Nos. 09-1298 and 09-1302

In the Supreme Court of the United States

GENERAL DYNAMICS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

THE BOEING COMPANY, SUCCESSOR TO MCDONNELL DOUGLAS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were automatically entitled to a judicial abrogation of the government's default termination of their contract because the government's unchallenged invocation of the state-secrets privilege precluded litigation of petitioners' claim that their lack of performance was caused by the government's alleged failure to share its superior knowledge.

2. Whether the court of appeals erred in affirming the trial court's determination that the responsible federal contracting officer had acted lawfully in terminating petitioners' contract for default.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-34a, 178a-211a, 250a-279a) are reported at 567 F.3d 1340, 323 F.3d 1006, and 182 F.3d 1319 respectively.[1] The pertinent opinions of the Court of Federal Claims (Pet. App. 35a-177a, 212a-249a, 280a-443a) are reported at 76 Fed.

[1] Unless otherwise specified, all references to the Pet. App. are to the appendix to the petition for a writ of certiorari filed in No. 09-1298.

Cl. 385, 50 Fed. Cl. 311, 40 Fed. Cl. 529, 37 Fed. Cl. 270, 35 Fed. Cl. 358, and 29 Fed. Cl. 791.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2009. Petitions for rehearing were denied on November 24, 2009 (Pet. App. 444a-445a; 09-1302 Pet. App. 462a-463a). On January 22 and 28, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 24, 2010, in No. 09-1302 and No. 09-1298 respectively. On March 11 and 12, 2010, the Chief Justice further extended the time to April 23, 2010, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In January 1988, petitioners entered into a fixed-price incentive contract with the Navy to develop the A-12 Avenger, a new carrier-based attack aircraft employing low-observable (stealth) technology. Pet. App. 2a. The Full Scale Engineering and Development (FSD) contract required petitioners to design, build, and test eight prototype aircraft at a ceiling price of $4,777,330,294. *Ibid.* The contract required petitioners to deliver the first aircraft in June 1990, with subsequent deliveries to be made at specified times ranging from July 1990 to January 1991. *Id.* at 5a. Each of the eight aircraft would be more complex than the last. Testing would be sequential, with later tests dependent upon successful completion of earlier testing. *Id.* at 45a-46a.

From early on, petitioners encountered difficulty in designing and building an aircraft that would meet critical contract specifications within the negotiated schedule. In June 1990, petitioners failed to deliver the first air-

craft as required under the contract. Pet. App. 4a. They informed the government that the estimated cost of performing under the contract would substantially exceed the contract ceiling price, resulting in an estimated cost that was "unacceptable" to them. *Ibid.* Petitioners proposed to address these difficulties by modifying the fixed-price nature of the contract. *Ibid.* The Navy's contracting officer sent petitioners a letter expressing "serious concern" and warning that the failure to meet the first delivery date "could jeopardize performance of the entire [contract] effort." *Ibid.*

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

On December 17, 1990, the Navy issued a cure notice informing petitioners that their performance under the contract was "unsatisfactory." Pet. App. 6a. The notice explained that petitioners had "failed to fabricate parts sufficient to permit final assembly in time to meet the schedule for delivery" and had "failed to meet specification requirements." *Id.* at 6a-7a. Because those deficiencies were "endangering performance of [the] contract,"

the Navy informed petitioners that it might terminate the contract for default unless the deficiencies were cured by January 2, 1991. *Id.* at 7a.[2]

In meetings with the government during the next two weeks, petitioners adhered to the position that they could not build the A-12 aircraft for the agreed-upon price, under the agreed-upon schedule, and to the agreed-upon specifications. Pet. App. 7a. Petitioners asserted they could not "get there if [they didn't] change the contract," and that the contract had "to get reformed to a cost type contract or [they could not] do it." *Ibid.* On January 2, 1991, in their formal reply to the cure notice, petitioners reiterated that they would "not meet delivery schedules or certain specifications of the original contract, or the revised FSD delivery schedule." *Ibid.* Petitioners represented that compliance with the Navy's demand to cure the schedule, weight, and other conditions was "unachievable." *Id.* at 7a-8a.

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[2] The contract at issue incorporates by reference 48 C.F.R. 52.249-9 (1984) (see Pet. App. 2a-3a), which provides in relevant part:

> (a)(1) The Government may * * * by written Notice of Default to the Contractor, terminate this contract in whole or in part if the Contractor fails to—
>
> (i) Perform the work under the contract within the time specified in this contract or any extension;
>
> (ii) Prosecute the work so as to endanger performance of this contract (but see paragraph (a)(2) below);
>
> * * *
>
> (2) The Government's right to terminate this contract under subdivisions (1)(ii) and (1)(iii) of this paragraph may be exercised if the Contractor does not cure such failure within 10 days (or more, if authorized in writing by the Contracting Officer) after receipt of the notice from the Contracting Officer specifying the failure.

On January 7, 1991, the Navy's contracting officer sent petitioners a letter terminating the contract for default. Pet. App. 8a. The termination letter explained that the action was based on petitioners' inability "to complete the design, development, fabrication, assembly and test of the A-12 aircraft within the contract schedule," as well as their "inability to deliver an aircraft that meets contract requirements," including the "weight guaranty contained within the contract specification." C.A. App. 18,297. Shortly thereafter, the Navy issued a formal demand for the return of unliquidated progress payments totaling $1.35 billion. Pet. App. 8a.

