Nos. 09-1298, 09-1302

IN THE

Supreme Court of the United States

GENERAL DYNAMICS CORPORATION,
Petitioner,

v.

UNITED STATES,
Respondent.

THE BOEING COMPANY, SUCCESSOR TO MCDONNELL DOUGLAS CORPORATION,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H. Street, N.W.
Washington, DC 20062
(202) 463-5337

CARTER G. PHILLIPS*
RICHARD KLINGLER
KATHLEEN M. MUELLER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Amicus Curiae

* Counsel of Record

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the Chamber) submits this brief as *amicus curiae* in support of the petitions for a writ of certiorari filed by General Dynamics Corporation and The Boeing Company.[1]

The Chamber is the world's largest business federation. The Chamber represents more than 300,000 direct members and indirectly represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

Many members of the Chamber do business with the federal government. The Chamber also represents businesses in industries, such as defense and aerospace, transportation, information technology and telecommunications, which long have served the nation by entering contracts to provide the federal government with goods and services that are vital to national security. Such contracts often relate to

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Rule 37.2(a), counsel of record for all parties have received timely notice of *amicus curiae*'s intent to file this brief and have consented to the filing of this brief in letters on file with the Clerk's office.

defense or national security programs that are highly classified, and the contracts themselves may contain classified information. For this reason, one of the questions presented by the petitions for certiorari – whether the Government may maintain a contract claim against a contractor after it asserts the state secrets privilege to deny the contractor a defense to that claim – is of particular concern to the Chamber and its members.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves an unprecedented implementation of the state secrets privilege that has far-reaching, adverse effects on the thousands of businesses that contract with the federal government to provide goods and services that are critical to the nation's security. The decision below, by permitting the Government's invocation of the privilege to advance the Government's claim and eliminate a contracting party's defense in a contract dispute, creates considerable uncertainty surrounding the enforceability of government contracts addressing classified matters. That certainty is essential to the effective and efficient delivery of defense systems and services by private companies to the Government, and a decision so severely undermining that certainty presents an important question warranting this Court's review.

In the decisions below, the courts allowed the Government to proceed with its breach of contract claim against Petitioners even though it had asserted the state secrets privilege to deprive Petitioners of the right to litigate a defense to that claim. Pet. App.

202a-203a.[2] The Federal Circuit therefore affirmed a judgment for the Government on the Government's default termination claim – a claim on which the Government is seeking approximately $2.9 billion in contract payments and interest from Petitioners. See General Dynamics Pet. at 11.

That decision – which will effectively govern the litigation of all government contract disputes by virtue of the Federal Circuit's appellate jurisdiction over claims brought in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491, or Contract Disputes Act, 41 U.S.C. §§ 601-613 – warrants this Court's review because it causes great uncertainty and even a deterrent for businesses that enter contracts with the Government in areas such as national security, homeland security, national defense, and intelligence. Such contracts often contain classified information or relate to a government program the operations of which are classified in whole or in part. Under the Federal Circuit's rule, these businesses can no longer be assured that their legal defenses to government contract claims will be judicially enforced if the Government asserts that the evidence relevant to the litigation of the defenses is protected by the state secrets privilege.

Review of the decision below to restore certainty to the contracting process would not call into question the propriety of the Government's invocation of the privilege or the Government's ability to shield from disclosure such privileged information – in this or any other case. Instead, this case concerns what litigation consequences follow from the Government's

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[2] Throughout this brief, citations to the Petition Appendix are to the Appendix to the Petition for Writ of Certiorari filed by General Dynamics in No 09-1298.

invocation of the privilege, and it does so only for the important but narrow context of contractual disputes arising between private parties and the Government. For claims brought *against* the Government or contractors by third parties – who have no contractual relationship with the Government, no defense to a contractual claim that could be eliminated upon the Government's invocation of the privilege, no grant of authority to handle classified information, and often no interest in safeguarding the nation's secrets – different litigation consequences are appropriate when the Government invokes the state secrets privilege.

