Nos. 09-1298 and 09-1302

In the Supreme Court of the United States

GENERAL DYNAMICS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

THE BOEING COMPANY, SUCCESSOR TO MCDONNELL DOUGLAS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioners are entitled to a judgment vacating the agency decision that terminated their contract for default and awarding them money damages solely because the courts below concluded that the state-secrets privilege precluded adjudication of one of petitioners' claims seeking to excuse their default.

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STATEMENT

A. Factual Background

1. In the mid-1970s, petitioner General Dynamics Corporation (GD) developed an aircraft design concept that relied on "low observable" or "stealth" technologies to assist the aircraft in avoiding detection. J.A. 1240-1241, 1246-1255. GD marketed that design concept to the Air Force without success, eventually abandoning its

efforts in the early 1980s. J.A. 1241-1242, 1258-1259. In 1983, however, the Navy approached GD about the concept of a low-observable attack aircraft that could operate from an aircraft carrier. J.A. 1242, 1255-1257. In response, GD described the design that it had marketed to the Air Force as an "excellent candidate" for the Navy's needs. J.A. 1242.

In 1984, the Navy included GD in a select group of defense contractors that comprised Northrop Corporation (Northrop), which was then developing the B-2, a low-observable bomber aircraft for the Air Force; Lockheed Corporation (Lockheed), which had built the F-117A, a low-observable fighter aircraft for the Air Force; and McDonnell Douglas Corporation (MDC),[1] a builder of Navy carrier-based aircraft. The Navy invited those contractors to form teams among themselves, or with others in the industry, to compete for rights to develop and produce the new Navy low-observable attack jet, which became known as the A-12. Petitioners (GD and MDC) chose to collaborate to compete against a second team led by Northrop. J.A. 401-402.

In late 1984, the Navy awarded preliminary contracts to both teams to further explore their respective design concepts and attendant risks. Over the next few years, the Navy paid the competing teams to investigate appropriate technologies; to assist the Navy in drafting the technical specifications for the new aircraft; to assess and plan for technical, schedule, and cost risks associated with development; and to prepare a full-scale engineering development (FSED) contract proposal.

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[1] On January 1, 2010, MDC, which had been a wholly owned subsidiary of petitioner The Boeing Company (Boeing), was merged into Boeing. Because Boeing is now the corporate successor to MDC, this brief refers to MDC as a petitioner. GD Br. ii.

J.A. 402-403; see Pet. App. 43a & n.1. Aware that Northrop had held a "technical advantage in stealth" because of the B-2 and other experience, J.A. 1065, 1169-1171, GD entered into a subcontract with Lockheed after determining that Lockheed's support was "critical to the success of [a very low observable (VLO)] aircraft program," J.A. 1069. Throughout this period, "the Navy maintained the A-12 Program in a classified, special access status in which information concerning the A-12 was tightly controlled for national security purposes." J.A. 401; see Exec. Order No. 13,526, at § 4.3, 75 Fed. Reg. 707, 722-723 (2010) (authorizing special-access programs in "exceptional" circumstances).

In evaluating the FSED contract proposals, the Navy focused on the projected weight of each team's design because, *inter alia*, an aircraft's suitability for use on a carrier depends in part on its weight. The Navy warned petitioners that petitioners' projected weight for their design appeared to underestimate it by thousands of pounds. J.A. 1081-1085. Petitioners rejected the Navy's weight calculations and decided, largely for business reasons, to postpone a more accurate (and expensive) weight estimate until after the FSED contract was awarded. J.A. 1202-1205.

Price was another important factor in the Navy's choice of contractors. Contrary to petitioners' suggestion (GD Br. 4), the Navy did not attribute Northrop's higher bid for the FSED contract to its specialized knowledge from the B-2 program.[2] Rather, the Navy's

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[2] In support of its suggestion, GD quotes (Br. 4) from a Defense Department official's January 1988 memorandum, in which the official admits that she had only two hours to conduct her review and therefore could not offer a "firm, well-reasoned" opinion on A-12 contract pricing risks. J.A. 44. In any event, that memorandum observes that petition-

formal pre-award cost analysis concluded that the higher amount of Northrop's bid ($563 million, or about 12%, above petitioners' target price) was due largely to business factors such as estimated inflation rates and differing business arrangements within the respective teams, as well as bidding strategy. J.A. 1119-1123. Cognizant that winning the FSED contract could lead to a subsequent production contract for hundreds of aircraft, petitioners submitted an ambitious proposal to defeat the Northrop team's bid. In September 1987, petitioners made a new best and final fixed-price offer to "*confidently propose and accept a management challenge*," J.A. 1087, that reflected a price reduction of 7.5% from their "[e]stimated [c]ost" of performance, J.A. 1091. At the same time, petitioners proposed an "aggressive" 30-month schedule for flight of the first aircraft. J.A. 1088.

In their FSED contract proposal, petitioners represented to the Navy that they had identified and reduced significant risks and were prepared to proceed to the A-12 program's development phase. J.A. 1087. Petitioners did not make their proposal contingent on access to information from other classified (including special-access) programs. To the contrary, petitioners assured the Navy that they, together with their subcontractors, possessed "multi-company, real world experience" with low-observable technology. J.A. 1076-1078.

2. The Navy judged petitioners' contract proposal to be better than the Northrop team's proposal, and in January 1988 petitioners signed the FSED contract at a ceiling price of $4.8 billion. Pet. App. 2a. The contract required petitioners to, *inter alia*, complete a design that satisfied the technical specifications that they had

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ers "are strongly interested in becoming involved in stealth technology so they might be prepared to accept some risks to do so." J.A. 45.

helped to develop; manufacture all necessary tools and aircraft parts; assemble eight prototype aircraft in accordance with a delivery schedule petitioners had proposed; conduct ground-based and flight testing; support independent Navy testing; and prepare for transition to the program's production and deployment phases. *Id.* at 40a-51a.

The contract contained a progress-payment clause that required the government to advance funds to petitioners to finance the contract work. J.A. 111-124. Generally, under that clause, the government agreed to advance periodically a percentage of the costs petitioners had incurred by performing, so long as petitioners were making satisfactory progress, with the balance due upon satisfactory completion of the contract. J.A. 111-116. At petitioners' request, the contract also contained a special feature that entitled petitioners to receive final payment for certain contract work that was to be performed before delivery of the first aircraft. To implement that feature, the Navy agreed that it could accept such work, if satisfactory, as complete and thereby "liquidate" associated progress payments. J.A. 115-116; 48 C.F.R. 52.232-2 (1984); see C.A. App. 19,567 (incorporating clause into contract by reference); J.A. 49-51 (listing contract work items separately priced).

Because the A-12 program implicated sensitive, classified military technology, the FSED contract continued the strict special-access security requirements that had been put in place from the beginning of the program. The contract provided that contract work would be performed under the restrictions applicable to sensitive classified and special-access information, and it included detailed descriptions of all related security requirements. J.A. 73-76, 130-135, 150-202.

The contract also identified all technical information (J.A. 137-140), testing and evaluation equipment (J.A. 82-97, 141-149), and operating bases, laboratories, and other facilities (J.A. 97-107) that the government would make available to petitioners to support their performance of the contract. The contract established schedules specifying when the government would make available such information, equipment, and facilities. J.A. 100-104, 137-140. Nothing in the A-12 contract, however, entitled petitioners to receive access to classified, special-access information from other government programs not specified therein.

The FSED contract contained a standard clause allowing the government to terminate the contract for default if petitioners failed to satisfy the contract's terms or to make adequate progress. Pet. App. 2a-3a; 48 C.F.R. 52.249-9 (1984); see C.A. App. 19,576 (incorporating clause into contract by reference). The contract also specified that, if a default termination occurred, petitioners would return to the government any progress payments that had not been "liquidated" through government acceptance of completed, satisfactory work. J.A. 120-121. The contract further stated that, if a default termination occurred but it was later determined that petitioners were not actually in default or that their default was excused, the termination would be treated as one for the government's "convenience"—meaning without fault or breach by the contractors. J.A. 226. In that case, petitioners might be entitled to the costs of performance, profit on work performed, and expenses to close out their operations. 48 C.F.R. 52.249-2(f) (1984); see C.A. App. 19,576 (incorporating clause into contract by reference). If petitioners would have sustained a loss on the contract had it been completed, however, then any

termination-for-convenience recovery would be reduced to account for the rate of loss petitioners were experiencing at the time of termination. 48 C.F.R. 52.249-2(f)(2)(iii); see 48 C.F.R 49.203 (1984).

3. From the outset, petitioners encountered difficulties in designing and building an aircraft that would meet critical contract specifications within the negotiated schedule and ceiling price. In June 1988, less than six months after signing the FSED contract, petitioners had internally verified—consistent with the Navy's pre-award weight warning—that they had underestimated the weight of their design by several thousand pounds. J.A. 1097-1103.

In June 1990, petitioners failed to deliver the first aircraft as required under the contract. Pet. App. 4a. They informed the government that the cost of completing the contract work would substantially exceed the contract ceiling price, resulting in an estimated cost that petitioners viewed as "unacceptable." *Ibid*. Petitioners stated that "[o]ne of the fundamental causes for the present * * * situation on the A-12 program is the use of a fixed price type of contract for the [development] effort." J.A. 239-240. Petitioners proposed further negotiations to explore a fundamental restructuring of the contract. J.A. 239-243. At this point, petitioners did not claim that a current lack of access to other classified, compartmented programs was an impediment to their performance; rather, they expressed the need for more time and money and their desire to revise the contract's technical specifications.

Performance failures continued during the ensuing six months of negotiations. Petitioners failed to achieve

any of the delivery dates or program milestones originally established in the contract. Pet. App. 143a-144a.[3]

By December 1990, pursuant to the contract's progress-payment clause, the government had advanced petitioners approximately $2.7 billion, J.A. 326, one half of which was deemed "liquidated" in accordance with the special contract terms petitioners had negotiated, J.A. 339-340. That same month, the Navy issued a cure notice informing petitioners that their performance under the contract was "unsatisfactory" because of, *inter alia*, their failure to fabricate parts sufficient to meet the delivery schedule and their failure to meet specification requirements. Pet. App. 6a-7a. Because those deficiencies were "endangering performance of [the] contract," the Navy informed petitioners that it might terminate the contract for default. *Id.* at 7a.

