No. 20-828

In the Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, ET AL.,
PETITIONERS

v.

YASSIR FAZAGA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether Section 1806(f) of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1801 *et seq.*, displaces the state-secrets privilege and authorizes a district court to resolve, *in camera* and *ex parte*, the merits of a lawsuit challenging the lawfulness of government surveillance by considering the privileged evidence.

PARTIES TO THE PROCEEDING

Petitioners are the United States of America; the Federal Bureau of Investigation (FBI); Christopher A. Wray, in his official capacity as the Director of the FBI; and Kristi K. Johnson, in her official capacity as the Assistant Director of the FBI's Los Angeles Division, each of whom is a defendant in the district court.

Respondents are Yassir Fazaga, Ali Uddin Malik, and Yasser Abdelrahim, each of whom is a plaintiff in the district court; and Paul Allen, Kevin Armstrong, Pat Rose, J. Stephen Tidwell, and Barbara Walls, each of whom is a defendant in his or her individual capacity in the district court.

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OPINIONS BELOW

The amended panel opinion of the court of appeals and the order denying rehearing en banc (Pet. App. 1a-98a) and the opinions regarding the denial of rehearing en banc (Pet. App. 98a-135a) are reported at 965 F.3d 1015. The opinion of the district court (Pet. App. 136a-180a) is reported at 884 F. Supp. 2d 1022. A related opinion of the district court (Pet. App. 181a-195a) is reported at 885 F. Supp. 2d 978.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2019. A petition for rehearing was denied and an amended panel opinion was issued on July 20, 2020

[1] This brief is filed on behalf of the official-capacity and other federal defendants. The individual-capacity defendants are separately represented by private counsel at government expense.

(Pet. App. 1a-98a). The petition for a writ of certiorari was filed on December 17, 2020, and was granted on June 7, 2021. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reproduced in the appendix to the petition. Pet. App. 196a-212a.

STATEMENT

A. Legal Background

1. The state-secrets privilege

The Executive's power and duty to safeguard the national security and to protect state secrets have been recognized since the earliest years of the Republic. Promptly after ratification, President Washington and his Cabinet determined that, even in the face of a request by a coordinate Branch, "the Executive ought to communicate such papers as the public good would permit, [and] ought to refuse those, the disclosure of which would injure the public"—a judgment in which the House of Representatives ultimately concurred. 1 *The Works of Thomas Jefferson* 214 (Paul Leicester Ford ed., 1904) (*Works of Thomas Jefferson*); see *id.* at 213-215 (discussing the House of Representatives' investigation into a disastrous expedition by General Arthur St. Clair); see also *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. O.L.C. 253, 270 (1996) ("[T]he St. Clair episode set an important precedent."); *id.* at 269-271.

The Judiciary, too, has long given effect to the state-secrets privilege. See *United States* v. *Reynolds*, 345 U.S. 1, 7 & n.18 (1953) (canvassing early Anglo-American

cases); Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 Geo. Wash. L. Rev. 1249, 1270-1298 (2007) (same). In the 1807 treason trial of Aaron Burr, Chief Justice Marshall emphasized that a court must afford "all proper respect" to the President's judgment that, in response to a trial subpoena, the public interest required that certain documents "be kept secret." *United States* v. *Burr*, 25 F. Cas. 187, 190, 192 (C.C.D. Va. 1807) (No. 14,694). In *Totten* v. *United States*, 92 U.S. 105 (1876), this Court held that, "as a general principle," "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential," including state and military secrets. *Id.* at 107. Most recently, in *General Dynamics Corp.* v. *United States*, 563 U.S. 478 (2011), the Court observed that it had long "recognized the sometimes-compelling necessity of governmental secrecy by acknowledging a Government privilege against court-ordered disclosure of state and military secrets." *Id.* at 484.

The state-secrets privilege is rooted in the Executive's "Art[icle] II duties" to protect the national security and conduct foreign affairs, which include the duty to safeguard "military or diplomatic secrets." *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). In addition to that constitutional foundation, the state-secrets privilege "is well established in the law of evidence." *Reynolds*, 345 U.S. at 6-7. The privilege shields information from disclosure whenever "there is a reasonable danger that compulsion of the evidence will expose military [or other] matters which, in the interest of national security, should not be divulged." *Id.* at 10. And where it

applies, the privilege is absolute: "[E]ven the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake." *Id.* at 11.

The government does not "lightly invoke[]" the state-secrets privilege. *Reynolds*, 345 U.S. at 7. It can assert the privilege only through "a formal claim" "lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *Id.* at 7-8 (footnote omitted). Furthermore, since 2009, even where another head of department wishes to claim the privilege, the Department of Justice conducts a high-level review that results in the "personal approval of the Attorney General" before it asserts the state-secrets privilege in litigation. Office of the Attorney General, *Policies and Procedures Governing Invocation of the State Secrets Privilege* 1-3 (Sept. 23, 2009), https://go.usa.gov/x6VqV. These procedures serve to ensure that the privilege is invoked only when—and to the extent—necessary to safeguard the national security.

Following a formal claim, the court must determine "whether the circumstances are appropriate for the claim of privilege." *Reynolds*, 345 U.S. at 8. In doing so, the court must take care not to "forc[e] a disclosure of the very thing the privilege is designed to protect." *Ibid.* This Court has stated that "the court should not jeopardize the security which the privilege is meant to protect" by unnecessarily "insisting upon an examination of the evidence, even by the judge alone, in chambers." *Id.* at 10.

As with any other evidentiary privilege, if the court upholds the government's claim of state-secrets privilege, the "privileged information is excluded" from the case. *General Dynamics*, 563 U.S. at 485; see *Sterling*

v. *Tenet*, 416 F.3d 338, 348-349 (4th Cir. 2005) (where the state-secrets privilege is properly invoked, a court is "neither authorized nor qualified to inquire further" into privileged matters "even in camera"), cert. denied, 546 U.S. 1093 (2006). In many circumstances, the case may then proceed without the excluded state secrets. See *General Dynamics*, 563 U.S. at 485; *El-Masri* v. *United States*, 479 F.3d 296, 306 (4th Cir.) ("If a proceeding involving state secrets can be fairly litigated without resort to the privileged information, it may continue."), cert. denied, 552 U.S. 947 (2007).

Dismissal is required, however, when the "maintenance of [the] suit" would threaten to disclose the privileged information. *Totten*, 92 U.S. at 107. Where "the very subject matter of the action" is a "matter of state secret," the action may be "dismissed on the pleadings without ever reaching the question of evidence." *Reynolds*, 345 U.S. at 11 n.26 (citing *Totten*). The courts of appeals have broadly recognized that the same principles dictate that if, at any stage, "'the circumstances make clear that sensitive [information] will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters,' dismissal is the proper remedy." *El-Masri*, 479 F.3d at 306 (citation omitted); see, *e.g.*, *Mohamed* v. *Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1079 (9th Cir. 2010) (en banc), cert. denied, 563 U.S. 1002 (2011); *Tenenbaum* v. *Simonini*, 372 F.3d 776, 777 (6th Cir.), cert. denied, 543 U.S. 1000 (2004); *Black* v. *United States*, 62 F.3d 1115, 1119 (8th Cir. 1995), cert. denied, 517 U.S. 1154 (1996). In such a case, where the privilege prevents adjudication of the merits, "neither party can obtain judicial relief." *General Dynamics*, 563 U.S. at 486.

2. The Foreign Intelligence Surveillance Act of 1978

The Foreign Intelligence Surveillance Act of 1978 (FISA or the Act), 50 U.S.C. 1801 *et seq.*, regulates the government's use of electronic surveillance within the United States for foreign-intelligence purposes.

a. The central provisions of FISA "provide a procedure under which the Attorney General can obtain a judicial warrant authorizing the use of electronic surveillance in the United States for foreign intelligence purposes." S. Rep. No. 604, 95th Cong., 1st Sess. 5 (1977) (Senate Judiciary Committee Report); see *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 402 (2013). "In constructing such a framework for foreign intelligence surveillance, Congress created two specialized courts": the Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review. *Clapper*, 568 U.S. at 402-403; see 50 U.S.C. 1803(a)-(b). When the government wishes to conduct electronic surveillance regulated by FISA, for example, where the target "has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes," 50 U.S.C. 1801(f)(4), FISA generally requires that the government obtain an order from the FISC approving the surveillance before conducting that surveillance. See 50 U.S.C. 1803(a), 1804(a); 50 U.S.C. 1805 (2018 & Supp. I 2019); 50 U.S.C. 1809(a)(1).

