents) seek evidence from the former CIA contractors, for use in criminal proceedings in Poland, that would confirm or deny whether "the CIA operated a detention facility in Poland in the early 2000s"; the alleged "use of interrogation techniques and conditions of confinement" in "that detention facility"; and the "details" of Abu Zubaydah's alleged treatment "there." *Id.* at 21a; see *id.* at 115a-116a, 120a. The discovery requests are thus predicated on respondents' allegation that Poland was the site for a CIA detention facility at which Abu Zubaydah was detained.

As discussed below, the 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 (EITs). The United States, however, determined that certain categories of information—including the identities of its foreign intelligence partners and the location of former CIA detention facilities in their countries—could not be declassified without risking undue harm to the national security. Information identifying those partners and locations remains classified Top Secret because its unauthorized disclosure reasonably could be expected to cause exceptionally grave damage to the national security. Pet. App. 124a & n.1, 126a, 129a-130a. While news outlets and other sources outside the government have commented and speculated on those topics, the United States has consistently safeguarded that classified information. *Id.* at 133a-134a, 150a.

A. Background

1. In 2010, Abu Zubaydah filed a criminal complaint in Poland "seeking to hold Polish officials accountable

for their [purported] complicity in his [alleged] unlawful detention and torture," which, he alleges, occurred at a CIA detention facility in Poland. Pet. App. 6a.

Polish prosecutors separately requested information to aid their investigation from the United States under a mutual legal assistance treaty (MLAT). Pet. App. 87a (Bress, J., dissenting from the denial of rehearing en banc). The MLAT provides that the United States and Poland "shall provide mutual assistance"—including taking "testimony or statements" and "providing documents, records, and articles of evidence"—"in accordance with the provisions of th[e] Treaty, in connection with the investigation, and prevention of offenses." Treaty Between the United States of America and the Republic of Poland on Mutual Legal Assistance in Criminal Matters (Poland MLAT), U.S.-Pol., arts. 1(1), (2)(a) and (b), July 10, 1996, T.I.A.S. No. 99-917.1. The treaty further provides, however, that the country receiving a request "may deny assistance if," as relevant here, "the execution of the request would prejudice the security or similar essential interests of [the receiving country]." Art. 3(1)(c).[1]

The United States denied the MLAT request on national-security grounds. Pet. App. 87a (Bress, J., dissenting); see C.A. E.R. 444. The Polish investigation was then closed without a prosecution. Pet. App. 6a.

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[1] In 2006, the United States and Poland entered an agreement updating their MLAT in accordance with an intervening agreement between the United States and the European Union. See S. Treaty Doc. No. 13, 109th Cong., 2d Sess. XVII-XVIII, XXXII (2006). The updated MLAT, which entered into force on February 1, 2010, is reproduced as the Annex to the 2006 agreement. *Id.* at XXXII; see also *id.* at 264-284 (2006 Agreement and Annex). The portions of the 1996 MLAT relevant here were unaltered and remain in force.

In 2013, Abu Zubaydah filed an application with the European Court of Human Rights (ECHR) alleging, *inter alia*, that Poland violated "international and Polish domestic law" by failing properly to investigate his criminal complaint. Pet. App. 114a; C.A. E.R. 597.

Poland did not cooperate with the ECHR's subsequent inquiry into Abu Zubaydah's application. Poland declined to "address in detail the Court's questions" about the allegations, was unwilling to provide answers based on the assumption that Abu Zubaydah "had been transferred to and from Poland and had legally or illegally been detained on its territory," and represented that it was "not prepared to affirm or negate the facts" that he alleged. C.A. E.R. 542; see *id.* at 398-401.

The ECHR observed that Poland's former President from 2000-2005 (Aleksander Kwasniewski) and its former Prime Minister who were in office when Abu Zubaydah alleges he was held in Poland had "denied the existence of any CIA prisons in Poland" and that other Polish prime ministers and ministers of foreign affairs had made similar denials. C.A. E.R. 447, 488. The court further observed that Poland's President "had refused to relieve [Kwasniewski] from his secrecy duty," precluding him from providing information to investigators. *Id.* at 446.

2. While that ECHR case was pending, the Senate Select Committee on Intelligence (SSCI) completed its 2009-2014 "comprehensive review" of the former CIA Program, which examined CIA records on that program comprising more than "six million pages of material." *SSCI Report* 8-9. The Committee's full 6700-page report is classified. See *ibid.* But the Committee's Findings and Conclusions (*id.* at x-xxviii), its detailed 499-page Executive Summary (*id.* at 1-499), and the sepa-

rate views of its members have been published—after declassification by the Executive Branch—as Senate Report 113-288 (2014). See *id.* at ii, 9-10 & n.6; Pet. App. 142a-143a.

That Senate report provides a detailed and critical public accounting of government actions involving the former CIA Program. See *SSCI Report* 1-499; cf. Memorandum from John O. Brennan, Dir., CIA, *CIA Comments on the SSCI Report on the Rendition, Detention, and Interrogation Program* (June 27, 2013), https://go.usa.gov/x6yR8 (disagreeing with certain conclusions). But the SSCI, at the CIA's request, omitted even from its classified report "the names of countries that hosted CIA detention sites," thereby safeguarding that highly classified information. *SSCI Report* 10.

A significant portion of the public SSCI report concerns Abu Zubaydah, who was the first detainee in the former CIA Program. *SSCI Report* xii-xiv, xviii, xx, 17-49, 204-210, 405-413, 437-439. The report explains that, shortly after his March 2002 capture in Pakistan, Abu Zubaydah was moved to "Country [redacted] where he was held at the first CIA detention site," which the report labels as Detention Site Green. *Id.* at 21, 23. The report states that after Abu Zubaydah's initial interrogation sessions, *id.* at 24-25, 29, 45 n.215, he was subjected to EITs at Detention Site Green beginning on August 4, 2002. *Id.* at 42; see *id.* at 40. The report recounts that Abu Zubaydah experienced at least 83 waterboard applications; spent over 11 days in a coffin-size confinement box and 29 hours confined in an extremely small enclosure; and was subjected to "walling, attention grasps, slapping, facial hold[s], stress positions," "white noise[,] and sleep deprivation." *Id.* at 42, 118 n.698 (citation omitted). The SSCI determined that

"[t]he CIA continued to use its enhanced interrogation techniques against Abu Zubaydah until August 30, 2002," *id.* at 42 n.190, and that "CIA records indicate that the use of the CIA's enhanced interrogation techniques [against Abu Zubaydah] ceased on [that date]," *id.* at 231 n.1316.

The SSCI report states that later, in December 2002, Detention Site Green "was closed" and Abu Zubaydah was transferred to a second detention site, labeled Detention Site Blue. *SSCI Report* 67; see *id.* at 24. Abu Zubaydah alleges that he was detained "[f]rom December 2002 until September 2003" at that second detention site, which he alleges was in Poland. Pet. App. 113a-114a.

3. In 2015, the ECHR issued a final judgment in favor of Abu Zubaydah. C.A. E.R. 383-607. The court acknowledged that it lacked "any form of direct account of the [alleged] events" and that it was forced to rely "to a great extent" on "circumstantial" material. *Id.* at 550-551. The court viewed its evidentiary "difficulties" as resulting from restrictions on Abu Zubaydah's ability to communicate from detention and "the extreme secrecy surrounding the US rendition operations," which were "compounded" by "the Polish Government's failure to cooperate with the Court in its examination of the case." *Ibid.* The court further determined that "[t]he burden of proof * * * rest[ed] on the authorities to provide a satisfactory and convincing explanation" in response to Abu Zubaydah's allegations and that Poland's "fail[ure] to disclose crucial documents to enable the Court to establish the facts or otherwise provide a satisfactory and convincing explanation of how the events in question occurred" gave rise to "strong [adverse factual] inferences" against Poland. *Id.* at 549-550; see *id.* at 556, 577.

The court labeled this factfinding method as "proof 'beyond reasonable doubt'" but emphasized that, in doing so, it did not follow "the national legal systems that use that standard." *Id.* at 549.

Under its standard and based on adverse inferences, the ECHR determined that Abu Zubaydah was detained at a CIA facility in Poland from December 2002 to September 2003. C.A. E.R. 556-558; see *id.* at 562-563, 567. The court recognized that the evidence before it provided "very sparse information" about Abu Zubaydah's treatment during that period, but the court "f[ound] it inconceivable" that the CIA did not employ EITs (other than waterboarding) against him "during [his] detention in Poland" because he had been the CIA's first high-value detainee "for whom the EITs were specifically designed." *Id.* at 556-557. The court concluded that Poland had violated Abu Zubaydah's rights both by being complicit in his purported detention and torture in Poland, *id.* at 589, and by failing to conduct an "effective investigation" into his criminal complaint, *id.* at 598-599.

