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 CONSTITUTIONAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici are legal scholars who teach, research, and publish about freedom of religion and the Religion Clauses. *Amici* have an interest in promoting a robust conception of free exercise that protects all religious individuals, including religious minorities, and in ensuring that the core guarantee of religious liberty that was central to the Framers' conception of fundamental rights is safeguarded by the courts. The names of individual *amici* are listed in the Appendix.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In seeking relief under the First Amendment's Free Exercise Clause, the Plaintiffs-Respondents ("Plaintiffs") have asked the judiciary to fulfill "this country's commitment to serving as a refuge for religious freedom." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring).

The government grounds its efforts to deny Plaintiffs their day in court on the assertion that the state secrets privilege is "firmly rooted in the Constitution" and the Executive's Article II powers, seeking to shield themselves behind the patina of constitutional protections. *See* Pet'rs' Br. at 2-3, 35-36, 42-47. As the court below explained, however, the state secrets privilege is merely an "evidentiary rule rooted in common law, *not* constitutional law." *Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015, 1045 (9th Cir.

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[1] All parties have consented to the filing of this brief. *Amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

2020); *see also* Resp'ts' Br. 4, 24-25, 58-63. And even if the state secrets privilege has constitutional "overtones," *Fazaga*, 965 F.3d at 1045, the privilege is not the sole constitutional value at play in this case. On the other side of the equation lies Plaintiffs' right to free exercise, a fundamental right inextricable from the very fabric of our Nation—as well as the judiciary's sacrosanct role in adjudicating constitutional claims. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 532-37 (2004) (plurality opinion).

It is now this Court's responsibility to ensure that the Framers' "commitment to the free exercise of religion as an unalienable right, existing prior to and above ordinary law," is not rendered lip service by the Executive's mere invocation of the state secrets privilege. *Korte v. Sebelius*, 735 F.3d 654, 673 (7th Cir. 2013). The "bedrock constitutional right" of free exercise, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring in the judgment), cannot be so easily cast aside.

ARGUMENT

I. THE FUNDAMENTAL CONSTITUTIONAL PROMISE OF RELIGIOUS LIBERTY IS AT STAKE IN THIS CASE.

Plaintiffs have alleged that the government subjected them to a "dragnet investigation" "[o]ver the course of fourteen months" that "indiscriminately collect[ed] personal information on hundreds and perhaps thousands of innocent Muslim Americans in Southern California," "simply because the targets were Muslim." Joint Appendix ("J.A.") 61-62. As alleged, through a confidential paid informant, the government conducted extensive electronic surveillance on Plaintiffs, amassing "hundreds of hours of video recordings that captured the interiors of mosques,

homes, businesses, and the associations of hundreds of Muslims"—because they were Muslims. J.A. 108. The government also recorded "thousands of hours" of "conversations," as well as "public discussions, groups, classes, and lectures occurring in mosques and at other Muslim religious and cultural events"—because the targets were Muslims. *Id.* The informant was told to "gather as much information on as many people in the Muslim community as possible," and even given daily quotas for the number of Muslims from whom he should obtain contact information. J.A. 93-94, 106. If the informant happened to gather information on non-Muslims, the FBI discarded that information. J.A. 103.

These allegations, if true,[2] would represent as deep an afront to the very character of this nation as can be envisioned. This Court has "time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship." *Board of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 714 (1994) (O'Connor, J., concurring in part and concurring in the judg-

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[2] To be sure, the FBI's confidential informant has already submitted sworn declarations in this case verifying many of Plaintiffs' religious discrimination allegations. For example, the informant declared that his FBI handlers directed him to "meet and get contact information for a certain number of Muslims per day," J.A. 172, to "gather as much information on as many people in the Muslim community as possible," J.A. 173, to "get close to . . . anyone from any mosque without any specific target," J.A. 180, and to "enter and observe Muslim schools whenever possible," J.A. 181. He also averred that his FBI handlers "set aside any non-Muslims who were identified through surveillance [he] performed," J.A. 182, that they "explicitly told [him] that Islam was a threat to America's national security," and that they "were only interested in Muslims," J.A. 182.

ment). To specifically "single[] out for special burdens" an entire community of people "on the basis of [their] religious calling" would be a "profound" "indignity" striking at the heart of what the First Amendment was designed to prohibit. *Locke v. Davey*, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting).

