No. 21-1017

In The Supreme Court of the United States

CAROLYN JEWEL, TASH HEPTING, ERIK KNUTZEN, YOUNG BOON HICKS (AS EXECUTRIX OF THE ESTATE OF GREGORY HICKS), AND JOICE WALTON,

Petitioners,

v.

NATIONAL SECURITY AGENCY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

THOMAS E. MOORE III
HAYNES AND BOONE, LLP
525 University Avenue
Suite 400
Palo Alto, CA 94301
Telephone: (650) 687-8800

RACHAEL E. MENY
BENJAMIN W. BERKOWITZ
KEKER, VAN NEST & PETERS LLP
633 Battery Street
San Francisco, CA 94111
Telephone: (415) 391-5400

ARAM ANTARAMIAN
LAW OFFICE OF ARAM ANTARAMIAN
1714 Blake Street
Berkeley, CA 94703
Telephone: (510) 841-2369

RICHARD R. WIEBE
Counsel of Record
LAW OFFICE OF RICHARD R. WIEBE
425 California Street
Suite 2300
San Francisco, CA 94104
Telephone: (415) 433-3200
wiebe@pacbell.net

CINDY A. COHN
DAVID GREENE
LEE TIEN
KURT OPSAHL
ANDREW CROCKER
AARON MACKEY
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

The Court should grant the petition. *U.S. v. Husayn* (*Abu Zubaydah*), 142 S.Ct. 959 (2022), and *FBI v. Fazaga*, 142 S.Ct. 1051 (2022), do not resolve the questions presented.

The stakes are high. At issue here is *suspicionless* domestic mass surveillance. The government claims the right to surveil all of us, continuously and without any individualized suspicion or articulable justification. Without this Court's intervention, the lower courts have created a broad national-security exception to the Constitution that allows all Americans to be spied upon by their government while denying them any viable means of challenging that spying.

ARGUMENT

I. Question Presented No. 1: Under *Abu Zubaydah*, The State-Secrets Privilege Does Not Exclude Plaintiffs' Public Evidence

Abu Zubaydah addressed whether the state-secrets privilege bars compelled disclosure from the government or government contractors of evidence relating to "information that has entered the public domain" but that has never been officially confirmed. *Abu Zubaydah*, 142 S.Ct. at 968. *Abu Zubaydah* held that the government can block discovery relating to facts that are public, if the government has not officially confirmed those facts and if disclosure of the evidence poses "a reasonable danger of harm to national security." *Id*. at 967.

Abu Zubaydah also provides that official confirmation occurs whenever a government insider, including contractors or employees privy to the secret, disclose the secret. *Abu Zubaydah*, 142 S.Ct. at 969, 970-71. Once the information has been confirmed by the government or a government insider, there is no further potential for harm because the information is both public and confirmed. *Id*. at 968-69. Thus, the state-secrets privilege does not apply to evidence relating to facts that the government or a government contractor has officially confirmed.

Under *Abu Zubaydah*, all of the evidence establishing petitioners' standing and showing their communication providers AT&T and Verizon participated in the surveillance falls outside the state-secrets privilege and is admissible because it is either: (1) public evidence as to which the government has never asserted the state secrets privilege; (2) evidence officially disclosed by the government; or (3) evidence publicly disclosed and confirmed by a government contractor.

1. Petitioners presented extensive public evidence of the interception of their Internet communications and Internet communication records by the government's "Upstream" suspicionless mass surveillance; evidence that the government never sought to exclude under the state-secrets privilege. Pet. 24-28.

The district court refused to adjudicate petitioners' standing because it concluded the state-secrets privilege made petitioners' claims nonjusticiable and required their dismissal. Pet. App. 31a, 32a-34a, 41a-42a.

However, nothing in *Abu Zubaydah* or state-secrets jurisprudence provides any basis for excluding this public evidence, or for dismissing petitioners' claims.

2. a. The evidence showing the government's collection of petitioners' phone records is also strong. In a FOIA lawsuit seeking only NSA documents, the government disclosed to the *New York Times*, and the *Times* published, an NSA document ("the NSA document," ER 869-907) establishing the government's acquisition of the phone records of AT&T's and Verizon's customers, including petitioners. Pet. 23-24; ER 147-48, ¶¶2-6; ER 896-97. Because of this official government disclosure, AT&T's and Verizon's participation in the phone-records program is not a state secret and the document cannot be excluded under the state-secrets privilege.

b. The government does not deny it produced the NSA document to the *Times*. Nonetheless, the government suggests that petitioners failed to authenticate it. Opp. 15.