4. In light of the ECHR's judgment, the Krakow regional prosecutor's office reopened an investigation into Abu Zubaydah's criminal complaint. Pet. App. 6a; C.A. E.R. 72. Polish authorities had previously submitted to the United States five additional MLAT requests and, after the ECHR judgment, they submitted a final "comprehensive" MLAT request for information about Abu Zubaydah's Poland-focused allegations. C.A. E.R. 632-633. The United States denied each of the additional requests and informed the Polish prosecutors that it would not entertain "any further [MLAT requests] concerning alleged CIA detention spots for persons suspected of terrorist activities." *Id.* at 633-634; see Pet.

App. 6a; C.A. E.R. 651. An attorney in Krakow's regional prosecutor's office thereafter "invited [Abu Zubaydah's Polish counsel] to submit evidence" to aid the investigation. C.A. E.R. 73, 79.

B. Proceedings Below

1. a. Abu Zubaydah and his American attorney then initiated this proceeding in district court by applying for an *ex parte* order under 28 U.S.C. 1782(a). Their Section 1782 application (Pet. App. 110a-122a) sought "leave to issue subpoenas" to the two former CIA contractors (Mitchell and Jessen) who they alleged were "co-architect[s] of the CIA's enhanced interrogation program" and had information "regarding the identities of Polish officials complicit in the establishment and operation of the black site [in Poland] and the nature of their activities." *Id.* at 110a, 115a-116a. The United States, which was not yet a party to the case, filed a statement of interest opposing respondents' application. *Id.* at 8a, 62a.

Section 1782(a) provides that a district court "may" order "a person" in its district "to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." 28 U.S.C. 1782(a). Under Section 1782(a), however, "[a] person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege." *Ibid.*

The district court granted respondents' application for leave to subpoena Mitchell and Jessen. Pet. App. 61a-71a. The court considered factors identified in *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), to guide a court's discretion under Section 1782,

id. at 264-265. See Pet. App. 65a-71a. The district court viewed the "nature and character of the foreign proceeding" as supporting respondents because Polish prosecutors invited respondents to submit information. *Id.* at 66a-67a. It determined that another factor—whether discovery would "circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"—"cut both ways": Polish prosecutors might "welcome" assistance, but the assistance would contravene policies in the relevant MLAT, which the United States had invoked in denying prosecutors' "repeated treaty requests" for evidence. *Id.* at 67a. Finally, the court deemed it "premature" to decide if discovery would be "unduly intrusive or burdensome." *Id.* at 68a. Rather than complete its analysis, the court stated that it could later consider undue intrusion or burden if the subpoenas were challenged on the ground that the information sought was "classifi[ed]" or "privilege[d]." *Ibid.*

b. The United States moved to intervene and quash the resulting subpoenas based, as relevant here, on its formal invocation of the state-secrets privilege supported by the declaration of then-CIA Director Michael Pompeo (Pet. App. 123a-160a). See *id.* at 9a.

Director Pompeo explained that he asserted the privilege to prevent the significant national-security harms that could reasonably be expected to result from compelling discovery from Mitchell and Jessen—former CIA contractors who worked on the CIA Program—on "the central issue that underlies this entire matter," *i.e.*, respondents' "allegation that the CIA operated a clandestine detention facility in Poland and/or conducted detention and interrogation operations with the assistance of the Polish Government." Pet. App. 128a-

129a; see *id.* at 126a, 130a, 134a. The Director stated that it is "critical" to the national security to protect the "location of detention facilities" and "the identity of foreign partners who stepped forward in the aftermath of the 9/11 attacks." *Id.* at 136a, 150a-153a.

The Director explained that in the wake of 9/11, when the CIA Program was developed to prevent further attacks on Americans, the CIA secured the help of "specific foreign countries" that "clandestinely assisted the CIA Program" (Pet. App. 126a) based on the United States' "pledge to keep any clandestine cooperation with the CIA a secret," *id.* at 136a. See *id.* at 140a-141a. The intelligence services of such countries, he stated, are "a direct source of intelligence" for the CIA and "act as partners in joint operations" in areas of the world where the CIA is "engaged in counterterrorism operations and intelligence collection activities to keep our country and our citizens safe." *Id.* at 130a. Those partners are thus a "critical intelligence source" and their ongoing assistance is "vital to [this Nation's] world-wide efforts to collect intelligence and thwart terrorist attacks." *Id.* at 130a-131a.

The Director further explained that the CIA's "clandestine relationships" with "intelligence and security services are extremely sensitive" and are "based" on their "trust" that the CIA will discharge its "duty to maintain the secrecy of its liaison relationships." Pet. App. 131a, 135a. He stated that the CIA's ability to "convince foreign intelligence services to work with us" depends on that trust, adding that it is "critical" that "the CIA maintain its commitment of confidentiality." *Id.* at 136a. If CIA personnel, including former contractors like Mitchell or Jessen, were to provide evidence

confirming or denying the existence of those relationships and any alleged Polish assistance to the former CIA Program, such action would be a "breach of the trust" on which the intelligence relationships rest and would "likely" cause "serious negative consequences" for the Nation's intelligence capabilities, including the reduction or cessation of intelligence cooperation by foreign partners. *Id.* at 131a; see *id.* at 134a.

The Director warned that such a breach of trust would not only affect the particular clandestine relationships that might be confirmed or denied but would also jeopardize the United States' "relationships with other foreign intelligence or security services." Pet. App. 132a. "[I]f the CIA appears unable or unwilling to keep its clandestine liaison relationships secret," the Nation would risk "significant harmful effects" from the "loss of trusted intelligence partners" and their "intelligence information and operational support." *Ibid.*; see *id.* at 136a.

The Director acknowledged that "much public speculation [existed] about which countries and services assisted the CIA's former detention and interrogation program" and noted that "the media, nongovernmental organizations, and former Polish government officials" had "publicly alleged that the CIA operated a detention facility in Poland." Pet. App. 133a-134a. But he explained that the speculation and allegations did not undermine the national-security harms that "reasonably could be expected to result from Mitchell or Jessen confirming or denying" Poland's alleged connection to a CIA detention facility. *Id.* at 134a. The Director stated that the locations of former CIA facilities and the identities of our foreign partners remain classified; the CIA has "steadfastly refused to confirm or deny the accuracy of

the public speculation," *id.* at 133a-134a; and the absence of such confirmation or denial both "leaves an important element of doubt about the veracity of the [public speculation]" and provides an "additional layer of confidentiality," *id.* at 135a. Moreover, the Director continued, "[the CIA's] foreign partners must be able to trust" that the United States will "stand firm in safeguarding any coordinated clandestine activities" even after "time passes, media leaks occur, or the political and public opinion winds change in those foreign countries." *Id.* at 136a. Such partners must "have confidence" that the CIA will not reveal their assistance "years down the line" even if, for instance, new "officials come to power in those foreign countries" who wish "to publicly atone or exact revenge for the alleged misdeeds of their predecessors." *Ibid.*

c. The district court granted the government's motions and quashed respondents' subpoenas. Pet. App. 35a-60a. The court upheld the state-secrets-privilege assertion for "operational details concerning the specifics of cooperation with a foreign government, including the roles and identities of foreign individuals." *Id.* at 55a-56a.

The district court, however, concluded that the privilege did not protect general information concerning Poland's alleged involvement in clandestine activity. Pet. App. 52a, 59a. The court recognized that the government has never "acknowledged Poland's cooperation or assistance with the [CIA] Program." *Id.* at 51a. But the court viewed the government's privilege assertion with the "skeptical eye" that it deemed mandated by the Ninth Circuit, *id.* at 47a (citation omitted), and determined that "merely acknowledging, or denying, the fact [that] the CIA was involved with a facility in Poland

[would not] pose[] an exceptionally grave risk to national security." *Id.* at 52a; see *id.* at 59a. The court stated that "the former President of Poland, Kwasniewski," had "acknowledged the cooperation with CIA"; the ECHR "found by proof beyond a reasonable doubt the CIA operated a facility in Poland"; and "[t]he fact has also been fairly widely reported in media." *Id.* at 52a-53a.

The district court nevertheless granted the government's request to terminate discovery. The court reasoned that "compelling Mitchell and Jessen to address the mere fact of whether they were part of CIA operations conducted in Poland, or whether they interrogated Zubaydah in Poland, would not seem to aid the Polish investigation" for which respondents sought discovery. Pet. App. 53a (noting that "Polish investigators already have a[n] ECHR Opinion" on the subject). The court further determined that, in any event, what respondents ultimately sought was "more detail as to what occurred and who was involved," *ibid.*, to reveal "the role of [any] foreign (Polish) nationals" at the alleged Poland-based CIA facility, *id.* at 56a. The court therefore determined that "[m]eaningful discovery" could not proceed without "an unacceptable risk of disclosing" those more detailed matters that are protected by the state-secrets privilege. *Id.* at 57a.

