No. 20-827

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

V.

ZAYN AL-ABIDIN MUHAMMAD HUSAYN,
AKA ABU ZUBAYDAH, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
Ninth Circuit

BRIEF OF COUNCIL ON AMERICAN-ISLAMIC RELATIONS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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A. The Council on American-Islamic Relations

Founded in 1994, the Council on American-Islamic Relations has a mission to enhance understanding of Islam, protect civil rights, promote justice, and empower Muslim Americans. The Government often targets innocent Muslim-Americans for clandestine surveillance. CAIR represents those individuals when they seek to enforce their constitutional right to travel, among other things.

The Government often asserts state secret privilege in those cases. And while that assertion itself may seem inoffensive, it can mean that a case is dismissed without a court even testing the Government's claim. In other words, while it is possible that Government is violating the plaintiff's constitutional rights, the court does not even look to see if there are any state secrets at risk.

With no meaningful ability to test the government's state secrets claim, it can be invoked when no secrets – as *Reynolds* envisioned that concept – are at

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than amici and their counsel funded its preparation or submission. Both parties have consented to this brief.

issue. It can also cut off litigation where the merits could be reached even without the privileged information.

SUMMARY OF ARGUMENT

No branch of American government has a blank check. Our entire system of checks and balances is designed to prevent constitutional abuses. And while it is often appropriate for various branches to defer to another branch's judgment, it is not appropriate to defer blindly.

The Ninth Circuit's ruling stands for just that: a district court should at least look before it leaps. When the Government claims privilege, the district court should attempt to disentangle privileged and unprivileged information. But the district court here dismissed the Respondent's claims based solely on the Government's say-so. And while the Petitioner's brief and various dissents paint a picture of uncontrolled calamity caused by a tidal wave of sensitive information spilling into the public view, that has never happened as a result of a court's in camera review.

The Ninth Circuit's ruling is a common sense measure that appropriately balances the competing interests of national security and individual liberties.

ARGUMENT

I. Reynolds itself reveals why blind deference to the Government is a recipe for disaster.

The Reynolds court ruled that a group of widows could not obtain an accident report about their husbands deaths. This did not happen in a vacuum. Chief Justice Vinson warned that it was "a time of vigorous preparation for national defense," and that "air power is one of the most potent weapons in our scheme of defense, and that newly developing electronic devices have greatly enhanced the effective use of air power." *United States v. Reynolds*, 345 U.S. 1 at 10 (1953). The burgeoning Cold War with the Soviet Union demanded that our "full military advantage is to be exploited in the national interests." Because the plane contained sensitive electronic equipment, the Court denied the widows the report.

They widows would have to be satisfied with the Government's interrogatory answer about what caused the accident: "At between 18,500 or 19,000 feet manifold pressure dropped to 23 inches on No. one engine." *Reynolds v. United States*, 192 F.2d 987, 991 (3d Cir. 1951). The Government argued the pressure drop's cause was a state secret that could not be revealed.

In 2000, the Government declassified the report. The reason the pressure drop occurred? Garden variety negligence. Someone failed to properly make "changes in the exhaust manifold for the purpose of eliminating a definite fire hazard." Petition for Writ of Error Coram Nobis to Remedy Fraud Upon This Court at 9, *In re Herring*, 539 U.S. 940 (2003). This caused a large fire in engine and led to the fatal crash. The Air Force's investigation concluded that the aircraft was not "safe for flight" and should have never been in the air that day.

Had a court reviewed that document, the truth would have come out. The court could have redacted nearly the entire document and the widows still would have had the evidence they needed. No harm to state secrets would have been remotely possible.

Instead, lawyers and judges fought over a document that none of them had ever laid eyes on.[2] For all the courts knew the document could have contained anything from nuclear launch codes to lunch orders. And for all the Government's dire warnings, it ap-

[2] This is a particularly droll aspect of state secrets proceedings. Most of the time – as in this case – even the Government's own attorneys do not know what they are even arguing about. The lawyers and courts end up playing Deal or No Deal with civil liberties.

pears something much different was at issue: the embarrassment and shame from admitting a stupid mistake that killed six people. But the Government used fear of military disadvantage to cover it up.

One would think that such a revelation would lead to a fundamental reevaluation of how courts should handle invocations of state secrets. One might also think that this would make the Government somewhat more reserved in future cases. That does not appear to be the case.