In meetings with the government during the next two weeks, petitioners maintained that they could not build the A-12 aircraft for the price, schedule, and specifications that had been incorporated into the development contract. Pet. App. 7a; see J.A. 251-271, 279-312. Petitioners asserted they could not "get there if [they

[3] In August 1990, because neither petitioner would commit to a schedule without first reaching agreement with the government on outstanding "technical and business" issues unrelated to sharing of government technology (Pet. App. 135a), the government unilaterally modified the contract to extend the delivery dates for all eight prototype aircraft by 18 to 25 months, thereby producing revised delivery dates ranging from December 1991 to February 1993. *Id.* at 5a, 199a-200a. At the time of the modification, petitioners stated that they believed they could deliver sooner than the revised schedule required. *Id.* at 225a. Several months later, however, petitioners projected a first delivery date of March 1992—a date in which petitioners themselves soon lost confidence, and which they believed to be achievable "only after significant changes." *Id.* at 5a-6a.

didn't] change the contract," and that the development contract had "to get reformed to a cost type contract or [they could not] do it." Pet. App. 7a (quoting J.A. 253, 261) (brackets in original). Petitioners submitted claims to the Navy seeking a $1.4 billion increase in the contract price. J.A. 396. In January 1991, in their formal response to the cure notice, petitioners reiterated that they would meet neither the contract's delivery schedules (original or revised) nor certain specifications. Pet. App. 7a; J.A. 272.

4. A few days later, the government terminated the contract for default. Pet. App. 8a; J.A. 313-318. The Navy's contracting officer notified petitioners that this action was based on petitioners' inability "to complete the design, development, fabrication, assembly and test of the A-12 aircraft within the contract schedule," as well as their "inability to deliver an aircraft that meets contract requirements." J.A. 314. Invoking the contract's default-termination clauses, J.A. 316-317, the contracting officer further advised petitioners (J.A. 315) that his letter was a final decision and apprised them of their appeal rights pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.*[4]

By the time of contract termination, MDC's financial health had deteriorated to the point that the government agreed to defer recoupment of the unliquidated progress payments—totaling $1.35 billion—to avoid reducing one of its major contractors to a financial condition that

[4] Despite petitioners' insinuations of improper influence in the default-termination decision by the Defense Department under then-Secretary Cheney (GD Br. 5-6; Boeing Br. 5-6), the Federal Circuit decisions rejected petitioners' claim of procedural defects and upheld the determination that petitioners were in fact in default. Pet. App. 1a-34a, 250a-279a.

would endanger essential defense programs. J.A. 329-331, 342-348; see Pet. App. 8a. Although petitioners did not produce a single aircraft under the FSED contract, the government did not dispute that petitioners were entitled to retain the remaining $1.35 billion in progress payments, which had been liquidated pursuant to the contract.

B. Procedural History

1. In June 1991, petitioners filed suit in the Claims Court (now the Court of Federal Claims (CFC)), invoking the CDA, 41 U.S.C. 609(a)(1), and the Tucker Act, 28 U.S.C. 1491(a). J.A. 399. In a 20-count complaint, petitioners advanced an array of claims against the government. J.A. 437-476.

Some of those claims alleged that the FSED contract was void or voidable, resulting in an implied contract under which petitioners must be compensated, or was subject to an equitable adjustment in price and schedule. J.A. 437-442, 464. Almost all the other claims asserted either that petitioners were not in default or that their default was excused—*e.g.*, impossibility of performance, commercial impracticability, mutual mistake of fact, lack of enforceable delivery schedule, satisfactory progress, and defective default termination procedure. J.A. 442-464. As discussed below, all but one of the claims pressed by petitioners were ultimately rejected on the merits by the CFC or the Federal Circuit (or both). See pp. 14-17, *infra*. The remaining claim (Count IX) alleged that petitioners' performance delays and inability to achieve contract requirements were excusable by reason of the government's failure to disclose its "superior knowledge" of information vital to petitioners' performance. J.A. 452.

As affirmative relief, petitioners sought entry of a judgment, *inter alia*, holding that the Navy had breached the FSED contract; reforming the contract into a cost-reimbursement plus fixed-fee type contract; ordering the contracting officer to grant an equitable adjustment in the contract price; converting the termination for default into a termination for convenience; and awarding petitioners damages—including all their costs of performance, plus profit and settlement expenses—of approximately $4 billion plus interest. J.A. 473-475; see J.A. 397; Pet. App. 282a-283a.

2. Under the judge-made "superior knowledge" doctrine, the government is generally subject to an implied duty to share "vital knowledge" of a fact affecting a contractor's performance when it knows that the contractor is unaware of the information and not reasonably likely to obtain it. See *GAF Corp.* v. *United States*, 932 F.2d 947, 949 (Fed. Cir. 1991), cert. denied, 502 U.S. 1071 (1992); *Helene Curtis Indus., Inc.* v. *United States*, 312 F.2d 774, 778 (Ct. Cl. 1963). Petitioners alleged that under this implied duty, the Navy was obligated to disclose information that petitioners acknowledged was highly classified and "subject to extraordinary security and program access restrictions." J.A. 406; see J.A. 405-409, 451-452.

In 1992, the government moved to dismiss petitioners' superior-knowledge claim, arguing that the implied duty invoked by petitioners cannot be applied to require the government to disclose classified, special-access information. See Pet. App. 354a n.7. The CFC initially denied the motion, on the theory that the government had a duty to provide petitioners at least a "general warning" about potential production problems, and or-

dered discovery into other classified, special-access programs. *Ibid.*

Pursuant to the CFC's orders, the government permitted discovery into two classified, compartmented aircraft programs involving Northrop's B-2 bomber and Lockheed's F-117A fighter. Pet. App. 353a-355a. In March 1993, in response to a CFC order to provide additional classified, compartmented special-access information, the Acting Secretary of the Air Force invoked the state-secrets privilege to prevent disclosure of highly sensitive information. J.A. 516-523 (unclassified version).[5] In April 1995, after the Federal Circuit had granted two writs of mandamus overturning CFC discovery orders into classified information (J.A. 526-549, 552-575), the CFC terminated all discovery related to petitioners' superior-knowledge claim and bifurcated consideration of that claim from the rest of petitioners' claims. Pet. App. 355a; J.A. 795.

3. a. In December 1995, after a trial focusing on petitioners' claim that the default termination was procedurally defective (Count XVII, J.A. 463-464), the CFC set aside the default termination. Pet. App. 382a-429a. Although the CFC found that the contracting officer had "based the termination on the fault of the contractors because he did not believe that the Navy bore any responsibility for the contractors' perceived inability to achieve the contract specifications or deliver the aircraft on schedule," the court concluded that the termination

[5] The classified version of the March 1993 declaration by Acting Secretary of the Air Force Donley was placed on the docket of the CFC proceedings, see J.A. 11, and reviewed by the Federal Circuit, J.A. 556 n.2. Because of its classified nature, the declaration is stored with military security officials and will be made available to the Court upon request.

decision was not the product of "reasoned discretion." *Id.* at 402a, 407a. The CFC ordered that the termination be treated as one for the government's convenience, and it commenced damages proceedings. *Id.* at 382a-384a.

b. In December 1996, in conducting those proceedings, the CFC held that it would not consider petitioners' claim for profits or the government's position that the convenience-termination recovery must be reduced to reflect petitioners' projected contract losses. Pet. App. 343a-381a. After reviewing the classified declaration explaining the government's assertion of the state-secrets privilege, the CFC concluded that those issues were dependent upon petitioners' "superior knowledge" claim, which, it determined, could not be safely, fairly, or reliably litigated:

> We cannot permit the parties to litigate plaintiffs' [superior knowledge] claims for three reasons: (1) One party or the other would be unfairly prejudiced due to limitations placed on discovery by the Executive for national security reasons; (2) Highly classified information may be compromised in discovery despite procedures in place to prevent that from happening; and (3) Even if information available to the parties could be protected properly in discovery, other information necessary for the court to render an honest judgment would not be available.

Id. at 345a.

The CFC described the parties' competing positions on the merits of the "superior knowledge" claim, Pet. App. 353a-355a, 367a-370a, and concluded that "[j]ust as we acknowledge plaintiffs' belief that they could prove superior knowledge within the confines of the A-12 program, we know that the Government may have defenses

based on the factors described in *Helene Curtis Industries*," *id*. at 368a. The CFC noted, for example, that petitioners "are involved in other programs with the Government; it is possible that they did not lack knowledge about low-observable technology." *Ibid.* After noting certain security breaches that had occurred during the litigation, the CFC further found that information implicated by the superior-knowledge claim was highly vulnerable to inadvertent disclosure. *Id*. at 372a. Accordingly, the CFC concluded that "[d]espite everyone's best efforts, the risk of compromising national secrets is too serious to proceed to trial." *Id*. at 381a.[6]

The CFC ultimately ruled that petitioners were entitled to incurred costs of $3.9 billion, and it awarded petitioners a monetary judgment in the amount of $1.2 billion (net due after crediting $2.7 billion in progress payments already received by petitioners) plus interest. Pet. App. 341a-342a; J.A. 884-885. The government appealed the CFC's December 1995 liability ruling and its December 1996 damages ruling.

4. In 1999, the court of appeals reversed the CFC's judgment invalidating the default termination. Pet. App. 250a-279a. The Federal Circuit ruled that the CFC had "erred by vacating the termination for default without first determining whether a default existed." *Id*. at 269a. The court therefore remanded the case to the CFC to decide whether the default termination was justified. *Id*. at 278a.