Indeed, it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause of the First Amendment." *Bowen v. Roy*, 476 U.S. 693, 703 (1986). The Framers saw the right to practice religion freely, without government interference, as one of the most crucial rights the new nation would protect. "To them, the freedom to follow religious dogma was one of this nation's foremost blessings, and the willingness of the nation to respect the claims of a higher authority than 'those whose business it is to make laws' was one of the surest signs of its liberality." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1517 (1990). To the Framers, the right to worship freely was universal and extended to all faiths. "As John Adams put it, religious freedom 'resides in Hindoos and Mahometans, as well as in Christians; in Cappadocian monarchists, as well as in Athenian democrats; in Shaking Quakers, as well as in . . . Presbyterian clergy; in Tartars and Arabs, Negroes and Indians'—indeed in '[all] the people of the United States.'" John Witte, Jr. & Joel A. Nichols, *"Come Now Let Us Reason Together": Restoring Religious Freedom in America and Abroad,* 92 Notre Dame L. Rev. 427, 446 (2016) (quoting Letter from John Adams to John Taylor (Apr. 15, 1814)).

The Framers actualized this broad vision of religious freedom through the Free Exercise Clause,

which, together with the Establishment Clause, constitute our "first freedoms," taking "pride of place in our hierarchy of constitutional values." Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 Cardozo L. Rev. 1243, 1243 (2000).

The Free Exercise Clause established a "guarantee that government may not unnecessarily hinder believers from freely practicing their religion" and placed "limits [on] the government's ability to intrude on religious practice." *City of Boerne v. Flores*, 521 U.S. 507, 549-50 (1997) (O'Connor, J., dissenting). This Court has embraced the Framers' vision of ensuring broad protections for the free exercise of religion, treating "our Nation's fundamental commitment to individual religious liberty," embodied in the First Amendment, as axiomatic. *See Emp. Div. v. Smith*, 494 U.S. 872, 891 (1990) (O'Connor, J., concurring in the judgment). It has made clear that this protection extends to all, regardless of their faith—but with special concern for the rights of those practicing minority or even disfavored religions, as "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility." *Id.* at 902; *accord Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). The Court has insisted on giving the Free Exercise Clause "broad meaning" "in the light of its history and the evils it was designed forever to suppress." *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 14-15 (1947); *see also Church of the Lukumi Babalu Aye*, 508 U.S. at 532 (noting that "it was 'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause'" (citation omitted)).

Moreover, this Court has long noted that the Free Exercise Clause's "purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963). The Framers expressed that purpose through the provision's text, as "the ordinary meaning of 'prohibiting the free exercise of religion' was [in 1791] (and still is) forbidding or hindering unrestrained religious practices or worship." *Fulton*, 141 S. Ct. at 1896 (Alito, J., concurring). Accordingly, this Court has "made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot" act in a manner that is "hostile to the religious beliefs of affected citizens," *Masterpiece Cakeshop*, 138 S. Ct. at 1731, since any such intrusion on religious liberty "is odious to our Constitution," *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017).

This commitment to prohibiting government intrusion on religious liberty has held steadfast even when courts may otherwise be inclined to defer to the political branches. As Justice Kavanaugh recently noted, even when faced with an "emergency or crisis" usually best left to the "politically accountable officials," any "judicial deference" to which those politically accountable officials may be entitled "does not mean wholesale judicial abdication, especially when important questions of religious discrimination . . . are raised." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 73-74 (2020) (Kavanaugh, J., concurring).

Although there is no dispute here that the Executive may invoke, and has invoked, the state secrets privilege, that Executive prerogative does not require on the other end "judicial abdication." *Id.* at 74. As

Plaintiffs have cogently explained, the Foreign Intelligence Surveillance Act ("FISA") provides a ready framework with which to adjudicate their religious discrimination claims, notwithstanding the invocation of the *Reynolds* state secrets privilege. If it were otherwise, the rights so deeply enshrined in the First Amendment would be without a remedy whenever the Executive claimed the privilege, thereby reducing these fundamental freedoms—inextricable from the very Founding of the nation—to "a meaningless scholasticism." *Wood & Selick v. Compagnie Generale Transatlantique*, 43 F.2d 941, 943 (2d Cir. 1930) (Hand, J.).

II. TO GIVE FULL EFFECT TO THE FREE EXERCISE CLAUSE, INDIVIDUALS WHOSE RELIGIOUS LIBERTIES ARE INFRINGED MUST BE PROVIDED AN AVENUE TO SEEK JUDICIAL REDRESS.