2. In June 1991, petitioners filed suit in the Claims Court (now the Court of Federal Claims (CFC)) under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 609(a), challenging the default termination on a number of grounds. Petitioners requested, *inter alia*, that the CFC enter a judgment that the government had breached the contract, and that the court convert the termination for default into a termination for convenience. Pet. App. 8a-9a; see Second Am. Unclassified Compl. at 79.[3]

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[3] "The right to terminate a contract when there has been no fault or breach by the non-governmental party, that is, for the 'convenience' of the government, appeared as a legal concept after the Civil War, to facilitate putting a speedy end to war production." *Maxima Corp.* v. *United States*, 847 F.2d 1549, 1552 (Fed. Cir. 1988). When a contract is properly terminated for convenience, the contractor ordinarily is entitled to recover "costs incurred, profit on work done and the costs of preparing the termination settlement proposal. Recovery of anticipated profit is precluded." *Ibid.*; see 48 C.F.R. 52.249-2(g). When a contract has been terminated because of an erroneous determination that the contractor was in default, the court may treat the termination as one for the convenience of the government. *Maxima Corp.*, 847 F.2d at 1553.

a. In December 1995, after a trial that focused on petitioners' claim that the Department of Defense had deprived the contracting officer of the ability to make an "independent decision" regarding the termination, the CFC converted the government's termination for default into a termination for convenience. Pet. App. 382a-429a. Although the CFC found that the contracting officer had "based the termination on the fault of the contractors because he did not believe that the Navy bore any responsibility for the contractors' perceived inability to achieve the contract specifications or deliver the aircraft on schedule," it concluded that the termination decision was not the product of "reasoned discretion." *Id.* at 402a, 407a. The CFC did not address the extent of petitioners' performance or whether they had actually been in default of their contractual obligations.

b. Relying on the state-secrets privilege, the CFC dismissed petitioners' claim that the government had caused their performance failures by withholding its "superior knowledge" of classified stealth technology. Pet. App. 343a-381a. The CFC had initially allowed petitioners to pursue discovery on the theory that the government had a duty to provide petitioners at least a "general warning" about problems concerning production of the A-12 aircraft. *Id.* at 354a-355a n.7 (citation omitted). In March 1993, the Acting Secretary of the Air Force invoked the military and state-secrets privilege to protect against disclosure of relevant but sensitive information. *Id.* at 358a. In December 1996, after noting the occurrence of security breaches during the course of the litigation, the CFC determined that petitioners' superior-knowledge claim could not be safely, fairly, or reliably litigated:

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

Id. at 345a.[4]

3. a. In 1999, in its first published opinion in this case, the court of appeals reversed the CFC's initial judgment invalidating the default termination. Pet. App. 250a-279a. The court ruled that the CFC had "erred by vacating the termination for default without first determining whether a default existed." *Id.* at 269a. The court distinguished this case from one involving a pretextual termination, explaining that "[t]he record and the facts found by the trial court establish that the government denied additional funding for the A-12 program and terminated the contract for default because of concerns about contract specifications, contract schedule, and price-factors that are fundamental elements of contract performance." *Ibid.* The court explained that "[b]ecause the trial court focused on the legitimacy of the government's default termination decision, rather than

[4] On the merits, the government argued that petitioners' participation in other classified Air Force programs provided them the information necessary to develop the A-12 aircraft according to specifications. Pet. App. 355a. The CFC found, however, that the privileged nature of the evidence "would lead to an incomplete record" precluding an accurate determination. *Id.* at 380a.

on whether [petitioners] were in fact in default, the parties have not yet been afforded the opportunity to fully litigate default." *Id.* at 278a. The court therefore remanded the case to the CFC to decide whether the default termination was justified. *Ibid.*

b. Without expressing any view on the merits, the court of appeals also vacated the CFC's dismissal of petitioners' superior-knowledge claim, inviting the CFC to reconsider its state-secrets ruling in light of the passage of time and other possible developments. Pet. App. 271a, 278a-279a.

This Court denied petitioners' petition for a writ of certiorari. 529 U.S. 1097 (2000).

4. a. In 2001, after conducting another trial on remand, the CFC sustained the default termination. Pet. App. 212a-249a. The CFC found that petitioners would not have delivered the first aircraft by the revised contractual deadline (December 1991) and therefore were in default of the contract. *Id.* at 218a-228a. The CFC rejected petitioners' various arguments for excusing their default, including their contentions that the revised delivery schedule was unreasonable and therefore unenforceable; that the schedule, even if enforceable, had been waived by the Navy; and that "the contract was impossible to perform." *Id.* at 228a-230a, 246a-248a.

b. The CFC also reaffirmed its prior ruling that petitioners' superior-knowledge claim could not be litigated due to national security concerns. Pet. App. 243a-246a. The CFC found that "the circumstances that prompted the [December 1996] ruling persist." *Id.* at 244a. The CFC added that it was unable to "establish that the information that has been removed from this case would have benefitted either party." *Id.* at 245a.