Between 1937 and 2001, the Government invoked the privilege in 159 cases, averaging 2.4 per year. Daniel R. Cassman, *Keep It Secret, Keep It Safe: An Empirical Analysis of the State Secrets Doctrine*, 67 Stan. L. Rev. 1173, 1188 (2015). From 2002 to 2013, the Government asserted the privilege 137 times – an increase of roughly 400%. What's more, the courts uphold the privilege in whole in 67% of cases, and in part in 15% of cases. At the moment, it is unknown how many of these cases caused outright dismissals. But, if the Government prevails here, it would give every district court the right to immediately dismiss a case without even testing Government's claim.

II. The growth in state secrets assertions threatens Americans' civil liberties.

This rise in state secrets assertions is no accident. Many observers predicted the rise, using the phrase "National Surveillance State" to describe what was coming. Rather than treating criminal and civil domestic matters as such, the Government could "choose to treat dangers within the United States as matters of war and national security rather than as matters of" criminal or civil justice. Jack M. Balkin & Sandford Levinson, *From Partisan Entrenchment to the National Surveillance State*, 75 Fordham L. Rev. 489, 523 (2006).

By doing this, the Government "can create a parallel law enforcement structure that routes around the traditional criminal justice system with its own rules for surveillance, apprehension, interrogation, detention, and punishment." And "[b]ecause it is not subject to the oversight and restrictions of the criminal justice system, the government may be increasingly tempted to use this parallel system for more and more things." *Id.* By invoking national security, the Government can sidestep all of our constitutional rights. A perfect example of this growing threat is the Terrorism Screening Database, known as the watchlist or the terrorist watchlist.

In 2003, the Government created the TDSB by executive order. The Government did this without congressional approval. There is also no congressional authorization for the Terrorism Screening Center that administers the TSDB.

The requirements for TSDB placement are vague. In theory, a person must be a "known or suspected terrorist." A person can be listed if there is "a reasonable suspicion that the individual is engaged, has been engaged, or intends to engage, in conduct constituting in preparation for, in aid or in furtherance of, or related to, terrorism and/or terrorist activities." *Khaled El Ali v. Barr*, 473 F. Supp. 3d 479, 493 (D. Md. 2020).

The TSC can consider an extremely broad set of factors when making placements. These factors include "beliefs and activities protected by the First Amendment, such as freedom of speech, free exercise of religion, freedom of the press, freedom of peaceful assembly, and the freedom to petition the government for redress of grievances" can be considered. The Government can also consider "travel history, associates, business associations, international associations, financial transactions, and study of the Arabic language." *Coker v. Barr*, 2020 U.S. Dist. LEXIS 255249, *3-4, 2020 WL 9812034 (D. Colo. Sept. 15, 2020).

Determining whether someone is a "known terrorist" is fairly simple. As of at least 2014, a person had to be "convicted of, currently charged with, or under

indictment for a crime related to terrorism in a U.S. or foreign court of competent jurisdiction." *Mohamed v. Holder*, 995 F. Supp. 2d 520, 531, n.14 (E.D. Va. 2014).

In contrast, a person becomes a suspected terrorist based on "satisfaction of a certain substantive derogatory criteria…" *Id.* at 531. A problem: no one outside the TSC knows what this "substantive derogatory criteria" is outside the vaguest generalities. And these generalities can apply to "completely innocent conduct" that serves as the jumping off point for "subjective, speculative inferences" ending in placement. *Id.* at 532. This is because of the amount of innocent activity the TSC is admittedly allowed to consider.

Indeed, Congress itself was largely left clueless in the process. So, for instance, in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No 108–458, 118 Stat. 3638 (2004), Congress demanded DHS inform Congress of, among other things, the "(A) the criteria for placing the name of an individual on the watch list, (B) the minimum standards for reliability and accuracy of identifying information, (C) the degree of information certainty and the range of threat levels that are to be identified for an individual; and (D) the range of applicable consequences that are to apply to an individual, if located." Putting aside that TSC (a subset of DOJ), and not DHS, makes these

decisions, it is unknown what (if anything) the Government told Congress. And it is still a mystery to the public what the correct answers to these questions are.