As fundamental to the nation's system of laws as the right to free exercise is the "right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); *see also, e.g.*, *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 800 (2021) (a plaintiff subject to a violation of a legal right "must of necessity have a means to vindicate and maintain [the right]" (alteration in original)). Religious liberty rights would be a dead letter, no matter how prominently displayed in the text of the First Amendment, if they could not be enforced in court. The government's efforts to shut the courthouse doors to Plaintiffs' religious discrimination claims threatens to bring about this precise scenario. If it is given sanction by this Court, the government will have every opportunity and incentive to employ the same tactic in future cases involving the alleged targeting of religious individuals, be they

Muslims, Catholics, Jews, Mormons, Sikhs, Buddhists or otherwise. Law enforcement officials will know, when turning their sights on adherents of disfavored faiths, that they are functionally immune from suit no matter how clearly established the laws they are going to be violating, so long as they conduct their activities under the banner of national security and a court accepts the government's claim of secrecy.

The Framers would be surprised to learn that Plaintiffs' free exercise claims are barred, not on their merits but from being heard at all, simply because the government's actions are deemed "secret." By "adopt[ing] and incorporat[ing] the widely-recognized natural and inalienable right of each person to worship God according to his or her own conviction and conscience" into the Constitution, the Framers turned the idea of religious freedom into a legally protected right. E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 Penn St. L. Rev. 485, 488 (2009). As this Court has explained, the "very purpose" of placing religious freedom within the Bill of Rights was to "withdraw" that "fundamental right[]" "from the vicissitudes of political controversy, to place [it] beyond the reach of majorities and officials and to establish [it] as [a] legal principle[] to be *applied by the courts*." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (emphasis added).

Indeed, this Court has repeatedly made clear that judicial fora are presumptively open to litigants seeking to vindicate their constitutional rights. *See, e.g.*, *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 681 n.12 (1988) (observing that construing a statute "to deny a judicial forum for constitutional claims" would raise "serious constitutional question[s]"); *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975) (noting

that a restriction on judicial review of constitutional challenges, whereby "absolutely no judicial consideration of the issue would be available," would be "extraordinary"). Because the judiciary is the "ultimate interpreter of the Constitution," it is the judiciary's "responsibility" to review claims alleging violations of constitutional rights. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

Cases concerning the Religion Clauses are no exception. By one commentator's count, since *Reynolds v. United States*, 98 U.S. 145 (1878), the Court's first Religion Clauses case,[3] this Court has decided at least "115 cases in which at least four Justices considered the Free Exercise or Establishment Clause (or both) to raise substantial issues." Mark David Hall, *Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases*, 85 Or. L. Rev. 563, 565 (2006).

Claimants alleging religious discrimination under the First Amendment have long been able to at least have their day in court, if not always succeed on the merits. *See, e.g.*, *Niemotko v. Maryland*, 340 U.S. 268, 269, 272-73 (1951) (Jehovah's Witnesses successfully challenged convictions stemming from discriminatory refusal to grant park permit); *McDaniel v. Paty*, 435 U.S. 618, 621, 629 (1978) (Baptist minister won challenge of state law disqualifying ministers from hold-

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[3] An earlier case involving the Free Exercise Clause was decided in 1845, but because the Bill of Rights was only applied to the federal government at the time, the Court merely stated that "[t]he Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws." *Permoli v. Municipality No. 1 of City of New Orleans*, 44 U.S. (3 How.) 589, 609 (1845).

ing certain public offices); *Church of the Lukumi Babalu Aye*, 508 U.S. at 524-28, 547 (adherents to the Santeria religion won challenge to city ordinances targeting a faith practice); *Locke*, 540 U.S. at 715-18 (student sued state officials for refusing to award a scholarship solely because he was pursuing a devotional theology degree); *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 65-67 (per curiam) (religious groups granted injunction against New York governor's COVID-19-related order as discriminatory toward houses of worship).

In a legal system where "[r]ights. . . do not exist in a vacuum," but rather "to protect persons from injuries to particular interests," *Carey v. Piphus*, 435 U.S. 247, 254 (1978), claimants have been provided a suite of tools to facilitate vindicating their religious freedom rights in federal court. Congress enacted Section 1983, for example, specifically to provide an avenue of judicial relief to redress constitutional injury. Indeed, the "very purpose" of Section 1983 was to "interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972); *see also, e.g.*, *Church of the Lukumi Babalu Aye*, 508 U.S. at 528-32 (Section 1983 suit brought to vindicate religious discrimination claim); *cf. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (implied cause of action for constitutional deprivation by federal officers). Similarly, Congress enacted Section 1985 to provide a cause of action for conspiracies to interfere with civil rights, with the purpose of "stifl[ing] the serious class-based deprivation of constitutional rights by private parties." *Trawinski v. United Tech.*, 313 F.3d 1295,

1299 (11th Cir. 2002); *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 416-17, 427, 431 (2d Cir. 1995) (religion-based Section 1985 claim).

