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 AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF RESPONDENTS YASSIR FAZAGA, ET AL.

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INTEREST OF AMICUS

The Electronic Frontier Foundation works to protect civil liberties and preserve privacy rights in the digital world, supported by more than 38,000 dues-paying members.

EFF has litigated issues involving 50 U.S.C. § 1806(f) and the state-secrets privilege. It has a strong interest in ensuring section 1806(f) is available as Congress intended for use by Americans challenging the lawfulness of government surveillance programs. It has an equally strong interest in ensuring the state-secrets privilege remains within the limits established by the Court and is not expanded to shield from judicial scrutiny government abuses and illegal conduct. EFF has served as counsel in lawsuits with section 1806(f) and state-secrets issues. *Jewel v. National Security Agency*, No. 19-16066, 2021 WL 3630222 (9th Cir. Aug. 17, 2021). EFF has served as amicus on state-secrets issues in this Court. *General Dynamics Corp. v. U.S.*, 563 U.S. 478 (2011); *U.S. v. Abu Zubaydah*, No. 20-827.[1]

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[1] Counsel for all parties have consented to the filing of this brief.

No party or party's counsel authored this brief in whole or in part, or contributed money to fund the preparation or submission of this brief. No person other than the amicus, its members, and its counsel contributed money to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This brief presents a textual analysis of 50 U.S.C. § 1806(f) of the Foreign Intelligence Surveillance Act ("FISA"). The ordinary public meaning of section 1806(f)'s text displaces the state-secrets privilege in lawsuits in which evidence relating to electronic surveillance is relevant. Instead, Congress has provided for discovery and use of state-secrets evidence under section 1806(f)'s alternative procedures.

Section 1806(f) applies "notwithstanding any other law" and is Congress's chosen means for addressing surveillance-related state-secrets evidence. It provides that state-secrets evidence of unlawful electronic surveillance is discoverable for use in civil litigation if the court determines the surveillance was unlawful. Section 1806(f) thus displaces the state-secrets privilege because it meets Federal Rule of Evidence 501's test of "provid[ing] otherwise" for evidence the state-secrets privilege might exclude.

18 U.S.C. § 2712(b)(4), which incorporates section 1806(f)'s procedures for other classes of surveillance cases, similarly displaces the state-secrets privilege.

Section 1806(f) is an essential tool for ensuring that Government surveillance programs are subject to meaningful judicial review to protect the liberty and privacy of Americans. Congress understood the critical importance of assigning the Judiciary a prominent role in preventing Executive surveillance abuses. Congress created civil remedies, and recognized they would be toothless if it did not also mandate section 1806(f)'s

procedure for using state-secrets evidence to adjudicate those claims.

The Government's arguments are all foreclosed by the text of the statute Congress enacted. "[A]s the government knows well, courts aren't free to rewrite clear statutes under the banner of our own policy concerns. If the government doesn't like Congress's . . . policy choices, it must take its complaints there." *Azar v. Allina Health Servs.*, 139 S.Ct. 1804, 1815 (2019).

Accordingly, the court of appeals' judgment should be affirmed.

ARGUMENT

I. The Pre-FISA Legal Landscape

The modern law of electronic surveillance began in 1967, when the Court overruled *Olmstead v. U.S.*, 277 U.S. 438 (1928), and held that electronic surveillance was subject to the Fourth Amendment's protections. *Katz v. U.S.*, 389 U.S. 347, 353 (1967); *Berger v. New York*, 388 U.S. 41, 50-51 (1967). In response, Congress began the process of legislatively addressing electronic surveillance.

In 1968, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act, commonly known as the Wiretap Act, regulating electronic surveillance conducted for criminal investigations. 18 U.S.C. §§ 2510-2522. It included a civil remedy for unlawful surveillance. 18 U.S.C. § 2520. Congress later

added protection for electronically-stored communications and communications records in the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701-2712, including a civil remedy, 18 U.S.C. § 2707. The Wiretap Act left open the question of how to regulate electronic surveillance conducted for national security purposes. 18 U.S.C. former § 2511(3) (repealed 1978); *U.S. v. U.S. Dist. Ct. (Keith)*, 407 U.S. 297, 301-06, 322-23 (1972).

The 1970s brought a cascade of revelations of intelligence agency abuses, including in electronic surveillance. These revelations created a groundswell of public opinion supporting fundamental reform of intelligence-gathering directed against Americans.

Prominent among the investigations of intelligence abuses was a Senate Committee chaired by Senator Frank Church. The Church Committee revealed that for decades the Executive, without any warrants or other lawful authority, had been conducting massive, secret dragnet surveillance invading the privacy and violating the constitutional rights of thousands of ordinary Americans. S. Rep. No. 94-755, BOOK II: INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS ("BOOK II") (1976).

The Church Committee concluded the Government's mass surveillance violated the Fourth Amendment, stating that the "massive record of intelligence abuses over the years" had "undermined the constitutional rights of citizens . . . primarily because checks and balances designed by the framers of the Constitution to assure accountability have not been applied."

BOOK II at 139, 290, 289. The Committee urged "fundamental reform," recommending legislation to "make clear to the Executive branch that [Congress] will not condone, and does not accept, any theory of inherent or implied authority to violate the Constitution, the proposed new charters, or any other statutes." *Id*. at 289, 297. "[T]here would be no such authority after Congress has . . . covered the field by enactment of a comprehensive legislative charter" that would "provide the exclusive legal authority for domestic security activities." *Id*. at 297.