To obtain such an order, the government must establish, *inter alia*, probable cause to believe that the "target of the electronic surveillance" is a foreign power or an agent thereof and that "each of the facilities or places" at which the surveillance is directed is being used, or is about to be used, by a foreign power or its agent. 50 U.S.C. 1805(a)(2). The government must also

establish that the "minimization procedures" it will employ are reasonably designed to minimize the acquisition, retention, and dissemination of nonpublic information concerning "United States persons." 50 U.S.C. 1801(h), 1805(a)(3); 50 U.S.C. 1805(c)(2)(A) (2018 & Supp. I 2019). Where the requirements are found to be met, "the judge shall enter an ex parte order as requested," or with any necessary modifications, approving the surveillance. 50 U.S.C. 1805(a).

FISA imposes criminal penalties on any person who intentionally engages in unauthorized electronic surveillance "under color of law" or intentionally "discloses or uses information obtained under color of law" by unauthorized electronic surveillance, "knowing or having reason to know that the information was obtained through" unauthorized electronic surveillance. 50 U.S.C. 1809(a)(2). Section 1810 of the Act also provides a private right of action for damages from officials in their individual capacities by any "aggrieved person"—"other than a foreign power or [its] agent"—who has been subjected to electronic surveillance, or about whom information obtained by electronic surveillance has been disclosed or used, in violation of the criminal prohibition. 50 U.S.C. 1810; see 50 U.S.C. 1801(k) (defining "[a]ggrieved person" to mean "a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance"); *Al-Haramain Islamic Found., Inc.* v. *Obama*, 705 F.3d 845, 855 (9th Cir. 2012).

b. Section 1806 of FISA regulates the government's "[u]se of information" obtained or derived from electronic surveillance conducted under the Act. 50 U.S.C. 1806. Among other things, Section 1806 requires that any person subject to surveillance pursuant to FISA be

afforded notice and an opportunity to be heard before information obtained or derived from that surveillance may be used against that person by the government in any court or agency proceeding.

Section 1806(c) provides that, "[w]henever the Government intends to enter into evidence or otherwise use or disclose in any * * * proceeding * * * , against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to [FISA]," the government must "notify the aggrieved person and the court * * * that the Government intends to so disclose or so use such information." 50 U.S.C. 1806(c); see 50 U.S.C. 1806(d) (imposing the same notice requirement on States and their political subdivisions). Section 1806(e) authorizes an aggrieved person "against whom [such] evidence * * * is to be, or has been, introduced or otherwise used or disclosed" to "move to suppress the evidence" on the ground that (1) "the information was unlawfully acquired," or (2) "the surveillance was not made in conformity with an order of authorization or approval." 50 U.S.C. 1806(e).

Section 1806(f) provides, in turn, a mechanism for *in camera* and *ex parte* resolution of the admissibility of such evidence if "the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States." 50 U.S.C. 1806(f). Specifically, Section 1806(f) authorizes the Attorney General to invoke the *in camera* and *ex parte* procedures in three circumstances:

> [i] [w]henever a court or other authority is notified pursuant to subsection (c) or (d), or [ii] whenever a motion is made pursuant to subsection (e), or [iii] whenever any motion or request is made by an aggrieved person pursuant to any other statute or

> rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under [FISA].

Ibid.

If the Attorney General submits an affidavit invoking Section 1806(f), then the district court in which the aggrieved person's motion was filed—or, "where the motion is made before another authority," the district court "in the same district as the authority"—"shall, notwithstanding any other law, * * * review in camera and ex parte the [FISA] application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." 50 U.S.C. 1806(f). Review under Section 1806(f) proceeds *ex parte* unless disclosure to the aggrieved person "is necessary to make an accurate determination of the legality of the surveillance," in which case the court "may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance." *Ibid.*

If the district court determines "pursuant to subsection (f)" that "the surveillance was not lawfully authorized or conducted," it "shall, in accordance with the requirements of law, suppress the evidence which was unlawfully obtained or derived from electronic surveillance of the aggrieved person or otherwise grant the motion of the aggrieved person." 50 U.S.C. 1806(g).

Conversely, "[i]f the court determines that the surveillance was lawfully authorized and conducted, it shall deny the motion * * * except to the extent that due process requires discovery or disclosure." *Ibid.*

B. The Present Controversy

1. Plaintiffs-respondents (referred to here as respondents) are three members of Muslim communities in Southern California. J.A. 64-65. They brought this putative class action in 2011 against the United States, the Federal Bureau of Investigation (FBI), former FBI Director Robert Mueller, and former Assistant Director of the FBI Los Angeles Field Office Steven Martinez in their official capacities (petitioners), and five FBI agents in their individual capacities (individual-capacity respondents). J.A. 65-69. Respondents allege that, from 2006 to 2007, the FBI used a confidential informant, Craig Monteilh, to covertly gather information about Muslims in their communities based solely on their religion. J.A. 61-62, 82, 113.

Respondents allege that the FBI directed Monteilh to engage in various forms of investigation, including non-electronic and electronic surveillance. They allege that Monteilh was directed to seize "every opportunity to meet people" by "attend[ing] lectures by Muslim scholars," "attend[ing] classes at the mosque," and "work[ing] out with people he met from the Muslim community." J.A. 97, 99, 101; see Pet. App. 10a. They allege that Monteilh gathered personal information, like phone numbers and email addresses, through face-to-face encounters at such gatherings. J.A. 106. They also allege that he collected video recordings capturing the interiors of mosques, homes, and businesses, and audio recordings of conversations, lectures, classes, and other events. J.A. 104-108. Finally, respondents allege

that the individual-capacity respondents separately planted audio-listening devices in one respondent's office and another's home. J.A. 95, 131.

Based on these allegations, respondents assert religious-discrimination and search-related claims under the Establishment Clause, the Free Exercise Clause, the equal protection component of the Due Process Clause, the Religious Freedom Restoration Act of 1993, the Federal Tort Claims Act (FTCA), Section 1810 of FISA, the Fourth Amendment, the Privacy Act, and California law. J.A. 137-145. They seek damages from the individual-capacity respondents under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and Section 1810 of FISA; damages from the government under the FTCA and California law; and an injunction ordering the government "to destroy or return any information gathered" through or derived from unlawful surveillance. J.A. 146; see Pet. App. 148a & n.6.

2. Before the district court, the government moved to dismiss all of respondents' claims against the government on grounds unrelated to any claim of privilege. Pet. App. 15a. In the alternative, the government sought dismissal of the religious-discrimination claims against the government and the individual-capacity respondents on the ground that those claims could not be litigated without risking the disclosure of state secrets —namely, whom (if anyone) the government was investigating and why. *Ibid.* To support that argument, the government formally invoked the state-secrets privilege, through a declaration of the Attorney General, over information concerning whether any particular individual, including each respondent, was the subject of an FBI counterterrorism investigation, the reasons for

any such investigation, and the particular sources and methods used (including any undisclosed court-ordered electronic surveillance). *Id.* at 146a, 163a. The government submitted classified declarations explaining in detail why disclosure of that information could reasonably be expected to harm the national security. See *id.* at 146a, 163a-164a.

The district court upheld the government's assertion of privilege and dismissed all but the FISA Section 1810 claims on state-secrets grounds. Pet. App. 136a-180a. The court determined that the covered information was properly subject to the state-secrets privilege because its disclosure "would significantly compromise national security." *Id.* at 165a. And it concluded that "dismissal at this stage of the proceeding is required" because "litigation of this action would certainly require or, at the very least, greatly risk disclosure of secret information." *Id.* at 165a-166a. The court dismissed respondents' FISA Section 1810 claim against the government on the basis of sovereign immunity. *Id.* at 186a-189a. The court declined to dismiss respondents' FISA Section 1810 claim against the individual-capacity respondents, deferring ruling on whether dismissal was required on state-secrets grounds and denying the individual-capacity respondents' motion to dismiss based on qualified immunity. *Id.* at 178a-180a, 195a & n.4.

3. The court of appeals reversed. Pet. App. 1a-98a. As relevant here, the court held that "the procedures established under FISA for adjudicating the legality of challenged electronic surveillance replace the common law state secrets privilege with respect to such surveillance to the extent that privilege allows the categorical dismissal of causes of action." *Id.* at 37a-38a. Without

addressing the district court's determination that further litigation would require or greatly risk the disclosure of state secrets, the court of appeals held that the district court erred in dismissing respondents' claims instead of relying on FISA Section 1806(f) as a means to adjudicate respondents' claims on the merits based on the privileged evidence. See *id.* at 37a-67a.