Without expressing any view on the merits of the CFC's damages ruling, the Federal Circuit vacated that

[6] In addition to its opinion, the CFC filed a "classified appendix" further addressing "the reasons for this ruling." Pet. App. 345a & n.2. The CFC directed that neither government nor petitioners' attorneys would be permitted access to that appendix.

ruling because, having reversed the CFC's liability decision, it viewed any question concerning the proper calculation of damages as unripe. Pet. App. 271a, 278a-279a. Noting the passage of time and other possible developments, the court invited the CFC to reconsider its state-secrets ruling pertaining to the superior-knowledge claim. *Id.* at 271a. This Court denied petitioners' petition for a writ of certiorari. 529 U.S. 1097 (2000).

5. On remand, petitioners served interrogatories pertaining to their superior-knowledge claim (see J.A. 971-972), and the Secretary of the Air Force again invoked the state-secrets privilege to prevent disclosure of highly sensitive information. J.A. 974-981 (unclassified version).[7] In 2001, after reviewing that second classified declaration, the CFC reaffirmed its prior ruling that petitioners' superior-knowledge claim could not be litigated because of national-security concerns, expressly adopting the state-secrets rationale from the vacated December 1996 ruling. Pet. App. 243a-246a. The CFC found that "the circumstances that prompted the [December 1996] ruling persist." *Id.* at 244a. The CFC stated that it was unable to "establish that the information that has been removed from this case would have benefitted either party. Without extensive discovery related to this information * * * no one can know whether either party would have been helped or hurt by it." *Id.* at 245a.

The CFC also sustained the default termination. Pet. App. 212a-249a. The CFC found that petitioners would not have delivered the first aircraft by the con-

[7] Secretary of the Air Force Peters's 2001 classified declaration was placed on the docket of the CFC proceedings. See J.A. 34. The declaration is stored with military security officials and will be made available to the Court upon request.

tractual deadline and therefore were in default of the contract. *Id.* at 218a-228a. The CFC rejected petitioners' various arguments for excusing their default, including their contentions that the revised delivery schedule was unreasonable and therefore unenforceable; that the schedule, even if enforceable, had been waived by the Navy; and that "the contract was impossible to perform." *Id.* at 228a-230a, 246a-248a.

The CFC entered judgment for the government, upholding the default termination and dismissing petitioners' complaint (including their superior-knowledge claim). J.A. 1262. In rejecting petitioners' post-trial motions to alter the judgment, the CFC reaffirmed its view that petitioners' allegations supporting their superior-knowledge claim "cannot be established."[8] J.A. 1264. Petitioners appealed.

6. In 2003, in its second published decision, the court of appeals affirmed in part and vacated in part. Pet. App. 178a-211a.

a. The Federal Circuit affirmed the CFC's dismissal of petitioners' superior-knowledge claim. Pet. App. 202a-210a. The court held that the government had properly invoked the state-secrets privilege and that the CFC had properly barred litigation of the superior-knowledge claim in light of the attendant risks. *Id.* at 205a-207a. The court also rejected petitioners' contention that, once the state-secrets privilege was found to preclude litigation of petitioners' superior-knowledge

[8] Petitioners nevertheless repeatedly state (*e.g.*, Boeing Br. 27-28; GD Br. 22) that the CFC found that they had established a prima facie "valid" claim of superior knowledge. As the CFC's ultimate 2001 ruling makes clear, however, it found that the validity of the claim could not be determined. J.A. 1264; see Pet. App. 245a ("*At one time* plaintiffs made a persuasive showing that they could prove their claim without the information.") (emphasis added).

claim, the Due Process Clause required the CFC to set aside the default termination. The Federal Circuit relied on this Court's distinction in *United States* v. *Reynolds*, 345 U.S. 1, 12 (1953), between the government as criminal prosecutor and the government as civil defendant. The court explained that, like the plaintiff in *Reynolds*, petitioners "are the plaintiffs in this purely civil matter, suing the sovereign on the limited terms to which it has consented." Pet. App. 208a.

b. The Federal Circuit affirmed the CFC's ruling that the contract delivery schedule was enforceable and had not been waived, Pet. App. 198a-202a, but held that the CFC "did not make adequate findings" to sustain the default termination. *Id.* at 187a. The court remanded the case to the CFC. *Id.* at 196a-197a.

7. a. In 2007, the CFC again sustained the default termination, Pet. App. 35a-177a, concluding that the government was justified in terminating the contract for petitioners' failure to make progress, *id.* at 133a-155a. The CFC entered judgment in favor of the government, and petitioners appealed again.

b. In 2009, in its third published decision, the court of appeals affirmed. Pet. App. 1a-34a. Based on its review of the record, the Federal Circuit held that the government had satisfied its burden under *Lisbon Contractors, Inc.* v. *United States*, 828 F.2d 759 (1987), of establishing a reasonable belief that there was no reasonable likelihood of timely performance of the contract. Pet. App. 22a-27a. Petitioners did not raise, and the Federal Circuit did not address, the superior-knowledge claim in that 2009 appeal.

8. This Court granted certiorari limited to the question whether the default termination should have been set aside because the government's invocation of the

state-secrets privilege prevented judicial resolution of petitioners' superior-knowledge claim. See 131 S. Ct. 62 (2010).

SUMMARY OF ARGUMENT

A. The state-secrets privilege serves the singularly compelling purpose of protecting national security. For at least a half century, it has been settled law that while the government may not criminally prosecute a defendant while invoking the state-secrets privilege to bar a defense, it cannot be penalized for invoking the privilege "in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented." *United States* v. *Reynolds*, 345 U.S. 1, 12 (1953). Subjecting the government to liability in such cases would improperly interfere with the Executive's decision to invoke the state-secrets privilege; it would encourage private parties to raise marginal or meritless claims to induce the privilege's invocation; and it would prejudice the public fisc by allowing money judgments against the government on claims that have not been proved.

B. Petitioners, who filed this lawsuit in 1991, are obviously the "moving parties" in this civil case. Pursuant to the limited waivers of sovereign immunity in the Tucker Act, 28 U.S.C. 1491(a), and the CDA, 41 U.S.C. 609(a)(1), petitioners brought suit against the government in the CFC to challenge the default termination of the A-12 contract. Petitioners sought vacatur of the contracting officer's decision and more than a billion dollars in additional government funds, while the government sought no affirmative relief whatsoever from the CFC. And while the government bears the burden of proof on the issue of default, the government carried that burden here.

The information as to which the government invoked the state-secrets privilege is potentially relevant solely to petitioners' superior-knowledge claim, on which petitioners, not the government, bore the burden of proof. Neither precedent nor logic supports petitioners' contention that the courts below were required to dispose of this case as though petitioners had proved their superior-knowledge claim and to order affirmative relief against the government based on that counter-factual hypothesis, even though the government's appropriate invocation of the state-secrets privilege made actual resolution of that claim impossible. The fact that the government is entitled to return of *unliquidated* progress payments as a result of the default termination—a happenstance of the timing of payments under the A-12 contract—does not change the analysis.

C. Even if the government were deemed the "moving party" in this case, the Federal Circuit's judgment should be affirmed. Although *Reynolds* did not discuss the proper disposition of civil cases in which the government as plaintiff invokes the state-secrets privilege, it would be inappropriate to extend to this civil case the rule noted in *Reynolds* that the government as criminal prosecutor cannot invoke the state-secrets privilege and foreclose the defendant from litigating a potentially viable defense. No court in a civil case has ever entered judgment against the government in response to the government's proper invocation of the state-secrets privilege. Courts have similarly refused to dismiss the claims of civil plaintiffs even for the invocation of other privileges that do not implicate the Nation's security.

D. Contrary to petitioners' suggestion, there is no reason to believe that federal officials will improperly invoke the state-secrets privilege in similar future litiga-

tion, to the detriment of defense contracting, if the Federal Circuit's decision is affirmed. The safeguards against capricious invocation of the privilege lie in the procedural and substantive restrictions that this Court imposed in *Reynolds*, 345 U.S. at 7-8, and in the presumption that agency heads discharge their duties in good faith—not in any judicially fashioned prophylactic rule that the government loses claims as to which the privilege has been invoked. The government has a strong interest in attracting capable defense contractors, who are sophisticated enough to use market-based solutions to protect themselves against any perceived risk in their negotiation of future contracts. Under petitioners' proposed rule, by contrast, contractors could raise marginal or meritless superior-knowledge or other claims simply to induce the government to invoke the state-secrets privilege, thereby achieving automatic invalidation of a justified default termination.

E. If this Court holds that the courts below improperly granted judgment in the government's favor, the Court should remand for consideration of additional defenses that the government preserved concerning the superior-knowledge claim. Those threshold legal defenses were pressed but never passed on in the Federal Circuit, and they do not require resort to privileged information. In any event, contrary to petitioner GD's contention, reinstatement of the CFC's 1998 damages award is not warranted. The Federal Circuit never ruled on the government's challenge to that $1.2 billion (plus interest) award on the merits because the court vacated the flawed award as moot in 1999.

ARGUMENT

AFTER DETERMINING THAT PETITIONERS WERE IN DEFAULT, AND THAT FURTHER LITIGATION OF PETITIONERS' SUPERIOR-KNOWLEDGE CLAIM RISKED THE DISCLOSURE OF STATE SECRETS, THE COURTS BELOW CORRECTLY ENTERED JUDGMENT FOR THE GOVERNMENT

Petitioners brought this suit to challenge the termination for default of the FSED contract. After nearly two decades of litigation, including multiple trials and appeals, the courts below rejected on the merits all the claims pressed by petitioners except for their superior-knowledge claim. The courts below concluded, and petitioners do not dispute, that the state-secrets privilege was properly invoked in this case and that their superior-knowledge claim could not be litigated without risking disclosure of military and state secrets. GD Br. 35-36, 50; Boeing Br. 27, 33.

Petitioners contend, however, that the necessary consequences of the government's unchallenged invocation of the state-secrets privilege were entry of judgment against the United States, invalidation of the contracting officer's default termination, and a gigantic monetary award in petitioners' favor. Regardless of how this case is ultimately resolved, petitioners will retain $1.35 billion in *liquidated* progress payments, of which the government has never sought return. Under petitioners' theory, petitioners would keep another $1.35 billion in *unliquidated* progress payments (the return of which would be required under a default termination) and would receive an additional $1.2 billion (plus interest) in damages.