In contrast, the Federal Circuit's decision would disrupt and make less efficient the process that enables the Government to contract to secure goods and services that provide for the nation's security. The Federal Circuit's decision to allow the Government to assert the state secrets privilege and *then* to deprive a contractor of a legal defense to a government contract claim is an unprecedented and unwarranted extension of the privilege that deprives government contractors of the assurance that their contractual rights and defenses will be judicially enforced. The resulting uncertainty threatens to harm businesses that enter contracts with the Government that relate to classified government programs and to undermine their capacity to provide services to the Government. The question presented in the petitions is thus a matter of public importance that warrants this Court's review.[3]

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[3] For similar reasons related to the need for certainty in the government contracting process, and because the issues presented by the petitions are intertwined, review of the other issues presented by the petitions is also warranted.

REASONS FOR GRANTING THE PETITIONS

THE FEDERAL CIRCUIT'S UNPRECEDENTED APPLICATION OF THE STATE SECRETS PRIVILEGE UNDERMINES CERTAINTY THAT CONTRACTORS CAN ENFORCE CONTRACTUAL RIGHTS AND ASSERT DEFENSES AGAINST THE GOVERNMENT.

A. The Defense Sector's Ability To Provide Services And Defense Goods To The U.S. Government Depends On Contractual Certainty.

The United States, unlike most other military powers, has chosen to rely upon the innovation and efficiency of the private sector to secure the most sensitive and sophisticated components of its national defense requirements. Other nations have historically relied instead upon agencies and instrumentalities of the government itself (as in the case of former and current Communist governments) or more recently upon companies substantially owned by the government (as in the case of Continental European governments). The United States is able to enlist the resources of private companies only by grounding the defense contracting process in rule of law principles, most importantly by providing certainty that contracts entered with the Government can be enforced.

Since the Revolutionary War, when the Continental Army relied on contractors to provide transportation and engineering services as well as clothing, weapons and labor, the U.S. Government has relied on contractors to provide goods and services to the military. See Moshe Schwartz, Congressional Research Service, *Defense Acquisitions: How DOD Acquires Weapon Systems and Recent Efforts to Reform the Process* 1-2 (July 10, 2009), *available at*

http://www.fas.org/sgp/crs/natsec/RL34026.pdf. Thus, as early as 1775, the Continental Congress established a procurement system and appointed a quartermaster general and a commissary general to buy goods and services for the Continental Army. *Id.* at 2.

Although the threats facing the nation and the needs of the military have changed significantly over the past 235 years, the federal government continues to depend upon the private sector to provide the goods and services necessary to protect the nation. The Department of Defense now relies on thousands of suppliers to provide the weapons, equipment and raw materials to achieve national security objectives, and the defense sector is an important part of the national economy. See Gen. Accounting Office, *DOD Assessments of Supplier-Base Availability for Future Defense Needs*; *Briefing to the Senate Committee on Banking and Housing, Urban Affairs, Subcommittee on Security and International Trade and Finance* 2 (Oct. 27, 2009), *available at* http:// www.gao.gov/new.items/d10317r.pdf. In 2008, for example, the Department of Defense purchased over $377.5 billion in goods and services from the nation's top 100 defense contractors. Gov't Executive, *Top 100 Defense Contractors* (Aug. 15, 2009), *available at* http://www.govexec.com/story_page.cfm?articleid=43388&printerfriendlyvers=1. And this year, outlays on national defense are estimated to represent almost 20 percent of total federal outlays and almost 5 percent of gross domestic product. U.S. Dep't of Commerce, *Statistical Abstract of the United States: 2010*, tbl.491, at 326, *available at* http://www.census.gov.prod/2009pubs/0statab/defense.pdf.

The U.S. defense contracting process is the principal mechanism that enables the U.S. Government to

secure supplies, including those needed for classified programs, from private corporations in an efficient manner over often lengthy periods. Since the Government first waived sovereign immunity for contract claims in 1855, the assurance that private companies can enforce their contracts against the U.S. Government has been viewed as "indispensable to the efficient operation of government, for without it, qualified private contractors might not undertake government projects …." Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 Vand. L. Rev. 1529, 1565 (1992). This applies equally to contracts involving the most highly classified weapons systems and services and to standard supply contracts. Indeed, defense contracts routinely address classified matters because only the private sector has the capability to develop and produce the most advanced, and thus most classified, technologies in support of the national defense.