Unsurprisingly, innocent people - who have never been within a mile of a terrorist in their lives - find themselves labeled "known or suspected terrorist." Making matters worse, the TSDB supposedly does not contain any "derogatory intelligence information." Rather, it just contains "sensitive but unclassified terrorist identity information consisting of biographic identifying information such as name or date of birth or biometric information such as photographs, iris scans, and fingerprints." *Id.* at 526, n.8. This means when an agency makes contact with a listee the agency has no idea who they are really dealing with. For all they know the listee could be the leader of Al Qaeda or the next president of their local Parent Teacher Association. All they "know" is that they are face to face with a potential terrorist. This could explain why, for example, Murat Frijuckic has been arrested by border agents five times. At gunpoint. Final Brief of Appellees at 6, *Elhady v. Kable,* 993 F.3d 208 (4th Cir. 2021)(20-1119, 20-1311). Including once in front of his then four-year-old child.

That sort of thing is not unusual for listees. The consequences of being listed end up impacting fundamental civil liberties in serious ways. The right to

travel, Second Amendment rights, and the right to earn a living, and others can be severely hampered by list placement.

And those are just the consequences we know about. Many more are suspected. For example, Air Force veteran Ahmad Halabi was detained by CBP and placed in a freezing cell for several hours because of his TSDB status. *Id.* at 18. But we also know his wife's immigration petition was delayed for more than 10 years. He eventually had to move to Dubai just to live with his wife. This routinely happens to TSDB listees' family members. There is reason to suspect there are other consequences ranging from banking restrictions to actual surveillance.

Given these consequences it makes sense that many of these law-abiding individuals have become a tad curious as to why they were or are on the list. Attempts to determine how one becomes a "known or suspected terrorist" are nearly always met with state secrets assertions. *See e.g.*, *Ibrahim v. Dep't of Homeland Sec.*, 2013 U.S. Dist. LEXIS 121196, 2013 WL 4549941 (N.D. Cal. 2013).

The bottom line is that CAIR believes that the TSDB system, as it currently exists, is unconstitutional. The Government uses it to search and seize people without probable cause of sufficient reasonable suspicion of criminal activity. There is even an admitted exception to the "reasonable suspicion" standard.

Ibrahim v. United States Dep't of Homeland Sec., 912 F.3d 1147, 1160 (9th Cir. 2019). The Government claims that exception is a state secret.

The TSDB also violates due process because a person has no idea what can land them on the list and there is no clear way off. CAIR also believes that the TSDB violates equal protection because it seems to be just a long list of Muslim names. Based on all available data, CAIR also believes that the TSDB is essentially useless in stopping terrorism. There has never been a single confirmed case of the TSDB stopping an attack. The list is, from all public knowledge, no more better at predicting terrorists than picking names at random from a telephone book.

In fact the Department of Homeland Security's confirmed that 2019 was the worst year for domestic terrorism since 1995. U.S. Department of Homeland Security, Homeland Threat Assessment October 2020, https://www.dhs.gov/sites/default/files/publications/2020_10_06_homeland-threat-assessment.pdf. White supremacists and other domestic violent extremists committed nearly all of those attacks. This lends more credence to the notion that the TSC illegally targets Muslims.

So CAIR Legal Defense Fund has challenged the constitutionality of the terrorist watchlist in cases around the country. Yet CAIR's efforts to prove this have been stymied in all three of its cases to get into

discovery encompasses the full range of constitutional issues. The government invokes the state secrets privilege and a meaningful constitutional test becomes impossible.

III. Ruling that District Courts should attempt to "disentangle" privileged information from non-privileged information is a time tested and safe method to balance competing interests.

Ibrahim v. Dep't of Homeland Sec., 62 F. Supp. 3d 909 (N.D. Cal. 2014) is a great example. *Ibrahim* was especially significant, as it was the first true test of the No-Fly List's[3] constitutional limits.

The Government invoked the privilege in *Ibrahim,* and several rounds of motions complete with ex parte and in camera review ensued. *Id.* at 913. The court upheld the privilege claim. But, instead of dismissing the case, the court decided that neither side could use any privileged information at trial or summary judgment. The Government could submit an ex parte sealed submission to explain how privileged information could bear on liability issues.

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[3] The No-Fly List is a subset of the TSDB. The TSDB is much larger.

