No. 20-828

IN THE

Supreme Court of the United States

FEDERAL BUREAU OF INVESTIGATION, *et al.*,

Petitioners,

—v.—

YASSIR FAZAGA, *et al.*,

Respondents.

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

BRIEF FOR THE RESPONDENTS

PETER BIBRING
MOHAMMAD TAJSAR
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West Eighth Street
Los Angeles, CA 90017

AMR SHABAIK
DINA CHEHATA
CAIR-LOS ANGELES
2180 W. Crescent Avenue, Suite F
Anaheim, CA 92801

PATRICK TOOMEY
ASHLEY GORSKI
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

AHILAN ARULANANTHAM
Counsel of Record
UCLA SCHOOL OF LAW
385 Charles E. Young Drive East
Los Angeles, CA 90095
(310) 825-1029
arulanantham@law.ucla.edu

DAN STORMER
SHALEEN SHANBHAG
HADSELL STORMER RENICK & DAI LLP
128 North Fair Oaks Avenue
Pasadena, CA 91103

DAVID D. COLE
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

TABLE OF CONTENTS

PAGE

PAGE

TABLE OF AUTHORITIES

PAGE(S)

Cases

PAGE(S)

PAGE(S)

PAGE(S)

Statutes

PAGE(S)

Constitutional Provisions

Legislative Materials

Other Authorities

PAGE(S)

INTRODUCTION

Plaintiffs are three Americans who allege that, fifteen years ago, the FBI sent an informant to spy on them and others in their community because of their religion. The Government acknowledges that it employed the informant and possesses recordings he made. The informant himself submitted sworn declarations testifying that FBI agents directed him to spy on Plaintiffs and hundreds of other members of Southern California's Muslim communities, instructed him to collect information on these law-abiding Americans simply because of their faith, and told him Islam itself is a threat. Eventually, the informant tried to incite community members to violence, scaring them enough that they reported him—to the FBI.

These acts caused deep harm to Plaintiffs and many other members of their communities. Plaintiff Fazaga, a religious leader and licensed therapist, was forced to restrict the counseling he provided to his congregants for fear it was no longer private. Plaintiffs Malik and AbdelRahim grew afraid to practice their faith openly and to attend the mosques the informant had infiltrated.

The question presented is whether Plaintiffs' claim that Defendants violated the Constitution's protection for freedom of religion will ever receive its day in court. Defendants maintain that no judge can decide whether they violated the Free Exercise and Establishment Clauses because they need to use certain evidence to defend themselves, but introducing it would reveal "state secrets." Defendants do not contend that the very subject matter of this case is secret; they have not sought to dismiss Plaintiffs' Fourth Amendment claims on

privilege grounds. Defendants seek to dismiss just the religion claims on state secrets—even though Plaintiffs need no secret information to prove them.

Defendants are wrong for two reasons. First, the state-secrets privilege does not permit dismissal of the religion claims based on Defendants' need to rely on secret information. Like all other privileges, the state-secrets privilege authorizes the *exclusion* of privileged evidence. But Defendants do not need to assert the privilege to keep the information out of this case. Only they possess the information they seek to keep secret, and Plaintiffs have not sought it to establish their entitlement to relief. Defendants instead seek *dismissal* of Plaintiffs' religion claims, based on *their own* need to use the information to defend themselves. But dismissal for that reason has no basis in the common-law state-secrets privilege or this Court's precedent. The decision below should be affirmed on that basis alone.

Second, because the secret information on which Defendants rely came from the electronic surveillance of U.S. persons on U.S. soil conducted in the name of national security, the procedures for litigating it are governed by the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. 1801 *et seq.*, not common law. Under 50 U.S.C. 1806, whenever the Government seeks to use information from FISA surveillance or Americans seek to obtain it for a suit against their government, and the Attorney General asserts that disclosing that information could threaten national security, the court "shall" review it ex parte and in camera to determine whether the underlying surveillance was lawful. These procedures apply "notwithstanding any other law," "whenever" the statute's conditions are met. They govern this case. Thus, even if the state-secrets privilege would

otherwise permit dismissal of Plaintiffs' religion claims, FISA's procedures displace it here.[1]

STATEMENT

I. Legal Background

A. State Secrets

The concept of state secrets encompasses two "quite different" doctrines. *General Dynamics Corp. v. United States*, 563 U.S. 478, 485 (2011). The one involved here is a common-law privilege "in the law of evidence," concerning "military and state secrets." *United States v. Reynolds*, 345 U.S. 1, 6–7 (1953). When the Government successfully invokes this privilege, "[t]he privileged information is excluded and the trial goes on without it. . . . [T]he Court [does] not order judgment in favor of the Government." *General Dynamics*, 563 U.S. at 485. Under *Reynolds*, dismissals occur only when plaintiffs cannot prove their case without the secret evidence. Brief of Professor Laura K. Donahue As Amicuc Curiae In Support of Neither Party ("Donohue Amicus") at 4–17 (collecting cases).

The other state-secrets doctrine, not presented here, is a justiciability bar this Court created from its "authority to fashion contractual remedies in Government-contracting disputes." *General Dynamics*,

---

[1] Because some Defendants are petitioners and some respondents in this Court, Plaintiffs use "Plaintiffs" and "Defendants" throughout. The "Government" refers to the official capacity Defendants. "Agent Defendants" refers to FBI agents sued in their individual capacities. When citing to the Government's opening brief, Plaintiffs use the abbreviation "Br."

563 U.S. at 485. That doctrine requires dismissal of government-contracting lawsuits "where the very subject matter of the action . . . [i]s a matter of state secret." *Tenet v. Doe*, 544 U.S. 1, 9 (2005) (discussing *Totten v. United States*, 92 U.S. 105 (1875)) (cleaned up); *Tenet*, 544 U.S. at 12 (Scalia, J., concurring) ("the bar of *Totten* is a jurisdictional one"). The authority for such dismissals is "something quite different from a mere evidentiary point," and the "state-secrets jurisprudence bearing upon that authority is not *Reynolds*, but two cases dealing with alleged contracts to spy." *General Dynamics*, 563 U.S. at 485–86 (citing *Tenet* and *Totten*). Individuals who enter into such secret contracts "assume[] the risk that state secrets would prevent the adjudication of" any disputes that may arise from them. *Id.* at 491. "The secrecy which such contracts impose precludes any action for their enforcement." *Totten*, 92 U.S. at 107.

While a few lower court cases conflated these two doctrines prior to *General Dynamics*, this Court has never done so. *Reynolds* itself makes clear that *Totten* rests on a "broader holding that lawsuits premised on alleged espionage agreements are altogether forbidden." *Tenet*, 544 U.S. at 9. Only *Totten* permits "dismiss[al] *on the pleadings without ever reaching the question of evidence*." *Id.* (quoting *Reynolds*, emphasis in *Tenet*).

B. Foreign Intelligence Surveillance Act

Congress enacted FISA in 1978 to establish "an exclusive charter for the conduct of electronic surveillance in the United States" in the name of national security, S. Rep. No. 95-604, at 15 (1977).

Through FISA, Congress "eliminat[ed] any congressional recognition or suggestion of inherent Presidential power with respect to electronic surveillance." S. Rep. No. 95-701, at 72 (1978). The statute provides substantive rules governing when such surveillance can occur, rules for judges to authorize it, procedures for litigating cases involving such surveillance, and a civil remedy to provide redress to Americans who are unlawfully surveilled.

In the years before FISA's passage, a congressional committee led by Senator Frank Church investigated claims of abusive surveillance practices. It discovered the government had, in the name of national security, surveilled an enormous number of innocent Americans without warrants—including Martin Luther King, Jr. and other civil rights leaders, journalists, antiwar groups, a law firm, and a member of Congress. Church Report, Book II, S. Rep. No. 94-755, at 6–13 (1976). President Nixon even authorized a wiretap program that obtained "information about a Supreme Court justice." *Id.* at 10. These abuses "demonstrate[d] the inappropriateness of relying solely on executive branch discretion to safeguard civil liberties." H.R. Rep. No. 95-1283, at 21 (1978).

FISA "embodies a legislative judgment that court orders and other procedural safeguards are necessary to insure that electronic surveillance by the U.S. Government within this country conforms to the fundamental principles of the fourth amendment." S. Rep. No. 95-701 at 13; see also H.R. Rep. No. 95-1720, at 35 (1978) (invoking *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

The FISA provisions relevant here are 50 U.S.C. 1806 and 1810. Section 1806(c) requires the Government to notify the court and those surveilled

("aggrieved persons") whenever it intends to use information obtained or derived from electronic surveillance in litigation: "[w]henever the Government intends to enter into evidence or otherwise use or disclose in any trial . . . against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person . . . the Government shall . . . notify the aggrieved person and the court . . . that the Government intends to so disclose or so use such information."

Section 1806(f) mandates special procedures for judicial review of secret information. Whenever the Government seeks to use information under subsection (c), "if the Attorney General files an affidavit . . . that disclosure [of information obtained or derived from electronic surveillance] or an adversary hearing would harm the national security of the United States," the "district court . . . shall, notwithstanding any other law, . . . review in camera and ex parte the 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."

Section 1806(f) also contains a catch-all provision that requires district courts to use the same review procedures "whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule . . . to discover or obtain . . . materials relating to electronic surveillance" or "information obtained or derived from electronic surveillance."

If the court finds the surveillance unlawful after conducting its ex parte, in camera review, Section 1806(g) directs that it "shall, in accordance with the

requirements of law, suppress the evidence" or "otherwise grant the motion of the aggrieved person."

Section 1810 establishes a civil damages remedy for U.S. persons subjected to unlawful surveillance. It makes federal officials who "intentionally engage[] in electronic surveillance under color of law" (as defined in Section 1809) liable for damages if their surveillance was *not* authorized. As the D.C. Circuit has recognized, courts dealing with secret information relating to electronic surveillance arising in civil litigation, including in Section 1810 suits, must use Section 1806(f)'s procedures when considering requests to discover or obtain such information. *ACLU Found. of So. Cal. v. Barr*, 952 F.2d 457, 470 (D.C. Cir. 1991); see also H.R. Rep. No. 95-1720, at 32 (courts will use statute's special review procedures "in both criminal and civil cases").

II. The FBI's Surveillance Program: Operation Flex

Plaintiff Sheikh Yassir Fazaga is a U.S. citizen who has lived in the United States for more than 30 years. J.A. 83. He has earned a national reputation for his progressive teachings about Islam. J.A. 83–84. In 2007, the State Department sponsored him to travel to Romania to speak at a conference. He has been interviewed for print, television, and radio, including by NBC's Today Show and the New York Times. J.A. 84. He was the imam of the Orange County Islamic Foundation at the time the events here occurred. J.A. 84.

Plaintiff Ali Malik is also a U.S. citizen, born and raised in Orange County, California. J.A. 65. He regularly attended services at the Islamic Center of Irvine, California. J.A. 65. Malik started a young

Republicans club in high school, and in college founded the Olive Tree Initiative, a peace-building program in which students from diverse religious backgrounds conduct fact-finding missions in Israel and Palestine—for which he was recognized by the University of California and the State Department. J.A. 86.

Plaintiff Yasser AbdelRahim is an immigrant from Egypt and long-time lawful permanent resident. He attended business school in Arizona before completing his degree in Southern California. J.A. 65. At the time the events here occurred, he lived in a house with other young immigrants. J.A. 90. In his free time, he watched TV, talked politics with his housemates, and played video games with them on Xbox. J.A. 214. He also attended services at the Islamic Center of Irvine. J.A. 65.

None of the Plaintiffs were ever charged with or convicted of any crime. Nonetheless, the FBI spied on them, along with hundreds of other law-abiding Southern California residents, because of their faith.

