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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

TWITTER, INC.,

Plaintiff,

v.

WILLIAM P. BARR, Attorney General of the United States, *et al.*,

Defendants.

Case No. 14-cv-4480-YGR

[PROPOSED] BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AND THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA IN SUPPORT OF TWITTER, INC.'S OPPOSITION TO DEFENDANTS' INVOCATION OF STATE SECRETS AND MOTION TO DISMISS

Hon. Yvonne Gonzalez Rogers

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STATEMENT OF INTEREST[1]

this suit. Amici are not aware of any case supporting the application of the privilege in these circumstances, and the government cites to none.

What is even more troubling is that the government makes this argument in the alternative. In other words, the government's position is that if the declaration must be disclosed to Twitter's security-cleared counsel, it is a state secret to be stripped from the evidentiary record—but if not, it is not. Unsurprisingly, the law of the state secrets privilege does not countenance these kinds of games. The privilege is too powerful a tool, and too susceptible to abuse, to permit its casual invocation for a tactical advantage.

At bottom, the facts and circumstances of this case make plain that the declaration is not subject to the privilege. And even if it were, the result is simply that the declaration is removed from the case, and the litigation proceeds accordingly. Dismissal on the basis of the privilege is entirely inappropriate here.

ARGUMENT

I. The Court Should Reject the Government's Invocation of the Privilege.

A. Both precedent and history show why the Court must conduct a particularly searching inquiry of the government's claim of privilege.

A look at several of the government's past invocations of the state secrets privilege makes clear why this Court must, as the Ninth Circuit has demanded, undertake an especially searching evaluation of the government's assertion of the privilege in this case.

The state secrets privilege is a common law evidentiary rule that, when properly invoked, allows the government to withhold information from discovery by establishing "there is a 'reasonable danger' that disclosure will 'expose military matters which, in the interest of national security, should not be divulged.'" *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1196 (9th Cir. 2007) (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)). The government bears the burden of establishing the privilege, which is "is not to be lightly invoked." *Reynolds*, 345 U.S. at 7. As courts have repeatedly admonished, the government may not use the privilege "to shield any material not strictly necessary" to prevent harm to national security. *Mohamed v.*

Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983)). "Because evidentiary privileges by their very nature hinder the ascertainment of the truth, and may even torpedo it entirely, their exercise 'should in every instance be limited to their narrowest purpose.'" *In re United States*, 872 F.2d 472, 478–79 (D.C. Cir. 1989) (citation omitted).

Assertions of the state secrets privilege are therefore subject to the most stringent judicial scrutiny. The courts' active role in evaluating the government's claims of privilege is essential, as it "ensure[s] that" the privilege applies only when absolutely necessary. *Jeppesen*, 614 F.3d at 1082 (quoting *Ellsberg*, 709 F.2d at 58). Courts must "take very seriously [their] obligation to review the government's claims with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege." *Id.* at 1077 (alteration omitted) (quoting *Al-Haramain*, 507 F.3d at 1203). As a result, successful claims of the privilege are found only "in exceptional circumstances." *Id.*

The Ninth Circuit has emphasized that mere classification "is insufficient" for use as a proxy to determine whether information is subject to the privilege. Blind acceptance of government classification as a basis for applying the privilege "would trivialize the court's role, which the Supreme Court has clearly admonished 'cannot be abdicated to the caprice of executive officers.'" *Id.* at 1082 (quoting *Reynolds*, 345 U.S. at 9–10). It would also ignore reality. Even leading members of the intelligence community have acknowledged that not all classification decisions would withstand judicial scrutiny, and disclosure of classified material may not lead to harm at all—let alone the type of harm required to be shown in the state secrets context.[2i]

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In *Reynolds*, the case establishing the modern roots of the state secrets evidentiary privilege, the Supreme Court cautioned that abandonment of judicial control over the privilege would open the door to "intolerable abuses." 345 U.S. at 8. More generally, courts have recognized "the risk that government officials may be motivated to invoke the state secrets doctrine not only by their obligation to protect national security," but also by illegitimate and self-serving reasons. *Jeppesen*, 614 F.3d at 1085 n.8.

Indeed, the government's conduct in other cases involving assertions of the state secrets privilege has repeatedly justified these concerns.

