

Form A1-2. Opposition to Motion to Dismiss Based on the State Secrets Privilege

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Use. The government (or a contractor relying on the government's assertion) has moved to dismiss at the pleading stage on the ground that the state secrets privilege makes the case impossible to litigate. The opposition does not contest the government's right to assert the privilege. It argues that (1) the assertion must be tested under *Reynolds*; (2) the privilege does not reach officially acknowledged facts; (3) the remedy is exclusion, with dismissal reserved for the three exceptional grounds, none of which applies at this stage; and (4) protective measures short of dismissal are available.

When to use. Opposing a motion to dismiss or for summary judgment based on the state secrets privilege. **Not for:** FOIA withholdings, which are litigated under the exemptions (Forms B1-2, A3-1).

Deadlines. The opposition is due under the court's local rule (in the District of Columbia, 14 days after service, LCvR 7(b)).

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLUMBIA

3 [PLAINTIFF],
4 Plaintiff,
5 v.
6 [DEFENDANTS],
7 Defendants.

Civil Action No.
[]

**PLAINTIFF'S MEMORANDUM
IN OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS ON THE BASIS
OF THE STATE SECRETS
PRIVILEGE**

8
9 **INTRODUCTION**

10 Defendants ask the Court to dismiss this case before any discovery on the ground that
11 litigating it would reveal state secrets. Plaintiff does not ask the Court to order disclosure of any
12 properly privileged information. Plaintiff asks the Court to do what *United States v. Reynolds*
13 requires: determine for itself whether the privilege has been properly invoked and what it
14 covers, remove from the case whatever information is privileged, and allow Plaintiff to proceed
15 on the substantial body of evidence that is not. Much of the subject matter of this case has been
16 officially acknowledged by the United States in statutes, in sworn testimony of officials before
17 Congress, and in records the government has itself released. Those facts are outside the
18 privilege. At this stage the Court cannot know whether the privilege will prevent a prima facie
19 case or deprive Defendants of a valid defense, and dismissal on either ground would be
20 premature.

21 **BACKGROUND**

22 **A. Plaintiff's claims.** [Summarize claims and the elements Plaintiff must prove.]

23 **B. Officially acknowledged facts.** [Table or numbered list. For each fact: the fact; the
24 official source; citation. Examples of categories (adapt; do not assert facts that have not been
25 officially acknowledged): 1. Congress has found and enacted that [e.g., federal agencies hold
26 records concerning unidentified anomalous phenomena and must transmit them to the National
27 Archives], Pub. L. No. 118-31, §§ 1841-1843 (2023). 2. Congress has prohibited the use of
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1 funds for [UAP-related activities not reported to Congress], *id.* § 1687. 3. [Official], in sworn
2 testimony before [committee] on [date], stated that [fact]. [Hearing cite at page.] 4. The
3 Department of War released [record identifier] on [date], which states [fact].]

4 **C. Defendants’ assertion of privilege.** [Describe the declarations: who signed; whether
5 the head of the department; whether based on personal consideration; categories claimed;
6 whether a classified ex parte declaration was lodged.]

7 **ARGUMENT**

8 **I. The Court must test the assertion under *Reynolds*.**

9 The privilege “is not to be lightly invoked.” *United States v. Reynolds*, 345 U.S. 1, 7
10 (1953). It requires “formal claim of privilege, lodged by the head of the department which has
11 control over the matter, after actual personal consideration by that officer.” *Id.* at 7-8. “The
12 court itself must determine whether the circumstances are appropriate for the claim of
13 privilege.” *Id.* at 8. “Judicial control over the evidence in a case cannot be abdicated to the
14 caprice of executive officers.” *Id.* at 9-10. Plaintiff’s need for the information is substantial,
15 which requires the Court to “probe” the claim more deeply. *See id.* at 11.

16 [If applicable:] The declaration offered here does not satisfy these requirements because [it was
17 signed by a subordinate official; it does not reflect personal consideration; it describes harm in
18 conclusory terms]. Defendants have also not shown compliance with the Attorney General’s
19 policy, which requires a “detailed declaration based on personal knowledge” specifying the
20 information to be protected, the significant harm disclosure could reasonably be expected to
21 cause, and the reason disclosure is reasonably likely to cause that harm, and which requires the
22 Attorney General’s personal approval. Memorandum from the Attorney General, *Policies and*
23 *Procedures Governing Invocation of the State Secrets Privilege* §§ 2.A, 4 (Sept. 23, 2009). The
24 Attorney General reaffirmed that policy in 2022 and added that the agency head’s declaration
25 must be “based on personal consideration of the matter.” Memorandum from the Attorney
26 General, *Supplement to Policies and Procedures Governing Invocation of the State Secrets*

1 *Privilege* § A.1 (Sept. 30, 2022). The Court should direct Defendants to state whether those
2 procedures were followed.