Plaintiffs filed suit on February 22, 2011. Drawing exclusively on publicly available sources, including Defendants' own public statements, detailed declarations from the FBI's informant, J.A. 165–219, and documents obtained through the Freedom of Information Act, their complaint paints a detailed picture of the FBI's 14-month-long investigation.

In the years after September 11, 2001, the FBI investigated many Americans because of their Muslim faith. J.A. 69–70. These investigations took different forms, including detentions, interrogations, broad efforts to "count" mosques and Muslims in each jurisdiction, and surveillance of communities throughout the country. J.A. 69–70. After 2003,

official FBI policy permitted agents to conduct "assessments" of people without any factual basis for believing they were engaged in criminal activity or even presented a security threat. J.A. 72–75. And in national security investigations, the FBI's own policy did not prohibit religious profiling. J.A. 74.

When this suit was filed, approximately 500,000 people practiced Islam in Southern California. J.A. 79. The FBI spied on thousands of them. Between 2001 and 2006, it gathered lists of mosques in the area, collected names of local religious leaders, amassed membership lists of religious organizations, interrogated hundreds of people in the area, and planted bugs and cameras in mosques.

In June 2006, Defendant Tidwell, the Los Angeles FBI Assistant Director, told an audience at the Islamic Center of Irvine that the FBI would not send informants into mosques to monitor community members. J.A. 81. This was false. In fact, he had already approved a plan for an informant to infiltrate mosques, and two of his agents, Defendants Allen and Armstrong, had already started training Craig Monteilh for the job. J.A. 81–82 & n.28.[2]

Less than a month after Tidwell's public address, Defendants sent Monteilh to introduce himself to congregants at the very mosque where Tidwell had spoken. J.A. 82. Monteilh told them he was ready to convert to Islam. J.A. 82. After he participated in a ceremonial declaration of faith, congregants talked with him about the tenets of the religion, showed him

---

[2] Defendants would later confirm that the FBI "utilized Monteilh as a confidential human source," and that it possesses his notes and the audio and video recordings he made. J.A. 49–50.

how to pray, and socialized with him. J.A. 83. Under the direction of Defendants Allen and Armstrong, Monteilh used that access to surveil and record community members. J.A. 168–70. Defendant Rose supervised and directed Allen and Armstrong's handling of Monteilh, while Defendant Walls worked below Tidwell to manage Armstrong, Allen, and Rose. J.A. 68–69, 109.

As Monteilh's declarations explain, the explicit purpose of Operation Flex was to gather information on people who practice Islam in Orange County—not terrorists, spies, or even ordinary criminals. See, *e.g.*, J.A. 173–75. Defendants did not identify specific targets, instead instructing Monteilh "to gather as much information on as many people in the Muslim community as possible." J.A. 174. The FBI discarded information Monteilh gathered on non-Muslims. J.A. 182. Defendants told him to focus on people who appeared more devout because they were "more suspicious." J.A. 184.

The Agents told Monteilh, "Islam is a threat to our national security." J.A. 194. They instructed him to:

- Collect contact information on at least "ten new Muslims per day," J.A. 174;
- Obtain the names and license plates of individuals who attended dawn and late evening prayers, because they were more devout, J.A. 184;
- Gather compromising information (whether marital, business, or petty criminal issues) they hoped to leverage to recruit other informants, J.A. 180, 187, 191, 209; and
- Report on all charitable giving, travel plans, and fundraising activities, J.A. 178–79, 216, as

> well as any lectures, classes, or any other events held at mosques, J.A. 179–80, 182, 217.

Through Monteilh, Defendants gathered "hundreds of phone numbers and thousands of email addresses;" "hundreds of hours of video recordings that captured the interiors of mosques, homes, businesses, and the associations of hundreds of people;" and "thousands of hours of audio recordings of conversations . . . as well as recordings of public discussion groups, classes, and lectures." J.A. 194.

Monteilh repeatedly recorded conversations to which he was not a party, including religious prayer groups in the mosque sanctuary. He did so by leaving behind a secret recording device hidden in his car key fob. J.A. 178, 192–93, 211. With it he recorded private religious conversations and study groups, including ones in which Malik and AbdelRahim participated. J.A. 192–93, 211, 217–18. Monteilh also video-recorded sensitive locations, including mosques, homes, and businesses using a hidden camera. J.A. 192–93, 202–03, 205. His handlers told him they were conducting electronic surveillance in at least eight area mosques, including Fazaga's office, and indicated there was no warrant for that surveillance. J.A. 177; see also J.A. 193.

By early 2007, Plaintiffs Malik, AbdelRahim, and other community members became frightened when Monteilh began expressing interest in violence, as Agents Armstrong and Allen had instructed him to do. J.A. 89, 91–92, 98, 112–13, 195–96. Monteilh also encouraged his "friends" to visit websites the Agents deemed "jihadist," so the FBI could document these site visits and use them as leverage to pressure more congregants to become informants. J.A. 182–83. In May 2007, Monteilh told several community members

that he had access to weapons and wanted to take violent action. J.A. 112–13. Alarmed, those individuals told a community leader, who reported Monteilh to the FBI. J.A. 112–13. Members of one mosque obtained a restraining order against him. J.A. 112–13. By October 2007, the FBI ended its work with Monteilh. J.A. 113, 198.

The FBI revealed Monteilh's identity as an informant during a public court hearing in a different case, in February 2009. J.A. 49, 114–16, 198. Once the news spread, national news media covered it extensively.[3]

Operation Flex severely harmed the religious practice of Plaintiffs and many other people in Southern California. Malik stopped attending the mosque for fear of seeing Monteilh and altered his practice to appear less religious. J.A. 90, 127. AbdelRahim also reduced his attendance at mosques and decreased his charitable giving to religious organizations for fear of additional surveillance. J.A. 133–34. Fazaga stopped offering therapist services to community members for fear their conversations would not be confidential. J.A. 123. All three were subjected to repeated interrogations, searches, and delays when traveling internationally. J.A. 123, 127, 130, 133.

Despite the scale of this dragnet surveillance program, Operation Flex yielded only a single criminal prosecution of any kind: an immigration fraud case dismissed on the Government's motion. J.A. 49 n.3, 62, 114–15.

---

[3] See, *e.g.*, *The Convert*, THIS AMERICAN LIFE (Aug. 10, 2012), available at https://www.thisamericanlife.org/471/the-convert.

III. Procedural History

A. District Court

Plaintiffs sued the United States, the FBI, and five individual officers who oversaw Monteilh's actions, alleging two types of unlawful conduct: illegal searches under the Fourth Amendment, 50 U.S.C. 1810 (FISA), and the Federal Tort Claims Act ("search claims"); and unlawful targeting of religion under the First and Fifth Amendments, 42 U.S.C. 1985(3), the Religious Freedom Restoration Act, and the Privacy Act ("religion claims"). J.A. 137–145. They sought damages, declaratory relief, and expungement or disclosure of the records of unlawful surveillance. J.A. 146.

Defendants moved to dismiss Plaintiffs' religion claims under the state-secrets privilege. J.A. 157–64. Defendants did not invoke state secrets as to the search claims, explaining that "[t]he Government does not seek dismissal of all claims at the outset based on the privilege assertion, nor to bar disclosure of all information concerning Operation Flex or Monteilh's activities." J.A. 160. The Government submitted a public declaration from then-Attorney General Eric Holder, J.A. 26–40, and both public and classified declarations from Mark Giuliano, the Assistant Director of the FBI's Counterterrorism Division. J.A. 41–60 (public declaration).

Attorney General Holder asserted privilege over: (1) evidence identifying whether anyone "was or was not the subject of an FBI counterterrorism investigation," (2) the "reasons for" and "results" of any FBI counterterrorism investigation, and (3) information "that could tend to reveal whether particular sources and methods were used in a

counterterrorism investigation." J.A. 28–29. He stated that disclosure of such information "could reasonably be expected to cause significant harm to the national security." J.A. 27.

The Giuliano Declaration stated that "[a]ddressing plaintiffs' allegations in this case will risk or require the disclosure of certain sensitive information concerning counterterrorism investigative activity in Southern California." J.A. 45. It also made clear that all the secret information at issue is in the FBI's possession. See, *e.g.*, J.A. 50 ("the FBI cannot publicly disclose" identities, reasons, and sources).

In their motion to dismiss, the Government emphasized its privilege assertion was "limited" in two ways. J.A. 160. First, it did not assert privilege over much of the information Monteilh collected, as they had previously produced some of it in other proceedings, and "expect[ed] that the majority of the audio and video will be available in connection with further proceedings" relating to Plaintiffs' search claims. J.A. 161–62.

Second, the Government sought to dismiss only the religion claims based on the state-secrets privilege, not the search claims. J.A. 161–62. As to the search claims, the Government stated "At least at this stage of the proceedings, sufficient non-privileged evidence may be available to litigate these claims should they otherwise survive motions to dismiss on non-privilege grounds." J.A. 162.

The Government's motion seeking dismissal of Plaintiffs' religion claims asserted that "full and effective litigation of" them "would risk or require the disclosure of privileged information." Mot. to Dismiss ("MTD") at 47, *Fazaga*, No. 8:11-cv-0031-CJC, ECF No. 55 (citing *Mohamed v. Jeppesen*, 614 F.3d 1070,

1083 (9th Cir. 2010) (en banc)). It claimed "even if plaintiffs could make a prima facie case with nonprivileged evidence," the evidence Defendants required "to mount a full and effective defense . . . would create an unjustifiable risk of revealing state secrets." *Id.* at 49 (cleaned up); see also *id.* at 5 ("any rebuttal of" Plaintiffs' religion claims would risk disclosure of secret information). Alternatively, the Government argued the court should order Plaintiffs to proffer "precisely what discovery [they] intend[] to seek against the Government." *Id.* at 52.

In response, Plaintiffs disclaimed any need for secret evidence to establish their religion claims. Opp'n to Mot. to Dismiss, at 21–22, *Fazaga*, No. 8:11-cv-0031-CJC, ECF No. 64 (hereinafter "Opp'n to MTD"). They publicly filed four declarations from Monteilh describing in detail the Government's surveillance program and how it involved Plaintiffs. J.A. 165–219. He stated "my handlers did not give me any specific targets, but instead told me to gather as much information on as many people in the Muslim community as possible," J.A. 173, and that "when my handlers asked me to identify individuals from photographs, . . . when I indicated . . . that the individual was not a Muslim, the picture was discarded." J.A. 182 (cleaned up). Plaintiffs also argued dismissal would be premature, and that the privilege was inapplicable. Opp'n to MTD at 31–40.

The district court granted the Government's motion to dismiss the religion claims on state-secrets grounds, and went further, dismissing search claims the Government had *not* moved to dismiss. It dismissed all claims except for Plaintiffs' FISA claim under Section 1810. Pet. App. 166a.

Based on the Government's classified declaration and classified supplemental memorandum, the district court concluded that "the Government will inevitably need the privileged information to defend" against Plaintiffs' claims. Pet. App. 164–66a. In the court's view, this warranted dismissal for two reasons under Ninth Circuit precedent. First, "privileged information provides essential evidence for Defendants' full and effective *defense* against Plaintiffs' claims." Pet. App. 173a–74a (emphasis in original). Second, the court found "privileged and nonprivileged information are inextricably intertwined," Pet. App. 175a, and therefore "cannot be separated as a practical matter." Pet. App. 176a.

B. Court of Appeals

The court of appeals affirmed in part, reversed in part, and remanded. As to state secrets, the court first ruled the district court erred in dismissing the claims Defendants had *not* sought to dismiss on privilege grounds. Pet. App. 42a–44a. Defendants have not challenged that ruling; the search claims remain to be litigated below.