The court of appeals determined that Section 1806(f) was triggered in two ways. First, it construed the Attorney General's declaration invoking the state-secrets privilege to *exclude* certain information—including whether there was any undisclosed court-ordered electronic surveillance—as constituting notice under Section 1806(c) of the government's intent to *use or disclose* information obtained or derived from electronic surveillance. Pet. App. 57a-58a; see 50 U.S.C. 1806(c) and (f) (providing for *in camera* and *ex parte* review "[w]henever a court or other authority is notified pursuant to subsection (c) or (d)" of the government's intent to "enter into evidence or otherwise use or disclose" electronic-surveillance information in a legal proceeding). Second, the court concluded that one prayer for relief in respondents' complaint—for an order requiring the destruction or return of information gathered in the alleged investigations—constituted a "motion or request * * * to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance" under FISA for purposes of Section 1806(f). Pet. App. 57a (quoting 50 U.S.C. 1806(f)); see *id.* at 58a.

The court of appeals further held that, when the Section 1806(f) procedure applies, it "displace[s] the common law dismissal remedy created by the *Reynolds* state secrets privilege as applied to electronic surveillance within FISA's purview." Pet. App. 47a; see *id.* at

46a-55a. The court reasoned that "[t]he state secrets privilege may have a constitutional core or constitutional overtones, but, at bottom, it is an evidentiary rule rooted in common law" that can be abrogated by statute. *Id.* at 48a-49a (citation and internal quotation marks omitted). And the court concluded that Congress intended to make Section 1806(f)'s *in camera* and *ex parte* procedure "the exclusive procedure for evaluating evidence that threatens national security in the context of electronic surveillance-related determinations." *Id.* at 50a; see *id.* at 49a-55a.

On that basis, the court of appeals reversed the district court's dismissal based on the Attorney General's assertion of the state-secrets privilege and remanded for further proceedings. Pet. App. 92a-98a. The court instructed that, on remand, to the extent respondents are "aggrieved persons" within the meaning of FISA, the district court "should, using § 1806(f)'s *ex parte* and *in camera* procedures, review any 'materials relating to the surveillance as may be necessary,' including the evidence over which the Attorney General asserted the state secrets privilege, to determine whether the electronic surveillance was lawfully authorized and conducted." *Id.* at 18a-19a, 92a-93a (citation omitted). "As permitted by Congress," the court continued, "'[i]n making this determination, the court may disclose to [respondents] * * * portions of the application, order, or other materials relating to the surveillance'" if "'necessary to make an accurate determination.'" *Id.* at 93a (quoting 50 U.S.C. 1806(f)) (first set of brackets in original).

The court of appeals further held that, once the district court used the Section 1806(f) procedures to determine the lawfulness of the electronic surveillance in resolving the merits of respondents' claims, then "it c[an]

rely on its assessment of the same evidence * * * to determine the lawfulness of the surveillance falling outside FISA's purview." Pet. App. 95a. The court of appeals reasoned that "[i]t would stretch the privilege beyond its purpose to require the district court to consider the state secrets evidence *in camera* and *ex parte* for one claim, but then, when considering another claim, ignore the evidence and dismiss the claim." *Ibid.* The court stated that, if its "prediction of the overlap between the information to be reviewed * * * to determine the validity of FISA-covered electronic surveillance and the information pertinent to other aspects" of the claims turned out to be inaccurate, the government would be "free to interpose a specifically tailored, properly raised state secrets privilege defense." *Ibid.*

4. The court of appeals denied rehearing en banc by a deeply divided vote. Pet. App. 3a.

a. Judges Gould and Berzon, both members of the original panel, concurred in the denial of rehearing en banc, joined by three other judges. Pet. App. 98a-108a. In their joint concurrence, Judges Gould and Berzon reiterated the reasoning of the panel opinion and stated that, in their view, the panel decision does not deprive the government of the state-secrets privilege itself, but "only" of the dismissal remedy "that sometimes follows the successful invocation of the state-secrets evidentiary privilege." *Id.* at 101a-102a. In a footnote, they stated that if a district court, in following the Section 1806(f) procedures, were to order the disclosure of state secrets to opposing counsel under that provision to facilitate the court's adjudication of the merits of respondents' claims, "nothing in the panel opinion prevents the government from invoking the state secrets privilege's

dismissal remedy as a backstop at that juncture." *Id.* at 100a n.1.

Senior District Judge Steeh, the third member of the panel, filed a brief statement respecting the denial of rehearing en banc, "agree[ing] with the views expressed by Judges Berzon and Gould in their concurrence." Pet. App. 108a.

b. Judge Bumatay, joined by nine other judges, dissented from the denial of rehearing en banc. Pet. App. 108a-135a. Judge Bumatay observed that the Executive's authority "to prevent the disclosure of information that would jeopardize national security" "lies at the core of the executive power" and has been recognized "[f]rom the earliest days of our Nation's history." *Id.* at 108a. He explained that courts must "ensure[] that Congress was unmistakably clear before vitiating a core constitutional privilege"—but "Congress articulated no directive in FISA to displace the state secrets privilege." *Id.* at 110a.

Judge Bumatay reasoned that Section 1806(f) provides procedures to determine the limited issue of the admissibility of electronic-surveillance evidence when the government seeks to use such evidence against an aggrieved person in litigation. Pet. App. 108a, 127a-134a. He explained that, contrary to the panel's opinion, the government's invocation of the state-secrets privilege to *remove* information from the case did not trigger Section 1806(f)'s procedures because it did not provide notice of an intent to *use* any evidence against respondents. *Id.* at 128a-130a. He likewise concluded that respondents' prayer for relief to destroy or return any information obtained or derived from government surveillance did not qualify as a motion or request "'to discover, obtain, or suppress evidence or information'" that

would trigger Section 1806(f), reasoning that that language applies only to motions to suppress or other similar procedural requests, not "substantive claims for relief." *Id.* at 132a (citation omitted); see *id.* at 131a-134a.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that Section 1806(f) displaces the state-secrets privilege and authorizes a district court to resolve, *ex parte* and *in camera*, the merits of an action by considering the privileged evidence.

A. Section 1806(f) provides an *ex parte* and *in camera* procedure for resolving procedural motions related to the suppression of FISA-obtained or FISA-derived evidence that the government seeks to use or disclose in a legal proceeding, not a procedure for deciding the merits of the underlying action. Section 1806(f)'s procedures are available only in three limited circumstances, none of which includes the filing of a civil action. And the only relief Section 1806(f) authorizes, if the surveillance is found to have been unlawfully authorized or conducted, is to "suppress the evidence * * * or otherwise grant [a] motion" to "discover [or] obtain" it, not to issue a judgment on the merits. 50 U.S.C. 1806(f) and (g).

The court of appeals, however, held that Section 1806(f) may be triggered whenever the government invokes the state-secrets privilege to exclude alleged FISA-obtained or FISA-derived evidence from a legal proceeding, on the ground that assertion of the privilege constitutes notice of the government's intent "to enter into evidence or otherwise use or disclose" the privileged information "against an aggrieved person" in the proceeding. 50 U.S.C. 1806(c). But that conclusion seriously misunderstands the function of the state-secrets

privilege and the effect of its invocation. The government invokes the state-secrets privilege for the same reason that any party asserts any evidentiary privilege: to *prevent* the introduction or disclosure of the privileged information, not to facilitate its use. Excluding evidence—not using that evidence—is how a litigant claiming any privilege vindicates the interest protected by that privilege.

The court of appeals also concluded that a prayer for relief on the merits in a plaintiff's complaint may constitute a "motion or request * * * to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance" that would satisfy the third ground for triggering Section 1806(f). 50 U.S.C. 1806(f). But a prayer for relief is not a "motion." And although it might be colloquially described as a "request," it is nothing like a motion to suppress or comparable procedural motion at which Section 1806(f) is aimed.