In petitioners' view, the government's unchallenged invocation of the state-secrets privilege compels those results even though the courts below held that petition-

ers were in default of the contract, the superior-knowledge issue to which the privileged information pertained was one on which petitioners bore the burden of proof, and the government did not receive a single aircraft. Petitioners thus contend that the courts below were required to dispose of this case *as though* petitioners had carried their burden of proof on their superior-knowledge claim, and to enter affirmative relief against the United States on that basis, even though the government's appropriate invocation of the state-secrets privilege made actual resolution of that claim impossible. No decision of this Court or any court of appeals supports the view that the government should be penalized in that manner for safeguarding vital national-security information.

A. Penalizing The Government For Its Invocation Of The State-Secrets Privilege Would Undermine The Privilege's Paramount Purpose Of Protecting National Security

1. The long-recognized purpose of the state-secrets privilege is to protect national security

From the earliest days of the Republic, courts have recognized the need to protect information critical to national security. See *United States* v. *Burr*, 25 F. Cas. 30, 37 (C.C. Va. 1807); *Martin* v. *Mott*, 25 U.S. 19, 31 (1827). This Court's first two detailed discussions of the state-secrets doctrine—*Totten* v. *United States*, 92 U.S. 105, 107 (1875) (barring suit that might expose confidential information "to the serious detriment of the public"), and *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953) (permitting government to withhold evidence concerning "military matters" "in the interest of national security") —recognize the importance of the state-secrets doctrine

to the protection of national security, an interest this Court has repeatedly deemed "compelling." *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988). Indeed, the Court has found it "'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig* v. *Agee*, 453 U.S. 280, 307 (1981). The responsibility to protect national-security information "falls on the President as head of the Executive Branch and as Commander in Chief." *Egan*, 484 U.S. at 527. The state-secrets privilege is deeply rooted in"the law of evidence," *Reynolds*, 345 U.S. at 6-7, and reflects the Executive's constitutional duty to protect "military or diplomatic secrets," *United States* v. *Nixon*, 418 U.S. 683, 710 (1974).

2. The standards for and consequences of invoking the state-secrets privilege are well established and critical to its proper and effective use

a. The basic rules governing the assertion of the state-secrets privilege are well established and not in dispute here. The privilege "belongs to the Government," which must assert it in a "formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Reynolds*, 345 U.S. at 7-8 (footnotes omitted). The state-secrets privilege applies when "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Id*. at 10. Although "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege," it must not in the course of considering that claim "forc[e] a disclosure of the very thing the privilege is designed to protect." *Id*. at 8. When properly invoked, the privilege is absolute: "even the most compelling

necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Id.* at 11.

b. When a court sustains a claim of privilege, it must then determine how, if at all, the litigation should move forward. Litigation generally should proceed if the privileged information is not necessary to litigate the claims and further litigation would not risk disclosure of state secrets. In *Reynolds*, for example, private parties brought a tort suit against the government arising out of a military plane crash and sought discovery of an accident-investigaton report, which the government withheld on the ground that it implicated military secrets. 345 U.S. at 2-4. In reversing the trial court's judgment against the government, this Court remanded for further proceedings to determine whether it was "possible for [the plaintiffs] to adduce the essential facts as to causation without resort to material touching upon military secrets." *Id.* at 11.

In other cases involving state secrets, however, further litigation may not be possible. This Court has recognized on several occasions that when a claim against the government cannot be litigated because it would risk disclosure of state secrets, the claim must be dismissed altogether. "[P]ublic policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *Totten*, 92 U.S. at 107; see *Tenet* v. *Doe*, 544 U.S. 1, 8 (2005); *Weinberger* v. *Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 146-147 (1981).

The Court in *Reynolds* identified one circumstance in which the government's proper invocation of the state-secrets privilege will result in dismissal of the gov-

ernment's case. The Court noted that, in federal criminal cases, lower courts had held that "the Government can invoke its evidentiary privileges only at the price of letting the defendant go free." *Reynolds*, 345 U.S. at 12 (footnote omitted). The Court explained that "[t]he rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *Ibid.* The Court further held, however, that "[s]uch rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented." *Ibid.*

Applying the guidance from *Reynolds*, the courts of appeals uniformly have held that a private party whose claim cannot be adjudicated because its litigation would threaten national security cannot be awarded affirmative relief. Instead, the claim is dismissed without any adverse litigation consequence to the government. See, *e.g.*, *El-Masri* v. *United States*, 479 F.3d 296, 313 (4th Cir.) (dismissing claims of unlawful detention and interrogation because "privileged state secrets are sufficiently central to the matter"), cert. denied, 552 U.S. 947 (2007); *Sterling* v. *Tenet*, 416 F.3d 338, 348 (4th Cir. 2005) (dismissing Title VII discrimination claim by former CIA employee because it could not be litigated "without presenting evidence on topics that are state secrets"), cert. denied, 546 U.S. 1093 (2006); *Tenenbaum* v. *Simonini*, 372 F.3d 776, 777 (6th Cir.) (dismissing religious-discrimination claims against federal agency personnel because "a reasonable danger exists that disclosing the information in court proceedings would harm

national security interests"), cert. denied, 543 U.S. 1000 (2004); *Black* v. *United States*, 62 F.3d 1115, 1119 (8th Cir. 1995) (dismissing tort claims because "litigation cannot be tailored to accommodate the loss of the [state-secrets] privileged information").

c. *Reynolds* and the uniform body of case law applying it reflect a recognition that the state-secrets privilege will not serve its vital purposes if the automatic consequence of invoking it is entry of judgment against the government. Even if no evidentiary privilege were available, the government could refuse to produce secret material (or abstain from litigating the claim altogether) and risk a default judgment. That is precisely the dilemma to which this Court in *Reynolds* refused to put the government. See 345 U.S. at 5 (reversing trial court's sanctions order under Federal Rule of Civil Procedure 37(b)(2)(i) "that the facts on the issue of negligence would be taken as established in plaintiffs' favor").

Moreover, if the government's proper invocation of the state-secrets privilege could result in a substantial monetary award against the United States, the duty of high-level Executive Branch officials to safeguard national security would come into conflict with their responsibility to protect the public fisc. Although those officials presumably would give precedence to their national-security obligations, the courts should not create such disincentives to appropriate invocation of the state-secrets privilege.

In addition, if judgment in the plaintiff's favor were required whenever invocation of the privilege made it impossible to litigate the plaintiff's claim, private litigants would be encouraged to raise marginal or meritless claims that potentially implicate secret infor-

mation, with the hope of inducing an invocation of the state-secrets privilege. Cf. *Tenet*, 544 U.S. at 11 ("Forcing the Government to litigate these claims would * * * make it vulnerable to 'graymail,' *i.e.*, individual lawsuits brought to induce the [government] to settle a case (or prevent its filing) out of fear that any effort to litigate the action would reveal classified information."). For all these reasons, the government should not be "punished for asserting the [state-secrets] privilege." *Salisbury* v. *United States*, 690 F.2d 966, 975 (D.C. Cir. 1982); see *id.* at 976 (observing that "[o]ther courts have also refused to employ sanctions against the United States for exercise of its state secrets privilege").

B. The Government Is Not The "Moving Party," Either Procedurally Or Substantively, In This Civil Case

As just discussed, *Reynolds* unequivocally holds—and petitioners do not dispute—that subjecting the government to an adverse judgment in response to a proper invocation of the state-secrets privilege is improper "in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented." 345 U.S. at 12. Petitioners contend (GD Br. 3, 40) that, despite filing a lawsuit seeking affirmative monetary relief against the government, they are merely "nominal plaintiffs" and not the "moving party." That contention lacks merit.

1. Petitioners are the "moving party" here because they brought this suit seeking affirmative relief against the government

a. In *Reynolds*, the private plaintiffs sued the government pursuant to the waiver of sovereign immunity effected by the Federal Tort Claims Act. 345 U.S. at 6.

By contrasting the term "moving party" with "a defendant only on terms to which it has consented," the *Reynolds* Court indicated that the government is not a "moving party" when a suit is brought against it pursuant to a limited waiver of sovereign immunity. *Id.* at 12. Under that formulation, the government is not a "moving party" here, since petitioners sued the government in the CFC pursuant to the limited waiver of sovereign immunity effected by the Tucker Act and the CDA. See 28 U.S.C 1491(a)(1); 41 U.S.C. 605(a), 609(a)(1). Indeed, because the CFC's jurisdiction is limited to suits against the United States (28 U.S.C. 1491), the government could not have been a plaintiff in that court.

b. Even if the term "moving party" as used in *Reynolds* could encompass some defendants (*e.g.*, those who file counterclaims against the plaintiff), it at least requires that the party seek affirmative judicial relief against another party. In this case, petitioners were the only parties seeking affirmative relief from the CFC.

Petitioners' complaint requests various forms of equitable relief as well as substantial money damages. J.A. 473-475. In this Court, GD seeks reinstatement of the original money judgment petitioners received from the CFC in 1998. GD Br. 58-61. Based on its conversion of the default termination to a termination for convenience (later overturned by the Federal Circuit), the CFC calculated petitioners' costs incurred to be $3.9 billion. Pet. App. 341a-342a. Because petitioners already possessed $2.7 billion in progress payments from the government (of which $1.35 billion was unliquidated), the CFC initially entered judgment against the government for an additional $1.2 billion plus interest. J.A. 884-885. It defies not only *Reynolds* but also common sense to contend that a plaintiff that seeks a judg-

ment setting aside the decision of a federal administrative official (here, the contracting officer), and ordering the government to pay more than a billion dollars to the plaintiff, is not the "moving party" in its own lawsuit.