The court of appeals also reversed the district court's dismissal of Plaintiffs' religion claims, holding FISA's special review procedures displaced the "dismissal remedy" that accompanies the state-secrets privilege under circuit precedent, at least at this preliminary stage. Pet. App. 46a–67a.[4] Instead, FISA requires the court to undertake ex parte, in camera review to determine whether the surveillance

[4] The Ninth Circuit had previously held dismissal was permissible in state-secrets privilege cases. *Jeppesen*, 614 F.3d 1070. Plaintiffs contend *Jeppesen* is wrong. See Section I, *infra*.

was lawfully authorized and conducted. Pet. App. 40a, 48a. FISA "speaks directly to the question otherwise answered by federal common law" concerning how a court should proceed in electronic surveillance cases where the Attorney General declares information too sensitive to disclose on national security grounds. The court emphasized that *Plaintiffs* would not be permitted to examine the secret evidence; but that FISA required *the court* to conduct ex parte, in camera review. Pet. App. 38a–39a.

The court held that, under 50 U.S.C. 1806, FISA's review procedures were triggered here for two independent reasons: (1) the Government sought to enter into evidence or otherwise use the information "obtained or derived from electronic surveillance" in its defense; and (2) Plaintiffs' Prayer for Relief seeking expungement or return of unlawfully obtained surveillance records "requested . . . to 'obtain' information gathered during or derived from electronic surveillance." Pet. App. 57a–58a.

The court found that "all of Plaintiffs' legal causes of action relate to electronic surveillance, at least for the most part, and in nearly all instances entirely, and thus require a determination as to the lawfulness of the surveillance." Pet. App. 93a (emphasis omitted). Moreover, "1806(f) provides that the district court may consider 'other materials *relating* to the surveillance'" as necessary to determine if it "was lawfully authorized and conducted." Pet. App. 94a. And, "it is far from clear" that even the claims that might require consideration of evidence not derived from electronic surveillance would, "as actually litigated . . . involve more than the electronic surveillance that is otherwise the focus of the lawsuit." Pet. App. 94a. The court therefore held the

district court may be able to assess the lawfulness of all the conduct Plaintiffs challenge using Section 1806(f)'s ex parte, in camera procedures.

The court therefore held that FISA displaced the "dismissal remedy" available under circuit precedent. It emphasized that Defendants could reassert the privilege either if Plaintiffs seek to apply FISA's procedures to secret information not relating to electronic surveillance, or if electronic surveillance "drop[s] out of consideration" from the case. Pet. App. 95a–96a.[5]

The court denied Defendants' requests for rehearing en banc over a dissent. Pet. App. 3a. In doing so, two members of the panel reiterated that their decision does not require disclosure to *Plaintiffs* of any secret evidence. They noted that "in the unprecedented event that a district court *does* order disclosure," the government could reassert the privilege "as a backstop." Pet. App. 100a n.1 (Gould and Berzon, JJ., concurring in denial of rehearing en banc) (emphasis in original).

C. Proceedings on Remand

On remand, the district court ordered the parties to address how proceedings should go forward. Resp't Supp. App. 1a. Plaintiffs stated their intent to seek discovery on their search claims, including the informant's audio recordings of conversations to which he was not a party, and video recordings inside mosques and homes. Resp't Supp. App. at 6a–8a.

---

[5] In the event that occurred, the court of appeals instructed the district court to apply the D.C. Circuit's definition of "valid defense." Pet. App. 96a–97a. Defendants do not challenge that aspect of the decision below.

Plaintiffs also stated they would move for summary judgment on their religion claims based entirely on publicly available information. Resp't Supp. App. at 9a–10a, 14a–15a. The district court stayed all proceedings.

SUMMARY OF ARGUMENT

Plaintiffs have asserted—and documented with declarations from Defendants' own informant—that FBI agents violated their religious freedom rights by spying on them because of their religion. In response, Defendants rely on the state-secrets privilege to argue for dismissal of those claims without any adjudication of whether the Defendants' surveillance was unlawful. Both this Court's state-secrets jurisprudence and the law governing domestic electronic surveillance prohibit that result.

1. The district court erred in dismissing Plaintiffs' religion claims under the state-secrets privilege. Like all other privileges, the common-law state-secrets privilege authorizes the *exclusion* of evidence. It deprives all parties of the evidence withheld. As with any privilege, its application may lead to dismissal where the plaintiffs cannot prove their claims without the excluded evidence, but plaintiffs must be given the opportunity to make their case, as they were in *Reynolds* itself.

The privilege does not support dismissal here. Defendants have not sought to exclude evidence from this case. They do not need to; only Defendants possess the secret information at issue, and Plaintiffs have disclaimed any intent to use it for their religious freedom claims. Defendants instead assert that Plaintiffs' claims should be dismissed because Defendants need to use secret information in their

own defense. But while the state-secrets privilege, when properly asserted, can justify keeping privileged information out of a case, it does not authorize a party to win dismissal because it wants *both* to keep the information secret and to use it in in *its own defense*. Like other privileges, state secrets authorizes only the exclusion of evidence, not the use of secret evidence to dismiss claims.

Defendants' attempt to win dismissal erroneously conflates the evidentiary privilege recognized in *Reynolds* with the distinct state-secrets justiciability bar recognized in *Totten*. That bar supports dismissal, but only for government-contracting lawsuits where the "very subject matter" of the suit is secret. Defendants have acknowledged that "the very subject matter" of this case is not a secret.

Moreover, *Totten*'s bar derives from federal courts' authority to fashion contractual remedies in cases where the parties assume the risk that there may be no judicial recourse to enforce a secret government contract. Plaintiffs never contracted with the Government, and never assumed the risk they would forfeit their First Amendment rights simply by practicing their faith. No doctrine of this Court permits the Government to extinguish Plaintiffs' constitutional rights under these circumstances.

Accordingly, the district court had no authority to dismiss Plaintiffs' religion claims at the pleading stage. Under the common-law rule, "the privileged information is excluded and the trial goes on without it," *General Dynamics*, 563 U.S. at 485. Plaintiffs are entitled to the opportunity "to adduce the essential facts . . . without resort to material touching upon" state secrets. *Reynolds*, 345 U.S. at 11. The decision below should be affirmed on this ground alone.

2. Even if the state-secrets privilege would otherwise support dismissal here, Congress has displaced that remedy in cases involving electronic surveillance. FISA's comprehensive provisions govern all aspects of domestic electronic surveillance of U.S. persons conducted for national security purposes. Section 1806 requires courts to conduct ex parte, in camera review to determine whether government officials complied with the law in two situations applicable here: (1) where the Government seeks to use information obtained or derived from electronic surveillance, see 1806(c); and (2) where U.S. persons sue the Government plausibly alleging that they were unlawfully surveilled, and request information related to that surveillance, see 1806(f). In both situations, if the Attorney General files a declaration attesting that disclosure of the information would threaten national security, Section 1806(f) requires the court to review the information ex parte and in camera to determine whether the underlying surveillance was lawful.

Section 1806(c) applies here because the Government says it has secret information it would like to "use" in its defense, and has sought dismissal of the religion claims on that basis. In support, it filed a declaration from the Attorney General stating disclosure of the information could threaten national security, and also a classified declaration. Under those circumstances, FISA requires a court to review the information ex parte and in camera to determine whether the underlying surveillance was lawful. It does not permit the Government to win dismissal without a judge determining whether it broke the law. Allowing such dismissals would permit the Government to escape civil liability even if it engages

in precisely the conduct that Congress enacted FISA to prevent. FISA forecloses that result.

Section 1806(f) independently triggers application of FISA's review procedures because Plaintiffs are "aggrieved persons"—*i.e.*, U.S. persons whom the Government surveilled—who have requested to "obtain" the information the Government illegally gathered about them. Section 1806(f) requires that, where an American seeks to "obtain" such information, the court must employ the same ex parte, in camera procedure. Plaintiffs' Prayer for Relief, which seeks destruction or *return* of the records Defendants illegally obtained, constitutes a "request" to "obtain" "information obtained or derived from electronic surveillance" under Section 1806(f).

Defendants propose a non-textual limitation on Section 1806, contending that courts can use its ex parte, in camera procedures only for "procedural motions," such as motions to suppress, and not to adjudicate "the merits." But the text contains no such distinction, and all textual signals refute it. Courts "shall" use Section 1806's procedures "whenever" their conditions are met, "notwithstanding any other law," in response to "any motion or request" under "any other statute or rule," irrespective of whether the motion could be described as "procedural"—a word that never appears in the statute.

Defendants' limitation also cannot be reconciled with Congress's decision to create a damages remedy for individuals subject to unlawful electronic surveillance in Section 1810. Defendants concede *they* could invoke Section 1806(f)'s procedures to defend themselves with secret information in such a lawsuit, but inexplicably maintain that the same is not true for a *plaintiff* bringing such a suit. That is not what

Congress wrote. Defendants' argument would leave the government free to win dismissal of virtually any Section 1810 suit simply by asserting that the underlying conduct was secret—whether or not it was lawful—thus nullifying the civil damages remedy Congress created to ensure surveillance remains constrained by law.

3. Where FISA applies, it speaks more than clearly enough to displace the dismissal remedy of the state-secrets privilege. FISA speaks directly to the precise concerns addressed by the privilege. The fact that it does not explicitly use the words "state secrets" is hardly surprising; prior to 1978, this Court and others often referred to "national security" rather than "state secrets" to describe the *Reynolds* privilege. Accordingly, Section 1806(f) applies where the Attorney General attests that disclosure would harm "national security." And it requires in camera review rather than dismissal, "notwithstanding any other law."

Defendants argue applying the statute as the court of appeals directed would give rise to constitutional problems related to the executive's constitutional authority to control national security information, but Congress clearly has authority to regulate surveillance affecting Americans, and to establish evidentiary rules governing civil litigation regarding that surveillance. *United States v. U.S. District Court (Keith)*, 407 U.S. 297, 323–24 (1972).

Nor does FISA give rise to serious constitutional problems for the Agent Defendants. Judges routinely resolve many dispositive issues in national security cases using ex parte, in camera review. And the statute expressly accommodates any constitutional concerns by specifying that any remedies must be "in

accordance with the requirements of law." 1806(g). If a particular remedy would be unconstitutional, the statute itself bars it.

Finally, Defendants' interpretation gives rise to serious constitutional problems. They read the statute to permit the Government to both assert that information is secret *and* use it to dismiss a suit alleging serious constitutional violations, without *any* judicial determination of whether the Government broke the law. Congress enacted FISA to constrain precisely such assertions of unchecked Executive power.

ARGUMENT

I. The State-Secrets Privilege Does Not Permit Dismissal Here

The court of appeals' decision can be affirmed without addressing the FISA issues because the state-secrets privilege the Government asserted authorizes only exclusion of privileged evidence, not dismissal on the pleadings based on defendants' need for evidence. This Court's cases establish two "quite different" state-secrets doctrines. *General Dynamics*, 563 U.S. at 485. Defendants conflate these doctrines throughout their brief. Neither provides the dismissal remedy Defendants advocate here.

A. This Court's State-Secrets Cases Do Not Permit Dismissal Here

Reynolds recognized a common-law privilege "in the law of evidence." 345 U.S. at 6–7. Where it applies, it operates like other evidentiary privileges: "[t]he privileged information is excluded and the trial goes on without it. . . . [T]he Court [does] not order

judgment in favor of the Government." *General Dynamics*, 563 U.S. at 485.

Under *Reynolds*, if the district court excludes secret information, it must give Plaintiffs the opportunity to make their case without it. *Reynolds*, 345 U.S. at 11. The common law has always required that approach; plaintiffs occasionally succeeded on the merits despite losing on privilege. See, *e.g.*, *Wyatt v. Gore*, [1816] Holt N.P.C. 299, 305 (plaintiff won even after privileged material was excluded); *Cooke v. Maxwell*, [1817] 2 Stark. 183, 185–86 (same); see Donohue Amicus at 8–12.