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

a. The court of appeals affirmed the CFC's determination that the revised delivery schedule imposed by the government was enforceable and had not been waived. Pet. App. 198a-202a. The court nevertheless held that the CFC "did not make adequate findings" to sustain the default termination. *Id.* at 187a. The court explained that although "absolute impossibility of performance or a contractor's complete repudiation or abandonment" is not required, a default termination cannot be justified "based solely on a contractor's concerns about meeting a contractual schedule milestone." *Id.* at 190a. Citing *Lisbon Contractors, Inc.* v. *United States*, 828 F.2d 759, 765 (Fed. Cir. 1987), the court stated that the government must establish a "reasonable belief on the part of the contracting officer that there was no reasonable likelihood that the contractor could perform the entire contract effort within the time remaining for contract performance." Pet. App. 191a. The court again remanded the case to the CFC to make pertinent factual findings and to apply the *Lisbon* standard. *Id.* at 196a-197a.

b. The court of appeals affirmed the CFC's dismissal of petitioners' superior-knowledge claim. Pet. App. 202a-210a. The court held that the government had properly invoked the state-secrets privilege and that the CFC had properly barred litigation of the superior-knowledge claim in light of the attendant risks. *Id.* at 205a-207a. The court also rejected petitioners' contention that, once the state-secret privilege was found to preclude litigation of petitioners' superior-knowledge claim, the Due Process Clause required the CFC to set aside the default termination. The court of appeals relied on this Court's

distinction in *United States* v. *Reynolds*, 345 U.S. 1, 12 (1953), between the government as criminal prosecutor and the government as civil defendant. The court explained that, because petitioners "are the plaintiffs in this purely civil matter, suing the sovereign on the limited terms to which it has consented," the Due Process Clause "does not require that [petitioners] be able to present all defenses, including a defense that would threaten national security." Pet. App. 208a-209a.

6. In 2007, after petitioners declined an opportunity to reopen the trial record (Pet. App. 113a n.54), the CFC again sustained the default termination. *Id.* at 35a-177a. The CFC found that the contract did not specify a date for completion of the entire effort, given that not all the milestone dates had been revised and that the completion date for a research-and-development contract is often indefinite. *Id.* at 70a-74a. The CFC nevertheless determined that the government's revised delivery schedule for the prototypes provided a yardstick that enabled the court "to consider [petitioners'] progress in light of factors that are probative of their ability and willingness to perform." *Id.* at 40a. After considering the record evidence in its totality, the CFC concluded that the government was justified in terminating the contract for failure to make progress. *Id.* at 132a-155a.

7. In 2009, in its third published decision, the court of appeals affirmed. Pet. App. 1a-34a. The court acknowledged that a literal application of the standard announced in *Lisbon* was difficult because the contract at issue here contained no definite completion date. *Id.* at 14a. Like the CFC, however, the court of appeals rejected petitioners' contention that the absence of a completion date categorically precludes the government from terminating a contract for failure to make adequate prog-

ress. *Id.* at 15a. The court relied on *Universal Fiberglass Corporation* v. *United States*, 537 F.2d 393 (Ct. Cl. 1976), a decision cited approvingly in *Lisbon*, see 828 F.2d at 765, in which the Court of Claims (a predecessor to the Federal Circuit) had upheld a default termination for failure to make progress even in the absence of a contract completion date. Pet. App. 16a-17a. The court held that it was possible to apply the *Lisbon* standard in this case based on the totality of the circumstances—including the contractor's failure to meet progress milestones, its problems with subcontractors and suppliers, its financial situation, and its performance history (all factors enumerated in its 2003 opinion, see *id.* at 193a-194a)—to determine whether petitioners had failed to "[p]rosecute the work so as to endanger performance" of the contract. *Id.* at 21a (quoting 48 C.F.R. 52.249-9(a)(1)(ii)).

Based on its review of the record, the court of appeals held that the government had satisfied its burden under *Lisbon* of establishing a reasonable belief that there was no reasonable likelihood of timely performance of the contract. Pet. App. 22a-27a. The court noted that petitioners on appeal had presented no argument for excusing their default and no evidence to show that they could have completed the contract on any date without contract restructuring. *Id.* at 28a. The court also rejected petitioners' argument that the default termination could not be sustained because the contracting officer had not conducted the *Lisbon* analysis prior to termination. The court explained that "the government is not required to establish that the contracting officer conducted the analysis necessary to sustain a default." *Id.* at 29a (quoting *Empire Energy Mgmt. Sys., Inc.* v. *Roche*, 362 F.3d 1343, 1357 (Fed. Cir. 2004)). The court further held that the

record evidence established that the contracting officer had exercised reasonable judgment and had not acted arbitrarily in terminating the contract. *Id.* at 30a-32a. In closing, the court reiterated that "the *Lisbon* test remains good law and our conclusion here is dictated by the unique facts of this case." *Id.* at 33a.

ARGUMENT

1. Petitioners do not dispute that the government properly invoked the state-secrets privilege in this case, nor do they challenge the lower courts' determination that the superior-knowledge issue could not be litigated without risking disclosure of secret information. 09-1298 Pet. 14; 09-1302 Pet. 30. Rather, petitioners contend that because the state-secrets privilege barred litigation of their superior-knowledge claim, the lower courts should have automatically entered judgment invalidating the government's default termination. 09-1298 Pet. 13-22; 09-1302 Pet. 28-34. No decision of this Court or any court of appeals supports that contention. Further review is not warranted.

a. The basic legal principles governing the application of the state-secrets privilege are well established and do not appear to be in dispute here. The state-secrets privilege is deeply rooted in both "the law of evidence," *United States* v. *Reynolds*, 345 U.S. 1, 6-7 (1953), and the Executive's "Art[icle] II duties" to protect "military or diplomatic secrets," *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). The government has a "compelling interest" in protecting national-security information, and the responsibility to do so "falls on the President as head of the Executive Branch and as Commander in Chief." *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988).

