No. 20-1191

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WIKIMEDIA FOUNDATION,

Plaintiff-Appellant,

v.

NATIONAL SECURITY AGENCY, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland at Baltimore

RESPONSE IN OPPOSITION TO PETITION FOR REHEARING EN BANC

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PRELIMINARY STATEMENT

Plaintiff sought to challenge the legality of a certain type of foreign-intelligence surveillance, called Upstream, conducted by the National Security Agency (NSA) under statutory and court authorization. The government invoked the state-secrets privilege over highly classified information, including where and how Upstream surveillance is conducted and whether it involves copying plaintiff's communications. The district court upheld the privilege, and, on appeal, plaintiff did not challenge the court's conclusion that disclosure of the privileged information would gravely damage national security. Accordingly, that privileged information cannot be used by either party, and is excluded from the litigation.

Plaintiff sought to avoid these straightforward consequences of the state-secrets privilege by pointing to an inapposite procedure for in camera review established under FISA, 50 U.S.C. § 1806(f). According to plaintiff's reading, that clause silently displaces the longstanding state-secrets privilege, and provides a mechanism for litigating the merits of plaintiff's claims. The panel correctly held that that clause has no application here and affirmed the dismissal of the case.

This Court should not grant rehearing en banc. The panel's decision is consistent with this Court's well-established state-secrets case law and with Supreme Court precedent. Rehearing would thus have no effect on the uniformity of this Court's decisions. *See* Fed. R. App. P. 35(a)(1), (b)(1)(A). And while the panel's interpretation of section 1806(f) does diverge from the interpretation adopted by a

panel of the Ninth Circuit, plaintiff fails to show why it would be exceptionally important for the en banc court to weigh in on the split at this time. *See id.* 35(a)(2), (b)(1)(B). As plaintiff observes, the relevant Ninth Circuit case is currently before the Supreme Court (as *FBI v. Fazaga*, No. 20-828), and the Supreme Court's decision will likely address the scope and effect of section 1806(f). Thus, granting rehearing en banc would not resolve the question that plaintiff describes as exceptionally important.

Acknowledging that *Fazaga* involves a similar question of law, the government does not oppose plaintiff's request to hold the petition in abeyance pending the outcome of *Fazaga*, subject to supplemental briefing to provide the panel an opportunity to assess the effect of the decision in *Fazaga*.

ARGUMENT

I. The panel's decision was correct and does not warrant rehearing en banc.

A. This case is consistent with well-settled precedent from this Court and the Supreme Court, and further consideration would thus not serve to establish the uniformity and consistency of this Court's decisions. *See* Fed. R. App. P. 35(a)(1), (b)(1)(A). The Court should therefore reject plaintiff's invitation to upend decades of consistent precedent recognizing and applying the state-secrets privilege. The analytical framework this Court's cases have set out is a faithful application of Supreme Court precedent, and it appropriately accounts for the interests of litigants while ensuring the protection of national security.

As this Court has repeatedly explained, dismissal of the case is appropriate where information subject to the state-secrets privilege is "so central to the litigation that any attempt to proceed will threaten that information's disclosure." *Abilt v. CIA*, 848 F.3d 305, 313 (4th Cir. 2017) (quoting *El-Masri v. United States*, 479 F.3d 296, 308 (4th Cir. 2007)); *see also Tenet v. Doe*, 544 U.S. 1, 9 (2005). That is true here, as Judge Diaz recognized, because "'the whole object of [Wikimedia's] suit and of the discovery' is to inquire into the 'methods and operations of the [NSA]'—'a fact that is a state secret.'" Op. 53 (quoting *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005)). This case cannot be "fairly litigated without resort to the privileged information" and thus the litigation cannot continue. *Abilt*, 848 F.3d at 313 (quoting *El-Masri*, 479 F.3d at 306).[1] The panel was correct to affirm the district court's dismissal of the case.

Perhaps recognizing that this Court's precedent requires dismissal, plaintiff asks the Court to upend that precedent. It contends that the Court should "reconsider[]" its longstanding framework for analyzing state secrets "in light of the Supreme Court's

[1] Plaintiff takes issue with one circumstance in which this Court and others have applied that principle—cases in which a defendant "could not properly defend [itself] without using privileged evidence." *Abilt*, 848 F.3d at 313-14 (quoting *El-Masri*, 479 F.3d at 309). Plaintiff argues that dismissal on that basis would require a judge to conduct an "in camera review of the privileged record" to confirm the existence of privileged evidence establishing the defense. Pet. 15-16. But Supreme Court precedent refutes the rule plaintiff proposes: When "there is a reasonable danger that the compulsion of evidence will expose [sensitive military secrets,] . . . the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

most recent state secrets decision," *General Dynamics Corp. v. United States*, 563 U.S. 478 (2011). Pet 14. But plaintiff is wrong to suggest that *General Dynamics* casts any doubt on this Court's long-established case law. To start, this Court has already affirmed the established framework for analyzing the state-secrets privilege after *General Dynamics*. In *Abilt*, the court rearticulated the state-secrets analysis that plaintiff challenges here—and with the full benefit of *General Dynamics*, decided six years earlier.