The Church Committee recommended the creation of civil remedies for unlawful surveillance. These remedies would both "afford effective redress to people who are injured by improper federal intelligence activity" and "deter improper intelligence activity." BOOK II at 336.

The Committee also anticipated the need for procedures that would both protect national security information and permit that information to be used to litigate civil claims of unlawful surveillance. It stated, "courts will be able to fashion discovery procedures, including inspections of materials in chambers, and to issue orders as the interests of justice require, to allow plaintiffs with substantial claims to uncover enough factual material to argue their case, while protecting the secrecy of governmental information in which there is a legitimate security interest." BOOK II at 337.

II. FISA

A. Introduction

FISA was Congress's response to the Church Committee's revelations and recommendations: "This legislation is in large measure a response to the revelations that warrantless electronic surveillance in the name of national security has been seriously abused." S. Rep. No. 95-604, pt. I, at 7 (1977). As "an exclusive charter for the conduct of electronic surveillance in the United States. . . . [i]t would relegate to the past the wire-tapping abuses . . . by providing, for the first time, effective substantive and procedural statutory controls over foreign intelligence electronic surveillance." *Id*. at 15.

FISA implemented the Church Committee's recommendations by imposing strict limits on the Executive's power to conduct electronic surveillance and creating remedies for unlawful surveillance. S. Rep. No. 95-604, pt. I, at 8 (FISA "curb[s] the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it."). By providing "effective, reasonable safeguards to ensure accountability and prevent improper surveillance"—including civil and criminal remedies for unlawful surveillance—FISA restored the "balance between protection of national security and protection of personal liberties." *Id*. at 7. FISA "reconcile[s] national intelligence and counterintelligence needs with constitutional principles in

a way that is consistent with both national security and individual rights." S. Rep. No. 95-701, at 16 (1978).

B. FISA's Statutory History

FISA was introduced in identical House and Senate versions in 1977. S. 1566, 95th Cong. (May 18, 1977); H.R. 7308, 95th Cong. (May 18, 1977). Originally, the bill was structured as amendments to the Wiretap Act in title 18 U.S.C.; the enacted bill ultimately added FISA to title 50, while also amending title 18.

Congress was highly engaged in the process of enacting FISA. The legislative effort was unusually broad-based and extensive, reflecting careful and nuanced deliberations over 18 months. In each house, two different committees reviewed the bill, holding numerous hearings. There was extensive debate and discussion from introduction to final enactment.

During legislative consideration the draft bill was revised numerous times in each house, and the bills passed by the House and Senate diverged. S. 1566, 95th Cong. (May 18, 1977), (Nov. 15, 1977), (March 14, 1978), as passed by Senate, 124 Cong. Rec. 10906-10910 (April 20, 1978); H.R. 7308, 95th Cong. (May 18, 1977), (June 8, 1978), as passed by House (as S. 1566), 124 Cong. Rec. 28427-28432 (Sept. 7, 1978).

To resolve the differences between the House and Senate bills, a House-Senate Conference Committee was convened, and the Conference Report was enacted

as Public Law No. 95-511, 92 Stat. 1783 (1978). Conference Report, 124 Cong. Rec. 33778-33789 (Oct. 5, 1978); agreed to by Senate, 124 Cong. Rec. 34846 (Oct. 9, 1978); agreed to by House, 124 Cong. Rec. 36417-36418 (Oct. 12, 1978).

III. Overview Of The Text And Structure Of FISA

In the Wiretap Act, Congress established a general prohibition on electronic surveillance with a series of exceptions, most notably for surveillance judicially authorized in criminal investigations. 18 U.S.C. §§ 2511, 2516. But it left unaddressed electronic surveillance for national security purposes. FISA filled in the missing piece, and together with the Wiretap Act forms a comprehensive system regulating electronic surveillance within the United States. The two statutes permit electronic surveillance in designated circumstances pursuant to judicial authorization and prohibit surveillance they do not affirmatively authorize.[2]

To ensure the Executive could not evade the limits Congress imposed, Congress expressly provided that FISA and the Wiretap Act are "the exclusive means by

[2] Other provisions of FISA added after 1978 provide procedures for authorizing pen registers (§§ 1841-1846), physical searches (§§ 1821-1829), business records acquisitions (§§ 1861-1864), and acquisition within the United States of communications of persons located outside the United States (§§ 1881-1881g). FISA's provisions addressing pen registers and physical searches each has a section paralleling section 1806(f). 50 U.S.C. §§ 1825(g), 1845(f).

which electronic surveillance, as defined in section 1[8]01 of [FISA], and the interception of domestic wire and oral communications may be conducted." Pub. L. No. 95-511, § 201(b), 92 Stat. at 1797, *codified at* 18 U.S.C. § 2511(2)(f); *accord* 50 U.S.C. § 1812(a) (added in 2008; "the procedures of chapters 119 [Wiretap Act], 121 [SCA], and 206 [pen register statute] of title 18 and this chapter [FISA] shall be the exclusive means by which electronic surveillance and the interception of domestic wire, oral, or electronic communications may be conducted").

FISA defines "electronic surveillance" broadly, using four alternative definitions. 50 U.S.C. § 1801(f). Importantly, these definitions are not purpose-based: they are not limited to electronic surveillance conducted for foreign intelligence or national security purposes but cover *any* surveillance within the terms of the definitions, regardless of purpose. The breadth of FISA's electronic-surveillance definitions ensures that FISA's prohibition of unauthorized electronic surveillance (50 U.S.C. §§ 1809, 1810) is comprehensive, and ensures that FISA and the Wiretap Act are the "exclusive means" for conducting electronic surveillance.