The state-secrets privilege "belongs to the Government," which must assert it in a "formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Reynolds*, 345 U.S. at 7-8 (footnotes omitted). The privilege applies when "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *Id.* at 10. While "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege," it must not in the course of considering that claim "forc[e] a disclosure of the very thing the privilege is designed to protect." *Id.* at 8. When properly invoked, the privilege is absolute: "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." *Id.* at 11.

b. As noted above, petitioners do not challenge the invocation of the state-secrets privilege or the dismissal of their superior-knowledge claim. 09-1298 Pet. 14; 09-1302 Pet. 30. Rather, petitioners contend that, once their superior-knowledge claim had been dismissed, the courts below were required to set aside the default termination. In support of that contention, petitioners rely significantly on the Court's reference in *Reynolds* to lower-court decisions finding it "unconscionable" to allow the government to undertake a criminal prosecution and then invoke its privileges to deprive the accused of his defense. 345 U.S. at 12. Petitioners' current challenge to the default termination, however, cannot properly be analogized to a criminal prosecution brought by the United States.

The government did not file any claim or seek any affirmative relief in the CFC, but rather is the defendant

in a suit commenced by petitioners. This case, moreover, is a civil rather than a criminal proceeding. See Pet. App. 208a. Lower-court decisions requiring the government to forgo criminal prosecution when it invokes certain privileges have "no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented." *Reynolds*, 345 U.S. at 12. The CFC proceedings commenced by petitioners are far removed from a criminal prosecution where an accused's liberty is at stake. And while petitioners characterize the government's demand for payment in this case as an attempt to impose "punishment" (09-1298 Pet. 28) or a "civil penalty" (09-1302 Pet. 32), the government simply seeks to recoup (with appropriate interest) monies that it had advanced to petitioners as progress payments for aircraft that it never received.

Among the government's contract rights is the right to terminate a contract for default in appropriate circumstances. See 48 C.F.R. 52.249-9(a) (incorporated by reference into the A-12 contract, see Pet. App. 2a-3a). Under the Tucker Act's waiver of sovereign immunity, 28 U.S.C. 1491(a)(1), and as authorized by the CDA, 41 U.S.C. 609(a), a contractor that is dissatisfied with the government's decision may sue for relief in the CFC. Petitioners' CFC action is thus no different from any other civil suit by a party seeking relief against the United States based on an applicable waiver of sovereign immunity.

Petitioners' characterization of the government as the "moving party" (09-1298 Pet. 16; 09-1302 Pet. 31) in this case is based in part on the fact that default termination has been deemed a "government claim," *Malone* v. *United States*, 849 F.2d 1441, 1443 (Fed. Cir. 1988), for which the government bears the burden of proof under

the CDA, 41 U.S.C. 601 *et seq.* In contract cases as in other litigation, however, the plaintiff may bear the burden of proof on some issues and the defendant on others. Thus, while petitioners bore the burden of proof on the superior-knowledge claim in response to which the government invoked the state-secrets privilege, see *DCX, Inc.* v. *Perry*, 79 F.3d 132, 134 (Fed. Cir.), cert. denied, 519 U.S. 992 (1996); *Koppers Co.* v. *United States*, 405 F.2d 554, 563-564 (Ct. Cl. 1968), the defendant ordinarily bears the burden of proving affirmative defenses. The government here is similarly situated to a private defendant sued for breach of contract after terminating the contract due to the other party's failure to perform or material breach: both bear the burden of justifying the termination based on the plaintiff's non-performance. See E. Allan Farnsworth, 2 *Farnsworth on Contracts* § 8.15, at 509 (3d ed. 2004). But the fact that the defendant bears the burden of proof on that defense does not cause it to be the "moving party" in the litigation.[5]

c. Petitioners also rely (09-1298 Pet. 18; 09-1302 Pet. 32) on decisions of this Court stating that due process principles guarantee a civil defendant "an opportunity to

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[5] If the A-12 contract had not required the first progress payment to be made until some date after the government determined that petitioners were in default, the government could simply have declined to make the progress payment (or any other payments) rather than entering a default termination. Petitioners would then have been forced to bring a breach-of-contract action against the government. In such a lawsuit, petitioners clearly would have been plaintiffs and the government the defendant—free to raise petitioners' non-performance as a defense and the state-secrets privilege to rebut any superior-knowledge claim. There is no apparent reason that the timing of progress payments under the contract—the only difference between the hypothetical case and this one—should make any substantive difference with respect to the consequences of invoking the state-secrets privilege.

present every available defense." *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972); *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982)). Even putting aside the fact that petitioners are not defendants here (see pp. 13-15, *supra*), those decision do not speak to the application of evidentiary privileges generally or the state-secrets privilege in particular.

This Court's precedents, as well as the Federal Rules of Civil Procedure and Evidence, have long recognized that evidentiary privileges may limit both plaintiffs' and defendants' access to material and may thereby affect a party's ability to prove its case. To further competing public policy interests, the attorney-client privilege, the spousal privilege, the psychotherapist-patient privilege, and the Presidential communications privilege all limit a litigant's access to potentially relevant material. See, *e.g.*, *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981) (attorney-client privilege); *Jaffee* v. *Redmond*, 518 U.S. 1, 10-15 (1996) (psychotherapist-patient privilege); *Trammel* v. *United States*, 445 U.S. 40, 50-52 (1980) (spousal privilege); *Nixon*, 418 U.S. at 708 (Presidential communications privilege); see also Fed. R. Civ. P. 26(b); Fed. R. Evid. 501-502. The lower courts' application of the state-secrets privilege similarly limits petitioners' ability to litigate the superior-knowledge claim in this case. But petitioners cite no civil case in which this Court has deemed the legitimate invocation of a privilege to violate the affected party's due process rights.