In *Reynolds* itself, the government engaged in exactly the kind of abuse that both the Ninth Circuit and the Supreme Court have warned against. *Reynolds* was a civil suit against the government brought by the estates of civilians killed in a military plane crash. *Reynolds*, 345 U.S. at 3. When the plaintiffs sought production of the Air Force's accident report, the government asserted that the report should be protected by the state secrets privilege because the aircraft that had crashed was engaged in a "highly secret mission," and disclosure of the report would "seriously hamper[] national security." *Id.* at 3–4. Several decades later, the accident report was declassified—and lo and behold, it turned out to contain no "details of any secret project the plane was involved in" (as the government had declared to the courts), but instead detailed "a horror story of incompetence, bungling, and tragic error." Garry Wills, *Why the Government Can Legally Lie*, 56 N.Y. Rev. of Books 32, 33 (2009); s*ee also Jeppesen*, 614 F.3d at 1094 n.1 (Hawkins, J., dissenting) (noting that in *Reynolds*, "avoidance of embarrassment—not preservation of state secrets—appears to have motivated the Executive's invocation of the privilege").

Similarly—and famously—in *New York Times Company v. United States* (*Pentagon Papers*), 403 U.S. 713 (1971), the government sought to enjoin the *New York Times* and *Washington Post* from publishing the contents of a classified study about the Vietnam War. The government asserted that disclosure would "pose a grave and immediate danger to the security of the United States." Brief for Appellant at 3, *Pentagon Papers*, 403 U.S. 713 (Nos. 1873, 1885),

1971 WL 167581, at *2, *7, *21, *26 (June 26, 1971). The Solicitor General later admitted, however, that he "[had] never seen any trace of a threat to the national security from the publication" and had not "seen it even suggested that there was such an actual threat." Erwin Griswold, *Secrets Not Worth Keeping*, Wash. Post, Feb. 16, 1989, https://wapo.st/2vybD7n. Rather, he explained, "there is massive overclassification and . . . the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another." *Id.*

More recently, the government's opportunistic invocation of the state secrets privilege has earned a rebuke from the Ninth Circuit. In *Ibrahim v. U.S. Department of Homeland Security*, 912 F.3d 1147 (9th Cir. 2019) (en banc), the plaintiff's lawyers sought attorneys' fees after successfully challenging the plaintiff's placement on the "No Fly" list. Although the government knew that this placement was the result of a mistake, it had continued to "unreasonabl[y]" defend the litigation. *Id.* at 1171. In the course of defending the case, the government had played "discovery games" with the state secrets privilege and "made false representations to the court" about whether it would seek to rely on state secrets at trial. *Id.* at 1162–65, 1171 & n.20. After a bench trial (over the government's state secrets objections), the district court found in the plaintiff's favor. *Id.* It also found that the plaintiff was entitled to attorneys' fees, but not to a rate enhancement because the government had not acted in "bad faith." *Id.* at 1165. On appeal, the Ninth Circuit reversed the district court's "bad faith" finding on several grounds. *Id.* at 1182. The court was particularly concerned that, even though the government had conceded that the plaintiff was not a threat to national security, it continued to place her on a watchlist for no apparent reason—and its justification was "claimed to be a state secret." *Id.* at 1160, 1171, 1182.

And in *Horn v. Huddle*, 647 F. Supp. 2d 55 (D.D.C. 2009), *vacated upon settlement*, 699 F. Supp. 2d 236 (D.D.C. 2010), the government "committed fraud on [the district court] and the Court of Appeals" by "knowingly failing to correct a declaration" in support of the state secrets privilege "that had been shown to be demonstrably false." 647 F. Supp. 2d. at 58 & n.3. The

whose access to the material is necessary." 558 F.2d 1130, 1132 (2d Cir. 1977). This approach is in keeping with courts' broad practice of using security-cleared counsel in noncriminal cases to ensure effective litigation of a wide variety of sensitive topics. *See, e.g.*, *Al Bakri v. Obama*, 660 F. Supp. 2d 1, 2 (D.D.C. 2009) (ordering disclosure of facts concerning detainees at Bagram Airbase in Afghanistan to security-cleared counsel); *Ibrahim v. Dep't of Homeland Sec.*, C 06-00545 WHA, 2013 WL 1703367 (N.D. Cal. Apr. 19, 2013) (ordering disclosure of documents pertaining to the "No Fly" list to Sensitive Security Information-cleared counsel); *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner*, 710 F. Supp. 2d 637, 660 (N.D. Ohio 2010) (ordering that counsel for charity contesting freezing of its assets "obtain an adequate security clearance to view the necessary documents, and will then view these documents in camera, under protective order, and without disclosing the contents to [plaintiff]").[3]

Critically, disclosure to security-cleared counsel under secure conditions is not the equivalent of a general public disclosure. *See Al-Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 983 (9th Cir. 2012) (disclosing information to a "lawyer for the designated entity who has the appropriate security clearance also does not implicate national security when viewing the classified material because, by definition, he or she has the appropriate security clearance"). And, of course, the degree of disclosure to security-cleared counsel can be tailored to the necessities of the case.[4]

[3] In recent years, the federal courts hav [(pr) 46(t)-26-6(t)4(r26()3((of)-L0(e)4(f)3(he)4ds)-11(he)4(983 ()3

C. The circumstances of this case and the government's invocation of the state secrets privilege show that the privilege is inapplicable.

