No. _____

IN THE

Supreme Court of the United States

SIBEL EDMONDS,

Petitioner,

—v.—

DEPARTMENT OF JUSTICE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming dismissal of a retaliatory termination case by an FBI whistleblower, based on the state secrets privilege, prior to any discovery or consideration of non-privileged evidence.

2. Whether the court of appeals violated the First Amendment when it *sua sponte* excluded the press and public from the argument of this case, without case-specific findings demonstrating the necessity of closure.

PARTIES TO THE PROCEEDINGS

The petitioner in this case is Sibel Edmonds. The respondents are the United States Department of Justice; the Federal Bureau of Investigation; and the following individuals sued in their official capacities: Alberto Gonzales, Attorney General of the United States; Robert S. Mueller, III, Director of the Federal Bureau of Investigation; Thomas Frields, Supervisory Agent in Charge of the Federal Bureau of Investigation's Washington Field Office; and George Stukenbroker, Chief of Security of the Federal Bureau of Investigation's Washington Field Office.

RULE 29.6 STATEMENT

In accordance with United States Supreme Court Rule 29.6, petitioner states that she has no parent companies or non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sibel Edmonds, a former translator for the Federal Bureau of Investigation (FBI) who was terminated in retaliation for reporting serious security breaches and potential espionage within the FBI's translation unit, seeks review of the judgment of the United States Court of Appeals for the District of Columbia affirming the dismissal of her retaliatory termination case on the basis of the state secrets privilege. Petitioner also seeks review of the Court of Appeals' *sua sponte* exclusion of the press and the public from appellate argument.

OPINIONS BELOW

The order of the court of appeals is unreported. Appendix ("App.") 1a-2a. The opinion of the district court is reported at 323 F. Supp. 2d 65 (D.D.C. 2004). App. 5a-33a.

JURISDICTION

The court of appeals entered its judgment on May 6, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the court of appeals was invoked under 28 U.S.C. § 1291. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." The Fifth Amendment provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law." The pertinent provisions of the Privacy Act are reprinted in the Appendix. *See* App. 39a-46a.

STATEMENT OF THE CASE

A. Ms. Edmonds' Termination

Following the terrorist attacks of September 11, 2001, Sibel Edmonds was hired by the FBI as a contract linguist to perform translation services in the Bureau's Washington Field Office. Court of Appeals Joint Appendix ("C.A. App.") 38 (Compl. ¶¶ 10-12). To obtain the requisite security clearance, Ms. Edmonds was subjected to, and passed, a polygraph examination and a ten-year background investigation. C.A. App. 38 (Compl. ¶ 14).

Between December 2001 and March 2002, Ms. Edmonds reported a number of incidents to FBI management officials that pointed towards "serious breaches in the FBI security program and a breakdown in the quality of translations as a result of willful misconduct and gross incompetence." C.A. App. 39 (Compl. ¶ 15). Ms. Edmonds' reports of misconduct included allegations that numerous communications had been intentionally left untranslated or mistranslated, thereby jeopardizing intelligence and law enforcement investigations related to the September 11 attacks and other ongoing counterterrorism, counterintelligence, and law enforcement investigations. Ms. Edmonds also reported concerns of potential espionage within the translation unit. Specifically, she reported that a fellow employee who had been granted a security clearance had past and ongoing associations with one or more targets of an ongoing FBI investigation and was apparently leaking information to those targets; that the same employee had improperly instructed Ms. Edmonds and another employee not to listen to or translate certain FBI wiretaps concerning those targets; and that the employee in question had threatened the lives and safety of Ms. Edmonds and a member of her family who resided in a foreign country. Finally, Ms. Edmonds reported that FBI managers had failed to take corrective action in response to her concerns, but had

instead retaliated against her. C.A. App. 39-40 (Compl. ¶ 16).

Ms. Edmonds raised her allegations of security breaches and misconduct up the FBI chain of command without effect, finally reporting them to the FBI's Office of Professional Responsibility and to the United States Department of Justice's Office of Inspector General. C.A. App. 41 (Compl. ¶ 23). Two weeks later, on March 22, 2002, Ms. Edmonds was fired, escorted from the building, and informed that she "would never step foot in the FBI again." C.A. App. 41-42 (Compl. ¶ 24). On April 2, 2002, Ms. Edmonds was notified in writing that she had been "terminated completely for the Government's convenience." C.A. App. 42 (Compl. ¶ 25).

Ms. Edmonds' allegations of security breaches came to the attention of United States Senator Charles Grassley, who wrote to FBI Director Robert Mueller on May 8, 2002, expressing concern about Ms. Edmonds' reports of misconduct and security violations and about apparent retaliation by the FBI. C.A. App. 42 (Compl. ¶ 27). On June 17, 2002, the FBI held an unclassified briefing for the Senate Judiciary Committee members and staff regarding Edmonds' allegations, "some of which the FBI verified were not unfounded." C.A. App. 80. Thereafter, Senator Grassley, joined by Senator Patrick Leahy, wrote to Glenn Fine, Inspector General of the Department of Justice, describing the FBI's June 17 testimony and requesting that the Office of Inspector General (OIG) pursue Ms. Edmonds' allegations. C.A. App. 73-74. In particular, the Senators' letter reported that the FBI had confirmed the validity of Ms. Edmonds' allegations relating to her fellow employee's misconduct. The entire text of the letter was printed in the Congressional Record. 148 Cong. Rec. S5842 (June 20, 2002).

The FBI provided a second unclassified briefing to Judiciary Committee members and staff on July 9, 2002. C.A. App. 200-01. The FBI once again presented

information relating to Ms. Edmonds' allegations concerning misconduct and mismanagement in the FBI translation unit. Following the briefing, Senators Grassley and Leahy wrote several additional widely disseminated letters to FBI Director Mueller and to then-Attorney General John Ashcroft regarding Ms. Edmonds, including an August 13, 2002 letter to the Attorney General concerning the status of the investigation of Ms. Edmonds' allegations, C.A. App. 80-81, and an October 28, 2002, letter to Director Mueller suggesting an independent audit and review of the translation unit. C.A. App. 108-09.