3 **II. The privilege does not extend to officially acknowledged facts.**

4 The privilege protects information whose official confirmation would harm national
5 security. *United States v. Zubaydah*, 595 U.S. 195, 210-11 (2022). In *Zubaydah*, the Court held
6 that widespread unofficial reporting did not defeat the privilege, because “official confirmation
7 of sensitive information may pose risks that unofficial disclosure does not.” *Id.* That reasoning
8 applies in reverse here. Every fact listed in Background Part B has already been confirmed by
9 the United States itself, through Congress, through sworn testimony of federal officials, or
10 through records the government released. Litigating those facts cannot cause the harm the
11 privilege exists to prevent. Plaintiff’s prima facie case rests on those facts and on [Plaintiff’s
12 own knowledge and other unclassified evidence]. [If a FOIA-style official-acknowledgment
13 test is useful, cite *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990), and *ACLU v. CIA*,
14 710 F.3d 422 (D.C. Cir. 2013); confirm pins.]

15 **III. At this stage the remedy is exclusion of privileged evidence.**

16 When the privilege applies, “the evidence is unavailable, as though a witness had died,
17 and the case will proceed accordingly, with no consequences save those resulting from the loss
18 of the evidence.” *In re Sealed Case*, 494 F.3d 139, 144-45 (D.C. Cir. 2007) (quoting *Ellsberg v.*
19 *Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983)). Dismissal is warranted only if (1) the plaintiff
20 cannot establish a prima facie case without privileged evidence, *id.* at 145; (2) the privilege
21 deprives the defendant of information that would otherwise give it a valid defense, *id.* at 148-
22 49; or (3) privileged evidence is so inseparable from nonprivileged information needed for the
23 claims or defenses that “litigating the case to a judgment on the merits would present an
24 unacceptable risk of disclosing state secrets,” *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d
25 1070, 1083 (9th Cir. 2010) (en banc); see *In re Sealed Case*, 494 F.3d at 153. None applies.

26 **A. Plaintiff can make a prima facie case with nonprivileged evidence.** [Walk
27 through each element and the unclassified evidence for it.] In *In re Sealed Case*, the D.C.
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1 Circuit reversed dismissal because the plaintiff could make out his claim even after privileged
2 material, including portions of inspector general reports, was excluded. 494 F.3d at 145-48,
3 153.

4 **B. Defendants have not shown that the privilege deprives them of a valid defense.**

5 A defendant seeking dismissal on this ground must identify a defense that the privileged
6 information would actually establish. In the D.C. Circuit a “valid defense” is one that “is
7 meritorious and not merely plausible and would require judgment for the defendant,” and the
8 district court must verify it through “appropriately tailored in camera review of the privileged
9 record.” *In re Sealed Case*, 494 F.3d at 149, 151. The Ninth Circuit’s 2024 decision in *Fazaga*
10 *v. FBI*, 124 F.4th 637 (9th Cir. 2024), adopted that requirement in detail, though that judgment
11 was later vacated on other grounds, *FBI v. Fazaga*, No. 25-430, 2026 WL 922539 (U.S. Apr. 6,
12 2026); its reasoning remains persuasive. Where the defense rests on a factual assertion, the
13 privileged evidence must establish the defense, and Plaintiff must have an opportunity to be
14 heard on whether it does. At the pleading stage, before Defendants have answered, the Court
15 cannot make that determination. *Cf. Jeppesen*, 614 F.3d at 1093 (Hawkins, J., joined by four
16 other judges, dissenting) (objecting that the majority dismissed “before Jeppesen has even filed
17 an answer”).

18 The Fourth Circuit’s reasoning in *Al Shimari v. CACI Premier Technology, Inc.*, 170
19 F.4th 162 (4th Cir. 2026), vacated on reh’g on other grounds, 2026 WL 2547096 (4th Cir.
20 Aug. 28, 2026) (per curiam) (unpublished), shows how the inquiry should proceed; the opinion
21 was vacated because intervening Supreme Court authority foreclosed the Alien Tort Statute
22 claims, not because of its privilege analysis. There, the government asserted the privilege over
23 the identities, training, interrogation plans, and contemporaneous reports of interrogators. The
24 Fourth Circuit examined each avenue of defense the contractor claimed it had lost and held that
25 the privilege did not prevent the contractor from contesting either whether the alleged treatment
26 occurred or whether it was involved; the effect of pseudonymous and telephonic testimony on
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1 the defense was “qualitative[]” and did not require dismissal. *Id.* at 197-98. The case was tried
2 to verdict.