By contrast, the government sought no affirmative relief from the CFC. Indeed, when the CFC ultimately rendered judgment in favor of the government after the government had proved petitioners' default at trial, the court's order stated simply that petitioners' "complaint was dismissed." J.A. 1262; see J.A. 1264 (post-trial order noting that the CFC did not "enter a money judgment for the United States"). The CFC's final judgment, which was wholly favorable to the government, thus produced exactly the same practical result as if the suit had never been filed.

c. The fact that the suit was commenced in response to a contracting officer's administrative decision does not detract from petitioners' status as plaintiffs or "moving parties" in the judicial proceedings. Almost every lawsuit against the government can be characterized as a reaction to some government official's action. Persons who challenge adverse agency action are treated as plaintiffs and must identify an applicable waiver of sovereign immunity. When the government has invoked the state-secrets privilege in response to such suits, and the plaintiffs' claims (including those alleging a violation of constitutional rights) are no longer justiciable as a result, the courts of appeals have uniformly dismissed the suits. See, *e.g.*, *Sterling*, 416 F.3d at 348-349 (affirming dismissal of former CIA employee's Title VII action); *Kasza* v. *Browner*, 133 F.3d 1159, 1168-1170 (9th Cir.) (affirming dismissal of suit against Air Force under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6972, alleging noncompliance with hazardous-

waste inventory and reporting requirements), cert. denied, 525 U.S. 967 (1998); see also *Edmonds* v. *Department of Justice*, 161 Fed. Appx. 6 (D.C. Cir. 2005) (affirming dismissal of claims by former FBI employee alleging under the Administrative Procedures Act that FBI's termination of her employment violated various statutory and constitutional provisions), aff'g 323 F. Supp. 2d 65 (D.D.C. 2004); cf. *Weinberger*, 454 U.S. at 146-147 (analogizing to *Totten* and *Reynolds* in holding that question "whether or not the Navy has complied with [the National Environmental Policy Act of 1969] 'to the fullest extent possible' is beyond judicial scrutiny" where plaintiff's challenge implicated national-security information).

Petitioners identify no case in which a court has treated the government's invocation of the state-secrets privilege during judicial-review proceedings as a ground for setting aside the administrative action that was the subject of the plaintiff's suit. There is no sound reason for ordering that relief here. That is particularly so because petitioners (unlike most of the complainants in the above-cited cases) were able fully to litigate (albeit unsuccessfully) their claim that they were not actually in default of their contractual obligations.

2. Neither the characterization of default termination as a "government claim" under the CDA, nor the fact that the government bore the burden of proof on the issue of default, makes the government the "moving party" in this judicial proceeding

Petitioners' characterization of the government as the "moving party" in this case is based in significant part on Federal Circuit decisions describing default termination as a "government claim" for which the govern-

ment bears the burden of proof under the CDA. GD Br. 41-45; Boeing Br. 37-39. Neither that label nor the applicable burden of proof alters the conclusion that petitioners are the "moving party" here.

a. Congress enacted the CDA, which applies generally to contracts involving the government's acquisition of goods or services, to "provide[] a fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims." S. Rep. No. 1118, 95th Cong., 2d Sess. 1 (1978). The CDA contemplates government "claims" in proceedings before the contracting officer. 41 U.S.C. 605(a) ("All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer."). The Federal Circuit has held that the government's termination of a contract for default is a government "claim" in those administrative proceedings. *Lisbon Contractors, Inc.* v. *United States*, 828 F.2d 759, 765 (1987); see *Malone* v. *United States*, 849 F.2d 1441, 1443 (1988) ("A default termination falls precisely within the contours of" 41 U.S.C. 605(a).).

Although the CDA authorizes the government to assert a claim through issuance of a contracting officer's final decision, the government has no similar right to commence a suit in the CFC. Once a contracting officer terminates a contract for default, that decision stands as "final and conclusive," 41 U.S.C. 605(b), unless the contractor either pursues an appeal to the agency's board of contract appeals, 41 U.S.C. 607, or files a lawsuit in the CFC, 41 U.S.C. 609(a)(1). Because only the contractor can file suit in the CFC, the statutory scheme does not provide for "government claims" in that court. Petitioners rely (GD Br. 43; Boeing Br. 9, 39) on the Federal Circuit's statement in *Lisbon* that the burden of estab-

lishing a contractor's default rests with the government in judicial as well as administrative proceedings. The court in *Lisbon* reasoned that "the government is only being made to bear the burden of proof on its own 'claim' of default." 828 F.2d at 764. The Federal Circuit's use of that terminology, however, cannot alter the fact that petitioners were the only parties entitled by statute to invoke the CFC's jurisdiction in this case, and the only parties who requested any affirmative relief from that court.

b. Petitioners are the "moving party" not only with respect to the suit as a whole, but also with respect to the specific issue to which the privileged information is potentially relevant. When a private contractor files suit in the CFC to challenge a default termination, the government bears the burden of proof on the question whether a default occurred. See *Lisbon*, 828 F.2d at 763 ("We conclude that the government bears the burden of proof on the *issue* of default by the contractor in this type of proceeding."). In a case like this one, the government therefore must establish that the contractor was failing to "[p]rosecute the work so as to endanger performance of this contract." 48 C.F.R. 52.249-9(a)(1)(ii).[9] Here, after multiple trials and appeals, the courts below concluded that the government had satisfied that burden, see Pet. App. 33a, and the government's invocation of the state-secrets privilege did not affect that determination.

[9] Petitioners are incorrect in asserting that the filing in the CFC of a lawsuit challenging a default termination "effectively vacat[es]" the underlying default termination decision. GD Br. 2, 43. The default termination remains in force pending *de novo* judicial review, and the contracting officer's decision becomes conclusive unless the challenge succeeds, just as if there had been no challenge at all. 41 U.S.C. 605(b).

The evidence that was rendered unavailable by the government's invocation of the state-secrets privilege was at most potentially relevant, not to the question whether petitioners were in default, but to petitioners' contention that their default was excusable because the government allegedly failed to share its "superior knowledge." As explained above (see pp. 31-32, *supra*), a plaintiff who commences suit in court and seeks affirmative judicial relief is properly viewed as the "moving party" under *Reynolds*, even if the government bears the burden of proof on some subsidiary questions. But even if it were appropriate to identify the "moving party" by fracturing the various issues involved in a lawsuit and focusing on the one to which state-secrets information is potentially relevant, petitioners would be the "moving party" with respect to their superior-knowledge claim. The gravamen of the superior-knowledge claim is that the government breached an implied duty under the contract; petitioners bore the burden of proving that such a breach occurred and that it excused their own failure to perform. See *GAF Corp.* v. *United States*, 932 F.2d 947, 949 (Fed. Cir. 1991); *Daewoo Eng'g and Constr. Co.* v. *United States*, 73 Fed. Cl. 547, 564 (2006), aff'd, 557 F.3d 1332 (Fed. Cir.), cert. denied, 130 S. Ct. 490 (2009); see also, *e.g.*, *DCX, Inc.* v. *Perry*, 79 F.3d 132, 134 (Fed. Cir.), cert. denied, 519 U.S. 992 (1996); 13 Richard A. Lord, *Williston on Contracts* § 39.1, at 511-512 (4th ed. 2000) (*Williston*). Petitioners identify no plausible reason for treating the government as the "moving party" in this case simply because the government bore (and satisfied) the burden of proof on a dis-

tinct issue (the occurrence of a default) to which the privileged information was irrelevant.[10]

In both *Tenet* and *Totten*, this Court held that the imperatives of national security foreclosed the lower courts from determining whether the government had in fact breached contractual obligations to the plaintiffs. The Court then resolved both cases, not by awarding the plaintiffs the relief to which they would have been entitled if they had proved that breaches of contract occurred, but by ordering that the suits be dismissed. See *Tenet*, 544 U.S. at 8-11; *Totten*, 92 U.S. at 105-107. Petitioners' contention that the government's alleged breach of duty to share its "superior knowledge" should be treated as proved cannot be reconciled with those dispositions. To be sure, petitioners' superior-knowledge claim is simply one aspect of a wide-ranging complaint, whereas the contract claims that the Court found nonjusticiable in *Tenet* and *Totten* were the entirety of the suits. The fact that petitioners were allowed to litigate a multitude of other claims, however, makes the impact on them less, rather than more, severe.

Petitioners contend that, "[w]hen the just outcome is unknowable, a court must refrain from exercising its power in the claimant's favor, not take affirmative action that might very well be wrong." GD Br. 23; see *id.* at 31;

[10] Petitioners also contend that the contract's disputes clause, which incorporated the relevant provisions of the CDA, "assur[ed] them the opportunity to require the government to prove any default claim, subject to their defenses," GD Br. 45, and that the removal of their superior-knowledge claim "deprived the Contractors of the process to which they—and the government—agreed," *id.* at 46. Nothing in the disputes clause (or in any other provision of the contract or the CDA), however, guaranteed petitioners the right to adjudication of claims rendered nonjusticiable by a proper assertion of the state-secrets privilege.

Boeing Br. 30-31. Any concern about active judicial participation in a possible injustice, however, weighs entirely in favor of the government. Petitioners, not the government, invoked the jurisdiction of the CFC. They sought vacatur of the contracting officer's decision and asked for a court order directing the United States to pay them more than a billion dollars in additional funds, whereas the United States simply urged dismissal of the suit. Petitioners further contend that the CFC should have decided this case as though their superior-knowledge claim had been established, even though petitioners bore the burden of proof on that issue and all parties agree that petitioners did not actually carry that burden. It is thus petitioners, not the government, that urged the courts below to "take affirmative action that might very well be wrong."