2. A divided panel of the court of appeals reversed and remanded. Pet. App. 1a-34a.

a. The panel majority "reject[ed] the government's blanket assertion of [the] state secrets privilege" based on its view that certain information "is not—at least in broad strokes—a state secret, namely: [1] the fact that the CIA operated a detention facility in Poland in the early 2000s; [2] information about the use of interrogation techniques and conditions of confinement in that

detention facility; and [3] details of Abu Zubaydah's treatment there," Pet. App. 20a-21a. See *id.* at 14a-21a. The court stated that "[t]hese facts have been in the public eye for some years now," *id.* at 21a, noting that "[j]ournalists, non-governmental organizations, and Polish government officials ha[d] widely reported that one of [the CIA's detention] sites was in Poland" and the ECHR had "found 'beyond reasonable doubt' that Abu Zubaydah was detained in Poland" and that his treatment "'by the CIA'" there amounted to "'torture,'" *id.* at 4a-6a.

Notwithstanding the CIA Director's contrary judgment, the majority concluded "that disclosure of [those] basic facts would not 'cause grave damage to national security.'" Pet. App. 18a (citation omitted). The majority stated that "to be a 'state secret,' a fact must first be a 'secret.'" *Ibid.* The majority also discounted the risks of discovery because Mitchell and Jessen are now "private parties," not "agents of the government," such that their evidence would not reflect that the government itself had "confirm[ed] or den[ied] anything." *Ibid.* The majority added that "*current* Polish authorities, specifically, prosecutors," had indirectly requested the evidence, which, in its view, lessened the risk of "breaching trust with the cooperating country." *Id.* at 19a.

The majority then determined that, even though other information sought by respondents was "covered by the state secrets privilege," Pet. App. 20a, the district court had erred in quashing the subpoenas. See *id.* at 21a-27a. The majority noted that dismissal of an action can be warranted on state-secrets grounds when the action's claims or defenses are to be litigated in United States courts, but it deemed such considerations inapplicable to this proceeding, which it termed a "pure

discovery matter" seeking information for use in another forum. *Id.* at 22a-23a. The majority stated that dismissal might be warranted here if discovery of nonprivileged information would present an "'unacceptable risk of disclosing state secrets'" because the "'privileged'" and "'nonprivileged information'" are "'inseparable,'" but it concluded that it "is not impossible to separate secret information," *id.* at 22a (citation omitted), and deemed it premature to conclude that discovery cannot proceed, *id.* at 25a-27a.

b. Judge Gould dissented. Pet. App. 29a-34a. He concluded that the "majority jeopardizes critical national security concerns"; stated that he was "not in a position as an Article III judge to make a conclusion that it is agreed that Abu Zubaydah was detained and tortured in Poland," even though "much media comment" and "some reasoning of the [ECHR]" "suggest[] that conclusion"; and explained that he would "defer to the view of then-CIA Director and now Secretary of State Michael Pompeo that the disclosure of secret information in this proceeding 'reasonably could be expected'" to harm the national security. *Id.* at 29a-30a. He further explained that, even assuming that some information involving purported CIA activity in Poland would not be protected, dismissal was still warranted because "walking close to the line of actual state secrets may result in someone overstepping that line" and because "the entire premise of the proceeding" here is to obtain information concerning "details about the CIA's involvement" for "Polish prosecutorial efforts." *Id.* at 30a-31a.

3. The court of appeals denied rehearing en banc. Pet. App. 72a-73a. Judge Paez, joined by Judges Fletcher and Berzon, concurred. *Id.* at 73a-85a. Judge Bress, writing for 12 judges, dissented. *Id.* at 86a-109a.

The 12 dissenting judges concluded that the panel majority's decision rests on "grave legal errors, conflicts with governing precedent, and poses a serious risk to our national security" by "treat[ing] information that is core state secrets material as fair game in discovery." Pet. App. 86a, 93a. In rejecting the government's privilege assertion, the judges explained, the panel majority failed to give "any apparent deference" to "the CIA Director on matters uniquely within his national security expertise." *Id.* at 93a, 96a-98a. The judges stated that the decision further erred in deeming classified information "basically public knowledge," *id.* at 98a (citation omitted), even though "[t]he privilege belongs to the Government" and cannot be "waived by a private party," *ibid.* (quoting *United States* v. *Reynolds*, 345 U.S. 1, 7 (1953)) (brackets in original); see *id.* at 100a-101a. And they found the majority's reliance on the ECHR's findings to be "especially troubling" because those findings rested on "negative inferences" resulting from Poland's refusal to confirm or deny the allegations. *Id.* at 101a n.1. The dissenting judges observed that "[i]t cannot be the law that foreign partners would destroy the U.S. state secrets privilege by trying to protect it." *Ibid.*

The dissenting judges further concluded that the panel majority was wrong to view the state-secrets privilege as diminished because "discovery is directed to a government contractor." Pet. App. 102a. They explained that the panel's "contrary rule would enable an end-run around the privilege, as litigants could simply subpoena current or former contractors to avoid the privilege's strictures." *Ibid.*

Finally, the dissenting judges concluded that, "even if some of the requested discovery" were not privileged,

the panel majority's decision would still be "deeply problematic": The majority's "critical errors" unacceptably risk revealing information that even the majority "concedes" is a state secret by allowing discovery of information where "exposing the classified 'mosaic' is the *entire point* of the Polish criminal proceeding." Pet. App. 103a-104a. The judges observed that "[t]his would all be troubling enough if the resulting discovery were being used in domestic litigation," yet here any discovery obtained "will be shipped overseas" to a foreign proceeding "dedicated to investigating our country's counterintelligence operations abroad," where its use cannot be guarded by the district court. *Id.* at 107a-108a.

SUMMARY OF ARGUMENT

In this proceeding to obtain classified information from former CIA contractors for use in a foreign proceeding investigating alleged CIA activities abroad, a divided panel of the Ninth Circuit erroneously held that discovery could proceed under Section 1782. The panel's decision poses significant national-security risks and is seriously flawed on two independent grounds.

A. First, Section 1782 does not extend to information protected by "any legally applicable privilege," 28 U.S.C. 1782(a), and, here, the state-secrets privilege protects information that would confirm or deny whether or not a CIA detention facility was located in Poland with any relevant assistance from Polish authorities. The former CIA Director explained why the compelled discovery of such information from Mitchell and Jessen would risk the national security. The CIA informs this Office that the current CIA Director has likewise determined that the compelled discovery of that information would reasonably be expected to harm the national security and

that the government should therefore continue to oppose discovery of that classified information in this case.[2]

1. The Ninth Circuit fundamentally erred in rejecting the government's privilege assertion. The panel majority's errors primarily derive from its failure to afford appropriate deference to the CIA Director's judgment regarding risks of harm to the national security. Courts properly extend "the utmost deference" to Executive Branch assessments of such harms, *Department of the Navy* v. *Egan*, 484 U.S. 518, 529-530 (1988) (citation omitted), reflecting the Executive's central constitutional role in this context. The majority, however, erroneously determined that its "essential obligation" was to conduct a "skeptical" review, which it recognized "contradict[ed]" prior circuit precedent acknowledging the need for deference. Pet. App. 14a-15a, 17a n.14. The majority's standard, and its consequent disregard of the CIA Director's detailed declaration, is a serious departure from established principles which alone warrants reversal of its judgment.

2. The majority further erred in the course of making its own independent assessment of national-security harms. The majority believed that no harm would result from the compelled discovery of information about alleged clandestine intelligence activity from former CIA contractors because such contractors are "private parties." Pet. App. 18a. That is clearly incorrect. The state-secrets privilege has long protected national-security information possessed by government contractors. The rule could not be otherwise.

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[2] Concerning the former CIA Program, the current CIA Director has made clear his commitment that the CIA will never again operate such a program.

3. a. The majority's willingness to reject the Executive Branch's national-security judgment based on its own assessment of purported "public knowledge" likewise fundamentally misapprehends the governing principles. Courts have long recognized that the existence of widespread public speculation without official government disclosure provides no sound basis to require government personnel to confirm or deny the accuracy of the speculation. That principle applies with particular force in the world of clandestine intelligence operations.

b. The majority's independent analysis of "public knowledge" based on an ECHR judgment and news stories underscores its methodological error. The ECHR had no direct information about any purported CIA activities in Poland; it based its judgment against Poland on adverse inferences it drew because Poland refused to confirm or deny Abu Zubaydah's allegations. The news stories, in turn, rested on prior stories and hearsay, often from unnamed sources. And reporting about statements attributed to Poland's former president, who reportedly had repeatedly denied the existence of any CIA detention facilities in Poland, at best demonstrates conflicting statements, not a basis for "public knowledge" that could override the CIA Director's considered judgment on matters of national security.

4. The panel's errors are particularly significant because respondents seek discovery for use in a *foreign* proceeding that is investigating alleged clandestine activities of the CIA abroad. That context warrants a particularly high degree of deference to the CIA Director's assessment. The Director's detailed declaration therefore far exceeds the requisite showing to sustain the government's privilege assertion.