Meanwhile, even as the substance of Ms. Edmonds' allegations was being largely corroborated by the FBI in briefings to Congress, press accounts quoted anonymous government officials who cast doubt on Ms. Edmonds' credibility in an apparent attempt to discredit her allegations. For example, on June 8, 2002, the *Associated Press* published an article quoting "Government officials, who spoke only on condition of anonymity," who stated that Ms. Edmonds' allegations had not been corroborated, that she herself was being investigated for security breaches, and that she had been fired for performance issues. C.A. App. 42-43 (Compl. ¶¶ 27-31), 59-60. The article further reported that "FBI officials said they believe the [translation] program is solid and secure even as they let the investigations move forward." C.A. App. 59. Similarly, a June 19, 2002 story in *The Washington Post* quoted anonymous government officials who stated that the "FBI fired" Ms. Edmonds because her "disruptiveness hurt her on-the-job performance" and she "had been found to have breached security." C.A. App. 68-71. The article included a defense of Ms. Edmonds from Senator Grassley, who stated that Ms. Edmonds had "made these allegations in good faith and even though the deck was stacked against her" and that the "FBI even admits to a number of her allegations . . . ." C.A. App. 69.

B. Proceedings Below

1. Filing of Suit and Invocation of the Privilege

Ms. Edmonds brought this suit against the Department of Justice, the FBI, and various high-level officials on July 22, 2002, alleging violations of the First Amendment, the Due Process clause of the Fifth Amendment, and the Privacy Act, arising from her retaliatory termination and from the government's subsequent unauthorized disclosures to the media. Rather than respond to the merits of Ms. Edmonds' claims, on October 18, 2002, Attorney General Ashcroft invoked the state secrets privilege and moved to dismiss the suit prior to discovery, asserting that "further disclosure of the information underlying this case, including the nature of the duties of plaintiff or the other contract translators at issue in this case reasonably could be expected to cause serious damage to the national security interests of the United States." C.A. App. 56 (Ashcroft Decl. ¶¶ 5-6). The Department of Justice thereafter moved successfully to stay all discovery pending the court's adjudication of the state secrets issue.

The Attorney General invoked the state secrets privilege a second time in an attempt to block Ms. Edmonds from being deposed in another case brought by families of those killed on September 11 against Saudi individuals and entities alleged to have financed al-Qaeda. *See Burnett v. Al Baraka Investment & Dev. Corp.,* Civ. Action No. 03-9848 (S.D.N.Y. filed Dec. 11, 2003). The government filed its motion to quash the deposition with the district judge in the present case, who then ordered the government to produce "any unclassified documents or other unclassified information in its possession that has been presented to the United States Senate or any other forum or individuals which is relevant to the substance of Sibel Edmonds' potential deposition." C.A. App. 216. In response, the government submitted additional *ex parte* and public declarations in

support of its invocation of the state secrets privilege, which the district court then considered in both cases. App. 6a, 27a, 32a.

The government then took the extraordinary step of moving to classify *retroactively* the information it had presented to the Senate Judiciary Committee. On May 13, 2004, the following email message was sent to staff of the Senate Judiciary Committee:

> The FBI would like to put all Judiciary Committee staffers on notice that it now considers some of the information contained in two Judiciary Committee briefings to be classified. Those briefings occurred on June 17, 2002, and July 9th, 2002, and concerned a woman named Sibel Edmonds, who worked as a translator for the FBI. *The decision to treat the information as classified from this point forward relates to civil litigation in which the FBI is seeking to quash certain information.* The FBI believes that certain public comments have put the information in a context that gives rise to a need to protect the information.
>
> Any staffer who attended those briefings, or who learns about those briefings, should be aware that the FBI now considers the information classified and should therefore avoid further dissemination. . . .

C.A. App. 200-01 (emph. added).

On May 20, 2004, Senator Grassley responded to the retroactive classification in comments to *The New York Times,* declaring that "[w]hat the F.B.I. is up to here is ludicrous," C.A. App. 178, and characterizing the classification order as being "as close to a gag order as you

can get."[1] An FBI official who spoke on the condition of anonymity disclosed that "the decision to classify the material was made by the Justice Department." C.A. App. 178-79. Attorney General Ashcroft corroborated that statement in testimony before the Senate Judiciary Committee on June 8, 2004, where he explained that the retroactive classification decision was "relate[d] to both a lawsuit which [was] underway and the national security interests of the United States."[2]

2. District Court Dismissal

On July 6, 2004, the district court dismissed Ms. Edmonds' case on state secrets grounds.[3] App. 5a-33a. The court first rejected Ms. Edmonds' contention that the government had not properly invoked the state secrets privilege, holding that Attorney General Ashcroft's declarations provided sufficient evidence that the Attorney General had personally considered the matter prior to his formal invocation, and that the declarations were sufficiently specific to support the propriety of the invocation. App.16a-24a. The court does not appear to have reviewed any particular documents the government claimed were privileged, but instead relied only on the government's characterization of privileged categories of information in its

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[1] Indeed, one of the retroactively classified documents was released to Ms. Edmonds in response to a FOIA request, and was marked "unclassified," well after the government's invocation of the privilege. C.A. App. 176, 184-85.

[2] *See DOJ Oversight: Counterterrorism & Other Topics: Hearing Before the Senate Judiciary Committee,* 108th Cong. (2004).