In addition, the *Reynolds* Court's reference to the United States as "a defendant only on terms to which it has consented," 345 U.S. at 6, reflects the principle that "the United States, as sovereign 'is immune from suit save as it consents to be sued,'" *United States* v. *Testan*, 424 U.S. 392, 399 (1976) (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)). Although Congress has authorized the CFC to award monetary relief to a plaintiff that establishes the government's breach of contract, the United States "has never consented to an *increase* in its exposure to liability when it is compelled, for reasons of national security, to refuse to release relevant evidence." *Ellsberg* v. *Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984); cf. Fed. R. Civ. P. 55(d) (permitting default judgment against the government "only if the claimant establishes a claim or right to relief by evidence that satisfies the court"). Because the "waiver of the Government's sover-

eign immunity will be strictly construed, in terms of its scope, in favor of the sovereign," *Lane* v. *Pena*, 518 U.S. 187, 192 (1996), it would be particularly inappropriate, absent clear congressional authorization of such a step, for a court to treat the government's assertion of the state-secrets privilege as a ground for ordering the United States to pay money on a claim the plaintiff has not proved.

c. Contrary to Boeing's contention (Br. 38), their status as the "moving party" in this suit is not "simply an artifact" of the "Government-friendly" CDA.[11] The government here is similarly situated to a private defendant who is sued for breach of contract after terminating a contract because of the other party's failure to perform. In those circumstances, both private and governmental defendants bear the burden of justifying the termination based on the plaintiff's nonperformance, see 2 E. Allan Farnsworth, *Farnsworth on Contracts* § 8.15, at 509 (3d ed. 2004); 13 *Williston* § 39.1, at 511-512, but the plaintiff who commences the suit and seeks judicial relief is still the "moving party" in the litigation.

The fact that the contracting officer's default termination gave rise to a right to return of unliquidated progress payments does not mean that the government was the "moving party" in the lawsuit or that it sought relief *in court*. Had the first progress payment required by the A-12 contract not come due before the date that the government determined that petitioners were in default, the government could have declined to make the

[11] GD (Br. 49) evidently disagrees with Boeing's characterization of the CDA. In any event, as explained below (pp. 51-52, *infra*), petitioners voluntarily agreed to the FSED contract under the CDA framework, and so any "Government-friendly" terms in it do not help petitioners.

progress payment (or any other payments). Alternatively, once the contracting officer's decision had established the existence of a debt to the United States in the amount of the unliquidated progress payments, the government could have sought to recoup the funds by offsetting that amount against payments owed petitioners under other contracts. Cf. *Astrue* v. *Ratliff*, 130 S. Ct. 2521 (2010). In either scenario, petitioners would then have been forced to bring suit in the CFC against the government. In such lawsuits, petitioners clearly would have been plaintiffs (and "moving parties") and the government the defendant—free to raise petitioners' nonperformance as a defense. The consequence of invoking the state-secrets privilege should be no different in this case.

3. The default termination in this case imposes no punitive consequences

Seeking to avail themselves of decisions requiring the government to forgo criminal prosecution when it invokes certain privileges, petitioners characterize the potential consequences of a default termination as quasi-criminal or punitive in nature. GD Br. 2, 44-45, 54; Boeing Br. 9-11, 24, 28, 36-37, 42. That characterization is plainly wrong on the facts of this case (and, as explained below (pp. 41-42, *infra*), wrong as a general matter).

Contrary to petitioners' suggestion (GD Br. 2, Boeing Br. 36-37), the government has not sought any "forfeiture" or "penalty" against petitioners as a result of its default termination of the A-12 contract. Although the government never received a single aircraft, it has not sought the return of $1.35 billion in *liquidated* progress payments that it advanced to petitioners, nor has it sought to impose any fine or civil penalty. The contract-

ing officer's decision does allow the government to demand the return (with appropriate interest) of the *unliquidated* progress payments, *i.e.*, monies it had advanced to petitioners for work never completed. But the recovery of funds expended for uncompleted work is not plausibly characterized as a penalty. In any event, the government did not seek a recoupment order or any other form of affirmative relief *in the CFC proceedings*; it simply argued that petitioners' suit should be dismissed.

The potential availability of harsher sanctions in other cases should not affect the analysis here. Although petitioners describe the potential consequences of a default termination—including debarment from public contracting (GD Br. 7; Boeing Br. 10)—none of those collateral consequences was imposed in this case. And even if those bargained-for consequences could properly be characterized as a "forfeiture" or civil "penalty," the government would be the "moving party" in the lawsuit only if it sought to have those sanctions imposed by the court. Here, any collateral consequences that petitioners' default termination might entail are traceable to the contracting officer's decision, and they would be the same even if the CFC proceedings had never been commenced. As explained above (pp. 29-30, *supra*), suits for judicial review of agency action are no exception to the general rule that a court may not award affirmative relief on a claim that the government's proper invocation of the state-secrets privilege prevents the court from adjudicating.

C. Even If The Government Were Viewed As The "Moving Party," It Should Not Be Penalized For Properly Invoking The State-Secrets Privilege In This Civil Case

If the Court agrees (for all the reasons explained in Part B, *supra*) that the government is not the "moving party" in this civil case, *Reynolds* controls and the Due Process Clause poses no bar to entry of judgment dismissing petitioners' complaint. But even if the government is viewed as the "moving party" here, the result should be the same. The Court in *Reynolds* did not decide what disposition is appropriate when the government asserts the state-secrets privilege as the "moving party" in a civil case. For the reasons that follow, however, there is no sound rationale for automatically entering judgment against the government in that circumstance.

1. In *Reynolds*, as discussed above (p. 25, *supra*), the Court noted criminal cases from the Second Circuit holding that "the Government can invoke its evidentiary privileges only at the price of letting the defendant go free." 345 U.S. at 12 (citing *United States* v. *Andolschek*, 142 F.2d 503 (2d Cir. 1944); *United States* v. *Beekman*, 155 F.2d 580 (2d Cir. 1946)). The Court then stated that the rationale of those cases "has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented." *Ibid.* The Court did not address the proper treatment for these purposes of civil cases in which the government *is* the "moving party."

In *Jencks* v. *United States*, 353 U.S. 657 (1957), the Court observed that "the protection of vital national interests may militate against public disclosure of documents in the Government's possession," and it pointed to

"civil causes" as examples. *Id.* at 670. The Court then contrasted those civil cases with "criminal causes," where "the Government can invoke its evidentiary privileges only at the price of letting the defendant go free." *Id.* at 670-671 (quoting *Reynolds*, 345 U.S. at 12). The Court did not suggest that the government's assertion of the state-secrets privilege similarly entails the automatic entry of an adverse judgment when the government is the "moving party" in a civil case.

In a typical federal criminal proceeding, the Executive invokes the power of the Judiciary to deprive an individual of his liberty. See *Shinseki* v. *Sanders*, 129 S. Ct. 1696, 1706 (2009). In a typical civil proceeding, by contrast, the defendant is subject to less serious potential sanctions.[12] In part because the stakes are generally so different (in kind and degree), criminal defendants are afforded greater constitutional protections than defendants in civil actions. See *In re Winship*, 397 U.S. 358, 372 (1970) ("[D]ue process * * * requires a more stringent standard for criminal trials than for ordinary civil litigation.") (Harlan, J., concurring); see also, *e.g.*, U.S. Const. Amend. VI (conferring various protections on criminal defendants). In particular, whereas withholding of exculpatory material evidence by the prosecution violates the due process rights of criminal defendants, *Brady* v. *Maryland*, 373 U.S. 83, 86-88 (1963), the defendant in a civil suit brought by the government has no comparable constitutional right. That fact alone would provide a sound basis for distinguishing criminal prosecutions from civil suits in which the government as

[12] Habeas corpus actions, in which the liberty of an individual is at stake, may present special considerations. No such considerations, however, are present in this case.

plaintiff invokes the state-secrets privilege. And whereas the "beyond a reasonable doubt" standard of proof reflects the view that significant uncertainties as to a criminal defendant's guilt should be resolved in the defendant's favor, see *Winship*, 397 U.S. at 363-364, the preponderance standard generally used in civil litigation imposes essentially equal risks of error upon the opposing parties.

For the foregoing reasons, when the government as civil plaintiff invokes the state-secrets privilege in response to a defendant's request for information, a per se rule of dismissal would be inappropriate. To be sure, if the unavailability of state-secrets information prevents the government from establishing an element of its claim seeking affirmative relief on which it bears the burden of proof, the government cannot prevail on that claim. In this case, however, the government carried its burden of proving that petitioners had defaulted on their contractual obligations. Even if the government were properly viewed as the moving party here, there would be no sound basis for extending to the civil context the rule that "the Government can invoke its evidentiary privileges only at the price of letting the defendant go free." *Reynolds*, 345 U.S. at 12.[13]

[13] In the immigration context, the Court has sustained the use of classified information to establish an alien's inadmissibility, *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953) and to deny an application for discretionary relief from deportation, *Jay* v. *Boyd*, 351 U.S. 345 (1956). See 8 U.S.C. 1225(c), 1229a(b)(4) and (c)(2); see also 8 U.S.C. 1534(e)(3)(E) (alien terrorist removal procedures). Similarly, in several other contexts, the government has submitted classified information to the courts for *ex parte* review. Even when such information has been used by courts to resolve the merits of a claim, the courts of appeals have rejected claims by private litigants that their due

2. No court in a civil case has *ever* entered judgment against the government in response to the government's proper invocation of the state-secrets privilege. Even in the three reported cases of which we are aware where the government invoked the state-secrets privilege as a civil plaintiff, none was dismissed as a result of that invocation. See *Attorney Gen.* v. *Irish People, Inc.*, 684 F.2d 928 (D.C. Cir. 1982) (civil enforcement action to compel registration under the Foreign Agents Registration Act, 22 U.S.C. 611-621 (1976)), cert. denied, 459 U.S. 1172 (1983); *United States* v. *Koreh*, 144 F.R.D. 218 (D.N.J. 1992) (seeking denaturalization of alleged Nazi collaborator); *Republic of China* v. *National Union Fire Ins. Co.*, 142 F. Supp. 551 (D. Md. 1956) (seeking insurance coverage on ships seized by Communist China).