B. Second, apart from questions of privilege, the district court could not have properly authorized discovery of national-security information for use by foreign prosecutors investigating alleged clandestine CIA activity in Poland. The district court here denied respondents' discovery application. And it would have been an abuse of discretion to have done otherwise because the key factors informing a court's exercise of discretion under Section 1782 all counsel strongly against discovery in this highly sensitive context. The attitudes of Poland's executive leadership have paralleled that of the United States. Respondents' discovery request targeting CIA contractors reflects an attempt to circumvent the policies in Section 1782 and the governing MLAT, which foreclosed discovery from the CIA itself. And even assuming *arguendo* that the CIA did operate a detention facility in Poland, discovery in this context riddled with state secrets would be unduly burdensome and intrusive. Because the issue is clear given the extraordinary circumstances here, this Court may reverse the court of appeals and affirm the district court's dismissal of respondents' application on that basis.

ARGUMENT

THE COURTS BELOW IN THIS SECTION 1782 PROCEEDING COULD NOT PROPERLY COMPEL FORMER CIA CONTRACTORS TO CONFIRM OR DENY WHETHER POLAND HOSTED A CLANDESTINE CIA DETENTION FACILITY OR PROVIDED RELATED ASSISTANCE

A divided panel of the Ninth Circuit reversed the district court and directed discovery to proceed under Section 1782 against former CIA contractors who would provide evidence confirming or denying whether the CIA operated a clandestine detention facility in Poland

and whether Poland's security services provided assistance. That decision is fundamentally flawed for two reasons, each of which independently warrants reversal. First, Section 1782 does not allow such discovery because the information central to this case is protected by a "legally applicable privilege," 28 U.S.C. 1782(a), namely, the state-secrets privilege. Second, aside from the privilege issue, respondents' requested discovery to assist foreign prosecutors investigating clandestine CIA intelligence activities falls outside the scope of what a district court may properly order under Section 1782. Those errors, whether considered separately or in combination, require reversal of the judgment below.

A. The State-Secrets Privilege Applies To Evidence From Former CIA Contractors That Would Confirm Or Deny Whether Poland Hosted A Clandestine CIA Detention Facility

1. The CIA Director's state-secrets-privilege assertion, which rests on his expert assessment of harm to the national security, warrants utmost deference

The Ninth Circuit's multiple errors derive largely from one key mistake: the court's failure to afford appropriate deference to the CIA Director's judgment regarding the risk of harm to the national security. That approach led the court further into error by relying on its own assessment of possible national-security harms, in disregard of the considered judgment of the Executive Branch official charged with that responsibility.

a. The state-secrets privilege is rooted in the Executive Branch's "Art[icle] II duties" to protect the national security and conduct foreign affairs, which include the duty to safeguard "military or diplomatic secrets." *United States* v. *Nixon*, 418 U.S. 683, 710 (1974).

In addition to that constitutional foundation, the state-secrets privilege "is well established in the law of evidence." *United States* v. *Reynolds*, 345 U.S. 1, 6-7 (1953). This Court has therefore long "recognized the sometimes-compelling necessity of governmental secrecy by acknowledging [that] Government privilege" for "information about our military, intelligence, and diplomatic efforts." *General Dynamics Corp.* v. *United States*, 563 U.S. 478, 484 (2011). In light of that "compelling interest," *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam), even if a litigant has made a "strong showing of necessity" for the discovery or use of such information, the state-secrets privilege will apply where "there is a reasonable danger that compulsion of the evidence will expose military [or other] matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10-11.

The government does not "lightly invoke[]" the state-secrets privilege. *Reynolds*, 345 U.S. at 7. It can assert the privilege only through "a formal claim" "lodged by the head of the department which has control of the matter" after "personal consideration by that officer." *Id.* at 7-8. Furthermore, since 2009, the Department of Justice conducts a high-level review that results in the "personal approval of the Attorney General" before it asserts the state-secrets privilege in litigation. Office of the Attorney General, *Policies and Procedures Governing Invocation of the State Secrets Privilege* 1-3 (Sept. 23, 2009), https://go.usa.gov/x6VqV. That additional process—which resulted in then-Attorney General Sessions's approval of the privilege assertion here—serves to ensure that the privilege is invoked "only when genuine and significant harm to national defense or foreign relations is at stake and only to the extent

necessary to safeguard those interests." *Id.* at 1; see Pet. App. 45a.

Consistent with that high-level Executive Branch review and determination, this Court has made clear that the government's assertion of the state-secrets privilege as part of its "Art[icle] II duties" is entitled to a "high degree of deference." *Nixon*, 418 U.S. at 710-711. The Court has emphasized that the responsible Executive officials possess "the necessary expertise" to make the required "[p]redictive judgment" about risks to the national security. *Department of the Navy* v. *Egan*, 484 U.S. 518, 529 (1988) (citing *CIA* v. *Sims*, 471 U.S. 159, 170 (1985)); see *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2421 (2018) (observing that national-security judgments are "delicate, complex, and involve large elements of prophecy") (citation omitted). And the Court has further recognized that "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973); see *Hawaii*, 138 S. Ct. at 2421 ("[W]e cannot substitute our own assessment for the Executive's predictive judgments on [national-security] matters."). Courts therefore provide "the utmost deference" to the Executive's assessment of potential national-security harms. *Egan*, 484 U.S. at 529-530 (quoting *Nixon*, 418 U.S. at 710).[3]

With respect to the CIA Director in particular, this Court has emphasized that "it is the responsibility of

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[3] See also *El-Masri* v. *United States*, 479 F.3d 296, 305 (4th Cir.) ("In assessing the risk" to national security, "a court is obliged to accord the 'utmost deference' to the responsibilities of the [E]xecutive [B]ranch.") (citation omitted), cert. denied, 552 U.S. 947 (2007); accord, *e.g.*, *Black* v. *United States*, 62 F.3d 1115, 1119 (8th Cir. 1995), cert. denied, 517 U.S. 1154 (1996); *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991).

the Director * * * , not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." *Sims*, 471 U.S. at 180. Unlike the Director, "the judiciary has no covert agents, no intelligence sources, and no policy advisors" to provide the necessary background and expertise for making sound national-security assessments. *Schneider* v. *Kissinger*, 412 F.3d 190, 196 (D.C. Cir. 2005), cert. denied, 547 U.S. 1069 (2006). It follows that the "decisions of the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference." *Sims*, 471 U.S. at 179.

b. Notwithstanding those principles, as the 12 dissenting judges below explained, the panel majority failed to afford "any apparent deference" to "the CIA Director on matters uniquely within his national security expertise." Pet. App. 93a, 97a (Bress, J., dissenting from the denial of rehearing en banc). The panel majority instead seized upon the word "skeptical" in an earlier Ninth Circuit decision and determined that "skeptical" review was itself "*contradictory*" to prior circuit precedent reflecting "the need to defer to the Executive." *Id.* at 14a-15a (emphasis added). The majority then deemed review with "a skeptical eye" to be its "essential obligation," *id.* at 17a n.14, and made no further reference to "deference" in its opinion.

The panel's approach is a serious departure from the "great deference" warranted in this context, *Sims*, 471 U.S. at 179, and erroneously invites courts to substitute their own views for the judgments of the officials vested with authority and responsibility to protect the Nation. The panel majority did just that here by disregarding

the CIA Director's detailed declaration describing his judgment that significant national-security harms could reasonably be expected to result from compelling discovery from the former CIA contractors in this case. See pp. 10-13, *supra* (discussing declaration). The panel instead elected to rely on its own, independent "conclusions" based on what it deemed to be "publicly available facts" to reject the government's assertion of privilege. Pet. App. 17a n.14. That error alone warrants reversal of the Ninth Circuit's judgment.

2. The disclosure of classified information by former CIA contractors risks significant harm to the national security

Without the doctrinal anchor of deference, the Ninth Circuit further erred in the course of making its own, independent assessment of national-security risks. The panel majority concluded that requiring Mitchell and Jessen to confirm or deny Poland's alleged clandestine connection to a CIA detention facility would not risk any harm because the former CIA contractors are "private parties" and, in the majority's view, their evidence would therefore not be "equivalent to the United States confirming or denying anything." Pet. App. 18a. That holding is deeply flawed, "would enable an end-run around the privilege," and would threaten significant harm to the national security in this case and future cases. *Id.* at 102a (Bress, J., dissenting).

The court of appeals' characterization of Mitchell and Jessen as "private parties" fails to account for the fact that they obtained the information that respondents seek to discover only by working for the CIA. Director Pompeo explained that Mitchell and Jessen are "former contractors employed by the CIA to assist in the interrogation of detainees," and their response to respondents'

subpoenas would "either confirm[] or deny[] the existence or nonexistence of a clandestine CIA detention facility in Poland" and whether the Polish government "clandestinely assisted the CIA." Pet. App. 123a, 126a, 130a. That response reasonably would be expected to cause significant damage to the national security. *Id.* at 126a, 134a. The Ninth Circuit's focus on the contractors' relationship to the government as a matter of employment or "agen[cy]" law and their status as "private parties," *id.* at 18a, is beside the point. What matters is that, as former CIA contractors with first-hand knowledge of CIA activities under the former CIA Program, their compelled disclosure of such information would be a "breach of the trust" on which the CIA's clandestine relationships with foreign governments are based, which would undermine the CIA's ongoing ability to maintain such cooperation. *Id.* at 131a; see pp. 11-12, *supra*.

