

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 PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF RESPONDENTS J. STEPHEN TIDWELL
AND BARBARA WALLS IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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QUESTION PRESENTED

Whether § 1806(f) of the Foreign Intelligence Surveillance Act of 1978 displaces the state-secrets privilege and authorizes a district court to consider privileged evidence to resolve—in camera and ex parte, and in violation of the due process and jury trial rights of individual defendants—the merits of a lawsuit challenging the lawfulness of government surveillance.

**PARTIES TO THE PROCEEDING
AND COMPLIANCE WITH RULE 12.6**

Respondents J. Stephen Tidwell and Barbara Walls are defendants in the district court sued in their individual capacities. They are aligned in the district court with petitioners the United States of America; the Federal Bureau of Investigation (FBI); Christopher A. Wray, in his official capacity as Director of the FBI; and Kristi K. Johnson, in her official capacity as the Assistant Director of the FBI's Los Angeles Division, each of whom is a defendant in the district court. Tidwell and Walls submit this brief pursuant to Rule 12.6 in support of the petition for certiorari.

Respondents Yassir Fazaga, Ali Uddin Malik, and Yasser Abdelrahim are plaintiffs in the district court.

Respondents Paul Allen, Kevin Armstrong, and Pat Rose are defendants in the district court sued in their individual capacities.

On January 5, 2021, Tidwell and Walls gave timely notice to all parties of their intention to file this brief in support of the petition for a writ of certiorari.

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INTRODUCTION

As the petition for certiorari explains, the U.S. Court of Appeals for the Ninth Circuit erred by holding that the state-secrets privilege is displaced by the Foreign Intelligence Surveillance Act's (FISA) procedures for adjudicating challenges to the legality of electronic surveillance. Respondents J. Stephen Tidwell and Barbara Walls, FBI agents who are co-defendants in their individual capacities with petitioners in the district court, agree that the petition should be granted.

Tidwell and Walls submit this brief pursuant to Rule 12.6 to underscore a further reason why this Court's review is warranted. By providing that FISA's *in camera*, *ex parte* procedures may be used not merely to determine the admissibility of evidence, but to resolve the defendants' liability entirely, the judgment below threatens to violate the due process and jury trial rights of the individual-capacity defendants in this case and cases like it. Those consequences confirm both the grave error in the decision below and the pressing importance of the question presented.

STATEMENT

Plaintiffs' complaint rests on their contention that, during a counterterrorism investigation in Los Angeles, petitioners and the individual-capacity defendants, including Tidwell and Walls, targeted them for surveillance not for valid investigative purposes, but because of their religion. Because litigating those claims would risk disclosure of sensitive national-security information, the government asserted the state-secrets privilege and moved to dismiss.

Tidwell and Walls likewise moved to dismiss all claims against them, arguing among other things that

the government’s assertion of the state-secrets privilege required dismissal of at least the religious-discrimination claims against them. Those claims are predicated on, and would require adjudication of, allegations that Tidwell and Walls knew of and approved unlawful investigative acts and surveillance based solely on plaintiffs’ religion. But the government’s assertion of the privilege precludes Tidwell and Walls from defending themselves fully and fairly against those contentions. As their motion to dismiss explained, without information protected by the state-secrets privilege, Tidwell and Walls cannot fairly contest plaintiffs’ allegations, cannot show that they had nondiscriminatory, national-security-related purposes, and cannot establish that their investigative methods were legal and narrowly tailored to achieve legitimate counterterrorism goals.

With the exception of one claim, the district court agreed that the state-secrets privilege bars adjudication of this action. Pet. App. 136a-180a.¹ Rejecting plaintiffs’ assertion that FISA preempts the state-secrets privilege, Pet. App. 155a-156a, the court concluded that dismissal was required under *United States v. Reynolds*, 345 U.S. 1 (1953), because the privileged information “provides essential evidence for Defendants’ full and effective *defense* against Plaintiffs’ claims—namely, showing that Defendants’ purported

¹ The district court dismissed all claims against petitioners and dismissed all claims against Tidwell and Walls except for plaintiffs’ FISA claim for unlawful surveillance under 50 U.S.C. § 1810. Pet. App. 179a-180a; 181a-195a. The district court did not reach Tidwell’s and Walls’s alternative defenses that the dismissed claims are barred by qualified immunity and fail to state a cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

‘dragnet’ investigations were not indiscriminate schemes to target Muslims, but were properly predicated and focused.” Pet. App. 173a-174a.