In a variety of contexts, Congress has authorized the government to seek injunctive relief to protect national-security interests. *E.g.*, 18 U.S.C. 2339B(c) (authorizing Attorney General to "initiate civil action * * * to enjoin" provision of material support to foreign terrorist organization); 18 U.S.C. 3511(c) (authorizing Attorney General to "invoke the aid" of a district court to compel compliance with a National Security Letter). Under petitioners' theory, however, the government as civil plaintiff would be categorically foreclosed from obtaining such relief if its invocation of the state-secrets privilege prevented the district court from adjudicating an asserted defense to the government's action. This

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process rights were violated. See, *e.g.*, *National Council of Resistance of Iran* v. *Department of State*, 373 F.3d 152, 159-160 (D.C. Cir. 2004) (Roberts, J.); *Global Relief Found., Inc.* v. *O'Neill*, 315 F.3d 748, 754 (7th Cir. 2002), cert. denied, 540 U.S. 1003 (2003); see also *United States* v. *Ott*, 827 F.2d 473, 476-477 (9th Cir. 1987); *United States* v. *Belfield*, 692 F.2d 141, 148 (D.C. Cir. 1982).

Court's decisions do not support such a rule, which would subvert Congress's determination that effective civil remedies should be available.

3. Petitioners also rely on decisions of this Court stating that due process principles guarantee a civil defendant "an opportunity to present every available defense." GD Br. 30; Boeing Br. 42-43 (quoting *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972)). In addition to the fact that petitioners are not defendants here, those decision do not speak to the application of evidentiary privileges generally or the state-secrets privilege in particular.

Boeing contends (Br. 49) that "judicial treatment of other evidentiary privileges" supports its position. It is well settled, however, that a court may not impose a substantial litigation penalty, such as the dismissal of a claim, on a party that validly invokes an evidentiary privilege, even when the privileged information is "vital, highly probative, directly relevant or even go[es] to the heart of an issue." *Rhone-Poulenc Rorer Inc.* v. *Home Indem. Co.*, 32 F.3d 851, 864 (3d Cir. 1994); see 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2018 (3d ed. 2010) (collecting cases) (*Federal Practice*).

Although Boeing relies (Br. 50-51) on select lower-court discussions of the privilege against self-incrimination in civil cases, even those decisions acknowledge that dismissal of a privilege holder's case is rare and disfavored. See *Serafino* v. *Hasbro*, 82 F.3d 515, 518 n.5 (1st Cir. 1996) ("dismissal has rarely been imposed or affirmed"); *Wehling* v. *CBS*, 608 F.2d 1084, 1087 (5th Cir. 1979) ("[D]ismissing a plaintiff's action with prejudice solely because he exercises his privilege against self-incrimination is constitutionally impermissible.").

More importantly, this Court has made clear that because "the Fifth Amendment guarantees * * * the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence," *Spevack* v. *Klein*, 385 U.S. 511, 514 (1967) (quoting *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964)), a court may not impose "any sanction which makes assertion of the Fifth Amendment privilege 'costly,'" *id.* at 515 (quoting *Griffin* v. *California*, 380 U.S. 609, 614 (1965)). Several courts of appeals, in accord with the view of leading commentators, have held that a party's invocation of that privilege thus cannot justify dismissal of his claim. See, *e.g.*, *United States* v. *Certain Real Property and Premises Known as 4003-4005 5th Ave.*, 55 F.3d 78, 82-84 (2d Cir. 1995) ("because exercise of Fifth Amendment rights should not be made unnecessarily costly," "litigants, even if deprived of key facts through an opposing party's assertion of the Fifth Amendment, often have no recourse in the civil litigation other than to comment upon the claim of privilege in the hope of persuading the trier of fact to draw a negative inference"); *Campbell* v. *Gerrans*, 592 F.2d 1054, 1057-1058 (9th Cir. 1979) ("It is obvious that dismissal of an action is costly and therefore" "not in accord with Supreme Court decisions."); *Federal Practice* § 2018.

Boeing's reliance (Br. 51-52) on court of appeals decisions involving the attorney-client privilege is similarly misplaced. See *United States* v. *Salerno*, 505 U.S. 317, 323 (1992) ("Parties may forfeit a privilege by exposing privileged evidence, but do not forfeit one merely by taking a position that the evidence might contradict."). Unlike here, those cases involve scenarios where the privilege holder has "waived" its rights by affirmatively

relying on the privileged information to prove its claim or defense. See *Ideal Elec. Sec. Co.* v. *International Fid. Ins. Co.*, 129 F.3d 143, 151 (D.C. Cir. 1997) (holding that the privilege holder waived the attorney-client privilege by "partially disclos[ing] the allegedly privileged information in support of its claim against [the opposing party], but then assert[ing] the privilege as a basis for withholding from its opponent the remainder of the information which is necessary to defend against the claim."); *Conkling* v. *Turner*, 883 F.2d 431, 434 (5th Cir. 1989) (similar); cf. *Rhone-Poulenc*, 32 F.3d at 855-857.[14]

Whatever the proper operation of other privileges, moreover, there are strong reasons not to penalize the government for invoking the state-secrets privilege. See *Totten*, 92 U.S. at 107 (contrasting state-secrets privilege with other privileges). Even when a private litigant

[14] The facts in *Rhone-Poulenc* are strikingly similar to those present here. In that case, two drug companies sued their insurer, alleging that the insurer had failed to honor its obligations to indemnify the companies against users' legal claims. 32 F.3d at 855. As its primary defense, the insurer alleged that the companies had failed to disclose their prior knowledge of the adverse effects of the drug. *Id.* at 856-857. To prove that defense, the insurer sought discovery of confidential communications between the pharmaceutical companies and their attorneys. *Ibid.* Although the Third Circuit did not question the relevance of the requested documents, it stated that "[r]elevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue." *Id.* at 864. The critical test, the court concluded, was whether the privilege holder had "attempt[ed] to prove [a] claim or defense by disclosing or describing an attorney client communication." *Id.* at 863. Because the plaintiffs had "not interjected the advice of counsel as an essential element of a claim in [the] case," the court held that the plaintiffs could not be required to disclose the information, regardless of its value to the defense. *Id.* at 864.

is *entitled* to assert a Fifth Amendment or attorney-client privilege against disclosure of requested information, there is ordinarily no legal or prudential barrier to his voluntary waiver of that privilege. A rule under which assertion of such privileges resulted in entry of judgment against the private civil litigant, though problematic in significant respects, would at least give the litigant a choice between two legitimate options. An agency head, by contrast, cannot appropriately "waive" the state-secrets privilege by effecting disclosures that he believes will jeopardize national security. In a civil case, the Court therefore should not depart from the established understanding that, to avoid undermining the paramount collective public interest that the state-secrets privilege serves, the government should not be "punished for asserting the privilege." *Salisbury*, 690 F.2d at 975.[15]

[15] Boeing's reliance (Br. 48-49) on proposed Federal Rule of Evidence 509 (ultimately rejected by Congress) is also unavailing. Proposed Rule 509 would have governed both civil and criminal cases, and it would have applied not just to the state-secrets privilege but also to "official information" privileges concerning, *inter alia*, intragovernmental opinions or recommendations issued in the course of policymaking, as well as certain law-enforcement investigatory files. See Proposed Fed. R. Evid. 509(a)(1)-(2), 56 F.R.D. 183, 251 (1972); see also Advisory Committee's Note to Proposed Rule 509(a)(1)-(2) and (e), *id.* at 252-254. As Boeing notes, proposed Rule 509(e) would have provided that when the government is a party to a suit and its valid assertion of a privilege deprives another party of material evidence, a court may issue any "orders which the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding against the government upon an issue as to which the evidence is relevant, or dismissing the action." *Id.* at 252. Although that menu of options would have included the authority to find in petitioners' favor on the "superior knowledge" issue, the proposed Rule would not have mandated that result. Indeed, noting an "unwillingness to allow the government's

D. Petitioners' Policy Arguments Do Not Support Entry Of Judgment Against The Government

1. Affirming the Federal Circuit's judgment will not lead to abuse of the state-secrets privilege

Petitioners suggest that, if the decision of the court of appeals is affirmed, federal officials will manipulate future litigation by invoking the state-secrets privilege in order to obtain favorable rulings on issues as to which the privilege has been claimed. GD Br. 31-33. That speculation is unfounded.

The safeguards against capricious invocation of the state-secrets privilege lie in the procedural and substantive restrictions that this Court has imposed upon the privilege, see *Reynolds*, 345 U.S. at 7-8, 10; pp. 23-24, *supra*, and in the presumption that agency heads discharge their duties conscientiously and in good faith—not in any judicially created prophylactic rule that the government must lose claims as to which the privilege has been invoked.[16] As discussed above (pp. 26-27, *supra*), the Judicial Branch should not create financial disincentives to the appropriate invocation of a privilege designed to safeguard vital national-security

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claim of privilege for secrets of state to be used as an offensive weapon against it," the Advisory Committee's Note approvingly cited *Reynolds* and *Republic of China*, 142 F. Supp. at 557, which held that the United States was *not* barred from suing ship insurers even though the government had validly invoked the state-secrets privilege with respect to information that the insurers (like petitioners here) contended could help establish a defense to the suit.