This Court's decisions underscore the validity of the Director's prediction. The Court has long recognized that "the appearance of confidentiality" is "essential to the effective operation of our foreign intelligence service," because the "continued availability" of assistance from "intelligence services of friendly nations" "depends upon the CIA's ability to guarantee the security of information that might compromise them." *Snepp*, 444 U.S. at 509 n.3, 512. The Ninth Circuit here significantly "underestimated the importance of providing" our intelligence partners "with an assurance of confidentiality that is as absolute as possible." *Sims*, 471 U.S. at 175. "[F]orced disclosure of the identities" of those partners would pose substantial risks for "the Agency's ability to carry out its mission," for if our intelligence partners "come to think that the Agency will be unable to maintain the confidentiality of its relation-

ship to them," they may "well refuse to supply information" critical to the national security. *Ibid.* "The possibility that a suit may proceed and [a clandestine intelligence] relationship may be revealed" under the Ninth Circuit's reasoning "is unacceptable: 'Even a small chance that some court will order [such] disclosure'" risks "'impair[ing] intelligence gathering'" and "'caus-[ing] sources to "close up like a clam."'" *Tenet* v. *Doe*, 544 U.S. 1, 11 (2005) (quoting *Sims*, 471 U.S. at 175).

It blinks reality to believe, as the panel majority apparently did, that the CIA's foreign intelligence partners would not be deterred from cooperating if their clandestine relationships with the CIA could be revealed by former CIA contractors. A contractor, like a government employee, must generally enter into a nondisclosure agreement before obtaining access to classified information and can be subject to sanctions for the unauthorized disclosure of that information. Exec. Order No. 13,526, §§ 4.1(a)(2), 5.5(b)(1), 3 C.F.R. 298, 314, 321 (2009 comp.) (50 U.S.C. 3161 note). That is because, as an insider, his unauthorized disclosure of the national-security information with which he has been entrusted can cause significant damage to the national security. Cf. *Standard Form 312: Classified Information Nondisclosure Agreement* ¶ 3 (rev. 2013) (obligation to "never divulge" classified information without authorization), https://go.usa.gov/xAc5E; cf. also *Snepp*, 444 U.S. at 507-508 (enforcing nondisclosure agreement against former CIA officer).

For the same reasons, the state-secrets privilege has long applied when information is sought from private contractors performing services on the government's behalf. This Court in *Reynolds* "looked to *Totten* [v. *United States*, 92 U.S. 105 (1876)]"—a case involving

purported spies providing services under an "alleged espionage agreement[]"—when it described "the 'well established' state secrets privilege." *Tenet*, 544 U.S. at 9 (citing *Reynolds*, 345 U.S. at 7 & n.11). And *Reynolds* further illustrated that established privilege by citing state-secrets decisions rejecting efforts to obtain evidence directly from government contractors. 345 U.S. at 6-7 & n.11; see *Pollen* v. *Ford Instrument Co.*, 26 F. Supp. 583 (E.D.N.Y. 1939) (denying discovery request for contractor's drawings of range-sighting devices for guns); *Firth Sterling Steel Co.* v. *Bethlehem Steel Co.*, 199 F. 353 (E.D. Pa. 1912) (denying enforcement of subpoena for contractor's drawings of munitions).

The rule, for obvious reasons, could not be otherwise. The government utilizes contractors in numerous national-security contexts—for example, to produce military weapons systems and reconnaissance platforms and, as here, to provide clandestine intelligence services. "[N]o [other] court" has adopted the Ninth Circuit's misguided approach, which would permit litigants to circumvent the state-secrets privilege by compelling "current or former contractors" to disclose classified information jeopardizing the national security. Pet. App. 102a (Bress, J., dissenting).

3. Purported "public knowledge" does not undermine the state-secrets-privilege assertion here

The Ninth Circuit's reliance on its own assessment of national-security harm, divorced from proper deference to the Executive Branch, led the court to err still further in its view that confirming or denying "basic facts" about the alleged location of a CIA detention facility in Poland and any assistance provided by Poland "would not 'cause grave damage to national security.'" Pet. App. 17a-18a, 21a (citation omitted). The panel

based that ruling on its view that "a fact must first be a 'secret'" to be "a 'state secret,'" and that no secrecy exists here because those facts are "basically public knowledge" that "have been in the public eye for some years." *Ibid.* That ruling fundamentally misunderstands the governing principles.

a. Information from nongovernment sources does not eliminate the national-security harms of confirming or denying the accuracy of that information

The state-secrets privilege "belongs to the Government" alone and cannot be "waived by a private party." *Reynolds*, 345 U.S. at 7 (footnote omitted). Publicly available accounts from sources outside the Executive Branch about a purported CIA detention facility in Poland do not undermine the government's ability to invoke the privilege to prevent its *own* employees and contractors with first-hand knowledge from being compelled by a court to confirm or deny that information. See Pet. App. 98a-99a (Bress, J., dissenting). As the CIA Director explained, such first-hand evidence from Mitchell and Jessen would confirm or deny the accuracy of existing public speculation and risk significant harm to the national security. See pp. 12-13, *supra*.

Courts have repeatedly recognized that "in the arena of intelligence and foreign relations," there can be "a critical difference between official and unofficial disclosures." *Fitzgibbon* v. *CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). "It is one thing for a reporter or author to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so." *Alfred A. Knopf, Inc.* v. *Colby*, 509 F.2d 1362, 1370 (4th Cir.), cert. denied, 421 U.S. 908, and 421 U.S. 992 (1975). "Rumors and speculations

circulate" and can "get into print," and "others may [then] republish [that] previously published material," but such reports are properly understood "as being of uncertain reliability" and insufficient for courts to displace the expert judgment of responsible Executive Branch officials regarding the harm of confirming or denying such speculation. *Id.* at 1368, 1370; accord *ACLU* v. *United States Dep't of Def.*, 628 F.3d 612, 621-622 (D.C. Cir. 2011); *Stein* v. *Department of Justice*, 662 F.2d 1245, 1259 (7th Cir. 1981) (concluding that information remains "properly classified" notwithstanding such public speculation, "even if the speculation may be accurate"); see, *e.g.*, *Frugone* v. *CIA*, 169 F.3d 772, 774-775 (D.C. Cir. 1999) (citing cases). Such determinations based on expert assessments of the potential for harm to the national security are therefore "generally unaffected by whether the information" is asserted to have "entered the realm of [so-called] public knowledge." *Halpern* v. *FBI*, 181 F.3d 279, 294 (2d Cir. 1999).

Courts have long recognized the key distinction between publicly available information from unofficial sources and evidence compelled under oath from government officials knowing the actual facts. The influential state-secrets case of *Rex* v. *Watson*, (1817) 171 Eng. Rep. 591 (K.B.), for instance, rejected centuries ago the view that purported public knowledge of national-security information would justify compelling a government official to confirm or deny the accuracy of the publicly available information. See *id.* at 604; cf. Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 Geo. Wash. L. Rev. 1249, 1275 (2007) (discussing *Watson*'s influence).[4]

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[4] The defendant in *Watson* was charged with high treason for a plot involving plans to attack the Tower of London to seize military

In the world of clandestine intelligence operations, that principle carries particular force. Intelligence officers routinely deploy tradecraft to cloak the true nature of their activities and misdirect attention. See, *e.g.*, Antonio Mendez & Matt Baglio, *Argo: How the CIA and Hollywood Pulled Off the Most Audacious Rescue in History* (2012) (recounting 1980 CIA operation to rescue Americans from Iran by posing as Canadian film crew using elaborate techniques to sell the operation's false cover). The very purpose of such tradecraft is to lead observers to reach the *wrong* conclusions about what might have occurred. As a result, public information in this sphere can be of uncertain reliability notwithstanding widely shared suppositions based on incomplete and circumstantial information.

The D.C. Circuit's influential decision in *Military Audit Project* v. *Casey*, 656 F.2d 724 (1981), illustrates the proper analysis. The court there confronted "widely publicized" media reports that the CIA had contracted with Howard Hughes to build a specialized vessel—the *Glomar Explorer*—to recover a sunken Soviet nuclear-missile submarine. *Id.* at 728 & n.1; see *id.* at 728-729.

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weapons for a rebellion. 171 Eng. Rep. 592-593 n.(a). After the prosecution established that a map found at his residence depicted "part of the interior of the Tower," the defendant attempted to mitigate the map's incriminating force by eliciting testimony from a government officer to show that a different map which could "be purchased at any shop in London" was also a "correct plan of the Tower." *Id.* at 601, 604. The court halted the examination of the officer and determined that the defendant could show that maps *purporting* to be maps of the Tower "might be purchased" publicly but "could not ask the officer whether they were accurate" because "allow[ing] an officer of the tower to be examined as to the accuracy of such a [publicly available] plan" "might be attended with public mischief." *Id.* at 604.

The government later acknowledged its ownership of the vessel and declassified certain portions of its contractual agreement with Hughes, but it declined to declassify further information, notwithstanding the "great deal of speculation in the press concerning the nature of the [vessel's] mission." *Id.* at 732.