Although the courts below rejected petitioners' contention that judgment should automatically be entered in their favor, the CFC afforded petitioners the opportunity to challenge the government's proof that petitioners were in default, and it entertained every argument petitioners sought to present that would not have risked the disclo-

sure of secret information. Neither the Due Process Clause nor this Court's decision in *Reynolds*—which reversed a trial court's automatic finding of negligence against the United States based on the government's invocation of the state-secrets privilege, 345 U.S. at 5—requires the extreme result sought by petitioners. To the contrary, where matters can be fairly litigated without resort to secret information, a suit may continue. *Id.* at 11.

d. Contrary to petitioners' contention (09-1298 Pet. 19-21; 09-1302 Pet. 33-34), the court of appeals' application of the state-secrets privilege does not conflict with decisions of other circuits. Petitioners rely on court of appeals decisions holding that dismissal of a claim is appropriate if invocation of the state-secrets privilege unduly hampers a defendant in establishing a valid defense. See *El-Masri* v. *United States*, 479 F.3d 296, 309-310 (4th Cir.), cert. denied, 552 U.S. 947 (2007); *Tenenbaum* v. *Simonini*, 372 F.3d 776, 777-778 (6th Cir.), cert. denied, 543 U.S. 1000 (2004); *Molerio* v. *FBI*, 749 F.2d 815, 825 (D.C. Cir. 1984); see also *Kasza* v. *Browner*, 133 F.3d 1159, 1166 (9th Cir.), cert. denied, 525 U.S. 967 (1998); *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991). Because petitioners are plaintiffs rather than defendants in this litigation, the court of appeals' decision in this case is fully consistent with the precedents on which petitioners rely. Indeed, the courts below correctly found petitioners' superior-knowledge claim unamenable to adjudication, in part because the state-secrets privilege prevented the government, as the defendant, from effectively responding to that claim. See Pet. App. 367a ("defendant may be unfairly prejudiced if discovery were restricted to these programs"); *id.* at 372a-373a ("it is not proper to consider plaintiffs' *prima*

facie evidence in a vacuum when defendant might refute plaintiffs' evidence with greater access").

Petitioners further suggest (09-1298 Pet. 21; 09-1302 Pet. 32) that federal officials may be tempted to invoke the state-secrets privilege arbitrarily if the government can obtain favorable rulings on issues as to which the privilege has been claimed. As petitioners acknowledge (09-1298 Pet. 20; 09-1302 Pet. 33-34), however, some of the cases on which they rely have culminated in the dismissal of claims against the government after the government's invocation of the state-secrets privilege precluded the assertion of an effective defense. The safeguards against capricious invocation of the state-secrets privilege lie in the procedural and substantive restrictions that this Court has imposed upon the privilege, see *Reynolds*, 345 U.S. at 7-8, 10; p. 13, *supra*, and in the presumption that high-level Executive Branch officials discharge their duties conscientiously and in good faith, not in any prophylactic rule that the government must lose any claim as to which the privilege has been invoked.

The rule that petitioners advocate, moreover, would itself be susceptible to manipulation by private parties. A contractor that challenges the government's termination of a contract for default could raise a superior-knowledge claim simply to induce the government to invoke the state-secrets privilege. Automatic invalidation of the default termination in those circumstances would inappropriately "punish[] [the government] for asserting the privilege." *Salisbury* v. *United States*, 690 F.2d 966, 975 (D.C. Cir. 1982).

There is likewise no sound basis for the speculation of petitioners and their amici that contractors will cease to do business with the government if the court of appeals' decision remains in place. 09-1298 Pet. 21-22;

Chamber of Commerce Amicus Br. 4, 7-8, 16; Nat'l Def. Indus. Assoc. Amicus Br. 5-7, 14, 23-25. The government has a strong interest in attracting contractors to ensure that our Nation's national security and other needs are met. Moreover, contractors like petitioners are highly sophisticated entities that can protect themselves against undue risk in their negotiation of future contracts. The government is not aware of any refusal to deal by contractors, many of whom rely on the government for business, as a result of the court of appeals' decision on the "unique facts of this case." Pet. App. 33a.

2. Petitioners also seek the Court's review of the court of appeals' application of its failure-to-make-progress standard to affirm the CFC's judgment upholding the default termination. Petitioners argue that (a) the contract's lack of a completion date precludes a default termination (09-1302 Pet. i, 37-40); (b) the court of appeals' 2009 decision impermissibly deviated from its 2003 mandate (09-1298 Pet. 31-36); (c) in issuing its 2009 decision, the court of appeals should have remanded again rather than affirm on the existing record (09-1302 Pet. 18-27); and (d) the court of appeals erred in upholding the default termination on grounds not relied on by the contracting officer (09-1298 Pet. 23-31). The lower courts' highly factbound application of the well-established default-termination standard—after nearly two decades of litigation—is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

a. Petitioner Boeing (09-1302 Pet. i, 37-40) argues that the government can never terminate a contract for failure to make adequate progress if the contract lacks a definite date of completion for all contract performance. Such a per se rule does not comport with the terms of the

default-termination clause, unnecessarily restricts consideration of relevant circumstances, and conflicts with longstanding Federal Circuit precedent.

The federal acquisition regulation, which was incorporated by reference into the A-12 contract (see note 2, *supra*), permits (in relevant part) a default termination when the contractor fails either (i) to "[p]erform the work under the contract within the time specified in this contract or any extension;" or (ii) to "[p]rosecute the work so as to endanger performance of this contract." 48 C.F.R. 52-249-9(a)(1). Although subsection (i) might plausibly be read to require a specific contract completion date, the contracting officer in this case terminated the A-12 contract under subsection (ii) for a failure to prosecute that "endanger[ed] performance of [the] contract." Pet. App. 7a. Nothing in the text of subsection (ii) requires a definite completion date before a determination can be made that the contractor's progress is so inadequate as to call performance into reasonable doubt.