Section 1806 as a whole, moreover, confirms that the third ground for invoking Section 1806(f) covers only motions or requests concerning the government's intended use or disclosure of FISA-obtained or FISA-derived evidence in a legal proceeding. The first two grounds apply (1) when the government provides notice, pursuant to Section 1806(c) or (d), of its intent to "use or disclose" such material against the aggrieved person in a proceeding, or (2) when the aggrieved person invokes Section 1806(e) to "suppress" such material. See 50 U.S.C. 1806(f). The third ground serves as a backstop to the first two, ensuring that an aggrieved person cannot circumvent Section 1806(f)'s *in camera*, *ex parte* procedures by seeking to suppress evidence or obtain discovery of FISA materials using "any *other* statute or

rule of the United States or any State." 50 U.S.C. 1806(f) (emphasis added).

Finally, the court of appeals' ultimate conclusion is flawed. The court reasoned that Section 1806(f) provides a mechanism for litigating a civil plaintiff's claims to final judgment. But nothing in Section 1806(f) suggests that it was intended to be used to litigate, *ex parte* and *in camera*, the merits of a case. The result of Section 1806(f) proceedings is not an award of judgment on the merits, but the grant or denial of a "motion" related to admissibility, for which the lawfulness of surveillance is the relevant rule of decision. 50 U.S.C. 1806(g). Conducting such a proceeding would be complicated enough when the federal government is a party to the claims; the practical impediments would be substantially magnified for claims between private parties, where neither party to a claim could participate in its adjudication. Section 1806(f)'s silence on those procedures is telling.

B. In any event, even when Section 1806(f)'s procedures are properly invoked, they do not silently displace the state-secrets privilege. FISA does not suggest—directly or indirectly—any intent to preclude the government from relying on the privilege to protect the national security by removing state secrets from a case. The privilege is not mentioned in the text of Section 1806 or anywhere in the Act. Neither the court of appeals nor respondents have identified anything in FISA's legislative history discussing the privilege. And nothing in the operation of Section 1806(f) is incompatible with the continued vitality of the privilege.

If there were any doubt that Congress did not displace the state-secrets privilege in Section 1806(f), any ambiguity should be construed in favor of retaining the privilege. The state-secrets privilege is a longstanding

feature of our legal system; its existence "has never been doubted." 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2378(2), at 794 (John T. McNaughton rev. ed., 1961) (Wigmore). Even when the privilege is viewed as one recognized at common law, the Court will not find the common law to be displaced by statute absent a clear expression of congressional intent to do so.

Moreover, the Court has explained that the "authority to classify and control access to information bearing on national security" is an aspect of executive power that "flows primarily from th[e] constitutional investment of power in the President and exists quite apart from any explicit congressional grant." *Department of Navy* v. *Egan*, 484 U.S. 518, 527 (1988). And the Court has repeatedly acknowledged that executive privileges, like the state-secrets privilege, that "relate[] to the effective discharge of a President's powers" are "constitutionally based." *United States* v. *Nixon*, 418 U.S. 683, 710-711 (1974).

Against that backdrop, neither Section 1806(f) nor any other provision in FISA contains the sort of clear statement that would be required to conclude that Congress has attempted to abrogate the state-secrets privilege and bring about such a startling change in the Executive's authority to protect national-security information.

ARGUMENT

The Executive Branch has the critical responsibility to protect the national security of the United States. The state-secrets privilege helps enable the Executive to meet that constitutional duty by ensuring that information may not be used in litigation where "there is a reasonable danger that compulsion of the evidence will expose military [or other] matters which, in the interest

of national security, should not be divulged." *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953). The court of appeals' decision creates a roadmap for inventive litigants to avoid the state-secrets privilege whenever electronic surveillance allegedly is involved and to have the merits of civil claims adjudicated *ex parte* and *in camera* on the basis of the privileged evidence. The decision below thus substantially weakens the government's ability to safeguard national-security information.

The court of appeals purported to find authorization for litigating the merits of such actions on the basis of state-secrets-privileged evidence in a provision of FISA, 50 U.S.C. 1806(f), that is narrowly focused on the admissibility and suppression of evidence, and that has never been understood, in the more than 40 years since its enactment, to have the effect the court gave it. The court held that Section 1806(f)'s procedures may be used in that manner whenever the government invokes the state-secrets privilege to exclude information that was allegedly obtained by or derived from electronic surveillance, or whenever a plaintiff files suit and requests in the prayer for relief an order to destroy or return information allegedly gathered through such surveillance. And the court further held that, where Section 1806(f) applies, it displaces the privilege and permits the district court to adjudicate the merits of substantive claims for relief by considering the very evidence over which the government asserted the privilege. Those holdings are profoundly wrong and should be reversed by this Court.

A. Section 1806(f)'s Procedures Do Not Provide A Means For Adjudicating The Merits Of An Action

The court of appeals erred in holding that Section 1806(f) creates a means for a plaintiff to allege unlawful

electronic surveillance in civil claims against the government and then to seek resolution of the merits of those claims *in camera* and *ex parte* on the basis of privileged information. As the ten dissenting judges below explained, FISA's review procedures are designed "to determine the admissibility of electronic surveillance evidence" when the government seeks to use the evidence against an aggrieved person, not to determine the merits of a suit. Pet. App. 109a (Bumatay, J., dissenting from denial of rehearing en banc) (emphasis omitted). Because the government has not stated any intent to introduce any such evidence in this case, and respondents have not filed a motion to suppress or any similar motion concerning the admissibility of such evidence, Section 1806(f)'s procedures have no application here.

1. Section 1806, titled "Use of information," regulates how the government may use or disclose evidence obtained or derived from electronic surveillance conducted under FISA. 50 U.S.C. 1806. Subsection (a) requires that such information "may be used" only in compliance with privacy-protective minimization procedures; subsection (b) explains that such information "may only be used" with the advance authorization of the Attorney General; subsections (c) and (d) require that, if a government entity seeks to "use or disclose" such information "against an aggrieved person" in a legal proceeding, the government must "notify the aggrieved person"; and subsection (e) provides that an aggrieved person against whom the electronic-surveillance information is to be "used or disclosed" may "move to suppress" the information "on the ground[] that" it was "unlawfully acquired." 50 U.S.C. 1806(a)-(e).

The provision at issue here, subsection (f), is the very next one. Subsection (f) creates a special *ex parte* and

in camera procedure for circumstances when a typical adversarial hearing on suppression or comparable exclusion of evidence would "harm the national security." 50 U.S.C. 1806(f). When the Attorney General attests to such harm, a district court reviews the underlying FISA application, order, and related materials *in camera* and *ex parte* to determine "the legality of the surveillance," and may disclose the relevant materials to the aggrieved person only where "necessary to make an accurate determination." *Ibid.* If the court "determines that the surveillance was not lawfully authorized or conducted, it shall * * * suppress the evidence [that] was unlawfully obtained or derived from electronic surveillance of the aggrieved person or otherwise grant the motion." 50 U.S.C. 1806(g). Conversely, "[i]f the court determines that the surveillance was lawfully authorized and conducted, it shall deny the motion * * * except to the extent that due process requires discovery or disclosure." *Ibid.*

On its face, Section 1806(f) thus provides a government-protective mechanism for resolving certain procedural motions related to the suppression of FISA-obtained or FISA-derived evidence that the government intends to use or disclose against a party, not a mechanism to resolve the merits of an underlying civil action. Section 1806(f)'s procedures are available only in three limited circumstances, none of which includes the filing of a civil action: first, when the government provides notice under subsections (c) or (d) of its intent to "use or disclose" electronic-surveillance evidence against an aggrieved person in a legal proceeding; second, when an aggrieved person against whom electronic-surveillance evidence has been, or is to be, used or disclosed in a le-

gal proceeding files a motion to suppress under subsection (e); or, third, "whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State" to "discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under [FISA]." 50 U.S.C. 1806(c), (d), and (f). And the only relief Section 1806(f) authorizes, if the surveillance is found to have been unlawfully authorized or conducted, is to "suppress the evidence * * * or otherwise grant [a] motion" to "discover [or] obtain" it, not to issue a judgment on the merits. 50 U.S.C. 1806(f) and (g).

2. The court of appeals' contrary reasoning lacks merit. The court reasoned that Section 1806(f)'s procedures may be triggered whenever the government invokes the state-secrets privilege to exclude FISA-obtained or FISA-derived evidence from a legal proceeding or when an alleged target of electronic surveillance files a complaint seeking an order to obtain information collected or derived from such surveillance. And the court concluded that, in such circumstances, Section 1806(f) provides the exclusive procedure for resolving—*ex parte* and *in camera*—the merits of the plaintiff's claims. That reasoning is flawed at every step.

a. As to the first ground on which Section 1806(f) may be invoked, the court of appeals concluded that the government's assertion of the state-secrets privilege with respect to certain categories of information constituted notice under Section 1806(c) of the government's intent "to enter into evidence or otherwise use or disclose" FISA-obtained or FISA-derived information against respondents in this lawsuit, 50 U.S.C. 1806(c).