The other state-secrets doctrine, reflected in *Totten,* also does not support dismissal here. It establishes a distinct justiciability bar for government-contracting lawsuits "where the very subject matter of the action . . . [i]s a matter of state secret." *Tenet*, 544 U.S. at 9. As this Court's most recent *Totten* decision explained, individuals entering into such contracts "assume[] the risk that state secrets would prevent the adjudication of" any disputes arising from their contracts, given their highly secret nature. *General Dynamics*, 563 U.S. at 491; see also *Tenet*, 544 U.S. at 8 (claim barred because "success depend[ed] upon the existence of [plaintiff's] secret espionage relationship with the Government") (citing *Totten*).[6]

Where it applies, the *Totten* bar supports dismissal on the pleadings, but it does not apply here. Defendants never argued this is a nonjusticiable spy-contracting case, or that its very subject matter is secret. On the contrary, Defendants said, "The Government does not seek dismissal of all claims at

[6] Not every case involving a contract to spy necessarily requires dismissal. See, *e.g.*, *Webster v. Doe*, 486 U.S. 592 (1988).

the outset based on the privilege assertion, nor to bar disclosure of all information concerning Operation Flex or Monteilh's activities." J.A. 160.

Even if Defendants had not disclaimed such arguments, they would be meritless. The "very subject matter" of this case is not a state secret. Defendants have acknowledged their informant worked for the FBI, J.A. 49–50, and represented that they could likely make large portions of the informant's recordings and notes available without threatening national security. J.A. 49. The complaint's allegations rest on what Plaintiffs and others saw the informant do, as well as other information made publicly available more than a decade ago, including the informant's own detailed declarations. J.A. 165–219.

Furthermore, Plaintiffs never entered into secret contracts with the government, and never "assumed the risk" they would lose the right to vindicate their Free Exercise rights just by practicing their faith. Nor is there any risk of "graymail" presented, because Plaintiffs have no access to any state secrets to use as leverage. *Tenet*, 544 U.S. at 11. Denying them a forum in which to present their constitutional claims under these circumstances, absent any such implicit waiver, poses serious constitutional problems. Cf. *Webster v. Doe*, 486 U.S. 592, 603 (1988) (noting "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim").

For these reasons, Defendants' assertion that they possess information relevant to this case would at most support *exclusion* of that evidence, not *dismissal*—and certainly not dismissal on the pleadings. Plaintiffs must have the opportunity to

make their case without the secret information. *Reynolds*, 345 U.S. at 11.

The district court order contravenes this Court's state-secrets doctrine. It ordered dismissal based specifically on *Defendants' need* for the privileged information "to defend" themselves, and the risk that their doing so could lead to inadvertent disclosure. Pet. App. 166a, 172a–76a; J.A. 163. Moreover, because the district court dismissed at the pleading stage, it never allowed Plaintiffs to make their case using nonprivileged evidence, as *Reynolds* requires, despite Plaintiffs' repeated assertions they could do so. Opp'n to MTD at 21–22; Resp't Supp. App. 14a–15a. Thus, contrary to Defendants' claim, the district court's dismissal was not the "result" of excluding evidence. Br. 26.

Defendants argue the district court found dismissal warranted because litigating the religion claims would present an unacceptable risk of disclosing secret information "even without privileged evidence," Br. 46, but the district court made no such finding. It found that "the Government will inevitably need the privileged information to defend against Plaintiffs' [religion claims]." Pet. App. 166a. While the district court noted that secret and non-secret information were "inextricably intertwined," Pet. App. 158a, 175a, it was referring to the *Government's* evidence; its rationale was that "any *rebuttal* against" Plaintiffs' allegations would create the risk of disclosure. Pet. App. 158a (emphasis added); 172a–74a (same).

In any event, this Court's cases do not support dismissal based on an "unacceptable risk" that litigation will disclose secret information even where Plaintiffs intend neither to seek nor submit it.

Rather, the privilege permits the court to eliminate any such risk by simply excluding all the privileged evidence and any non-privileged evidence "intertwined" with it. Here, that process would be straightforward, as neither Plaintiffs nor the informant possesses any state secrets, let alone the particular secret information over which the Government asserts privilege. Only the FBI holds the secrets here; there is no risk that Plaintiffs will disclose them. J.A. 50 ("the FBI cannot publicly disclose" identities, reasons, and sources); J.A. 52 ("The FBI seeks to protect . . . information that would confirm or deny" those facts); J.A. 59 (same as to sources and methods).

B. The Pre-*Reynolds* Common Law Does Not Permit Dismissal Here

Comprehensive review of the common-law state-secrets authorities, including every authority cited in *Reynolds*, confirms they would not permit dismissal here. 345 U.S. at 7 n.11, 15. With the exception of *Totten*—which rests on a distinct doctrine, as both *Tenet* and *General Dynamics* explained—in every state-secrets case *Reynolds* cites, and every case on which those cases rely, if the privilege is sustained the evidence is excluded and the case proceeds without it. Dismissals occur only when the *plaintiffs* cannot make their case without the excluded evidence; never because the defendant needs to use the evidence or because there is an "unacceptable risk" of inadvertent disclosure.

The American cases *Reynolds* cites confirm this. See *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353, 356 (E.D. Pa. 1912) (court ordered "expunging the exhibits in question from the record,"

not dismissal); *Pollen v. Ford Instrument Co.*, 26 F. Supp. 583, 586 (E.D.N.Y. 1939) (motion to compel denied, no dismissal); *Cresmer v. United States*, 9 F. R. D. 203, 204 (E.D.N.Y. 1949) (court conducted ex parte, in camera review in response to privilege assertion, granted motion to compel); *Bank Line Ltd. v. United States*, 68 F. Supp. 587, 588 (S.D.N.Y. 1946) (court reaffirmed prior order granting motion to compel production of Navy record); *In re Grove*, 180 F. 62, 70 (3d Cir. 1910) (reversing contempt order where witness had refused to produce documents deemed secret by the Navy, without regard to underlying litigation).

The secondary sources cited in *Reynolds* also confirm Plaintiffs' understanding. William Sanford described the privilege as applicable where "[a] public interest demands that such matters be beyond the reach of court processes *for production or disclosure*," without mentioning a remedy permitting defendants to seek dismissal based on their need to use their own privileged information. William Sanford, *Evidentiary Privileges Against the Production of Data Within the Control of Executive Departments*, 3 Vanderbilt L. Rev. 73, 75 (1949) (emphasis added). And no example cited in Sanford, Wigmore, or Greenleaf involves dismissal even where the plaintiff could make their case without privileged evidence. See, *e.g.*, *H.M.S. Bellerophon*, [1875] 44 LJR 5–9 (cited in Wigmore) (excluding evidence and then resolving the merits for defendants); *Rex v. Watson*, [1817] 2 Stark. 116, 148, 159 (excluding evidence defendant sought; defendant ultimately acquitted); *Worthington v. Scribner*, 109 Mass. 487 (1872) (cited in Greenleaf) (extensively reviewing English and American privilege cases without ever mentioning dismissal, and concluding

that reports of potential criminal activity could not be sought by interrogatory).

The British cases *Reynolds* referenced (in footnote 15) are in accord. *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624 (H.L.), upholds a privilege claim against a subpoena for documents in a private party suit, without dismissal. *Duncan* cites many other cases, none of which support dismissal on Defendants' theory. See, *e.g.*, *Wyatt*, *supra*.

C. The Few Lower Court Cases Permitting Dismissal Where Defendants Seek to Use Privileged Evidence to Defend Themselves Precede *General Dynamics*, and Are Wrong or Inapplicable

Defendants rely on a few lower court decisions that conflated *Reynolds* and *Totten* prior to *General Dynamics*. Br. 26 (citing, *inter alia*, *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007); *Jeppesen*, 614 F.3d 1070). But as *General Dynamics* makes clear, those cases were wrongly decided. *El-Masri* and *Jeppesen* held the Government could win dismissal at the pleading stage in cases *not* involving government contracts where either the defendants needed secret evidence to defend themselves, or where secret and non-secret evidence were so "inseparable" as to create an "unacceptable risk" that state secrets would be revealed through discovery. *Jeppesen*, 614 F.3d at 1083 (citing *El-Masri*, 479 F.3d at 308). While those rationales might have made sense as further exercises of courts' "common-law authority to fashion contractual remedies in Government-contracting disputes," *General Dynamics*, 563 U.S. at 485, they have no basis in *Reynolds* or any other privilege law,

and therefore no application outside the contracting context.[7]

Although the D.C. Circuit has also dismissed cases following an invocation of the state-secrets privilege where the Government asserts a need for secret information to defend itself, it has required defendants to show they have a "meritorious" defense, not merely a "possible" or "plausible" one. *In re Sealed Case*, 494 F.3d 139, 149–50 (D.C. Cir. 2007)). As a result, such dismissals do not occur at the pleading stage, but only after the court undertakes ex parte, in camera review to resolve whether the defendant acted lawfully in light of plaintiff's claims. For example, *Molerio v. FBI* reviewed secret materials to determine, after "in camera consideration of the state-secrets privilege," that plaintiff's First Amendment and Privacy Act claims were "properly dismissed" on the merits. 749 F.2d 815, 822, 825–26 (D.C. Cir. 1984) (Scalia, J.). The court held it would be a "mockery of justice for the court—knowing the erroneousness" of plaintiff's claims, to nonetheless rule for plaintiff. *Id*. at 825.[8]

---

[7] Defendants cite two other circuit cases, but they offer little support for Defendants' approach. *Black v. United States* upheld a state-secrets dismissal with minimal explanation. It appears the court may have found sufficient the district court's conclusion that, without the privileged evidence, the plaintiff could not make a prima facie case. 62 F.3d 1115, 1118–19 (8th Cir. 1995). This is standard privilege procedure. *Tenenbaum v. Simonini* conclusorily states that the court "reviewed the materials Defendants produced under seal" and determined that their exclusion "deprived Defendants of a valid defense." It therefore appears to have determined that plaintiffs' claim failed on the merits. 372 F.3d 776, 777 (6th Cir. 2004).

[8] These cases do not explain why their rationale would not apply to other privileges, where the traditional rule requires exclusion

This Court need not decide if the common law permits the D.C. Circuit's innovation, because Defendants have not asserted the secret information would exonerate them—*i.e.*, prove that religion played no motivating part in their decision to surveil Plaintiffs, or that their use of a religious classification was sufficiently tailored to satisfy strict scrutiny. The court of appeals instructed the district court to permit the Government to do so on remand, should it re-assert the state-secrets privilege. Pet. App. 96a–97a.

Finally, even were this Court to take the unprecedented step of ratifying *El-Masri* and *Jeppesen*'s transmogrified "privilege" doctrine, the district court acted prematurely in applying it here. Given Defendants' acknowledgment that "the majority" of Monteilh's audio and video recordings likely need not remain secret, J.A. 162, the court should have permitted the case to proceed. Indeed, the Government suggested this as an alternative remedy in its own dismissal motion. J.A. 163–64 (arguing that the court should dismiss the Agent Defendants while allowing Plaintiffs to propose discovery against the Government).

A district court cannot apply *Reynolds* without knowing what secret information could be disclosed. The Government's speculative assertion that certain kinds of information may eventually be relevant to its defense is no substitute for the court's consideration

---

irrespective of which side benefits. As Judge Learned Hand explained, the "grievous hardship" that sometimes follows the exclusion of evidence is "a consequence of any evidentiary privilege." *United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950). It may be relevant that both *Sealed Case* and *Molerio* involve individuals who either worked for or sought to work for the government in positions involving sensitive information.

of the actual information the Government would seek to use—whether through a specific description of it or review of the actual evidence. The Attorney General's declaration confirms dismissal was premature, as it does not state that he personally examined the allegedly secret information the Government would have to use, as opposed to just "the matter." See J.A. 27. *Compare Duncan*, A.C. at 625 (head of department "should have seen and considered *the contents of the documents*") (emphasis added).