Measures that erode the enforceability of defense contracts, as the Federal Circuit's rule does by providing the Government with a discretionary means of avoiding its contractual commitments, undermine the defense sector's ability and willingness to supply the nation's security requirements. For this important sector of our economy to function efficiently, the rules governing the award, administration, and termination of government contracts need to be clearly stated and consistently applied. Cf. *Ducre* v. *Executive Officers of Halter Marine, Inc.*, 752 F.2d 976, 994 n.37 (5th Cir. 1985) (noting the "supremely important interests in predictability and certainty which lie at the heart of contract law"). This adherence to basic "rule of law" principles creates a predictable legal framework that gives businesses the confidence to enter into government

contracts that may extend over several years or contain many contingencies. If, however, the rules become uncertain or tilt toward the Government, the cost of contracting with the Government increases, and some companies may even be unable to enter into contracts with the Government. Increased contractual uncertainty thus threatens not only to undermine the vitality of the economically significant defense sector, but also to increase the cost and lower the range of goods available to the Government. See *United States* v. *Winstar Corp.*, 518 U.S. 839, 913 (1996) (plurality opinion) (Breyer, J., concurring) (if parties are "unwilling to undertake the risk of government contracting," the Government may be unable "to obtain needed goods and services").

B. The State Secrets Privilege, As Applied By The Federal Circuit, Harmfully Undermines Contractual Certainty.

By adding uncertainty to the adjudication of private contractors' defenses to government contract claims, the decision below threatens to harm the many businesses that enter government contracts that contain classified information or relate to classified programs, and harm their ability to provide services efficiently to the Government. Under the Federal Circuit's decision, such businesses can no longer be assured that the judiciary will enforce their defenses to government contract claims. Instead, they face the possibility that, if a contract dispute arises, the Government may assert the state secrets privilege with the effect of preventing the litigation of their contractual defenses.

By reviewing the Federal Circuit's application of the state secrets privilege in this case, the Court could establish a more stable and predictable legal environment and one that ultimately is fair. In the

absence of that review, the importance of the Federal Circuit to shaping the federal contracting process ensures that an unusually high degree of uncertainty is injected into the defense contracting process. The contracting process would shift from one grounded in rule of law principles toward a less workable one more like that governing espionage arrangements, where "contracts" reflect the parties' aspiration and ostensible intent rather than judicially enforceable agreements. See *Tenet* v. *Doe*, 544 U.S. 1 (2005), *Totten* v. *United States*, 92 U.S. 105 (1876). Of course, the party harmed in this situation is the contractor that acted in good faith and, as in these cases, is potentially liable for billions of dollars of liability without an appropriate opportunity to defend against the claim that they breached their contracts.

The source of legal uncertainty is not the Government's ability to invoke the state secrets privilege, but rather the litigation consequences of doing so. Legal certainty can be reestablished without calling into question either the Government's undisputed right to invoke the state secrets privilege if there is a "formal claim of privilege, lodged by the head of the department which has control over the matter," *United States* v. *Reynolds*, 345 U.S. 1, 7-8 (1953), or the Government's absolute right to withhold the information subject to the privilege "if the court is ultimately satisfied that military secrets are at stake." *Id.* at 11. Instead, the issue is whether and in what circumstances the Government can, by invoking the privilege, secure a profoundly unfair advantage in a contractual dispute that it would not otherwise have. The Federal Circuit erred in this limited but crucial respect, and legal certainty would be restored by a determination that the Government's ability to secure that advantage in a contractual

dispute is considerably narrower than what the Federal Circuit's new rule provides. Cf. Pet. App. 202a-210a.

Narrowing the consequences of the Government's invocation of the state secrets privilege in the setting of contract disputes, and particularly in this context, is justified for several reasons. First, the Government is using the state secrets privilege to secure an advantage in the context of a contract it has already entered. The Federal Circuit's rule permits the Government to assert a claim under the contract while retaining the discretion to invoke the privilege to avoid a defense to the claim. This result is horribly one-sided and has the detrimental effects outlined above. See *supra* pp. 7-8. Second, the Government is invoking the privilege in a context where the private parties to the contract have the ability and incentive to safeguard classified information. Defense contractors on a daily basis handle many of the nation's most sensitive secrets and must agree not to disclose such information. See Info. Security Oversight Office, *Classified Information Nondisclosure Agreement Briefing Booklet* (discussing the nondisclosure agreement that must be signed by employees of government contractors and consequences related to breach), *available at* http://www.archives.gov/isoo/training/standard-form-312.html ("Briefing Booklet"). Indeed, the contract at issue in this case directly addressed classified information that was presumably very closely related to the classified information subject to the state secrets doctrine. See Pet. App. 245 (state secrets doctrine applying to information the Court of Federal Claims found to be necessary to litigate Petitioners' "superior