Congress has also specifically sought to expand religious liberty claims by enacting such laws as the Religious Freedom Restoration Act of 1993 ("RFRA"), *codified at* 42 U.S.C. § 2000bb *et seq.*, and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), *codified at* 42 U.S.C. § 2000cc *et seq. See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693-96 (2014) (explaining that "Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty" by subjecting even laws of "general applicability" to strict scrutiny if they "substantially burden a person's exercise of religion," and noting that RLUIPA is to be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted [by statute] and the Constitution").

It would be perverse, in light of this national history and the federal courts' role as "guardians of the people's federal rights," *Mitchum*, 407 U.S. at 242, to allow the dismissal of religious discrimination claims due solely to the Executive invocation of an evidentiary rule, without any judicial review of Plaintiffs' serious and troubling allegations. "[P]art of the enormous historical significance of the Free Exercise Clause is that it was one of the first constitutional embodiments of a principle of equality that was later broadened to other spheres." Bret Boyce, *Equality and the Free Exercise of Religion*, 57 Clev. St. L. Rev. 493, 523 (2009). Denying religious adherents a legal remedy for the egregious violation of that "principle of equality" would make a mockery of not only that principle, enshrined in the First Amendment and since "broadened to other spheres," *id.*, but also that "very

essence of civil liberty"—the "right of every individual to claim the protection of the laws." *Marbury*, 5 U.S. (1 Cranch) at 163.

III. To Vindicate The Framers' Intent To Protect Free Exercise, This Court Cannot Permit The Executive's Mere Invocation Of National Security Concerns To Block Judicial Review.

The availability of meaningful judicial review of the government's alleged violation of bedrock constitutional rights cannot be permitted to disappear simply because, as here, the Executive asserts national security interests. *Cf., e.g.*, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 191, 196 (2012); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

"[W]hile the [Executive's] tasks include the protection of the national security and the maintenance of the secrecy of sensitive information, the judiciary's tasks include the protection of individual rights." *McGehee v. Casey*, 718 F.2d 1137, 1149 (D.C. Cir. 1983); *see also N.Y. Times Co. v. United States*, 403 U.S. 713, 718-20 (1971) (Black, J., concurring) (emphasizing the need for courts to scrutinize the government's assertion of national security interests where First Amendment interests are at stake). Thus, when constitutional rights and individual liberties are "at stake," even in the context of a national security interest as strong as the war on terror, the Constitution "most assuredly envisions a role" for the judicial branch, "[w]hatever power the United States Constitution envisions for the Executive." *Hamdi*, 542 U.S. at 532-37.

Put simply, the "fiat of a government official . . . cannot displace the judicial obligation to enforce constitutional requirements." *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 882-83 (2d Cir. 2008), *as modified* (Mar. 26, 2009); *see also, e.g.*, *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 313 (D.C. Cir. 2014) ("[W]e do not automatically decline to adjudicate legal questions if they may implicate foreign policy or national security."). Thus, while courts have afforded significant deference to assertions of Executive privilege, they have also maintained a critical eye over the scope and validity of such assertions. In *United States v. Nixon*, for example, this Court emphasized that an assertion of executive privilege is not immune from judicial review. 418 U.S. 683, 706 (1974). The Court rejected the President's assertion of an "absolute privilege of confidentiality for all Presidential communications," instead weighing the Presidential privilege against "the legitimate needs of the judicial process" and "resolv[ing] those competing interests in a manner that preserves the essential functions of each branch." *Id.* at 703, 707.