[3] The district court also granted in part the government's motion to quash Ms. Edmonds' deposition on state secrets grounds in *Burnett v. Al Baraka Investment & Dev. Corp.,* 323 F. Supp. 2d 82 (D.D.C. 2004).

classified, *ex parte* declarations. After upholding the government's invocation of the privilege, the court then considered whether dismissal of Ms. Edmonds' case was warranted. App. 24a. The court did not first allow Ms. Edmonds to conduct any non-privileged discovery or to submit any non-privileged evidence in support of her claims. The court ultimately dismissed the case, holding that Ms. Edmonds would be "unable to prove the prima facie elements of each of her claims without the disclosure of privileged information," and that defendants would be "unable to assert valid defenses to her claims without such disclosures." App. 27a. The court accepted the government's broad assertion that both the "nature of [Ms. Edmonds'] employment" and the "events surrounding her termination" constituted state secrets. App. 28a. Accordingly, the court held that it would be unable to "disentangle" state secrets from non-privileged evidence, and dismissed the case at the pleading stage.

Two weeks after the district court issued its opinion, FBI Director Mueller sent a letter to Senator Orrin Hatch in which he noted that the Department of Justice's Inspector General had "recently completed its classified report on the allegations of Sibel Edmonds" and had concluded that "Ms. Edmonds' allegations 'were at least a contributing factor in why the FBI terminated her services.'"[4] A few days later, the Department of Justice's Inspector General released an

[4] Letter from FBI Director Mueller to Senator Hatch, dated July 21, 2004, at 1, at http://www.pogo.org/m/hsp/hsp-040721-Mueller.pdf; *see also* Eric Lichtblau, *Whistle-blowing Said to be Factor in an F.B.I. Firing,* N.Y. TIMES, July 28, 2004, at A1 ("[A] classified Justice Department investigation has concluded that a former F.B.I. translator at the center of a growing controversy was dismissed in part because she accused the bureau of ineptitude, and it found that the F.B.I. did not aggressively investigate her claims of espionage against a co-worker.").

unclassified executive summary of its audit of the translation services unit of the FBI.[5] In further support of Ms. Edmonds' allegations, the audit revealed a serious backlog of more than 370,000 hours of untranslated counterintelligence tapes and more than 119,000 hours of untranslated counterterrorism tapes recorded after September 11, and disclosed ongoing problems with inaccurate translations.[6]

3. The Inspector General's Report on Ms. Edmonds' Allegations

Ms. Edmonds timely appealed the district court's dismissal to the United States Court of Appeals for the District of Columbia. One day after Ms. Edmonds filed her opening appellate brief, the Justice Department released to the public an unclassified summary of its Inspector General's report on Ms. Edmonds' allegations.[7] The Inspector General concluded that the FBI had retaliated against Ms. Edmonds

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[5] *The Federal Bureau of Investigation's Foreign Language Program -- Translation of Counterterrorism and Counterintelligence Foreign Language Material*, Rep. No. 04-25, July 2004, Office of the Inspector General, at http://www.usdoj.gov/oig/reports/FBI/a0425/final.pdf.

[6] Indeed, in a recently released follow-up audit of the FBI translation program, the Inspector General found that those backlogs have increased to 707,742 hours of unreviewed counterintelligence and counterterrorism audio. *Federal Bureau of Investigation's Foreign Language Translation Program Follow-up,* Rep. No. 05-33, July 2005, Office of Inspector General at pg. v, at http://www.usdoj.gov/oig/reports/FBI/a0533/final.pdf).

[7] *A Review of the FBI's Actions in Connection with Allegations Raised by Contract Linguist Sibel Edmonds,* January 2005; Unclassified Summary, Office of Inspector General, at http://www.usdoj.gov/oig/special/0501/final.pdf (hereinafter "IG Report").

for reporting serious security breaches, stating that "many of her allegations were supported, that the FBI did not take them seriously enough, and that her allegations were, in fact, *the most significant factor in the FBI's decision to terminate her services*." IG Report at 31 (emphasis added).

The Inspector General's findings corroborate Ms. Edmonds' version of the events surrounding her termination. The Inspector General found that Ms. Edmonds raised serious allegations of espionage that were "supported by either documentary evidence or witnesses other than Edmonds," and that the FBI's investigation of those allegations was "significantly flawed." IG Report at 10, 15. The Inspector General emphasized that, "as demonstrated by the espionage of former FBI Agent Robert Hansen, the FBI must take seriously allegations suggesting security breaches, even if the evidence is not clear-cut." *Id.* at 12 n.13.

The Inspector General found that "rather than investigate Edmonds' allegations vigorously and thoroughly, the FBI concluded that she was a disruption and terminated her contract." IG Report at 11. Soon after Ms. Edmonds began reporting her concerns, a high level manager began inquiring about the FBI's options with respect to terminating contracts with linguists. *Id.* at 21. By March 20, 2002, Ms. Edmonds' supervisor officially recommended that her contract be terminated, and repeatedly mentioned her reports of misconduct as a reason for the decision. *Id.* Ms. Edmonds was terminated two days later. Shortly thereafter, additional allegations of security violations were lodged against Ms. Edmonds. However, an internal analyst noted in a memorandum described by the Inspector General that Ms. Edmonds was not fired for security reasons and that her clearance had not been revoked. *Id.* at 23.

On the basis of this evidence, employing an analysis almost identical to a First Amendment retaliation analysis,[8] the Inspector General found that Ms. Edmonds' whistleblower activity was "the most significant factor in the FBI's decision to terminate her services." IG Report at 31; *see also id.* at 35. The Inspector General also found that the government could not establish a valid defense to Ms. Edmonds' retaliation claim. The Inspector General deemed entirely unpersuasive the FBI's claim that it had legitimate reasons for firing Ms. Edmonds, and its claim that it would have fired her notwithstanding her whistleblower activity. The Inspector General expressly determined that the FBI could not show "that at the time the decision was made it would have terminated Edmonds' contract absent her disclosures." IG Report at 30. Rather, the Inspector General found that Ms. Edmonds was not fired because the FBI did not need her services, nor because she was a security threat, but because she was perceived as having a "disruptive effect" due to her whistleblower activity. *Id.* at 31-32. The Inspector General expressed its further concern that "[b]y

