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 RESPONDENTS PAUL ALLEN, KEVIN ARMSTRONG, AND PAT ROSE

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QUESTION PRESENTED

Does a construction of Section 1806(f) of the Foreign Intelligence Surveillance Act that requires a judge, rather than a jury, to decide the merits of a *Bivens* suit raise serious doubt about the statute's constitutionality under the Seventh Amendment?

PARTIES TO THE PROCEEDING

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

The Respondents filing this brief are Paul Allen, Kevin Armstrong, and Pat Rose, each of whom is a current or former FBI agent and was a defendant sued in his or her individual capacity in the district court. The other Respondents are Yassir Fazaga, Ali Uddin Malik, and Yasser Abdelrahim, each of whom is a plaintiff in the district court; as well as J. Stephen Tidwell, and Barbara Walls, each of whom is a defendant in the district court sued in his or her individual capacity.

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INTRODUCTION

The government's brief argues correctly that the Ninth Circuit misinterpreted Section 1806(f) of the Foreign Intelligence Surveillance Act (FISA). Yet there is another reason to reach the same result. The Ninth Circuit's interpretation would allow a district court to resolve certain claims on their merits—in an *ex parte* and *in camera* proceeding—in derogation of the litigants' Seventh Amendment rights. The doctrine of constitutional avoidance counsels strongly

against accepting that interpretation. For this additional reason, the Ninth Circuit's decision should be reversed.

Plaintiffs allege that the FBI conducted a covert surveillance program that gathered information about them based solely on their religion. Asserting that the investigation violated their constitutional rights, Plaintiffs sued the FBI and several federal officers in their official capacities. They also seek monetary damages from certain FBI agents allegedly involved in the investigation, including Paul Allen, Kevin Armstrong, and Pat Rose (the Respondent Agents). In response to Plaintiffs' claims, the government asserted the state-secrets privilege over the investigation's targets, predicates, and methods. Because the privilege prevents the parties from litigating who the FBI investigated, and how and why the FBI investigated them, the district court properly dismissed Plaintiffs' religious discrimination claims.

The Ninth Circuit reversed, purporting to find—buried in a single paragraph of FISA—a radical congressional mandate to do away with jury trials in civil rights cases that touch on state-secrets evidence. According to the Ninth Circuit, that paragraph authorizes—and, indeed, requires—the district court, not a jury, to decide the merits of Plaintiffs' claims in an *ex parte* and *in camera* trial.

As the government aptly explains, the Ninth Circuit's adventurous construction of Section 1806(f) misreads its statutory text and legislative history. It also treads on the Executive's power and responsibility to safeguard the Nation's security. These are reasons enough to reverse.

But the Ninth Circuit's interpretation also raises serious doubt about the statute's constitutionality under the Seventh Amendment, which grants litigants the right to have a *jury*—not the district court—decide the merits of civil claims. That doubt provides yet another reason to reject the court of appeals' distortion of the statute and reverse the decision below.

OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. 1a) is published at 965 F.3d 1015. The district court's opinion (Pet. App. 136a) is published at 884 F. Supp. 2d 1022.

JURISDICTION

The court of appeals issued its judgment on February 28, 2019. The court denied petitions for rehearing and issued an amended panel opinion on July 20, 2020. The government petitioned for a writ of certiorari on December 17, 2020. The Respondent Agents filed a brief in support of the petition on January 18, 2021. The Court granted certiorari on June 7, 2021. The Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The appendix to the petition sets forth the pertinent statutory provisions of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801–1810. Pet App. 196a–212a.

STATEMENT

The Respondent Agents join in the government's statement and supplement it as follows.

A. Plaintiffs' allegations

Plaintiffs allege that in 2006 the FBI hired Craig Monteilh as a confidential informant as part of a counterterrorism investigation known as Operation Flex. Pet. App. 8a. At the Respondent Agents' direction, Plaintiffs allege, Monteilh surveilled Plaintiffs and others, using both electronic and non-electronic means. *Id.*

According to Plaintiffs, the investigation gathered information on Muslims in Southern California based solely on their religion. *Id.* They also allege that the surveillance was conducted illegally without warrants. *Id.* at 143a.

Invoking *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), Plaintiffs sued (among others) the Respondent Agents for violating the Establishment Clause, the Free Exercise Clause, the equal protection component of the Due Process Clause, and the Fourth Amendment. Pet. App. 14a. These claims seek compensatory and punitive damages from the Respondent Agents in their individual capacities. *Id.*; *see also* Pet. App. 148a n. 6. Plaintiffs also seek compensatory and punitive damages under FISA Section 1810. Pet. App. 18a.