Similarly, in the context of requests for government records under the Freedom of Information Act, *codified at* 5 U.S.C. § 552, courts review, routinely and as a matter of course, an agency's invocation of the national security exemption to withhold information. *See, e.g.*, *N.Y. Times Co. v. U.S. Dep't of Just.*, 756 F.3d 100, 115, 120 (2d Cir. 2014) (determining, after *in camera* review, that certain Department of Defense documents were required to be disclosed); *ACLU v. Dep't of Def.*, 492 F. Supp. 3d 250, 261-62 (S.D.N.Y. 2020) (rejecting the agency's privilege claims after review of a classified submission). Courts have also emphasized the need for "meaningful judicial review" of executive branch decisions to issue National Security

Letters ("NSL") in light of the First Amendment concerns at stake. *Mukasey*, 549 F.3d at 882. NSLs are administrative subpoenas to electronic communication service providers for non-content information, typically accompanied by a nondisclosure requirement forbidding the recipient from disclosing the request on the grounds that doing so could endanger national security or cause certain other enumerated harms. *See* 18 U.S.C. § 2709. While courts "will normally defer to the Government's considered assessment of why disclosure in a particular case may result in an enumerated harm related to such grave matters as international terrorism or clandestine intelligence activities, [a court] cannot . . . uphold a nondisclosure requirement on a conclusory assurance that such a likelihood exists." *Mukasey*, 549 F.3d at 881.

So, too, courts must scrutinize the Executive's assertion of the state secrets privilege. "[A] court must not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role." *In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989). Courts thus routinely undertake a "skeptical" *in camera* review of classified affidavits or other materials to ensure the privilege is properly applied. *Reynolds*, 345 U.S. at 10; *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) (judiciary must "review the [secret] documents with a very careful, indeed a skeptical, eye"); *see also, e.g.*, *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983) ("it is essential that the courts continue critically to examine" assertions of the privilege).

The judiciary's role, of course, is not limited to assessing the validity of privilege assertions—its "task[] [of] protect[ing] . . . individual rights" would be left

unfulfilled if dismissal were to automatically follow invocation of the *Reynolds* privilege. *McGehee*, 718 F.2d at 1149. Indeed, courts do "not look[] favorably upon broad assertions by the United States that certain subject matters are off-limits for judicial review," recognizing that "[d]ismissal of a suit, and the consequent denial of a forum without giving the plaintiff her day in court, . . . is indeed draconian." *In re Sealed Case*, 494 F.3d 139, 151 (D.C. Cir. 2007) (alteration in original) (quoting *In re United States*, 872 F.2d at 477). And more generally, this Court has warned that "national-security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'" *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985)).

Thus, taking a measured approach against the risk of government overreach, some courts have specifically maintained the availability of a judicial forum to vindicate rights even in the face of the state secrets privilege. For example, in *Ellsberg*, the court—despite upholding most of the government's assertions of the state secrets privilege—reversed the district court's dismissal of the action, holding that key remaining issues could be "resolved by the trial judge through use of appropriate *in camera* procedures." 709 F.2d at 69; *see also id.* at 69 n.77 (noting that the "legitimacy of recourse to such [*in camera*] procedures, when feasible and otherwise unavoidable, is beyond dispute"). In *In re Sealed Case*, the court likewise held that the "evidentiary privilege" should not be used to "eliminate substantive rights from the outset." 494 F.3d at 151. Rather, the district court was di-

rected on remand to assess the merits of the government's proffered defense in "appropriately tailored *in camera* review of the privileged record." *Id.*[4]

Similarly, in *In re United States*, the court endorsed the district court's refusal to dismiss the action (and its decision to take an "item-by-item" determination of privilege) because "with evidentiary control," the "litigation could proceed without jeopardizing national security." 872 F.2d at 478; *see also id.* at 481-82 (Ginsburg, J., concurring and dissenting) (endorsing the *Ellsberg* court's decision to "consider the merits of the privileged defense on an *ex parte, in camera* basis" and noting that "[t]here is no reason why the Government in this case, to the extent that its defense rests upon materials covered by its state secret privilege, cannot use the *in camera* procedure suggested in *Ellsberg*").

In an analogous context, this Court rejected the CIA Director's argument that allowing the constitutional claims of an allegedly wrongfully terminated plaintiff to proceed would impermissibly entail "extensive 'rummaging around' in the [CIA's] affairs to the detriment of national security." *Webster v. Doe*, 486 U.S. 592, 594-96, 604 (1988). The Court held instead that the National Security Act, on which the CIA Director relied, could not be read to preclude constitutional claims, and that the district court's "latitude to

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[4] In *Molerio v. FBI*, then-Judge Scalia dismissed a First Amendment claim not simply because the state secrets privilege applied, but because in the course of the *in camera* analysis of whether the privilege applied, the court had assured itself that reviewed evidence rendered the plaintiff's First Amendment claim meritless—that is, the court considered the merits of the case using the same *in camera* procedures that it had to undertake in any event to assess the validity of the privilege assertion. 749 F.2d 815, 825 (D.C. Cir. 1984).