That argument lacks merit: the government's disclosure fully authenticates the NSA document. Authentication "'does not erect a particularly high hurdle.'" *U.S. v. Dhinsa*, 243 F.3d 635, 658 (2d Cir. 2001). All it requires is "evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). Showing a government document "is from the office where items of this kind are kept" authenticates it. Fed. R. Evid. 901(b)(7)(B). And in *Abu Zubaydah*, the Court held the production of

government documents in litigation by the government or government contractors amounts to official confirmation of the secret facts in the documents; that was the basis on which it denied discovery. *Abu Zubaydah*, 142 S.Ct. at 968, 969. Accordingly, the NSA's production of the NSA document is proof of its authenticity and its NSA origin, "leav[ing] virtually no doubt as to the veracity of the information" and taking it out of the state-secrets privilege. *Id*. at 969.

c. The government argues that even if AT&T and Verizon did produce phone records, at most they did so in 2010 when BR 10-10, the FISC order referenced by the NSA document (ER 849), was in effect. Opp. 17. But that ignores the evidence.

The government admits that the phone-records program was the same in 2008 when petitioners filed their complaint as it was in 2010. "Since May 2006, the court has continuously renewed its authorization of the NSA's telephone records program approximately every ninety days." ER 201; *see also* ER 192, 197. The government made this admission in 2014, so from 2006 to 2014 the program was "continuously renewed," meaning there was no change during that period in the records collected by the phone-records program or the companies providing them. Just as AT&T and Verizon provided records in 2010, they had also done so in 2008.

d. In the face of this conclusive evidentiary record, the government offers only far-fetched and unsupported speculation. In the phone-records program, the

FISC issued "primary orders" authorizing the NSA to collect the records, and "secondary orders" directed to each phone company. The government hypothesizes without any foundation that perhaps the FISC, having issued the BR 10-10 primary order (ER 849), somehow forgot to issue to AT&T and Verizon the accompanying secondary orders referenced in the primary order (ER 851). Opp. 17.

The government's baseless speculation is rebutted by its own admission that the program was "continuously renewed" every three months from 2006 to 2014. ER 201. A gap in which the FISC issued no secondary orders and the NSA collected no phone records is inconsistent with that admission.

Additionally, the "compliance incident" discussed in the NSA document occurred with respect to phone records collected pursuant to BR 10-10. ER 896. If no records had been collected pursuant to BR 10-10, there could not have been any compliance incident.

e. Equally baseless is the government's speculation that BR 10-10 somehow excluded petitioners' phone records from those that AT&T and Verizon provided. Opp. 17-18. To the contrary, BR 10-10 required "all" call detail records be provided for both domestic and international calls. ER 851-52. "All" does not mean "slightly less than all."

The government seizes on this statement in the PCLOB Section Report 215 to argue that petitioners' records may have been omitted: "At least one telephone company presently is ordered to provide less than all

of its call detail records." ER 177 n.29; Opp. 18. But the word "presently," which the government omits, deprives this statement made in 2014 of probative value regarding conditions in 2008 or 2010.

Even more significantly, primary order BR 13-158 that the PCLOB Section 215 Report cites includes *all* calls by *all* customers made within the U.S.: "*all* call detail records or 'telephony metadata' created by [redacted company name] for communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls." *In re Application of the FBI for an Order Requiring the Production of Tangible Things*, No. BR 13-158 (FISC Oct. 11, 2013), Primary Order at 4 (italics added); *see* ER 177 n.29. It excludes only foreign-to-foreign calls.

3. Unaccountably, the Ninth Circuit concluded that petitioners were not prejudiced by the district court's exclusion of evidence. The notion that petitioners were not prejudiced by the exclusion of the NSA document the government disclosed to the *Times* unambiguously showing their standing does not bear scrutiny. And the Ninth Circuit's conclusion that it need not even decide whether 18 U.S.C. § 2712 entitled petitioners to rely on the classified evidence to establish their standing is an abdication of duty. The Ninth Circuit's rulings reflect a serious lack of care in its handling of this case.

4. *Abu Zubaydah* explains that disclosures by former government contractors amount to official confirmation of secret information and take the

information out of the state-secrets privilege. "Confirmation by such an insider is different in kind from speculation in the press or even by foreign courts because it leaves virtually no doubt as to the veracity of the information that has been confirmed." *Abu Zubaydah*, 142 S.Ct. at 969. "[C]onfirmation (or denial) [by a government contractor] . . . would be tantamount to a disclosure from [the government] itself." *Id*. at 971.

The *Guardian* published a draft NSA Inspector General's report. Pet. 28; ER 91-143. The report confirms the participation of petitioners' carriers AT&T and Verizon in the government's Internet-content-interception, Internet-records, and phone-records programs. AOB 29, 35-36, 38; ER 121-22, 128-29, 1025-30.

The authenticity of this government document has been verified by former government contractor Edward Snowden. ER 87-88. Under *Abu Zubaydah*, Snowden's confirmation of the government document removes it from the state-secrets privilege. *Abu Zubaydah*, 142 S.Ct. at 969.