Given past Executive abuses, Congress's mandate of statutory exclusivity would become a reality only if Congress also created mechanisms for judicial enforcement of the comprehensive procedural and substantive limitations on electronic surveillance it had imposed. Accordingly, FISA subjects electronic surveillance to judicial review both *before* and *after* it occurs.

FISA created the Foreign Intelligence Surveillance Court (FISC) and requires (with limited exceptions) that the Government obtain an order from the FISC *before* conducting surveillance for foreign intelligence purposes. *See* 50 U.S.C. §§ 1804, 1805. The FISC reviews applications for electronic surveillance according to statutory criteria and grants or denies orders authorizing the surveillance. Pre-surveillance judicial review allows the FISC to enforce the substantive limitations FISA imposes on surveillance; e.g., FISA requires the FISC find probable cause that the target is an "agent of a foreign power." *Id.*; 50 U.S.C. § 1805(a)(2)(A).

FISA and 18 U.S.C. § 2712 (discussed below) also provide for judicial review of electronic surveillance *after* it occurs. They do so by creating criminal and civil liability for unlawful electronic surveillance (18 U.S.C. § 2712; 50 U.S.C. §§ 1809 (criminal), 1810 (civil)) and by providing for the exclusion in criminal cases of unlawfully-obtained surveillance evidence (50 U.S.C. § 1806(e)). They also do so through section 1806(f)'s requirement that courts grant discovery of state-secrets evidence in cases of unlawful surveillance.

Section 1806(f) provides the practical means by which the civil liability created to protect the exclusivity of FISA and the Wiretap Act and enforce substantive limitations on surveillance can be litigated without endangering national security. Thus, both the civil remedies and section 1806(f)'s discovery procedures are essential elements of Congress's comprehensive statutory scheme.

FISA's criminal and civil remedies in sections 1809 and 1810 apply regardless of whether the surveillance was conducted for a foreign-intelligence purpose or otherwise was within the scope of FISA. Sections 1809 and 1810 encompass all electronic surveillance within FISA's broad definition of "electronic surveillance," even electronic surveillance unrelated to foreign intelligence investigations, electronic surveillance that could never be authorized under FISA, and electronic surveillance prohibited by the Wiretap Act or the SCA. Thus, unlawful surveillance may simultaneously violate sections 1809 and 1810, the Wiretap Act, and the Constitution, as Congress recognized. H.R. Rep. No. 95-1283, pt. I, at 97 (1978).

IV. Section 1806

Congress recognized that in civil actions challenging unlawful electronic surveillance, the evidence may include secret information. In section 1806(f), Congress established a procedure enabling those actions to go forward to a decision on the merits while protecting the secrecy of the information. Rather than excluding secret evidence, as would occur under the state-secrets privilege, Congress instead displaced the state-secrets privilege and directed courts to determine the discoverability of the secret evidence by examining it *in camera* and *ex parte* to decide whether the surveillance was illegal. Only if the surveillance was illegal does the court grant the discovery request.

The following examination of section 1806's text explains how it operates in civil actions challenging unlawful surveillance.

Sections 1806(a)-1806(e): Sections 1806(a)-1806(e) address the Government's use of electronic-surveillance evidence. Section 1806(a) requires minimization of information acquired from electronic surveillance, protects privileged communications, and limits the use of acquired information to lawful purposes. Section 1806(b) requires that any disclosure of FISA-acquired information for law enforcement purposes be accompanied by notice that the Attorney General must authorize any use in criminal proceedings. Sections 1806(c) and 1806(d) require notice if the federal or state governments seek to use electronic-surveillance evidence in a proceeding against a person who was the target of or subject to surveillance. Section 1806(e) addresses grounds for motions to suppress electronic-surveillance evidence.

Section 1806(f): The first sentence of section 1806(f) is long, but its ordinary meaning is clear and unambiguous. The sentence begins with three "whenever" clauses that lay out three different circumstances in which section 1806(f) applies.

Clause one addresses situations, described in sections 1806(c)-(d), in which the Government is seeking to introduce electronic-surveillance evidence; clause two addresses motions where a party is seeking to suppress such evidence under section 1806(e): "Whenever a court or other authority is notified pursuant to

subsection (c) or (d), or whenever a motion is made pursuant to subsection (e), ..." § 1806(f).

Clause three, however, addresses circumstances in which a person subjected to electronic surveillance is seeking to discover evidence relating to the surveillance: "whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter. . . ." § 1806(f). It is clause three that applies when a private plaintiff seeks discovery of surveillance-related evidence.

"[*A*]*ny* motion or request . . . pursuant to any other statute or rule . . . to discover or obtain" encompasses any discovery request of whatever kind, including civil discovery requests by private parties. § 1806(f) (emphasis added); *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 218-28 (2008). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' Webster's Third New International Dictionary 97 (1976)." *U.S. v. Gonzales*, 520 U.S. 1, 5 (1997). "Congress did not add any language limiting the breadth of that word," *id*., and so it must be read to encompass all "motion[s] or request[s]" to "discover or obtain applications or orders or other materials relating to electronic surveillance," § 1806(f). Clause three thus includes any discovery requests by

a civil plaintiff suing the Government and seeking materials relating to electronic surveillance. "A decision of illegality [of government surveillance] may not always arise in the context of suppression; rather it may, for example, arise incident to a discovery motion in a civil trial." H.R. Rep. No. 95-1283, pt. I, at 93.