The facts of this case, set forth fully in Twitter's opposition brief, make plain that the government's invocation of the state secrets privilege is improper. *See* Pl. Opp. 4–17. A few key points bear emphasis. First, the government voluntarily entered the classified Steinbach declaration into evidence more than two years ago. It now contends that the declaration is so sensitive that it must be removed from the case, yet the government's delay in asserting the privilege suggests otherwise. *Cf. Horn*, 647 F. Supp. 2d at 58 (observing that the government invoked the state secrets privilege "too broadly, inconsistently, and sloppily"). Second, at least some of the information that the government contends is a "state secret" is already in Twitter's possession. *See* Gov. Br. 10, ECF No. 281 (describing four categories of information at issue, the first of which is "Information Regarding National Security Legal Process that Has Been Served on Twitter"). The notion that it would harm national security to disclose *this* information in particular to Twitter's security-cleared counsel is deeply suspect. And finally, the Court—in its opinion denying the government's motion for summary judgment—has *already* found that the classified Steinbach declaration "largely relies on a generic, and seemingly boilerplate, description of the mosaic theory and a broad brush concern that the information at issue will make more difficult the complications associated with intelligence gathering in the internet age." *Twitter, Inc. v. Sessions*, 263 F. Supp. 3d 803, 817 (N.D. Cal. 2017).

In light of the government's belated and unusual invocation of the state secrets privilege over material already found to be "generic" and "seemingly boilerplate," the Court should hold that the privilege is inapplicable, and it should deny the government's request to discharge the Order to Show Cause.

II. Even if the State Secrets Privilege Applies to the Classified Steinbach Declaration, Dismissal Here Is Improper.

Even where a court has determined that an invocation of the *Reynolds* evidentiary privilege is valid, the result is not the automatic dismissal of a litigant's claims. "The effect of

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"inherent authority over procedure").

Gov. Notice of Motion, ECF No. 281. The government thus concedes that, from its perspective, litigation on the merits of Twitter's claims could proceed in this case—it merely objects to sharing with Twitter's cleared counsel the same information it has already shared with the Court (without invoking state secrets at all). Gov. Br. 3. In other words, privileged and non-privileged information can be separated, and additional litigation would not present an "unacceptable risk of disclosing state secrets." *Fazaga*, 916 F.3d at 1253.

Even setting aside the government's concession, this Court should construe the "inseparable evidence" exception narrowly and hold that it has no application here. This is so for several reasons.

First, the "inseparable evidence" exception is both novel and rare. The Ninth Circuit articulated it for the first time in 2010, in an "exceptional" case in which the plaintiffs brought suit against a U.S. company, Jeppesen Dataplan, on the grounds that the company provided flight planning and logistical support for the CIA's post-9/11 rendition and torture program. *Jeppesen*, 614 F.3d at 1075, 1089. Sitting en banc, the Ninth Circuit held that the "inseparable evidence" exception compelled dismissal. *Id.* at 1087. State secrets relevant to the case were "difficult or impossible to isolate," and "even efforts to define a d [("i)-6(n)-s tÌ n¦! !ã•"âÄ¤ !ã•¤"> ÎF #9Ô ÄB#,æ

privileged and non-privileged information are "inseparable," but instead as whether privileged evidence is "central" to these proceedings. Gov. Br. 23–24.

With this sleight of hand, the government is seeking to import a standard that appears in state secrets cases in the Fourth Circuit. *See, e.g., Fitzgerald v. Penthouse I.4(ias)i65(e)4(e)4t0.0 m 0 -837(27(2*

"eliminates actions" and "performs a different function than *Reynolds*, which merely affects the evidence available").

Indeed, the Ninth Circuit has explicitly recognized that the Fourth Circuit's approach improperly "conflate[s] the *Totten* bar's 'very subject matter' inquiry with the *Reynolds* privilege." *Jeppesen*, 614 F.3d at 1087 n.12

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