See Pet. App. 57a-58a. The court reasoned that it was "because the Government would like to use this information to defend itself that it * * * asserted the state secrets privilege." *Id.* at 57a. That reasoning seriously misunderstands the function of the state-secrets privilege and the effect of its invocation.

The government invoked the state-secrets privilege for the same reason that any party asserts any evidentiary privilege: to *prevent* the introduction or disclosure of the privileged information, not to *facilitate* its use. In invoking the privilege, the Attorney General explained that disclosure of the privileged information—including whether there was any undisclosed court-ordered electronic surveillance—"could reasonably be expected to cause significant harm to the national security." J.A. 27. The government sought to avoid such harm by precluding the use by any party of any evidence protected by the state-secrets privilege.

By the panel's reasoning, a litigant who asserts the attorney-client privilege signals her intent to use or disclose private communications with counsel, and a husband who asserts the marital-communications privilege signals his intent to use or disclose private conversations with his spouse. But, of course, they do nothing of the sort. The rules of privilege "forbid the admission of various sorts of evidence because some consideration extrinsic to the investigation of truth is regarded as more important and overpowering." Wigmore § 2175, at 3; see *General Dynamics Corp.* v. *United States*, 563 U.S. 478, 485 (2011) ("[P]rivileged information is excluded."). A litigant claiming the privilege vindicates such an interest by invoking the rule of exclusion, not by announcing an intent to undermine that rule and use the evidence in the proceeding. The court of appeals'

"upside-down logic" to the contrary "should not stand." Pet. App. 128a (Bumatay, J., dissenting from denial of rehearing en banc).

To be sure, invoking the state-secrets privilege to remove evidence from a case may result, as it did here, in dismissal of a claim if further litigation would threaten to reveal state secrets. See *Totten* v. *United States*, 92 U.S. 105, 107 (1876) ("[A]s a general principle, * * * public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."); see, *e.g.*, *El-Masri* v. *United States*, 479 F.3d 296, 306 (4th Cir.), cert. denied, 552 U.S. 947 (2007); *Mohamed* v. *Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1079 (9th Cir. 2010) (en banc), cert. denied, 563 U.S. 1002 (2011); *Tenenbaum* v. *Simonini*, 372 F.3d 776, 777 (6th Cir.), cert. denied, 543 U.S. 1000 (2004); *Black* v. *United States*, 62 F.3d 1115, 1119 (8th Cir. 1995), cert. denied, 517 U.S. 1154 (1996).

But seeking dismissal of certain claims to avoid disclosing state secrets is not a declaration of the government's "inten[t] to enter into evidence or otherwise use or disclose" any privileged information "in any trial, hearing, or other proceeding." 50 U.S.C. 1806(c). The premise of such a request—as with every invocation of the privilege—is that any disclosure of the privileged information, even indirectly, would undermine the national security. Indeed, as this case demonstrates, the government may invoke the privilege and request such a dismissal even of claims to which the government is not a party (except for the purpose of asserting the privilege). See, *e.g.*, Pet. App. 178a-180a (dismissing claims against individual-capacity respondents on state-secrets

grounds); *Jeppesen Dataplan, Inc.*, 614 F.3d at 1076-1077; *Bareford* v. *General Dynamics Corp.*, 973 F.2d 1138, 1141-1144 (5th Cir. 1992), cert. denied, 507 U.S. 1029 (1993); *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544, 545-546 (2d Cir. 1991); *Fitzgerald* v. *Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1237 (4th Cir. 1985). With respect to such claims, the government would have no ability to introduce evidence or otherwise use or disclose information in any trial, hearing, or proceeding. At most, a request to dismiss claims on the basis of the state-secrets privilege might reasonably be described as using the *privilege* with the consequence of preventing a trial; it cannot plausibly be described as declaring an intent to use or disclose the *information* in a trial.

Nor is invoking the state-secrets privilege rightly described as announcing an intent to use any information "against an aggrieved person." 50 U.S.C. 1806(c). The Executive Branch asserts the state-secrets privilege not as a litigant seeking to prevail in any particular case but to safeguard the public interest, regardless of whether doing so helps or harms the government's or any other party's litigation interests. The government does not "lightly invoke[]" the state-secrets privilege, *Reynolds*, 345 U.S. at 7, and follows extensive procedures to ensure the privilege is invoked only when and to the extent necessary to protect the national security. Although an ordinary privilege "is for the protection of the litigant," the state-secrets privilege "is a principle to be observed in administering justice, quite unconnected with the interests or claims of the particular parties in litigation." *Duncan* v. *Cammell, Laird & Co.*, [1942] A.C. 624 (H.L.) [641-642]; see *Reynolds*, 345 U.S. at 7-8 & nn.15 & 20 (relying on *Duncan* to discern the principles governing the state-secrets privilege).

The privilege is therefore properly invoked and upheld whenever "there is a reasonable danger that compulsion of the evidence will expose military [or other] matters which, in the interest of national security, should not be divulged," regardless of whether the privileged information would support or undermine any particular litigant's cause. *Reynolds*, 345 U.S. at 10. And a state-secrets dismissal rests on the determination that the claims are "nonjusticiable," "leav[ing] the parties where they [we]re" when they reached the courthouse door. *General Dynamics*, 563 U.S. at 489, 490. It denies a judicial forum to all parties to an action —government or private—depriving them of the opportunity to vindicate their claims or defenses "in order to protect a greater public value." *Sterling* v. *Tenet*, 416 F.3d 338, 348 (4th Cir. 2005) (citation omitted), cert. denied, 546 U.S. 1093 (2006); see *General Dynamics*, 563 U.S. at 489 (noting that "[n]either side" may be "entirely happy" with such a resolution).

b. The court of appeals also concluded that a prayer for relief on the merits in respondents' complaint triggered the third ground on which Section 1806(f) may be invoked. Specifically, the court reasoned that respondents' prayer for an injunction requiring the government to "destroy or return any information gathered through the [allegedly] unlawful surveillance program" may constitute a "motion or request * * * made by an aggrieved person * * * to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance" under FISA, 50 U.S.C. 1806(f). Pet. App. 58a. That conclusion is inconsistent with the text, structure, and history of Section 1806.

Section 1806(f) speaks of "any motion or request * * * to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance." 50 U.S.C. 1806(f). A prayer for relief is not a "motion." Although it might be colloquially described as a "request," a word or phrase in a statute "is known by the company it keeps." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995); see *Freeman* v. *Quicken Loans, Inc.*, 566 U.S. 624, 634-635 (2012) ("[T]he 'commonsense canon of *noscitur a sociis* * * * counsels that a word is given more precise content by the neighboring words with which it is associated.'") (citation omitted). And a prayer for relief on the merits in a civil complaint is nothing like a motion to suppress or comparable procedural motion at which Section 1806(f) is aimed.

Section 1806(g) confirms that the two words—"motion" and "request"—should be understood as close synonyms. That subsection refers only to granting or denying the "motion," not the "request," when it specifies the possible results of a Section 1806(f) proceeding. 50 U.S.C. 1806(g). If the court finds, under Section 1806(f), that the surveillance was unlawful, the only relief it may afford is to "suppress the evidence" or "grant the *motion* of the aggrieved person." *Ibid.* (emphasis added). If the court finds the surveillance lawful, it "den[ies] the *motion*." *Ibid.* (emphasis added).

The broader structure and context of Section 1806(f) reinforce that conclusion. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Sturgeon* v. *Frost*, 577 U.S. 424, 438 (2016) (citation omitted). Section 1806 as a whole, including its title ("Use of information"),

demonstrates that the provision concerns the government's use or disclosure of FISA-obtained and FISA-derived evidence. And the subsections immediately preceding subsection (f) demonstrate that subsection (f), in particular, concerns the government's ability to use or disclose such evidence against an aggrieved person in a legal proceeding. See 50 U.S.C. 1806(c) and (d) (notice); 50 U.S.C. 1806(e) (motion to suppress).