The D.C. Circuit concluded that information pertaining to the purpose of the *Glomar Explorer* project remained properly classified even in the face of the widespread reporting, giving "substantial weight" to the government's affidavits, which explained that confirming or denying the public speculation would risk serious harm to the national security. *Military Audit Project*, 656 F.2d at 738 (citation and emphasis omitted); see *id.* at 741-745. While "the *reported* purpose of the *Glomar Explorer*'s mission may well [have been] notorious," the court accepted that its "*actual* purpose may well still [have been] a secret, or, at the very least, unresolved doubt may still remain," and that eliminating "lingering doubts" through confirmation or denial risked harm to the national security. *Id.* at 744-745. The court noted the possibility that publicly available information from reporters who "stumbled upon the *Glomar Explorer* project trail" might have reflected CIA tradecraft providing a false "cover for a secret mission as yet safely secure." *Id.* at 729, 744 (brackets and citation omitted). And the court accepted the government's predictive judgment of harm, notwithstanding that various sources had described the vessel's mission as reported in the press, including the French edition of a book by the former CIA Director (which the "CIA did not clear" before its publication), a Senate committee's publication (which appeared to adopt "'speculation from non-governmental sources'"), and a government scien-

tific memorandum (by an "agency not connected in any way with the Glomar Explorer project" that apparently relied on news accounts). *Id.* at 742-744 (citation omitted). Because the government's affidavits supplied "an understandable and plausible basis" for the information's ongoing classification to prevent harm to the national security, the court properly deferred to that Executive Branch judgment. *Id.* at 745.[5]

Respondents largely have no answer to the foregoing principles governing assertions of "public knowledge," except to note (Br. in Opp. 28) that *Military Audit Project* in particular arose in the context of a "statutory exception to [Freedom of Information Act (FOIA)] requirements, not an evidentiary privilege." But the "sole issue" in that FOIA case was whether, notwithstanding substantial speculation in public sources, the compelled disclosure of information about the *Glomar Explorer's* actual mission "'reasonably could be expected to cause serious damage to the national security.'" *Military Audit Project*, 656 F.2d at 738; see *id.* at 736-738. That question directly tracks the state-secrets inquiry, which turns on whether the government's privilege assertion is justified by a risk that "compulsion of the evidence will expose military [or other] matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10-11.

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[5] Years later, the Executive Branch declassified the *Glomar Explorer*'s mission, which was, as had been reported, a "recovery operation against the[] lost [Soviet] submarine." Author Redacted, *Project Azorian: The Story of the* Hughes Glomar Explorer, 22 Studies in Intelligence 1, 46, 49 (Fall 1978) (declassified 2010) (emphasis omitted), https://go.usa.gov/x67qq; see *id.* at 1 (noting that "[t]he widespread publicity ha[d] contained much fact" but also "extensive error") (emphasis omitted).

b. The Ninth Circuit's public-knowledge analysis underscores the error of its failure to accord deference to the CIA Director's national-security judgment

The panel majority's independent assessment of the state of "public knowledge" further demonstrates its error in substituting its "skeptical" review for the required deference. The majority deemed the actual facts of whether a CIA detention site was in Poland and whether Abu Zubaydah was detained and mistreated there to be "no secret at all" based on its view of what was in the "public eye," Pet. App. 20a-21a—namely, the ECHR's 2015 findings "'beyond reasonable doubt'" and "widely reported" information in the press, including reports of statements by former Polish officials, *id.* at 4a-6a. Each source illustrates major shortcomings in the court's approach.

i. Although the ECHR labeled its findings as "beyond reasonable doubt," those findings are not similar to findings beyond a reasonable doubt made in our legal system. The ECHR applied that label to describe findings that it deemed "supported" by the evidence and "inferences" drawn from the parties' submissions. C.A. E.R. 549. The ECHR then decided the case as if Abu Zubaydah's factual allegations were "no[t] contest[ed]" and based its findings on adverse inferences it chose to draw against Poland, because Poland declined to confirm or deny the allegations, refused to disclose "documents to enable the Court to establish the facts," and otherwise "fail[ed] to cooperate with the Court." *Id.* at 542, 548-551; see *id.* at 556; pp. 5, 7-8, *supra*. As the 12 dissenting judges in this case concluded, "[i]t cannot be the law that foreign partners" that "refuse[] to confirm allegations to protect U.S. state secrets" will convert "the allegations [into] 'public knowledge'" and thereby

"destroy the U.S. state secrets privilege by trying to protect it." Pet. App. 101a n.1.

The ECHR judgment in fact supports the Director's explanation that "public speculation" about a CIA facility in Poland leaves "an important element of doubt about the veracity of the information." Pet. App. 133a, 135a. The ECHR acknowledged that it lacked "any form of direct account of the [alleged] events" and ultimately credited Abu Zubaydah's allegations based on circumstantial "threads of information gleaned" from public sources and adverse inferences. C.A. E.R. 550-551; see *id.* at 549, 556, 577. Moreover, Abu Zubaydah's central allegation of "torture" in Poland after his purported transfer there in December 2002, Pet. App. 114a, is itself undermined by the public SSCI report, which found based on a comprehensive review of CIA records that the CIA discontinued its use of EITs on Abu Zubaydah months *before* December 2002. See *SSCI Report* 42 n.190, 231 n.1316.[6]

ii. In addition to the ECHR judgment, respondents supported their discovery request with two news stories reflecting speculation that the CIA operated a detention facility in Poland. C.A. E.R. 97-104. The first report is based principally on anonymous sources collectively identified as former CIA officials; acknowledges that much remains "cloaked in mystery"; identifies six countries by name that purportedly assisted the CIA Program; and asserts that Human Rights Watch, "multiple [unnamed] European officials," and "news accounts" had identified Poland as one such location. *Id.*

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[6] Although the ECHR's judgment did not become final until after the December 2014 printing of the SSCI Report, the ECHR adopted its judgment beforehand and therefore apparently did not consider that report. See C.A. E.R. 383, 395, 425.

at 100-104. The second story cites the first as reporting Poland's alleged role; discusses the ECHR's determination that Poland "allow[ed] prisoners to be mistreated on its territory"; and quotes one sentence that the author attributes to former President Kwasniewski, which implies that Poland hosted a CIA detention facility. *Id.* at 97-98. Such stories conveying hearsay and double hearsay—largely from unnamed sources—cannot properly establish a state of "public knowledge," much less override the sworn declaration of the CIA Director on matters of national security.

Respondents have also focused on a Polish news publication (quoted in the ECHR's opinion) that purports to reflect a 2012 interview with then-former President Kwasniewski. Br. in Opp. 6 (citing C.A. E.R. 472). That publication states that Poland provided "intelligence cooperation"; suggests that the CIA may have kept "prisoner[s]"; and reflects that the former President had no "knowledge of any torture." C.A. E.R. 472. But the ECHR also emphasized that numerous former Polish officials—including Kwasniewski—reportedly had also repeatedly "denied the existence of any CIA prisons in Poland." *Id.* at 447, 488. Such information at best suggests inconsistent statements, hardly a basis for establishing "public knowledge."

iii. The Ninth Circuit's willingness to discern "public knowledge" of Poland's alleged connection to clandestine CIA activity based on such sources, Pet. App. 17a & n.14, was influenced by its view that respondents' discovery request came "indirectly from *current* Polish authorities, specifically, prosecutors" investigating alleged CIA activity, *id.* at 19a. That investigation, in the panel majority's view, both "undermine[d]" the CIA Director's assessment of the national-security risks of

"breaching trust with [a] cooperating country" and suggested that any alleged Polish cooperation "is not a secret that would harm national security." *Ibid.* Those determinations further underscore the fundamental error in the majority's disregard of the proper standard of deference.

The panel majority, for instance, simply ignored Director Pompeo's explanation that although Polish prosecutors had sought information for a "criminal investigation into alleged CIA detention activities in Poland," that inquiry did not alter the harm of compelling discovery from the CIA's former contractors. Pet. App. 135a. The CIA's ability to maintain "a cooperative and productive intelligence relationship with foreign intelligence and security services," he explained, is separate from actions that might be taken by "*other elements* of that government" and rests on their trust in the CIA's "pledge to keep any clandestine cooperation with the CIA secret," even if "political and public opinion winds change" and "new political parties or officials come to power in those foreign countries that want to publicly atone or exact revenge for the alleged misdeeds of their predecessors." *Id.* at 135a-136a (emphasis added).

The panel also failed to appreciate that Polish prosecutors can be expected to obtain information about alleged actions on Polish soil from within their own government. The fact that they have sought such information from United States sources only reinforces the Director's explanation of why any foreign intelligence cooperation must be protected. The ECHR's observation that Poland's President had, in fact, *prevented* former President Kwasniewski from providing information to Polish prosecutors by "refus[ing] to relieve [him] from his secrecy duty," C.A. E.R. 446, like the

ECHR's determination that Poland had refused to cooperate with its own inquiry into Abu Zubaydah's allegations, see p. 5, *supra*, vividly illustrates the extreme hazards of the panel's freestanding assessment of possible harms divorced from the deference owed to Executive Branch national-security judgments.