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[8] *See, e.g., Connick v. Myers*, 461 U.S. 138 (1983). The Inspector General considered whether Ms. Edmonds had been retaliated against under the standards of the FBI whistleblower regulations. Much like a First Amendment retaliation claim, the whistleblower retaliation inquiry asks whether an employee's disclosure is "protected," whether the employee "reasonably believe[d] the disclosure evidence[d]" some kind of violation, mismanagement, abuse of authority or danger to the public, and whether the "disclosure was a contributing factor" in the termination decision. IG Report at 30. If a whistleblower establishes those elements, the burden shifts to the FBI to show that "it would have taken the personnel action against the complainant in the absence of [the] protected disclosure." *Id.*

terminating Edmonds' services, in large part because of her allegations of misconduct, the FBI's actions also may have the effect of discouraging others from raising concerns." *Id.* at 32.

Approximately one month after the summary of the Inspector General's Report was released, while the case was still pending before the court of appeals, the Justice Department conceded that information about Ms. Edmonds' allegations that it had presented to the Senate Judiciary Committee was not in fact classified, as the government had previously insisted. *See* R. Jeffrey Smith, *Access to Memos is Affirmed*, WASH. POST, Feb. 23, 2005, at A17 (reporting that the "Justice Department has backed away from a court battle over its authority to classify and restrict the discussion of information [related to Sibel Edmonds] it has already released.").[9]

4. The Court of Appeals' Closure of the Courtroom and the Affirmance

Oral argument before the court of appeals was scheduled for April 21, 2005. On April 20, the court's clerk informed counsel by telephone that the Court had decided to exclude the press and public from the courtroom. The Court issued no order of closure, and made no case-specific findings

[9] The lawfulness of the government's retroactive classification of this information had been the subject of a separate lawsuit. *Project on Government Oversight v. Ashcroft*, No. 1:04-CV-01032-JDB (D.D.C. filed 6/23/04). On the eve of a hearing in that case, the government released the information on the ground that "[t]he FBI has determined that these letters are releasable in full, pursuant to the [FOIA]." *See* Letter of February 18, 2005, from Vesper Mei, DOJ Trial Attorney to Michael Kirkpatrick, counsel for Project on Government Oversight, at http://www.pogo.org/m/gp/gp-02182005-JusticeDeptLetter.pdf.

demonstrating the need for closure. In fact, the government had previously notified the court that it was "prepared to argue this case publicly, in an open courtroom." App. 47a (Letter of April 12, 2005, from H. Thomas Byron III, counsel for appellees, to Clerk of Court). Later that day, Ms. Edmonds and several *amici* filed motions asking the court to hold argument in public. App. 3a (Order of April 21, 2005). Additionally, several media organizations, including The Washington Post, The New York Times, The Los Angeles Times, the Associated Press, Reuters America, and Cable News Network (CNN) moved to intervene in the case for the purpose of moving to open oral argument to the public. App. 3a. The government did not oppose these motions. Nevertheless, the next morning, the Court granted the media's motion to intervene but denied all motions to open the courtroom, without opinion.

The oral argument ultimately proceeded in two phases. First, the Court questioned both Ms. Edmonds' counsel and the government. No privileged or sensitive information was discussed. The Court then asked Ms. Edmonds and her counsel to leave the courtroom so that it could continue to question the government in private. Before leaving the courtroom, counsel for Ms. Edmonds asked the court to release a transcript of the portion of the argument that had just concluded. The government stated that it did not oppose that request, and the court granted it. The transcript was released soon thereafter.

Fifteen days later, the court of appeals affirmed the district court's dismissal of Ms. Edmonds' suit, without opinion. In an unpublished order, the court of appeals held that "the order of the district court dismissing Edmonds' claims is hereby affirmed for the reasons given in that court's opinion, 323 F. Supp. 2d 65 (D.D.C. 2004)." App. 1a-2a (Order of May 6, 2005).

REASONS FOR GRANTING THE PETITION

The Court should grant review to provide guidance to the lower courts about the proper scope and application of the state secrets privilege, and to prevent further misuse of the privilege to dismiss lawsuits at the pleading stage. Last Term, in *Tenet v. Doe*, the Court considered the so-called *Totten* rule, which allows outright dismissal at the pleading stage of cases involving unacknowledged espionage agreements. It contrasted the *Totten* rule with the state secrets privilege, which may be invoked to prevent disclosure of specific evidence during discovery. Because the state secrets privilege was discussed in *Tenet* only to contrast it with the *Totten* rule, the *Tenet* Court had no occasion to clarify the proper scope and use of the state secrets privilege. This case presents that occasion. Confusion about the state secrets privilege continues to create conflicts among the decisions of the lower courts. Over the past several decades, some courts have dangerously expanded the privilege far beyond the narrow bounds outlined by this Court in *United States v. Reynolds*. Failing to recognize that the state secrets privilege is merely a discovery shield, these courts have allowed the government to use the privilege as a sword to justify premature dismissal of legitimate lawsuits. Ms. Edmonds' case is the most recent, and most extreme, example. The lower court's dismissal of Ms. Edmonds' straightforward retaliatory termination case at the pleading stage illustrates the harms that result from ongoing confusion about the state secrets privilege.

In addition, the Court should grant review to clarify that the press and public may not be excluded from appellate arguments in civil cases in the absence of specific findings demonstrating the need for closure.

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE PROPER SCOPE AND APPLICATION OF THE STATE SECRETS PRIVILEGE.