Each of the three grounds for invoking Section 1806(f), listed at the outset of that provision, fits precisely within that same framework. The first ground applies whenever the government provides notice under Section 1806(c) or (d) of its intent to "use or disclose" FISA-obtained or FISA-derived material against the aggrieved person in a proceeding. 50 U.S.C. 1806(c) and (d); see 50 U.S.C. 1806(f). The second ground applies when the aggrieved person invokes Section 1806(e) to "suppress" such material—*i.e.*, to prevent such use or disclosure of the material. 50 U.S.C. 1806(e); see 50 U.S.C. 1806(f). And the third ground serves as a backstop to the first two, ensuring that an aggrieved person cannot circumvent Section 1806(f)'s *in camera*, *ex parte* procedures by seeking to suppress evidence or obtain discovery of FISA materials by invoking "any *other* statute or rule of the United States or any State." 50 U.S.C. 1806(f) (emphasis added).

Where, as here, "general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384-385 (2003) (citation omitted). This interpretive principle "implies the addition of *similar* after the word

other." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012). It thereby avoids "giving unintended breadth to the Acts of Congress." *Yates* v. *United States*, 574 U.S. 528, 543 (2015) (plurality opinion) (citation omitted). Here, that familiar principle makes clear that the third ground covers a situation in which an aggrieved person creatively seeks to invoke a statute or rule *other* than those articulated in Section 1806(c), (d), or (e), in order to achieve a *similar* effect of preventing the government from using or disclosing electronic-surveillance evidence against the aggrieved person in a legal proceeding. See, *e.g.*, Fed. R. Crim. P. 12(b)(3)(C) (allowing a criminal defendant to file a pre-trial motion to suppress evidence); 18 U.S.C. 3504(a)(1) and (2) (permitting a party "aggrieved" by illegal surveillance to seek the "disclosure of information for a determination if evidence is inadmissible" because it was unlawfully obtained).

The legislative history of Section 1806(f) further supports that textual reading. The Senate Report accompanying the adoption of Section 1806 explains that the *in camera* procedure in Section 1806(f) is used to "determine whether the surveillance" violated the "right[s] of the person *against whom the evidence is sought to be introduced*." S. Rep. No. 701, 95th Cong., 2d Sess. 63 (1978) (Senate Intelligence Committee Report) (emphasis added). The report states that the third ground, in particular, is meant to prevent the "carefully drawn" procedures of Section 1806(f) "from being bypassed by the inventive litigant using a new statute, rule or judicial construction" rather than the notice and suppression provisions included in Section 1806. *Ibid.*; see Senate Judiciary Committee Report 57.

c. Finally, the court of appeals' ultimate conclusion is flawed. The court reasoned that, where the circumstances for invoking Section 1806(f) are met, it provides the exclusive mechanism to litigate a civil plaintiff's claims to final judgment. But nothing in Section 1806(f) suggests that it was intended to establish a mechanism for litigating an entire case.

As noted above, the result of Section 1806(f) proceedings is not an award of judgment on the merits, but the grant or denial of a "motion" related to admissibility, for which the lawfulness of surveillance is the relevant rule of decision. See 50 U.S.C. 1806(g) ("Suppression of evidence; denial of motion"). The statute also provides no guidance on how a court should conduct an entire trial *ex parte* and *in camera*, where only the government is permitted to participate. The court of appeals appeared to expect that litigation of respondents' religious-discrimination claims would proceed under Section 1806(f). See Pet. App. 92a-95a; *e.g.*, *id.* at 65a n.31 (suggesting that individual-capacity respondents "may prevail on summary judgment"). But the Federal Rules of Civil Procedure are plainly not designed for such an *ex parte* and *in camera* proceeding. Establishing the mechanics of discovery, the submission of testimony by witnesses, and the presentation of evidence would be difficult enough where the federal government is a party to the claims. Cf. Classified Information Procedures Act, 18 U.S.C. App. 3, at 414 (2018) (providing detailed procedures for the management of criminal cases involving classified information). The practical impediments would be substantially magnified for claims that involve only private parties or state or local governments. Section 1806's silence on those questions

is telling. Cf. 50 U.S.C. 1803(g)-(i) (providing for rules of procedure of *ex parte* proceedings before the FISC).

The court of appeals erred in concluding that Section 1810, which creates a private cause of action to recover damages for a violation of FISA's criminal provisions, requires a broader reading of Section 1806(f). The court posited that "[i]t would make no sense" for Congress to provide procedures for reviewing national-security evidence in Section 1806(f) "but not intend for those very procedures to be used" to resolve damages actions under Section 1810. Pet. App. 61a. Section 1806(f) could well apply to covered *motions* in such a case—for example, if a question were to arise about whether FISA-obtained or FISA-derived evidence could be introduced against the Section 1810 plaintiff or instead must be suppressed. But the existence of the Section 1810 cause of action itself provides no basis for reading Section 1806(f) to create a mechanism for resolving the *merits* of a claim. Indeed, the absence of any cross-reference in the text of the two provisions—or in the legislative history—undermines the court of appeals' conclusion that they are inherently linked.

Moreover, while the court of appeals determined that Section 1806(f) could be invoked by respondents' prayer for injunctive relief, their Section 1810 claim cannot serve as the basis for any such "request." Section 1810 authorizes only claims for monetary, not injunctive, relief. See 50 U.S.C. 1810(a)-(c) (providing for actual damages, punitive damages, and reasonable attorney's fees and costs). And a prayer for monetary damages and attorney's fees, whether under Section 1810 or any other cause of action, cannot conceivably be described as a "motion or request * * * to discover or obtain applications or orders or other materials relating

to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under [FISA]." 50 U.S.C. 1806(f).

The court of appeals provided no basis for its contrary conclusion other than to observe that its interpretation of Section 1806(f) would enable Section 1810 plaintiffs to successfully litigate more of their claims. See Pet. App. 61a. But Congress frequently creates statutory causes of action without guaranteeing that all prospective plaintiffs will be able to litigate their claims to judgment. Various impediments, such as standing, sovereign immunity, the state-secrets privilege, or other generally applicable doctrines, may stand in the way of resolving the merits of a statutory or constitutional claim in particular cases—especially where litigation would threaten the national security. See, *e.g.*, *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 401-402, 407-408 (2013) (affirming the dismissal of a challenge to alleged electronic surveillance for lack of Article III standing); *Sterling*, 416 F.3d at 348-349 (dismissing Title VII claims against Central Intelligence Agency as precluded by state-secrets privilege); *Kasza* v. *Browner*, 133 F.3d 1159, 1166 (9th Cir.) (dismissing claims under the Resource Conservation and Recovery Act of 1976 on state-secrets grounds), cert. denied, 525 U.S. 967 (1998). The prospect that such doctrines may also impede Section 1810 damages claims does not suggest that Congress took the extraordinary step in Section 1806(f) of requiring resolution of the merits of claims *ex parte* and *in camera*.

Section 1806(f) is not a freestanding tool for obtaining electronic-surveillance material or adjudicating the merits of a civil lawsuit, available to all potential plain-

tiffs alleging unlawful electronic surveillance regardless of whether the government seeks to *use* electronic-surveillance evidence against an aggrieved person in a legal proceeding. In holding to the contrary, the court of appeals read Section 1806(f) as serving a function completely unrelated to the rest of Section 1806. But "[i]t would be odd for Congress to ambiguously bury a substantive right for plaintiffs to 'obtain' national security secrets in the muddled language of § 1806(f)." Pet. App. 133a (Bumatay, J., dissenting from denial of rehearing en banc). "If Congress indeed meant to make" Section 1806(f) what the court of appeals found that it is, "one would have expected a clearer indication of that intent." *Yates*, 574 U.S. at 540. This Court should accordingly reject the court of appeals' interpretation of Section 1806(f).

B. Section 1806(f)'s Procedures Do Not Silently Displace The State-Secrets Privilege

The court of appeals significantly compounded its error by further holding that Section 1806(f)'s procedures preclude the government from invoking the state-secrets privilege to remove any sensitive national-security information from a case in which Section 1806(f) applies. The state-secrets privilege is a long-standing privilege, rooted in both the Constitution and the common law. Prior to FISA's enactment, the privilege existed alongside judge-devised *in camera* procedures for considering the lawfulness of government surveillance in connection with admissibility questions. Nothing in Congress's codification of similar procedures in this context suggests an intent to displace the privilege—much less with the clarity that this Court would ordinarily require for such a fundamental change

in the Executive's authority to fulfill its constitutional obligations.