control any discovery process" would be sufficient to balance the "need for access to proof [to] support a colorable constitutional claim" and the CIA's needs for "confidentiality." *Id.* at 604. The *ex parte*, *in camera* procedure provided through FISA here offers exactly the kind of evidentiary "control," *id.*, that obviates the "draconian" recourse of denying a forum to Plaintiffs "without giving [them their] day in court," *In re Sealed Case*, 494 F.3d at 151.[5]

This is particularly so given that the state secrets privilege invoked here is a mere evidentiary rule. *See Fazaga*, 965 F.3d at 1045; Resp'ts' Br. 4, 24-25, 58-63. The invocation of such a rule should not be permitted to completely deny a forum for judicial review of allegations of violations of fundamental constitutional rights, as this Court has often recognized. For example, in *Washington v. Texas*, the Court weighed the Sixth Amendment right to compulsory process for ob-

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[5] The Individual-Capacity Respondents argue that other constitutional interests—due process and the Seventh Amendment jury right—should also factor into this Court's analysis. Tidwell & Walls Br. at 21-30; Allen, Armstrong & Rose Br. at 9-13. To the extent the FBI's decision to invoke the state secrets privilege threatens to infringe its own agents' constitutional rights, "this is a regrettable position for the government to be placed in [but] is in part caused by its own doing." *Cf. United States v. Dawlett*, 787 F.2d 771, 776 n.7 (1st Cir. 1986). That should not weigh in favor of, or result in, denying Plaintiffs the opportunity to vindicate their own constitutional rights; rather, the government should bear the burden of accommodating the interests on its side. Allowing the government and its agents to violate express constitutional rights and then rely on other constitutional doctrines to escape any responsibility for their actions would, moreover, result in "gamesmanship" that unacceptably "leaves plaintiffs with *no* court in which to pursue their claims." *Cf. Arrigoni Enterprises, LLC v. Town of Durham*, 136 S. Ct. 1409, 1411 (2016) (Thomas, J., dissenting from denial of certiorari).

taining supporting witnesses against state evidentiary rules preventing defendants from introducing accomplices as witnesses. 388 U.S. 14, 22 (1967). In permitting the introduction of such accomplice testimony, the Court made clear that "[t]he Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." *Id.* at 23.

More recently, in *Pena-Rodriguez v. Colorado*, the Court held that the "no-impeachment rule"—which generally prohibits a juror from testifying about the jury's deliberations during an inquiry into the validity of a verdict or indictment, and with centuries-old roots in the common law—must yield to constitutional values where a "juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant." 137 S. Ct. 855, 861, 864-65, 869 (2017). Citing the Fourteenth Amendment and noting that its "central purpose . . . was to eliminate racial discrimination emanating from official sources in the States," the Court held that allowing racial bias to persist in the justice system would result in "loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." *Id.* at 867, 869. Thus, to preserve the fundamental rights enshrined by the Sixth and Fourteenth Amendments, that Court held that the no-impeachment rule must "give way" in cases of clear racial bias and permit the trial court to "consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Id.* at 869.

Here, the national "commitment" to religious freedom is no less an imperative of our "heritage" than the

Fourteenth Amendment's goal of eradicating racial bias. *Id.* at 867. And just as even centuries-old common law rules like the no-impeachment rule must "give way" when their operation would conflict with core constitutional rights, so here the state secrets privilege must not be allowed to completely foreclose Plaintiffs' ability to vindicate their First Amendment rights. To paraphrase Justice Scalia, "we do not think the Framers meant to leave the [First] Amendment's protection[s] to the vagaries of the rules of evidence." *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

As this Court has long recognized, "[t]he danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is . . . real." *Mitchell*, 472 U.S. at 523. The judiciary must not simply bow to the Executive's assertion of privilege and allow the shield of "national security" to potentially "cover a multitude of sins." *Id.* Indeed, Congress, through FISA—specifically, the *ex parte*, *in camera* process provided by 50 U.S.C. § 1806(f)—has already provided a means to protect the Executive's legitimate concerns motivating the assertion of the state secrets privilege while providing a forum for plaintiffs to vindicate their First Amendment rights, without an all-or-nothing choice between disclosure and dismissal.

This Court, in other words, should resolve this case "in a manner that preserves the essential functions of each branch," *Nixon*, 418 U.S. at 707—by giving effect to this *congressionally* directed procedure for obtaining meaningful *judicial review* when the *Executive* invokes national security in an effort to quash claims sounding in fundamental rights.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted.

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