B. District court proceedings

In the district court, the government asserted the state-secrets privilege over three categories of information related to the counterterrorism investigation: (a) the investigation's targets, (b) the government's reasons for investigating those targets, and (c) the sources and methods the government used in the investigation. Pet. App. 148a, 163a. The district court

upheld the state-secrets privilege, determined that litigation of Plaintiffs' claims would unjustifiably risk disclosure of the information protected by the privilege, and ultimately dismissed all the claims against the government. Pet. App. 138a.

After the government asserted the privilege, the Respondent Agents also moved to dismiss, arguing that the government's invocation of the privilege barred Plaintiffs' *Bivens* action. Pet. App. 137a. The district court agreed, reasoning that Plaintiffs' claims raise "fact-intensive questions that necessitate a detailed inquiry into the nature, scope, and reasons for the investigations under Operation Flex." Pet. App. 174a. Because Plaintiffs' claims depended on a showing that the investigation targeted Muslims, they required evidence covered by the privilege, including "the subjects who may or may not have been under investigation, the reasons and results of those investigations, and their methods and sources." *Id.* at 174a. The district court also found that although the investigation "involves both privileged and nonprivileged information," the state-secrets material "cannot be separated as a practical matter." Pet. App. 176a. The court thus dismissed the *Bivens* claims against the Respondent Agents.[1] Pet. App. 177a, 180a.

C. The Ninth Circuit's decision

The court of appeals reversed, holding that the district court erred in dismissing the *Bivens* claims.

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[1] The district court denied the Respondent Agents' motion to dismiss Plaintiffs' FISA Section 1810 claim. Pet. App. 181a. On appeal, the Ninth Circuit narrowed the claim to a single category of allegedly unlawful surveillance. Pet. App. 36a.

The court reasoned that the district court instead "should have relied on FISA's alternative procedures for handling sensitive national security information." Pet. App. 37a. Those "alternative procedures," found in Section 1806(f), required the district court to review the state-secrets evidence *ex parte* and *in camera*, and then "determine whether the electronic surveillance was lawfully authorized and conducted." Pet. App. 92a–93a. Although the court acknowledged that "not all of the surveillance detailed in the complaint * * * constitutes electronic surveillance," it still held that the district court should use Section 1806(f) "to review the state secrets evidence *in camera* and *ex parte* to determine the lawfulness" of the "surveillance falling outside FISA's purview." *Id.* at 94a–95a.

The court also held that this *ex parte* and *in camera* inquiry should expand beyond technical violations of FISA to reach the question of "whether [the Respondent Agents] violated *any* of the constitutional and statutory provisions asserted by Plaintiffs in their complaint," including the First Amendment's prohibition against religious discrimination. *Id.* at 93a (emphasis added). In short, the district court must serve as ultimate factfinder on the merits of Plaintiffs' claims, in a secret trial on secret evidence.

The Respondent Agents briefed the appeal separately from the government, arguing (among other things) that Plaintiffs' proffered interpretation of Section 1806(f) would violate their Seventh Amendment right to a jury trial. (Case 12–56874, Dkt. 57–1 at 38–39; Case 12–56867, Dkt. 137–1 at 10 n. 2.) Invoking the canon of constitutional avoidance, the Respondent Agents asserted that the court should adopt the government's construction of the statute, because Plain-

tiffs' interpretation raised "serious doubts about [the statute's] constitutionality under the Seventh Amendment." (Case 12-56867, Dkt. 137-1 at 10 n. 2.)

The Ninth Circuit declined to address the Respondent Agents' constitutional avoidance argument. Pet. App. 65a n. 31. It instead found any reference to Seventh Amendment rights "premature" because certain "contingencies" might dispose of the case before trial. *Id.* For example, the Ninth Circuit noted that Plaintiffs may be unable to expand *Bivens* liability to this new context or that the individual defendants may prevail on qualified immunity grounds—arguments the Respondent Agents previously raised in their motion to dismiss. *Id.* (citing Parts III.B and IV.B of the opinion below). The Ninth Circuit also observed that the case may be resolved on summary judgment. *Id.* "Should the various contingencies occur and leave liability issues to be determined," the Ninth Circuit held, the individual defendants may "raise their Seventh Amendment arguments on remand." *Id.*

SUMMARY OF THE ARGUMENT

I. The Seventh Amendment guarantees the Respondent Agents' right to have a jury hear Plaintiffs' *Bivens* claims.

A. In *Carlson v. Green*, 446 U.S. 14 (1980), this Court noted—without proceeding through the traditional Seventh Amendment analysis—that *Bivens* litigants can "opt for a jury." *Id.* at 22. Although later cases have cast doubt on *Carlson*'s expansive view of *Bivens* liability, none has questioned a *Bivens* litigant's right to a jury trial.