1. Section 1806(f) does not speak to the continuing viability of the state-secrets privilege

a. Nothing in FISA speaks—directly or indirectly—to displacing the state-secrets privilege or the government's ability to protect the national security by removing state secrets from a case. The privilege is not mentioned in the text of Section 1806 or anywhere in the Act. Neither the court of appeals nor respondents have identified anything in FISA's legislative history discussing the privilege—much less evincing an intent to displace the privilege. And nothing in the operation of Section 1806(f) is incompatible with the continued vitality of the privilege.

Section 1806(f) is designed for cases in which the government affirmatively seeks to "use or disclose" FISA-obtained or FISA-derived evidence or information against an aggrieved person in a legal proceeding, typically in a criminal case. In those circumstances, the government has determined that the benefits of introducing the evidence outweigh any risk of harm to the national security. And Section 1806 provides a means (and requirement) for notifying the aggrieved person and a government-protective mechanism for adjudicating whether the information may be introduced in evidence or must be suppressed. In keeping with the focus on the government's use of information in litigation, the Attorney General (or his delegee)—the official primarily responsible for government litigation—triggers those statutory procedures. 50 U.S.C. 1801(g), 1806(f). If the government prevails under Section 1806(f)'s procedures, the government may introduce the evidence in the proceeding. See 50 U.S.C. 1806(g).

By invoking the state-secrets privilege, by contrast, the government seeks to *prevent* the use or disclosure of information in a case. The privilege is properly invoked only where the use or disclosure of the information would pose an unacceptable risk of harm to the national security, regardless of the benefit to any party. The privilege is invoked most often where the government is a defendant, but it also may apply in a case between private parties. See, *e.g.*, *Fitzgerald*, 776 F.2d at 1237. In keeping with that broader focus, the state-secrets privilege is invoked by the "head of the department" responsible for the national-security information (*not* always the Attorney General), who must "personal[ly]" make a privilege claim. *Reynolds*, 345 U.S. at 7-8. The privilege generally forecloses even *in camera* consideration of the evidence. See *id.* at 10 (holding that a court should not unnecessarily "jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers"). And if the claim is upheld, the information may *not* be introduced in the case by anyone.

There is no sound basis to infer that, by providing a government-protective means for determining the admissibility of FISA-obtained or FISA-derived evidence in a legal proceeding, Congress also implicitly precluded the government from excluding privileged evidence for national-security purposes. Both procedures can readily coexist without either interfering in the other's separate domain. Even before FISA was enacted, courts used *ex parte* and *in camera* procedures, in appropriate circumstances, to determine the admissibility of evidence allegedly derived from foreign-intelligence surveillance. See *United States* v. *Belfield*,

692 F.2d 141, 149 & n.38 (D.C. Cir. 1982) (collecting cases). "Given that ex parte, in camera review procedures coexisted with the state secrets privilege before FISA," Congress's codification of similar procedures should not be interpreted as evincing "an intent to eliminate the privilege." Pet. App. 124a (Bumatay, J., dissenting from denial of rehearing en banc).

b. The court of appeals reasoned that Section 1806(f) displaces the privilege because both are "animated by the same concerns—threats to national security." Pet. App. 51a. But Section 1806(f) is designed to guard against threats to the national security posed by "an adversarial hearing." 50 U.S.C. 1806(f). Its *in camera* procedures plainly do not guard against the risk that even *in camera* consideration could inadvertently or indirectly reveal state secrets and harm the national security. See *Sterling*, 416 F.3d at 344 (recognizing that *in camera* consideration of state secrets is "play[ing] with fire"); cf. *Clapper*, 568 U.S. at 412 n.4. The state-secrets privilege, by contrast, does guard against that risk. See *Reynolds*, 345 U.S. at 10. Because Section 1806(f) does not "displace[] the danger" the privilege is designed to prevent, it does not displace the privilege. *United States* v. *Mandujano*, 425 U.S. 564, 575 (1976) (plurality opinion) (holding that a grant of immunity displaces the privilege against self-incrimination only where immunity "displaces the danger" against which the privilege is designed to protect) (citation omitted); see *Reynolds*, 345 U.S. at 8-9 ("draw[ing] upon judicial experience in dealing with an analogous privilege, the privilege against self-incrimination," when evaluating the scope of the state-secrets privilege).

The court of appeals emphasized that Section 1806(f) provides that, "whenever" one of the triggering conditions is met, the *in camera*, *ex parte* procedures "shall" be used "notwithstanding any other law." Pet. App. 50a (quoting 50 U.S.C. 1806(f)) (emphasis omitted). But that mandatory language is expressly conditioned on the Attorney General's invocation of the Section 1806(f) procedures by sworn affidavit. See 50 U.S.C. 1806(f) (requiring a district court to conduct *in camera* review, "notwithstanding any other law, *if* the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security") (emphasis added). Section 1806(f) permits the government to insist on the type of review the court must undertake in those circumstances—"in camera and ex parte," rather than adversarial adjudication in open court, *ibid.*—regardless of what procedure the aggrieved person attempts to invoke. See pp. 29-31, *supra*. The provision does not require such review to occur even where an independent bar already exists—for example, if a criminal defendant attempted to rely on Rule 12(c) to suppress evidence after the trial began. See Fed. R. Crim. P. 12(c) (requiring motions to suppress to be filed pretrial, absent good cause).

The background of Section 1806(f) makes clear that it was not intended to force the government's submission of confidential information. As the U.S. Senate Select Committee on Intelligence explained, the statute's use of broad, mandatory language, like "'notwithstanding any other law,'" was intended to "make very clear that the procedures set out in [Section 1806(f)] apply whatever the underlying rule or statute referred to in the [aggrieved person's] motion" to suppress, discover, or

obtain FISA-obtained or FISA-derived evidence. Senate Intelligence Committee Report 63; see *ibid.* ("Although a number of different procedures might be used to attack the legality of the surveillance, it is this procedure 'notwithstanding any other law' that must be used to resolve the question."). At the same time, however, the report highlights that those procedures "cannot be invoked until they are triggered by a Government affidavit." *Ibid.* And the government always may "prevent[]" a court's "adjudication of legality" by simply "choos[ing]" to "forgo the use of the surveillance-based evidence" and thereby avoid the risk that even Section 1806(f)'s protective procedures "would damage the national security." *Id.* at 65; see also Senate Judiciary Committee Report 57-59.

The court of appeals purported to find support for its contrary reading of the history in general statements—from an earlier phase of Congress's consideration of electronic-surveillance issues—about the need to enact "fundamental reform," to provide the "exclusive legal authority for domestic security activities," and to provide a civil remedy to "afford effective redress to people who are injured by improper federal intelligence activity." Pet. App. 53a-54a (quoting *Intelligence Activities and the Rights of Americans: Book II*, S. Rep. No. 755, 94th Cong., 2d Sess. 289, 297, 336 (1976) (Church Committee Report)). Those statements from the Church Committee Report describe nascent proposals for reform several years before FISA was enacted, not actual statutory provisions—much less the provision at issue here. To the extent they are relevant to interpreting the final legislation, they are reflected in FISA's provisions (1) making the FISA warrant procedures the "exclusive" authority for domestic electronic surveillance

for foreign-intelligence purposes, 50 U.S.C. 1812(a); see Senate Intelligence Committee Report 71; and (2) creating a private cause of action for damages based on violations of FISA's criminal provisions, see 50 U.S.C. 1810. Indeed, the only mention of any *in camera* consideration that the court of appeals identified was the Church Committee's expectation that courts would "fashion" their own "discovery procedures" for "inspection of material in chambers," Pet. App. 54a, akin to those that existed alongside the state-secrets privilege for years. See pp. 37-38, *supra*. Tellingly, the Church Committee did not recommend depriving the Executive of its ability to invoke the state-secrets privilege, even though the privilege was well-established by the time of the Committee's work.