A. Lower Courts Have Repeatedly Confused the State Secrets Privilege with the *Totten* Rule.

This Court outlined the proper use of the state secrets privilege more than fifty years ago in *United States v. Reynolds*, 345 U.S. 1 (1953) and has not directly considered the doctrine since then. In *Reynolds*, the family members of three civilians who died in the crash of a military plane in Georgia sued for damages. In response to a discovery request for the flight accident report, the government asserted the state secrets privilege, arguing that the report contained information about secret military equipment that was being tested aboard the aircraft during the fatal flight. 345 U.S. at 3-4. Noting that the government's privilege to resist discovery of "military and state secrets" was "not to be lightly invoked," the Court required "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." *Id*. at 7-8. The greater the necessity for the allegedly privileged information in preserving the case, the more a "court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." *Id.* at 11. Where the necessity for the information is "strong . . . the claim of privilege should not be lightly accepted." *Id.* The *Reynolds* Court cautioned that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Id.* at 9-10.

The *Reynolds* Court then upheld the claim of privilege over the accident report, *but did not dismiss the suit.* Rather, it remanded the case for further proceedings, explaining that:

> There is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident. Therefore, it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets. Respondents were given a reasonable opportunity to do just that, when petitioner formally offered to make the surviving crew members available for examination. We think that offer should have been accepted.

345 U.S. at 11. Upon remand, plaintiff's counsel deposed the surviving crew members, and the case was ultimately settled.[10] Under *Reynolds,* the state secrets privilege is an evidentiary privilege that may be invoked to shield legitimately sensitive evidence from discovery, but not to

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[10] Newly disclosed facts about the *Reynolds* litigation confirm the need for the Court to review the state secrets privilege. The accident report at issue in *Reynolds* was recently declassified, and in fact contained no details whatsoever about secret military equipment. *See Herring v. United States,* 2004 WL 2040272 at *8 (E.D. Pa. Sept. 10, 2004) (noting that the accident report "does not… refer to any newly developed electronic devices or secret electronic equipment"). Apparently the government's true motivation in asserting the state secrets privilege was not to protect military secrets but rather to cover up its own negligence. *See id.* (the accident report revealed that "engine failure caused the crash" and that "had the plane complied with the technical orders . . . the accident might have been avoided"); *see also* Barry Siegel, *The Secret of the B-29*, L.A. TIMES, Apr. 18, 2004, at A1 (reporting on the recently unclassified accident report and the *Reynolds* litigation).

justify dismissal of an entire case at the pleading stage.[11]

The Court articulated a related but distinct doctrine in an even older case, *Totten v. United States*, 92 U.S. 105 (1875). In *Totten*, the Court dismissed at the pleading stage an action to enforce an alleged contract to conduct espionage because the government could not confirm or deny the existence of the contract. The *Totten* rule has repeatedly been confused with the state secrets privilege in the lower courts.

Last term in *Tenet v. Doe*, the Court considered the *Totten* rule, which is appropriately invoked to bar judicial review in cases "where success depends upon the existence of [a] secret espionage relationship with the government," 125 S. Ct. 1230, 1236 (2005), or where the government cannot openly acknowledge, i.e., "neither admit or deny [a] fact that [is] central to the suit." *Id*. at 1237 (internal quotation marks omitted). This Court stated that *Totten* is a "unique and categorical bar – a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry." *Id.* at 1235 n.4. The *Totten* rule thus requires a case to "be dismissed on the pleadings without ever reaching the question of evidence." *Id.* at 1237.

The Court distinguished *Totten*'s categorical bar and the evidentiary state secrets privilege by emphasizing the "obvious difference" between a contract action initiated by an

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[11] In recognizing the state secrets privilege, the *Reynolds* Court relied on a number of prior cases in which the government had asserted a privilege during discovery or at trial over discrete pieces of evidence that if disclosed would reveal specific military secrets. *See, e.g., Bank Line v. United States*, 163 F.2d 133 (2d Cir. 1947); *Cresmer v. United States*, 9 F.R.D. 203 (E.D.N.Y. 1949); *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583 (E.D.N.Y. 1939); *Firth Sterling Steel Co. v. Bethlehem Steel Co.,* 199 F. 353 (E.D. Pa. 1912).

unacknowledged covert spy, and an employment discrimination action such as *Webster v. Doe*, 486 U.S. 592 (1988), brought by an "acknowledged (though covert)" employee of the CIA. *Id.* *"Totten's* core concern [is] implicated" only in the first instance. *Id*. In contrast, employment cases like *Webster* are "regularly entertain[ed]" by the courts. *Id*. The Court went on to explain that "*Reynolds* . . . cannot plausibly be read to have replaced the categorical *Totten* bar with the balancing of the state secrets evidentiary privilege . . . The state secrets privilege and the more frequent use of *in camera* judicial proceedings simply cannot provide the absolute protection we found necessary in enunciating the Totten rule." *Id*. Though the Court clarified and upheld the *Totten* rule in *Tenet,* it did not clarify the proper scope and use of the evidentiary state secrets privilege.

The Court should accept review in the present case to resolve conflicting decisions in the lower courts on at least four related issues regarding the state secrets privilege. First, because of confusion about the distinction between the state secrets privilege and the *Totten* rule, courts have disagreed about whether the state secrets privilege ever justifies dismissal at the pleading stage. Some courts have improperly cited the state secrets privilege to dismiss at the pleading stage lawsuits involving central facts that the government could neither confirm nor deny; those courts should have relied instead on the *Totten* rule. *See, e.g., Zuckerbraun v. General Dynamics Corp.,* 935 F.2d 544, 547-48 (2d Cir. 1994) (wrongful death claim could not be resolved without confirming specific details about military weapons systems and "the rules of engagement" under which a Navy vessel operated); *Bareford v. General Dynamics Corp.,* 973 F.2d 1138 (5th Cir. 1992) (same).