The state-secrets privilege is concerned with preventing the *disclosure* of secret information. Here, because Plaintiffs disclaimed any intention to seek secret information, the Government has complete control over any risk of disclosure. Neither law nor logic permit it to win dismissal at the pleading stage based on the risk that its own actions could disclose state secrets.[9]

II. If the State-Secrets Privilege Otherwise Authorizes Dismissal, FISA Displaces It, and Requires Ex Parte, In Camera Review Rather Than Dismissal

Even if the state-secrets privilege would otherwise provide for dismissal here, the decision below correctly concluded that FISA has displaced that remedy through its comprehensive, exclusive framework for litigation concerning domestic electronic surveillance undertaken for national security purposes.

---

[9] Plaintiffs preserved this ground for affirmance. See Opp'n. Cert at 3. It is also encompassed within the question presented, which does not define the "state-secrets privilege."

Congress might have simply deprived all parties of the use of secret information in surveillance cases—as under common law—or it might have allowed courts to dismiss suits where the Government claimed it needed secret information to defend itself, as Defendants seek here. However, having uncovered widespread "abuses of domestic national security surveillance[]" that "demonstrate[d] the inappropriateness of relying solely on executive branch discretion to safeguard civil liberties," H.R. Rep. No. 95-1283, at 21, Congress rejected those options in favor of a middle path that would protect national security while giving courts ultimate responsibility to ensure surveillance remained constrained by law.

That path included a civil damages remedy. See 50 U.S.C. 1810. Congress recognized the statute's rules for litigation included "[r]equirements to disclose certain information . . . [that] might force the Government to dismiss the case (or concede the case, if it were a civil suit against it) to avoid disclosure," but nonetheless enacted those procedures to ensure that challenges to surveillance conducted in violation of FISA could go forward. H.R. Rep. No. 95-1283, at 94.

FISA requires district courts to use its ex parte, in camera review procedures whenever (1) the Government claims it needs to enter into evidence or otherwise use information that the Attorney General asserts must remain secret to protect national security, or (2) a civil litigant seeks to obtain such secret information as part of a suit plausibly alleging unlawful surveillance. Because both conditions apply here, the district court should have conducted ex parte review, rather than granting dismissal.

A. Defendants' Motion to Dismiss Triggers FISA's Special Review Procedures Under Sections 1806(c) and (f)

Defendants' motion to dismiss triggers FISA's ex parte, in camera review procedures because Defendants seek to "enter into evidence or otherwise use" secret information obtained through electronic surveillance to dismiss Plaintiffs' religion claims. 50 U.S.C. 1806(c).

The statute's terms are clear and mandatory. Section 1806(c) requires the Government to notify the court and the aggrieved person "whenever" it intends to "enter into evidence or otherwise use" information obtained or derived from electronic surveillance. Section 1806(f) requires that "whenever a court . . . is notified," and "the Attorney General [has] file[d] an affidavit . . . that disclosure or an adversary hearing would harm the national security of the United States," the "district court . . . shall, notwithstanding any other law . . . review in camera and ex parte the 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."

Here, Defendants stated they would need to "enter into evidence or otherwise use" such information. Pet. App. 56a–58a; see also MTD at 49. And the Holder Declaration states that "disclosure of [the secret] information . . . could reasonably be expected to cause significant harm to the national security," J.A. 27. Therefore, Section 1806(f) requires that the court review the information ex parte and in camera to determine "whether the surveillance . . . was lawfully authorized and conducted."

Defendants' motion seeking dismissal based on their need to rely on secret information—including the submission of a classified declaration to support that request—notified the court of their intent to use and was itself a use of that information. "Use" means "to put into action or service." *Use*, Webster's New Collegiate Dictionary 1288 (1977) (hereinafter "Webster's"). By relying on secret information to support their motion to dismiss, Defendants "put[] [it] into service" to win dismissal.

That Section 1806(c) adds the word "otherwise" before "use" underscores that Congress meant "use" capaciously. "Otherwise" is a catch-all, enlarging the actions to which "use" refers. *Otherwise*, Webster's 813 (defining "otherwise" as including "a different way or manner," "in different circumstances," and "in other respects").

The statute's separation of "otherwise use" from both "enter into evidence" and "disclose" also supports a broad understanding of "use." "If a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision, or that deprives another provision of all independent effect, and (2) another meaning that leaves both provisions with some independent operation, the latter should be preferred." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (hereinafter "*Reading Law*") 176 (2012). FISA expressly contemplates that the Government may "use" secret information even without "enter[ing] it into evidence" or "disclos[ing]" that information. That is precisely what Defendants have done here: they are "using" the information to secure dismissal by relying on it as the factual predicate for their motion. Defendants' contrary interpretation of the statute fails to give "use" distinct meaning. Br. 36 (conflating

"use" of evidence with "introducing" it); Br. 37 (conflating "use" with "disclose").

By the same token, Defendants' motion expresses intent to "enter [the secret information] into evidence," as their motion to dismiss is predicated on their own need to rely on secret information to defend themselves. J.A. 163 ("any rebuttal of [Plaintiffs' religion] claim would risk or require disclosure of [secret information]"); J.A. 163–64 (arguing Agent Defendants could not litigate *Bivens* and qualified immunity defenses absent privileged information). FISA speaks directly to that scenario by requiring the court to conduct ex parte, in camera review to determine whether the surveillance from which the secret information derives was lawful, rather than simply dismissing in order to keep the information secret.

Defendants assert they merely seek to prevent introduction or disclosure of the information. Br. 18, 25. But because only Defendants possess the information, they do not need to assert privilege to keep it secret. They can simply choose not to rely on it. Their reliance on the information to seek dismissal, even where Plaintiffs have stated their own case rests wholly on public information, constitutes more than mere exclusion.

Where, as here, the Government triggers FISA's procedures, they are mandatory, and displace all options otherwise available to the court. Section 1806(f) applies "notwithstanding any other law." The common law is "other law." See, *e.g.*, *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018) ("notwithstanding any other provision of law" abrogates common-law sovereign immunity); *Commodity Futures Trading Comm'n v. Schor*, 478

U.S. 833, 846–47 (1986) ("notwithstanding" clause encompasses common-law debt claims); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 390–91 (1980) ("notwithstanding" clause abrogates common-law res judicata).

In addition, Section 1806(f) commands that courts "*shall*" use its procedures. "Shall" means "must"— it imposes an "unequivocal mandate," *Jennings v. Rodriguez*, 138 S. Ct. 830, 834, 835 (2018), and precludes "further refinement" through common-law adjudication. *General Dynamics*, 563 U.S. at 491. And both Sections 1806(c) and (f) apply "*whenever*"—*i.e.*, "at any or every time that"—their conditions are met. *Whenever*, Webster's 1333.

Thus, because Defendants' motion to dismiss rests on *their own* asserted need to "enter into evidence or otherwise use" secret information, FISA requires that the district court "shall" conduct ex parte, in camera review.[10]

[10] Nothing in the decision below requires the Government to produce information on which it chooses *not* to rely. Pet. App. 57a (FISA procedures triggered because "the Government would like to use this information to defend itself"). Defendants' assertion that they would be forced to disclose secret information if Plaintiffs prevail also misreads the decision below. Br. 47. Plaintiffs have requested *destruction or return* of the illegally obtained records. Compelled disclosure would only occur if Defendants declined to destroy the evidence, and even then Defendants would have a further opportunity to object to *public* disclosure on state-secrets grounds. Pet. App. 100a n.1.

B. Plaintiffs' Prayer for Relief Independently Triggers FISA's Special Review Procedures Under Section 1806(f)

The court of appeals also correctly held that Section 1806(f)'s catch-all provision independently requires ex parte, in camera review here because Plaintiffs requested return of the illegally obtained surveillance in their Prayer for Relief.

Section 1806(f) requires that courts employ its ex parte, in camera review procedures not just when the Government provides notice of intent to use secret information under 1806(c), or a litigant files a motion to suppress such information under 1806(e), but also "whenever . . . any motion or request is made by an aggrieved person . . . to obtain . . . information . . . derived from electronic surveillance," and the Attorney General responds with a declaration seeking to shield it. Plaintiffs' Prayer for Relief seeking "destr[uction] or return [of] any information gathered through the unlawful surveillance program" constitutes a "request" triggering Section 1806(f)'s procedures. Pet. App. 58a.

Plaintiffs' Prayer is, literally, a "request" that seeks to "obtain" information "obtained or derived from" electronic surveillance. Black's Law Dictionary defines "prayer for relief" as "[a] request addressed to the court . . . esp. . . . for specific relief." *Prayer for Relief*, Black's Law Dictionary (4th ed. 1968). Defendants do not dispute that if Plaintiffs were to prevail on their claim that the surveillance was

unlawful, their Prayer would entitle them to seek destruction or return of the evidence.[11]

Thus, Plaintiffs' Prayer independently requires ex parte, in camera review to determine whether the surveillance at issue was lawful.

C. Defendants' Objections Are Meritless

In the face of Section 1806's clear and mandatory textual directive, Defendants argue that its procedures do not apply, and that they should therefore win outright dismissal under the state-secrets privilege. But their argument ignores the broad meaning of "use" and relies on non-textual limitations they would superimpose on the statute's plain language. Their position also cannot be reconciled with other provisions of the statute, in particular Section 1810. Having established a comprehensive system for judicial oversight of domestic electronic surveillance undertaken for national security purposes, Congress did not then allow the government to evade that system simply by invoking state secrets.

1. Defendants' Interpretation of "Use" Contravenes Its Ordinary Meaning

Defendants object that they do not seek to "use" the secret information to win dismissal, but their arguments fail. They first contend their invocation of the state-secrets privilege does not "use" secret information by analogizing to the assertion of other privileges, such as the attorney-client or marital-

[11] Defendants have not challenged the court of appeals' holding that expungement remains available "to vindicate constitutional rights." Pet. App. 67a.

communications privilege. Br. 25. But defendants who assert attorney-client privilege in a lawsuit cannot obtain dismissal because they need to use their own privileged communications to defend themselves, or might disclose them by accident. As explained above, Defendants do not merely seek to exclude the evidence; they seek to use it to win dismissal.

Defendants next argue they asserted the privilege "not as a litigant" against aggrieved persons, but instead "to safeguard the public interest," Br. 27. But, as explained above, Defendants could keep the information secret without asserting the privilege. They chose instead to seek dismissal precisely so they could, "as a litigant," use that information to prevail against Plaintiffs' religious freedom claims. In any event, Section 1806(c) refers only to use by "the Government," not to "litigants," and Defendants have assuredly used the information to assert the privilege "against" Plaintiffs, as they sought dismissal of Plaintiffs' religion claims.

Defendants next argue that seeking dismissal "at most" constitutes a use of the *privilege*, rather than the *information*, Br. 27, but this fails for the same reason: they are using the information to win dismissal, not just trying to keep it secret. And the fact that the Government requested dismissal of claims to which it was not initially a party changes nothing. Br. 26. Its motion puts secret information "into service" to win their dismissal.

2. Defendants' Non-Textual Limitation on Section 1806(f) Cannot Be Squared With Its Plain Text

Defendants next propose a non-textual limitation on Section 1806(f): they ask the Court to interpret its

review procedures to apply only to "procedural" motions related to "admissibility and suppression of evidence." Br. 21, 23. On their view, Congress did not intend courts to use Section 1806(f)'s ex parte, in camera review procedures to determine whether the government's surveillance was lawfully authorized and conducted where that question goes to "the merits" of whether the government violated federal law.