5. Question Presented No. 1 encompasses another issue not resolved by *Abu Zubaydah* or *Fazaga*: whether the state-secrets privilege authorizes the dismissal of an action as nonjusticiable outside the government-contracting context. Pet. 2-4, 29, 35; *see General Dynamics Corp. v. U.S.*, 563 U.S. 478, 485-86, 492 (2011).

Fazaga reserved this issue. *Fazaga*, 142 S.Ct. at 1063. The issue was determinative below: the district court did not decide whether the evidence established

petitioners' standing because it concluded the lawsuit was nonjusticiable under the state-secrets privilege and must be dismissed. Pet. 29.

II. Question Presented No. 2: 18 U.S.C. § 2712 Displaces The State-Secrets Privilege

A. In Section 2712, Congress Used Clear Statutory Language To Displace The State-Secrets Privilege

The Court has never addressed Question Presented No. 2: whether 18 U.S.C. § 2712 displaces the state-secrets privilege. Section 2712, enacted as part of the USA PATRIOT Act of 2001, creates a cause of action for victims of unlawful national-security surveillance and special procedures for using state-secrets evidence to litigate those claims.

In *Fazaga*, the respondents did not raise and the Court did not address whether section 2712 displaces the state-secrets privilege.

Fazaga addressed only a different statutory provision, 50 U.S.C. § 1806(f), and found that it does not displace the state-secrets privilege. The Court concluded that section 1806(f) focuses on proceedings where the government seeks to use surveillance evidence, and where the trial court consequently must determine the lawfulness of the surveillance in order to rule on its admissibility. *Fazaga*, 142 S.Ct. at 1057-58, 1061.

The Court determined that section 1806(f) does not displace the state-secrets privilege by applying the

established standard for statutory displacement of federal common law, asking whether Congress used "clear statutory language" to displace the state-secrets privilege. *Fazaga*, 142 S.Ct. at 1061.

As the Court has repeatedly held, this standard is a much lower hurdle than the "clear statement" required when Congress preempts *state* law. "Legislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest [congressional] purpose' demanded for preemption of state law." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011). "Congress need not 'affirmatively proscribe' the common-law doctrine at issue." *U.S. v. Texas*, 507 U.S. 529, 534 (1993). Congress need not "state precisely any intention to overcome" the state-secret privilege. *Astoria Federal Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). All that is required is that "'a statutory purpose to the contrary is evident.'" *Id*.

Applying this standard shows that Congress displaced the state-secrets privilege with clear statutory language providing for the use of state-secrets evidence in lawsuits brought under section 2712. Unlike 50 U.S.C. § 1806, section 2712 is a purely remedial statute: its sole purpose is to afford a remedy to persons like petitioners who have been subjected to unlawful surveillance by the government.

Subsection (a) imposes liability on the government for unlawful surveillance. 18 U.S.C. § 2712(a).

Subsection (b), entitled "Procedures," creates procedures governing unlawful-surveillance lawsuits

brought under subsection (a). 18 U.S.C. § 2712(b). Section 2712(b)(4) provides:

> Notwithstanding any other provision of law, the procedures set forth in section 106(f) [50 U.S.C. § 1806(f)], 305(g), or 405(f) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.) shall be the exclusive means by which materials governed by those sections may be reviewed.

The subject matter of section 2712(b)(4) are the "materials governed by" section 1806(f). 18 U.S.C. § 2712(b)(4). The materials governed by section 1806(f) are any materials whose "disclosure . . . would harm the national security." § 1806(f). These are the same materials that are otherwise governed by the state-secrets privilege. *Abu Zubaydah*, 142 S.Ct. at 963 (state-secrets "privilege allows the Government to bar disclosure of information that, were it revealed, would harm national security"). So section 2712(b)(4) and the state-secrets privilege address the same subject matter.

The "procedures set forth" in section 1806(f) are the procedures for *ex parte*, *in camera* review. As *Fazaga* explains, section 1806's *other* provisions narrowly limit the use to which the *ex parte*, *in camera* review procedures may be put when they are invoked under section 1806. Under section 1806, these procedures may be used only under specified circumstances and for specified purposes, such as determining a motion to suppress in a criminal case. *Fazaga*, 142 S.Ct. at 1061.

But section 2712 borrows section 1806(f)'s *ex parte*, *in camera* review procedures for a different and broader purpose. Section 2712 makes those procedures the "exclusive means" for "review" of state-secrets materials for any purpose, including deciding the merits of section 2712 claims.

Unlike section 1806, section 2712 does not impose any limits on the purposes for which the court may review state-secrets materials. It thus transcends the limitations on the use of section 1806(f)'s *ex parte*, *in camera* review procedures that the Court found in *Fazaga* were imposed by section 1806's other provisions.