When a plaintiff makes a discovery request to obtain materials relating to electronic surveillance, section 1806(f) puts the Government to a choice. It can provide the requested materials pursuant to its discovery obligations under the rules of civil procedure. Or, if "disclosure [of the materials] . . . would harm the national security" the Government can invoke section 1806(f)'s *ex parte*, *in camera* review procedures: the "court . . . shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance. . . ." § 1806(f). Under section 1806(f), there is no additional alternative.

The purpose of the district court's *in camera*, *ex parte* review is "to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted." § 1806(f). The movant can provide whatever evidence it possesses to assist the court in deciding the lawfulness of the surveillance, just as the movant in any discovery motion does. And section 1806(f) gives the district court discretion to disclose the surveillance materials to the movant under secure procedures where disclosure is necessary to accurately

determine whether the surveillance was lawful: "In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance." § 1806(f).

Section 1806(g): Section 1806(g) says what happens next, after the district court determines the lawfulness of the surveillance. If the surveillance was unlawful, the court "shall . . . grant the motion of the aggrieved person." § 1806(g). This mandatory language leaves the court with no discretion. In the case of a civil discovery motion seeking surveillance-related evidence, granting the discovery motion means that the evidence is available for use in deciding any issue in the case to which it is relevant, including standing and the merits. The district court may impose appropriate security procedures and protective orders, as in any civil litigation.

If instead "the court determines that the surveillance was lawfully authorized and conducted, it shall deny the motion of the aggrieved person except to the extent that due process requires discovery or disclosure." § 1806(g). So even if the court determines the surveillance was lawful, discovery still occurs in those circumstances where due process requires it.

Section 1806(h): Section 1806(h) provides the Government with a number of safety valves to protect

against the erroneous disclosure or use of national security information. It does so by making a series of the district court's decision points into final orders immediately appealable under 28 U.S.C. § 1291. "Orders granting motions or requests under subsection (g), decisions under this section that electronic surveillance was not lawfully authorized or conducted, and orders of the United States district court requiring review or granting disclosure of applications, orders, or other materials relating to a surveillance shall be final orders. . . ." § 1806(h).

Thus, the Government may obtain immediate appellate review of:

- the initial decision to conduct *ex parte*, *in camera* review—before any actual disclosure of surveillance-related materials to the court or the movant;
- any decision under the last sentence of section 1806(f) to grant the movant access to surveillance-related materials to assist in the court's lawfulness determination;
- any determination after reviewing the surveillance-related materials that the surveillance was unlawful;
- any decision granting the movant's discovery motion and making the surveillance-related materials available for use in the lawsuit.

The Government's multiple rights to immediate appellate review give strong protections that there will be no erroneous disclosure of surveillance-related

materials. *See* H.R. Rep. No. 95-1720, at 32 (1978) (Conf. Rep.).

Summary: When a litigant makes a discovery request or motion seeking surveillance-related evidence and the Government asserts that disclosure of the evidence would harm national security, section 1806(f) provides, "notwithstanding any other law," that the court "shall" review the evidence *in camera* and *ex parte* and determine whether the surveillance was lawful. If it was unlawful, the court "shall" grant the discovery motion. § 1806(g).

V. Section 1806's Statutory History And FISA's Structure Confirm Section 1806(f)'s Plain Meaning

The initially-introduced version of what became section 1806(f) is the statute that the Government wishes Congress had enacted. Unlike section 1806(f), it made no provision for discovery requests or motions (clause three of section 1806(f)); it was limited to the Government's use of evidence and motions to suppress that evidence (clauses one and two). S. 1566, 95th Cong. (May 18, 1977) (proposed 18 U.S.C. § 2526(c)); H.R. 7308, 95th Cong. (May 18, 1977) (same). If in section 1806(f) Congress had wanted only to address the Government's use of surveillance-related evidence, Congress would never have added clause three. But Congress did add clause three, thereby rejecting any limitation of section 1806(f) to only the Government's

use of surveillance-related evidence and motions to suppress that use.

Section 1806(f)'s application to discovery motions and requests in civil cases, as its plain language commands, is a necessary part of the statutory scheme. Without section 1806(f), the civil enforcement mechanisms that Congress created to ensure FISA's exclusivity would be toothless. By asserting the state-secrets privilege to block judicial review of the lawfulness of its activities, the Executive could evade the restraints of FISA and once again conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it.

The Conference Committee's reconciliation of the House and Senate bills confirms that section 1806(f) applies to plaintiffs seeking evidence in civil cases. The House and the Senate passed different versions of the provision that became section 1806(f). H.R. Rep. No. 95-1720, at 31-32 (Conf. Rep.). The House bill had two separate procedures for determining the legality of electronic surveillance, one for introduction and suppression of evidence in criminal cases and one for discovery in civil cases; the Senate bill had a single procedure for both criminal and civil cases. *Id.*; S. 1566, 95th Cong., as passed by Senate, 124 Cong. Rec. 10906-10910, at 10908-10909 (April 20, 1978); S. 1566, 95th Cong., as passed by House, 124 Cong. Rec. 28427-28432, at 28430-28431 (Sept. 7, 1978).

In the end, Congress adopted a modified version of the Senate procedure, deeming a single procedure

sufficient both for criminal and civil cases: "The conferees agree that an in camera and ex parte proceeding is appropriate for determining the lawfulness of electronic surveillance in both criminal and civil cases."[3] H.R. Rep. No. 95-1720, at 32 (Conf. Rep.).

VI. Congress Expanded The Use Of Section 1806(f) In The USA PATRIOT Act

In 2001 in the USA PATRIOT Act, Congress reaffirmed and expanded the use of section 1806(f) in civil litigation by adding 18 U.S.C. § 2712. Section 2712 creates a civil cause of action against the United States for violations of the Wiretap Act and the SCA, as well as violations of select provisions of FISA. (It replaced an earlier cause of action against the Government under 18 U.S.C. § 2511.)