The court ended up denying the Government's motion for summary judgment. At that point, the Government shifted gears. At the final pretrial conference, the Government now argued that the entire case should be dismissed because of the privilege. Having seen all the relevant documents, the court denied the motion.

Ibrahim won at trial. Her achievements were remarkable. Dr. Ibrahim:

- was the first person ever to force the government to admit a terrorist watchlisting mistake;
- obtained significant discovery about how the federal watchlisting system works;
- forced the government to trace and correct all erroneous records in its customer watchlists and databases;
- won a ruling requiring the government to inform a watchlisted individual of her TSDB status;
- forced the Government to admit that there were secret exceptions to the watchlisting reasonable suspicion standard.

Ibrahim, 912 F.3d at 1147.

This ruling – which benefited unknown scores of American citizens – would not have been possible had the district court dismissed the case.

In addition, what did not happen is also notable. It does not appear that anything reviewed by Judge William Alsup ever made its way into public view. And he reviewed scores of documents that he eventually concluded did contain state secrets.

But in the wake of *Ibrahim* and another loss in *Latif v. Holder,* 28 F. Supp. 3d 1134, 1161-63 (D. Ore. 2014)(requiring TSC to inform American citizens of their No Fly List status) the Government has changed tactics. Rather than proceeding on the merits without privileged documents (*Ibrahim*) or recognizing no secrets are really at play (*Latif*), the Government is now invoking the privilege and demanding dismissal immediately.

For example, after those losses, the Government took a new view of its state secret claim *Mohamed v. Holder,* 2015 U.S. Dist. LEXIS 92997, *40, 2015 WL 4394958 (E.D. Va. 2015). Originally, the Government sought to have the case dismissed on grounds unrelated to state secrets. *Mohamed v. Holder,* 2011 U.S. Dist. LEXIS 96751, *5, 2011 WL 3820711 (E.D. Va. 2011). But, after its setbacks its *Ibrahim* and *Latif,* the Government sought to have the entire matter dismissed based on the state secrets privilege.

Rather than dismissing the case, the court reviewed the documents in camera and determined some were privileged, while others were not. *Mohamed,* 2015 U.S. Dist. LEXIS at *38-40. And, just like in *Ibrahim*, Judge Anthony Trenga reviewed scores of documents, some of which were privileged. None of them ever made it into the public eye.

In fact, there is not one documented instance of a document protected by the state secret privilege reaching public view after being reviewed in camera. Our courts have an exceptionally strong record faithfully stewarding this kind of information.

CONCLUSION

Third Circuit Judge Albert Maris believed that the Government should have produced the *Reynolds* crash report "to the judge for his examination in camera." *Reynolds*, 192 F.2d at 997. He felt that "to hold that the head of an executive department of the Government in a suit to which the United States is a party may conclusively determine the Government's claim of privilege" would "abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution." Moreover, "a sweep-

ing privilege against any disclosure of the internal operations of the executive departments of the Government as contrary to a sound public policy." *Id.* at 995. He also felt that "[i]t is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers." Chief Justice Vinson disagreed. The dangers presented by the Cold War required asserted "military secrets" to be guarded without question. *Reynolds*, 345 U.S. at 10.

As it turned out, Judge Maris' fear about what could eventually happen because of a sweeping privilege – hiding something embarrassing under the rug – was happening under his nose. In the end the Government snuck one past the Court.

The state secrets doctrine is not always invoked to protect a state secret. That should not surprise anyone because the people invoking the doctrine are, in fact, people. People do not like to be embarrassed. People do not like to admit mistakes. People do not like to lose lawsuits. When a doctrine exists that can allow one to avoid those things without question? There will be a temptation to use it inappropriately.

Federalist 51 observed that "[i]f men were angels, no government would be necessary." The Federalist No. 51 (James Madison). What is less famous is the observation that comes right after: "If angels were to

govern men, neither external nor internal controls on government would be necessary." In framing a government that is given amount of control over the governed, the Government is necessarily "oblige[d] to control itself" for exactly the same reason a government is necessary in the first place. And because there are no angels in Government, sometimes people will fall to that temptation. The courts are the check on that impulse.

The Ninth Circuit's ruling that the district court should take in camera submissions to determine whether state secrets are at issue should be upheld.

Respectfully submitted,

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August 17, 2021