3 **C. The evidence is not so intertwined that litigation would risk disclosure.** [Explain
4 how claims can be tried on acknowledged facts; propose segregation.] Dismissal on this ground
5 is appropriate only in the exceptional case, *Jeppesen*, 614 F.3d at 1083, 1089, and the D.C.
6 Circuit in *In re Sealed Case* declined to dismiss where the plaintiff’s case could be tried on
7 unprivileged evidence with the district court policing the line through in camera review, 494
8 F.3d at 151-54. The measures available here include the protective order Plaintiff has proposed
9 [or the Court has entered], cleared counsel, closed sessions for classified matters, pseudonyms,
10 unclassified summaries and stipulations, and in camera review of specific documents.

11 **IV. The *Totten* bar does not apply.** [Include if Defendants invoke it.] *Totten v. United*
12 *States*, 92 U.S. 105 (1876), and *Tenet v. Doe*, 544 U.S. 1 (2005), bar suits whose very subject
13 matter is a secret relationship with the government, such as an agreement to perform espionage.
14 Plaintiff does not sue to enforce any secret agreement. Plaintiff’s claims arise under [statute /
15 constitutional provision / state tort law] and concern [conduct], the existence and general nature
16 of which the United States has officially acknowledged. The categorical bar has no application
17 to claims of that kind. *Cf. General Dynamics Corp. v. United States*, 563 U.S. 478, 490 (2011)
18 (limiting the remedy in contract cases to defenses supported by a prima facie showing).

19 **V. Alternatively, the Court should defer ruling.**

20 If the Court is not prepared to deny the motion, it should defer ruling until (1)
21 Defendants answer;
22 (2) the Court has reviewed in camera the information over which the privilege is claimed, in
23 addition to the declarations describing it; and (3) the parties have presented proposals for
24 protective measures. [If a declassification request or congressional inquiry is pending, ask for a
25 stay pending its outcome.]
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CONCLUSION

The motion to dismiss should be denied. The Court should determine the scope of the privilege by reviewing the underlying information in camera, exclude what it finds privileged, and set a schedule for discovery under appropriate protective measures.

Dated: [_____] Respectfully submitted,
[signature block]

1 **Alternative Part III for a case in the Fourth Circuit**

2 [Replace Part III with the following when the case is pending in a district court in the Fourth
3 Circuit. The Fourth Circuit applies *Reynolds* through a three-part analysis and does not follow
4 the D.C. Circuit’s requirement that the court verify a “valid defense” in camera, so the
5 argument shifts to the second step and to the scope of the claims.]

6 **III. The privileged information is not so central to this case that it cannot be**
7 **litigated.**

8 The Fourth Circuit resolves a state secrets assertion in three steps: whether the
9 procedural requirements for the claim were met, whether the information is privileged, and how
10 the case should proceed in light of a successful claim. *El-Masri v. United States*, 479 F.3d 296,
11 304 (4th Cir. 2007); *Wikimedia Foundation v. National Security Agency*, 14 F.4th 276, 302-03
12 (4th Cir. 2021). The doctrine “does not represent a surrender of judicial control over access to
13 the courts.” *El-Masri*, 479 F.3d at 312. “If a proceeding involving state secrets can be fairly
14 litigated without resort to the privileged information, it may continue.” *Id.* at 306. Dismissal
15 follows only where the plaintiff cannot make a prima facie case without privileged evidence,
16 where the defendant could not properly defend itself without it, or where further litigation
17 would present an unjustifiable risk of disclosure. *Abilt v. CIA*, 848 F.3d 305, 313-14 (4th Cir.
18 2017); *Wikimedia*, 14 F.4th at 303.

19 **A. The Court should define what is privileged before deciding what follows.** The
20 second step is where the Court may examine the government’s showing most closely. “[W]here
21 there is a strong showing of necessity, the claim of privilege should not be lightly accepted,”
22 and the Court may consider the evidence it needs, including in camera, to decide whether the
23 information is in fact a state secret. *El-Masri*, 479 F.3d at 305; *Wikimedia*, 14 F.4th at 303
24 (citing *Sterling v. Tenet*, 416 F.3d 338, 345 (4th Cir. 2005)). Plaintiff’s need here is strong, and
25 the facts on which Plaintiff relies have been officially acknowledged (Part II). The Court
26 should sustain the privilege, if at all, only for the identified categories in Defendants’
27 declarations and should state that officially acknowledged facts fall outside it. *See Wikimedia*,

1 14 F.4th at 302 (reading the district court’s ruling not “to make privileged what’s already
2 public”).