Other courts, like the lower courts in this case, have improperly dismissed cases at the pleading stage on state secrets grounds that could have proceeded because they did

not involve central facts the government could neither confirm nor deny. *See, e.g., Tenenbaum v. Simonini,* 372 F.3d 776, 777 (6th Cir. 2004) (upholding pre-discovery dismissal on the basis of the state secrets privilege in a religious discrimination case); *Farnsworth Cannon, Inc. v. Grimes,* 635 F.2d 268, 281 (4th Cir. 1980) (*en banc*) (dismissing contract suit between defense contractors at the pleading stage because any trial on the matter would "inevitably" reveal state secrets); *Black v. United States,* 62 F.3d 1115, 1119 (8th Cir. 1995) (affirming pre-discovery dismissal of a Fourth Amendment suit because of the risk that state secrets might be disclosed).

Still other courts have properly refused to dismiss a suit prematurely on the basis of the state secrets privilege before discovery. *See, e.g., In re United States,* 872 F.2d 472, 478-79 (D.C. Cir. 1989) (rejecting premature and categorical invocation of the privilege to dismiss a Federal Tort Claims Act case); *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 334-35 (4th Cir. 2001) (upholding claim of privilege but rejecting premature dismissal of a trade secret misappropriation suit and remanding for further discovery); *Monarch Assurance P.L.C. v. United States,* 244 F.3d 1356, 1364 (Fed. Cir. 2001) (reversing premature dismissal of a contract suit on the basis of the privilege so that plaintiff could engage in further discovery to support claim with non-privileged evidence); *Spock v. United States*, 464 F. Supp. 510, 519 (S.D.N.Y. 1978) (rejecting pre-discovery motion to dismiss a Federal Tort Claims Act suit on state secrets grounds as premature).

The second category of confusion in state secrets cases concerns whether to allow further non-privileged discovery once the state secrets privilege is invoked, and when the privilege may ultimately require dismissal. Some courts have improperly dismissed a suit after the privilege is invoked without first allowing non-privileged discovery, or explicitly considering whether the parties could litigate the case without

the privileged evidence. *See, e.g., Bowles v. United States,* 950 F.2d 154, 156 (4th Cir. 1991) (dismissing Federal Tort Claims Act suit); *Farnsworth Cannon,* 635 F.2d at 281 (dismissing defense contractors suit). Some courts have allowed some non-privileged discovery, but have then improperly failed to consider non-privileged evidence before dismissing. *Fitzgerald v. Penthouse Internat'l Ltd.*, 776 F.2d 1236, 1241, 1244 (4th Cir. 1985) (dismissing libel suit on the eve of trial without analyzing non-privileged evidence); *Kasza v. Browner,* 133 F.3d 1159, 1170 (9th Cir. 1998) (dismissing a suit concerning hazardous materials at an Air Force facility without analyzing non-privileged evidence); *see also Tilden v. Tenet*, 140 F. Supp. 2d 623, 627 (E.D. Va. 2000) (dismissing gender discrimination claim against the CIA without analyzing non-privileged evidence). Some courts wrongly halt non-privileged discovery once the privilege is invoked, but permit the plaintiff to submit non-privileged evidence before deciding whether dismissal is necessary. *See, e.g., Molerio v. FBI*, 749 F.2d 815, 822 (D.C. Cir. 1984) (halting discovery but terminating employment lawsuit only after evaluating plaintiffs' non-privileged evidence).

Still other courts properly follow *Reynolds* by allowing further non-privileged discovery after invocation of the privilege, and dismissing only if the privileged evidence is necessary for plaintiff to prove a *prima facie* case or for defendant to assert a valid defense. *See, e.g., Ellsberg v. Mitchell*, 709 F.2d 51, 64 n.55 (D.C. Cir. 1983) (reversing dismissal of a constitutional tort action and remanding where the district court "did not even consider whether the plaintiffs were capable of making out a prima facie case without the privileged information."); *Clift v. United States,* 597 F.2d 826, 830 (2d Cir. 1987) (refusing to dismiss an Invention Secrecy Act suit on the basis of the state secrets privilege because plaintiff could produce non-privileged evidence); *McDonnell Douglas Corp. v. United States,* 323 F.3d 1006,

1021 (Fed. Cir. 2003) (dismissing defense contractor suit only after discovery and determination that the claims could not be proved through non-privileged evidence); *see also Heine v. Raus,* 399 F.2d 785, 791 (4th Cir. 1968) (upholding claim of privilege in a defamation suit, but remanding for further discovery of non-privileged evidence); *Monarch Assurance P.L.C.*, 244 F.3d at 1364 (upholding claim of privilege in a contract suit, but remanding for further discover of non-privileged evidence).

Third, the lower courts are in conflict over whether a judge is obligated to examine the allegedly privileged material before dismissing a case due to the privilege. Some courts have improperly dismissed suits without examining the allegedly privileged evidence *in camera. See, e.g., Black,* 62 F.3d at 1119 (examining only government declarations); *Kasza,* 133 F.3d at 1170 (same). Other courts have properly examined the allegedly privileged material before dismissing a case on the basis of the privilege. *See, e.g., Ellsberg*, 709 F.2d at 59 n.37 (when litigant must lose if privilege claim is upheld, "careful *in camera* examination of the material is not only appropriate, but obligatory"); *ACLU v. Brown,* 619 F.2d 1170, 1173 (7th Cir. 1980) (stating that "a party's showing of need often compels the . . . court to conduct an in camera review of the documents allegedly covered by the privilege in order to determine whether the records are properly classified 'secret' by the government").

Fourth, the lower courts have no uniform practice of considering alternatives before dismissing a suit on the basis of the state secrets privilege. Some courts have improperly dismissed cases on the basis of the privilege without considering alternatives. *See, e.g., Farnsworth Cannon*, 635 F.2d at 281; *Tenenbaum*, 372 F.3d at 777. Other courts have properly refused to dismiss cases on the basis of the privilege where certain mechanisms to protect sensitive information would enable the case to proceed. *See, e.g., Halpern v. United States*, 258 F.2d 36, 41 (2d Cir. 1958) (refusing to

dismiss Invention Secrecy Act suit because the case could be tried *in camera*); *In re United States,* 872 F.2d at 478 (discussing bench trials, protective orders, seals and other mechanisms that may be employed to protect sensitive information); *see also Fitzgerald*, 776 F.2d at 1244 ("Only when no amount of effort and care on the part of the court and the parties will safeguard privileged material is dismissal [on state secrets grounds] warranted.").