Section 2712(b)(4) expands section 1806(f)'s scope to include not just evidence relating to "electronic surveillance" as defined in FISA but also evidence relating to interceptions of communications under the Wiretap Act and the acquisition of communications records under the SCA. In lawsuits presenting Wiretap Act or SCA claims, section 2712(b)(4) mandates that, "[n]otwithstanding any other provision of law," section

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[3] A House-Senate Conference Report and Joint Explanatory Statement are far different from a legislative committee report. The Conference Report is the statutory text negotiated by the members chosen by each chamber to represent it. The Joint Explanatory Statement is the explanation to both chambers by the Conference members of the provisions they negotiated in the Conference Report.

1806(f)'s procedures are the "exclusive means" for handling "materials governed by" section 1806(f). The materials governed by section 1806(f) are materials whose "disclosure . . . would harm the national security." § 1806(f).

VII. Section 1806(f) And Section 2712 Displace The State-Secrets Privilege

Because section 1806(f) and section 2712 apply notwithstanding any other law, they displace the state-secrets privilege for surveillance-related evidence.

A. The State-Secrets Privilege

As established by *U.S. v. Reynolds*, 345 U.S. 1 (1953), the state-secrets privilege is a common-law evidentiary privilege that the Court formulated by exercising its "power to determine the procedural rules of evidence." *General Dynamics Corp. v. U.S.*, 563 U.S. 478, 485 (2011). Where the Government sustains its burden of showing the privilege applies, "[t]he privileged information is excluded and the trial goes on without it." *Id*. at 485.

Reynolds sets out a balancing approach for courts to use in determining whether the state-secrets privilege applies. 345 U.S. at 7-11. Courts independently balance the strength of the Government's showing of "reasonable danger" from the production of the evidence against the requesting party's need for the evidence. *Id*. The greater the necessity of the evidence to

the party seeking it, the more the Government needs to substantiate its claim of potential harm. *Id*.

In cases "[w]here there is a strong showing of necessity [by the requesting party], the claim of privilege should not be lightly accepted," and the court may probe further "in satisfying itself that the occasion for invoking the privilege is appropriate." *Reynolds*, 345 U.S. at 11. While not "automatically require[d]," in such cases the court may review the evidence *in camera* to assess whether it is privileged and, if so, to determine the scope of the privilege. *Id*. at 10.

Above all, "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Reynolds*, 345 U.S. at 9-10. "[A] complete abandonment of judicial control would lead to intolerable abuses." *Id*. at 8.

As Justice Scalia made clear for a unanimous Court in *General Dynamics*, the state-secrets privilege only excludes evidence. It is distinct from the special rule that government-contract disputes are nonjusticiable if "too many of the relevant facts remain obscured by the state-secrets privilege to enable a reliable judgment." *General Dynamics*, 563 U.S. at 492. The Court explained that the government-contract nonjusticiability rule springs not from "our power to determine the procedural rules of evidence, but our common-law authority to fashion contractual remedies in Government-contracting disputes." *Id*. at 485-86 (citing two spy-contract cases: *Totten v. U.S.*, 92 U.S. 105 (1876); *Tenet v. Doe*, 544 U.S. 1 (2005)). Because this

is not a government-contract dispute, the nonjusticiability rule does not apply.

EFF's amicus brief in *U.S. v. Abu Zubaydah*, No. 20-827, presents a further discussion of the state-secrets privilege.

B. Section 1806(f) And Section 2712 Displace The State-Secrets Privilege

The state-secrets privilege does not apply to this lawsuit because section 1806(f) displaces it. Congress has the power to displace the state-secrets privilege by statute. "Congress, of course, has plenary authority over the promulgation of evidentiary rules for the federal courts." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 31 (1976).

Congress has also set the standard by which the question of displacement of the state-secrets privilege should be judged. Federal Rule of Evidence 501 provides "[t]he common law . . . governs a claim of privilege unless any of the following provides otherwise: . . . a federal statute."[4]

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[4] Rule 501's history confirms it encompasses the state-secrets privilege. The Court's proposed 1972 Federal Rules of Evidence defined nine evidentiary privileges. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 230 (1972). Proposed Rule 509 defined the privilege for "secrets of state and other official information." *Id*. at 251.

Congress rejected the proposed rules and drafted the Federal Rules of Evidence. It took a different approach to privileges, providing in Rule 501 that they should continue their common-law development except as Congress otherwise provided. Rule

Section 1806(f) meets Rule 501's test: it is a statute that "provides otherwise" for the discovery and use, under special protective procedures, of surveillance-related evidence that the state-secrets privilege might otherwise exclude. Section 1806(f) thereby displaces the common-law state-secrets privilege that would otherwise apply under Rule 501.

The overlap between section 1806(f) and the state-secrets privilege is self-evident. The state-secrets privilege is a common-law doctrine addressing evidence whose public disclosure would harm national security. The subject matter of section 1806(f) is the same: evidence whose "disclosure . . . would harm the national security." § 1806(f).

In cases involving electronic-surveillance evidence, section 1806(f) displaces the common-law

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501, as originally enacted, provided that "the privilege of . . . [the] government . . . shall be governed by the principles of the common law" "[e]xcept as otherwise . . . provided by Act of Congress." Pub. L. No. 93-595, § 1, 88 Stat. 1933 (1975), *codified as* Fed. R. Evid. 501 (1975). "[T]he privilege of . . . [the] government" includes the state-secrets privilege. *See* H.R. Rep. No. 93-650 (1973) (explaining that Rule 501 encompasses the "secrets of state" privilege); S. Rep. No. 93-1277 (1974) (same).