In the end, not even the panel itself appears to have had confidence in any purported congressional intent to displace the state-secrets privilege. The dissent from the denial of rehearing en banc raised the concern that the court of appeals' opinion might require a district court to disclose sensitive national-security information to the subjects of government surveillance. See Pet. App. 125a (Bumatay, J.). In response, two panel members announced in their concurrence in the denial of rehearing en banc that, if the district court ordered such disclosure pursuant to Section 1806(f), "nothing in the panel opinion prevents the government from invoking the state secrets privilege's dismissal remedy as a backstop at that juncture." *Id.* at 100a n.1 (Gould & Berzon, JJ., concurring in denial of rehearing en banc). The third panel member "agree[d]." *Id.* at 108a (Steeh, J., statement regarding denial of rehearing en banc). But the panel did not explain how the text of Section 1806(f) could be read to displace the state-secrets privilege but

then to reinstate the privilege if disclosure to the aggrieved party is ordered during the Section 1806(f) proceedings. And nothing in FISA's text, structure, or history supports such a construction. The fact that the panel felt the need to craft such a *post hoc* limitation on its decision underscores the implausibility of the panel's interpretation.

2. Any ambiguity in Section 1806(f) must be resolved in favor of retaining the constitutionally based state-secrets privilege

If there were any doubt that Congress did not displace the state-secrets privilege, any ambiguity in Section 1806(f) should be construed in favor of retaining the privilege. The state-secrets privilege is firmly rooted in the Constitution as well as the common law. "It is a well-established principle of statutory construction that '[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose." *Norfolk Redevelopment & Hous. Auth.* v. *Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983) (citation omitted; brackets in original); see *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (recognizing a "presumption favoring retention" of federal common law). More fundamentally, if the "construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 466 (1989) (citation omitted). At a minimum, Section 1806(f) does not speak with the clarity that would be required to displace the state-secrets privilege.

a. The state-secrets privilege is a longstanding feature of our legal system and its existence "has never

been doubted." Wigmore § 2378(2), at 794; see 1 Simon Greenleaf, *A Treatise on the Law of Evidence* § 250, at 323-324 (6th ed. 1852) (describing the evidentiary privilege for "secrets of State"); 1 Thomas Starkie, *A Practical Treatise on The Law of Evidence* § 80, at 106 (1826) (recognizing a privilege on "grounds of state policy" protecting evidence the disclosure of which "might be prejudicial to the community"). "From the earliest days of our Nation's history, all three branches of government have recognized that the Executive has authority to prevent the disclosure of information that would jeopardize national security." Pet. App. 108a (Bumatay, J., dissenting from denial of rehearing en banc); see *id.* at 113a-119a (canvassing historical sources). This Court's opinion in *Reynolds* traced the history of the privilege in the United States to, among other notable roots, the treason trial of Aaron Burr. 345 U.S. at 6-9 & n.18. By 1978, when FISA was enacted, "it [wa]s quite clear that the privilege to protect state secrets must head the list" of "the various privileges recognized in our courts." *Halkin* v. *Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978); see *United States* v. *Nixon*, 418 U.S. 683, 710-711 (1974). Even the court of appeals recognized that the state-secrets privilege is well-established in the common law. See Pet. App. 47a.

The privilege, however, is also firmly rooted in the Constitution. Article II establishes the President as "Commander in Chief," and vests him with the authority to "make Treaties," to "appoint Ambassadors," and to otherwise conduct the Nation's foreign affairs. U.S. Const. Art. II, § 2; see *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 414 (2003) ("[T]he historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of

responsibility for the conduct of our foreign relations.'") (citation omitted); *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (recognizing the President's "unique responsibility" over "foreign and military affairs"). "In the governmental structure created by our Constitution," the Executive is thus "endowed with enormous power in the two related areas of national defense and international relations." *New York Times Co.* v. *United States*, 403 U.S. 713, 727 (1971) (per curiam) (Stewart, J., concurring). And the Framers recognized that the Executive Branch's ability to safeguard state secrets was critical to its ability to fulfill its constitutional duties. John Jay explained that, with respect to foreign relations, "[t]here are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery." *The Federalist No. 64*, at 434-435 (Jacob E. Cooke ed., 1961). And President Washington recognized that "there might be papers of so secret a nature" that the Executive "ought to refuse" to provide them even to a coordinate Branch (Congress) to avoid a "disclosure [that] would injure the public." *Works of Thomas Jefferson* 214.[2]

This Court has repeatedly endorsed a similar understanding. The Court has explained that "both as Commander-in-Chief and as the Nation's organ for foreign

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[2] See Memorandum from John R. Stevenson, Legal Advisor, Dep't of State, and William H. Rehnquist, Assistant Att'y Gen., Dep't of Justice, Office of Legal Counsel, *The President's Executive Privilege to Withhold Foreign Policy and National Security Information* (Dec. 8, 1969) (on file with the Office of the Solicitor General) (chronicling the history of presidential refusal to disclose foreign-policy information if it was considered contrary to the national interest to do so).

affairs," the President "has available intelligence services whose reports are not and ought not to be published to the world." *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). The Court has further observed that the "authority to classify and control access to information bearing on national security" is an aspect of executive power that "flows primarily from th[e] constitutional investment of power in the President and exists quite apart from any explicit congressional grant." *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988). And the Court has made clear that the authority "to protect such information" likewise "falls on the President as head of the Executive Branch and as Commander in Chief." *Ibid.*

The Court has thus explained that executive privileges, including the state-secrets privilege, that "relate[] to the effective discharge of a President's powers" are "constitutionally based." *Nixon*, 418 U.S. at 710-711; see *Franchise Tax Bd.* v. *Hyatt*, 139 S. Ct. 1485, 1498-1499 (2019) (noting that the "executive privilege" is one of the "constitutional doctrines" "implicit in [the Constitution's] structure and supported by historical practice"). And the Court has recognized that, outside the careful limits that it has established, "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." *Chicago & S. Air Lines, Inc.*, 333 U.S. at 111. In short, there can be no doubt that the state-secrets privilege has "a firm foundation in the Constitution" and "performs a function of constitutional significance." *El-Masri*, 479 F.3d at 303-304.

b. Against this backdrop, Section 1806(f) does not come close to speaking with the clarity that should be

required to find that Congress has attempted to displace the state-secrets privilege. "[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Egan*, 484 U.S. at 530. That approach reflects the judgment that Congress does not bring about a significant change in the Executive Branch's power to protect the national security by happenstance, or by securing the President's approval of a bill with that unstated effect. The reluctance to infer such a change should only be amplified when the question concerns the elimination of a privilege "inherent in the constitutional design and acknowledged since our Nation's founding." Pet. App. 134a (Bumatay, J., dissenting from denial of rehearing en banc). Yet the court of appeals determined that Congress brought about that result in Section 1806(f) without a single mention of state secrets or the state-secrets privilege.

It is no answer to claim, as the panel did, that the decision below overrides "only the *dismissal remedy* that sometimes follows the successful invocation of the state secrets evidentiary privilege." Pet. App. 101a (Gould & Berzon, JJ., concurring in denial of rehearing en banc). Even if that were an accurate description of the panel's decision, it would not avoid the constitutional problem. Where, as here, dismissal is based on a determination that further proceedings (even without privileged evidence) would pose an unacceptable risk of disclosing state secrets, *id.* at 165a-166a, requiring the litigation to nevertheless proceed would undermine the Executive's ability to fulfill its constitutional obligation in the same manner as requiring the submission of the privileged evidence itself.

In any event, the panel's suggestion that its holding does not actually abrogate the state-secrets privilege, but rather only the dismissal remedy, is inaccurate. Where an aggrieved person successfully invokes Section 1806(f)'s procedures in a civil action challenging the lawfulness of alleged electronic surveillance, the court of appeals' decision expressly requires that the district court resolve the merits *on the basis of the privileged evidence*. See Pet. App. 18a-19a, 92a-93a (instructing that, to the extent plaintiffs prove that they are "aggrieved persons," the district court must "review any 'materials relating to the surveillance as may be necessary,' including the evidence over which the Attorney General asserted the state secrets privilege, to determine whether the electronic surveillance was lawfully authorized and conducted") (citation omitted). Preventing courts from relying on privileged evidence to decide the merits of a suit is the core of any evidentiary privilege.

For the reasons described above, by far the better reading of Section 1806(f) is that it does not displace the government's ability to invoke the state-secrets privilege to protect the national security. At a minimum, there exists no clear statement in Section 1806(f), or anywhere else in FISA, that Congress intended to bring about such a startling change in the Executive's authority to protect national-security information from compelled disclosure in litigation. The court of appeals thus erred in "discovering abrogation of the state secrets privilege more than 40 years after FISA's enactment" and "disrupt[ing] the balance of powers among Congress, the Executive, and the Judiciary." Pet. App. 110a (Bumatay, J., dissenting from denial of rehearing en banc).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 2021