Defendants never define "procedural" or explain why neither their motion to dismiss nor Plaintiffs' Prayer qualifies, but their argument fails for a more basic reason: the text must govern, not what Defendants believe Congress contemplated. Statutory text governs even where Congress indisputably did *not* contemplate a particular application. "The fact that a statute has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity, but rather the breadth of a legislative command." *Bostock v. Clayton County,* 140 S Ct. 1731, 1749 (2020) (cleaned up). Thus, even if Congress did not contemplate that motions to dismiss based on state secrets would trigger Section 1806(c), or that requests for return of illegally obtained evidence would trigger Section 1806(f), that would not justify ignoring the words Congress wrote. "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

Section 1806(f) simply does not distinguish between "procedural motions" and the "merits." It mandates ex parte, in camera review "whenever" the Government seeks to "use" secret information or any

aggrieved person "requests" it. And it requires the court to determine whether surveillance was "lawfully authorized and conducted" "whenever" those conditions apply, not just when the question affects admissibility. Its terms foreclose the non-textual limitation the Government proposes.

Nor does any other provision support Defendants' view. On the contrary, Section 1806(g) confirms Section 1806(f)'s breadth. If the court finds the surveillance unlawful, it "shall, in accordance with the requirements of law, suppress the evidence . . . or otherwise grant the motion of the aggrieved person." 50 U.S.C. 1806(g). Thus, if the Court finds the surveillance here unlawful, it must "suppress" the evidence on which the Government says it needs to rely, thereby prohibiting its use for any purpose—not reward the Government with dismissal of claims because it acted in secret when it broke the law. See *Suppress*, Webster's 1171 (defining "suppress" as, *inter alia*, "to exclude from consciousness").[12]

Similarly, when Plaintiffs move for summary judgment, if Defendants decide to rely on their secret information for their defense by submitting it for ex parte, in camera review, the court will decide if the surveillance was lawful. If it was not, then the court shall, "in accordance with the requirements of law," grant Plaintiffs' summary judgment motion and other

---

[12] While suppression is most often discussed in criminal cases, the term has long also applied in civil contexts, including to motions to suppress evidence gathered in discovery. See, *e.g.*, *Cogen v. United States*, 278 U.S. 221, 223–24 (1929) (referencing civil motions "to secure or to suppress evidence"); *Grant Brothers Constr. Co. v. United States*, 232 U.S. 647, 662 (1914) (affirming denial of "motion to suppress certain depositions" read into evidence in civil case).

appropriate relief. 50 U.S.C. 1806(g). The flexible remedial authority in Section 1806(g) confirms Section 1806(f)'s breadth.[13]

Defendants invoke two canons—*noscitur a sociis* and *ejusdem generis*, Br. 29–31—to support their proposed limitation of Section 1806(f) to procedural motions. But neither applies absent ambiguity. "When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) (cleaned up).

In any event, the canons do not support Defendants' non-textual limitation. Defendants cite *noscitur a sociis* and Section 1806(g)'s use of "motion" to argue that "request" must be similar to "motion," which they further limit to "procedural" motions. Br. 29. But the statute refers capaciously to "*any*" motion or request pursuant to "*any other* statute or rule," not just to "procedural" motions. The canon cannot limit such unambiguous catch-all language. *Compare United States v. Stevens*, 559 U.S. 460, 474 (2010) (rejecting *noscitur* where statute was unambiguous) *with Wikimedia Found. v. Nat'l Sec. Agency*, __ F.4th __, No. 20-1191, slip op. at 37–38 (4th Cir. Sept. 15, 2021) (invoking *noscitur* to limit "any," while ignoring "other").

Ejusdem generis is also inapplicable. There is no need "to ensure that a general word will not render specific words meaningless" in Section 1806(f), because it expressly uses the words "any" and "other" to make clear that it is a catch-all. *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277, 295

[13] Orders granting such relief are final and therefore appealable. See 50 U.S.C. 1806(h).

(2011). Moreover, the canon does not limit the fourth of the four long, separate paragraphs at 1806(c)–(f). Every example of *ejusdem generis* Defendants cite, and every example in *Reading Law*, involves a list of words or phrases, not separate lengthy paragraphs. *Cf. United States v. Aguilar*, 515 U.S. 593, 615 (1995) (Scalia, J., concurring in part and dissenting in part) (*ejusdem generis* applies to "a general or collective term following a list of specific items to which a particular statutory command is applicable"); *Reading Law*, at 199–206.[14]

Defendants raise several practical concerns they say warrant adopting their non-textual limitation. First, they argue that FISA's text cannot govern because it would require district courts to conduct secret trials. Br. 32. But the statute merely requires that district courts determine the legality of surveillance ex parte and in camera, as they have for decades under FISA. In some cases, the district court's determination will require suppression, while in others it might justify discovery, *cf. Alderman v. United States*, 394 U.S. 165, 181–82 (1969), destruction of illegally obtained evidence, or some other relief. The statute's text contains no limitation

[14] *Wikimedia* recently misused *ejusdem generis* to narrow Section 1806(f)'s catch-all provision, holding that it applies only when an aggrieved person makes a request *in response* to the government's attempt to use FISA evidence. *Wikimedia*, slip op. at 38. The court believed a broader reading would render the second clause of Section 1806(f)—which refers to motions to suppress pursuant to Section 1806(e)—meaningless. See *id.* But construing the catch-all provision to encompass requests by plaintiffs in civil litigation, including Plaintiffs' Prayer for Relief, would not render 1806(e) meaningless. The catch-all contains the word "other," and therefore applies to motions or requests pursuant to any statute or rule "other" than Section 1806(e).

on the types of motions courts must resolve using Section 1806(f)'s procedures and limits the relief only insofar as it must be in "accordance with . . . law."

Second, Defendants contend applying the statute as written requires district courts to use Section 1806(f) to "award judgment," Br. 32, but it does not. Just as a finding that the only probative evidence against a criminal defendant must be suppressed does not by itself "award judgment" for the defense, so FISA simply requires that the court determine whether the surveillance was lawful, and then grant any relief "in accordance with the requirements of law," as the context of the particular case demands.[15]

Defendants next characterize as novel the court of appeals' view that FISA could be used to adjudicate the lawfulness of government surveillance in civil litigation. Br. 21. But that was *the Government's position* when the ACLU sued the Attorney General under Section 1810 for allegedly unlawful surveillance. *ACLU Found. of So. Cal. v. Barr*, 952 F.2d 457 (D.C. Cir. 1991). The Government's brief in *Barr* maintained that courts should use Section 1806(f)'s review procedures to resolve questions concerning "the legality of the surveillance" "in administrative, civil, or criminal proceedings" where FISA-derived evidence is sought for use. Br. of Appellees at 15, No. 90-5261 (D.C. Cir. Jan. 24, 1991). The Government never suggested Section 1806(f) was limited to cases where the government sought to introduce FISA-derived evidence against the

---

[15] Proposing still another non-textual limit, Defendants argue that Section 1806's title, "Use of Information," should be interpreted to cover only *the Government's* intended use. Br. 29–30. But the plain meaning of "use" without further limitation includes use by any party.

plaintiffs. Rather, it stated "Section 1806(f) provides that district courts are to determine if surveillance was lawfully authorized and conducted whenever *any person who was overheard* moves or requests before any authority of the United States to discover or obtain materials relating to electronic surveillance under the FISA." *Id.* at 38 (emphasis added).

Agreeing with the Government, the D.C. Circuit found Section 1806(f)'s procedures applicable in constitutional challenges to unlawful surveillance: "Congress also anticipated that issues regarding the legality of FISA-authorized surveillance would arise in civil proceedings and . . . empowered federal district courts to resolve those issues, *ex parte* and *in camera* whenever the Attorney General files an appropriate affidavit under § 1806(f) . . . ." 952 F.2d at 470. As *Barr* recognized, "the normal rules regarding discovery must be harmonized with . . . § 1806(f)." *Id*. at 469.

Defendants also cite the Classified Information Procedures Act (CIPA), by way of contrast, to argue that Congress would have provided more guidance if it intended FISA's special procedures to be used in civil litigation. Br. 32–33. But this Court cannot ignore the statute's plain text because of a perceived deficiency in the level of detail it provides. Moreover, this argument proves too much, as CIPA provides more detail than FISA even for criminal cases, where Defendants concede FISA applies.

The notion that Congress did not intend for its evidentiary procedures to be used by plaintiffs in civil litigation is also directly refuted in the legislative history. Defendants cherry-pick quotes from Senate reports to suggest Section 1806(f) was intended only

for suppression, so the government could always avoid ex parte, in camera review by choosing to "forgo the use of the surveillance-based evidence." Br. 31, 40. But Congress did not enact the Senate's version of Section 1806. The House passed a different version, and when the conference committee reconciled the bills, it "agree[d] that an in camera and ex parte proceeding is appropriate . . . *in both criminal and civil cases*." H.R. Rep. No. 95-1720, at 31–32 (emphasis added). The conferees also amended the Senate's version of Section 1806(g) to add that if a court finds surveillance unlawful, it must either suppress evidence "*or otherwise grant the motion of the aggrieved person*." H.R. Rep. No. 95-1720, at 14 (emphasis added). Thus, they adopted the House's understanding that "[r]equirements to disclose certain information . . . might force the Government to dismiss the case (or concede the case, *if it were a civil suit against it*) to avoid disclosure." H.R. Rep. No. 95-1283, at 94 (emphasis added). The legislative history thus confirms that Section 1806(f) applies where civil plaintiffs challenge unlawful surveillance and seek secret information in furtherance of their claims. *Compare* S. Rep. No. 95-701, at 88–89 *with* H.R. Rep. No. 95-1283, at 10–11 *and* 50 U.S.C. 1806(g) (adopting House language).

3. Defendants' Limiting Construction Would Eviscerate the Civil Remedy Congress Created in Section 1810

Defendants' construction also cannot be reconciled with a key feature of FISA's structure: the civil damages remedy in Section 1810. Cf. *Reading Law*, at 167 (courts should "consider the entire text, in view of . . . [the] logical relation of its many parts"). Defendants acknowledge that Congress meant to "creat[e] a private cause of action for damages" in

1810 to remedy unlawful electronic surveillance, Br. 41, but their construction eviscerates that remedy by permitting the Government to win dismissal of virtually all such suits by invoking state secrets. See *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978) (even where statute is not comprehensive, it displaces common law that would otherwise render it toothless).

In 50 U.S.C. 1810, Congress provided victims of unlawful surveillance a civil damages remedy. Because FISA surveillance is authorized and conducted in secret, and because Section 1810 permits litigation to challenge unlawful FISA surveillance, Congress no doubt understood that many Section 1810 suits would involve information that, if disclosed, might harm national security. It therefore required courts to use FISA's ex parte, in camera review procedures to resolve such suits.

Defendants' one-sided view of Section 1806(f) maintains that the Government can use its ex parte procedures in Section 1810 suits, Br. 33, but Plaintiffs cannot. Indeed, on Defendants' theory, *the same information* would be available for the Government's use through ex parte, in camera review, but not available to plaintiffs. According to Defendants, the statute provides *no mechanism* for plaintiffs to obtain ex parte, in camera review of secret information to pursue 1810 suits.

But the text makes no distinction between requests by the Government and requests by plaintiffs. As the court of appeals recognized, "[i]t would make no sense for Congress to pass a comprehensive law concerning foreign intelligence surveillance, expressly enable aggrieved persons to sue for damages when that surveillance is unauthorized, see *id.* § 1810, and

provide procedures deemed adequate for the review of national security-related evidence, see *id.* § 1806(f), but not intend for those very procedures to be used when an aggrieved person sues [under 1810]." Pet. App. 61a. Nor can Defendants explain *why* Congress would have wanted courts to use FISA's procedures if the Government requests information, but not if plaintiffs request that same material.[16]

Defendants object that Sections 1806(f) and 1810 do not cross-reference each other, Br. 33, but that is hardly surprising given that Section 1806(f) applies not just to 1810 suits, but broadly to all motions or requests under "any" statute or rule seeking information derived from electronic surveillance. Similarly, Section 1810 creates civil liability for unlawful surveillance under several provisions outside the chapter containing FISA. See Section 1809(a)(1).