B. The traditional Seventh Amendment analysis reaches the same result. Under that approach, juries decide constitutional tort claims, especially claims that hinge on questions of fact like discriminatory intent and the credibility of proffered justifications for allegedly illegal conduct. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721 (1999). This conclusion applies even more forcefully here because Plaintiffs seek only legal remedies—compensatory and punitive damages—from the Respondent Agents. *Id.*

II. The canon of constitutional avoidance requires a court to reject a proffered interpretation of a statute that raises "serious doubt" about the constitutionality of the statute. *Nielsen v. Preap*, 139 S. Ct. 954, 971 (2019). That canon requires reversal here, because the Ninth Circuit's construction of Section 1806(f) raises serious doubt about the statute's constitutionality under the Seventh Amendment. The Court should instead adopt the interpretation advanced by the government: that Section 1806(f)'s *ex parte* and *in camera* procedures apply to evidentiary and discovery disputes, not the adjudication of the merits in a civil rights case.

III. Nor is consideration of the Seventh Amendment premature, as the Ninth Circuit held and as Plaintiffs contend in this Court. Constitutional avoidance is a tool for interpreting statutes, and thus the Seventh Amendment is directly relevant to the question presented here: the proper interpretation of Section 1806(f).

IV. Plaintiffs also join the Ninth Circuit in pointing to lower courts that reject constitutional chal-

lenges to Section 1806(f). But these cases approve the use of *ex parte* and *in camera* procedures to resolve motions by criminal defendants to suppress or disclose FISA evidence, not to determine the merits of a civil rights suit. Thus, these cases support the statutory interpretation advanced by the government, not the decision below.

ARGUMENT

The Respondent Agents agree with the government that the Ninth Circuit's interpretation of Section 1806(f) is erroneous. On its face, the statute provides a limited procedure for determining the *admissibility* or *disclosure* of electronic-surveillance evidence. It does not empower the district court to resolve *the merits* of a civil rights lawsuit brought against federal officers accused of violating the Constitution. The decision below should be reversed on that basis.

I. The Seventh Amendment guarantees the individual defendants' right to have a jury hear Plaintiffs' claims.

Even if the decision below offered a plausible interpretation of Section 1806(f), it should still be reversed, because that interpretation raises serious doubt about the statute's constitutionality under the Seventh Amendment.

A. This court has already recognized that a jury should hear *Bivens* claims.

Deciding whether the Seventh Amendment's jury guarantee applies to a given claim sometimes requires an inquiry into eighteenth century English common law. But that historical excavation is unnec-

essary here because this Court has already recognized that a jury must hear *Bivens* claims. In *Carlson v. Green*, 446 U.S. 14, 22 (1980), the Court considered whether the Federal Tort Claims Act counseled against extending *Bivens* to an alleged Eighth Amendment violation. The Court noted, as one factor in favor of the *Bivens* remedy, that "a plaintiff cannot opt for a jury in an FTCA action, as he may in a *Bivens* suit." *Id.* at 22 (citation omitted).[2]

Although the Court's later decisions may call *Carlson*'s expansion of *Bivens* into doubt, they do not question that a properly recognized *Bivens* claim requires a jury trial. *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1863 (2017) (reversing appellate court's expansion of *Bivens* without questioning *Carlson*'s conclusion that a jury must hear *Bivens* claims). And lower courts have relied on *Carlson* to hold that *Bivens* claims are triable to a jury. *See, e.g.*, *Nurse v. United States*, 226 F.3d 996, 1005 (9th Cir. 2000) (per *Carlson*, jury trials are "available in claims against individual defendants under *Bivens*").

B. The traditional Seventh Amendment test requires a jury to hear Plaintiffs' *Bivens* claims.

Should *Carlson* leave any doubts about the Respondent Agents' right to a jury trial, the Court's tra-

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[2] *Carlson* frames this right as belonging to "a plaintiff," but the jury right attaches when "*either* party to a cause invoke[s] its Seventh Amendment right." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 625 (1991) (emphasis added); *see also Curtis v. Loether*, 415 U.S. 189, 190 (1974) (defendant had Seventh Amendment right to a jury trial over plaintiff's objection).

ditional Seventh Amendment jurisprudence disposes of them.