knowledge" defense).[4] Sanctions associated with contractors' disclosure of classified information are severe. See Briefing Booklet, *supra*, at Question 20 (the Government "may move to terminate the contract or to seek monetary damages from the contractor, based on the terms of the contract" and may also criminally prosecute individuals or organizations). Finally, as discussed below, permitting the Government to invoke the privilege to assist it purely in litigating a contractual claim it asserts against a private party is contrary to established equitable principles and judicial processes. See *infra* pp. 13-16.

Review in this case would thus not call into question the broader effects on litigation appropriately produced when the Government invokes the state secrets privilege in cases brought by third parties against the Government or its contractors. See, *e.g.*, *Mohamed* v. *Jeppesen Dataplan, Inc.*, 579 F.3d 943 (9th Cir.), *reh'g en banc granted*, 586 F.3d 1108 (9th Cir. 2009); *El-Masri* v. *United States*, 479 F.3d 296 (4th Cir. 2007); *Al-Haramain Islamic Found., Inc.* v. *Bush*, 507 F.3d 1190 (9th Cir. 2007); *Hepting* v. *AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006).[5] There, the plaintiffs have no contract

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[4] The Chamber does not dispute the Government's assertion that the stealth aircraft technology at issue in this case is protected by the privilege, and its knowledge of the facts of this case is limited to those set forth in the lower court opinions reprinted in the Petition Appendices, which of course are public materials.

[5] The Chamber filed an *amicus* brief in support of the Government's assertion that the state secrets privilege required dismissal of a third party's claim against a company alleged to have contracted with the Government regarding matters relating to national security. *See* Brief of *Amicus Curiae* Chamber of Commerce of the United States of America in Support of Appellants and Urging Reversal in *Hepting* v. *AT&T*

with the Government, have not been selected by the Government for their ability to handle classified information, and by definition bring claims *against* the Government – often in the form of advocacy litigation designed to increase the disclosure and scrutiny of sensitive national security information.

C. The Government's Ability To Use The State Secrets Privilege To Further Its Claims Against Defense Contractors Especially Undermines Contractual Certainty.

Certainty surrounding defense suppliers' contracts and particularly the remedies available when a dispute arises between the parties is especially undermined if the Government can use the state secrets privilege not only to withhold information, but also to deprive a private contracting party of a defense against the Government's own contractual claim. The Federal Circuit's rule operates in just this manner. In this case, the Government is acting as the "moving party" on the default termination claim. *United States* v. *Reynolds*, 345 U.S. at 12 (state secret invocation providing litigation benefit to the Government upheld because the Government is not the "moving party"). The Government bore the burden of proving that Petitioners were in default of their contractual obligations (Pet. App. 196a-197a), and it sought the repayment of billions of dollars from Petitioners after it prevailed on this claim in the courts below. General Dynamics Pet. at 11. As a result of the Government's assertion of the state secrets privilege, as applied by the Federal Circuit,

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Corp., 539 F.3d 1157 (9th Cir. 2008). The Chamber's submission in this case is completely consistent with its position in *Hepting*.

Petitioners were stripped of their defense to this claim.

In criminal and civil contexts, a government generally cannot both assert a privilege and, as a result, secure a litigation advantage for its own claim. For example, a government cannot pursue a claim and assert foreign sovereign immunity as a defense to counterclaims. See 28 U.S.C. § 1607; *Cabiri* v. *Gov't of Ghana*, 165 F.3d 193 (2d Cir. 1999). Nor can a state government pursue a claim and advance that claim, or deflect counterclaims, by invoking state sovereign immunity recognized by the Eleventh Amendment. See, *e.g.*, *Lapides* v. *Bd. of Regents*, 535 U.S. 613, 619 (2002) (State waives Eleventh Amendment immunity by removing case to federal court; allowing States "to follow their litigation interests by freely asserting both [a claim and immunity] in the same case could generate seriously unfair results"); *Gardner* v. *New Jersey*, 329 U.S. 565, 574 (1947) (when State files a bankruptcy claim, "it waives any immunity which it otherwise might have had respecting the adjudication of the claim").