Most important, if Defendants' reading of Section 1806(f) were correct, the Government could adopt a secret warrantless surveillance program in blatant contravention of FISA's constraints, knowing that it could use the state-secrets privilege to win dismissal of Section 1810 suits against that program. Cf. J.A. 162 (Defendants suggesting they may eventually invoke privilege to "foreclose litigation of [the Fourth Amendment and FISA claims]"). This would render Section 1810 toothless against the very abuses Congress enacted FISA to prevent, undermining

---

[16] Defendants' theory also cannot explain why Congress believed the statute's "requirements to disclose certain information" might force the Government to "concede . . . a civil suit against it." H.R. Rep. No. 95-1283, at 94. If Section 1806(f) were only for the Government's use, it would never have to concede an 1810 suit to avoid disclosing information to a court.

Congress's determination that "the statutory rule of law must prevail in the area of foreign intelligence surveillance." S. Rep. No. 95-604, at 7; cf. 50 U.S.C. 1812 (prohibiting non-statutory electronic surveillance).[17]

Defendants note that other doctrines (besides state secrets) may also sometimes bar litigation challenging national security measures, Br. 34, but this grossly understates the problem their construction creates. Whereas standing, sovereign immunity, and other doctrines make civil rights litigation more difficult in some contexts, FISA surveillance *by definition* occurs for national security purposes and virtually always involves secret information. Defendants' construction of Section 1806(f) would give the Government a tool to dismiss nearly all 1810 suits, even where (as here) Plaintiffs can establish standing and face no sovereign immunity or other barriers. That result provides a strong reason to reject Defendants' view. Congress wanted Americans to obtain civil remedies for unlawful surveillance, as Section 1810's enactment itself shows. The Court should reject any reading that gives the Government complete control over the outcome of such suits.[18]

---

[17] For similar reasons, Defendants' construction of Section 1806(f) would also eviscerate the remedy in 18 U.S.C. 2712 for FISA violations. Congress enacted that provision in 2001 to provide a further remedy for the misuse of information obtained through surveillance. Like Section 1810, it requires district courts to use Section 1806(f)'s ex parte, in camera review procedures to review secret FISA information when determining whether the government's conduct was unlawful. 18 U.S.C. 2712(b)(4).

[18] Defendants do not press Judge Bumatay's view that Section 1806(c) does not apply even when *the Government* seeks to use secret information in civil suits. On his view, the provision

* * *

For these reasons, the text, structure, and history of Section 1806 make clear that it governs this case.

III. FISA Speaks Clearly to Displace Any "Dismissal Remedy" That the State-Secrets Privilege Might Otherwise Authorize

Section 1806's broad and unequivocal language easily satisfies any applicable standard for congressional displacement of the dismissal remedy that, according to Defendants, accompanies the state-secrets privilege. "[W]e start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 317 (1981) (cleaned up). Therefore, FISA need only "speak[] directly to the question at issue." *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 423–24 (2011). However, even if the Court were to conclude that Congress must use "clear and explicit" language to displace the privilege's dismissal remedy in this setting, Br. 42, it has done so.

---

applies only in proceedings "against an aggrieved person," which he believes requires that person to be a defendant. Pet. App. 129a–30a (citing Section 1806(c)). But as Defendants rightly recognize, Section 1806(c) applies when the *information* is used "against the Section 1810 plaintiff," Br. 33, and the same is true for plaintiffs suing under other causes of action. It is the use of the information that must be "against an aggrieved person," not the lawsuit itself. This interpretation does not render "against an aggrieved person" surplusage. Pet. App. 130a n.11. The phrase makes clear that Section 1806(f) does not apply if the Government seeks to use secret information against someone who makes no claim they are "aggrieved" by surveillance. Cf. *Alderman*, 394 U.S. at 171–72.

A. Section 1806(f)'s Review Procedures Displace the State-Secrets Privilege in Cases Involving Domestic Electronic Surveillance

FISA speaks directly to the issue addressed by the state-secrets privilege in the context of domestic electronic surveillance for national security purposes. *Reynolds* described how courts should apply the privilege for "military matters which, in the interest of national security, should not be divulged." 345 U.S. at 10. Section 1806(f) addresses precisely that issue; namely, judicial treatment of information where "disclosure or an adversary hearing would harm . . . national security." Instead of exclusion or dismissal, Congress provided for ex parte, in camera review of the disputed surveillance to assess its lawfulness, rather than simple dismissal. That choice governs.

The fact that Congress did not use the words "state secrets," Br. 35–36, is immaterial. "State secrets" was not the generally accepted term for the *Reynolds* privilege in 1978. *Reynolds* itself referred only once to "military and state secrets." *Id.* at 7. Shortly before FISA's enactment, this Court described *Reynolds* as protecting "*national security* secrets" and "military matters which, in the interest of *national security*, should not be divulged." *United States v. Nixon*, 418 U.S. 683, 706, 711 (1974) (quoting *Reynolds*) (emphasis added). Justice Harlan referred to the "national security privilege" when discussing *Reynolds* just a few years earlier. *Alderman*, 394 U.S. at 199 (Harlan, J., concurring in part and dissenting in part). By establishing alternative procedures for information the government seeks to protect for "national security" reasons, Section 1806(f) directly

displaced any dismissal remedy that the state-secrets privilege would otherwise provide in this class of cases.[19]

Defendants point to superficial differences between the state-secrets privilege and FISA's procedure, but that Congress altered the common-law doctrine does not show it lacked intent to displace it. In any event, the insignificance of the differences to which Defendants point underscores how fundamentally similar the rules actually are. Officials other than the Attorney General can invoke the state-secrets privilege, Br. 37, but Section 1806(f) sensibly consolidates responsibility for invoking its procedures in surveillance cases under the Attorney General, who both supervises domestic electronic surveillance of Americans under FISA and represents the Government in court proceedings. The fact that Congress chose to displace the privilege's remedies only in a subset of cases involving electronic surveillance does not diminish the clear displacement in *this* context.

---

[19] Pre-FISA courts of appeals decisions also used "national security," "military secrets," "diplomatic secrets" and other phrases as often as "state secrets" when describing *Reynolds*. See, *e.g.*, *Dellums v. Powell*, 561 F.2d 242, 246 (D.C. Cir. 1977) (*Reynolds* inapplicable because case "[was] not premised on a claim of a need to protect national security, military or diplomatic secrets"); *United States v. Lyon*, 567 F.2d 777, 783 n.4 (8th Cir. 1977) ("national security privilege"); *Olson Rug Co. v. NLRB*, 291 F.2d 655, 661 (7th Cir. 1961) ("[i]nformation relating to national defense and security may be withheld" under *Reynolds*); see also *Ethyl Corp. v. Envtl. Prot. Agency*, 478 F.2d 47, 51 (4th Cir. 1973) (*Reynolds* privilege "has been often described as 'state secrets' or matters relating to national security, either military or diplomatic").

Defendants contend that *Reynolds* addresses a different harm from FISA because it "generally forecloses" even in camera inspection, Br. 37–38, but the primary concern has always been *public* disclosure (which FISA prevents), not review by courts. *Reynolds* emphasized "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." 345 U.S. at 9–10. And while in camera review is not "automatically require[d]" under *Reynolds*, the Court contemplated that courts would sometimes require it. *Id.* Submission of some secret information to the court to establish the basis for the privilege assertion remains the norm. See Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 Geo. Wash. L. Rev. 1249, 1288–89 (2007).

Wigmore's discussion of the privilege confirms that the primary harm it addresses is public disclosure, not keeping information from courts. Wigmore believed state-secrets determinations should be made by judges. In "matters involving international negotiations or military precautions against a foreign enemy . . . the existence of a necessity for secrecy must be in each instance declared . . . [by] the Court." John Henry Wigmore, Treatise on the System of Evidence in Trials at Common Law § 2376 (1905). For a court to do otherwise would be to "abdicate its" role and "furnish to designing officials too ample opportunities for abusing the privilege." *Id.*

Defendants claim that because ex parte, in camera review "coexisted" with the state-secrets privilege prior to FISA, Congress must not have meant to displace the privilege's dismissal remedy. Br. 37–38 (citing *United States v. Belfield*, 692 F.2d 141, 149 n.38 (D.C. Cir. 1982)). But Defendants have not established there *was* a dismissal remedy under the

state-secrets privilege in 1978. At the time Congress enacted FISA, only *one* case, in any context—*Totten*—had authorized dismissal based on anything akin to the state-secrets privilege where plaintiffs could make their case without secret evidence. See Donohue Amicus at 8 ("*Totten* is the single exception that proves the rule"). *No court* had ever dismissed an electronic surveillance case on state secrets where, as here, the plaintiff did not seek or need secret information. See Section I, *supra*.

In any event, what the history Defendants rely on actually shows is that Congress chose a particular procedure—ex parte, in camera review—that had been used in *some* state-secrets cases, and mandated its use in all such cases involving the electronic surveillance of Americans. *Belfield* and the cases it collects show that ex parte, in camera review (rather than dismissal) was already the pre-FISA norm in criminal cases. But Defendants fail to recognize that, prior to FISA, several courts used that same procedure in *civil* cases where the government invoked *Reynolds*, including where the government asserted the need to defend itself based on secret information. In FISA, Congress mandated this procedure, thereby precluding any alternatives, including outright dismissal.

For example, in *Jabara v. Webster*, a civil action challenging illegal surveillance, the government acknowledged it had conducted surveillance without a warrant, but asserted the state-secrets privilege. 691 F.2d 272, 274 (6th Cir. 1982). The district court reviewed the secret evidence ex parte and in camera to determine whether the surveillance was lawful. On appeal, the Sixth Circuit cited *Reynolds* in holding "the district court was correct in its ruling" that "materials . . . properly protected by the state secret

privilege, should be submitted in camera," to determine whether the surveillance was lawful. *Id.*; see also *Jabara v. Kelley*, 75 F.R.D. 475 (E.D. Mich. 1977). It went on to reverse on the merits.

Similarly, *Halpern v. United States* held the state-secrets privilege required in camera proceedings to resolve a patent suit under the Invention Secrecy Act. 258 F.2d 36, 43–44 (2d Cir. 1958) (holding that statute displaced the privilege "dependent upon the availability and adequacy of other methods of protecting the overriding interest of national security"). *Halpern* distinguished *Reynolds* and *Totten* because "[n]either of these cases involved a specific enabling statute contemplating the trial of actions that by their very nature concern security information." *Id.*

Section 1806(f) codified the ex parte, in camera practice used in such cases, and thereby displaced any alternative remedy in cases concerning the domestic electronic surveillance of Americans. Defendants point to nothing in the pre-FISA history even suggesting Congress meant to silently preserve a dismissal remedy, to the extent such a remedy even existed.

The concurrence from denial of rehearing en banc underscores the limited nature of the displacement here. It emphasized that FISA pre-empts state secrets only insofar as it requires ex parte, in camera review by judges at this stage. If the district court orders disclosure of secret information *to Plaintiffs*, the court noted, Defendants can reassert the privilege at that point. Pet. App. 100a n.1.

What FISA does *not* permit, as both the decision below and the concurrence make clear, is dismissal *without* a court conducting an ex parte, in camera

review to determine whether the Government broke the law. Congress mandated such judicial review because it did not want the Government to escape accountability for secretly spying on Americans in violation of federal law.

B. The Canon of Constitutional Avoidance Does Not Support Defendants' Interpretation

Defendants invoke the canon of constitutional avoidance to support their non-textual limitation on Section 1806, but it "has no application absent ambiguity." *Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019) (cleaned up). See Section II, *supra*.

In any event, merely conducting ex parte, in camera review, as FISA requires here, raises no constitutional concerns. Courts routinely conduct ex parte, in camera review of sensitive information in national security cases. And the statute's express statement that any relief afforded must be "in accordance with law" would preclude, as a statutory matter, relief that would violate the Constitution. That provision, akin to a savings clause, ensures that the statute by its terms authorizes only constitutional forms of relief.