The court of appeals correctly rejected "such a *per se* rule because it serves only the contractors' interest." Pet. App. 20a. Instead, the court examined all the relevant circumstances to determine whether petitioners had failed to make adequate progress so as to justify the default termination under the terms of the provision. See *id.* at 21a ("Only after analyzing the totality of the circumstances can a court determine whether a contractor failed to '[p]rosecute the work so as to endanger performance' of the contract.") (quoting 48 C.F.R. 52.249-9(a)(1)(ii)). The court of appeals relied on the extensive record of petitioners' deficient performance history (including the failure to meet several milestones such as the first delivery date) as well as their financial difficulties (including repeated statements that the con-

tract could not be performed without significant cost restructuring). *Id.* at 22a-27a. Even petitioners appeared to acknowledge that the contract's sequential, "building block" structure made failure to deliver the first aircraft a critical event. See *id.* at 23a (noting petitioners' admission that "one cannot test an aircraft before it has been built, nor build a production airplane before developing its prototype"). The court of appeals correctly held that those facts taken together supported the default termination under the applicable legal standard.

To the extent that petitioners are concerned about an ad hoc factual inquiry into the totality of circumstances for default terminations in contracts that lack a completion date (09-1302 Pet. 34-40), they are free to negotiate completion dates or other metrics into future contracts. As noted above (p. 19, *supra*), contractors like petitioners are highly sophisticated businesses that can adequately protect themselves against any alleged uncertainty created by Federal Circuit precedent. In any event, Boeing's contention (*id.* at 34) that the court of appeals' decision will "[d]estabilize" the law in this area is particularly unavailing because the per se rule that Boeing advocates is itself inconsistent with established Federal Circuit law.

In *Universal Fiberglass Corporation* v. *United States*, 537 F.2d 393, 398 (1976), the Court of Claims (the Federal Circuit's predecessor, whose decisions are binding precedent in that Circuit, see, *e.g.*, *Strickland* v. *United States*, 423 F.3d 1335, 1338 (Fed. Cir. 2005)) sustained a default termination for failure to make progress even though the contract contained no specific completion date. See also *State of Florida, Dep't of Ins.* v. *United States*, 81 F.3d 1093, 1097 (Fed. Cir. 1996) (holding that the Postal Service was justified in terminating a contract for failure to make progress even though the

original deadline for completion had passed and the Postal Service had not set a new one). Indeed, in *Lisbon Contractors, Inc.* v. *United States*, 828 F.2d 759 (Fed. Cir. 1987)—a decision that all the parties to this case endorse—the court of appeals cited *Universal Fiberglass* approvingly. *Id.* at 765. Although a completion date may facilitate the *Lisbon* analysis, it is not a prerequisite for default termination if the totality of the circumstances indicates that the contractors' failure to make progress makes it reasonably likely that performance would be untimely or not occur at all.[6]

b. Petitioner General Dynamics contends that the court of appeals in its 2009 decision altered the standard articulated in its 2003 opinion, in violation of the "law of the circuit" doctrine (under which ordinarily only an en banc court can overrule a panel decision). 09-1298 Pet. 31-37. In petitioners' view, the standard for default termination articulated in the court's 2003 decision required a contract completion date. *Id.* at 32-33; 09-1302 Pet. 23. Petitioners' argument depends on an unduly narrow parsing of the 2003 opinion. In any event, any refinement in the 2009 opinion in light of new facts on remand does not violate the "law of the circuit" doctrine.

In all three of its published opinions in this case between 1999 and 2009, the court of appeals reaffirmed the *Lisbon* standard embraced by petitioners here. See Pet. App. 15a-16a, 33a, 191a-194a, 269a-270a. To support a default termination under *Lisbon*, "the government must

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[6] Boeing suggests in passing (09-1302 Pet. 38) that the court in *Universal Fiberglass* recognized an "exception" to the per se rule Boeing advocates, but it contends that the exception applies only when a contractor is "making no progress at all." The court of appeals, in construing *Universal Fiberglass* more broadly, determined that the record in this case supported its application here. Pet. App. 17a-21a.

establish by a preponderance of the evidence * * * a 'reasonable belief on the part of the contracting officer that there was no reasonable likelihood that the contractor could perform the entire contract effort within the time remaining for contract performance.'" *Id.* at 11a (quoting *id.* at 191a) (citing *Lisbon*, 828 F.2d at 765). All three opinions (like *Lisbon* itself, 828 F.2d at 765) also approvingly cite *Universal Fiberglass*, in which the court upheld a default termination for failure to make progress in the absence of a definite completion date. Pet. App. 16a n.3 (citing *id.* at 194a, 267a). In its 2009 decision, the court of appeals faithfully applied those two established circuit precedents to the facts of this case. *Id.* at 13a-21a.

Petitioners contend (09-1298 Pet. 30; 09-1302 Pet. 23-24) that the court of appeals in its 2009 decision unfairly upset petitioners' expectations by applying a legal standard significantly different from the standard articulated in the court's 2003 opinion. That is incorrect. Although the court in its 2003 opinion directed the CFC on remand to determine the "contract completion date" and the "time remaining for performance" (Pet. App. 196a), the court did not purport to overrule *Universal Fiberglass*, which remained binding precedent within the Federal Circuit and which made clear that a specific completion date is not a prerequisite for a default termination (see pp. 21-22, *supra*).