This principle should extend equally to the Government's privileges related to classified information and the nation's security. For example, the Classified Information Procedures Act ("CIPA") is designed to provide a measure of protection to the Government's use of classified information in the course of prosecutions. See 18 U.S.C. app. 3 §§ 1-16. The Government may not, however, use CIPA's provisions to secure a material litigation advantage; the Government is required instead to abandon the claim relevant to the information the Government chooses not to disclose. See *id.* § 6(e)(2) (dismissal of claim or count, or finding against Government); see also *id.* § 12(b). In addition, outside the context of CIPA, the

Government must choose between pursuing a prosecution and invoking executive privilege to protect classified information or other government secrets material to a defense against the Government's case. See *United States* v. *Smith*, 780 F.2d 1102, 1107-08 (4th Cir. 1985) (en banc); see also *Roviaro* v. *United States*, 353 U.S. 53, 60 (1957).

The Federal Circuit's decision to allow the Government to proceed on this default termination claim while simultaneously invoking the state secrets privilege to deprive Petitioners of a defense to the claim is, moreover, more broadly inconsistent with the courts' general refusal to allow any litigants to use a privilege as both a sword and a shield. See, *e.g.*, *United States* v. *Rylander*, 460 U.S. 752, 761 (1983) (Fifth Amendment privilege against self-incrimination); *Bittaker* v. *Woodford*, 331 F.3d 715 (9th Cir. 2003) (attorney-client privilege); *Wehling* v. *CBS*, 608 F.2d 1084, 1087 (5th Cir. 1980) (Fifth Amendment privilege against self-incrimination). These decisions are based on the recognition that it is fundamentally unfair to permit a litigant to proceed with a claim while declining to provide the other party with the information needed to prepare a defense to the claim. See, *e.g.*, *Wehling*, 608 F.2d at 1087; cf. *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense") (internal quotation marks omitted).

This Court's leading state secret doctrine decision similarly indicates that there are limits on the Government's ability to assert the state secrets privilege and secure a litigation benefit for its own claim, although the Court had no occasion to address the issue directly or to define the full implications of the invocation of the doctrine for the Government's

own claim. *United States* v. *Reynolds*, 345 U.S. 1, involved a tort suit brought against the United States by three widows whose husbands were killed when an Air Force plane crashed during a flight to test secret electronic equipment. *Id.* at 3. This Court upheld the invocation of the privilege even though it deprived plaintiffs of evidence they sought in pursuit of their claims. The Court distinguished criminal cases where the Government "can invoke its evidentiary privileges only at the price of letting the defendant go free," *id.* at 12, on the basis that the case arose "in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented." *Id.*

This case thus also provides the opportunity for this Court to elaborate the point it raised in *Reynolds*, and to resolve the important question whether, when the Government seeks to pursue a claim in a civil action after asserting the state secrets privilege, the court must also apply the privilege to deprive the other party of a defense to that claim. What makes the Government's claim particularly unfair is that the Government does not lose the ability to terminate a contract if state secrets are implicated in the parties' dispute and the standard means of protecting classified information short of invocation of the state secrets privilege are insufficient. Instead, the Government is limited to the remedies of a termination for convenience, which are substantial, but not one-sided. See, *e.g.*, Krent, *supra*, at 1565-66 (when the Government terminates a contract for convenience, it may "escape the full consequences of a breach" because the contractor may not obtain specific performance and its recovery is generally limited to costs incurred, profit on work done, and the cost of preparing the termination settlement pro-

posal). Thus, the interests of the Government can be fully protected without having to impose undue burdens on contractors and thereby create disincentives for future potential contractors to undertake to promote the Government's most sensitive and important national security and defense assignments.

In light of the far-reaching and unfair effects of the Federal Circuit's decision below, the question whether the Government may use the state secrets doctrine not only as a shield to prevent the disclosure of privileged information, but also as a sword to strike a contractor's defense to the Government's own contract claim, presents an important question that merits this Court's review.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be granted.

Respectfully Submitted,

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

CARTER G. PHILLIPS*
RICHARD KLINGLER
KATHLEEN M. MUELLER
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Amicus Curiae

* Counsel of Record

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