The court of appeals reversed the state-secrets determination, concluding that 50 U.S.C. § 1806(f) provides the “exclusive procedure for evaluating evidence that threatens national security in the context of electronic surveillance-related determinations” and “overrides ... the state secrets evidentiary dismissal option.” *Fazaga v. FBI*, 916 F.3d 1202, 1231-1232 (9th Cir. 2019), *amended on reh’g*, 965 F.3d 1015 (9th Cir. 2020). Although this holding meant that plaintiffs’ claims “[would] not go forward under the open and transparent processes to which litigants are normally entitled,” the court observed that any resulting harm to plaintiffs was ameliorated by the fact that “it is Plaintiffs who have invoked the FISA procedures” and were thus “willing to accept those restrictions” as an alternative to dismissal. *Id.* at 1226.

As to the individual-capacity defendants, however, the court brushed aside any concerns arising from the use of § 1806(f)’s in camera, ex parte proceedings to adjudicate plaintiffs’ claims. In a footnote, the court acknowledged the defendants’ argument that doing so would violate their due process and Seventh Amendment jury trial rights. 916 F.3d at 1238 n.31. But the court dismissed those arguments as “unpersuasive” because the constitutionality of the FISA procedures had been upheld “with regard to criminal defendants” and because “[i]ndividual defendants in a civil suit are not entitled to more stringent protections than criminal defendants.” *Id.*

Tidwell and Walls sought rehearing en banc, arguing that applying § 1806(f)’s procedures to adjudicate

the claims against them would violate their constitutional rights, or at least raise serious constitutional questions. C.A. Reh’g Pet. 8. As a result, they argued, the canon of constitutional avoidance lent further support to petitioners’ argument that FISA’s procedures do not displace the state-secrets privilege. *Id.* at 14.

The court of appeals issued an amended opinion and denied rehearing, adhering to the conclusion that FISA displaces the state-secrets privilege. Pet. App. 37a-67a. In analyzing the statutory question, the court continued to disregard the serious constitutional questions raised by its interpretation of the statute. *Id.* In a footnote, the amended opinion repeated the dismissal of the due process argument. Pet. App. 65a-66a n.31. The court revised its treatment of the Seventh Amendment argument, deeming it “premature”—and discarding it as irrelevant to the statutory question—because “any hypothetical interference with a jury trial would arise” only if, among other things, the district court determined that plaintiffs could state a cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); found after review of the privileged evidence that unlawful surveillance had occurred; and concluded that the claims could not be resolved on summary judgment. Pet. App. 65a n.31. The court stated that the Seventh Amendment arguments could be raised on remand if those contingencies occurred. *Id.*²

² The court of appeals sustained the dismissal of several of the claims against Tidwell and Walls on qualified-immunity grounds and held that qualified immunity also bars the FISA claim against them. Pet. App. 23a, 81a, 86a. As to the religious-discrimination claims, the court acknowledged that “there are likely to be few, if any, remaining *Bivens* claims” given the “narrow availability of

ARGUMENT

As the petition correctly explains, the procedures for in camera, ex parte review set forth in 50 U.S.C. § 1806(f) apply where a government entity intends to use evidence obtained or derived from electronic surveillance against an aggrieved person who was subject to the surveillance. They do not displace the state-secrets privilege or establish a mechanism for adjudicating the merits of a claim on the basis of evidence subject to the privilege. Pet. 14-29. The court of appeals' contrary opinion conflicts with this Court's precedent, intrudes on the separation of powers, and undermines the ability of the Executive to protect sensitive national-security information. *Id.*; see Pet. 30-32.

The need for this Court's review is made even clearer by the consequences of the decision below for individual-capacity defendants in cases, like this one, where the claims turn on allegations that cannot be refuted without access to privileged evidence. Under the court of appeals' ruling, the in camera, ex parte procedures of § 1806(f) are to be used in such cases not only to determine the admissibility of evidence—the usual function of § 1806(f)—but also to adjudicate the plaintiff's claims on the merits in secret proceedings. The court of appeals did not address whether individual defendants in such cases may participate at all in the adjudication of their own liability, and § 1806(f) on its face does not indicate that they can.