The court of appeals' 2003 mandate, as reaffirmed in the 2009 decision, required a review of "the evidence and circumstances surrounding the termination" and "the events, actions, and communications leading to the default decision in ascertaining whether the contracting officer had reasonable belief that there was no reasonable likelihood of timely completion." Pet. App. 187a, 195a; see *id.* at 21a. The 2003 opinion specifically identi-

fied relevant factors other than the completion date, including "the contractor's failure to meet progress milestones," "problems with subcontractors and suppliers," its "financial situation," and its "performance history" (*id.* at 193a-194a (citations omitted))—all factors on which the court relied in its 2009 decision in affirming the CFC's subsequent judgment (*id.* at 21a-27a). Indeed, the court in its 2009 decision "reiterate[d] that the *Lisbon* test remains good law and our conclusion here is dictated by the unique facts of this case." *Id.* at 33a.

In any event, because any difference in emphasis between the 2009 and 2003 opinions in the articulation of the *Lisbon* standard was attributable to intervening factual findings by the CFC, the case falls comfortably within an established exception to law-of-the-case doctrine. In *Arizona* v. *California*, 460 U.S. 605, 618 n.8 (1983), this Court recognized that a court may appropriately depart from its own decision in the same case if the prior holding is clearly erroneous and would work a manifest injustice. Contrary to petitioner General Dynamics's contention (09-1298 Pet. 33), other circuits generally follow this Court's guidance in *Arizona* to permit modification of a prior ruling—including in light of further record development. See *United States* v. *Wallace*, 573 F.3d 82, 89 (1st Cir.) ("A panel's reconsideration of a ruling made by a previous panel in the same case may be proper if the initial ruling was made on an inadequate record, * * * if newly discovered evidence bears on the question, or if reconsideration would avoid manifest injustice.") (internal quotation marks omitted), cert. denied, 130 S. Ct. 657 (2009); *EEOC* v. *United Ass'n of Journeymen and Apprentices of the Plumbing & Pipefitting*, 235 F.3d 244, 249-250 & n.1 (6th Cir. 2000), cert. denied, 534 U.S. 987 (2001); *Maxfield* v. *Cintas*

Corp., No. 2, 487 F.3d 1132, 1135 (8th Cir. 2007); *Mendenhall* v. *National Transp. Safety Bd.*, 213 F.3d 464, 469 (9th Cir. 2000); *Johnson* v. *Champion*, 288 F.3d 1215, 1226 (10th Cir. 2002); *Murphy* v. *FDIC*, 208 F.3d 959, 966 (11th Cir. 2000); *United States* v. *Thomas*, 572 F.3d 945, 948 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 1725 (2010); cf. *City Pub. Serv. Bd.* v. *General Elec. Co.*, 935 F.2d 78, 82 (5th Cir. 1991).

Petitioner General Dynamics quotes stricter language from Fifth and Ninth Circuit decisions that might appear to foreclose panel reconsideration notwithstanding the *Arizona* exception. See Pet. 09-1298 Pet. 33-34 (quoting *United States* v. *162.20 Acres of Land*, 733 F.2d 377, 379 (5th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *United States* v. *Washington*, 593 F.3d 790, 798 n.9 (9th Cir. 2010)). The Fifth Circuit's subsequent decision in *City Public Service Board*, however, recognizes that—albeit "[o]nly in extraordinary circumstances"— "this court [may] sustain a departure from the 'law of the case' doctrine on the ground that a prior decision was clearly erroneous." 935 F.2d at 82. And the Ninth Circuit's decision in *Mendenhall* applies the *Arizona* exception to vacate an earlier panel ruling that was "clearly erroneous and would work a manifest injustice." 213 F.3d at 469. In any event, defining the precise circumstances under which one Federal Circuit panel may depart from the reasoning of a prior panel in the same case is a function principally entrusted to the Federal Circuit itself. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

c. Petitioner Boeing contends (09-1302 Pet. 18-27) that the Due Process Clause required the court of appeals to remand the case to the CFC for further fact-

finding under the standard for default termination articulated in the court of appeals' 2009 decision. That contention lacks merit. As explained above (see pp. 22-24, *supra*), the Federal Circuit's 2003 opinion had instructed the CFC to consider substantially the same factors that the court of appeals identified in 2009 in affirming the CFC's ensuing judgment. In any event, although the Federal Circuit may remand to the trial court to apply a newly announced legal standard, *e.g.*, *Baginsky* v. *United States*, 697 F.2d 1070, 1074 (Fed. Cir.), cert. denied, 464 U.S. 981 (1983) such a remand is not required in every case in which the appellate court elaborates on the applicable legal standard. See, *e.g.*, *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982) (remand is unnecessary where "the record permits only one resolution of the factual issue"); *Hatch* v. *FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981) ("In those cases in which courts have not required the agency to allow the litigants to submit new evidence relevant to the newly announced standard, either actual notice of the operative standard existed at the time of the first hearing, or an additional opportunity to submit evidence was not deemed critical because the agency merely revised the legal significance of the same kind of facts.") (citations omitted).

Boeing's contention (09-1302 Pet. 23) that it "had no reason to anticipate" the relevance of other circumstances underlying its contract performance, and that it therefore lacked a meaningful opportunity to present material evidence, rings hollow in light of this case's long and winding litigation history. The court of appeals first mandated a broad factual inquiry in 1999, which it repeated verbatim in 2003:

> The question of whether Contractors satisfied their duty is of course that of breach, and must be deter-

> mined by taking into account all of the relevant facts and testimony, such as Contractors' statements that they could not meet the contract specifications, the contract delivery schedule, nor complete performance at the specified contract price.