The need for this Court to clarify the state secrets privilege is urgent because the government's use of the privilege is on the rise. *See* William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 86, 101-02, 107 (Spring 2005). When this Court last addressed the privilege, there were but a handful of lower courts that had considered the privilege. *Reynolds,* 345 U.S. at 7 n.11. A recent study reports that between this Court's decision in *Reynolds* and 1976, there were only four reported cases in which the government invoked the privilege. Weaver & Pallitto at 101. From 1977 to 2001, the number of reported cases concerning the privilege rose to fifty-one. *Id*. And in the first term of the present Administration, the government invoked the privilege in at least eight cases. *Id*. at 109, n.88 (reporting seven cases); *see also* Bill Conroy, *DEA Whistleblower Exposes CIA's "War of Pretense,"* ONLINE JOURNAL, Sept. 15, 2004, at http://www.onlinejournal.com/Special_Reports/091504Conroy/091504conroy.html (reporting that government had successfully invoked the state secrets privilege in a case brought by a former Drug Enforcement Agency employee). Since Ms. Edmonds' case was dismissed, the government also invoked the privilege to dismiss at the outset an individual's claim that he was illegally "rendered" by the United States to Syria and subsequently tortured. *See Arar v. Ashcroft*, No. 04-CV-0249-DGT (E.D.N.Y filed Jan. 22, 2004). Because the state secrets privilege may force a private citizen to sacrifice a vital constitutional right for collective security, the

government's power to invoke it should be tightly constrained, controlled by clearly-defined rules, and closely monitored by the judiciary. The Court should grant review to establish clear guidelines regarding the proper scope and use of the state secrets privilege.

B. Ms. Edmonds' Case Illustrates the Harms that Result from Ongoing Confusion about the State Secrets Privilege.

This case illustrates the harms that result from ongoing confusion over the proper use of the state secrets privilege. The lower courts mistakenly treated Ms. Edmonds' case as a *Totten* case. While not expressly relying on *Totten* and its progeny, the district court dismissed the case at the pleading stage by reasoning that "the nature of the plaintiff's employment" and the "events surrounding her termination" are state secrets. App. 28a. Because Ms. Edmonds' case does not involve an unacknowledged secret relationship with the government or facts that can be neither confirmed or denied, it is clearly not controlled by *Totten*. *See Tenet,* 125 S. Ct. at 1236; *see also Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 146 (1981). Ms. Edmonds, an FBI contract translator with a security clearance, was fired in retaliation for speaking out about serious security breaches. As this Court made clear in *Webster v. Doe*, and recently reaffirmed in *Tenet,* employment litigation against the CIA (and *a fortiori* the FBI) is routinely considered by the courts. *Tenet,* 125 S. Ct. at 1237; *Webster*, 486 U.S. at 604.

The nature of Edmonds' job, moreover, is not even a state secret, let alone a fact that can be neither confirmed nor denied under *Totten*. FBI agents and translators are law enforcement personnel, not covert and unacknowledged government agents. In stark contrast to covert spies, the duties of FBI contract linguists are public knowledge and have been widely disclosed to the public. *See e.g.,* C.A. App.

59-60; IG Report at 3-7. The notion that all of the events surrounding Ms. Edmonds' termination are state secrets is equally implausible. A great deal of information about her termination is already public – and much of it was disclosed by the government itself. *See, e.g.,* C.A. App. 83-85, 108-09, 200-01. The Inspector General Report contains a tremendous amount of detail about the structure of the translation unit, the FBI response to security breaches, and the substance of Ms. Edmonds' allegations. IG Report at 3-7. The events surrounding Ms. Edmonds' termination simply cannot be considered state secrets when information about them has been so widely distributed. *See Snepp v. United States*, 444 U.S. 507, 511-512 (1980) (suggesting government has no interest, and lacks authority, to suppress national security information already in the public domain).

The lower courts' confusion over the state secrets privilege also led them to dismiss Ms. Edmonds' claims prior to discovery and the consideration of non-privileged evidence. Even at this early stage of the litigation, the available evidence strongly suggests that this case could be decided without relying on state secrets. The Inspector General's report would be admissible to support Ms. Edmonds' core First Amendment claim and negate the government's defenses.[12] Ms. Edmonds could also rely on information provided by the FBI in unclassified briefings to Congress. Furthermore, Ms. Edmonds could bolster her case by conducting non-privileged discovery. For example, the Inspector General's report identifies a range of non-

[12] Fed. R. Evid. 803(8)(C) provides that "Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth…in civil actions… factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness," are not "excluded by the hearsay rule."

privileged material from FBI emails, reports, and memoranda.[13] In addition, because the government has publicly admitted to a number of Ms. Edmonds' allegations, it may have no basis for denying certain allegations in her Complaint.