1. FISA's Ex Parte, In Camera Review Procedures Present No Article II Concerns

FISA's ex parte review procedures present no Article II problems. The materials the court must review ex parte, in camera by definition "relat[e]" to the domestic electronic surveillance of Americans. 50 U.S.C. 1806(f). This Court has already recognized Congress's authority to craft "protective standards" in

that context, *Keith*, 407 U.S. at 323–24, including evidentiary rules to implement them, *Vance v. Terrazas*, 444 U.S. 252, 265–66 (1980). Thus, even if the Executive has some inherent Article II authority to keep information secret *absent* congressional regulation, its authority is not "exclusive and conclusive" in this area. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015); see also *Youngstown Sheet & Tube Co.*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring). Congress plainly has authority to displace it to the limited extent of requiring ex parte, in camera judicial review where the court must determine the legality of domestic surveillance, which is all that is at issue here.

The cases Defendants cite do not even suggest that ex parte, in camera review is unconstitutional. Br. 43–45. The only state-secrets case Defendants cite—*Reynolds*, see Br. 43—explicitly avoided reliance on any "constitutional overtones" based on Article II. *Reynolds*, 345 U.S. at 6 & n.9; see also *General Dynamics*, 563 U.S. at 485 (*Reynolds* resolved "a purely evidentiary dispute by applying evidentiary rules"). It also expressly contemplated courts would sometimes engage in ex parte, in camera review of secret information to decide privilege claims, even without congressional authorization. *Id.* at 9–10.

The other cases Defendants cite are far afield. *Nixon* recognized that secret national security information contained in the *President's own communications* might be privileged, but nowhere suggested that privilege extended to mid-level law enforcement officers, or that in camera review violated Article II. 418 U.S. at 710. *Nixon* actually authorized the district court to review national security information in camera. *Id.* at 715 n.21 (citing *Reynolds*). *Dep't of the Navy v. Egan*, 484 U.S. 518,

520 (1988), addressed the "narrow question" of *which* administrative agency within the Executive branch handled appeals from denials of security clearances. And while it described a sphere of executive authority over such clearances, to which "no one has a 'right,'" *id.* at 528, it did not address executive authority to control information in the face of congressional regulation and competing constitutional rights.[20]

The longstanding authority of courts to review classified documents under FOIA and FISA confirms that merely requiring ex parte, in camera judicial review does not impermissibly intrude on Executive authority. *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 226 (1978) (1974 FOIA amendments reaffirmed courts' authority to conduct in camera review to determine if documents are properly classified—and even to order public release). FISA's existing judicial review process and legislative reporting requirements, including those added in 2008, also confirm that Congress may order the Executive to provide secret information to courts without violating Article II. See 50 U.S.C. 1803 (creating Foreign Intelligence Surveillance Court to hear applications for orders under FISA); *Clapper v. Amnesty Int'l*, 568 U.S. 398, 403–04 (2013) (describing FISC review and approval of electronic surveillance applications both before and after FISA amendments in 2008); 50 U.S.C. 1802(a)(3) (requiring

[20] *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.* decided nothing at all about executive privilege. It merely held non-justiciable a challenge to a Presidential directive concerning air traffic patterns. 333 U.S. 103, 111 (1948). The other cases Defendants cite simply describe presidential power in unrelated areas. Br. 43–45.

Attorney General to provide information about warrantless surveillance to FISC).

Defendants also cite Founding era history, Br. 42–43, but scattered examples of Presidents sometimes keeping secrets do not show the Founders implicitly incorporated the state-secrets privilege into the penumbra of Article II, let alone that they precluded ex parte, in camera review of assertedly secret information where needed to secure constitutional rights. Indeed, as a textual matter, the Founders explicitly authorized only Congress to keep secrets, not the Executive. U.S. Const., Art. I, § 5.

To the extent the doctrine derived from governmental privilege under British law, the Framers chose *not* to imbue the American executive with the powers of the King. See, *e.g.*, The Federalist No. 69 (Alexander Hamilton). Neither John Jay's emphasis in Federalist No. 64 on the benefits of secrecy in treaty-making—favoring placement of that power in the executive—nor early instances of congressional demands for information from the President and his "very highest officers," show that Congress lacks authority to require courts to conduct ex parte, in camera review to determine whether mid-level executive officials broke the law. Abraham D. Sofaer, *Executive Power and the Control of Information: Practice Under the Framers*, 16 Duke L.J. 1, 46 (1977).[21]

---

[21] Judge Sofaer interpreted early Presidents' surreptitious withholding of information to demonstrate "that they regarded Congress as empowered to disagree with and override their judgments." *Id.* He concluded that Congress could and should regulate executive secrecy through statutory reform. *Id.* at 50–54; see also Pet. App. 114a–15a (Bumatay, J., dissenting) (citing Sofaer). Other scholars have cast doubt on whether the

Defendants cite the *Burr* trial, but it further undermines their argument. Br. 3, 43. Although the case never resolved whether the President has authority to resist judicial subpoenas, Chief Justice Marshall stated he would review the letter over which the President had asserted privilege to determine which parts should be withheld, and also suggested a closed proceeding to allow full use of any information properly considered secret. *United States v. Burr*, 25 F. Cas. 187, 192 (C.C.D. Va. 1807).

Defendants' interpretation also raises its own constitutional problems, because it would permit the Executive to block courts from adjudicating claims of unconstitutional surveillance, thereby eviscerating the civil remedy Congress established to serve as a critical check on Executive power in this context. "The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice . . . would plainly conflict with the function of the courts under Art. III." *Nixon*, 418 U.S. at 707. That concern has particular force here, because the Fourth Amendment requires the judiciary to oversee executive search authority, even where the executive asserts disclosure to courts would threaten national security. *Keith*, 407 U.S. at 317.

FISA "eliminat[ed] any congressional recognition or suggestion of inherent Presidential power with respect to electronic surveillance." S. Rep. No. 95-701,

---

Constitution protects *any* form of executive privilege, given the Constitution's failure to mention it and meager historical support. See, *e.g.*, Raoul Berger, *Executive Privilege: A Constitutional Myth*, 50 Indiana L.J. 193 (1974); Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 Minn. L. Rev. 1143, 1157–58 (1999).

at 71–72. It "embodies a legislative judgment that court orders and other procedural safeguards are necessary to insure that electronic surveillance . . . within this country conforms to [fourth amendment] principles." S. Rep. No. 95-701, at 13. Given that Congress enacted FISA to constrain executive authority, it would not want the Court to "shy[] away from constitutional questions" about executive power, but rather to "construe [the] statute expansively . . . to give the statute its maximum constitutionally permissible scope." Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1956 (1997). Because "firm evidence" shows "Congress intended to" legislate in the "constitutional thickets" surrounding electronic surveillance, avoidance doctrine should not be applied. *Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 466 (1989).

2. The Agent Defendants' Speculative Due Process and Seventh Amendment Concerns Do Not Support Their Interpretation

The Agent Defendants raise distinct Due Process and Seventh Amendment arguments as constitutional concerns, but they provide no support to Defendants' proposed non-textual limitations on FISA.

As an initial matter, the Agent Defendants' constitutional objections are speculative and premature. The parties have not moved for summary judgment; no one even knows whether any material facts triggering the jury trial right will ever be in dispute. If Plaintiffs establish religious discrimination using non-privileged information and the district court determines after review of the secret information that no material factual disputes

exist, their concerns will not arise. If instead the court determines that trial is needed and the Agent Defendants object to the procedures the court employs to handle secret information, the decision below permits them to raise their constitutional objections when they are ripe. Pet. App. 65a n.31.[22]

Nor do the Agent Defendants' arguments support application of avoidance doctrine. Br. of Resp'ts Tidwell and Walls 21–22 (citing *Clark v. Martinez*, 543 U.S. 371 (2005)), Br. of Resp'ts Allen, Armstrong, and Rose 15–16. As explained above, because Section 1806(g) requires the district court to act "in accordance with the requirements of law" when granting any relief, the statute prohibits relief that violates the Constitution. It already requires that courts consider any constitutional problems when they actually arise, and therefore need not be "construed" to avoid unconstitutional relief.

The Agent Defendants also overstate the constitutional problems. No court has ever held that

---

[22] Plaintiffs argued below that they could prove their religion claims by showing merely that (1) their religion was *a factor* in Defendants' decision to surveil them, and (2) Defendants could not show that using religion as a factor warranting suspicion was narrowly tailored. *Emp't Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990) (holding religious classifications "subject to the most exacting scrutiny") (citations omitted). Thus, if Plaintiffs' legal theory proves correct, the only information about these investigations relevant to establishing liability may be the fact that religion was a factor in opening them, which may not require consideration of any secret information at all. See Dep't of Justice Civil Rights Division, "Guidance Regarding the Use of Race by Federal Law Enforcement Authorities," at 7–8 (June 2003), *available at* https://www.scribd.com/document/22092319/DOJ-Guidance-Regarding-the-Use-of-Race-by-Federal-Law-Enforcement-Agencies-June-2003 (permitting racial and religious profiling in national security or border integrity investigations).

FISA's ex parte, in camera review procedures violate Due Process or the Sixth or Seventh Amendments' jury trial right. In analogous contexts, courts use various substitute procedures, including unclassified substitutions, to "provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." 18 U.S.C. App. III § 6(c)(1) (CIPA). Moreover, liability will not turn solely on the results of in camera review. There is already a large amount of non-privileged evidence in the record, and according to the Government, "the majority" of Monteilh's audio and video recording is likely available. J.A. 162. And more evidence will likely be declassified, both due to its age and because Defendants may want to use it.[23]

That a court may consider some evidence relevant to liability ex parte and in camera does not necessarily render the proceedings unconstitutional. In *Molerio*, for example, the court did exactly that to determine "the genuine reason for denial of employment," and concluded that the FBI did not violate plaintiff's rights. 749 F.2d at 825. The court dismissed the claim *after* determining, based on its in camera review, that the government's conduct was lawful.

Finally, the Agent Defendants' alternative construction—that FISA permits dismissal even though Plaintiffs can prove their claims without any privileged evidence—itself raises serious questions regarding *Plaintiffs'* First Amendment, Due Process, and Seventh Amendment rights. It would deny them

---

[23] The Government already declassified portions of Monteilh's tasking in an attempt to support their brief on appeal. See J.A. 220–231.

any forum to adjudicate a substantial claim that their constitutional rights have been violated. Because the Agent Defendants' construction fails to avoid constitutional problems, it provides no justification for invoking the canon.

* * *

Where it applies, Section 1806 directs courts to review allegedly unlawful FISA surveillance ex parte and in camera to assess whether the government broke the law, rather than to dismiss such lawsuits at the outset. Congress did not want the defendants to escape civil liability for unlawful domestic electronic surveillance programs simply by declaring them secret.

CONCLUSION

This Court should affirm the decision below.

Respectfully Submitted,

PETER BIBRING
MOHAMMAD TAJSAR
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West Eighth Street
Los Angeles, CA 90017

AHILAN ARULANANTHAM
Counsel of Record
UCLA SCHOOL OF LAW
385 Charles E. Young Drive East
Los Angeles, CA 90095
(310) 825-1029
arulanantham@law.ucla.edu

AMR SHABAIK
DINA CHEHATA
CAIR-LOS ANGELES
2180 W. Crescent Avenue, Suite F
Anaheim, CA 92801

DAN STORMER
SHALEEN SHANBHAG
HADSELL STORMER RENICK & DAI LLP
128 North Fair Oaks Avenue
Pasadena, CA 91103

PATRICK TOOMEY
ASHLEY GORSKI
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

DAVID D. COLE
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005

Dated September 21, 2021