The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII. Because the Amendment acts to "preserve" the jury right, its scope is "guided by historical analysis comprising two principal inquiries." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708 (1999) (*quoting Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996)). First, the Court determines whether the cause of action at issue "was tried at law at the time of the founding or is at least analogous to one that was." *Id.* Second, the Court considers "whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791." *Id.*

1. *Bivens* claims are analogous to legal claims recognized at common law.

As to the first inquiry, "the Seventh Amendment jury guarantee extends to statutory claims unknown to the common law, so long as the claims can be said to sound basically in tort, and seek legal relief." *City of Monterey*, 526 U.S. at 709. In *City of Monterey*, the Court considered whether a civil rights claim brought under 42 U.S.C. § 1983 sounded in tort for Seventh Amendment purposes. Answering in the affirmative, the Court held that the statute "creates a species of tort liability" because "[j]ust as common-law tort actions provide redress for interference with protected personal or property interests, § 1983 provides relief for invasions of rights protected under federal law."

Id. at 709. The Court also noted that the plaintiff in *City of Monterey* sought only damages for the alleged constitutional violation, the legal relief traditionally available in courts of law at the time of the founding. *Id.* at 710. Because the Court found that the Section 1983 suit "sounded in tort and sought legal relief," it was an action at law under the Seventh Amendment. *Id.* at 711.

The same analysis applies here. *Bivens* claims are "the federal analog to suits brought against state officials under" Section 1983. *Hartman v. Moore*, 547 U.S. 250, 255 n. 2 (2006). Like Section 1983, *Bivens* creates a species of tort liability, because it allows an injured party to recover monetary damages from a federal officer for violating federal law. *See, e.g.*, *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020) (recognizing *Bivens* as creating "constitutional tort" liability). And Plaintiffs seek only monetary damages from the Respondent Agents, a factor that can be even "more important" to the Seventh Amendment analysis than the legal theory pled. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). Because Plaintiffs' *Bivens* claims sound in tort and seek legal relief, they present an action at law under the Seventh Amendment.[3] *City of Monterey*, 526 U.S. at 711.

2. Plaintiffs' claims raise factual issues that a jury must resolve.

The second inquiry asks whether "the particular issues of liability [a]re proper for determination by

[3] Plaintiffs' claim for monetary relief under FISA Section 1810 requires a jury trial for the same reasons.

the jury." *Id.* at 718. Historically, questions raising "predominantly factual issues are in most cases allocated to the jury." *Id.* at 720.

Plaintiffs allege an investigation "motivated by intentional discrimination against [them] because of their Muslim faith." Pet. App. 77a. These allegations require an accounting of the investigative steps undertaken by the Respondent Agents—a question of fact. More importantly, they require an exploration into whether religious discrimination motivated those actions or if a nondiscriminatory reason can explain them. Discerning discriminatory motive is a factual inquiry historically undertaken by juries, not judges. *See Curtis v. Loether*, 415 U.S. 189, 190 (1974) (finding jury trial right in housing discrimination case); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 548 (1990) (same in employment discrimination). Determining whether a proffered nondiscriminatory justification is sincere or mere pretext is also a fact question for the jury. *City of Monterey*, 526 U.S. at 721 (jury must determine whether challenged conduct "was reasonably related to the city's proffered justifications"). In sum, Plaintiffs' *Bivens* suit asks whether the Respondent Agents "denied a constitutional right" and "if so, the extent of any resulting damages." *Id.* at 722. As held in *City of Monterey*, these are "questions for the jury." *Id.*

II. The canon of constitutional avoidance requires reversal of the Ninth Circuit's interpretation of FISA.

The canon of constitutional avoidance "provides that when a serious doubt is raised about the constitutionality of an act of Congress, this Court will first

ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Nielsen v. Preap*, 139 S. Ct. 954, 971 (2019) (cleaned up). If such a construction is permissible, then it should control. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999).

The canon thus reins in "adventurous application" of federal rules and statutes that implicate constitutional rights, including Seventh Amendment jury rights. *Id.* at 845-46 (applying Seventh Amendment canon to Fed. R. Civ. P. 23); *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707 (1999) (applying same to 42 U.S.C. § 1983); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 342 (1998) (applying same to Copyright Act).