3 **B. Plaintiff’s prima facie case rests on nonprivileged evidence.** [Walk through each
4 element and the unclassified evidence for it, as in the main Part III.A.]

5 **C. This is not a case in which every valid defense would reveal state secrets.** The
6 Fourth Circuit has distinguished a case in which the government points to “possible defenses”
7 that cannot be pursued without privileged material from one in which “any valid defense ...
8 would require resort to privileged materials,” and dismissed without further inquiry only in the
9 second category. *Wikimedia*, 14 F.4th at 304 (discussing *In re Sealed Case*, 494 F.3d 139, 149
10 (D.C. Cir. 2007), and leaving open whether to require proof that a defense is valid). Dismissal
11 in that category is reserved for a case in which state secrets are “so central to [the] proceeding
12 that it cannot be litigated without threatening their disclosure.” *Id.* (quoting *El-Masri*, 479 F.3d
13 at 308). In *Wikimedia* the claim was that the agency acquired all communications on a
14 monitored cable, and no answer was possible without revealing how and where the surveillance
15 was done. In *El-Masri* the claims required proof of how the rendition program was run and who
16 ran it. 479 F.3d at 309-11. In *Abilt* and *Sterling* the employment claims required comparison of
17 covert employees and the agency’s internal assignment criteria. 848 F.3d at 313-16; 416 F.3d at
18 346-48. Here, by contrast, [state how each claim and each likely defense can be tried on
19 acknowledged facts and unclassified evidence: e.g., the defense that records were transferred
20 lawfully turns on dates, statutes, and unclassified correspondence, not on program details].
21 Program names, locations, and technical details are not elements of any claim.

22 **D. The Court should adopt measures short of dismissal.** [As in the main Part III.C:
23 protective order, cleared counsel, closed sessions, pseudonyms, unclassified summaries and
24 stipulations.] If the Court concludes that some claims cannot proceed, it should dismiss only
25 those claims and allow the rest to go forward.

Drafting notes

- Build Background Part B carefully. Official acknowledgment does all the work. Use only official sources (statutes, committee reports, sworn testimony of federal officials, agency releases). Insider testimony by non-officials, journalism, and books do not qualify under *Zubaydah*; cite them, if at all, only for context.
- Check whether Defendants' motion relies on *Kasza v. Browner*, 133 F.3d 1159 (9th Cir. 1998) (Groom Lake); distinguish it on official acknowledgment and on the presidential RCRA exemption in that case.
- If the case was filed in a court outside the D.C. Circuit, substitute that circuit's leading case (e.g., *El-Masri*, 479 F.3d 296 (4th Cir. 2007), in the Fourth Circuit (*Al Shimari*'s panel opinion is vacated); *Jeppesen* in the Ninth Circuit; *Sakab*, 58 F.4th 585 (1st Cir. 2023), in the First Circuit).
- Use the bracketed personal-consideration challenge in Part I only when the declaration gives a factual basis for it. Courts accept a department head's consideration of the categories of information and of subordinates' classified declarations without review of each document. *In re Terrorist Attacks on Sept. 11, 2001*, 523 F. Supp. 3d 478, 496-97 (S.D.N.Y. 2021) (Attorney General and Acting DNI; relying on *Kasza*, 133 F.3d at 1169, and *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 400 (D.C. Cir. 1984)). The stronger objection is usually that the claim is not confined to identified documents or categories, which that court also required.
- In the Fourth Circuit, use the Alternative Part III above. *Abilt v. CIA*, 848 F.3d 305, 313-16 (4th Cir. 2017), affirmed dismissal of a CIA employee's discrimination and retaliation claims because any nondiscriminatory reason the agency could give would rest on privileged information, and it did not ask whether that defense was meritorious. The *In re Sealed Case* "meritorious and not merely plausible" standard is not the law there. Argue instead that the defendant's main avenues of defense can be presented with unprivileged evidence, and distinguish *Abilt* and *Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005), where the claims put the agency's own assignment criteria in issue.
- Expect the government to argue that confirming who holds UAP-related material, where, and under what program would reveal sources, methods, or capabilities even if the general subject is acknowledged. Draft the claims so that program names, locations, and technical details are not elements.
- Before filing, confirm that the 2009 policy and the 2022 supplement have not been withdrawn. No public rescission had been found as of October 14, 2026 (see [Issue A1](#)).