General Dynamics described the effect of the state-secrets privilege in a particular situation arising in government-contracts litigation, but it did not opine on the effect of the privilege in other contexts. *See Gen. Dynamics*, 563 U.S. at 492 (noting that the Court's "decision today clarifies the consequences of [the use of the state-secrets privilege] only where it precludes a valid defense in Government-contracting disputes"). There is nothing inconsistent between the outcome in that situation and this Court's statement that state-secrets cases generally must be "dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure." *Abilt*, 848 F.3d at 313 (quoting *El-Masri*, 479 F.3d at 308). Neither this circuit nor any other has held otherwise.

And for good reason: As the Supreme Court has explained, the "core concern" animating the doctrine of state-secrets dismissals is preventing state secrets "from being revealed" by continued litigation. *See Tenet*, 544 U.S. at 10. While this principle applies with special force in government-contracts cases, it also applies in suits not

arising from contracts. *See id.* at 9. Thus, the Court has held that an environmental-law claim was "beyond judicial scrutiny" where evaluating the government's compliance would require an inquiry into the Navy's intent to store nuclear weapons in a particular location. *Weinberger v. Cath. Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 146-47 (1981). *General Dynamics* called into question neither this holding nor the "general principle" that suits whose very litigation would threaten the disclosure of state secrets cannot be maintained—whether or not they arise from government contracts. *See Totten v. United States*, 92 U.S. 105, 107 (1875); *Tenet*, 544 U.S. at 9 (observing that in *Weinberger*, the Court "again credited the more sweeping holding in *Totten*, thus confirming its continued validity" outside the realm of government contracts).

Here, the privileged information was so central to the litigation that the case could not proceed without risking disclosure of that information. Dismissal was appropriate under Supreme Court and Fourth Circuit precedent, and plaintiff has failed to demonstrate any inconsistency that would warrant en banc consideration. *See* Fed. R. App. P. 35(a)(1), (b)(1)(A).

B. The panel correctly rejected plaintiff's argument that this clear and well-established state-secrets privilege was silently displaced by an implicit loophole buried in the third clause of the sixth paragraph of a 40-year-old statute, 50 U.S.C. § 1806(f).

As the panel explained, that clause provides a mechanism for a party to contest the *government's* use of surveillance information in an adjudicatory proceeding. Op. 37-

38. Plaintiff's view—that the clause could compel the government to produce information otherwise protected by the state-secrets privilege—"would contort the § 1806(f) and (g) procedures beyond recognition." Op. 41.

Indeed, there is no indication in the statute that section 1806(f) silently displaces the government's ability to assert the state-secrets privilege when necessary to protect information whose disclosure could reasonably be expected to harm national security. The state-secrets privilege is mentioned nowhere in the statute, and we are not aware of any discussion of the privilege in the legislative history. In the absence of any structural support, plaintiff's reading must rest on the unlikely assumption that "Congress stashed away an expansive right for litigants within a statute directed entirely toward the government's use of information." Op. 41-42. There is no basis for that assumption.

Plaintiff nonetheless contends that its interpretation of section 1806(f) is essential to the operation of FISA as a whole, and that the panel's reading would "eviscerate" FISA's safeguards and "nullify[]" the statute's remedies. Pet. 5, 10. Plaintiff suggests that the government could "defeat practically any civil suit challenging FISA surveillance" by asserting the state-secrets privilege over information critical to the litigation. Pet. 10. But as the panel explained, the government has not and could not use the state-secrets privilege indiscriminately to defeat any FISA claim. Op. 44-45. The Supreme Court and this Court have established clear standards for demonstrating the applicability of the state-secrets

privilege, and courts have an obligation to review assertions of the privilege. Op. 45. It is true that the assertion of the state-secrets privilege will sometimes preclude further litigation of a civil case, including some cases brought against the government. But, as the panel observed, that is no basis to doubt the existence of the privilege: "Every state secrets case presents the possibility that a plaintiff will be denied—in the interests of national security—a remedy available by law." Op. 47.

C. Because the panel's decision was correct, this Court should not grant rehearing en banc. Plaintiff observes that a case pending in the Supreme Court, *FBI v. Fazaga*, No. 20-828, is likely to address some of the legal questions in this case. Pet. 17; *see* 141 S. Ct. 2720 (2021) (granting certiorari). But far from supporting the case for en banc rehearing, this observation undermines plaintiff's argument that it is exceptionally important for the full court to consider these questions now. *See* Fed. R. App. P. 35(a)(2). The possibility that the Supreme Court could provide guidance on any of the issues already addressed in this Court's decision is not a basis for granting rehearing en banc, and this Court can accordingly deny the rehearing petition without prejudicing the ordinary remedy of seeking certiorari.

Plaintiff alternatively proposes that this Court hold its petition in abeyance pending the Supreme Court's decision in *Fazaga*. But plaintiff did not move to hold this case in abeyance pending *Fazaga* when the case was before the panel, and is proposing this option only in the wake of an unfavorable decision. Nonetheless, the government would not object if this Court preferred to hold plaintiff's petition in

abeyance. In that event, the government would request an opportunity for supplemental briefing on what effect, if any, the Supreme Court's opinion in *Fazaga* has on plaintiff's petition.

CONCLUSION

For the foregoing reasons, the petition for rehearing en banc should be denied or held in abeyance.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with Federal Rules of Appellate Procedure 32(a)(5)(A) and 35(b)(2)(A) because it uses a proportionately spaced 14-point font and contains 1866 words according to the count of Microsoft Word.

s/ *Catherine Padhi*
CATHERINE PADHI