[16] Congress has considered various proposals to regulate the government's assertion of the state-secrets privilege—*e.g.*, State Secrets Protection Act, S. 2533, 110th Cong. 2d Sess. (2008); State Secrets Protection Act, S. 417, 111th Cong. 1st Sess. (2009)—but has not passed any such legislation.

information. And petitioners point to no pattern of abuse despite the thousands of contracts awarded by the Defense Department and military services each year. Notably, petitioners do not contend that the government improperly invoked the privilege in this case. Boeing Br. 27; GD. Br. 35-36.[17]

On September 23, 2009, the Attorney General issued Policies and Procedures Governing Invocation of the State Secrets Privilege, http://www.justice.gov/opa/documents/state-secrets-privilege/pdf (State Secrets Policy), which provides additional safeguards. Under that policy, the Department of Justice will defend an assertion of the state-secrets privilege and seek dismissal of a claim only when "necessary to protect against the risk of significant harm to national security." *State Secrets Policy* 1. "The Department will not defend an invocation of the privilege in order to: (i) conceal violations of the law, inefficiency, or administrative error; (ii) prevent embarrassment to a person, organiza-

[17] Although petitioners acknowledge that they have no basis for challenging the government's invocation of the state-secrets privilege in this case, they nevertheless accuse the government of vaguely defined abuses relating to its treatment of classified information during the course of the litigation. See GD Br. 13-14, 25-26, 46, 53-54; Boeing Br. 16 n.6, 37. Those accusations are unfounded. The Federal Circuit reviewed the same allegations and rejected the CFC's statement that the government had used the privileged information "for tactical purposes involving the merits of plaintiffs' superior knowledge claim." J.A. 568 n.5. The Federal Circuit explained that the government attorneys' alleged review of privileged information was "entirely irrelevant to whether there would be a 'reasonable danger' to national security if the information is released to someone new." J.A. 568. Three years later, the CFC found that "[d]espite *everyone's best efforts*, the risk of compromising national secrets is too serious to proceed to trial." Pet. App. 381a (emphasis added).

tion, or agency of the United States government; (iii) restrain competition; or (iv) prevent or delay the release of information the release of which would not reasonably be expected to cause significant harm to national security." *Id.* at 2. In addition, the Department will defend an assertion of the privilege in court only with the personal approval of the Attorney General following review and recommendations from senior Department officials. *Id.* at 3. See *Mohamed* v. *Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1080, 1090 (9th Cir. 2010) (en banc).[18]

The rule that petitioners advocate, by contrast, would itself be susceptible to manipulation by private parties. As discussed above (p. 27, *supra*), a contractor that challenges the government's termination of a contract for default could raise a superior-knowledge claim simply to induce the government to invoke the state-secrets privilege. Cf. *Tenet*, 544 U.S. at 11. In those circumstances, automatic invalidation of a default termination—or, more generally, a requirement that courts rule against the government on any issue to which state-

[18] Because the September 2009 policy applies only to cases in which the government invokes the state-secrets privilege after October 1, 2009, *State Secrets Policy* 1, it does not govern the Department's litigation of this case. In any event, the courts below determined that the government had properly invoked the state-secrets privilege here, and petitioners did not challenge that determination in their petitions for writs of certiorari. The questions on which this Court granted certiorari do not encompass the question whether the privilege was properly invoked. Because petitioners nevertheless seek to cast doubt on the propriety of the government's assertion of the privilege in this case (*e.g.*, Boeing Br. 37), we encourage the Court to examine the classified declarations filed by the government and reviewed by the CFC and Federal Circuit in this case. Those classified declarations, which appear in unclassified form at J.A. 516-523 and 974-981, will be made available at the Court's request.

secrets material would potentially be relevant, including issues on which a private plaintiff bears the burden of proof—would inappropriately "punish[] [the government] for asserting the privilege." *Salisbury*, 690 F.2d at 975.

2. Affirming the Federal Circuit's judgment will not undermine defense contracting

There is likewise no sound basis for the speculation of petitioners and their amici that defense contracting will be undermined if the judgment of the court of appeals is affirmed. GD Br. 48-49; Chamber of Commerce Amicus Br. 6-9; NDIA Amicus Br. 11-17. The government has a strong interest in attracting contractors to ensure that our Nation's security and other needs are met, and it disagrees entirely with such speculation. Moreover, contractors like petitioners are highly sophisticated entities that can protect themselves against undue risk in their negotiation of future contracts.

In this case, for example, petitioners were allowed (even under the court of appeals' decision) to retain $1.35 billion in progress payments, notwithstanding their failure to deliver a single aircraft, because they successfully negotiated contract terms that permitted "liquidation" of certain progress payments prior to completion of all contract work. J.A. 115-116; see p. 5, *supra*. The FSED contract also contained a clause specifying what information the government was required to share with petitioners. J.A. 136-140. Petitioners could have sought to include in that clause the classified information that they now allege was necessary to perform the contract, and they could have declined to enter into the contract if the government had refused to promise them access to such information.

Petitioners cite no evidence that contractors have refused to deal with the government as a result of the decision of the court of appeals on the "unique facts of this case." Pet. App. 33a. To the contrary, petitioners themselves, as well as other contractors, have entered into long-term development and production contracts for military aircraft and other equipment for billions of dollars since the government's 1993 invocation of the state-secrets privilege in this suit. See, *e.g.*, *Boeing Receives Multi-Year Contract from U.S. Navy for 124 F/A-18 and EA-18 Aircraft* (Sept. 28, 2010), http://boeing.mediaroom.com/index.php?s=43&item=1442. The absence of any apparent adverse impact on contractors' willingness to deal with the government is unsurprising, as it has been clear at least since *Reynolds* that the government as civil defendant may invoke the state-secrets privilege without suffering the automatic entry of an adverse judgment. And petitioners cite no civil case involving the government as either defendant or plaintiff in which the assertion of the state-secrets privilege was held to entail that consequence.

Finally, nothing prohibits contractors like petitioners from requesting a clause in future contracts that would assign the risk of a state-secrets invocation to the government—*e.g.*, by providing that if the contractor is terminated for default, and a subsequent invocation of the state-secrets privilege precludes access to information which could have supported a valid excuse for nonperformance, the default will be treated as one for convenience. Or contractors could request specific procedures to facilitate the consideration of sensitive information in the event of a dispute; for example, the Navy in limited circumstances has agreed to alternative dispute resolu-

tion procedures for contracts involving special-access programs.

For all these reasons, there is no reason to suppose that a decision affirming the judgment below would change government contractors' perceptions of the risks to which they are subject when they perform work on projects implicating national-security concerns.

E. If This Court Reverses The Judgment Of The Court Of Appeals, It Should Remand For Consideration Of The Government's Other Preserved Defenses To The Superior-Knowledge Claim

1. Before it invoked the state-secrets privilege, the government had sought dismissal of petitioners' claim that their default could be excused based on the government's alleged failure to disclose to them information contained in "classified, compartmented weapon system development programs." J.A. 451-452. The government relied in part on the general legal proposition that there can be no implied duty to share highly classified information. The CFC ruled that the government at least had a duty to provide petitioners a "general warning" about potential problems, if not the classified information itself. Pet. App. 354a n.7. In response, the government contended, *inter alia*, that the warnings it raised at the time petitioners submitted their proposal to win the A-12 contract satisfied any such duty and that no further "general warning" would have aided petitioners. J.A. 896-900, 909-913, 1275-1280.

The government further argued that recognition of an implied duty to share classified information would conflict with the express terms of the A-12 contract. J.A. 895-896, 1275-1276. As noted above (p. 6, *supra*), the contract specifically identified the information that

the government agreed to provide petitioners. J.A. 136-140. It is well established that an implied duty "cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions." *Precision Pine & Timber, Inc.* v. *United States*, 596 F.3d 817, 831 (Fed. Cir. 2010), petition for cert. pending, No. 10-341 (filed Sept. 8, 2010).

The government preserved those threshold legal arguments by raising them in the first two appeals to the Federal Circuit. See J.A. 893-916, 1274-1292. (The last appeal did not involve the superior-knowledge claim.) The Federal Circuit never passed on those arguments because it resolved the superior-knowledge issue on the basis of the state-secrets privilege. If this Court were to reverse the Federal Circuit's judgment, however, those defenses would become ripe for appellate review. The court of appeals should be allowed to consider those issues before the government is subjected to an adverse judgment.[19]

2. Because those defenses remain pending, GD's request that this Court reinstate the 1998 CFC damages award—$1.2 billion, plus interest, after offsetting $2.7 billion in liquidated and unliquidated payments already

[19] GD notes (Br. 55) that the "government's opposition to certiorari did not question the trial court's rulings that the government had a duty to share its knowledge with the Contractors." But that issue was not encompassed by the questions presented in the petition, which challenged only the consequences of the Federal Circuit's holding that the superior-knowledge claim was nonjusticiable. In any event, the government does not ask this Court to rule on its legal defenses to petitioners' superior-knowledge claim, but simply to leave them open on remand if the Court reverses or vacates the judgment below.

made to petitioners (J.A. 884-885)—is premature.[20] Moreover, the Federal Circuit never ruled on the government's challenge to that award on the merits, as it had vacated the award as moot in 1999 in light of its reversal of the CFC's underlying determination of government liability and conversion to a termination for convenience. Pet. App. 271a, 278a-279a. The CFC has had no occasion to reconsider its prior ruling, which it also regarded as moot after further proceedings on remand. *Id.* at 174a. The government therefore should be permitted at least to obtain appellate review on the merits of that multi-billion dollar award before being subjected to it.[21]

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[20] Notably, Boeing does not join GD in making such an untenable request.

[21] On the merits, the CFC's 1998 damages judgment is seriously flawed. The contract's termination-for-convenience provision allows for recovery of the costs of performance, plus profit, without regard to whether work was completed or whether work was acceptable, *except* if the contractor was already performing at a loss. 48 C.F.R. 52.249-2(f)(2)(iii). "If it appears that the contractor would have suffered a loss on the entire contract * * * the contractor would not obtain a profit, and its cost recovery is reduced according to the rate of loss." Pet. App. 282a. The plain language of the contract therefore *requires* adjustment for the loss rate to ensure that a convenience termination does not place petitioners in a better position than they would have occupied if they had performed the contract. See *Rumsfeld* v. *Applied Cos.*, 325 F.3d 1328, 1336 (Fed. Cir.) (citing *Miller* v. *Robertson*, 266 U.S. 243, 260 (1924)), cert. denied, 540 U.S. 981 (2003). Here, it is undisputed that petitioners were performing at a significant loss at the time of termination and that, by their own admission, they could not have absorbed the contract's projected losses. See pp. 7-9, *supra*. In addition, petitioners bear the burden of establishing the amount of any convenience-termination recovery. *Lisbon*, 828 F.2d at 767. Because the CFC found that the nonjusticiable superior-knowledge claim was related to petitioners' convenience-termination claim for damages, the CFC should have dismissed that damages claim. J.A. 901-903, 917-921, 1058-1059.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 2010