Pet. App. 186a (quoting *id.* at 278a). Petitioners thus were apprised well before 2009 of the relevance of the type of evidence that the court of appeals ultimately invoked in affirming the CFC's judgment.

Accordingly, the court of appeals was well within its discretion in deciding that the extensive factual record compiled over nearly two decades of litigation was sufficiently developed to permit it to apply directly the *Lisbon* standard to this case. Pet. App. 32a ("the facts in the record are sufficient for the court, in a *de novo* review, to sustain the default termination"). In light of the ample evidence the court cited (*id.* at 23a-27a), there is no reason to believe that a third remand to the CFC would have yielded a different result.

d. Petitioner General Dynamics contends (09-1298 Pet. 23) that the court of appeals' application of the *Lisbon* standard "conflict[s] with basic principles of judicial review of administrative action" because the court did not limit itself to the reasons for default termination proffered by the contracting officer. General Dynamics appears to base that argument on the fact that the Federal Circuit upheld the default termination notwithstanding the CFC's statement that "the contracting officer did not conduct a *Lisbon* analysis prior to termination." Pet. App. 29a (quoting *id.* at 176a n.92); see *id.* at 28a-32a. Petitioner's argument lacks merit.

Unlike the court in an Administrative Procedure Act suit, which must sustain a challenged agency decision unless it is unsupported by substantial evidence in the

administrative record, 5 U.S.C. 706, the CFC in a CDA action does not review an administrative record or defer to the contracting officer's decision to terminate for default. See 41 U.S.C. 605(a) ("Specific findings of fact [by the contracting officer] are not required, but, if made, shall not be binding in any subsequent proceeding."); 41 U.S.C. 609(a)(3) (actions challenging contracting officer decisions in the CFC proceed "de novo in accordance with the rules of the * * * court"); cf. *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 23 (1974) ("contractor may institute its *de novo* proceeding in the Court of Claims, unfettered by any prejudice from the agency proceeding and free from any claim that the [prior] determination is supported by substantial evidence"). Rather, "the parties start in court * * * with a clean slate," *Wilner* v. *United States*, 24 F.3d 1397, 1402 (Fed Cir. 1994) (en banc), and the CFC decides *de novo*, based on a judicial record, whether the government has satisfied its burden to demonstrate that the default termination was valid. See *Lisbon*, 828 F.2d at 765.

For nearly a century, the government in such a suit has been entitled to establish that a default termination is justified based on any grounds available, regardless of whether those grounds were known at the time of termination. See *College Point Boat Corp.* v. *United States*, 267 U.S. 12, 15-16 (1925) ("A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him, although he was then ignorant of the fact. He may, likewise, justify an asserted termination, rescission, or repudiation, of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later."); see also Pet. App. 29a; *Empire Energy Mgmt. Sys., Inc.* v. *Roche*, 362 F.3d

1343, 1357 (Fed. Cir. 2004) (explaining that "the subjective knowledge of the contracting officer herself is irrelevant" to the proper disposition of a contractor's suit challenging a default termination); *Kelso* v. *Kirk Bros. Mech. Contractors, Inc.*, 16 F.3d 1173, 1175 (Fed. Cir. 1994) ("This court sustains a default termination if justified by circumstances at the time of termination, regardless of whether the Government originally removed the contractor for another reason."); *Joseph Morton Co.* v. *United States*, 757 F.2d 1273, 1277 (Fed. Cir. 1985) ("[I]t is settled law that a party can justify a termination if there existed at the time an adequate cause, even if then unknown.") (quoting *Pots Unlimited, Ltd.* v. *United States*, 600 F.2d 790, 793 (Ct. Cl. 1979)); 2 *Farnsworth* § 8.18, at 526 ("If an injured party terminates, a court will not ask whether the injured party was actually motivated by the other party's breach or even whether the injured party knew of the breach.").[7]

In any event, as the court of appeals explained (Pet. App. 30a-32a), the contracting officer considered several significant deficiencies before deciding to terminate the A-12 contract for default. The contracting officer summarized his reasoning at trial:

> [Petitioners] were in default because they acknowledged they would not be able to achieve the contract specifications and the contract requirements. Two, they had indicated that the[y] would not be able to meet the delivery schedule that was currently in the contract. And three, they would not be able to per-

[7] Petitioner General Dynamics (09-1298 Pet. 25-26) attempts to distinguish these precedents by construing them to permit judicial reliance on new legal, but not factual, justifications for a prior contract termination. As the quotations above indicate, however, those cases do not establish such a distinction.

> form the contract without extraordinary relief or additional funding for the contract. So they basically said they can't perform under the contract and they were in default of it.

Id. at 265a-266a. The contracting officer's conclusion that petitioners would be unable to perform the contract was amply supported by the course of dealing between the parties. For example, when asked in December 1990 by the Under Secretary of Defense whether petitioners would complete the contract regardless of the cost, the CEO of one of the petitioners responded that the contract "has got to get reformed to a cost-type contract or we cannot do it." *Id.* at 81a.

The court of appeals was properly "less concerned about the label of the contracting officer's action so long as, in fulfilling his duty, the contracting officer exercised reasoned judgment and did not act arbitrarily." Pet. App. 30a. The contracting officer's cure notice and termination letter (pp. 3-5, *supra*) substantiate his testimony and support the court's determination that the officer exercised "reasoned judgment" when terminating the contract for default. Pet. App. 30a. Thus, while the contracting officer may not have explicitly conducted a "*Lisbon* analysis" (*id.* at 29a), the rationale on which the officer terminated the contract was not different in kind from the rationale on which the court of appeals upheld the default termination.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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