At a minimum, the Ninth Circuit's construction of Section 1806(f) raises "serious doubt" as to the statute's constitutionality under the Seventh Amendment. *Nielsen*, 139 S. Ct. at 971. That construction supplants the jury with the district court as ultimate factfinder of Plaintiffs' *Bivens* claims. But placing sole responsibility for determining liability—and presumably damages—in the hands of a single district court judge deprives the Respondent Agents of their Seventh Amendment right to a jury trial.

This Court should therefore adopt the far more plausible interpretation of the statute advanced by the government: that Section 1806(f) provides a mechanism to determine the admissibility or discoverability of electronic surveillance evidence, but it is not a "freestanding vehicle to litigate the merits of any case involving electronic surveillance." Pet. App. 127a (Bumatay, J., dissenting from denial of rehear-

ing en banc). This construction respects FISA's statutory text and pays proper deference to the Executive's responsibility to safeguard the Nation's security, while also avoiding an irreconcilable clash with the Respondent Agents' Seventh Amendment rights.

III. Consideration of the Seventh Amendment is not premature.

Plaintiffs have never disputed that their claims require a jury trial. Indeed, Plaintiffs *demanded a jury* in their complaint and conceded on appeal that a jury should decide their claims. (Case 8:11–cv–00301, Docket No. 1 at 1; Case 12–56874, Dkt. 79–2 at 21 ("As a threshold matter, the Seventh Amendment protects plaintiffs' right to jury trial as well").)

Nor has the Ninth Circuit rejected the Seventh Amendment's application here. Instead, the appellate court held that it would be premature to consider the Seventh Amendment now, because pretrial motions may resolve the case. Pet. App. 65a n. 31. Plaintiffs echoed this contention in their opposition to the government's petition. Opp. 32.

The argument misunderstands the case's posture. The Respondent Agents do not raise "a head-on constitutional challenge" to Section 1806(f) in this Court today.[4] *See Nielsen*, 139 S. Ct. at 972. The Respondent Agents instead invoke the Seventh Amendment under the canon of constitutional avoidance. Because the canon is a tool for *interpreting* statutes, it directly

[4] Nor should they, because the Ninth Circuit declined to rule on their direct challenge and instructed the Respondent Agents to raise it in the district court. Pet. App. 65a n. 31.

relates to the question currently before the Court: whether the Ninth Circuit properly *interpreted* Section 1806(f). The possibility that pretrial proceedings may resolve the case before actual "interference with a jury trial would arise" does not deprive the canon of its interpretive force. Pet. 65a n. 31. Nor does it justify a statutory interpretation that raises serious doubt about the law's constitutionality. Thus, the Court should consider the Seventh Amendment through the lens of constitutional avoidance now—not later, as Plaintiffs and the decision below suggest.

IV. The proffered authorities lend no support to the decision below.

The Ninth Circuit also reasoned that courts have upheld "the constitutionality of FISA's *in camera* and *ex parte* procedures with regard to criminal defendants." Pet. 65a n. 31. It then suggested that the "[i]ndividual defendants in [this] civil suit are not entitled to more stringent protections." Pet. App. 65a n. 31. Plaintiffs echoed the argument in their opposition to the petition. Opp. 33–34.

But the proffered cases endorse Section 1806(f)'s application to evidentiary and discovery disputes, *not* questions of civil liability. *See United States v. Abu-Jihaad*, 630 F.3d 102, 129 (2d Cir. 2010) (upholding application to request for "disclosure of FISA materials" and for an adversarial "preliminary hearing" on the admissibility of the evidence); *United States v. Damrah*, 412 F.3d 618, 623 (6th Cir. 2005) (upholding application to "motions to compel the production of FISA applications, orders, and related documents and to suppress FISA obtained evidence"); *United States v. Ott*, 827 F.2d 473, 475-77 (9th Cir. 1987) (uphold-

ing application to a "motion to suppress"); *United States v. Nicholson*, 955 F. Supp. 588, 589-92, 590 n.3 (E.D. Va. 1997) (same); *United States v. Belfield*, 692 F.2d 141, 143-49 (D.C. Cir. 1982) (approving application to a request for "disclosure of any electronic surveillance covering" the criminal defendants).

None of these cases endorse the use of Section 1806(f) to decide the *merits* of a civil rights claim asserted against a federal officer in her individual capacity. On that score, the decision below broke new and constitutionally perilous ground.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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