4. Discovery requests for information for use in foreign proceedings investigating alleged clandestine CIA activities warrant enhanced deference to the Executive's assertion of privilege

The panel's errors are particularly significant because respondents seek the discovery of evidence for use in a foreign proceeding the very purpose of which is to investigate alleged clandestine activities of the CIA abroad. Under *Reynolds'* approach for resolving assertions of the state-secrets privilege, a privilege assertion seeking to foreclose such discovery warrants a particularly high degree of deference to the CIA Director's assessment of harm.

Reynolds adopted its formula for evaluating privilege assertions to reconcile two competing propositions. The Court observed that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers," but it recognized that "a complete disclosure to the judge"—which could "jeopardize the secrecy which the privilege is meant to protect"—should not be automatically required "before the claim of privilege will be accepted." 345 U.S. at 9-10. *Reynolds* therefore concluded that "how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate" is determined by "the showing of necessity" made by the party seeking the information. *Id.* at 11. To uphold the privilege when a

party makes a "strong showing of necessity" for the evidence, a court must be satisfied, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military [or other] matters which, in the interest of national security, should not be divulged." *Id.* at 10-11. But "where necessity is dubious," a lesser showing is "sufficient" for the court to sustain the privilege and "cut off further demand" for evidence. *Id.* at 11.

Reynolds struck that balance between a court's adjudicatory authority and the need to maintain secrecy in a wholly domestic setting, where the plaintiffs had brought a wrongful-death action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* See *Reynolds*, 345 U.S. at 2-3. The plaintiffs' requisite "showing of necessity" in *Reynolds* was therefore that the information they sought from the government would be necessary as evidence of the "causation" element of their federal claim. *Id.* at 11.

But where, as here, a trial court has no claim for relief before it to adjudicate and where the discovery "will be shipped overseas," "totally out of control of a domestic court," Pet. App. 108a (Bress, J., dissenting), the considerations that *Reynolds* sought to reconcile weigh decidedly against discovery. The coercive power of this Nation's courts is invoked here not in aid of the court's own power to resolve disputes but solely to export sensitive evidence about the Nation's intelligence activities to a *foreign* proceeding probing purported clandestine CIA operations and relationships. Nothing in *Reynolds* suggests that a proper evaluation of the government's formal claim of privilege in this context should require anything more than a showing that the discovery poses a facially plausible risk to the national security.

The panel majority, however, treated "the fact that the information sought here is ultimately destined for a foreign tribunal" as essentially irrelevant to its standard for evaluating the government's privilege assertion. Pet. App. 21a n.17. And the panel revived respondents' discovery petition even though it agreed that the government had properly asserted the state-secrets privilege over information concerning "identities and roles of foreign individuals involved with the [purported CIA] detention facility" in Poland and related operational details. *Id.* at 20a. The panel determined that the only "potentially applicable" ground to quash respondents' subpoenas in this "pure discovery matter" was if the privileged evidence was "'inseparable'" from nonprivileged information. *Id.* at 22a-23a (citation omitted). The majority stated that it is "not impossible to separate" them and, in light of respondents' suggestion that the Polish prosecutor already has a "'good idea'" of "'who his targets are,'" the majority determined that evidence from Mitchell and Jessen could "provide context to Polish prosecutors or corroborate prosecutors' independent investigations." *Id.* at 22a, 25a.

The panel's approach is exactly backwards. More, not less, deference to national-security interests is warranted in this "pure discovery matter" for a foreign proceeding. Even in contexts involving actual claims for relief, "[c]ourts are not required to play with fire and chance further disclosure—inadvertent, mistaken, or even intentional—that would defeat the very purpose for which the privilege exists." *Sterling* v. *Tenet*, 416 F.3d 338, 344 (4th Cir. 2005), cert. denied, 546 U.S. 1093 (2006); see *General Dynamics Corp.*, 563 U.S. at 486-487 (allowing discovery into sensitive areas impermissibly risks state secrets by allowing litigants "to probe up

to the[ir] boundaries"). Yet the panel did exactly that by authorizing discovery of "context[ual]" information for the express purpose of "corroborat[ing]" matters that it acknowledged are state secrets for use in a foreign proceeding focused on alleged Polish participation in clandestine CIA activities. Pet. App. 25a.

Given the utmost deference owed to the Executive Branch's judgments regarding national-security harms, the CIA Director's detailed declaration satisfied even the higher standard applicable when the privilege is asserted in a purely domestic case: A "reasonable danger [exists] that compulsion of the evidence will expose [classified intelligence] matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10. And in the context of respondents' request for discovery for a foreign investigation probing the Nation's intelligence operations, the Director's assessment of national-security harms far exceeded the showing needed to sustain the government's assertion of privilege.

B. The District Court Could Not Properly Authorize Discovery Of National-Security Information For Use By Foreign Prosecutors Investigating Clandestine CIA Activity

The court of appeals' decision warrants reversal for reasons independent of its state-secrets-privilege errors. Section 1782 provides that a district court "may order" the production of evidence, 28 U.S.C. 1782(a), and leaves the decision to issue or "refuse to issue [such] an order" to the exercise of sound discretion. See *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 260-261, 264 (2004) (citation omitted). The district court here ultimately refused to issue an order compelling

Mitchell and Jessen to produce discovery and "dismiss[ed]" respondents' Section 1782 application. Pet. App. 60a. That determination was correct, and it would have been an abuse of discretion under Section 1782 for the court to have done otherwise.

1. This Court has identified four nonexhaustive "guides for the exercise of district-court discretion" that "bear consideration in ruling on a [Section] 1782(a) request." *Intel Corp.*, 542 U.S. at 263 n.15, 264. Although discovery may sometimes be warranted if, as here, the persons "from whom discovery is sought" are "nonparticipants in the foreign proceeding," *id.* at 264, several other *Intel* factors can warrant the denial of discovery. First, the appropriateness of discovery can turn on "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance." *Ibid.* Second, discovery may be unwarranted if "the [Section] 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States." *Id.* at 265. Third, a court may reject or curtail requests that are "unduly intrusive or burdensome." *Ibid.* In this case, each of those factors counsels strongly against discovery.

a. The "character of the [foreign] proceedings" and the "receptivity of the foreign government" to compelled discovery, *Intel Corp.*, 542 U.S. at 264, both counsel great caution here. The foreign proceedings are highly atypical, probing within a criminal investigation the alleged clandestine intelligence activities of the CIA when the United States has steadfastly refused to confirm or deny the alleged Poland-based activities and has repeatedly rejected Polish prosecutors' requests for

treaty-based assistance. Moreover, the "receptivity of the foreign government" to the Section 1782 application, *ibid.*, must be measured not simply by the fact that prosecutors might welcome evidentiary assistance. A court must consider more broadly the "attitudes of the *government* of the country from which the request emanates." S. Rep. No. 1580, 88th Cong., 2d Sess. 7 (1964) (emphasis added). And here, as Abu Zubaydah argued to the ECHR, Poland's President "refused to relieve the former President of Poland" from "his secrecy duty for the purpose of providing information to the [Polish] prosecutors." C.A. E.R. 446. Poland's executive leadership has therefore done precisely what the United States is attempting to do here: ensure that those who may have information obtained during their past government service uphold their duty of secrecy in the face of a Polish investigation into Abu Zubaydah's charges.

b. Given that context, the fact that respondents' "[Section] 1782(a) request conceals an attempt to circumvent * * * policies of a foreign country or the United States," *Intel Corp.*, 542 U.S. at 265, should be dispositive. Respondents' request to compel former CIA contractors to provide evidence is a transparent attempt to evade limitations in United States law and the bilateral MLAT with Poland, which both effectively foreclose any attempts to obtain such information from the CIA directly. Cf. *Kiobel* v. *Cravath, Swaine & Moore LLP*, 895 F.3d 238, 245 (2d Cir. 2018) (finding Section 1782 order directed to New York attorneys for Royal Dutch Shell to be an abuse of discretion where discovery from the attorneys would, as relevant here, "circumvent the Netherlands' more restrictive discovery practices" that would apply if discovery were sought directly from the company), cert. denied, 139 S. Ct. 852 (2019).

If respondents had sought information under Section 1782 from the CIA, rather than its former contractors, their request would have been properly denied because "Congress's salutary purposes in enacting [Section 1782] do not anticipate" compelling the production of "classified" information from federal agencies. *Al Fayed* v. *United States*, 210 F.3d 421, 425 (4th Cir. 2000). Indeed, Section 1782's application to "person[s]" does not authorize discovery of even unclassified information from the United States or its agencies. *Al Fayed* v. *CIA*, 229 F.3d 272, 274-277 (D.C. Cir. 2000).