Finally, Ms. Edmonds' case illustrates how improper use of the state secrets privilege can threaten rather than protect national security. Ms. Edmonds raised serious allegations about espionage within the FBI unit responsible for translating counterterrorism wiretaps. IG Report at 34 (noting that Ms. Edmonds' allegations "raise serious concerns that, if true, could potentially have extremely damaging consequences for the FBI," and remarking on the "need for FBI vigilance about security issues"). Since the attacks of September 11, "there has been a surge of national security whistleblowers whose disclosures are warnings so that tragedy will not recur." Testimony of Thomas Devine, Government Accountability Project, Senate Governmental Affairs Comm. on S.1358, Nov. 12, 2003, at 9, at http://hsgac.senate.gov/_files/111203devine.pdf. If the state

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[13] *See, e.g.,* IG Report at 15, n.15 (quoting email written by the Language Supervisor); *id.* at 16 (quoting an email written by the Language Administration and Acquisition Unit); *id.* (quoting an Electronic Communication written by the Language Supervisor concerning Edmonds); *id.* at 17 (quoting testimony of FBI manager); *id.* (quoting Security Officer's request for polygraph examinations); *id.* at 20 (quoting what appears to be testimony of FBI manager); *id.* at 21 (quoting an Electronic Communication recommending Ms. Edmonds' termination, which included reference to the impression that Ms. Edmonds was using her whistleblower status as a "club" against her supervisors); *id.* (quoting final Electronic Communication recommending termination).

secrets privilege can be invoked to bar litigation by employees working in classified environments, then the government may retaliate with impunity against other whistleblowers who disclose national security blunders. As the Inspector General advised, such employees should be encouraged, rather than deterred, from raising their concerns. IG Report at 32. The Court should accept review to ensure that the state secrets privilege is not used as a tool to silence employees who risk their careers to protect the nation.

II. THE COURT SHOULD GRANT REVIEW TO CONSIDER THE COURT OF APPEALS' *SUA SPONTE* EXCLUSION OF THE PRESS AND PUBLIC FROM THE COURTROOM.

The court of appeals' decision to exclude the press and public from the courtroom during appellate argument, made at the eleventh hour without any findings as to the necessity of closure and without any request by the government to close proceedings, provides another basis for this Court's review. Indeed, the record in this case presents the opportunity, and demonstrates the need, for this Court to clarify that the First Amendment right of access to judicial proceedings extends to civil cases and to appellate arguments.

In the landmark case of *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980), this Court first held, in the context of criminal trials, that the First Amendment guarantees to the press and public the right of access to judicial proceedings. As this Court explained: "Free speech carries with it some freedom to listen . . . [T]he First Amendment guarantees of freedom and press, standing alone, prohibit government from summarily closing courtroom doors." 448 U.S. at 576. In particular, when "the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest,

and is narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 606-07 (1982). Thus, before a proceeding may be closed to the press and public, the court must make "specific, on record findings . . . demonstrating that closure is essential to preserve higher values and is narrowly tailored to preserve that interest." *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501, 510 (1984) (citations omitted).

Other circuits have recognized that the rationale for ensuring public access to criminal trials extends to civil and appellate proceedings. For example, in *In re Grand Jury Proceedings*, 983 F.2d 74 (7th Cir. 1992), the Seventh Circuit denied motions to seal appellate arguments in two cases, one involving grand jury material and the other involving medical records. Judge Easterbrook explained:

> What happens in the halls of government is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat; this requires rigorous justification.

983 F.2d at 75, *see also Doe v. United States,* 253 F.3d 256, 262 (6th Cir. 2001) (citations omitted) (denying government motion to close appellate argument in case involving subpoena in ongoing criminal investigation). The requirement of public appellate argument does not evaporate because an appeal involves national security information. When the United States asked this Court to close just *part* of the oral argument in the Pentagon Papers case – a case that involved classified information of the greatest sensitivity – the motion was denied. *New York Times Co. v. United States,* 403 U.S.

944 (1971). Likewise, in an appeal in the ongoing prosecution of Zacarias Moussaoui, an alleged conspirator in the September 11 terrorist plot, the Fourth Circuit soundly rejected the government's argument that the entire appellate argument be held *in camera*:

> There can be no question that the First Amendment guarantees a right of access by the public to oral arguments in the appellate proceedings of this court. Such hearings have historically been open to the public, and the very considerations that counsel in favor of openness of criminal trial support a similar degree of openness in appellate proceedings.

United States v. Moussaoui, 65 Fed. Appx. 881, 890 (4th Cir. 2003).[14]

In contrast, the court of appeals here simply issued a one-line order summarily denying the motions of Ms. Edmonds and a media consortium to open the argument to the public. That action was all the more remarkable because the government made no motion to exclude the public from the courtroom, and indeed did not file any portion of its brief under seal. Moreover, neither Ms. Edmonds nor her counsel had security clearances, thus guaranteeing that no classified information could be mentioned during the argument.

The pointlessness of the court's closure order demonstrates the need for consistent enforcement of this Court's First Amendment holdings. While there can be no doubt that the protection of state secrets from disclosure is a compelling government interest, there was absolutely no connection between that interest and the court's actions in

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[14] A portion of the appellate argument in *Moussaoui* was closed, following a determination by the court that sensitive national security information might be disclosed.

this case. Assuming that security considerations were the motivating factor behind the court's closure order, the order was either fatally over- or under-inclusive. If, as the government itself plainly believed, there was no need to exclude anyone from the courtroom, then the court's order was unjustified and excessive. If, on the other hand, the court deemed it likely that the argument would involve a discussed of the alleged state secrets themselves, then Ms. Edmonds' uncleared counsel should have been excluded along with the press and public. Either way, the court's actions were the very antithesis of narrow tailoring and demonstrate the pressing need for this Court's guidance.

Finally, in a time of increasing government demands for secrecy, it is critical that the public retain confidence in the integrity of judicial proceedings. Cases involving state secrets will always pose special challenges to the adversarial process and to principles of open government. Especially when the scales are tilted against a private litigant through deprivation of key evidence or even the elimination of an otherwise legitimate claim, it is imperative to preserve the presumption of openness. Just as the privilege itself should "not . . . be lightly invoked," *Reynolds*, 345 U.S. at 7, the constitutional principle of openness should not be lightly discarded. It is no accident that the closure of the courtroom in this case generated as much attention and controversy as the profoundly serious allegations at the heart of this case, and the court of appeals' unexplained closure unnecessarily contributed to the public perception of official cover-up. This case, accordingly, presents an ideal opportunity to clarify both the reach and the importance of the First Amendment's guarantee of open judicial proceedings.

CONCLUSION

For the reasons stated above, petitioner urges this Court to grant review in this case.

Respectfully submitted,

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