In 2011, the Court reworded Rule 501 to state "[t]he common law . . . governs a claim of privilege unless any of the following provides otherwise: . . . a federal statute." Fed. R. Evid. 501. These changes are "stylistic only," and so the state-secrets privilege continues to be governed by Rule 501. Fed. R. Evid. 501 advisory committee's 2011 note. In any event, what matters is the standard for displacement ("provides otherwise") remains the same as it stood in 1978 ("otherwise . . . provided")—the relevant time for measuring displacement.

state-secrets privilege. Congress expressly provided that section 1806(f) applies "notwithstanding any other law," thus confirming its intent to displace the "other law" of the state-secrets privilege. § 1806(f). Section 1806(f) directs courts, rather than excluding evidence whose disclosure would harm national security, to use the evidence to decide the lawfulness of the surveillance and, if the surveillance is unlawful, to grant discovery of the evidence for use in the lawsuit. Thus, it is plainly contrary to the state-secrets privilege's exclusion of such evidence.

Section 1806(f) leaves no room for the state-secrets privilege to operate. Section 1806(f) and the state-secrets privilege are mutually exclusive. Applying the state-secrets privilege to exclude evidence relating to illegal surveillance would mean nullifying section 1806(f), contrary to Congress's intent.

Section 2712 independently displaces the state-secrets privilege. It is equally explicit in "provid[ing] otherwise" for the admission of evidence that the state-secrets privilege might otherwise exclude. Fed. R. Evid. 501. It, too, applies "[n]otwithstanding any other provision of law," and provides in section 2712 lawsuits that section 1806(f)'s procedures are the "exclusive means" for reviewing materials relating to electronic surveillance whose disclosure would harm national security. 18 U.S.C. § 2712(b)(4).

Even if Rule 501 did not govern, sections 1806(f) and 2712(b)(4) would still displace the state-secrets privilege by their express terms.

Where federal "common-law adjudicatory principles" like the state-secrets privilege are at issue, all that is required is that "'a statutory purpose to the contrary is evident.'" *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). Congress is not required to "state precisely any intention to overcome" the state-secret privilege's application to FISA. *Id.* Section 1806(f)'s statutory purpose of using secret evidence to decide discovery requests seeking materials relating to surveillance and to grant discovery if the surveillance was unlawful is plainly contrary to the state-secrets privilege's purpose of excluding secret evidence. Section 2712(b)(4)'s command to use section 1806(f)'s procedures is equally contrary.

The Government fails to propose a standard for judging displacement. Gov't Brief 35-36. It argued below (ECF No. 69 at 16) that section 1806(f) does not "speak directly" to the state-secrets privilege and therefore does not displace it. Even assuming arguendo that the "speaks directly" test and not Rule 501's "provides otherwise" standard governs, it is satisfied here. Section 1806(f) "'speak[s] directly to [the] question' at issue" under the state-secrets privilege: the use of evidence whose disclosure would harm national security. *American Electric Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011). Importantly, "Congress need not 'affirmatively proscribe' the common-law doctrine at issue." *U.S. v. Texas*, 507 U.S. 529, 534 (1993); *accord Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981); *American Electric Power*, 564 U.S. at 423 ("'evidence of

a clear and manifest [congressional] purpose'" not required).

Section 1806(f) speaks directly to the admissibility and use of state-secrets evidence relating to electronic surveillance. It establishes a different standard and a different procedure for determining whether the evidence may be used in the lawsuit—procedures that the district court "shall" use, that apply "notwithstanding any other law," and that are manifestly incompatible with the state-secrets privilege. § 1806(f). Section 2712(b)(4) does likewise. The textual commands in these two statutes necessarily displace the "other law" of the state-secrets privilege.

VIII. The Government's Arguments Are Unavailing

The Government's arguments all fail because the statutory text contradicts them.

1. The Government asserts that clause three of section 1806(f) should have the word "similar" inserted after "other," making it read "whenever any motion or request is made . . . pursuant to any other *similar* statute or rule," and that once the statute is altered it thereby references only motions or requests similar to those covered by clauses one and two. Gov't Brief 30-31. That attempted alteration of the statute doesn't work.

The argument runs aground on the statutory text because there is no similarity between clause three

and clauses one and two. Neither clause one nor clause two addresses "motion[s] or request[s]" to "discover" or "obtain" anything, while clause three expressly does cover such motions and requests. Indeed, clause one does not address motions at all; it addresses Government notifications that it will use surveillance-related evidence. Clause two addresses motions to suppress the Government's use of that evidence. So there is nothing similar between the discovery motions and requests covered by clause three and what clauses one and two cover; they are mutually exclusive, and inserting "similar" makes clause three incoherent.

There is a simple explanation for how the word "other" ended up in clause three, and it further demonstrates why the Government's argument is wrong. In the Senate-passed bill, the relevant phrase in clause three read "or whenever any motion or request is made by an aggrieved person pursuant to *section 3504 of this title [18] or* any other statute or rule." 124 Cong. Rec. 10909, § 2526(e) (italics added). The House-passed bill had separate provisions for criminal and civil cases, putting clause three in a separate subsection; its version of the relevant phrase read "Except as provided in subsection (f) [dealing with Government notices of use of surveillance evidence and motions to suppress that evidence], whenever any motion or request is made pursuant to any statute or rule." 124 Cong. Rec. 28431, § 106(g).