Such a proceeding would violate the individual defendants' rights under the Due Process Clause and the

Bivens remedies under current law," but reinstated and remanded the claims anyway subject to that defense. Pet. App. 65a n.31.

Seventh Amendment—or, at the very least, would raise serious constitutional concerns.

First, “[t]he fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). In this case, for example, adjudicating plaintiffs’ claims against Tidwell and Walls would require inquiry into such issues as whether plaintiffs were subject to investigation at all; if so, whether the investigation was conducted in the manner alleged by plaintiffs; whether Tidwell and Walls had nondiscriminatory, national-security-related reasons for investigating specific individuals; and whether the investigative methods were narrowly tailored to achieve legitimate counterterrorism goals. The requirements of due process would not be honored if Tidwell and Walls lack the opportunity to be heard, or to have their counsel heard, concerning the evidence that determines their liability and its bearing on these issues. The Due Process Clause prohibits “punishing an individual without first providing that individual with an opportunity to present every available defense.” *Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007) (quotation marks omitted).³

³ The court of appeals dismissed the due process concerns, citing cases involving criminal defendants. Pet. App. 65a-66a n.31. But the cases on which the court relied addressed the entirely different context for which the § 1806(f) procedures were actually designed—namely, determining the admissibility of evidence. See *United States v. Abu-Jihaad*, 630 F.3d 102, 129 (2d Cir. 2010); *United States v. Damrah*, 412 F.3d 618, 624 (6th Cir. 2005); *United States v. Ott*, 827 F.2d 473, 476 (9th Cir. 1987); *United States v. Belfield*, 692 F.2d 141, 148-149 (D.C. Cir. 1982); *United States v. Nicholson*, 955 F. Supp. 588, 590-592 (E.D. Va. 1997). None of the cases addressed whether a defendant’s liability could be adjudicated in a secret proceeding.

Second, whether or not individual defendants are permitted to participate or to have the assistance of counsel in an adjudication under § 1806(f), their Seventh Amendment right to a jury trial would be eviscerated if their liability is decided in secret by the district court. *See Carlson v. Green*, 446 U.S. 14, 22 (1980) (plaintiff may “opt for a jury ... in a *Bivens* suit”); *Nurse v. United States*, 226 F.3d 996, 1005 (9th Cir. 2000) (jury trial right applies in *Bivens* actions). Below, plaintiffs noted that they, too, would be deprived of their right to a jury trial were their claims adjudicated under § 1806(f)’s procedures. But as the panel observed, plaintiffs received something in exchange for forfeiting that right—namely, the opportunity to have their claims heard at all. Pet. App. 39a. Individual-capacity defendants in such a case receive no such offsetting benefit, but are instead deprived of their right to a jury trial and then potentially subject to liability and damages depending on the judge’s *in camera*, *ex parte* determination.

Under the canon of constitutional avoidance, “if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, [courts] are obligated to construe the statute to avoid such problems.” *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citation and quotation marks omitted). And here, FISA can readily be interpreted to avoid the substantial Due Process and Seventh Amendment problems inherent in a procedure that allows liability to be determined behind closed doors. As the petition explains, the subsections of § 1806, read together, make clear that the purpose of FISA’s *in camera*, *ex parte* procedure is to determine the admissibility of evidence the government intends to use against an aggrieved

person who was subject to surveillance. That is why the statute requires notice to the aggrieved person, 50 U.S.C. § 1806(c)-(d); allows him to move to suppress the evidence, *id.* § 1806(e); and provides for suppression as a remedy if the evidence is found to have been improperly obtained, *id.* § 1806(f). The in camera, ex parte procedure does not apply in a case—like this one—where the government’s aim is to prevent the disclosure of evidence in litigation. At a minimum, that is a plausible interpretation of the statute that the court of appeals should have adopted instead of “the alternative which raises serious constitutional doubts.” *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

The court of appeals erred by failing to give due weight to these considerations in construing FISA to replace the state-secrets privilege with a mechanism for adjudicating claims on the merits that violates the Due Process Clause and Seventh Amendment—or, at the very least, raises “grave doubts upon that score.” *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998). The threat posed by the decision below to the constitutional rights of the individual-capacity defendants—in this case and others like it—heightens the urgent need for this Court’s review.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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