Further unlike section 1806, section 2712 does not focus on the government's use of surveillance evidence, does not focus on admissibility determinations, and does not apply to criminal proceedings. Instead, it applies to only to civil lawsuits by private plaintiffs seeking relief for unlawful surveillance.

Section 2712(b)(4) and the state-secrets privilege are in clear conflict. They address the same subject matter—evidence whose disclosure might harm national security—but provide conflicting commands for how courts should handle that evidence.

Section 2712(b)(4) provides that state-secrets evidence "may be reviewed" for any purpose, so long as the court does so *ex parte* and *in camera*, thereby avoiding disclosure. But under the state-secrets privilege, once a court determines the privilege applies, it must exclude the evidence.

Congress dictated that section 2712(b)(4) should prevail over the state-secrets privilege. Section 2712(b)(4) provides that it applies "[n]otwithstanding any other provision of law," including the state-secrets privilege. This makes clear that for claims like petitioners brought under section 2712, section 2712(b)(4)—and not the state-secrets privilege—exclusively governs the use of state-secrets materials. Without section 2712(b)(4), section 2712 would have been a useless vehicle for remedying national-security surveillance violations.

B. Under Federal Rule of Evidence 501, Section 2712 Displaces The State-Secrets Privilege

Section 2712 additionally displaces the state-secrets privilege under the standard Congress established in Federal Rule of Evidence 501 for determining whether a statute displaces an evidentiary privilege. Rule 501 provides "[t]he common law . . . governs a claim of privilege unless any of the following provides otherwise: . . . a federal statute."

The plain meaning of "privilege" in Rule 501 includes the state-secrets privilege.[1] And section 2712

[1] The Court's 1972 proposed Federal Rules of Evidence included proposed Rule 509 defining the "secrets of state and other official information" privilege. [Proposed] Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 251 (1972).

Congress rejected the Court's proposed rules and enacted the Federal Rules of Evidence. It provided in Rule 501 that "the privilege of . . . [the] government . . . shall be governed by the

"provides otherwise" for the use, rather than exclusion, of state-secrets evidence, thereby displacing the state-secrets privilege. It tells a court presented with materials whose disclosure would harm national security that it may review those materials, rather than excluding them as the state-secrets privilege would. And a court may do so "[n]otwithstanding any other provision of law," including the state-secrets privilege. § 2712(b)(4).

III. Question Presented No. 3: *Fazaga* and *Abu Zubaydah* Do Not Address A Court Of Appeals' Duty To Review Classified Orders

The district court issued a classified dispositive order adjudicating petitioners' standing using all of the evidence, including the public evidence erroneously excluded under the state-secrets privilege and the classified evidence that section 2712 makes admissible. Pet. 40-42; Pet. App. 23a, 45a. On appeal, the Ninth Circuit failed to review and adjudicate this order. Pet. App. 1a-4a.

Because the district court's classified order, unlike its public order, is based on the entire body of evidence that petitioners were entitled to rely upon and because

---

principles of the common law" "[e]xcept as otherwise . . . provided by Act of Congress." Pub. L. No. 93-595, § 1, 88 Stat. 1926, 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) (Rule 501 encompasses the "secrets of state" privilege); S. Rep. No. 93-1277 (1974) (same).

it adjudicates petitioners' standing, the Ninth Circuit was required to review it.

The government argues that there was no need for the Ninth Circuit to review the classified order because it held that petitioners' public evidence failed to establish their standing. Opp. 19-20. But that holding, plainly wrong for all the reasons stated above, does not make the Ninth Circuit's failure to review the classified order harmless. The Ninth Circuit's standing determination was limited to only the public evidence; it was defective because it failed to use all the evidence, including the classified evidence section 2712 makes available.

CONCLUSION

The petition for a writ of certiorari should be granted.

May 2022

Respectfully submitted,

THOMAS E. MOORE III
HAYNES AND BOONE, LLP
525 University Avenue
Suite 400
Palo Alto, CA 94301
Telephone: (650) 687-8800

RACHAEL E. MENY
BENJAMIN W. BERKOWITZ
KEKER, VAN NEST
& PETERS LLP
633 Battery Street
San Francisco, CA 94111
Telephone: (415) 391-5400

RICHARD R. WIEBE
Counsel of Record
LAW OFFICE OF
RICHARD R. WIEBE
425 California Street
Suite 2300
San Francisco, CA 94104
Telephone: (415) 433-3200
wiebe@pacbell.net

ARAM ANTARAMIAN
LAW OFFICE OF
ARAM ANTARAMIAN
1714 Blake Street
Berkeley, CA 94703
Telephone: (510) 841-2369

CINDY A. COHN
DAVID GREENE
LEE TIEN
KURT OPSAHL
ANDREW CROCKER
AARON MACKEY
ELECTRONIC FRONTIER
FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333

Counsel for Petitioners