The other difference between the House and Senate bills was that clause three in the Senate bill included only discovery motions seeking "evidence or

information obtained or derived from electronic surveillance." 124 Cong. Rec. 10909, § 2526(e). The House bill additionally included motions seeking "applications or orders or other materials relating to surveillance." 124 Cong. Rec. 28431, § 106(g).

Congress chose the Senate's approach of a single provision for both criminal and civil cases, but broadened it to include "applications or orders or other materials relating to surveillance," as had the House. It deleted from clause three of the Senate bill the phrase "section 3504 of this title or," leaving "any other statute or rule." That deletion did not magically limit clause three to only the (dissimilar) matters covered by clauses one and two.

Moreover, the Government's argument would as a practical matter limit section 1806(f) to criminal cases, and deprive it of any effect in civil cases challenging unlawful surveillance. That is contrary to the broad scope of clause three's text.

2. Relatedly, the Government argues that clause three is *only* a process allowing a defendant to seek evidence to support a suppression motion when the Government intends to use surveillance evidence. Gov't Brief 18-19. The plain language of clause three defeats this argument, because it extends section 1806(f)'s procedures to "any motion or request" "pursuant to any other statute or rule" "to discover or obtain" surveillance-related evidence, "notwithstanding any other law." § 1806(f). Clause three contains nothing even

remotely hinting that it is limited only to the Government's attempts to introduce surveillance evidence.

3. The Government approvingly cites legislative history saying that clause three prevents "the inventive litigant" from "bypass[ing]" section 1806(f)'s procedures. Gov't Brief 31. But the Government is the only inventive litigant attempting to bypass section 1806(f)'s mandatory procedures for state-secrets evidence. Rather than using section 1806(f)'s procedures as Congress commanded, it is attempting to invoke the common-law state-secrets privilege instead.

4. The Government cites without elaboration footnote 4 of *Clapper v. Amnesty International USA*, 568 U.S. 398, 412 n.4 (2013). Gov't Brief 38. In dicta in footnote 4, *Clapper* hypothesized that *in camera* proceedings to determine whether a plaintiff has standing to challenge surveillance "would surely signal to the terrorist whether his name was on the list of surveillance targets." *Id*. The *Clapper* hypothetical has no application to section 1806(f). First, the Court of course made no suggestion that it could defy Congress's mandate in section 1806(f). And in any event the hypothetical's conclusion is not true of section 1806(f), in which a denial of a discovery motion is inherently ambiguous and does not reveal to the movant whether they were surveilled. If the district court denies a discovery motion *in camera* and *ex parte* without revealing the basis for the denial, the movant does not know whether the motion has been denied because the surveillance occurred but was legal or instead has been denied because no surveillance occurred. (Of course, the motion

could also be denied on grounds to which all discovery motions are subject, e.g., if the requested evidence is irrelevant, cumulative, etc.) And if the Court grants the motion because the movant was subject to illegal surveillance, that is exactly what the statute commands must occur.

5. Below, the Government argued that a movant must prove they are an aggrieved person before the district court can decide their discovery motion under clause three. Gov't Ninth Circuit Petition for Rehearing, 17-18; Opposition to Petition for Certiorari, App. at 35a-38a. That argument is meritless because Congress expressly rejected that requirement in enacting section 1806(f).

Under the House-passed bill, a movant seeking discovery of surveillance-related evidence could only use section 1806(f)'s procedures only if first "the court or other authority determines that the moving party is an aggrieved person." 124 Cong. Rec. 28431, § 106(g). In the Senate-passed bill, the parallel provision did not require a prior judicial finding of "aggrieved person" status. 124 Cong. Rec. 10909, § 2526(e). In the enacted law, Congress rejected the aggrieved-person finding required by the House-passed bill as a condition for using section 1806(f). There could hardly be a starker refutation of the notion that Congress intended that a court must find that a plaintiff is an aggrieved person before the court uses section 1806(f)'s procedures to decide a discovery request or motion.

Section 1806(f)'s text confirms this conclusion. Under section 1806(f), an "aggrieved person" is someone who makes a discovery motion or request for materials relating to the surveillance. A plaintiff may obtain discovery without first proving up its claim. Only at trial or summary judgment, after discovery has occurred, must plaintiffs prove up their factual allegations, including those establishing standing and that they are aggrieved persons.

This accords with section 1810 and section 2712, in which an aggrieved person is simply someone with sufficient facts to file suit. § 1810 ("An aggrieved person . . . shall have a cause of action"); § 2712(a) ("Any person who is aggrieved . . . may commence an action"). And section 2712(b)(4) has no aggrieved-person test for using section 1806(f)'s procedures. *See also* 18 U.S.C. § 3504(a)(1) ("party aggrieved" may compel Government to affirm or deny whether the surveillance occurred).

FISA's definition of "aggrieved person" also does not require a judicial finding: "a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance." 50 U.S.C. § 1801(k). Congress's intent in creating the "aggrieved person" standard was not to limit section 1806(f)'s operation but to make standing to bring FISA claims "coextensive, but no broader than, those persons who have standing to raise claims under the Fourth Amendment." H.R. Rep. No. 95-1283, pt. I, at 66. The term was meant to exclude from FISA's remedies only "persons, not parties to a

communication, who may be mentioned or talked about by others," because "such persons have no fourth amendment privacy right in communications about them." *Id*. Congress had "no intent to create a statutory right in such persons." *Id*.