The proper procedure for Polish prosecutors seeking information regarding Abu Zubaydah's allegations was to seek assistance from the United States under the governing MLAT, not for respondents to invoke Section 1782 here to supply the information to those prosecutors. Respondents' discovery requests impermissibly bypass the limitations negotiated by the United States and Poland, which the United States invoked to deny the prosecutors' repeated MLAT requests.

When the United States entered its MLAT with Poland, it was understood "that the Treaty w[ould] be implemented in the United States pursuant to the procedural framework provided by * * * Section 1782." S. Exec. Rep. No. 22, 105th Cong., 2d Sess. 292-293 (1998) (discussing Poland MLAT); cf. 18 U.S.C. 3512(a) and (g) (additional authority added in 2009 for execution of MLAT requests). But the MLAT itself, like the United States' MLATs more generally, expressly vests each signatory with discretion to deny an otherwise mandatory request for assistance on the ground that executing it would prejudice the country's "essential interests." Poland MLAT art. 3(1)(c); see S. Exec. Rep. No. 22, at

295 (explaining that the Poland MLAT is like "[a]ll United States [MLATs]" in this regard). That "essential interests" exception authorizes denials on national-security grounds, including when the information sought "is classified for national security reasons." *Ibid.*; see also *Extradition, Mutual Legal Assistance, and Prisoner Transfer Treaties: Hearing before the Senate Comm. on Foreign Relations*, 105th Cong., 2d Sess. 6, 31 (1998) (State Department's explanation that the Poland MLAT, like "all MLATs currently in force," authorizes denials of requests for "essential interests," including "deni[als] on national security grounds"). The United States accordingly rejected Poland's *seven* MLAT requests. See pp. 4, 8-9, *supra*.

Only after the United States had repeatedly denied the MLAT requests from Polish prosecutors and informed them that it would deny "any further [requests] concerning alleged CIA detention spots for persons suspected of terrorist activities," C.A. E.R. 634, did the prosecutors suggest that Abu Zubaydah supply evidence to aid their investigation. Respondents' discovery request is thus a clear attempt to circumvent the MLAT's limitations on evidentiary assistance in this highly sensitive context. The proper exercise of discretion under Section 1782 thus required the denial of respondents' request.[7]

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[7] Lower courts confronting similar issues in much less sensitive contexts have repeatedly denied Section 1782 applications circumventing the relevant MLAT process. See, *e.g.*, *In re Application of the Republic of Turkey*, No. 2:20-mc-36, 2021 WL 671518, at *9-*12 (S.D. Ohio Feb. 22, 2021) (Turkey's request for evidence must proceed through MLAT process absent sound reason to bypass it.); *Federal Republic of Nigeria* v. *VR Advisory Servs., Ltd.*, 499 F. Supp. 3d 3, 14-17 (S.D.N.Y. 2020) (noting that Nigeria "failed to point to any other foreign sovereign who was granted permission

c. Finally, the discovery here would be "unduly intrusive or burdensome," *Intel Corp.*, 542 U.S. at 265.

The courts below upheld the state-secrets privilege over information about the "operational [staffing and other] details" of alleged clandestine CIA activities, including the identities and roles of any foreign officials who assisted such alleged activities in Poland. Pet. App. 53a, 55a-56a; see *id.* at 20a. The court of appeals itself concluded that discovery thus would "no doubt impose[] a burden on the government," *id.* at 26a, which would need to police discovery into a subject riddled with state secrets. See *id.* at 27a n.23.

Assuming *arguendo* that the CIA did operate a detention facility in Poland (which the United States can neither confirm nor deny), that burden would be unjustified. To the extent respondents seek "more detail as to what occurred and who was involved," Pet. App. 53a, 59a, to corroborate the identity of prosecutorial targets —whose identities would be state secrets—discovery would "present an unacceptable risk" and should not be

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under § 1782 to take discovery in support of a criminal investigation without first clearing the MLAT process"), appeal pending, No. 20-3909 (2d Cir. filed Nov. 17, 2020); *In re Application of O2CNI Co.*, No. 3:13-mc-80125, 2013 WL 4442288, at *8 (N.D. Cal. Aug. 15, 2013) (rejecting Section 1782 application of complainant in South Korean criminal investigation where investigating authorities had not used MLAT process).

Because MLATs provide assistance only to prosecutorial authorities, their provisions do not necessarily preclude defendants in foreign criminal cases from invoking Section 1782 to aid their defense. See *Weber* v. *Finker*, 554 F.3d 1379, 1381, 1383 (11th Cir.) (affirming discovery granted to "the defendant in a Swiss criminal action" because the governing MLAT was "designed to help * * * prosecutors"), cert. denied, 558 U.S. 816 (2009).

allowed. *Id.* at 57a. And to the extent the evidence provides only general context, the resulting burden on the United States would be "undue." Furthermore, probing sensitive intelligence matters for a foreign proceeding would be unduly intrusive. See pp. 41-42, *supra*.

2. The court of appeals did not conclude otherwise. The panel majority merely determined that the proper application of Section 1782 under the *Intel* factors was not before it because, it reasoned, the government did not appeal from the district court's initial order, which considered the *Intel* factors and granted respondents leave to issue subpoenas. Pet. App. 11a n.13. That analysis was flawed.

The government had no occasion to appeal the district court's initial order (Pet. App. 61a-71a) because the court deemed it "premature" to complete its *Intel* analysis and made its order granting leave to subpoena Mitchell and Jessen subject to further proceedings on "[a]ny motion to quash, motion for protective order or motion to modify" timely filed after the subpoenas had been served. *Id.* at 68a, 70a-71a.[8] Once the United States moved to intervene and timely filed such a motion, the district court *granted* the government's motions and "dismiss[ed] [respondents'] Application for [Section 1782] Discovery." *Id.* at 60a. The government as appellee was accordingly entitled to defend that order on "any ground appearing in the record." *Rivero* v. *City & Cnty. of S.F.*, 316 F.3d 857, 862 (9th Cir. 2002); accord *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 273 (2009).

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[8] Even if the district court had not expressly conditioned its order on other proceedings, the government could have properly waited until the subpoenas actually issued to intervene, moved to quash the subpoenas, and then appealed any adverse ruling.

The panel majority's erroneous refusal to address the government's *Intel*-based arguments set that court on an avoidable "collision course" with the Executive Branch, in contravention of this Court's guidance. *Cheney* v. *United States District Court*, 542 U.S. 367, 389 (2004). The district court's judgment could have, and should have, been affirmed on the ground that allowing discovery under these circumstances would be an abuse of discretion. Because that issue is particularly clear given the extraordinary circumstances presented here, this Court may reverse the court of appeals and affirm the district court's dismissal of respondents' application on that basis. See Pet. 29, 31.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1782 provides:

Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

2. The Treaty Between the United States of America and the Republic of Poland on Mutual Legal Assistance in Criminal Matters, July 10, 1996, U.S.-Pol., T.I.A.S. No. 99-917.1, as amended, provides in pertinent part:

Article 1. Scope of Assistance.

1. The Contracting Parties shall provide mutual assistance, in accordance with the provisions of this Treaty, in connection with the investigation, prosecution, and prevention of offenses. The Contracting Parties shall also provide such assistance for forfeiture and other proceedings directly related to criminal offenses, where such assistance is not prohibited by the laws of the Requested State.

2. Assistance shall include:

a) taking the testimony or statements of persons;

b) providing documents, records, and articles of evidence;

c) locating or identifying persons or items;

d) serving documents;

e) transferring persons in custody for testimony or other purposes;

f) executing requests for searches and seizures;

g) assisting in proceedings related to immobilization and forfeiture of assets, restitution to the victims of crime, collection of fines; and

h) any other form of assistance not prohibited by the laws of the Requested State.

3. Assistance shall be provided without regard to whether the conduct that is the subject of the investigation, prosecution, or proceeding in the Requesting State would constitute an offense under the laws of the Requested State.

4. This Treaty is intended solely for mutual legal assistance between the Parties. The provisions of this Treaty shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request.

* * * * *

Article 2. Central Authorities.

1. Each Contracting Party shall have a Central Authority to make and receive requests pursuant to this Treaty.

2. For the United States of America, the Central Authority shall be the Attorney General or a person designated by the Attorney General. For the Republic of Poland, the Central Authority shall be the Minister of Justice-Attorney General or a person designated by the Minister of Justice-Attorney General.

3. The Central Authorities shall communicate directly with one another for the purposes of this Treaty.

Article 3. Limitations on Assistance.

1. The Central Authority of the Requested State may deny assistance if:

a) the request relates to an offense under military law that would not be an offense under ordinary criminal law;

b) the request relates to a political offense;

c) the execution of the request would prejudice the security or similar essential interests of the Requested State; or

d) the request is not made in conformity with the Treaty.

2. Before denying assistance pursuant to this Article, the Central Authorities shall consult to consider whether assistance can be given subject to such conditions as the Central Authority of the Requested State deems necessary. If the Requesting State accepts assistance subject to these conditions, it shall comply with the conditions.

3. If the Central Authority of the Requested State denies assistance, it shall inform the Central Authority of the Requesting State of the reasons for the denial.

* * * * *