6. The Government erroneously reads section 1806's title "Use of Evidence" as "Use of Evidence by the Government." Govt. Brief 29-30. But that ignores the title's plain meaning, which encompasses use by anyone of evidence relating to electronic surveillance, not just use by the Government. And the text of 1806(f) makes that clear just as the title does. "The caption of a statute . . . 'cannot undo or limit that which the [statute's] text makes plain.'" *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004).

7. The Government contends that Congress hid a secret escape hatch in section 1806(f), and that if in response to a discovery motion seeking surveillance-related materials the Attorney General refuses to assert that disclosure would harm national security, the Government can make the same assertion in a state-secrets motion and obtain exclusion of the evidence or dismissal. Gov't Brief 36-40.

But Congress did not build into section 1806(f) a mechanism for its evasion. If Congress had wanted the Government to control when the state-secrets privilege governed discovery or use of surveillance-related evidence, it would not have enacted section 1806(f) at all. That would have left the Government with discretion to invoke or waive the privilege as it saw fit.

Congress did enact section 1806(f), however, and clause three is Congress's procedure for deciding a litigant's discovery request seeking state-secrets evidence, "notwithstanding any other law," including the state-secrets privilege. *Accord* § 2712(b)(4). Indeed, the very same page of the Senate Intelligence Committee report the Government cites (Gov't Brief 40) refutes its argument. It explains that if the Attorney General does not submit an affidavit, the result is not exclusion of the evidence, as would occur under the state-secrets privilege, but "mandatory disclosure" of surveillance-related materials. S. Rep. No. 95-701, at 63.

Moreover, if the Government had the choice between using section 1806(f) or the state-secrets privilege, there would be no reason for section 1806(h)'s right to Government interlocutory appeals, because section 1806(f) proceedings would occur only with the Government's consent. That appeal right only makes sense because section 1806(f) permits a litigant to seek discovery of state-secrets evidence against the Government's wishes.

IX. The Judgment Should Be Affirmed

The court of appeals' judgment reversing the state-secrets dismissal and remanding for further proceedings using section 1806(f) should be affirmed.

The gravamen of the Government's state-secrets motion, and of the district court's dismissal, was that the Government needed state-secrets evidence to defend itself. Made at the very start of litigation, the

motion was wildly premature, whether considered under section 1806(f) or the state-secrets privilege. Motion practice testing the legal sufficiency of the claims was occurring concurrently, and so the existence and scope of the claims were in flux. Discovery had not opened, and the Government was not subject to any discovery requests seeking state-secrets evidence. And the Government was months if not years away from having to present evidence in its defense at summary judgment or trial.

A. The Motion Should Have Been Denied Under Section 1806(f)

Section 1806(f) is the available and exclusive procedure for the Government to present state-secrets evidence in its defense, and for the other defendants or the plaintiffs to discover state-secrets evidence. Because section 1806(f) displaces the state-secrets privilege, the district court should have denied the Government's motion. The Government's alternative to using section 1806(f) to present evidence is not the state-secrets privilege but to forgo using the evidence.

But, the Government protests, it should not be put to the choice of either using section 1806(f)'s procedures to introduce evidence or forgoing use of the evidence and thereby risking an adverse judgment. That, however, is the system Congress created.

The Government's recourse is with Congress, not to ask this Court to ignore section 1806(f) or to create immunity for the Government in the form of a novel

doctrine of state-secret nonjusticiability. The waiver of sovereign immunity, including the procedures to be followed, is exclusively within Congress's control. For the Court to create a novel nonjusticiability rule for claims against the Government would violate the separation of powers by encroaching upon Congress's power to waive sovereign immunity and create claims against the United States. *See U.S. v. Muniz*, 374 U.S. 150, 165 (1963).

The Government's attempt to drape its arguments in constitutional garb derogates Congress's authority—not just its authority to create procedures for litigating claims against the United States but also its war powers. Congress's authority "To make Rules for the Government and Regulation of the land and naval Forces," Const., art. I, § 8, cl. 14, extends to "Rules for the Government and Regulation" of intelligence surveillance, including the power to determine when and how surveillance-related materials should be used in litigation. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) (President "may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers"). The Government's attempt to constitutionalize the state-secrets privilege to trump section 1806(f) also lacks support in the Court's decisions. *See* EFF's Amicus Brief, *U.S. v. Abu Zubaydah*, No. 20-827, at 9-12.

B. The Motion Should Have Been Denied Under The State-Secrets Privilege

Even if the state-secrets privilege and not section 1806(f) governed, the district court should have denied the motion as premature. Without knowing the specific items of evidence at issue, a court cannot properly assess the potential harm from disclosure, and cannot balance the potential harm against the need for the evidence. Broad and ill-defined categories do not tell a court exactly what evidence is at issue. That is why, like all privileges, it is properly asserted after, and not before, an opposing party seeks the allegedly privileged evidence.

Apart from prematurity, the district court erred by dismissing claims rather than excluding evidence. The state-secrets privilege is a common-law evidentiary rule that excludes evidence, not a nonjusticiability rule. *General Dynamics*, 563 U.S. at 485 (*Reynolds* "decided a purely evidentiary dispute by applying evidentiary rules," not by imposing a justiciability bar or "order[ing] judgment in favor of the Government."). The Court should reject the Government's attempt to transform the *Reynolds* privilege into a nonjusticiability rule, just as the Court rejected it in *General Dynamics*. *See* EFF's Amicus Brief, *U.S. v. Abu Zubaydah*, No. 20-827, at 12-15.

CONCLUSION

The Court should affirm the court of appeals' judgment, and hold that section 1806(f) displaces the state-secrets privilege for evidence relating to electronic surveillance and prohibits state-secrets dismissals.

Dated: September 28, 2021

Respectfully submitted,

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